

## DEBATING THE RULE OF LAW: THE CURIOUS RE-ENACTMENT OF THE SOLICITATION OFFENCE

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*The author worries that the rule of law was diminished when Parliament re-enacted section 213(1.1) of the Criminal Code. This “offence” is a refurbished version of the unconstitutional prohibition against communicating in public for prostitution, which was invalidated by the Supreme Court of Canada in 2013. On its face, section 213(1.1) appears to create an offence to offer sexual services near select public places where minors might be present. But on the ground, section 213(1.1) is not actually operating as an offence at all — at least according to government politicians responsible for passing section 213(1.1) into law and police officers who lobbied for its re-enactment.*

*By delving into the lawmaking process, the author discovers evidence that section 213(1.1) was instead re-enacted to operate as a warrantless detention power. If the debate between legislators and police is taken seriously, de facto detention under section 213(1.1) appears to serve as a means to two ends: (1) to extricate people who sell sex out of the industry; and (2) to collect evidence of graver offences by pimps and johns. Neither of these two ends involve charging the citizens who are technically criminalized under section 213(1.1), yet who are otherwise cloaked in moral blamelessness by legislators and police.*

*Despite the benevolent motives of legislators and police, the author identifies four interconnected rule of law problems with de facto detentions under section 213(1.1): unaccountability to law, misallocation of power, unanswerability to citizens, and inaccessibility to justice. The author argues that distorting a criminal offence into a de facto detention power deprives people not only of constrained choices, but also of vital procedural safeguards, without which they cannot seek the answers, accountability, and justice that everyone deserves.*

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## I. INTRODUCTION

### A. ZOMBIE LAWS AND THE RULE OF LAW

The rule of law is making headlines in newspapers, tweets on Twitter, and proclamations in the *Canada Gazette*. Recently, eyes have widened at an omnibus criminal justice bill passed by Canada’s 42nd Parliament, which vowed to promote the rule of law by ridding the nation of “zombie” laws.<sup>1</sup> In the vernacular of the politicians and pundits who coined the term, “zombie” characterizes two batches of inoperative criminal offences that appeared in the *Criminal Code*’s physical pages. By querying Parliament’s rationale for cleaning up the *Criminal Code*, we will become acquainted with a rule of law problem.

The first batch of zombie laws in the omnibus bill consisted of obsolete criminal offences. Lurking amongst the *Criminal Code*’s nearly 3,000 annotated pages were ancient bans against misconduct such as “challeng[ing] another person to fight a duel” and “[p]retending to practise witchcraft.”<sup>2</sup> Yet if charlatans of sorcery dare to endanger public safety by brandishing wands in this century, then modern charges, such as uttering threats, assault, or fraud, would amply cover the gravamen of the offence. The prime evils threatening society today had surely rendered the first batch of zombie laws obsolete.

Along with repealing these obsolete offences that harkened back to medieval times, Parliament’s clean-up also targeted a second batch of zombie laws, but this second batch had

<sup>1</sup> *House of Commons Debates*, 42-1, No 310 (7 June 2018) at 20:55 (Hon Colin Fraser); Bills C-39 and C-51 were rolled into the omnibus Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 25.

<sup>2</sup> *Criminal Code*, RSC 1985, c C-46, ss 71, 365; 2019 *Annotated Tremear’s Criminal Code* (2920 pages), 2019 *Martin’s Annual Criminal Code* (2640 pages); Bill C-75 incorporated, *inter alia*, Bill C-51, which proposed to repeal, *inter alia*, *Criminal Code* sections 49 (Alarming Her Majesty), 71 (Dueling), 143 (Advertising a reward for the return of stolen property “no questions will be asked”), 163(1)(b) (Making, printing, publishing, distributing, selling or possessing crime comics), 296 (Publishing blasphemous libel), 365 (Fraudulently pretending to practise witchcraft), 370 (Falsely purporting a document to have been printed by the Queen’s Printer), and 427 (Issuing trading stamps).

more recently seen the light of day. Fresher in Canada's constitutional memory, and rawer in the harms occasioned to society, unconstitutional offences of abortion, vagrancy, and buggery all conjured the spectre of a state that violated human rights, fundamental justice, and the values of a free and democratic society.<sup>3</sup>

So how did both the obsolete and unconstitutional batches of zombie laws threaten the rule of law? The obsolete offences (such as challenging someone to a duel) were not, in fact, enforced. The unconstitutional, invalidated offences, such as abortion, could not, in law, be enforced. The distinction between *de facto* unenforced offences and *de jure* unenforceable offences was only in the abstract. Prior to falling to the same fate of repeal, both batches of zombie laws did not operate. It was this persistent inoperability that threatened the rule of law.

Be they socially outmoded or instrumentally defective, when criminal offences do not operate, but stay inscribed in the statute books, the rule of law is frustrated. To live safely and freely in a democratic society, the rules of the criminal law must apply equally to citizens and officials. When the rules applicable to all are published with fair notice, not changed too quickly, written clearly without contradiction, and capable of being obeyed, everyone can make informed decisions about their behaviour. When the potential consequences of running afoul of those rules is the coercion, disruption, deprivation, stigmatization, and punishment wielded by the criminal justice system, the disjuncture between the rules on the books and the rules enforced on the ground can be perilous.

To nurture the rule of law, police, judges, and legislators all have coordinate roles to fulfil. Take police: unlike the United States, Canada has no doctrine of desuetude, which effectively repeals obsolete offences after decades of pervasive nonenforcement by American police.<sup>4</sup> At most, obsolescence across Canada signals that zombie laws no longer pose a threat to modern public safety, and that police priorities have shifted. Provisions of Canada's *Criminal Code* are not erased by the gradual decline of obsolete offences from incident reports and investigations.

What about judges? When a litigant persuades a court to nullify an unconstitutional law, the court's declaration of invalidity alone cannot cultivate the rule of law. Section 52(1) of the *Constitution Act, 1982* only empowers courts to invalidate laws by declaring them to be "of no force and effect."<sup>5</sup> Once unconstitutional offences are so declared, those invalidated laws do not instantly disappear from the *Criminal Code*. Although a declaration of invalidity nullifies the unconstitutional law *ab initio*, section 52(1) is not a supernatural spell that courts can use to vanish zombie laws out of the *Criminal Code*.

<sup>3</sup> Bill C-75 also incorporated the previously tabled Bill C-39, which proposed to repeal *Criminal Code* sections 159 (Anal Intercourse), 179(1)(b) (Loitering), 181 (Spreading False News), 229(c) (Unlawful Object Murder), 230 (Murder in the Commission of Offences), 258(1)(c)-(d) (Impaired Driving – Legal Presumptions), 287 (Abortion), 719(3.1) (Credit for Pre-Sentence Custody).

<sup>4</sup> *Canterbury v Blake*, 584 SE 2d 512 (W Va 2003).

<sup>5</sup> Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For all its fundamentality as a legal principle, the rule of law is not a freestanding justiciable claim available for nullifying legislation, see *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [Trial Lawyers].

That leaves legislators. So far as the recent cull of zombie laws is concerned, police and judges had only begun the work that legislators had to complete and polish. After all, Parliament is the supreme legislative body possessing the capacity and competency to draft, debate, pass, and promulgate laws for the whole nation. As the Justice Department explains, it falls to Parliament to “help to avoid confusion and errors by ensuring that the laws on paper reflect the laws in force.”<sup>6</sup> So while it may take a long time for the issues spotted by the judges and priorities signaled by police to reach Parliament’s agenda, by repealing both obsolete and unconstitutional offences from the *Criminal Code*, the 42nd Parliament took “a final step that fully vindicate[d] the rule-of-law.”<sup>7</sup>

If all that was necessary to vindicate the rule of law was some elementary legislative drafting, then it is worth asking why this reform has been so long coming. On that ledger, commentators have chided the Government for plucking low-hanging fruit. This quick trim was the “easiest and most obvious” law reform when a deeper purge — even drawing up a new *Criminal Code* from scratch — would have better eliminated the confusion.<sup>8</sup>

Yet amidst the buzz over wiping out zombie laws, neither the Government nor the press gallery stopped to wonder whether there might be anything troublesome about the inverted legislative scenario, which would appear to be a zombie law’s doppelgänger. That is, if Parliament strengthens the rule of law by deciding to *repeal* inoperative criminal offences, then does Parliament weaken the rule of law by deciding to *enact* an inoperative criminal offence?

To show how the rule of law is indeed weakened when Parliament decides to enact an inoperative criminal offence, this article presents section 213(1.1): an “offence” which evaded the recent clean-up of the *Criminal Code*. Section 213(1.1) deserves to be handled with “scare quotes” because it does not operate as an “offence.” Not only does section 213(1.1) resemble the first, obsolete batch of zombie laws from its de facto inoperability, it also resembles the second batch of zombie laws — the unconstitutional offences nullified by a declaration of invalidity. The resemblance is striking because section 213(1.1) is actually a renewed version of another unconstitutional offence, section 213(1)(c), the former

<sup>6</sup> Department of Justice Canada, *Cleaning up the Criminal Code, Clarifying and Strengthening Sexual Assault Law, and Respecting the Charter* (Ottawa: Department of Justice, 2017), online: <canada.ca/en/department-justice/news/2017/06/cleaning\_up\_the\_criminalcodeclarifyingandstrengtheningsexualassa.html>.

<sup>7</sup> Department of Justice Canada, *Charter Statement - Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts* (Ottawa: Department of Justice, 2017), online: <justice.gc.ca/eng/csj-sjc/pl/cuol-mgnl/c39.html>.

<sup>8</sup> Scholars have long called for thorough recodification, see e.g. Don Stuart, “Time to Recodify Criminal Law and Rise Above Law and Order Expediency” (2000) 28:1 *Man L J* 89. For commentary on zombie laws, see Jordan Gold, “Revising the Canadian Criminal Code of Zombie Laws,” online (blog): <robichaudlaw.ca/zombie-laws-in-canadian-criminal-law/>; Kathleen Harris, “Experts Urge Liberals to Update ‘Embarrassingly Bad’ Criminal Code,” *CBC News* (18 November 2016), online: <cbc.ca/news/politics/criminal-code-outdated-justice-discrimination-1.3853810>; Melanie Murchison, “Time to Kill Canada’s ‘Zombie Laws,’” (14 June 2017), online: *Robson Crim Legal Blog* <web.archive.org/web/20200919122909/https://www.robsoncrim.com/post/2017/06/14/time-to-kill-canada-s-zombie-laws>; Star Editorial Board, “Ottawa Shows Courage by Killing ‘Zombie Laws’: Editorial,” *Toronto Star* (12 March 2017), online: <www.thestar.com/opinion/editorials/2017/03/12/ottawa-shows-courage-by-killing-zombie-laws-editorial.html>.

solicitation offence, which prohibited communicating in public for the purpose of prostitution.<sup>9</sup>

I will not, however, try to persuade anyone that section 213(1.1) is also unconstitutional. Instead, I worry about a more basic rule of law problem buried in the process that enacted section 213(1.1). From casting light into that legislative process, we see that it may be difficult for any judge to have the occasion to determine whether section 213(1.1) is unconstitutional. For unlike the socially defunct and constitutionally defective zombie laws, the hazard that section 213(1.1) poses to the rule of law is not so plain to see, and that hazard might obscure section 213(1.1) from judicial review.

Plainly read, section 213(1.1) looks as though it creates an offence to communicate “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.”<sup>10</sup> Ostensibly, police would enforce section 213(1.1) by investigating a neighbourhood incident or community complaint around a school, playground, or daycare, or by witnessing a suspected bargain for sexual services while on proactive street patrol. If such investigations (which might also expand into other criminal offences and involve other suspects) yielded reasonable and probable grounds of solicitation, then police could lay charges for prosecutors to review, and those charges would be disposed of through criminal proceedings before a judge, in open court, on the public record.

Yet it is by looking to a different public record — namely, Parliament’s proceedings — that we begin to see why section 213(1.1) might not actually operate as an offence in the usual course of the justice system. In actuality, section 213(1.1) operates as though it is a detention power, where *de facto* detention is a means to two ends: (1) to extricate individuals who offer to sell their own sexual services (“sellers”) out of the industry; and (2) to collect evidence of graver offences by buyers and exploiters of sexual services. Neither of these ends involve prosecuting the legal subjects of section 213(1.1), who politicians and police regard as morally blameless.

## B. THEORETICAL APPROACH AND RESEARCH METHOD

In revealing section 213(1.1) to be a façade for detention, this article sifts the legislative process through the principle of congruence, one of Lon Fuller’s celebrated and contested “Eight Ways to Fail to Make Law.”<sup>11</sup> As what Fuller regarded as the very essence of the rule of law, congruence requires state officials to exercise their legal powers in a way that reflects the law declared in the legislative text.<sup>12</sup> Congruence holds that there must be harmony between what the law says, and what law officials do. When the justice system suffers from a congruence deficit, the ensuing arbitrariness can discriminate against people who have done nothing wrong — depriving them of liberty and denying their autonomy and dignity.

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<sup>9</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford SCC*], rev’g in part 2012 ONCA 186, aff’g in part 2010 ONSC 4264 [*Bedford ONSC*].

<sup>10</sup> *Criminal Code*, *supra* note 2.

<sup>11</sup> Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 46–91 [*Fuller, Morality of Law*].

<sup>12</sup> *Ibid* at 215.

While Fuller is no stranger to the legal academy, this article takes an unconventional approach to examining his idea of congruence. In delving into lawmaking at Parliament, an arena often neglected by legal scholarship's court-centric lens, I accept invitations from scholars who have marked a shortfall of data on Parliament's reactions to judicial review.<sup>13</sup> Curiously, the research reported here did not originate with any particular interest in section 213(1.1). My observations were initially gleaned from a large-scale project, which combed Parliament's record with a coding scheme geared for tracking the evidence, law, and litigants from *one* court case. Initially, my aim was to assess how adjudication can both stymie and scintillate democratic debate. I did not anticipate discovering an enforcement problem *within* the legislative process.

Empirically, I show how incongruence arose before "the law" actually became law: the risk to the rule of law crystallized when section 213(1.1) was merely a clause presented for debate in a policy proposal. I concede my approach departs from orthodox methods of statutory interpretation, for I am uninterested in how a judge might interpret section 213(1.1). For those readers who are, this article nevertheless offers thoughtful content, considering the Supreme Court's unpredictable cherry-picking of Hansard — both to gain points in the bench's own philosophical contest over morality reasoning, and to discern legislative intent in the penal context.<sup>14</sup>

Methodologically, I reproduce key portions of Hansard, a rich source that is seldom the primary subject of legal commentary. This granular method captures external social forces entering the political process of deliberating policy and the legal process of legislating criminal law.<sup>15</sup> Just as it is impossible for judges to pronounce all of the latent factors influencing their resolution of a case, it is impossible for legislators to announce their conscious and unconscious reasons for voting a policy proposal into law — but what they take pains to say does have descriptive and analytical value. It is by questioning why Parliament re-enacted section 213(1.1), by taking seriously what legislators said, and by accepting police officers' testimony at their word, that section 213(1.1) is revealed to be not a criminal offence, but a faux and inferior substitute for a chargeless detention power.

### C. OUTLINE

This article contains three parts, each reflecting a relationship integral to maintaining the rule of law: The Court and Parliament; Parliament and Police; and Police and Citizens. Part

<sup>13</sup> David Landau, "A Dynamic Theory of Judicial Role" (2014) 55 Boston College L Rev 1501 at 1505–15; Robert Leckey, *Bills of Rights in the Common Law* (Cambridge, UK: Cambridge University Press, 2015); Aileen Kavanagh, "What's So Weak About 'Weak-form Review'? The Case of the UK Human Rights Act 1998" (2015) 13:4 NYU Intl J Cont L 1008. See also David Dyzenhaus, "Are Legislatures Good at Morality? Or Better at it Than the Courts?" (2009) 7:1 NYU Intl J Cont L 46 at 50–51.

<sup>14</sup> See e.g. *R v Appulonappa*, 2015 SCC 59 at para 72 (striking down an overbroad human smuggling offence when a Committee was informed by shoddy legal advice); *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 31–35 (rejecting a Minister's avowed goal of retribution to strike down caps on sentencing credits); *Ewert v Canada*, 2018 SCC 30 at paras 55–56 (accord significant weight to a Green Paper to order an exceptional declaration for breach of a statutory duty). Outside of penal law, contrast *Frank v Canada (Attorney General)*, 2019 SCC 1 at paras 58, 64, Chief Justice Wagner (inferring Parliament's objective from debates that were "not extensive") with the textual approach of Justice Côté and Justice Brown at paras 133–37. See also Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 260–61.

<sup>15</sup> New institutionalism in political science and an "internal, legal approach" to judicial decisions involve similar methods. See Leckey, *supra* note 13 at 7–33.

II sets the stage for legislating section 213(1.1) by tracing the constitutional challenges to its predecessor, the former solicitation offence, from its eventual invalidation in the 2013 *Bedford*<sup>16</sup> case back to the 1990 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*.<sup>17</sup> This overview of the jurisprudence underscores that the Supreme Court of Canada did not pronounce the final word on how to lawfully control the activity formerly called prostitution. Part II then follows the litigants from the Court into Parliament, where Bill C-36 is introduced. Sparked by *Bedford*'s invalidation of three prostitution-related offences, Bill C-36 enacted section 213(1.1) as one small part of the Federal Government's new paradigm shift towards targeting buyers and profiteers of another person's sexual services. In sum, Part II disaggregates the law propounded in *Bedford*'s judgment from the practical impacts that *Bedford*'s result had on Parliament's capacity to respond.

Next, Part III takes an empirical turn to the legislative process. Part III reproduces the words that politicians and police spoke in Parliament when they debated the merits of enacting section 213(1.1). I present this empirical evidence chronologically, charting section 213(1.1)'s progression from its introduction into the House of Commons until it was passed in the Senate. This comprehensive record of the democratic debate is necessary to accurately demonstrate what ends politicians and police understood section 213(1.1) to serve. From tuning into the legislative process from beginning to end, Part III evinces that neither the Government members who voted in favour of section 213(1.1), nor the police witnesses who sought to use it, envisioned section 213(1.1) to operate as a criminal offence. Rather, politicians and police desired section 213(1.1) to help people out of the sex industry — not by punishing them, but by detaining them without charge.

Finally, Part IV distills why deliberately enacting an inoperative criminal offence weakens the rule of law. If a criminal offence operates as a de facto detention power, then the *Criminal Code*'s guidance to both citizens and officials regarding the conditions and consequences of criminal liability is distorted. From this distortion, four risks to the rule of law arise: unaccountability to law, misallocation of power, unfairness to citizens, and inaccessibility to justice.

## II. COURT AND PARLIAMENT

### A. LITIGATING THE SOLICITATION OFFENCE

Section 213(1.1) was introduced into the 41st Parliament as one clause contained in Bill C-36: *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*.<sup>18</sup> As explicitly acknowledged by Bill C-36's long title, this new policy proposal was prompted by the *Bedford* case. The facts and law in *Bedford* thus formed part of the backdrop for re-enacting section 213(1.1).

