TORONTO THE GOOD: DEVOLUTION AND THE TRANSFORMATIVE POWER OF MUNICIPAL REGULATION

Andrea Jeannette Sanche, Institute of Comparative Law, Faculty of Law, McGill University, Montreal

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Abstract

This paper outlines how the devolution of power from federal and provincial governments to municipalities has expanded and the role of municipal law. This shift in power to municipalities was supported by courts and buttressed by a shift in political philosophy. This paper demonstrates that although many critics have argued that municipal regulation has been used to marginalize already marginalized groups, it may also have a transformative effect on cities and their residents. Using the case study of municipal regulation passed in the City of Toronto, this paper argues that while this transformation may result in marginalization, it may also allow for the inclusion of more and more diverse voices in municipal decision-making.

Ce document décrit la façon dont la décentralisation du pouvoir des gouvernements fédéral et provincial aux municipalités s'est élargie et le rôle du droit municipal. Ce transfert de pouvoir aux municipalités a été appuyée par les tribunaux et étayée par un changement de philosophie politique. Le présent document démontre que, bien que de nombreux critiques ont fait valoir que le règlement municipal a été utilisé pour marginaliser les groupes déjà marginalisés, elle mai également avoir un effet transformateur sur les villes et leurs habitants. Utilisation de l'étude de cas du règlement municipal adopté dans la ville de Toronto, ce document fait valoir que, si cette transformation mai fait à l'exclusion, elle mai également permettre l'inclusion des voix de plus en plus diverses dans le processus décisionnel municipal.

Introduction

Jane Jacobs, the renowned urbanist, wrote that cities have "the capability of providing something for everybody, only because, and only when, they are created by everybody."[1] Jacobs lived in Toronto, Ontario for many years and she was a prominent "everybody" who played an active part in the city's ongoing creation. As Jacobs suggests, cities are in some ways living organisms, with citizens (their constituent parts) responsible for their success or failure. Jacobs's observation also implies that cities are not successful without the participation of all residents. Rather than posing a challenge to government, Jacobs's observation demands that citizens take an active role in their cities. Without each and every voice, she suggests, a city will neither succeed nor exist. She also implicitly acknowledges that until cities are created by everybody, they will not offer the range of services or opportunities that support their constituents. In a sense, they will be cities that serve only those who participate in their creation. This selection almost guarantees the marginalization and exclusion of some groups in service of the interests of the few. In the 1980s and 1990s, many cities clearly embarked on this path.

In Canada in the 1980s and 1990s – as in many other advanced capitalist countries – federal and provincial governments engaged in a process of decentralization which placed enormous pressure on cities to administer services. In response to these pressures, Canadian cities demanded increased power and control over local issues. In particular, in Toronto, Jacobs's home and research site for many years, the city demanded that it be given control over areas that might otherwise have fallen under provincial or federal authority, but which had disproportionately local flavour. While many areas engaged these demands (in particular, taxation power), the conflicts and confusion that underlie this devolution to municipalities and the expansion of municipal power is best seen when the criminal law is displaced by the municipal law. In Toronto, this shift happened most clearly in respect of the regulation of adult businesses, which was consistently and loudly cited as a serious social problem in the late 1970s and which has continued to preoccupy some Torontonians into the present. An analysis of the consequences of this shift in authority and an explanation of the way in which it occurred

[1] Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage Books, 1992) at 236.

provides an opportunity for a broader and more widely applicable discussion of the contemporary role of municipal law, the pitfalls of municipal regulation, and the opportunity it affords for transformation. In the discussion that follows, I will use the example of this regulation to tease out these themes.

This paper is divided into three sections. In the first section, I set out the political, legislative, and legal forces that supported the devolution of law-making authority from the federal and provincial government to Canadian municipalities. In discussing this phenomenon, I focus on changes that occurred in the City of Toronto. In particular, I analyse this phenomenon through the lens of Toronto's assumption of responsibility for the regulation of adult businesses. I begin this by discussing a shift in political philosophy which occurred in the 1980s and 1990s and which supported the transfer of broad political responsibilities to municipalities. Next, I review how this devolution has been supported by Canadian courts. In this respect, I argue that courts both explicitly and implicitly permit cities to exercise greater decision-making authority and to legislate in a broader range of subject matters than before. In both sub-sections, I argue that devolution and judicial deference to municipal authority have had significant consequences. In particular, I argue that municipalities have been tasked with addressing fundamental social, legal, and political problems with the limited legal tools available to municipalities. Consequently, these problems are redefined so that they fit within municipalities' mandate and are appropriately subject to their authority. It is through this process that the transformative power of municipal regulation is made most clear.