In 2013, *Bedford*'s victorious plaintiffs proved that the *Criminal Code*'s offences of solicitation in public places, living on the avails of prostitution, and keeping a common-

<sup>16</sup> *Supra* note 9.

<sup>17</sup> [1990] 1 SCR 1123 [*Prostitution Reference*].

<sup>18</sup> 2nd Sess, 41st Parl, 2014 (assented to 6 November 2014), SC 2014, c 25 [Bill C-36].

bawdy house were unconstitutional. Part of what made the plaintiffs' claim novel was the fact that those three offences had failed to be effectively enforced. The *existence* of all three laws on the books unjustifiably violated section 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>19</sup> Unanimously, the Supreme Court agreed that *obeying* these three laws jeopardized the security of the people who exchanged sex for money: a transaction that, at the time, was itself a lawful activity.<sup>20</sup>

Although *Bedford* was a landmark constitutional case with numerous complexities,<sup>21</sup> only two holdings from the final appeal are directly relevant to section 213(1.1)'s subsequent enactment. First, the Supreme Court upheld the trial judge's findings of fact pertaining to the solicitation offence's effects. Second, the Supreme Court partly upheld and partly reaffirmed its own legal precedent. Both of these holdings were opportunities for Parliament to broaden and sharpen the public debate about whether and how the criminal justice system ought to deal with the activity formerly called prostitution. Both of these holdings influenced the mischief that Parliament sought to address when it subsequently modified the former solicitation offence into the new section 213(1.1).

## 1. UPHOLDING THE TRIAL JUDGE'S FINDINGS OF FACT

From merely existing on the books, the solicitation offence had grave effects that were grossly disproportionate to its quotidian purpose. That purpose, which had been authoritatively defined in the 1990 *Prostitution Reference*,<sup>22</sup> was to stamp out the social nuisance from the sight of negotiating sex on the street, and the blight of its accompanying paraphernalia. Nearly a quarter century later, voluminous social science evidence marshalled in *Bedford* proved that the prospect of criminal liability for solicitation in public places had displaced transactions to transient, isolated outdoor areas. Police officers had attested to a policy of "compassionate enforcement," whereby sellers were arrested to recover from illness and exhaustion, to hide from menacing pimps and johns, or to attempt exiting the industry.<sup>23</sup> At the same time, however, sellers testified that the risk of arrest for solicitation impeded basic safeguards such as scanning customers for warning signs of violence, and confirming conditions for health and safety, such as condoms.<sup>24</sup>

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<sup>19</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>20</sup> *Bedford* SCC, *supra* note 9. For brevity, Part II's summary focuses on the solicitation offence. The living on the avails offence (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. The bawdy house offence (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 abating community disruption.

<sup>21</sup> On *Bedford*'s broader importance, see Lisa Dufraimont, "Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7" (2014) 67 SCLR (2d) 483; Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ 575.

<sup>22</sup> *Supra* note 17.

<sup>23</sup> *Bedford* ONSC, *supra* note 9 at paras 91 (describing "compassionate enforcement"), 497.

<sup>24</sup> *Bedford* SCC, *supra* note 9 at paras 13, 68–72, 146–49. *Bedford* ONSC, *ibid* at para 421 (summarizing finding of facts).



These factual findings, which established the dangers posed by the very existence of the solicitation offence, were important to how politicians and police later responded during the legislative debates. In the post-*Bedford* legislative process, the same problems proven in *Bedford* were reasserted by opponents to section 213(1.1): both the anti-prostitution organizations and the pro-sex work movement. Those for and against the right to sell sex all feared that section 213(1.1) would replicate the same harms of displaced transactions and unsafe conditions. Yet the same “compassionate enforcement” policy was advocated by the proponents of section 213(1.1): the police worried that they would lose the legal authority to provide both a brief reprieve and more permanent retreat from the industry.

Another factual finding in *Bedford* was that indoor transactions were *safer* than street work.<sup>25</sup> Yet because the bulk of the evidence adduced at trial had only covered street work, it meant that indoor work, which comprised the vast majority of prostitution, was largely unstudied. This gap in knowledge left open much room for Parliament to maneuver. For if Parliament generated new research unavailable and thus not considered in *Bedford*, then the Supreme Court’s legal analysis would be closely cabined inside the case’s four corners, situated in the scenario of consensual adult sex.

## 2. UPENDING AND UPHOLDING THE PROSTITUTION REFERENCE

The legal holding most germane to section 213(1.1)’s re-enactment involved partly upending and partly upholding the 1990 *Prostitution Reference*. In *Bedford*, the Supreme Court overhauled the common law doctrine of stare decisis to overturn its own precedent. Had the Supreme Court not carved out two exceptions to stare decisis, the applicants’ section 7 claims against the solicitation and bawdy house offences could have been swiftly defeated because those same offences had already passed constitutional muster in the Supreme Court’s 1990 *Prostitution Reference* — albeit on different doctrine, and less evidence.<sup>26</sup> To revisit section 7 in 2013, *Bedford* carved out two exceptions to stare decisis, which the case satisfied on the merits.<sup>27</sup> This time around, there were novel legal issues under section 7 of the *Charter* for the Supreme Court to decide, and in a new factual context with significantly shifted social attitudes.<sup>28</sup> Since overruling the *Prostitution Reference* on section 7 sufficed

<sup>25</sup> *Bedford SCC*, *ibid* at paras 49–65; *Bedford ONSC*, *ibid* at para 421. The solicitation offence increased the danger outdoors because individuals offering services would likely yield to clients without time for checking identities, screening for impairment, propensity for violence, and negotiating the scope and conditions of the transaction. On standard of review, the Supreme Court of Canada concluded that regardless of whether facts are adjudicative facts (e.g. oral testimony), social (e.g. expert evidence), or legislative (for example, policy context), they cannot be overturned absent palpable, overriding errors. On distinguishing these three forms of facts, see *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086; *R v Spence*, 2005 SCC 71.

<sup>26</sup> *Supra* note 17. See also the concurrent decision in *R v Skinner*, [1990] 1 SCR 1235, where an alleged customer unsuccessfully challenged the solicitation offence for violating ss 2(b) and (d).

<sup>27</sup> *Bedford SCC*, *supra* note 9 at paras 42–47. *Bedford* carved two exceptions to stare decisis: a new legal issue, and/or a significant change in attitudinal or evidentiary circumstances that “fundamentally shift the parameters of the debate.” Since reference opinions do not have any binding force on the parties, it is unfortunate that *Bedford* did not address the issue of whether its stare decisis exceptions apply with equal force to reference opinions.

<sup>28</sup> The case raised novel legal issues under section 7 with significantly developed principles of gross disproportionality and overbreadth, and by invoking personal security instead of the liberty interest implicated in 1990. The living on the avails offence was not considered in the *Prostitution Reference*, *supra* note 17, and the section 7 argument in the *Prostitution Reference* was also based on different norms under the principles of fundamental justice (vagueness and indirect criminalization). Plus, the vast record of new research on prostitution accumulated over the two decades after the *Prostitution Reference* signalled that the evidence and societal attitudes were ripe for debate.

to resolve the dispute in *Bedford*, the Supreme Court left the applicants' freedom of expression section 2(b) claim undecided.<sup>29</sup>

Although Parliament was explicitly responding to *Bedford*, two abiding ironies from the *Prostitution Reference* also influenced section 213(1.1)'s enactment, namely: the official end initially announced as part of the Federal Government's new policy to eradicate prostitution; and the unofficial means eventually developed throughout the debates.

What would become the Federal Government's policy end in 2014 was originally argued by Ontario's Attorney General as a failed justification for the solicitation offence in the *Prostitution Reference*. A quarter century earlier, the plurality in the *Prostitution Reference* (and again the unanimity in *Bedford*) held that the solicitation offence aimed to abate the congestion, harassment, paraphernalia, and lewd sights from negotiating sex on the street, contrary to the argument of Ontario's Attorney General.<sup>30</sup> Justice Lamer, however, was persuaded that the solicitation offence aimed to counter the exploitation, victimization, and degradation of women and children, and thus endorsed the provision as an enforcement tool to combat recruitment into the sex trade.<sup>31</sup> Although the Attorney General's argument was defeated both times in court when prostitution was still a "perfectly legal activity," the Federal Government later recycled the argument in Parliament when it opted to make prostitution a criminally unlawful activity: the profound goal of eradicating exploitation, victimization, degradation, and prostitution itself was reprised as Bill C-36's ultimate policy end.

The Government's reuptake of a more profound policy end was not the only twist that endured from the *Prostitution Reference*. The means for accomplishing that end of eradication was the second way in which the *Prostitution Reference* influenced section 213(1.1)'s enactment. What had troubled the dissent in 1990 as unreasonable, excessive police power was later promoted as desirable, necessary enforcement discretion throughout both legislative chambers in 2014. In the prescient opinion of Justices Wilson and L'Heureux-Dubé, to stifle communication — even commercial speech — was too drastic a means, for "[i]t enables the police to arrest citizens who are disturbing no-one" from even "the proverbial nod or wink."<sup>32</sup> It was no consolation, in their view, that police could subsequently release any detainees who had not intended to engage in prostitution.

True as it is that four out of six justices saved the solicitation offence in the *Prostitution Reference*, Parliament soon confirmed the fears of the two dissenters.<sup>33</sup> Only four months

<sup>29</sup> *Bedford* SCC, *supra* note 9 at para 17.

<sup>30</sup> *Prostitution Reference*, *supra* note 17 at 1134–35.

<sup>31</sup> *Ibid* at 1193–95, Justice Lamer, who would have characterized the objective broadly in the manner submitted by the Attorney General of Ontario.

<sup>32</sup> *Ibid* at 1212–15. For clarity, the article adopts the term "citizen" in the sense it is used by the dissenters in the *Prostitution Reference*, *ibid*: not the strict legal sense of a person who possesses legal Canadian citizenship or the right to vote in federal elections, but rather in the broad sociopolitical sense of a private individual who lives within the borders of the Canadian state. This meaning of "citizen" is consistent with the way in which Fuller conceptualizes and refers to "citizen." See Fuller, *Morality of Law*, *supra* note 11 at 39–40 (drawing from Georg Simmel's sociological construction of citizenship and discussing the reciprocal bond between individual and state).

<sup>33</sup> *Prostitution Reference*, *ibid*. The dissent would have invalidated the solicitation offence for unjustifiably violating both sections 2(b) and 7 of the *Charter*. The risk of imprisonment for exercising the constitutionally protected freedom of expression was too drastic to curb social nuisance, and thus could not be justified under section 1.

after the solicitation offence survived the *Prostitution Reference*, the House of Commons finished its own three-year-long probe into the offence's effects across Canada. Not only did the study substantiate the dissent's prudential concerns about excessive enforcement discretion, it also indicated a disconnect between the means of stifling communication and the end of abating nuisance — a connection upon which the majority had caveated its justification of the *Charter* limitation.<sup>34</sup> In Justice Lamer's opinion, the solicitation offence's utility as a proportionate measure to combat recruitment had been buoyed by the fact that Parliament had undertaken to monitor its efficacy in that very study.<sup>35</sup> As Part III relays, both the *Prostitution Reference* and the study were hardly mentioned at all when Parliament debated the solicitation offence again post-*Bedford*. Ironically, the ineffective enforcement and risk of arbitrary discretion that were feared by the dissent (then confirmed by Parliament's study) to be the solicitation offence's frailties in 1990 were forgotten — to only be later cheered as strengths of tremendous, compassionate enforcement discretion when re-enacted in 2014.

However, the functions and limits of litigation's adversarial process are important for setting realistic expectations for the legislative response to *Bedford*. The adversarial process is structured to resolve bipartite disputes by testing evidence and applying doctrine to specific facts from the past. The legislative process is dedicated to debating general policy and producing law for the present and future. So as monumental as *Bedford* was for testing complex evidence and for innovating *Charter* doctrine, it is easy to overstate *Bedford*'s substantive influence beyond section 7, and on the development of criminal legislation at large. It is axiomatic that legislators who amend the *Criminal Code* accomplish that task by paying more than superficial homage to judicial pronouncements, and by contemplating implications beyond the enforcement of one *Charter* right. Even *Bedford*'s *obiter dicta*, which hinted to legislative drafters that “[g]reater latitude in one measure ... might impact on the constitutionality of another measure,” came through the lens of section 7's interest in personal security, without reconsidering section 2(b)'s freedom of expression from the *Prostitution Reference*.<sup>36</sup>

More than that, *Bedford*'s parameters did not encompass the distinct angles of some directly affected groups. Particularly, men's perspective, both as buyers and sellers, as well as homosexual transactions, were absent from *Bedford*, as was the occurrence of prostitution in rural communities. Nor did the Supreme Court pass judgment on viable claims under equality rights and freedom of association, as a parallel appeal in *Canada (Attorney General)*

<sup>34</sup> Standing Committee on Justice and the Solicitor General, Fourth Report of the Standing Committee on Justice and the Solicitor General on Section 213 of the Criminal Code (Prostitution-Soliciting) (Ottawa: House of Commons, 1990). See also Justice Canada, Federal, Provincial, Territorial Working Group on Prostitution, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (Ottawa: Department of Justice, 1998) at 7.

<sup>35</sup> *Prostitution Reference*, *supra* note 17 at 1200, Lamer J.

<sup>36</sup> *Bedford* SCC, *supra* note 9 at paras 165–67. For different interpretations of what the Supreme Court might have been suggesting in (or expecting from) this passage, see Brenda Cossman, “What if Ottawa Now Criminalizes Prostitution?” *The Globe and Mail* (20 December 2013), online: <theglobeandmail.com/opinion/what-if-ottawa-criminalizes-prostitution/article16071830/>; Dufraimont, *supra* note 21; Christopher Manfredi, “Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006–2015” (2015) 52:3 Osgoode Hall LJ 951; Carolyn Moulard, “Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity” (2018) 41:4 Man LJ 281 at 300–301.

v. *Downtown Eastside Sex Workers United Against Violence Society* was abandoned.<sup>37</sup> Had the merits of *Downtown Eastside* been adjudicated, the headlines might have recounted the industrialized and globalized dimensions of sex work as a collective cultural phenomenon — a story normatively distinct from section 2(b) and section 7’s individualized lens of autonomy and dignity.

So on *Bedford*’s heels, Parliament’s institutional advantages offered a forum for a wider public debate — an opportunity for diverse voices, interest groups, and national stakeholders to inform whether and how prostitution would be regulated. There was much the Supreme Court did not say in *Bedford* about the permissible bounds of legislating. *Bedford* did not constitutionalize a right to sell and buy sex, nor did *Bedford* set out a stencil for lawmaking.

## B. INSTITUTIONAL DYNAMICS: THE COURT AND THE GOVERNMENT

Although it is clear that *Bedford* did not predetermine Bill C-36’s *content*, the case’s more immediate and direct impact was upon Bill C-36’s *process*. Although the Supreme Court unanimously declared the three laws to be unconstitutional on 20 December 2013, the Supreme Court suspended the declaration’s effect for 12 months. Functionally equivalent to the “snooze” button on an alarm clock, this suspension signalled the Supreme Court’s expectation that the Government would rise to open a public debate while the Supreme Court’s declaration laid in abeyance.<sup>38</sup> In struggling with whether to temporarily keep the unconstitutional laws in force, the Supreme Court was wary that “[h]ow prostitution is regulated is a matter of great public concern” and deferred to Parliament’s competency and capacity to confront a “complex and sensitive problem.”<sup>39</sup>

Legislators grappled with the complexity and sensitivity of this policy problem with constrained time and resources. During the first six months of the suspension, Bill C-36 was conceived and drafted. Before long, it would be passed with one month to spare in Parliament’s busy, productive second session, through which 86 total bills received Royal Assent. Then-Minister of Justice, Peter MacKay, was propelled by both the upcoming summer adjournment and the impending expiration of the Supreme Court’s 12-month suspension. On a motion to abridge the debate on Second Reading to five hours, the Minister 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.”<sup>40</sup>

At the same time, numerous legislators were fraught over Bill C-36’s legal intricacies. They wanted more time to digest what Bill C-36 proposed to do. Regrettably, no one on the

<sup>37</sup> 2012 SCC 45, at para 64 [*Downtown Eastside*]. On behalf of racial and cultural minorities struggling through poverty, violence, addiction, and poor health, whom the Supreme Court held had no reasonable and effective means to launch a *Charter* challenge, *Downtown Eastside* mounted additional claims unique from *Bedford*. On the solicitation offence, the Society claimed that prohibiting communication in a public place violated section 2(d)’s protection of freedom of association by preventing sellers from working together safely, and infringed section 15’s equality guarantee by discriminating against marginalized groups.

<sup>38</sup> I previously used the “snooze button” analogy (prior to my legal name change) in Moulard, *supra* note 36.

<sup>39</sup> *Bedford* SCC, *supra* note 9 at 167.

<sup>40</sup> *House of Commons Debates*, 41-2, No 102 (12 June 2014) at 11:50–11:55 (Hon Peter MacKay) [*Hansard* (12 June 2014)].

record suggested that the Attorney General should return to court to request an extension, as had happened (and would soon again) for other delicate *Criminal Code* reform.<sup>41</sup> Alternative strategies for preserving a full debate at Second Reading also failed, as Opposition members across the aisle unsuccessfully proposed to send Bill C-36 back to the Supreme Court on a reference question.<sup>42</sup>

Despite the abridged debate in the House of Commons, Bill C-36 continued to be hotly contested. After Second Reading, the House of Commons' Standing Committee on Justice and Human Rights (JUST) struck an exceptional summer sitting to study Bill C-36 in July 2014. Over five days, JUST held 13 meetings where 81 witnesses appeared. Many of those same individuals also reappeared on the list of the 60 witnesses who testified before the Senate's Standing Committee on Legal and Constitutional Affairs (LCA). The upper chamber convened a four-meeting Pre-Study in September 2014 before conducting its shorter two-meeting Study in October 2014.

Much as the strain on time and resources was practically difficult, the added pressure might also have been politically favourable. Quite inconveniently, were it not for the Supreme Court releasing its judgment in *Bedford* on 20 December 2013, wholesale prostitution reform would not have landed on the 41st Parliament's agenda. In *Bedford*'s aftermath, Stephen Harper's Conservative Government was still reeling from what Christopher Manfredi has characterized as "a narrative of conflict" with the McLachlin Court: the Health Minister had arbitrarily pulled the plug on a safe injection site, the Government lacked any legal basis to appoint its preferred judicial candidate to the ranks of the Supreme Court, and Parliament was constitutionally barred from implementing the Government's proposed reform to the Senate.<sup>43</sup> So during such a turbulent period of institutional relations, it is therefore unsurprising that the Government would be loath to gamble on another adverse judicial decision by returning to the Supreme Court to request an extension or a reference opinion. Somewhat opportunistically, however, the Government also combined consultations for Bill C-36 with roundtables for a new *Canadian Victims Bill of Rights*, and heralded the two bills together as community-oriented, victims-first justice reform.<sup>44</sup> As we shall hear, victimization was a salient concern throughout Bill C-36's debates, and victimization is at the crux of section 213(1.1)'s rule of law problem.