In the second section of this paper, I review the existing literature on the impact of devolution on municipal regulation and explore its criticisms of the consequences of this devolution and its implications for municipal governance. I explore two prominent themes in the literature: privatization and purification. With respect to the former, scholars suggest that this shift in political philosophy led to a renewed focus on community and, consequently, a renewed focus on local laws. Further, local laws became a force of boundary-definition, with private and public spaces increasingly defined by legislation, in part to ensure the protection and economic development of private space. Yet, privatization also involves the expansion of private space, which is often achieved through the cleansing of certain undesirable elements from public space. Scholars especially note that the legislative landscape of the 1980s and 1990s was typified by

the introduction of local laws to control and eradicate issues such as homelessness, panhanding, and graffiti. In this section, I further explore how theories of purification explain this renewed focus on local government.

This review provides the framework for the third section of this paper, in which I analyse the process and substance of Toronto's municipal regulation of adult businesses. I use these regulations as my subject matter because they best demonstrate the interplay between federal (criminal) and municipal law. Arguably, however, this analysis applies more generally to other examples of municipal legislation. This section is divided into three subsections. In each, I argue that while these regulations reflect some of the concerns in the critical literature, they also have a transformative power that the literature does not adequately address or explain. In the first part of this section, I review the process of municipal law-making and argue that the existing literature fails to fully capture the organic and transformative way in which municipal legislation is used to create a community. In the second part of this section, I analyse the substance of these regulations and argue that while the existing literature provides some insight into their effect and goals, it is insufficient to explain their inter-relationship. In this respect, I argue that the literature again fails to acknowledge the transformative power of municipal regulation. In the final subsection, I demonstrate how the discourse used to support the introduction of these regulations parallels the process of devolution discussed in the first section. In particular, I note that as municipalities were granted increased authority by higher levels of government and supported by the courts, the political and popular rhetoric shifted from one of moral contamination to public health and safety. I argue that this shift is partly an effect of the increasing importance of municipal regulation. Additionally, it is also a cause of increased municipal power, working to underscore municipalities' regulation of certain areas. Thus, once municipalities were granted the power to regulate in the area of public health and safety, it only made sense that various activities, businesses, and people be regulated through this mechanism. What once might not have seemed a public health and safety concern – or what once might have been a criminal/moral concern – was redefined as such. Further, I argue that what constitutes public health and safety has increasingly been left to municipalities to define and decide.

Part I: A Shifting Division of Power: Political Developments and the Rise of Canadian Municipal Authority

In the late 1970s and early 1980s, many Toronto politicians, journalists, and citizens began to demand that the provincial and federal governments grant the city responsibility to license and regulate adult businesses. These individuals argued that the city be granted this power so that it could commence a "clean-up and crackdown" campaign on Yonge Street, its main downtown retail area.[2] At this time in the city's history, Yonge Street was described as Canada's equivalent to Times Square or 42nd Street in New York City.[3] Body-rub parlours, erotic cinemas, adult video stores, and strip clubs lined the street, washing it in bright lights that drew mostly young people from around the metropolitan area.[4] Certainly Yonge Street's evolution into a "sin strip" was a gradual one, but at this time attention turned to the state of the street largely because of the impending opening of Eaton Centre, an enclosed shopping mall being been built on two city blocks the street.[5] The targeted "sin strip" was located adjacent to and north of Eaton Centre and posed a challenge to the shopping mall's representation of cleanliness, order, and consumption. Additionally, the construction of such an enormous revenue-generating retail and office complex underscored long simmering tensions between the three levels of government. Like many other shopping centre construction projects underway at the time, Eaton Centre was hailed as a way to ensure that suburban shoppers came to the downtown core, which would be made attractive to them and to their wallets. Making this area attractive would require changes to its existing composition, as well as a focus on keeping it "clean". Yet, under existing provincial legislation, Toronto, like other Ontario cities, was only permitted to enact by-laws in several limited subject-areas; adult businesses, which had a conspicuous presence on the street, was not one of them. Provincial legislation permitting such regulation was required. Without such permission, only the criminal law – a federal power – could be used to establish what some Torontonians desired.

The choice truly was between a clean-up and a crackdown; municipal law could best accomplish the former and the criminal law was not equipped to accomplish the latter. In Canada, the

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[2] "Yonge St. 'a mess': Nixon to Davis: End 'permissive' body rub shops" *Toronto Star* (4 June 1975) A1.
[3] "Act now to stop Yonge St. degeneration," Editorial, *Toronto Star* (4 June 1975) B4.
[4] Warren Gerrard, "Yonge Street strip: Is it a boon or a blight?" *Toronto Star* (31 May 1975) A1.
[5] Vincent Devitt, "Yonge St.: Rotten fruit on the money tree" *Toronto Star* (2 July 1975) B3.