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<sup>41</sup> See e.g. *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: <scs-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=19758>. For an example, soon after Bill C-36, see *Carter v Canada*, 2016 SCC 4 (extending the original 12-month suspended declaration by four months to enact *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3).

<sup>42</sup> *Hansard* (12 June 2014), *supra* note 40 at 11:35–12:10.

<sup>43</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [Insite]; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21; *Reference re Senate Reform*, 2014 SCC 32, discussed in Manfredi, *supra* note 36.

<sup>44</sup> *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2; *Hansard* (12 June 2014), *supra* note 40 at 11:50–12:10 (Hon Peter MacKay).

## C. THE POLICY APPROACH OF BILL C-36

### ULTIMATE END: ERADICATING PROSTITUTION

Bill C-36's long title acknowledged that it was "An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford." Its short title, however, broadcasted the Government's sweeping aspirations front and centre: "*The Protection of Communities and Exploited Persons*."<sup>45</sup> When the Justice Minister commenced the abridged debate on Second Reading, his speech proclaimed Bill C-36's transformational goals "to reduce the demands for prostitution, which disproportionately impact on society's most marginalized and vulnerable" and "ensure that those who exploit others through prostitution are held to account for capitalizing on the demand created by purchasers."<sup>46</sup>

These virtues are extolled in Bill C-36's preamble, which declares the importance of reducing demand, preventing social harm from commodifying and commercializing the body, protecting women's dignity and equality, encouraging victims to report violence and leave prostitution, and safeguarding children and communities from harm.<sup>47</sup> Redolent of radical feminism, the preamble condemns the patriarchal subordination of women, and espouses a contentious presupposition that all prostitution is inherently exploitative.<sup>48</sup>

As noted above, in both *Bedford* and the *Prostitution Reference*, the Attorneys General had argued to no avail that the aims animating the former solicitation office were eradicating the exploitation, subordination, and degradation of vulnerable people.<sup>49</sup> Both the Justice Minister's speech and the preamble explicitly elevated these goals into Bill C-36's blend of economic and symbolic approaches to deterrence and denunciation, which ultimately aspire to eradicate prostitution.

Bill C-36's main technique for deterring and denouncing prostitution is to criminalize "prostitution," a legal term that Bill C-36 modernized as "sexual services for

<sup>45</sup> Bill C-36, *supra* note 18. For analyses of this policy, see Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23:1 Fem Leg Stud 27; Lielle Gonsalves, "Explaining the Appeal of Asymmetrical Criminalization: Julia Hughes (UNB), Vanessa MacDonnell (Ottawa) & Karen Pearlston (UNB) on Options, Bedford, and the Role of Legal Professionals," online: *IFLS Blog* <web.archive.org/web/20200813120021/https://ifls.osgoode.yorku.ca/explaining-the-appeal-of-asymmetrical-criminalization-julia-hughes-unb-vanessa-macdonnell-ottawa-karen-pearlston-unb-on-options-bedford-and-the-role-of-legal-professionals/>; Benjamin Perrin, "How To Make Canada's New Prostitution Laws Work," Commentary (Ottawa: Macdonald-Laurier Institute, 2014), online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1249&context=fac\_pubs>. For opinions on Bill C-36's constitutionality, see Debra M Haak, "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017) 50:3 UBC L Rev 657; Michael Plaxton, "First Impressions of Bill C-36 in Light of *Bedford*," online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2447006>; Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69.

<sup>46</sup> *House of Commons Debates*, 41-2, No 101 (11 June 2014) at 17:00 (Hon Peter MacKay).

<sup>47</sup> Bill C-36, *supra* note 18, preamble.

<sup>48</sup> See Andrea Dworkin, "Prostitution and Male Supremacy" (1993) 1:1 Mich J Gender & L 1; Jody Freeman, "The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent" (1990) 5 Berkeley Women's LJ 75.

<sup>49</sup> *Bedford SCC*, *supra* note 9 at para 147.

consideration.”<sup>50</sup> Bill C-36’s entry into force on 6 November 2014 was historical: for the first time in Canadian law, adult prostitution became a *de facto* criminal activity.<sup>51</sup>

To shift the paradigm to criminalization, the Government borrowed from the Nordic model pioneered in Sweden, yet it also added a uniquely Canadian spin.<sup>52</sup> Bill C-36’s central instrument is the new purchasing offence, which directly targets the demand-side of the transaction (“johns”) by outright prohibiting the purchase of sexual services. Flanking the purchasing offence is the material benefits offence, which targets third parties (“pimps”) who capitalize on the transaction. Unique to Canada is the brand new advertising offence, which discourages the marketing of sexual services by prohibiting advertisements for sexual services in print and online, and which *Bedford* did not anticipate.<sup>53</sup> Last but not least, Bill C-36 also diverges from Sweden by re-enacting section 213(1.1), the narrowed iteration of the unconstitutional solicitation offence, which prohibits communicating to sell sexual services, but now only near select public places where minors are likely to be present.

But for the amended section 213(1.1), Parliament’s new legislation nominally addresses the Court’s concerns for the safety of individuals who sell sex. Narrow exemptions from the purchasing, advertising, and material benefits offences conceivably permit individual sellers to work indoors, and to hire bodyguards and drivers. Conceptually, Bill C-36’s framework views all prostitution as an intrinsically violent form of sexual exploitation, whose victims are not just the communities where sex is bought, but also the sellers themselves.<sup>54</sup>

As much pragmatic as it is profound, Bill C-36 engineered a clever technique for sellers to avoid criminal liability. Despite regarding sellers as victims, it does *not decriminalize* individuals who offer or provide sexual services. Rather, it *immunizes* sellers from prosecution for all the new offences, except for the “offence” with which this article is concerned: section 213(1.1), the amended solicitation offence.<sup>55</sup> It is the sole offence that directly, technically, targets individuals who sell sex, who are otherwise exempted or immunized from prosecution. Within this transformed legal landscape for the commercial exchange of sexual services, the new section 213(1.1) is therefore an anomaly.

<sup>50</sup> Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act*, online: <[www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf](http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf)> [Technical Paper] (note this updated version was published mere weeks after Bill C-36 received Royal Assent on 6 November 2014). Bill C-36 deleted the undefined term “prostitution” from the *Criminal Code*. The Justice Department informed Members of Parliament that the *Prostitution Reference*’s definition of “prostitution” as “offering by a person of his or her body for lewdness for payment in return” means the same as “obtaining sexual services for consideration.” See House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 41-2, No 44 (15 July 2014) at 10:00–10:02 (Nathalie Levman) [JUST Proceedings (15 July 2014)]. See *Prostitution Reference*, *supra* note 17 at 1159, citing *R v Lantay*, [1966] 3 CCC 270 (Ont CA), adopting the United Kingdom definition from *R v De Munck*, [1918] 1 KB 635 (CCA).

<sup>51</sup> Bill C-36, *supra* note 18; *Criminal Code*, *supra* note 2, s 286.1. Juvenile prostitution has always been a criminal activity.

<sup>52</sup> *The Swedish Criminal Code*, (brottsbalken, 1962:700), Ch 6, ss 6.11 (purchasing offence), 6.12 (third party offence). Unlike Bill C-36, the Nordic Model does not contain any prohibitions on advertising sexual services and communicating. 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,” online: <[researchgate.net/publication/321254711](http://researchgate.net/publication/321254711)>. For issues with importing the Nordic Model 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.

<sup>53</sup> *Criminal Code*, *supra* note 2, ss 286.2–286.4. Bill C-36 also modernized the procuring offence.

<sup>54</sup> Technical Paper, *supra* note 50 at 4.

<sup>55</sup> As Plaxton observes, *supra* note 45 at 5, “[t]he provision addresses prosecutors, not sex workers.”

## D. THE NORMATIVE STRUCTURE OF SECTION 213(1.1)

### 1. THE VICTIM-PERPETRATOR PARADOX

To summarize, Bill C-36 ushered in an ambitious slate of new offences to directly target buyers and exploiters of sex. In striving to undercut demand and seeking to condemn prostitution as a socially malign activity, the new regime endeavours to eradicate “prostitution for its own sake.”<sup>56</sup> As a general policy, the preamble, exemptions, and immunities all cloak sellers in moral blamelessness, based on a contested ideological premise: all sellers are incapable of freely participating in an activity deemed intrinsically violent, and criminally unlawful.<sup>57</sup>

However, we need not interrogate the competing ideological stances, nor the merits of criminalizing prostitution. What is intriguing about section 213(1.1)’s re-enactment is that, despite strenuously disagreeing about Bill C-36’s overall wisdom and symbolism, abolition activists and legalization advocates united to oppose section 213(1.1). The basis for this truce in an otherwise inflamed debate is what I call “the victim-perpetrator paradox.”

At the crux of this paradox are section 213(1.1)’s legal subjects: people who sell sex for money. On one hand, Bill C-36 signifies that sellers are victims who do not deserve criminal punishment for participating in a socially harmful transaction. Yet on the other, section 213(1.1) protrudes like a sixth finger: lopsided, and superfluous. Not only is section 213(1.1) the sole pre-*Bedford* prostitution offence that Parliament *amended* rather than *repealed*: it is also the sole post-*Bedford* offence that *on its face* criminalizes sellers.

Impugning section 213(1.1)’s constitutionality on this basis is possible;<sup>58</sup> however, I am not interested in dissecting *Charter* doctrine, but with making and enforcing law. The normativity of making and enforcing law has both structural and symbolic aspects. Structurally, through exemptions and immunities, the victim-perpetrator paradox is inscribed into section 213(1.1)’s statutory framework, and thus into the operational context where it now applies. Symbolically, the state actors empowered to enact and apply section 213(1.1) are also implicated in the victim-perpetrator paradox. Beyond structuring Bill C-36 in a way that instrumentally embraces sellers as victims, those state actors — namely, legislators and police — perpetuated the victim-perpetrator paradox with the language they used to debate how section 213(1.1) ought to function.

Importantly, political rhetoric can blur legal terminology. “Victim” and “prostitute” are loaded words that can rouse pejorative connotations, yet are also technical terms with legal

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<sup>56</sup> *Bedford* SCC, *supra* note 9 at para 147.

<sup>57</sup> For an introduction to the contested feminist ideology more generally, see *supra* note 48. With respect to Canadian law more specifically, see Janine Benedet, “Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?” (2013) 18:2 *Rev Const Stud* 161; Campbell, *supra* note 45.

<sup>58</sup> For example, it is arguably arbitrary under section 7 of the *Charter* to criminalize children as a means to prevent child exploitation. Exploited juvenile sellers would still foreseeably be criminalized under section 213(1.1) simply from being recruited from their schools. In this contradiction, section 213(1.1) is also externally inconsistent with the procuring offence, which, logically, exempts those whose sell their own sexual services from party liability if the offence relates to their own sexual services. For another potential section 7 argument, see *R v Beatty*, 2008 SCC 5 at para 34, Charron J holding that it is a “principle of fundamental justice that the morally innocent not be deprived of liberty.”



definitions.<sup>59</sup> Labelling a single person to simultaneously be both a “victim” and “prostitute” ascribes assumptions, often wanton and polemical, that dare to define that person’s moral agency and character. As we shall soon hear, some politicians and police are insensitive to the indignity their diction can connote. However, when those legislators and officers employ the categories “victim” and “prostitute” to create and enforce criminal law, they are presumed and obliged to do so with knowledge of what those technical terms denote in law.<sup>60</sup>

Despite the insistence of many people who do not subjectively perceive themselves as victims, the *Criminal Code* objectively places such people into a distinct legal position vis-à-vis perpetrators.<sup>61</sup> Although victims are third parties to the bipartite criminal prosecution, the *Criminal Code* instructs that “victim” is a person against whom an offence has (or is alleged to have) been committed, or who has (or is alleged to have) suffered, physical or emotional harm, property damage or economic loss as the result of the commission (or alleged commission) of the offence. Additionally, section 4 of the new *Canadian Victims Bill of Rights* emboldens this position by excepting that, “[a]n individual is not a victim in relation to an offence, or entitled to exercise a victim’s rights under this Act, if the individual is charged with the offence.”<sup>62</sup> Introduced just two months prior to Bill C-36, section 4 of the *Canadian Victims Bill of Rights* was passed by the exact same Parliament that passed section 213(1.1), and during the exact same session as Bill C-36.

We must therefore be careful and critical of the moral blamelessness invoked when legislators and police refer to section 213(1.1)’s legal subjects with the term “victim.” The debates in Part III below exhibit a purpose to use section 213(1.1) not as an offence to be enforced against sellers as alleged perpetrators of crime, but as a proxy to intervene in the welfare of sellers regarded as victims. To deliberately enact an inoperative criminal offence solely to enable such warrantless, chargeless detentions, I argue in Part IV, is to weaken the rule of law.

## 2. THE TEMPLATE OF A CRIMINAL OFFENCE: PROHIBITION, PENALTY, PURPOSE

To see how the rule of law is weakened if section 213(1.1) does not operate as a criminal offence, it would help to first set out what a criminal offence is supposed to look like on the books. To measure the gap between section 213(1.1) on the page and section 213(1.1) on the ground, it is important to first see the template: what exactly the law is supposed to have written on the page.

<sup>59</sup> Bill C-36, *supra* note 18, s 12(1) repealed the former definition of “prostitute” under section 197(1) of the *Criminal Code* as “a person of either sex who engages in prostitution.” On the technical meaning of prostitution, see *supra* note 50.

<sup>60</sup> *Interpretation Act*, RSC 1985, c 1-21; *R v DLW*, 2016 SCC 22 at paras 20–22, Cromwell J; *R v Summers*, 2014 SCC 26 at paras 55–56; *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at paras 55–65.

<sup>61</sup> This theme is explored at length in Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999). For a principled take on the legal difference and conflicting interests between victims and perpetrators in relation to police conduct, see *Hill v Hamilton-Wentworth Police Services Board*, 2007 SCC 41 at paras 130–33, Charron J, dissenting against creating a tort of negligent police investigation in relation to suspects.

<sup>62</sup> *Canadian Victims Bill of Rights*, *supra* note 44, s 4 [emphasis added].

In legislative form, a criminal offence has three technical or normative features.<sup>63</sup> To make a criminal offence, Parliament must legislate a prohibition, backed by a penalty, both of which must be rooted in a criminal law purpose.<sup>64</sup>

Before turning to section 213(1.1)'s purpose, consider its penalty and prohibition.<sup>65</sup> First, section 213(1.1)'s classification as a summary conviction offence limits how the criminal process unfolds and the extent of punishment available. Second, Government legislators altered its prohibition's geographic ambit partway through the legislative process.

Both section 213(1.1)'s penalty and prohibition are noteworthy because they are the only aspects of Bill C-36 that attained unanimity across civilian witnesses. The united fronts of abolitionists and pro-sex work movements against section 213(1.1) led to two substantive motions to amend Bill C-36: one failed amendment by the Opposition, and one successful amendment by the Government. Since both of these proposed amendments enhanced section 213(1.1)'s attractiveness to legislators, and each relates to a key technical feature, the motions are worth underlining here.

#### a. Penalty: Summary Conviction

Identical to the sanction stipulated under its unconstitutional forerunner, section 213(1.1)'s prohibition is backed by punishment upon summary conviction.<sup>66</sup> At the time it was enacted, section 213(1.1) carried a maximum penalty of six months' imprisonment, or a \$2,000 fine. However, due to the reclassification accomplished by the very same omnibus legislation that repealed the zombie laws, section 213(1.1) now carries a maximum penalty of two years less a day imprisonment, or a \$5,000 fine.<sup>67</sup>

Section 213(1.1)'s classification as a summary conviction offence limits the procedural route and protections available throughout the criminal process. Contrasted with serious hybrid or straight indictable offences, police do not typically arrest someone prior to charging that individual with a summary conviction offence, unless an officer directly observes the individual in the process of perpetrating the guilty act. Nonetheless, patrol officers, as potential eyewitnesses themselves, could theoretically be more likely to arrest under section

<sup>63</sup> These formal textual features are distinguished from the substantive elements of *mens rea* and *actus reus*.

<sup>64</sup> *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 27.

<sup>65</sup> *R v Mabior*, 2012 SCC 47 at para 23. At bottom, criminal law's central purpose is "the public identification of wrongdoing *qua* wrongdoing which violates public order and is so blameworthy that it deserves penal sanction." This content-neutral definition leaves aside the philosophical question of whether moral wrongdoing and the harm principle ought to be exhaustive or co-extensive with criminal offences.

<sup>66</sup> Note the gender disparity in convictions and sentences under the former section 213. In 2003–2004, 68 percent of females were convicted, yet 70 percent of males had charges withdrawn or stayed. Of those convicted, nearly 40 percent of females were imprisoned, whereas 5 percent of males were imprisoned. See House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) (Chair: Art Hanger).

<sup>67</sup> *Criminal Code*, *supra* note 2, s 787(1); Bill C-75, *supra* note 1, s 316. The increased maximum due to the reclassification came into force on 19 September 2019.

213(1.1) than under other pure summary conviction offences,<sup>68</sup> since an essential element of section 213(1.1) is that it transpired in a public place.<sup>69</sup>

As for punishment, it is important to flag a misapprehension about summary conviction offences. This misapprehension baffled legislators and witnesses during JUST's study. Astonishingly, the Chief of the Calgary Police erroneously assured legislators that summary conviction offences are *not* registered on a criminal record.<sup>70</sup> However, despite the Chief's insistence, regardless of whether an offence is classified as summary, hybrid, or indictable, *all* convictions for criminal offences are duly registered on the offender's criminal record.<sup>71</sup> Beyond the stipulated penalty, the lasting ramifications of a criminal record are instrumental to all criminal offences' deterrent effect on the general population.

While the Parliamentary Secretary requested a memo from the Justice Department to clarify the misapprehension, JUST moved on to hear testimony detailing how criminal records under the former section 213 not only tarnished reputations with stigma, but also hindered opportunities for housing, education, and employment.<sup>72</sup> Witnesses of all political stripes reached universal consensus that no seller, past or present, should be fettered with a criminal record. This democratic will culminated into an amendment motion. Proposing to add an amnesty, the amendment would have expunged the criminal convictions for all sellers under the unconstitutional section 213, if only the failed Opposition motion garnered one more vote.<sup>73</sup>

#### b. Prohibition: Proscribing Communication

The substantive amendment that did succeed pertained not to *whom* section 213(1.1) applied, but *where*. In the initial version of section 213(1.1) introduced by the Justice Minister into the House of Commons, section 213(1.1) amended the former unconstitutional solicitation offence by providing a new heading and proscribing a narrower geographic ambit. Instead of applying to all public places, the guilty act of communicating to provide sexual services for consideration would have to occur at or near 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

<sup>68</sup> See e.g. *Criminal Code, ibid*, s 393(3), which prohibits fraudulently obtaining transportation, one among few pure summary conviction offences.

<sup>69</sup> *Ibid*, s 213(2) defines “public place” as “any place to which the public have access as of right or by invitation, express or implied.” It has been interpreted to include a moving vehicle. See also *R v Smith*, [1989] 49 CCC (3d) 127 (BCCA).

<sup>70</sup> House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 41-2, No 35 (8 July 2014) at 10:56 (Rick Hanson, examined by Hon Sean Casey) [JUST Proceedings (8 July 2014)].

<sup>71</sup> *Criminal Code, supra* note 2, ss 570, 806, Form 36.

<sup>72</sup> JUST Proceedings (8 July 2014), *supra* note 70 at 13:00 (Hon Bob Dechert). On the barriers posed by criminal records, see House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 41-2, No 41 (10 July 2014) at 10:15 (Deborah Pond), 13:25 (Kate Quinn) [JUST Proceedings (10 July 2014)].

<sup>73</sup> JUST Proceedings (15 July 2014), *supra* note 50 at 13:10 (New Democratic Party Motion by Hon Françoise Boivin).

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.<sup>74</sup>

By applying to public places frequented by minors, section 213(1.1) thereby cast a tighter net for criminal liability than the unconstitutional solicitation offence. As already mentioned, however, section 213(1.1) is substantively anomalous. It is the only offence that directly targets persons who sell sex, whom Bill C-36 otherwise immunizes or exempts from criminal liability.

Procedurally, section 213(1.1) is also anomalous. Section 213(1.1) is the only offence that was successfully amended during the debates for Bill C-36. This amendment was no small feat, considering numerous other proposed amendments were one vote shy of passing.<sup>75</sup> The democratic impetus behind this amendment is also remarkable. In both its introduced and amended forms, section 213(1.1) ignited outrage from both proponents and opponents to Bill C-36. To quell the backlash from abolitionists, lawyers, academics, and sex work activists, the Government proposed the following amendment to section 213(1.1) at clause-by-clause, which is the crucial stage for amending a Bill's content through altering, deleting, and adding provisions. The amendment enumerated three locations often frequented by minors:

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.<sup>76</sup>

This compromise was ultimately passed at JUST's clause-by-clause, and thus represents the version of section 213(1.1) subsequently studied in the Senate. Nevertheless, this olive branch was rejected by nearly all witnesses in the red chamber afterwards. Despite clashing on the wisdom of Bill C-36 on the whole, numerous citizens, experts, and interest groups aligned in objecting to section 213(1.1). What stoked their ire was not the breadth and ambiguity of *where* section 213(1.1) would apply, but rather *to whom*. As noted, the legal subjects targeted by section 213(1.1) are sellers.<sup>77</sup>

### c. Purpose: Child Protection?

According to an unusual Technical Paper from the Justice Department, this vehemently opposed amendment did not alter section 213(1.1)'s legislative purpose. The Technical Paper states that section 213(1.1) was conceived to protect children. It asserts that this child

<sup>74</sup> Bill C-36, *supra* note 18 at cl 15 (First Reading in the House of Commons on 6 June 2014).

<sup>75</sup> JUST Proceedings (15 July 2014), *supra* note 50, (Clause-by-Clause). Among those failed motions (all voted down five-to-four) were proposals to grant an amnesty for criminal convictions under the former section 213(1)(c), to delete the advertising offence, and to expressly recognize *Bedford's* holding that the *Criminal Code* had grossly disproportionate effects on health and safety.

<sup>76</sup> JUST Proceedings (15 July 2014), *ibid*.

<sup>77</sup> For consistency with the current legal regime, I use the term "seller" to refer to the legal subject formerly called "prostitute," who is technically liable under section 213(1.1), yet who is also immunized from prosecution under Bill C-36's purchasing, advertising, and material benefits offences. For consistency with Fuller, I use citizen in the broad sense to describe rights-bearing private individuals who live within the political community. Using citizen in this way necessarily includes many unfranchised people who are not legal "citizens of Canada" with the right to vote in Federal elections.

protection purpose stayed intact, despite the vociferous debate driving section 213(1.1)'s amendment:

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, as well as the need to protect vulnerable children from prostitution's harms.<sup>78</sup>

The above passage acknowledges that section 213(1.1) is the only instance where sellers are directly criminalized. Clearly, the authors of the Technical Paper understood that both the introduced and amended versions of section 213(1.1) aimed to impose criminal liability upon individuals who offer to sell their own sexual services, without exception or immunity.

There are numerous reasons to resist equating the purpose asserted by the Technical Paper with the purpose endorsed by the Parliamentarians who passed section 213(1.1) into law. For one, a cynic might distrust the Technical Paper due to its peculiar provenance. Laconically titled, the "Technical Paper" might easily be confused with the commonly known White Papers or Green Papers, which stake out a Government's policy proposal to inform public consultations, prior to drafting. However, as legislative counsel Charlie Feldman has observed, Technical Papers are rarely prepared for ordinary bills in general legislative practice.<sup>79</sup> More strangely, the Privy Council Office lacks any guidelines indicating when or why a government would engage drafters to prepare a "Technical Paper" of legal research and analysis, after legislation has already been drafted.<sup>80</sup>

Besides this peculiar provenance, Bill C-36's Technical Paper was also unique in when, where, and how it was disclosed.<sup>81</sup> A cynic reading the record might also notice that the Justice Minister produced the Technical Paper as a diversion strategy.<sup>82</sup> On timing alone, it seems felicitous that the Justice Minister offered to table the Technical Paper to JUST after Second Reading amidst objections that Bill C-36 would be subject to constitutional attack, regardless of what JUST did with the Bill.

Apart from noticing the strategic time and place for disclosing the Technical Paper (after debate in principle had already occurred in the House), a cynic might also perceive the

<sup>78</sup> Technical Paper, *supra* note 50 at 10.

<sup>79</sup> Charlie Feldman, "Beyond *Charter* Statements: Constitutional Communications in the Parliamentary Context" (2018) *J Parliamentary & Pol L* 37.

<sup>80</sup> Government of Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2nd ed (Ottawa: Privy Council Office, 2001).

<sup>81</sup> Feldman, *supra* note 79 found Bill C-36's Technical Paper noteworthy because the Justice Minister proactively tabled it to both Standing Committees instead of the House of Commons at-large, and because the Paper asserted constitutional compliance but without identifying areas of constitutional risk.

<sup>82</sup> *Department of Justice Act*, RSC 1985, c J-2, s 4.1; *Statutory Instruments Act*, RSC 1985, c S-22, ss 3(2), 3(3). For all Government-proposed legislation, not just those sponsored by his own Department, the Justice Minister possesses statutory duties to alert the House of Commons to Bills inconsistent with human rights.

Technical Paper as a shield for deflecting substantive questions. When touting Bill C-36's strengths at both Standing Committees,<sup>83</sup> the Minister deferred to the Technical Paper's legal analysis and research, which was grounded in his Department's internal process for subjecting all Government Bills to *Charter* review.<sup>84</sup> In fact, the record in both chambers logs the Minister and his drafters directing legislators to the Technical Paper when faced with difficult questions about each proposed offence's constitutionality and functionality. Of course, an optimist would chalk these irresistible inferences up to coincidence and optics. To be sure, the Technical Paper was helpful to expedite the process, especially given the tight deadline Parliament was rushing to meet.

Realistically, however, if the purpose that Government legislators understood section 213(1.1) to serve diverges from that asserted by the Minister and his Department, there are pragmatic reasons to pay attention. As an extrinsic aid produced by Government lawyers prior to democratic debate, we cannot assume that the Technical Paper accurately represents the legislative purposes that Parliament as a whole voted upon. At most, the Technical Paper represents what the Minister and his staff who drafted Bill C-36 understood its constitutional basis and its policy goals to be.<sup>85</sup>

Moreover, scrutinizing the purpose that legislators deliberated as a matter of fact is faithful to democracy, as a matter of principle. Unelected legislative drafters possess an underestimated power to influence policymaking behind the scenes.<sup>86</sup> The public interest in transparent, accountable governance is better served by heeding the purpose that emerged and developed throughout the publicized debates at specialized legislative committees. Committees have special and independent constitutional status, which equips and requires members to exercise their deliberative, legislative, and accounting roles, unmoored to what the Justice Department might advise the Government.<sup>87</sup> Not only are standing committees mandated to hold the Executive directly accountable, the nature and discipline of committee work is less prone to the whips and whims of partisan politicking: members subject departmental policy to line-by-line independent expert review, welcome affected citizens to participate, and report to Parliament at-large.

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<sup>83</sup> At the time, Departmental practice was to issue a report warning of inconsistency only if a Bill appeared so "manifestly unconstitutional" that "no credible (namely, reasonable and bona fide) argument" could sustain it. See *Schmidt v Canada (AG)*, 2016 FC 269 (Agreed Statement of Facts at para 9 and appended publications, especially "Statutory Examination and Legal Risk Management in Drafting Services"), aff'd 2018 FCA 55.

<sup>84</sup> Technical Paper, *supra* note 50; House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 41-2, No 34 (7 July 2014) at 10:50 (Hon Peter MacKay) [JUST Proceedings (7 July 2014)] (tabling an earlier version of the Technical Paper); Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 44 (9 September 2014) (Hon Peter MacKay) [LCA Proceedings].

<sup>85</sup> LCA Proceedings, *ibid*. During examination, counsel Nathalie Levman directed Senators four times to the Technical Paper (see examination by Senator Jaffer, Senator McIntyre; Senator Joyal examination).

<sup>86</sup> Leckey, *supra* note 13 at 109–15, 195.

<sup>87</sup> House of Commons, Standing Committee on Public Accounts, *Evidence*, 40-2, No 29 (18 June 2009) at 16:05 (Rob Walsh: "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"). In the latter part of his tenure, Walsh became perturbed by an apparently routine practice across departments and agencies to deny Committee requests for disclosure. See Rob Walsh, *On the House: An Inside Look at the House of Commons* (Montreal & Kingston: McGill-Queen's University Press, 2017).

Given that the Executive already de facto controls Parliament, it would shortchange democracy to aggrandize ministerial power even more by adopting his (or his staff's) view of the law's best legal meaning, *before* "the law" has even been debated by lawmakers. Simply put, the Justice Department's explanation of proposed legislation *for* Parliament is no substitute for reasoned justification *by* Parliament. It is that reasoned justification to which we now turn.

### III. PARLIAMENT AND POLICE

Centrally, this article claims that section 213(1.1) suffers from a rule of law problem: the criminal liability Parliament wrote into the *Criminal Code* is incongruent with the moral blamelessness guiding enforcement on the ground. On the books, section 213(1.1) appears to be an offence. But if applied for the purpose that Government legislators envisaged and police witnesses desired, section 213(1.1) is detached from the conditions and consequences for wrongdoing. Uncovering this incongruence involves sifting through the fine grains of Hansard — without taking section 213(1.1)'s statutory words at face value, and without constructing the fiction of legislative intent. What follows lets the legislators politically accountable for enacting section 213(1.1) speak for themselves and takes the police responsible for enforcing section 213(1.1) at their word.

Part III's empirical account of section 213(1.1) has one overarching theme: despite its text, section 213(1.1)'s primary purpose is not to be a criminal offence, but to be a detention power, short of charges. United by the need for discretion to protect the public, prevent harm, and preserve peace, section 213(1.1)'s detention purpose has two threads that ran throughout the legislative process: first, police needed an investigative tool for collecting evidence against exploitative third parties; and second, police wanted a means for extricating sellers out of the industry, into services and treatment. Neither of these detentions involve charging sellers with an offence.

This two-fold detention purpose materializes in the dialogue between politicians and police who scrutinized Bill C-36 at the Standing Committees in both the House of Commons and Senate. In the interests of concision, Part III is necessarily non-exhaustive. Impractical as it is to quote every statement that supported section 213(1.1)'s detention purpose, the extracts below exemplify the views of Government legislators who sat on the Standing Committees, including the Parliamentary Secretary to the Justice Minister in the House of Commons, and Bill C-36's Senatorial Sponsor. The extracts below also exemplify the positions advanced by all active police officers who participated in Bill C-36's legislative studies.<sup>88</sup> To accurately track Bill C-36's trajectory, Part III is also presented chronologically, beginning with JUST's study in July 2014 and ending with LCA's Study in October 2014.

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<sup>88</sup> Those legislators were Hons Robert Goguen, David Wilks, Joy Smith, Bob Dechert, Denise Batters, and Donald Plett. For brevity, I have not reproduced Dechert's questions and statements. See e.g. JUST Proceedings (15 July 2014), *supra* note 50 at 11:08–11:15 (Hon Bob Dechert, Government Motion to Amend section 213(1.1)). Query whether examinations by Senators Linda Frum and Jean-Paul Dagenais would also bring the tally up to eight: See e.g., Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 16 (17 September 2014) (examining Tom Stamatakis) [LCA Pre-Study]. Notably, two retired RCMP officers, Brian McConaghy and Deborah Pond, opposed section 213(1.1). See JUST Proceedings (10 July 2014), *supra* note 72 at 10:50, 16:05.

## A. JUST: HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

Regardless of what happens in court, there are practical and legal constraints on policymaking in Parliament. One important constraint is that Parliamentary privilege governs who is invited to testify at committee studies.<sup>89</sup> Of course, it should come as no surprise that Federal legislators would invite provincial justice officials to participate in criminal law reform. For making policy to regulate prostitution, the nature and number of incidents vary widely from coast-to-coast, as do the local resources available to respond effectively. When a lawmaking body is tasked with setting nationwide standards, a variety of regional perspectives are invaluable for responsive, comprehensive policymaking.

The legal constraints of the constitutional division of powers also enjoin provincial justice departments into the policy debate. Parliament has the plenary power to legislate the substance and procedure of criminal law for all of Canada under section 91(27) of the *Constitution Act, 1867*.<sup>90</sup> However, the administration of justice, property and civil rights, and local matters falls under the mandate of the provinces, plus health is a shared matter of federal-provincial jurisdiction that necessitates synchronization across multiple levels of Government.<sup>91</sup> Given these intersecting spheres of jurisdiction, ideal legislative practice would directly include justice officials from British Columbia to Nunavut to Newfoundland and Labrador.

Unfortunately, Manitoba was the sole province whose Justice Minister and Attorney General, Andrew Swan, testified before Parliament.<sup>92</sup> Overall, Manitoba supported Bill C-36's paradigm shift, which in Minister Swan's view, complemented his own province's restorative justice approach. Despite his generally favourable review for Bill C-36, Minister Swan testified that section 213(1.1) would be challenged. In examining Minister Swan, Government Member Robert Goguen recounted how arrest and detention under the old section 213 was used prior to *Bedford* in an attempt to help people exit the industry:

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?<sup>93</sup>

<sup>89</sup> "Committees" in Marc Bosc & André Gagnon, eds, *House of Commons Procedure and Practice*, 3rd ed (Cowansville: Éditions Yvon Blais, 2017), online: House of Commons <[www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/index-e.html](http://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/index-e.html)>.

<sup>90</sup> 30 & 31 Vict, c 3 (UK), reprinted in RSC 1985, Appendix II, No 5.

<sup>91</sup> *Ibid*, ss 92(13), (16); *Reference re Assisted Human Reproduction Act*, 2010 SCC 61; *Insite*, *supra* note 43.

<sup>92</sup> Nothing in the record indicates whether other provinces were invited.

<sup>93</sup> JUST Proceedings (7 July 2014), *supra* note 84 at 17:30 (Hon Robert Goguen, examining Hon Andrew Swan).



In articulating that he wanted to give police the ability to extract and divert sellers away from the industry, Goguen saw the policy problem as one solvable through the criminal process, with police discretion as the primary legal solution. From that premise, he reasoned that police needed a conversation prompt, and that section 213(1.1) would provide the legal authority for that prompt. In the resulting conversation, police would collect information from sellers to use for investigating pimps (as he assumed that they were not working for themselves by their own volition), and sellers would obey police's directions to go to services for leaving the industry. In short, Goguen's reasons attempted to leverage space within the criminal process for section 213(1.1) to operate, but without charges ever landing before a judge.

To reject Goguen's idea that consent to charges would make section 213(1.1) more palatable, Minister Swan maintained that section 213(1.1) was both unnecessary and unsavoury. He urged that the threat of criminal prosecution was no good way to assist victims, as being "picked up for communicating" would hang "the Sword of Damocles over your head."<sup>94</sup> When the Minister postulated that sellers would have to "give up information on somebody else" to avoid being charged themselves, Goguen doubled-down on the need for "legal authority to apprehend them":

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... 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... if there's no legal authority to apprehend them and to somehow incite them to get the help, where do you go?<sup>95</sup>

In this rejoinder to Minister Swan, Goguen reinforced his view that the power to arrest and detain pursuant to section 213(1.1) had two valuable uses: in addition to extracting information from sellers to further investigations against others, police required a specified lawful authority to "incite" sellers to receive assistance from social workers or victim support groups. For his part, Minister Swan rejected using section 213(1.1) as an authority to "help those who don't want to help themselves." Instead, he applauded Manitoba's prostitution diversion program, which his Province intended to continue, with or without an amended Bill C-36.

While Manitoba was the only provincial Justice Department officially represented in Parliament, the Canadian Police Association (CPA) put forth the position of frontline officers from 160 police services in 27 regions across the country. Not to be confused with police unions, the CPA is "the national voice for 60,000 police personnel," and is a registered lobbyist of no less than 19 Federal departments and organizations.<sup>96</sup> Parliament's study of Bill C-36 was not the first time that the CPA bargained for enforcement tools in *Bedford's*

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Office of the Commissioner of Lobbying of Canada, "Registration - In-house Organization: Canadian Police Association," online: <[lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=236&regId=491501](http://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=236&regId=491501)>. Curiously, none of the CPA's communications involving Bill-36 appear to have been reported to the Lobbying Commissioner.

wake. Indeed, in his presentation to JUST, CPA President Tom Stamatakis commended the Government for consulting with frontline officers when Bill C-36 was still being drafted.<sup>97</sup>

The CPA's presentation to JUST included a firm commitment to continuing the very enforcement practices impugned in *Bedford*, despite, as discussed in Part II, the proven fact that the risk of arrest had forced sellers to forego health and safety measures. In fully endorsing Bill C-36, Stamatakis stressed "the absolute need for both law enforcement and sex trade practitioners to end the adversarial nature of any interactions between their two groups." Yet Stamatakis reaffirmed that the police enforcement practices from the past would continue into the present and future, submitting that, "[w]hen it comes to prostitution ... Canadian police personnel exercise a tremendous amount of discretion in the pursuit of their duties. This will continue even if Bill C-36 becomes law."<sup>98</sup> This remark about "tremendous" enforcement discretion struck a chord with JUST, as members parsed out which specific duties police would continue to pursue.