movement away from criminal vagrancy laws and towards other legal mechanisms was one triggered by Parliament. In 1972, largely as a result of the 1970 Report of the Royal Commission on the Status of Women, the vagrancy provisions of the *Criminal Code* were repealed by the federal government.[6] For example, prior to its repeal, then-section 164(I)(c) of the *Criminal Code* treated prostitution as a form of vagrancy. "Vag C", as it was known, stated that "[e]very one commits vagrancy who, being a common prostitute or night-walker is found in a public place and does not, when required, give a good account of *herself*" [emphasis added].[7] The vagrancy provision gave police significant discretion to identify and remove from public space individuals who were deemed problematic or out of place. Although replaced by another prostitution provision, there was some sentiment that without the vagrancy provision the police were constrained from adequately attacking the "sin strip".[8] As there was no certainty that another criminal provision could conduct the sweeping "clean-ups" that the vagrancy provision accomplished, many proponents advocated using municipal regulation in place of the vagrancy and loitering laws that had in many jurisdictions been invalidated.[9] Thus, the licensing of businesses constituted a new technique that might take the place of the criminal law, and which was "developed and adopted in response to judicially imposed limits on older mechanisms of urban control".[10] These laws – municipal by-laws and zoning provisions – could be used to ensure order maintenance and to shore up police power to maintain order in the city.[11]

There was a clear feeling that in respect of Yonge Street and its adult businesses, what the police could not accomplish through enforcement of the criminal law, the municipality could and ought to address through legislation. Using municipal law to regulate adult businesses, however, required some activity on the part of the provincial and federal governments. Under Canadian law, municipalities were traditionally constrained by provincial governments and were able only to exercise those powers that the province explicitly granted to them by statute. Municipalities

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[6] Christine Boyle & Sheila Noonan, "Prostitution and Pornography: Beyond Formal Equality" (1986-1987) 10 *Dalhousie Law Journal* 225 at 229.
[7] *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1).
[8] "Ontario may ask federal help to stop vagrancy on Strip" *Toronto Star* (11 August 1977) A1; "Ontario may seek return of vagrancy charge" *Toronto Star* (11 August 1977) A3.
[9] Katherine Beckett & Steve Herbert, "Dealing with Disorder: Social Control in the Post-Industrial City" (2008) 12 *Theoretical Criminology* 5 at 21.
[10] Beckett & Herbert, *ibid.*
[11] Beckett & Herbert, *ibid.*

were merely "delegates of a proper (state or provincial) government", only able to act if and when expressly authorized by statute.[12] As one former Toronto mayor wrote, under this model "explicit permission must be obtained from the province for every stoplight that municipal traffic authorities want to erect".[13] Municipalities were "politically inferior governmental bodies" that were "tightly controlled, limited in their jurisdiction and subject to numerous restrictions to prevent abuses of power".[14]

As a result of politicians' demands and several high-profile incidents that stimulated intense public concern,[15] the *Municipal Act* was amended in 1975 to permit Toronto to regulate body-rub parlours. The city passed its first by-law on August 26, 1975.[16] This by-law limited the number of body-rub parlours in Toronto to 25 and imposed license requirements for owners and operators, with the latter costing $3,000.[17] It also specifically addressed concerns about the visible representation of disorder that appeared on the street, walking, standing, and talking beside passers-by. Additionally, in the 1980s and 1990s, under increasing pressure from the federal government to provide once-federal services and from their own cost-cutting measures, many provinces revised and modernized their municipal legislation to expand the range of areas over which municipalities might legislate. These changes introduced "an era of slightly less prescriptive [provincial] legislation and regulation."[18] As a result, cities were given enhanced power to pass by-laws in respect of a larger sphere of activities. Concomitantly, cities were granted expanded powers of taxation, thus ensuring that they were able to retain money that would otherwise have been claimed by the provincial or federal governments.[19] By the new millennium, municipalities were no longer just service-providing mechanisms under the direction of regional (provincial) governments, but bodies that functioned to allow "local public

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[12] Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 *Osgoode Hall L.J.* 409 at para. 12 (Q.L.).
[13] *Ibid.* at para. 13.
[14] Stanley M. Makuch, Neil Craik, and Signe B. Leisk, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson Carswell, 2004) at 2.
[15] In particular, the murder of 11 year-old shoe shine boy, Emanuel Jaques. See: Deborah R. Brock, *Making Work, Making Trouble: Prostitution as a Social Problem* (Toronto: University of Toronto Press, 1998).
[16] Ken MacGray, "Metro passes law to license body-rub shops" *The Toronto Star* (26 August 1975) A3.
[17] *Ibid.*
[18] Leo F. Longo and John Mascarin, *A Comprehensive Guide to the City of Toronto Act, 2006* (Toronto: LexisNexis, 2008) at 2-3.
[19] *Ibid.* at 2.

control" over the provision of services".[20] Under this model, municipalities came to be seen as the body most directly connected to the community and most able to articulate its needs and interests. In addition, however, municipalities were tasked with providing services in more areas than ever before, with no more legal resources at their behest.