Take the subsequent parley about enforcement disparities with JUST Committee Member David Wilks, himself a former police officer. In asking Stamatakis to elaborate on tremendous discretion, Wilks observed that the York Regional Police had not laid charges under the former solicitation offence in five years, yet other police units had utilized the unconstitutional offence as a channel for diversion programs. To emphasize section 213(1.1)'s potential as a social intervention, Wilks also minimized the consequences of discretionary power: they were discussing a prohibition punishable on summary conviction, rather than indictment.<sup>99</sup> Given these theoretically less serious consequences, Wilks was curious to hear the CPA's perspective on whether the refurbished section 213(1.1) could help "get a person out of trouble."<sup>100</sup>

In replying to Wilks, Stamatakis acknowledged the complexity and controversy of using section 213(1.1) "as an opportunity to engage with someone who might be in a vulnerable situation." When JUST Vice-Chair Sean Casey asked Stamatakis to unpack the utility of engaging with a vulnerable person, Stamatakis noted how it could facilitate and further investigations. He stated that section 213(1.1) would help confirm "if that person is in fact being exploited."<sup>101</sup> If so confirmed, Stamatakis ventured that the next step — a step which Vice-Chair Casey called "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."<sup>102</sup> This line of questioning ties together two threads of police power: detaining a person to direct them into a different course of behaviour; and detaining a person to obtain information to incriminate another person. Whether detention was to direct sellers to food and shelter, or to encourage them to report crime, Stamatakis regarded detention not as means to criminal charges against the detainee, but as an end in itself.

<sup>97</sup> JUST Proceedings (10 July 2014), *supra* note 72 at 16:10 (Tom Stamatakis); LCA Pre-Study (17 September 2014), *supra* note 88 (Tom Stamatakis).

<sup>98</sup> JUST Proceedings (10 July 2014), *ibid* at 16:15 (Tom Stamatakis).

<sup>99</sup> No one noted on the record that the former unconstitutional section 213 was also a summary conviction offence. See JUST Proceedings (10 July 2014), *ibid* at 15:30–17:30 ("from the perspective of discretionary powers from a police officer because it's a summary conviction offence").

<sup>100</sup> JUST Proceedings (10 July 2014), *ibid* at 16:33 (Hon David Wilks).

<sup>101</sup> *Ibid* at 16:37–16:40 (Tom Stamatakis, examined by Hon David Wilks and Hon Sean Casey).

<sup>102</sup> *Ibid* at 16:40 (Tom Stamatakis, examined by Hon Sean Casey).

The need for legislative authority to intervene under section 213(1.1) was vented openly and forcefully by Rick Hanson, then-Chief of the Calgary Police. Chief Hanson's presentation to JUST revived the nuisance abatement objective that *Bedford* had condemned against the grossly disproportionate impact on sellers' health and safety. To reduce the community's exposure to both the moral depravity of exchanging sex for money and the accompanying physical detritus discarded in the neighbourhood, Chief Hanson vouched 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."<sup>103</sup> Admitting the police's repugnance for sellers' "strolls" in public places, Chief Hanson defined community harm as "reduced perception of safety within communities; an 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."<sup>104</sup> The Chief's support for a national strategy to abolish prostitution did not resonate with the loftier aspirations of Bill C-36's Preamble to foster equality and dignity, but instead amplified the former nuisance abatement objective of the unconstitutional solicitation offence.

At the same time, however, the Chief renounced charging people who sell sex — people who, in his eyes, were victims whom the police ought to help. To that benevolent end, the Chief acknowledged "that all efforts must be taken to not further victimize those trapped in the sex trade through criminal charges. Instead, apprehension powers should be used to remove sex trade workers from oppressive situations and connect them to counselling and support services."<sup>105</sup> He concluded his presentation by asking for "the legal authority to intervene in a way that allows us to target organized crime and johns, while using the law as an opportunity to extract and provide services for those who are the victims of prostitution, the service providers."<sup>106</sup> In other words, the Chief rejected criminalizing people who sell sexual services, while also appreciating that Parliament had to also expressly provide the legislative authority for police to physically extricate sellers.

Although Chief Hanson did not specifically cite section 213(1.1) as the legislative provision that ought to authorize the chargeless apprehension powers, David Wilks latched onto section 213(1.1) as a source that could serve that end. In conferring with Chief Hanson, Wilks likened section 213(1.1) to conditions imposed under a form of police release, noticing that section 213(1.1)'s language is "similar to when a person who's arrested ... for a sex assault being put on a recognizance that says they cannot go near schools, playgrounds, etc." Chief Hanson agreed with Wilks that "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.... We need the authority to be able to do something."<sup>107</sup> By analogizing section 213(1.1)'s utility to that of another tool in the *Criminal Code*, a recognizance with conditions, both the officer and the legislator shared a mutual vision for how section 213(1.1) could prevent harm to children

<sup>103</sup> JUST Proceedings (8 July 2014), *supra* note 70 at 09:55.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid* at 09:50–09:55 (Rick Hanson).

<sup>106</sup> *Ibid* at 10:00 (Rick Hanson).

<sup>107</sup> *Ibid* at 11:15 (Rick Hanson, examined by Hon David Wilks).

and communities: by constraining the liberty of sellers, but without subjecting them to prosecution.

On the next day of JUST's study, a similar line of inquiry with another chief of police, York's Eric Jolliffe, also explored the instrumental value of detention under section 213(1.1). In the passage below, Wilks asked Chief Jolliffe to clarify the role of discretion to account for the fact that his force had not laid charges under the unconstitutional solicitation offence for over five years:

[W]e do have the ability to decide, based on factors, if we wish to move forward with arrest and charge or not ... we use the power of sections in the Criminal Code to inculcate ourselves into what's going on and to extricate individuals who are involved in the trade to be able to have this conversation about what is going on, if they are comfortable in what they are doing, whether they are doing it of their free will...What that does is to lead us to what we see as more important things. It leads us to pimps. It leads us to the human trafficking charges that are far more important for us to get to ... we will choose to use discretion to gain the trust and confidence of workers so they feel comfortable enough speaking to us and sharing what is really going on in their lives, so we have the ability to extract if required or at least point them in a direction for treatment or services.<sup>108</sup>

Embedded in Chief Jolliffe's reply are again, two uses: finding evidence to lay more serious charges against truly exploitative individuals, and apprehending sellers out of the trade.

Importantly, these coercive and compelling exercises of police power — extracting tips on pimps and traffickers, and inculcating sellers to accept treatment or services — were not just offered to describe past police practices under the former solicitation offence, but also purported to justify future exercises of discretion under the new section 213(1.1) — “based on factors” that neither the Chief nor Parliament specified.<sup>109</sup> What was more, if Parliament failed to pass Bill C-36, Chief Jolliffe feared losing section 213(1.1), despite never laying charges under its unconstitutional predecessor:

Chief Jolliffe: That's the tool piece; that's what opens the door for us. We use the section ... to give us the authorities to interject ourselves into a process and then determine where it will take us.... What it does for us is provide the opening of the door for us to get in and begin an investigation of something of a much bigger magnitude.

Sean Casey: Does that mean that you use section 213 for the purposes of apprehending a sex worker, whom you then attempt to extricate with the possibility of a charge under section 213 hanging over that person's head, but that you never actually deliver on what is hanging over that person's head? Is that what you mean by having it as a tool that you never actually use?

Chief Jolliffe: As I said, we have never charged a prostitute under that particular section of the code. We use it as a tool to help us get to much bigger things.<sup>110</sup>

<sup>108</sup> House of Commons, Standing Committee on Justice and Human Rights, *Minutes Proceedings and Evidence*, 41-2, No 38 (9 July 2014) at 10:41 (Eric Jolliffe, examined by Hon David Wilks) [JUST Proceedings (9 July 2014)].

<sup>109</sup> *Ibid* at 10:44 (Eric Jolliffe, examined by Hon David Wilks) and 10:50 (Eric Jolliffe, examined by Hon Sean Casey).

<sup>110</sup> *Ibid* at 10:50 (Eric Jolliffe, examined by Hon Sean Casey).

Hence, when Vice-Chair Casey asked Chief Jolliffe to explain the puzzle that York officers had not been “using” the power to charge under the unconstitutional solicitation offence, yet were now afraid of “losing” that power if Bill C-36 failed to pass, it became clear that the Chief already used the unconstitutional section 213 not as an offence, but as legislative authority to detain sellers. Furthermore, the Chief’s testimony elided any distinction between the former solicitation offence and the newly proposed section 213(1.1), which would apply more narrowly, only to places where minors would likely be present. Indeed, the Chief referred only to section 213 as a “power” and “tool” to reach “much bigger things,” not to enforcing what section 213 actually prohibited. So far as the Chief was concerned, the new section 213(1.1) would enable his officers to do exactly what they had done under the old unconstitutional section 213. What he feared most was losing the section that authorized them to apprehend sellers.

An undercover officer from Chief Jolliffe’s Drugs and Vice Unit gave the Committee an *in camera* glimpse into grave situations where section 213, be it before or after *Bedford*, could enable police to detain sellers in order to extract information and to extricate them away from exploitation. From the standpoint of covert operations inside trafficking rings, Detective Thai Truong forecasted that Bill C-36 would hinder his mandate to rescue exploited girls and women. In fact, he stressed that Bill C-36 paradigm shift did not empower the police enough. The Detective denied that the combined effect of two policy measures — namely, enforcing Bill C-36’s mainstay purchasing offence, and funding charitable social and health outreach — would encourage sellers to walk away from the sex trade.

In Detective Truong’s view, “rescue” was the first step, and “the power to intervene” was the only way to “separate prostitutes from their abusers and end their isolation”.<sup>111</sup> 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.”<sup>112</sup> The Detective therefore advanced the same policy solution as Goguen, Stamatakis, Wilks, Hanson, and Jolliffe: the legislative authority to intervene into the lives of sellers so as to collect evidence against nefarious buyers and exploiters, and to detach sellers from the industry — all without imposing criminal liability on the apprehended seller.

Similar to the prior statements by his colleagues, Detective Truong also wanted Parliament to preserve elements of the unconstitutional pre-*Bedford* regime. What differentiated Detective Truong’s position, however, was the distinction he drew across adult sex, child exploitation, and human trafficking. Notably, *Bedford*’s trial judge had drawn that same distinction to confine her factual findings to adult sex, as exploitation and human trafficking were not relevant to *Charter* violations of the three adults who avowed their own volition under the old regime.<sup>113</sup> Candidly, when Detective Truong was reminded that the old regime “runs afoul of the supreme law of the land,” he replied, “I respect what the Supreme Court

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<sup>111</sup> *Ibid* at 11:40 (Thai Truong).

<sup>112</sup> *Ibid*.

<sup>113</sup> *Bedford* ONSC, *supra* note 9 at para 183 (“While important, none of these issues are directly relevant to assessing potential violations of the *Charter* rights of the applicants”).

said with respect to the independent sex workers, but that doesn't apply to these girls who are being enslaved every single day."<sup>114</sup>

Nevertheless, distancing *Bedford's* factual findings from the mischief that Parliament and the police now sought to tackle under section 213(1.1) provoked serious constitutional risk. According to Vice-Chair Casey, the power that Detective Truong asked Parliament to confer, "the right to intervene," was more accurately described as "the right to detain." However, if Parliament was going to confer the powers that Detective Truong believed were necessary to combat human trafficking and exploitation, there were only two options available to Parliament in Casey's opinion: either invoke section 33, the *Charter's* notwithstanding clause to override *Charter* rights; or amend the *Charter* itself.<sup>115</sup> For his part, Detective Truong frankly conceded that Bill C-36 did not explicitly fashion a power to detain sellers of sex. But the Detective did invite "the Committee to consider" overriding or amending the *Charter*.<sup>116</sup>

Although nothing on the record hints that the Committee seriously considered the nuclear option of amending the *Charter*, they did briefly discuss the notwithstanding clause. As it happened, members of the official New Democratic Party Opposition renewed complaints they had previously voiced to the Justice Minister. Those complaints eventually led the Minister to admit that "at least one *Charter* right was infringed" by Bill C-36.<sup>117</sup> Vice-Chair Françoise Boivin (also the Official Opposition's Justice Critic) attempted to probe deeper into Cabinet's acceptance of this high constitutional risk during clause-by-clause.<sup>118</sup> Yet Vice-Chair Boivin received no answer as to whether the Government had considered enacting Bill C-36 notwithstanding the *Charter*:

[H]as your department thought of maybe using the notwithstanding clause based on section 7 of the Charter ... to say the whole thing is illegal, that we don't want prostitution? That's what I heard from the [sic] 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?<sup>119</sup>

In discerning that Bill C-36 permits people to sell what no one can lawfully buy, Boivin tapped into what Part II introduced as the victim-perpetrator paradox. As explained above, under Bill C-36's overarching policy of eradicating prostitution, section 213(1.1) technically treats the same individual as both a perpetrator and victim of crime.

The constitutional risk attending the victim-perpetrator paradox elicited an Opposition motion to delete section 213(1.1) from Bill C-36 altogether.<sup>120</sup> The paradox became starker when the Committee reflected on evidence from civilian witnesses. As Opposition Member Ève Péclet pointed out in response to a dreadful example recalled by Parliamentary

<sup>114</sup> JUST Proceedings (9 July 2014), *supra* note 108 at 11:59 (Thai Truong, examined by Hon Sean Casey).

<sup>115</sup> *Ibid*; *Charter supra* note 19, s 33.

<sup>116</sup> JUST Proceedings (9 July 2014), *ibid* at 11:59 (Thai Truong, examined by Hon Sean Casey).

<sup>117</sup> See e.g. JUST Proceedings (7 July 2014), *supra* note 84 at 10:00 (Hon Peter MacKay, examined by Françoise Boivin); at 10:30–10:35 (Hon Peter MacKay, examined by Craig Scott, conceding that section 1 justification was "very much ultimately the determining factor").

<sup>118</sup> Bosc & Gagnon, *supra* note 89 at ch 16, ch 20.

<sup>119</sup> JUST Proceedings (15 July 2014), *supra* note 50 at 11:55 (Hon Françoise Boivin).

<sup>120</sup> *Ibid* at 10:35 (New Democratic Party Motion by Hon Françoise Boivin).

Secretary, Bob Dechert, girls recruited into sex work from their school bathrooms were simultaneously victimized and criminalized under section 213(1.1).<sup>121</sup>

To contest the motion, Government member Joy Smith praised section 213(1.1) by summoning human trafficking into the debate. Her applause for section 213(1.1) at clause-by-clause resounded with the position she had championed in the House at-large, where, prevailing upon her admirable charitable outreach in combatting sex slavery and child exploitation, Smith detoured the debate away from consensual adult sex.<sup>122</sup> In conflating those very different circumstances together in the passage below, Smith reinforced the view that section 213(1.1) would authorize police to interact with victims who sell sexual services:

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.<sup>123</sup>

By claiming that section 213(1.1) would move the sex trade out of schoolyards without arresting sellers, Smith's argument solidified two aspects of the deliberations, both linked to the former solicitation offence. First, out of concern for community harm, the idea that police would coax sellers to "move along" from "off-limits" locations rings of the nuisance-abatement objective of the former unconstitutional solicitation offence, which Chief Hanson had revived earlier. Second, like Smith's fellow Government members Goguen and Wilks, it was the absence of charges against people whom Smith saw as victims — the same subjects to whom the provision's language treats as perpetrators — that animated her approval of section 213(1.1).

Bolstered by the police witnesses who appeared at JUST's study, the Government legislators who formed the majority on JUST cumulatively and consistently varnished sellers in moral innocence through the rhetoric of victimization. Yet against the almost unanimous stance of witnesses who railed against using section 213(1.1) to "help" sellers (including many witnesses who, but-for section 213(1.1), welcomed Bill C-36), all five Government members at JUST saved section 213(1.1) from the four votes of Independent, Liberal, and New Democratic Party members to delete section 213(1.1).<sup>124</sup>

As seen at Part III's outset, the Government extended an olive branch by successfully passing a substantive amendment, which enumerated section 213(1.1)'s ambit to school grounds, playgrounds, and daycare centres. As we shall hear next in the Senate, another motion to delete section 213(1.1), from the Liberal Opposition, was defeated by the same recurring theme: police needed section 213(1.1) not to charge sellers, but to detain them in order to harvest evidence and extricate them into social services.

<sup>121</sup> *Ibid* at 10:20 (Hon Bob Dechert, Hon Ève Pécelet).

<sup>122</sup> See e.g. *Hansard* (12 June 2014), *supra* note 40 at 13:20, 13:45, 15:45. Significantly, combating human trafficking was the aspect emphasized at Third Reading before the House of Commons passed the Bill: *House of Commons Debates*, 41-2, No 122 (3 October 2014) at 10:05, 10:26, 10:30. See also interventions of Hon Stella Amber. See e.g. JUST Proceedings (9 July 2014), *supra* note 108 at 14:06–14:15.

<sup>123</sup> JUST Proceedings (15 July 2014), *supra* note 50 at 10:25 (Hon Joy Smith).

<sup>124</sup> *Ibid* at 10:35.

**B. LCA: SENATE COMMITTEE ON  
LEGAL CONSTITUTIONAL AFFAIRS**

Due to the successful Government amendment at JUST, the version of section 213(1.1) introduced into the Senate was substantively different from the version initially introduced into the House of Commons. By the time the Senate's Committee on Legal and Constitutional Affairs (the LCA) began its Pre-Study of Bill C-36 eight weeks after JUST finished its study, section 213(1.1) enumerated three public places where communicating for the purpose of selling sex was prohibited: school grounds, playgrounds, and daycare centres.

As Bill C-36 wound its way through the next stage of the legislative process, it would be normal to expect that the substantive amendment on such a controversial clause would stimulate and sharpen discussion about the circumstances for enforcing section 213(1.1) against sellers, particularly at those three locations. Indeed, the LCA had the opportunity to improve the record already established in the House of Commons by hearing fresh testimony from new witnesses, as well as by re-examining this significant development with prominent witnesses who had already advanced their position at JUST.

Yet as things turned out, the substantive amendment had little consequence for the red chamber's sober second thoughts on section 213(1.1). Certainly, the Senators had much to say, though much of what was said in favour of the amended section 213(1.1) parroted much of what had already been heard during JUST's study in the House: sellers were victims who ought to be apprehended so that police could collect evidence to use against pimps and johns, and so that the police could extricate those victims into treatment and services. To the ends of furthering investigation and extrication, section 213(1.1) bestowed the requisite legislative authorization. If anything, the amendment was taken to suggest that instead of only detaining sellers, police might consider going one step farther to arrest, but that they still ought to refrain from laying charges.

The CPA was privileged to reappear in Parliament where it redoubled its coast-to-coast support for a police power to intervene. In light of the many witnesses who had already voiced concern "about the possibility of prostitutes being charged," Bill C-36's Senatorial Sponsor, Denise Batters, took the opportunity to synopsise the benefits of "the old communication provision" with President Stamatakis.<sup>125</sup> On Senator Batters' take, what was most beneficial about the unconstitutional provision was that it "allowed police an opportunity to intervene with the prostitute, determine if that person is being exploited, and then direct them toward sources."<sup>126</sup> She asked Stamatakis whether he felt "Bill C-36 will afford [him] that same opportunity?"<sup>127</sup> Although Stamatakis confessed that he himself had no personal experience investigating prostitution, as the spokesperson for

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<sup>125</sup> Senate of Canada, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 16 (17 September 2014) (Tom Stamatakis, examined by Hon George Baker, Hon Denise Batters).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*



over 160 Canadian police services, Stamatakis reiterated the need to intervene with renewed vigour:

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... with the provisions contained within this proposed legislation, we are able to do that ... 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?<sup>128</sup>

Having highlighted section 213(1.1) as a “key piece” that the CPA sought during drafting, once again, Stamatakis did not describe the police’s objective as laying charges against sellers who appeared to be communicating to sell sex near schoolyards, playgrounds, or daycare centres — in fact, he made no mention of children or teenagers at all.<sup>129</sup> Rather, what police across the country wanted was “legislative authority to insert ourselves” into exploitative, coercive situations, thereby facilitating social intervention and serious investigation against dangerous third parties.