Toronto's demands for more power and control over sex entertainment peaked just as the forces of political decentralization and privatization began to influence Canadian political thought. These forces, often described as neo-liberal or neo-conservative philosophies, had a significant impact on the position and role of Canadian cities. Broadly defined under the term "the privatization project", these forces coalesced as a movement in advanced capitalist economies whereby the "welfare state" underwent substantial transformation.[21] In particular, this transformation included:

> the privatization of public utilities and welfare functions, the marketization of health services, social insurance and pension schemes, educational reforms to introduce competition between schools and colleges, the introduction of new forms of management into the civil service modelled upon an image of methods in the private sector, new contractual relations between agencies and service providers and between professionals and clients, a new emphasis on the personal responsibilities of individuals, their families and their communities for their own future well-being and upon their own obligation to take active steps to secure this.[22]

Common to these phenomena is a movement from the public (government) to the private (market). One aspect of the privatization project is the transfer of services that were once provided by the state to private bodies. Another is the introduction into the public sphere of values traditionally attributed to the private sphere. For example, in the 1990s, values associated with the market – such as a focus on "productivity" – became part of the public sphere through the introduction of mechanisms such as "work fare" programs which restricted welfare through lifetime limits and other caps on access and entitlement.[23] The privatization project's focus away

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[20] Makuch et al., *supra* note 14 at p. 2.
[21] Nikolas Rose, "The death of the social? Re-figuring the territory of government" (August 1996) 25:3 *Economy and Society* 327 at 327.
[22] *Ibid*. at 327.
[23] See, e.g.: Marlee Kline, "Blue Meanies in Alberta: Tory Tactics and the Privatization of Child Welfare in Alberta" in Judy Fudge & Brenda Cossman, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 330; Dorothy E. Chun & Shelley A.M. Gavigan, "Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor" in Amanda Glasbeek, ed., *Moral Regulation and Governance in Canada: History, Context, and Critical Issues* (Toronto: Canada Scholar's Press Inc., 2006) 357.

from government dovetailed with a renewed political focus on community. The latter may in many ways be considered a less public level of government and service delivery. The community is less subject to judicial and democratic oversight. Decisions made by community boards or agencies are most likely only reviewable by lower government agencies (like the Ontario Municipal Board) or by seeking leave to appeal to the court. Additionally, such bodies are less transparent, with many decisions made on the basis of internal memoranda or guidelines.[24] Further, this shift away from government accompanied a renewed call for "personal responsibility". It was individuals' responsibility to care for themselves, not the state's. Further, those individuals were encouraged through legislative change and political rhetoric to care for those closest to them – their families and neighbours. Thus, devolution of responsibility to cities and to neighbourhoods ultimately formed part of the privatization project philosophically and practically. In its practical effect, this process amplifies cities' importance as a level of government and emphasizes that it is in many ways a more private kind of regulation. In this sense, under many new statutes, municipalities are considered "natural persons" and given powers of a natural person (such as entering into contracts).[25] The municipality itself is recast as a private figure, somewhat removed from "government", and less easily scrutinized and challenged by those involved. Additionally, philosophically, this decentralization of power constitutes not only a new approach "to specific problems of government policy" but a shift in political theory that is "informed by a desire to decentralize political and social power".[26]

By the 1990s, this process of decentralization began to place extraordinary pressure on local governments to provide services to citizens and to remedy myriad social problems. Unsatisfied with the kind of incremental power-granting that had started with the 1970s clean-up campaign, Toronto politicians and residents demanded a "new deal" with the provincial and federal governments which would give them increased power (particularly licensing and taxation power) to mirror the city's increased responsibility. At the same time, there was increasing interest at all levels of government, including federal, in redefining the power and structure of

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[24] See, e.g.: Lorne Sossin, "Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 42:3 Osgoode Hall L. J. 363.
[25] George Rust-D'Eye and Ophir Bar-Moshe, *The Ontario Municipal Act: A User's Manual - 2006* (Toronto: Thomson Carswell, 2005) at I-2.
[26] Richard C. Schragger, "The Limits of Localism" (November 2001) 100 *Mich. L. Rev.* 371 at 377.

Canadian cities.[27] In respect of Toronto, the demand for such special legislation – a "new deal" – came from the city itself. The city faced financial difficulties following two major changes in the 1990s. First, the city was radically and controversially restructured in 1997, when the metropolitan government and local municipalities were dissolved and a new single tier government (the City of Toronto) was created.[28] As a result of the amalgamation, the new Toronto had a huge volume of material to review at each City Council meeting, with some lasting three days as a result of 45 councillors' review of an agenda that was a foot thick.[29] Second, this new legislative framework coincided with the downloading of many fiscal responsibilities to the city from the provincial government lead by former Premier Mike Harris.[30] For example, as part of its all-encompassing neo-conservative project, the Harris Government "downloaded" transit and social services and housing costs to Toronto in exchange for the province's assumption of education costs.[31] The resulting fiscal strains on Toronto lead to a chorus which echoed the rallying cry of the 1970s, demanding that the city be given more power to address its increased responsibilities.