This disconnect between what section 213(1.1)’s text expressed and the powers that Stamatakis interpreted section 213(1.1) to grant police is what spurred Senator Serge Joyal to inform Stamatakis “[t]hat’s not exactly what the bill says.”<sup>130</sup> Since Stamatakis did not have a copy of Bill C-36 with him to inform his submissions, Senator Joyal read the words of section 213(1.1) aloud, into the record. Stamatakis then admitted that section 213(1.1) was “clearly” an offence.<sup>131</sup>

To follow up on Senator Joyal’s and Stamatakis’ recognition that section 213(1.1) technically fashioned an offence, Senator Don Plett asked Stamatakis whether “the ability of the police to arrest the prostitutes in ... limited circumstances is a valuable tool.”<sup>132</sup> In declaring the CPA’s absolute support for section 213(1.1), Stamatakis resuscitated the nuisance abatement aim with the following example:

[P]rostitutes 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.

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

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.<sup>133</sup>

In this response, the victim-perpetrator paradox is prominent. Stamatakis indicated that the very individuals criminalized by section 213(1.1) as a matter of law do not, as a matter of fact, cause the detritus and depravity that section 213(1.1) endeavoured to deter and denounce. Again, the immediate targets of section 213(1.1) were seen not seen as responsible agents who cause the tangible and moral harms that Parliament and police strove to redress.

Yet it almost seems that police might have understood section 213(1.1)'s ambit to empower interventions beyond the reach of the amended text as well. Perplexingly, although section 213(1.1), (even prior to JUST's enumeration and prior to *Bedford*'s invalidation) only applied to "public places," when Senator Linda Frum queried the difficulty of investigations, Stamatakis explained that it was particularly because of the "non-street sex trade cases" that "I said earlier that having the legislative authority to intervene will be of some assistance."<sup>134</sup> Alas, Stamatakis was not asked to explain how the key piece that the CPA held up to authorize that intervention could now somehow authorize intervening into private, "off-the-street activity."<sup>135</sup> For in all versions, and especially now in its amended version, section 213 only ever applied to solicitation in public places.

As the LCA's scrutiny of Bill C-36 moved onward into a two-day Study in October, the victim-perpetrator paradox resurged. The rift between section 213(1.1)'s text and its purpose to empower chargeless detention cemented during the examination of Detective-Sergeant Bernard Lerhe, an officer from Quebec City with firsthand experience fighting juvenile prostitution. To appease the "concern expressed by certain prostitutes that police officers are going to be using their charging powers," Senator Batters asked the Detective-Sergeant to tell "the Canadian public who are listening" about charging discretion.<sup>136</sup> Citing the frequent sight of solicitation on the street, Lerhe opined that "officers will be more inclined to want to help them and refer them to help centres," as opposed to "laying charges against the prostitutes."<sup>137</sup> To his mind, Bill C-36 would send a "clear message to police officers that these women, if they are doing their job voluntarily where permitted, are still victims."<sup>138</sup>

Significantly, this dialogue between Senator Batters and the Detective-Sergeant illustrates that there are two equally important audiences instructed by section 213(1.1): the police and the public. Senator Batters' question was aimed at informing the public about why people who sell sex do not deserve to be charged, while the Detective-Sergeant conveyed that police, too, needed a "clear message" directing officers against laying charges. The law had to guide both the police and the public by encoding the message that although sellers should not be charged, the ability to charge encourages the police to investigate whether sellers are exploited, and to try to channel them out of the industry to accept services and treatment. Mutually, the legislator and the officer perceived people who sell sex not as morally

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Senate of Canada, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 19 (29 October 2014) [LCA Study (29 October 2014)].

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

blameworthy criminals deserving of sanction, but as astray victims worthy of strong intervention.

This directive against charging had already been signalled by the pre-*Bedford* decline in charges against prostitutes, shown by statistics that Lerhe had gathered from his jurisdiction. Noting only a dozen charges laid in 2013, he advised “charging prostitutes is not a priority for police officers right now and, with this bill, it will be even clearer that they are victims.”<sup>139</sup> Strangely, it was the absence of charges — a fact relied upon in *Bedford* to prove that the former regime was unconstitutional — that now buttressed the case to re-enact a smaller piece of that regime.

Mirroring what had happened at JUST, once again, the victim-perpetrator paradox prompted a motion to delete section 213(1.1). This time around, however, the stakes were higher and the audience wider. With six weeks left until the Supreme Court’s declaration of invalidity would leave prostitution in a legal vacuum, Bill C-36 had already passed Third Reading in the House of Commons and had thence proceeded to the last hurdle before Royal Assent. In front of the entire Senate at Third Reading, Opposition Senator Mobina Jaffer availed of the final opportunity to improve Bill C-36. After echoing the Justice Minister’s aspiration to eradicate prostitution, Senator Jaffer nevertheless asserted, “Bill C-36 suffers from a disconnect between its purposes and likely effects,” pointing to section 213(1.1) as the source of that disconnect:

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.<sup>140</sup>

To fuel Senator Jaffer’s motion, Senator George Baker relayed the wishes of citizens and experts who had presented during the LCA’s deliberations. On Senator Baker’s tally, the motion to delete section 213(1.1) had momentum from direct democratic will, as “the vast majority of those who appeared supported the bill but wished to remove this particular section.”<sup>141</sup>

Not to be outwitted by her colleagues across the floor, Senator Batters had the last word on section 213(1.1). She alleviated anxiety about retaining section 213(1.1) by raising two

<sup>139</sup> *Ibid.*

<sup>140</sup> “Bill C-36, 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 consequences to Acts,” 3rd Reading, *Debates of the Senate*, 41-2, No 92 (4 November 2014) at 15:30–15:40 (Hon Mobina Jaffer) [*Debates of the Senate* (4 November 2014)]. Once passed through the House of Commons, Third Reading in the Senate is the final stage before Bills, once passed, receive Royal Assent.

<sup>141</sup> *Ibid* at 15:50 (Hon George Baker). For accuracy, the tally of unanimity would have to subtract legislative drafters and active police.

important points. First, after recapping the testimony of both Stamatakis and Lerhe on the virtues of police discretion, Senator Batters also recapitulated an observation about mechanisms for accountability and fairness in the justice system at-large, which she herself had posited to the LCA during the Pre-Study:<sup>142</sup>

Police and prosecutors have discretion when choosing whether to charge prostitutes under the clause, and judges always have discretion when sentencing.<sup>143</sup>

This first point dovetailed with the comfort Goguen took in prosecutorial discretion when he unsuccessfully proposed that prosecutorial consent to charges could mitigate constitutional risk.<sup>144</sup> Not only did Senator Batters entrust police to exercise their broad discretion to protect victims, she also vested faith in prosecutorial and judicial discretion to safeguard sellers in the criminal process.

Second, Senator Batters exhorted her peers that “some of those groups who indicated they would prefer the removal of [s 213(1.1)] have indicated they would still support Bill C-36 even if [s 213(1.1)] remains.”<sup>145</sup> With this final push from Bill C-36’s Sponsor, the motion to delete section 213(1.1) was defeated 49-to-24, with votes divided down party lines. On that division, Bill C-36 was read a third time, then passed, and then received Royal Assent two days later.<sup>146</sup>

#### SUMMARY

If legislators and police were serious and sincere while debating section 213(1.1), then I fear that the rule of law has been weakened by rendering section 213(1.1) a façade. Part III has revealed that although section 213(1.1)’s text fashions a criminal offence enforceable against individuals who sell sex, neither the Government legislators who supported section 213(1.1) nor the police witnesses tasked with enforcing it wanted sellers criminalized under section 213(1.1) to be charged with perpetrating a criminal offence. Instead of using section 213(1.1) to authorize charges, they advocated for police to use section 213(1.1) to authorize detentions. Boiled to its essence, the rule of law problem is incongruence: what section 213(1.1) is on the books — a *de jure* criminal offence — is not what section 213(1.1) is on the ground — a *de facto* detention power.

As told by the zombie laws ill-fated and belated repeal, all justice institutions have equally important, distinct roles in maintaining the rule of law. However, despite calls from jurists

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<sup>142</sup> Senate of Canada, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 15 (11 September 2014) (Hon Denise Batters examining Keira Smith-Tague).

<sup>143</sup> *Debates of the Senate* (4 November 2014), *supra* note 140 at 16:30 (Hon Denise Batters).

<sup>144</sup> These assertions are refuted by recent jurisprudence holding that enforcement discretion cannot salvage an instrumentally defective offence. See e.g. *R v Appulonappa*, *supra* note 14 at 74 (not heard until after Bill C-36 became law). At least since 2004, the case law has plainly established that prosecutorial discretion cannot cure a constitutional infirmity: *R v Demers*, 2004 SCC 46 at para 54; *R v Anderson*, 2014 SCC 41 at para 17.

<sup>145</sup> *Debates of the Senate* (4 November 2014), *supra* note 140 at 16:30.

<sup>146</sup> *Ibid* at 2384, 23/24 votes supporting the motion were from the Liberal caucus. Senator Elaine McCoy, who left the Progressive Conservative caucus in 2013, also supported the motion. Senator Pierre-Claude Nolin, a member of the PCs, abstained. *Debates of the Senate*, 41-2, No 94 (6 November 2014) (Royal Assent) at 2428 (the Hon the Speaker).

that Parliament is best situated to regulate police, the legal academy has paid scant attention to Parliament for Parliament's sake, never mind the sway of police on Parliament's agenda.<sup>147</sup>

Mindful of Parliament's role, I have not therefore filtered section 213(1.1)'s legitimacy through judicial *dicta*. Rather, this article has viewed section 213(1.1) from Parliament's unique vantage point to deliberate, legislate, and account. Parliament has a sovereign capacity to deliberate criminal justice policy, reduce that policy into a legally enforceable mandate in the *Criminal Code*, and then ultimately hold justice officials accountable to the political community that participates in (and is represented by) Parliament.

Taking participatory and representative democracy seriously, it would be an overstatement to claim that each legislator who voted in favour of Bill C-36 individually endorsed de facto detention under section 213(1.1), that each Government member in fact mandated police to use section 213(1.1) to extricate sellers to services, and extract evidence from them to inculcate third parties. Not only does Parliament as a whole vote on Bills *in toto*, we cannot know what factored into political bargaining and deliberations behind the scenes, especially to squeeze Bill C-36 through *Bedford*'s tight 12-month timeframe.

Indeed, some citizens and legislators wanted Bill C-36 to pass with or without section 213(1.1). As Senator Batters pointed out, the overall benefits that anti-prostitution activists saw in criminalizing the purchase and profits of sex more than compensated for the cost of one flawed provision. The benefits that anti-prostitution organizations stood to gain also included \$20 million in Government grants to boost exit strategies.<sup>148</sup> Understandably, the all-or-nothing outcome of legislative decision-making, with its mode of voting by majority, does not detail dissent on particular provisions — even if the debate preceding the vote accommodates such nuance.

Besides, incongruence might not be a concrete problem at all — especially if like Senator Batters, we trust police to proactively protect vulnerable people. It would be hasty to condemn section 213(1.1) without also considering how it now influences the relationship between police and citizens. To come full circle, Part III moves forward to how police and sellers presently interact.

<sup>147</sup> See e.g. Steven Penney & James Stribopoulos, "'Detention' under the *Charter* after *R v Grant* and *R v Suberu*" (2010) 51 SCLR (2d) 439 at 473–75 (proposing that a brief, preliminary investigative detentions should be legislatively exempted from section 10(b) of the *Charter*); James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1 (calling for legislative reform of search and seizure); James Stribopoulos, "The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning" (2008) 40 SCLR (2d) 211 (noting the absence of legislative intervention on detention powers, and that the Supreme Court has not incentivized Parliament to address substantial gaps in detention). Literature on police-government relations primarily addresses Government influence on police, not the peculiar scenario of police influence on Government.

<sup>148</sup> Government of Canada "Government of Canada Announces \$20 Million to Help Victims Leave Prostitution," online: <[www.canada.ca/en/news/archive/2014/12/government-canada-announces-20-million-help-victims-leave-prostitution.html](http://www.canada.ca/en/news/archive/2014/12/government-canada-announces-20-million-help-victims-leave-prostitution.html)>. Department of Justice Canada, "Measures to Address Prostitution Initiative, Call for Proposals - NGOs & Governmental Organizations" (Ottawa: Department of Justice, deadline 30 January 2015) online: <[web.archive.org/web/20150213023137/http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/ngo.html](http://web.archive.org/web/20150213023137/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: Public Safety Canada, deadline 30 January 2015) online: <[web.archive.org/web/20150721072143/https://www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/fndng-prgrms/crm-prvntn-ctn-fnd-eng.aspx](https://www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/fndng-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."

#### IV. POLICE AND CITIZENS

##### A. ASSESSING THE RISK TO THE RULE OF LAW

In pivoting from legislating into policing, Part IV presents a risk assessment. Previously, Part III showed that section 213(1.1)'s façade for detention was constructed *ex ante*, before the former solicitation offence was re-enacted as part of the "law" that currently authorizes police action. Consequently, the *ex poste* reality of patrolling the streets also informs the risk to the rule of law. It is on the streets where police are responsible for launching the larger machine of the criminal justice system into motion.

From here onwards, I critique section 213(1.1)'s legitimacy only to the extent that the intents and purposes disclosed in Parliament depict how section 213(1.1) operates on the ground. Cognizant of this caveat, the implications may still reach far. The CPA, lobbying as it did in both the elected House of Commons and appointed Senate, spoke for 60,000 police personnel from coast-to-coast. And yet, their President did not even appreciate that section 213(1.1)'s text fashioned an offence until schooled by Senator Joyal. Equally concerning is the erroneous misconception that summary conviction offences escape criminal records. That this seemingly basic fact of policework was so emphatically misunderstood (and prompted a memo from the Justice Department to legislators) should also give pause about how well police absorb the criminal law they are entrusted to correctly understand, and tasked to skillfully enforce.

Competency concerns aside, the rule of law post-Bill C-36 could be faring fine. According to the reported cases since Bill C-36's entry into force, police are enforcing, the Crown is prosecuting, and judges are trying and interpreting the new legal landscape for exchanging sex for money.<sup>149</sup> On closer examination, however, while the new purchasing, material benefits, and advertising offences have been all put to the test, section 213(1.1) is noticeably absent from the case law so far. Given the enforcement against purchasers and profiteers to date, it is peculiar that section 213(1.1) stands out as the sole "offence" enacted by Bill C-36 that has yet to receive judicial treatment.<sup>150</sup> The *ex poste* fact that section 213(1.1) has not surfaced in the reported cases heightens the suspicion that it is not operating as an offence, but instead as a *de facto* chargeless, warrantless detention power.

At this stage, you might wonder why this suspicion matters: since I have not attempted to dispute the wisdom of criminalizing the sex industry, why am I complaining that Parliament enacted an inoperative criminal offence? To explain why we should care, Part IV disputes section 213(1.1)'s legitimacy from within the institutional structure for the rule of law.

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<sup>149</sup> See e.g. *R v Boodhoo and others*, 2018 ONSC 7205 at paras 22–58; *R v Gallone*, 2019 ONCA 663 at paras 84–100; *R v Gudmandson*, 2018 MBPC 31 at paras 27–32; *R v Hall*, 2018 ABQB 459 at paras 72–77; Perrin, *supra* note 45 at 5 (opining that five to ten years of enforcement evidence will be necessary to challenge Bill C-36).

<sup>150</sup> It is also arguable whether doctrinal analysis would lead the court to conclude that section 213(1.1) is unconstitutional. Although most commentators to date have only analyzed the new offences, for a favourable opinion on section 213(1.1), see Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham, Ont: LexisNexis, 2015) at § 21.268.

Below, I delineate four pillars of the rule of law: accountability to law, allocation of institutional labour, answerability to citizens, and access to justice. I warn that this structural integrity of the rule of law is destabilized if section 213(1.1) is a façade for chargeless, warrantless detention: unbounded by the *Criminal Code*'s mandate to enforce the conditions and consequences of wrongdoing, police frustrate sellers' ability to self-determine their own behaviour. By refusing to lay charges, police pre-empt their own accountability, and preclude sellers' access to justice.

In my understanding, congruence between the written and enforced law is the core that fortifies these four pillars of the rule of law. I portray the importance of fairness to citizens and restraint of police by contrasting two scenarios: relative congruence versus deliberate incongruence. In a post-Bill-C-36 world of relative congruence, I imagine how section 213(1.1) would function if enforced as a *de jure* criminal offence. Conversely, in today's scenario of deliberate incongruence, I sketch how section 213(1.1) might now malfunction if used as a *de facto* detention power, without seeking warrants or laying charges.

Finally, Part IV recognizes that such a heavy-handed but creative approach to social intervention does offer one singular benefit: chargeless detention avoids saddling sellers with criminal convictions. However, Part III tries to refute the assertion that section 213(1.1)'s incongruence ultimately serves the common good. Drawing on provincial legislation and recent enforcement, I end on the provocative note that for some sellers, the consequences of detention may actually be worse than conviction.

## B. CONGRUENCE AND THE RULE OF LAW

Admittedly, it is a bit of a stretch to conclude that the rule of law deteriorates simply because well-meaning police decline to lay charges, especially without a clear sense of what constitutes the rule of law. Philosophers who have thought long and hard about the rule of law have bemoaned the confused and confusing meanings that abound from casually tossing around such a weighty and slippery concept.<sup>151</sup> As spectators of recent political crises will have noticed, more and more, "the rule of law" is tokenized and sloganized into obfuscation. Before I can concentrate on the frontlines where section 213(1.1) now operates, it is therefore important to orient from the larger institutional structure undergirding the rule of law.<sup>152</sup>

Conceptually, the rule of law's content is perpetually under dispute. Rivaling accounts do, however, share some commonalities. Since this common ground engages with Lon Fuller, whose idea of congruence is my theoretical toehold, I only outline the basics here.<sup>153</sup> In my

<sup>151</sup> Joseph Raz, *The Authority of Law*, 2nd ed (Oxford: Oxford University Press, 2009) at 217–18; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 21:2 *Law & Phil* 136 at 139.

<sup>152</sup> This public law conception of criminal law reflects Lon Fuller's vision that the law is not only an instrument for social control, but for human interaction, discussed further in this part. On how a public law approach to criminal law also reflects liberal constitutionalism more generally, see Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford: Oxford University Press, 2019); Malcolm Thorburn, "Criminal Law as Public Law" in RA Duff & Stuart Green, eds, *Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011).

<sup>153</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006) at 10–13; Raz, *supra* note 151 at 217–18; Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 *Ga LR* 1 at 20–24. Although Waldron is famously opposed to judicial review of legislation, he believes courts must maintain the rule of law by enforcing social

view, congruence between written law and enforced law supports four pillars of the rule of law.

### 1. ACCOUNTABILITY TO LAW

First, all exercises of police power must be accountable to law. Police cannot lawfully operate by intuition: they must already have a tangible legal authorization at hand to which they can point, prior to interacting with citizens.<sup>154</sup> All exercises of police power must be grounded in either pre-existing common law or the *Criminal Code*.<sup>155</sup> Whether authorized by common law or statute, accountability to law also requires those legally authorized interactions to be constitutional, comporting with the higher, fundamental standards and values that overlay the legal system.

### 2. ALLOCATION OF POWER

Second, the law to which all justice officials are accountable also includes an allocation of labour among their respective justice institutions, according to capacity and competency. As the empowering statute that enacted section 213(1.1), the *Criminal Code* allocates distinct tasks and specialized roles in the criminal process. In fulfilling their role, police are public office holders expressly mandated to uphold the integrity of law.<sup>156</sup> In acting pursuant to section 213(1.1), police are therefore bound by their sworn duties as peace officers to preserve and maintain the peace, using their unique skills and training to prevent and investigate crime.<sup>157</sup> Despite how persuasive police may have been at lobbying politicians in Part III, police are not the legislators responsible for amending the *Criminal Code*, nor the justices who authorize warrants, nor the judges who try charges brought against citizens.<sup>158</sup> This proper allocation of labour is linked to accountability to law: if police become a law unto themselves, it is a fruitless, unproductive endeavour to allocate separate tasks to distinct criminal justice institutions.

### 3. ANSWERABILITY TO CITIZENS

The rule of law's third pillar is answerability to citizens. Unless each institution's exercise of power is ultimately answerable to citizens, it is a hollow enterprise to attempt to hold legal power accountable to law.<sup>159</sup> In a free and democratic society, efficient governance through

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norms through "tightly structured proceedings." He also accepts that judges must be able to review officials' actions for accountability to law. See Jeremy Waldron, "Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346 at 1354.

<sup>154</sup> *Ibid*; *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 748–49.

<sup>155</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 88; *R v Grant*, 2009 SCC 32 at paras 53–57.

<sup>156</sup> *R v Campbell*, [1999] 1 SCR 565 at paras 18–19, citing *Royal Canadian Mounted Police Act*, RSC 1985, c R-10.

<sup>157</sup> *Criminal Code*, *supra* note 2, s 2, "peace officer." Federal, provincial, and municipal police forces have similar legislative mandates. See e.g. *Royal Canadian Mounted Police Act*, *ibid*, ss 11.1, 18, 37; *Police Services Act*, RSO 1990, c P-15, s 42; *Police Act*, RSA 2000, c P-17, s 38.

<sup>158</sup> Of course, once upon a time, police were not state agents, but were private citizens donning uniforms, taking turns to carry out every citizen's civic duty to watch over their community's welfare. See Chiao, *supra* note 152 at 13–21.

<sup>159</sup> Fuller, *Morality of Law*, *supra* note 11 at 162; Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 369; David Dyzenhaus, "Process and Substance as Aspects of the Public Law Form" (2015) 74:2 Cambridge LJ 284 at 303–306 [Dyzenhaus, "Process and Substance"].



law depends upon the citizenry's will. Steeped in a "culture of justification," governance through law requires more than efficiency: efficacy also depends on citizens' active participation.<sup>160</sup>

Since section 213(1.1) constrains the conduct of sellers, answerability means that each exercise of police discretion must be justifiable to sellers, as people who belong to the political community that grants power to police.<sup>161</sup> As participants in the political community, sellers are presumed by the criminal law to be capable of rationally determining for themselves whether to abide the law, or accept the risk of punishment.<sup>162</sup> While sellers might disagree with the policy goal that section 213(1.1) serves, as responsible moral agents expected to obey the law, people subjected to section 213(1.1) deserve the opportunity to challenge the evidence, logic, and legal source behind that exercise of power. For each such instance where their liberty is deprived, the rule of law must make it possible to ask how the law could and should apply to them, otherwise their dignity and autonomy is denied.<sup>163</sup>

#### 4. ACCESSIBILITY TO JUSTICE

These three pillars — accountability to law, allocation of power, and answerability to citizens — are secured by the fourth pillar: accessibility to justice. People subject to section 213(1.1) must have access to an independent forum to demand a justification for power claimed to be exercised under section 213(1.1).<sup>164</sup> Impartial arbiters check the exercise of power and can redress excesses, inequities, and insufficiencies.

Courts are the institution equipped for pre-authorizing police power beforehand, supervising power as it is executed, and reviewing power afterward. Courts are therefore integral to keeping police accountable before, during, and after, criminal charges are contemplated. Police present applications to justices of the peace, who decide whether warrants to arrest, search, or seize should issue, and verify that charges do follow from allegations of crime. For their part, judges oversee the trying and sentencing of charges, and are empowered to provide meaningful and just remedies for violations of police power. It is only when courthouse doors open that there is a forum for accounting, allocating, and answering power.

All four pillars are dynamic and symbiotic. What binds these four pillars into a singular rule-of-criminal-law is congruence. Written criminal law, static on the page, lacks momentum and meaning until it is applied by citizens to themselves, by police to citizens, by justices to police and citizens, and by citizens to all criminal justice officials. What lifts law from the page, into action, is this sequence of interactions within the legal process. If one interaction is interrupted or pre-empted, the structural integrity of the rule of law is at risk of destabilization. It is the interaction between police and citizens to which we now attune.

<sup>160</sup> See generally David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17:1 Rev Const Stud 87.

<sup>161</sup> *R v Beaudry*, 2007 SCC 5 at paras 35–39, with Justice Charron holding that police have a duty to justify declining to charge.

<sup>162</sup> Raz, *supra* note 151 at 213–14, 221.

<sup>163</sup> Dyzenhaus, "Process and Substance," *supra* note 159 at 303–306. See generally, Jeremy Waldron, "How Law Protects Dignity" (2012) 71:1 Cambridge LJ 200.

<sup>164</sup> *Trial Lawyers*, *supra* note 5 at paras 38–40.

## C. ENFORCING SECTION 213(1.1) IN RELATIVE CONGRUENCE

### COMMUNICATING NORMS THROUGH LEGISLATION

To demonstrate a criminal offence's normativity when there is congruence between written and enforced law, I allegorize the concept of legislation as communication. Underscoring the importance of harmony between how citizens and officials interpret the law as written, a criminal offence must clearly guide both sellers' conduct and police decisions. However, section 213(1.1)'s normative direction and guidance is distorted if section 213(1.1) is muddled into a power for warrantless, chargeless detention.

As a general proposition, I take it that a bill proposes a policy solution to a public problem. This proposed solution is deliberated by citizens and their legislative representatives. If passed, the resulting statute is an act of communication that conveys the policy proposal into law.<sup>165</sup> In Fuller's words, law is not "a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen."<sup>166</sup> For law to function legitimately and effectively, I presume that "the creation of an effective interaction" between state and citizen is essential.<sup>167</sup>

To create this two-way communication between the individual and the state institution, we might therefore imagine Parliament akin to a radio channel. Parliament receives democratic input on the policy proposal contained in a Bill, which is conducted and galvanized through the majoritarian process before then transmitting legal output: the resulting statute. Each clause, converted into a statutory provision upon passing, thereby records a deliberate, conscious, communicative act: a message. Each enacted provision's message is encoded with normative information and direction.

In concert, the principles of lawmaking compose and transmit this singular two-dimensional normative message to all recipients within the legal system. As we know, legislation should be publicly promulgated with prospective effect, clearly drafted in a manner consistent with existent law, and not changed so rapidly that it is impractical to obey.<sup>168</sup> Transmitted efficiently and effectively with such qualities of good legal craftsmanship, the normative message is synchronically received, with advance warning, by two interacting audiences: citizens who are expected to obey, and justice officials expected to enforce.

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<sup>165</sup> Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 16–17, 348; Dyzenhaus, "Process and Substance," *supra* note 159 at 297.

<sup>166</sup> Fuller, *Morality of Law*, *supra* note 11 at 192.

<sup>167</sup> *Ibid.*

<sup>168</sup> Out of the medley of laws drafted and passed into legislation, the criminal offence is perhaps the only form to incorporate all of Fuller's lawmaking principles. Repugnance to vagueness, and the corollary reverence for clarity, generality, publicity, stability, are enshrined as principles of fundamental justice under section 7 of the *Charter*, and are immanent in the common law rule of strict construction for penal legislation. Publicity and clarity are also at the core of section 11(a)'s right to be informed without unreasonable delay of the specific offence, triggered upon charging. Stability and consistency are constitutionalized by section 11(i)'s right to receive the lesser punishment when Parliament has varied an offence's penalty prior to sentencing, and section 45 of the *Interpretation Act*, *supra* note 60. Most distinctly, section 11(g)'s constitutionalization of the principle against retroactivity and retrospectivity expressly embodies prospectivity, a norm that can be validly overridden in any sphere of legislative jurisdiction, except criminal law. See *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 69; *R v DLW*, *supra* note 60 at paras 54–65, Cromwell J; *R v Levkovic*, 2013 SCC 25 at para 2.

In this channel, the message communicated by a substantive offence has two mutually reinforcing, reciprocal dimensions: duty and power. An offence imposes a duty upon citizens to refrain from the prohibited conditions of wrongdoing, and it confers powers upon officials (police, prosecutors, and judges) to enforce the consequences in the public interest. Citizens' duties, which limit autonomy, and officials' power, which facilitate action, are both communicated by the same normative message encoded in an offence: the conditions and consequences of wrongdoing. This harmony of transmission and reception instils reciprocity between citizen and official, between duty and power. Citizens who are expected to obey the law likewise expect the police to exercise power to the extent required to secure order, an antecedent for a peaceful, just, safe society.

Reciprocity links public safety to individual self-actualization, for law operates as both an instrument for social order, and a facilitation for positive human interaction.<sup>169</sup> Consider the collective safety and individual self-actualization from the interactions that would conceivably transpire if section 213(1.1) were to operate as drafted, as an offence. Section 213(1.1) would encourage a seller to say to a client, let my driver bring us to a safehouse because kids shouldn't see or hear what we're going to do together. It would enable the prosecutor to question the officer, why did you detain the seller for so long without the opportunity to call a lawyer? It would allow the judge to justify discharging a conviction because no kids were playing outside at 2:41a.m. when the seller took the time to check a prospective client's sobriety and vehicle for visible weapons.

Each of these hypothetical interactions reinforces section 213(1.1)'s normative message and thus secures order. Each interaction is also an accountability check: the buyer to the seller, the police to the prosecutor, the judge to the public. By distorting a criminal offence's normative message, incongruence risks disordering individual behaviour and pre-empting these positive interactions.

Now recall that we are immersed in a world of relative congruence. Even with unlimited resources, it would be unrealistic to expect police to investigate and charge every technical violation. So quite sensibly, one might object that complete congruence between the written law understood by citizens — a criminal offence — and the policy enforced by police — social intervention — is unnecessary to maintain the rule of law. In actuality, the vices of unpredictability and unknowability might serve the rule of law virtues of deterrence and fairness.

In a classic article, Meir Dan-Cohen illuminated this insight by imagining a fictional legal system where the law promulgating a criminal offence is projected to citizens and officials who are capsuled in separate, acoustically sealed chambers:

[T]he law, while promulgating criminal conduct rules that were fully coextensive with the relevant moral precepts, might at the same time apply decision rules that were more precisely defined and narrowly drawn than the corresponding conduct rules. The law would thus avoid the charge that it was directed at the "bad

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<sup>169</sup> Lon Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" (1975) 1975:1 BYUL Rev 89 at 90–92.

people” in the community but would neither risk unjust punishment nor give free reign to the personal and discretionary power of decisionmakers.<sup>170</sup>

Seen this way, the rule of law does not fade if sellers, following the law to the letter, refrain from a range of conduct more extensive than the threshold conditions that spur officials, upholding a compassionate spirit of the law, to detain sellers. All told, if the sentiments of pity that legislators expressed towards sellers in Part III bely anything, it is overweening paternalism, not a belief that section 213(1.1) is targeted at “bad people.” In this imaginary world, the utility of deterring misconduct and the value of fair restraint could both thrive, without perfect harmony between the proscribed conditions of wrongdoing and the enforced consequences.

However, the brilliance of Dan-Cohen’s insight was not in separating an offence’s normative information into two qualitatively distinct acoustic sounds: one sound for citizen’s duties, and a different sound for officials’ powers. Rather, the utility of deterrence and the value of fairness, both which inhere in the rule of law, emanated from setting a different amplitude for each audience to hear.

#### a. The Siren of a Criminal Offence

With this subtle but substantial difference, in a relatively congruent state, we might imagine a wailing siren as the acoustic sound that befits and carries the offence’s normative information. Acoustically, the separation of normativity would not be *what* is heard, but the decibel level sent to each audience: legislators dial a loud volume for citizens, a moderate volume for police. When near public places where minors might be, the siren loudly warns that citizens should refrain from negotiating sexual transactions.<sup>171</sup> The reason, moreover, that citizens should refrain from that conduct is a social precept: the political community to which the citizens belong believes it is wrong to expose and lure minors to commodified sexual behaviour.

Loudly and clearly, the siren warns citizens of the consequences of breaching section 213(1.1)’s conditions: the intimate details of their personal affairs, routine, and reputation are liable to be aired, pathologized, judged, and recorded in front of their community, before being ordered to spend upwards of two years less a day in jail or a \$5,000 fine. The loud siren reaches the outer limits of citizens’ auditory register and thus attains deterrence. At the same time, when section 213(1.1) is amplified at a moderate volume, police are mobilized to respond to wrongdoing at the core of the offence: near daycares, playgrounds, and schools. Listening carefully and thus treading lightly, police charge in unambiguous circumstances that comport precisely with the text of section 213(1.1), as passed.

The siren’s disparate decibel levels resonate with the tension between fairness and order.<sup>172</sup> A seller who ignores the siren, then technically perpetrates an offence, and yet goes

<sup>170</sup> Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1984) 97:3 Harv L Rev 625 at 651.

<sup>171</sup> Technically, section 213(1.1) does not require that the actual performance of the service is to occur anywhere in public, only that the negotiation preceding the service can be overheard or observed near a school, playground, or daycare.

<sup>172</sup> Dan-Cohen, *supra* note 170 at 634, 656, 665, 671–72.

unpunished, is unlikely to complain that their expectation to be jailed or fined has been frustrated because the police, prosecutor, or judge, erring on the side of restraint, applied a lighter standard.

Conceptualizing an offence as a siren suggests that the rule of law does not require citizens and police to share a perfectly harmonious comprehension of the precise conditions for wrongdoing. A diligent, law-abiding citizen can limit their own behaviour beyond what officials actually enforce, so long as the quality and direction of the normative message — the core of the conditions, and the full extent of the consequences for wrongdoing — remain the same. Notwithstanding two disparate volume levels of the siren, citizens and officials can both still hear that section 213(1.1) is clearly a criminal offence that carries penal consequences.

#### **D. ENFORCING SECTION 213(1.1) IN DELIBERATE INCONGRUENCE**

##### NORMATIVE NOISE

If we leave this hypothetical, acoustically insulated world behind for the real world, what does section 213(1.1) sound like? In this incongruent reality, the enforcement protocol attested to in Part II is implemented: section 213(1.1) operates not as an offence, but as a detention power. Here, the targets of section 213(1.1) have done nothing morally wrong. According to the police and politicians we heard in Part II, the sellers captured by section 213(1.1) are objectified, oversexualized victims of social inequity. Here, section 213(1.1) is a means to help morally blameless victims by detaining them for two ends: (1) to extricate sellers out of the industry by “inciting” them to receive medical services and “inculcating” them to charitable and social programs; and (2) to collect evidence of graver offences by buyers and exploiters. Neither of these ends involves charging sellers.

In relative congruence, the siren of a criminal offence has a particular salience — a tone, pitch, and tempo — that is qualitatively and functionally different than a detention power. Yet instead of a loud, wailing siren that warns sellers to stay away from the prohibited public places, if transmitted as a detention power, section 213(1.1)’s normative force is refracted in the opposite direction. More like a whistle, this opposite refraction attempts to beckon sellers to police. The reason, moreover, that sellers are signalled to move towards police, is an entirely different precept, the one that we actually heard in Part II: as victims, not perpetrators, they deserve to be helped to leave their environment, and blend into a mainstream society that is repelled by exchanging sex for money.

The resulting normative noise disrupts the rule of law’s proper allocation of power. A criminal offence imposes a burden for citizens to follow the law, and a burden on police to protect public safety. A criminal offence does not bestow a social benefit to perpetrators, nor does it accord police discretion to provide food and shelter. Police carry batons, tasers, handcuffs, and guns — not stethoscopes, methadone kits, or religious texts. My point is not to be facetious, but rather to vivify how the benevolent ends legislators and police offered to justify section 213(1.1) are qualitatively different from criminal law. Police are trained to enforce the law against perpetrators who violate it, not to provide medical and social services, nor psychological counselling or spiritual guidance to victims.

Aside from unbalancing the rule of law's allocation of institutional power, as police assume tasks for which they are ill-suited, this incongruence also mutes the rule of law's answerability to citizens. Warped into a social intervention, section 213(1.1) treats all people criminalized by section 213(1.1) as victims who lack moral autonomy. It frustrates their expectation to be treated as responsible people, capable of following the law. Subliminally, if a criminal offence is a social intervention, the opposite message is conveyed: to be entitled to help from the police, one must violate section 213(1.1).

This normative noise is confoundingly unfair. Sellers cannot know in advance how to conduct themselves, whether section 213(1.1) is for them or against them: their detention is contingent upon their susceptibility to submit to outcomes (extrication to social programs or extracting evidence against bosses and clients) that are irrelevant and extraneous to prosecuting and punishing them for breaching section 213(1.1). Furthermore, as a warrantless detention power that directs police against charging, this deliberate incongruence pre-empts accessibility to justice, which is necessary for providing answerability to citizens, and holding police accountable to law.

Above, the acoustic allegory contrasted the *ex ante* operation of section 213(1.1) in scenarios of relative congruence and deliberate incongruence. Put simply, the normative guidance and direction channeled through the qualitative form of a criminal offence is distorted and disrupted by incongruent police action. This creates an unpredictable, unfair, unaccountable state of affairs *ex ante*. To gauge the extent of these flaws, I next contemplate the *ex poste* consequences of arbitrary detention: police have no legal mandate to detain sellers as victims; people who technically fall under section 213(1.1) are effectively deprived of vital procedural rights and meaningful remedies, which are available only to victims and perpetrators.

#### **E. WORSE THAN CONVICTION?**

I began Part IV by allegorizing a criminal offence as a siren. This allegory demonstrated that wielding a criminal offence to detain people for purposes unrelated to imposing criminal liability distorts the *Criminal Code*'s guidance and direction. I believe that the ensuing confusion strains the rule of law's pillars of accountability, allocation, answerability, and accessibility.