Toronto's demands were ultimately met with the province's ratification of the *City of Toronto Act, 2006* (the "*Toronto Act*"), which granted the city the power to legislate within several broad categories.[32] These powers are to "be interpreted broadly so as to confer broad authority on the city to enable the city to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues."[33] By the time the *Toronto Act* was introduced, many earlier by-laws were no longer sufficient to address changes to existing adult businesses and the introduction of adult businesses in new forms. In particular, concerns were raised by residents that adult businesses, such as body-rub parlours, were operating under the guise of holistic centres or traditional medicine centres. Although the *Toronto Act* enabled Toronto to respond without having to obtain specific provincial permission through statute, the city had only the same limited tools with which to work.[34] By and large, concerns raised by Torontonians are

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[27] Longo & Mascarain, *supra* note 18 at 2.
[28] Makuch et al., *supra* note 14 at p. 27-28; *City of Toronto Act, 1997*, S.O. c. 2, s. 7.
[29] Makuch, *ibid.* at p. 28.
[30] Longo & Mascarin, *supra* note 18 at 1.
[31] *Ibid.* at 1.
[32] *City of Toronto Act, 2006*, S.O. 2006, Chapter 11, Schedule A [*Toronto Act*].
[33] *Ibid.* at s. 6(1).
[34] Longo & Mascarin, *supra* note 18.

addressed through by-law enactment or amendment and zoning restrictions; cities cannot create new ways of governing.[35] By-laws are somewhat reactive mechanisms which do not enable cities to engage in constructive action. Thus, to address its homeless population, some city councillors tried to enact a zoning by-law which would enable private organizations or charities to establish shelters throughout the city.[36] Cities are largely unable to enact more prospective, constructive legislation which might create programs or incentives in an effort to reduce the homeless population.

Although legal tools available to cities remain limited to zoning regulation and passing by-laws, their sphere of legislative influence has expanded. This expansion has been driven by political as well as jurisprudential trends. Courts have demonstrated a reluctance to constrain cities from passing laws with a distinctly criminal flavour or from engaging in criminal enforcement behaviour with respect to particular areas, such as public order. In the case of adult businesses, it is important to consider the courts' treatment of challenges to municipal by-laws which regulate these businesses and of challenges to the regulation of these businesses under the criminal law. In respect of the latter, many adult businesses and performers are criminally charged with permitting or committing acts of "indecency". The courts' determination of what is indecent is often made in reference to its interpretation of what the community will tolerate. Thus the courts elucidation of what constitutes "indecency" is connected to, and often draws on, what the community prohibits through municipal by-law.

Canadian courts' approach to the authority of municipalities has paralleled the increased influence of the privatization project in political life. This shift from a restrictive to a more deferential approach is particularly evident when one considers topics that engage both federal and municipal authority. For example, while courts have always permitted municipalities to regulate subject areas with clear moral components, in the 19th and early 20th Centuries, they were only permitted to do so in a circumscribed fashion. Municipalities' power was limited to the enactment of by-laws "in the nature of police or municipal regulation of a merely local character to preserve in the municipality, peace and public decency, and to repress drunkenness

[35] Rust-D'Eye & Bar-Moshe, *supra* note 25 at I-6;
[36] Levi & Valverde, *supra* note 12.

and disorderly or riotous conduct".[37] Municipalities could thus pass local laws that applied to local matters, primarily in respect of maintaining peace and order in the community. Within this realm, courts were reluctant to enforce a bright-line distinction between federal criminal law and municipal (provincial) law, recognizing that some overlap between the two was acceptable. The courts' real concern was in determining how two sets of moral regulation – municipal and criminal – could coexist. Courts' determinations of the ambit of municipalities' power are fundamentally connected to decisions about what the federal law can and ought to address. As the privatization process unfolded, this correlation took an interesting turn. To demonstrate this shift, the following section surveys the courts' review of municipal regulation of adult businesses and demonstrates that courts have moved from a more traditional understanding of municipalities' role, which highly constrained their authority and power, to a more deferential perspective, which prioritizes the decentralization of political and social power to municipalities. As a consequence of this shift, many social and political issues that might previously have been addressed by the federal government are played out in the municipal field. Additionally, the courts' deference has made decisions made by municipalities, and the legislation they pass, of increasing importance in citizens' lives.

A Shifting Judicial Perspective and the Expansion of Municipal Authority

The Supreme Court of Canada (the "Supreme Court") established the extent to which municipal legislation may touch on federal spheres of power in *Westendorp v. R.* [*Westendorp*].[38] In *Westendorp*, the Supreme Court determined that a City of Calgary by-law that made it an offence to be on the street for the purposes of prostitution invaded exclusive federal power in relation to the criminal law. The Supreme Court found that the purpose of the by-law was "so patently an attempt to control or punish prostitution as to be beyond question".[39] It rejected arguments that the by-law was about the regulation of public nuisance – a permissible purpose for municipal by-laws – because it was introduced as a separate by-law, apart from the "public nuisance" by-laws, which sentences and definitions did not apply to the prostitution by-law.[40] In

[37] *Hodge v. The Queen* (1883), 9 App. Cas. 117 (Privy Council) at 131.
[38] [1983] 1 S.C.R. 43 (W.L.) [*Westendorp*].
[39] *Ibid.* ¶ 17.
[40] *Ibid.* ¶ 19.

finding that the by-law was not within the competence of the City of Calgary, the court strongly noted: "If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!"[41]

The *Westendorp* precedent guided later courts' assessments of several Ontario cities' attempts to exercise their newly-minted power to regulate adult businesses. In a trilogy of cases from 1984 and 1985, which would later be overruled, the Ontario Court of Appeal (the "Court of Appeal") found that municipal by-laws which set minimum dress codes for strippers were unconstitutional because their purpose was "the regulation of public morals and therefore an intrusion into Parliament's jurisdiction over the field of criminal law."[42] In *Re Nordee Investments Ltd. and City of Burlington* [*Nordee*], the Court of Appeal confirmed that the municipality of Burlington had the authority to enact a by-law regulating adult businesses, but found that the enacted by-law conflicted with the *Criminal Code*'s nudity and indecency provisions. The Court of Appeal found that the by-law's prohibition of the display of breasts and buttocks by dancers and others cast too wide a net.[43] Likewise, in *Sherwood Park Restaurant Inc. v. Markham (Municipality)*, the Court of Appeal determined that the regulation of "the dress or undress in an eating establishment of someone who has nothing whatever to do with the preparation, handling or serving of food or which has nothing whatever to do with any other legitimate object within principal jurisdiction is a clear attempt to regulate public morals and therefore is an attempt to legislate in the field of criminal law".[44] In *Re Koumoudouros and Municipality of Metropolitan Toronto*, the Court of Appeal cited this statement and added that "the true object and purpose" of Toronto's impugned dress code by-law was not "the regulation of the trade and business of an

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[41] *Ibid.* ¶ 22.
[42] Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (Purich Publishing, 1996) at 12-13. The trilogy of dress code cases is: *Re Nordee Investments Ltd. and City of Burlington* (1984), 48 O.R. (2d) 123, 13 D.L.R. (4th) 37, 27 M.P.L.R. 214 (W.L.) (finding that bylaw conflicted with Criminal Code s. 170(1) re: nudity) [*Nordee Investments*]; *Re Sherwood Park Restaurant Inc. and Town of Markham; Re Wendy and Town of Markham* (1984), 48 O.R. (2d) 449, 14 D.L.R. (4th) 287, 16 C.C.C. (3d) 95 (W.L.) [*Sherwood Park*]; and *Re Koumoudouros and Municipality of Metropolitan Toronto* (1985), 52 O.R. (2d) 442, 24 D.L.R. (4th) 638, 23 C.C.C. (3d) 286 (W.L.) [*Koumoudouros*].
[43] *Nordee Investments*, *ibid.* ¶ 36. The Court of Appeal determined that one could obey the criminal law while being in violation of the by-law.
[44] *Sherwood Park*, *supra* note 42 ¶ 6.

adult entertainment parlour, but the regulation of public morals".[45]

The dress code trilogy marks a judicial high point in the Ontario courts' maintenance of the boundary between criminal and municipal laws. The cases are interesting on several levels. First, despite municipalities' submissions to the contrary, the courts had no difficulty determining that the dress code by-laws were, in substance, about the regulation of public morals and not about the regulation of businesses. Second, the by-laws were deemed to be overbroad in the sense that they did not sufficiently target adult businesses; rather, municipalities banned nudity or toplessness in "any establishment" offering "any service". As will be discussed below, municipalities responded to these concerns by isolating adult businesses from other businesses and by enumerating, specifically, what behaviour and dress was and was not permitted. Third, the dress code trilogy marked a divergence from the prevailing authority. This divergence led the Supreme Court to find in a later decision that the dress code trilogy was wrongly decided.[46] Generally, municipal by-laws are seen to wrongfully interfere with the criminal law if the by-law and the *Criminal Code* "are telling citizens to do inconsistent things" or if "compliance with one is defiance of the other".[47] In the dress code trilogy, however, this conflict was re-characterized.