Nevertheless, there remains a formidable democratic counterargument to my concerns. After all, section 213(1.1) was re-enacted by a majority of two legislative chambers. Chargeless detentions to extricate sellers from the industry and extract evidence against their dangerous exploiters would thus give effect to what the governing majority who passed section 213(1.1) into law actually wanted.

Let me expand this democratic objection: although Government legislators at both Committees did not bother to precisely tailor section 213(1.1)'s text to those benevolent ends, perhaps I have expounded an overly formalistic view of congruence and pessimistic assumptions about police. Perhaps congruence, as the rule of law's essence, is not really between the law on the page and the law on the ground, but rather, between the policy ends inspiring the majority's support for section 213(1.1) and the detentions now operationalized by police. Indeed, I acknowledge the primary virtue of section 213(1.1)'s incongruence: by

deliberately detaining sellers without charge, morally innocent people are not hauled into court and are spared the consequences of criminal punishment.

And yet, this virtue of de facto detention depends on a persuasive, but defeasible presumption: not only that chargeless detention will succeed in extricating sellers and extracting evidence, but also that those two results of chargeless detention are better than the ramifications of criminal conviction. To now challenge this presumption, I enrich the debate by comparing non-criminal measures for chargeless detention, measures that are overtly crafted as health and social interventions. To further sharpen the debate, I visit a recent sting in Cape Breton, where I end with one point: chargeless detention may embroil some sellers into a predicament worse than section 213(1.1)'s stipulated penalties.

## 1. CIVIL LEGISLATIVE MEASURES FROM THE PROVINCES

Although there a variety of means available to transform policy into law, it is critical to remember that there is no provision in the *Criminal Code*, nor police power at common law that expressly bestows the authority to detain victims *qua* victims.<sup>173</sup> Instrumentally, however, Bill C-36 could have explicitly drafted a new *Criminal Code* power to detain victims of violent buyers, exploiters, and traffickers. Recall that such a measure was exactly what Vice-Chair Casey and Detective Truong thought would require invoking the *Charter*'s notwithstanding clause to override the rights of people who provide sexual services.

Interestingly, although no one mentioned any of the following examples during Bill C-36's debates, functionally equivalent powers already exist in an array of provincial statutes. For one, Newfoundland and Labrador's *Detention of Intoxicated Persons Act* pursues twin goals of nuisance abatement and health promotion by empowering police to detain intoxicated individuals.<sup>174</sup> One of three criteria provides sufficient legal justification to detain, so long as the officer finds the intoxicated person in public: detainees must pose a danger to themselves, others, or cause nuisances. Detainees are then escorted to detoxification centres, where their custody is time-limited, with built-in mechanisms for review by medical practitioners and provisions for release to responsible adults.

For another germane example, multiple provinces have authorized medical officers to apply to a court for detention and treatment orders when adults are infected with communicable diseases, including sexually transmitted infections and HIV.<sup>175</sup> To prevent both the spread of disease and the commission of aggravated sexual assault, detainees are treated and counselled about safe sex.<sup>176</sup> While these provincial regimes are highly controversial in their own respects, the legislation properly allocates institutional labour: it does not fall to police, but to social workers and doctors to apprehend, treat, and provide

<sup>173</sup> See also assessment and disposition under the Mental Disorder provisions of the *Criminal Code*, *supra* note 2, Part XX.1. The closest approximation of a broad criminal power to detain the morally innocent might be the former section 613, which, perhaps not surprisingly, was repealed after it was found unconstitutional in *R v Swain*, *supra* note 41. That provision authorized the Lieutenant-Governor to indefinitely detain "insanity acquittees" at pleasure.

<sup>174</sup> RSNL 1990, c D-21. See also Manitoba's *Intoxicated Persons Detention Act*, CCSM c 190 and New Brunswick's *Intoxicated Persons Detention Act*, RSNB 2014, c 114.

<sup>175</sup> See e.g. *Health Protection Act*, SNS 2004, c 4, ss 32–48; *Health Protection and Promotion Act*, RSO 1990, c H.7, ss 22, 35.

<sup>176</sup> *R v Al Safi*, 2018 ONSC 326; *R v Ralph*, 2014 ONSC 1376.

health-enhancing services to detainees who have done nothing criminally wrong, without camouflaging a social intervention as criminal law.

More apposite is Alberta's *Protection of Sexually Exploited Children Act*.<sup>177</sup> Reading this statute conjures a strange sense of *déjà entendu*. This provincial regime authorizes police officers to apply to court for an "apprehension order" to physically detain prostituted people under age 18, convey them to a protective safehouse, and hold them in confinement, where they receive medical treatment and counselling. In addition to providing for voluntary agreements to participate in services and exit programs thereafter, the legislation explicitly incapacitates prostituted detainees to seek restraining orders against their exploiters.<sup>178</sup> Given the stark similarity to section 213(1.1)'s two *de facto* ends of extricating sellers and investigating third parties, it strains credulity to believe that Calgary's Police Chief, whose officers had already ensconced hundreds of minors in Calgary's own statutory safehouse, did not have an adult version of this apprehension power in mind during his submissions.<sup>179</sup>

Although the constitutionality of Alberta's civil scheme is surely contestable,<sup>180</sup> it is at least more democratically defensible, considering that those most acutely affected by section 213(1.1) all objected to criminalization as a means of victimization — what I have called the victim-perpetrator paradox. Furthermore, Alberta's approach is also a technically tailored means to achieve precisely what police and Government legislators wanted. Police have express but limited powers to intervene, without foisting charities, churches, and referrals into the shadows of investigative detention. Recognizing that police are not psychologists, doctors, nor social workers, the scheme evenly distributes institutional labour: it prevails upon specialized professionals with the skills and expertise in treatment and counselling that police lack.

Critically, accountability to law is anchored in the detainee's express procedural rights to review and appeal their confinement. Unlike detentions under section 213(1.1), there is a direct channel to access justice: the detainee's ongoing deprivation of liberty is superintended by a neutral, impartial, open process, limited by detailed conditions, and subject to reporting requirements. In this vital difference, the detainee is also offered answerability: the opportunity to demand the legal reason for, and challenge the merits of, the detention, according to established legal criteria. The legal reason, in such circumstances, is not to punish with the stigma of the criminal law for participating in an activity the community condemns as annoying and degrading — but rather to safeguard the detainee's health and social welfare. By regarding exploited minors as responsible people, capable of

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<sup>177</sup> RSA 2000, c P-30.3. Ontario enacted similar legislation but it never entered into force and was subsequently repealed: *Rescuing Children from Sexual Exploitation Act, 2002*, SO 2002, c 5 (assented to 27 June 2002, repealed 31 December 2012).

<sup>178</sup> *Protection of Sexually Exploited Children Act*, *ibid*, s 2.

<sup>179</sup> Mario Toneguzzi, "Anti-Child Prostitute Regulation 'Saved Me: Teens, Police, Officials Praise Protection Act'" *Calgary Herald* (22 December 2003) B1. From 1999–2004 alone, there were over 728 statutory apprehensions in Alberta. In a news release regarding one such apprehension, the Calgary Police reminded the public, "Adults can also be sexually exploited. There is no legislation to protect sexually exploited adults but there are support service providers available to assist them." See City of Calgary, "Calgary Police Lay Human Trafficking Charges Against Two Local Men," online: <newsroom.calgary.ca/calgary-police-lay-human-trafficking-charges-against-two-local-men>.

<sup>180</sup> Significant amendments, particularly to accord procedural rights to the detainee, were added immediately before its constitutionality was upheld on judicial review. See *Alberta v KB*, 2000 ABQB 976, quashing *Alberta (Director of Child Welfare) v KB*, 2000 ABPC 113.



understanding why and how that law could and should apply them, Alberta's statute epitomizes the congruence that section 213(1.1) lacks.

To be sure, these various provincial schemes almost undoubtedly exert disproportionate impacts upon marginalized people. It is thus all the more unfortunate that Government legislators responsible for studying, amending, and passing Bill C-36 did not have the political courage to say what they really meant in explicit legislative terms. By that, I mean that if the Government had attempted to invoke the notwithstanding clause in re-enacting section 213(1.1), we might have had a more candid, frank debate about what protecting and respecting our fellow citizens really means.

## 2. OPERATION-JOHN-BE-GONE

That debate might have been uncomfortable, as these closing remarks now make plain. Awful as it is to suggest, for some sellers, enforcing section 213(1.1) as a criminal offence might actually be the lesser of multiple evils. Importantly, people who accept financial remuneration for sexual services come from all walks and stages of life. Bill C-36 uniformly applies to individuals diverse in gender, sexuality, family, community, race, and socioeconomic status. Amidst these manifold needs, interests, and goals, are many people who reject the rhapsodized rhetoric of victimization, who genuinely vow that they enjoy their work, and do so freely, without coercion, without exploitation. For those citizens who are denied their autonomy and dignity without recourse to justice or accountability to law, the rule of law's answerability is also out of reach.

So, ponder the paradigmatic predicament that legislators and police feared most, the opposite situation of *Bedford's* plaintiffs. As it happened, section 213(1.1) was likely one of the "specialized investigative tools and techniques" resorted to in Cape Breton's "Operation-John-be-Gone."<sup>181</sup> In rural communities like Cape Breton, it is almost inevitable that being anywhere will be "near" enough to engage section 213(1.1). There, the beleaguered merchant district under investigation is home to a playground popular with tourists. Amongst the 35 sellers police identified in the sting were a majority of Indigenous females struggling with opiate-dependence and living through poverty. In sentencing one of their alleged customers, *R. v. Mercer* held that those sellers along Sydney's waterfront were "not there by free choice but by social economic conditions, addictions, and abuse as well as the potential for violence to them."<sup>182</sup>

For marginalized, stigmatized people struggling to survive destitution and drug addiction, all while beholden to a violent pimp with a quota to satisfy, how meaningful are their choices if section 213(1.1) operates on the ground as a detention power? Contemplate how they should choose when, under the auspices of section 213(1.1), an undercover officer asks them

<sup>181</sup> At the time of submission, the author was still awaiting a response to an information request to the Cape Breton Regional Police seeking clarification of the extent to which section 213(1.1) was relied upon in the sting. Nancy King, "Twenty-seven Charged in Downtown Sydney Prostitution Sting" *Cape Breton Post* (8 September 2015) <[www.capebretonpost.com/news/local/twenty-seven-charged-in-downtown-sydney-prostitution-sting-9947/](http://www.capebretonpost.com/news/local/twenty-seven-charged-in-downtown-sydney-prostitution-sting-9947/)> (Sergeant Wilson estimating 80 percent Indigenous, 90 percent abusing prescription drugs, but also observed the problems for business, tourism and spreading disease).

<sup>182</sup> 2017 NSPC 20 (sentencing) at para 48; 2017 NSPC 3 (entrapment application); 2016 NSPC 48 (conviction) [*Mercer* decisions].

to go for a ride,<sup>183</sup> and tries to persuade them to help themselves by leaving the industry, or help him by giving up tips or snatching used condoms.

Do they rat out their boss, and risk a vicious reprisal? Do they tattle on customers, and go hungry, miss the quota, and multiply the risk of violent reprisals, by aggravating more demanding oppressors with much power? Or, do they snitch on both their boss and customers, and thus not only risk losing the roof over their head and their income, but must also accept the ideological pressures and moral condemnation of exit programs — all while enduring severe symptoms of drug detoxication, and living with constant trepidation of running into their exploiters?

In the shadows of enforcement discretion, sellers might rather avoid this irreconcilable detention dilemma altogether, compared with what choices and rights they might exercise if they were instead charged. Instead of gambling with their lives and livelihood from snitching on their boss and customers, they might hide their exploiters' identities and activities by a quick guilty plea and spend a few weekends behind bars. Or, if they have cash on hand, the maximum \$5,000 fine might be a small price to pay for keeping afloat and staying alive. While it would set them back temporarily, at least they could earn the cash back because they would still have customers.

These grim questions are not conjecture. Fearing retribution, all sellers entangled in Operation John-be-Gone declined to testify against the buyers — despite the police offering entry into Methadone Programs and handing out free lipstick tubes with concealed information for exit agencies.<sup>184</sup> Graver still, Cape Breton's Police Chief admitted that sellers who lost their income are now suffering from an absence of community support — against mounting reports of missing women in the aftermath of Operation-John-Be-Gone.<sup>185</sup> As the Program Manager of Atlantic Canada's sole outreach organization said, the sting actually endangered sellers by “push[ing] them into shadows ... in dark alleys and country roads.”<sup>186</sup>

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<sup>183</sup> In *R v P (NM)*, 2000 NSCA 46, the undercover officer denied he was a cop, and touched the 17-year old appellant's pubic hair when she invited him to prove it. On appeal, her *Charter* application for a stay was refused, the officer deemed to be acting both lawfully and constitutionally. In *R v Hutt*, [1978] 2 SCR 476, the undercover officer drove up to the appellant and returned her smile. She asked, “Do you want a girl?” (at 479). Concurring with three others, Justice Ritchie characterized “the appellant's conduct as “co-operation” rather than “solicitation,” given the officer testified “one of his duties was to make it appear as if he wanted a girl for sex” (at 486).

<sup>184</sup> *R v Ellison*, 2017 NSPC 5. Just 450 metres away from that playground, one accused buyer encountered an undercover female officer. Prompted by the accused's “wink and nod,” she approached his vehicle, asked him how he was, and what he wanted (at paras 4–5). See also, *Mercer* decisions, *supra* note 182.

<sup>185</sup> “Sydney Prostitution Crackdown will Continue, says Cape Breton Police Chief,” *CBC News* (9 September 2015), online: <[cbc.ca/news/canada/nova-scotia/sydney-prostitution-crackdown-will-continue-says-cape-breton-police-chief-1.3220927](http://cbc.ca/news/canada/nova-scotia/sydney-prostitution-crackdown-will-continue-says-cape-breton-police-chief-1.3220927)>.

<sup>186</sup> *Ibid.*

Of course, the foregoing presumes that officers in those shadows act in good faith.<sup>187</sup> Yet travel west to Vancouver, where James Fisher, a decorated member of Vancouver Police Department's Counter-Exploitation Unit was recently sentenced for sexual exploitation and breach of trust.<sup>188</sup> His offences were committed against two prostituted teenagers, who, doubling as paid police agents, had worn wires to advance the investigation into the two notorious pimps who first employed and exploited them. Now that Bill C-36 has made buying sex a criminal activity, the risk for insidious abuses of power, previously realized, may very well now be reified.<sup>189</sup>

To be clear, by suggesting that the consequences of arbitrary detention could be worse than conviction, I am not advocating for gratuitous guilty pleas, nor am I minimizing the real hurdles that criminal records pose to overcoming marginalization and stigmatization.<sup>190</sup> It is not for me to say which of these dire outcomes is the least worst, to say what anyone would prefer, if given a meaningful choice. But what I can at least say is that disguising and distorting a criminal offence into a de facto detention power deprives people not only of constrained choices, but also of vital procedural safeguards and accountability mechanisms, without which they cannot seek the answers and justice that everyone deserves.

## V. CONCLUSION

Masquerading as an offence written into the *Criminal Code*, section 213(1.1) operationalizes a crude policy that combines overcriminalization with underenforcement. This crude combination of overcriminalization and underenforcement purported to authorize warrantless, chargeless detentions of people who, in the eyes of lawmakers, and the language of the law, are otherwise cloaked in moral blamelessness.

Consequently, a deeper, subterranean incongruence diminished the rule of law under section 213(1.1). This diminishment did not come to light from litigation, but from taking seriously what politicians and police openly stated in the democratic arena. Their attempt to justify section 213(1.1) as a de facto detention power was also an attempt to justify re-enacting a constitutionally defective offence during a wider public debate about the appropriate deployment of the criminal law.

<sup>187</sup> Consider also the streets of Toronto during the era of the *Prostitution Reference*. Back then, Sergeant Brian Whitehead, dressed in uniform, picked up "Jane Doe," on the street, and threatened to charge her if she did not gratify his sexual desires. His accountability for extorting sex, back when prostitution was still a lawful activity, was a paltry demotion to Constable. See Glenn Cooly, "Sexual Theft: Jane Doe's Story," *NOW Magazine* (30 January–5 February 1992) at 10, online: <nowtoronto.pressreader.com/now-magazine/19920130>. On lack of accountability and the resulting inquiry, see Dianne Martin, "Accountability Mechanisms: Legal Sites of Executive-Police Relations—Core Principles in a Canadian Context" in Margaret Beare & Tonita Murray, eds, *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) 257.

<sup>188</sup> *R v Fisher*, 2019 BCCA 33, upholding *R v Fisher*, 2018 BCPC 210.

<sup>189</sup> Giuseppe Valiante, "La législation canadienne met en danger les travailleuses du sexe" (16 Février 2020) online: *LeSoleil* <www.lesoleil.com/actualite/la-legislation-canadienne-met-en-danger-les-travailleuses-du-sexe-3226cbf2cf524787e633fd6e5b4be18f?fbclid=IwAR03qi\_EU04bs\_ddfv9MB-MjTHUGQ6tliop0uCLtvvW0zlp4S6zmH8ITo0g>.

<sup>190</sup> See e.g. *R v Manion*, 2005 ABPC 35. A massage therapist who ran an escort agency was granted a conditional discharge for living on the avails of prostitution, in part due to the fact that the City of Calgary, fully aware of the nature of her business, licensed her escort agency at a rate 36 times more than other retail businesses. On conviction, she would have been unable to support her children because the City was the same entity responsible for issuing her massage license.

The storied history of litigating, legislating, and policing a very old criminal “offence” is also a parable about how the rule of law and democracy are intertwined, and sometimes pull in opposite directions. Although I have demonstrated that section 213(1.1) suffers from deficits of legal legitimacy, it would exceed my remit to do justice to the issue of democratic legitimacy. However, I would be remiss if I neglected to observe that when lawyers and judges cannot hold police accountable, people seek redress from legislators — elected and appointed. Parliament’s role is not only to deliberate and legislate, but to also hold the Executive officials who are responsible for justice and public safety to account.<sup>191</sup>

To that end, I have focused on the words of legislators and police in an effort to hold them accountable. The actions that accompany those words are also integral to section 213(1.1)’s legal and democratic legitimacy. Yet to a concerned (and confused) citizen watching their democratic representatives re-enact the unconstitutional solicitation offence struck down in *Bedford*,<sup>192</sup> it might have looked as if Government politicians lent their ears and proxied their votes to police — police whose defective, deficient enforcement of section 213(1.1)’s predecessors was what landed law reform on the Government’s agenda — after launching the Government into court in the first place.

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<sup>191</sup> Democratic accountability is often too late. Marylène Levesque, discussed in Valiante, *supra* note 189, was murdered by an offender who was knowingly permitted by the Parole Board to purchase sexual services. Levesque’s murder has prompted numerous questions in the House of Commons. See e.g. *House of Commons Debates*, 43-1, No 14 (4 February 2020) (Opposition Motion – Instruction to the Standing Committee on Public Safety and National Security).

<sup>192</sup> LCA Study (29 October 2014), *supra* note 136 (Hon George Baker, “[T]he general public watching these proceedings would be confused as to what this bill does”).