The permissible extent of overlap between municipal/provincial and federal law was addressed a few years later by the Supreme Court in *Rio Hotel v. New Brunswick (Liquor Licensing Board)* [*Rio Hotel*].[49] In *Rio Hotel*, the Supreme Court considered whether a provincial prohibition against issuing liquor licenses to establishments offering nude entertainment could operate notwithstanding the more general but related prohibitions against nudity contained in the *Criminal Code*.[50] In his concurring judgment, Chief Justice Dickson made the finding that the provincial law was valid and that such regimes could co-exist. In his judgment, he found that while there was "some overlap between the licence condition precluding nude entertainment and various provisions of the *Criminal Code*, there is no direct conflict. It is perfectly possible to

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[45] *Koumoudouros, supra* note 42 ¶ 4.
[46] *R. v. Mara*, [1997] 2 S.C.R. 630 (W.L.) [*Mara, SCC*].
[47] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 (S.C.C.) (W.L.).
[49] *Rio Hotel v. New Brunswick (Liquor Licensing Board)* [1987] 2 S.C.R. 59 [*Rio Hotel*] (W.L.).
[50] *Ibid.* ¶ 3

comply with both the provincial and the federal legislation."[51] In respect of jurisdiction, the Supreme Court found that in determining local questions of "peace and public decency", municipalities might necessarily pass legislation in areas already governed by federal criminal law. In his leading judgment, Justice Estey distinguished this case from *Westendorp* on the basis that in the latter, "the prostitution provision could not be said to relate to any head of provincial jurisdiction".[52] Similarly, His Honour found that the dispositions in the dress code trilogy were wrong because the dress code restrictions were connected to a valid municipal (provincial) licensing scheme.[53] In general, the Supreme Court determined that provided that a provincial or municipal scheme was clearly connected to an area within its jurisdiction and did not conflict with the criminal law, it would likely be upheld as a valid exercise of local power.

In the journey from *Westendorp* to *Rio Hotel*, the courts showed an increasing willingness to allow municipal intervention in matters of morality, provided these interventions were connected to an area of municipal authority. In particular, after *Rio Hotel*, the courts signalled to municipalities that they could enact adult business regulations that were more definitively and broadly moralistic. In this respect, the reasoning in *Rio Hotel* intimated that courts would be reluctant to parse moral and social concerns in evaluating cities' legislation, provided the impugned legislation could be justified by reference to municipalities' jurisdiction. Since municipalities are not prevented from passing legislation in areas already governed by federal criminal law, they in effect pass "shadow" criminal legislation.[54] This development, moreover, connects to the evolution of the courts' interpretation of the *Criminal Code*'s indecency provisions. Courts have taken an increasingly liberal approach to what is considered criminally indecent. Yet, when courts have restricted the intervention of the criminal law (by dismissing indecency charges) municipalities have responded by passing by-laws banning those activities. Further, given courts' increasing willingness to defer to municipal law-making, many of these by-laws have been upheld. Courts also defer to municipalities in the very determination of whether an activity is criminally indecent by citing municipal by-laws which regulate or prohibit

[51] *Ibid.* ¶ 6.
[52] *Ibid.* ¶ 7.
[53] *Ibid.* ¶ 38.
[54] Wayne A. Logan, "The Shadow Criminal Law of Municipal Governance" (2001) 62 *Ohio State Law Journal* 1409.

an activity as proof that it is not tolerated by the community and is thus indecent. Although it is beyond the scope of this paper to review the long history of Canada's judicial dance with notions of indecency and obscenity – ground skilfully covered by other authors – a brief review of pertinent case law is necessary to understand how courts have scaled bank the criminal regulation of adult businesses and allowed for, and encouraged, municipal regulation.

Although numerous earlier cases addressed its definition under the *Criminal Code*, the decision in *R. v. Tremblay* [*Tremblay*"] arguably marked the beginning of an era of more liberal interpretation of what constitutes indecency.[55] Mr. Tremblay, the owner of a Montreal club called the "Pussy Cat" was charged with keeping a common bawdy-house for practices of indecency pursuant to s. 210(1) of the *Criminal Code*. The "Pussy Cat" was a private dwelling adorned with a plaque that read "Pussy Cat", in which establishment nude dancers would perform for clients in private rooms which contained a mattress and a chair. While the dancers performed, a majority of their clients masturbated. The club had a rule against physical contact which was strictly enforced by staff which monitored the private rooms by way of a peep hole in the door. At trial, the judge dismissed the charges against Mr. Tremblay. In the view of the majority of the Supreme Court, the trial judge had properly applied the test for indecency: the community standard of tolerance test.[56] Pursuant to the test, a particular activity or item is considered indecent if it is something that "Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it."[57] The majority found that in applying this test, the trial judge had properly relied on evidence that masturbation is tolerated by the Canadian community, that the activities in strip bars were similar, and that the police also tolerated these activities.[58] In upholding the trial judge's finding that neither the actions of the dancers nor the acts of masturbation constituted indecent acts, the majority of the Supreme Court specifically relied on the facts, which demonstrated that the acts occurred in a relatively private, closed room with only consenting adults present and that the no-touching rule meant that there was no harm or risk of harm to anyone, including the transmission of sexual diseases.

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[55] *R. v. Tremblay*, [1993] 2 S.C.R. 932 (WL) [*Tremblay*].
[56] *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (WL).
[57] *Towne Cinema Theatres v. The Queen*, [1985] 1 S.C.R. 494 (WL) ¶ 508.
[58] *Tremblay*, *supra* note 55 ¶ 51 & 60.

Following *Tremblay*, a similar charge and case came before the Ontario courts. In *R. v. Mara*, [*Mara*] the owners of Toronto's Cheaters Tavern were charged with permitting an indecent performance, in violation of the *Criminal Code*.[59] The indecent performances were alleged to involve, among other things, dancers appearing nude except for an open shirt or blouse, a dancer performing a lap-dance, and a dancer permitting the customer to touch and fondle her.[60] The trial judge dismissed the indecency charges on the basis that conduct occurring in an adult entertainment establishment – such as touching, lap-dancing, and permitted fondling – was not indecent.[61] In so deciding, the trial judge found that the conduct complained of was "innocuous by comparison to the conduct dealt with by the Supreme Court" in *Tremblay* and by the Court of Appeal in another case.[62]

Following this decision, lap-dancing became a popular form of entertainment in Toronto as club owners and dancers were confident that performing or permitting lap-dancing (and the conduct described in *Mara*, generally) would not put them in violation of the *Criminal Code* bawdy-house or other indecency provisions.[63] The City of Toronto responded to this trend, however, by passing a by-law prohibiting lap-dancing. The by-law, which came into force on August 25, 1995, prohibited physical contact, including touching between dancers and patrons.[64] A month after it came into force, in *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)* [*Adult Entertainment*], the Divisional Court upheld the by-law on the basis that it was not persuaded that its primary purpose was to legislate morality.[65] The Divisional Court found that the pith and substance of the by-law was "the protection of health and safety of persons in adult entertainment parlours, and the prevention of crime in licensed establishments."[66] These purposes, moreover, were within the city's authority. Certainly, by this time, the creation of the unified City of Toronto had been set in motion and its and other cities'

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[59] *R. v. Mara*, [1994] O.J. No. 264 (Prov. Div.) (WL) [*Mara, Prov. Ct.*].
[60] *Ibid.* ¶ 19.
[61] *Ibid.* ¶ 32.
[62] *Ibid.* ¶ 30. See: *Regina v. Hawkins, Jorgensen, Ronish and Ronish, and Smeenk* (1993), 15 O.R. (3d) 549 (C.A.).
[63] *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)* (1995), 29 M.P.L.R. (2d) 141, 101 C.C.C. (3d) 491 (Ont. Div. Ct.) (WL) [*OAEBA*] ¶ 36 and 31, the latter quoting the affidavit of Theodoros Koumoudouros, owner and operator of two adult entertainment parlours in Toronto: House of Lancaster I and House of Lancaster II.
[64] *Ibid.* ¶ 33; City of Toronto, By-law No. 129-95.
[65] *Ibid.*
[66] *Ibid.* ¶ 48.

responsibilities were being expanded further than ever before.[67] The Divisional Court was willing to support this devolution of power to Toronto, finding that the lap-dancing by-law provisions were not criminal in nature. Drawing on the language in *Rio Hotel*, the Divisional Court also found that while there was some overlap between the touching prohibition and the indecency and immorality provisions of the Code ("touching or other forms of physical contact may or may not offend the criminal law, depending on the circumstances"[68]) the by-law did not directly conflict with the criminal law: the by-law and the Code could "live together".[69]

Six months after the city introduced its prohibition on lap-dancing, and a few months after the Divisional Court upheld it (which decision was under appeal to the Court of Appeal), the Court of Appeal overturned the lower court's decision in *Mara*.[70] In so doing, the court found that, contrary to the trial judge's findings, the community standard of tolerance would not permit the activities that took place in Cheaters Tavern. In particular, the conduct, and the public context in which it took place, was deemed to be harmful to society:

> It degrades and dehumanizes women and publicly portrays them in a servile and humiliating manner, as sexual objects, with a loss of their dignity. It dehumanizes and desensitizes sexuality and is incompatible with the recognition of the dignity and equality of each human being. It predisposes persons to act in an antisocial manner, as if the treatment of women in this way is socially acceptable and is normal conduct, and as if we live in a society without any moral values.[71]

These findings, while seemingly impressionistic, supported the court's determination that the Canadian community would not tolerate these activities, or these effects. In support of its finding that the activities were harmful, the Court of Appeal cited the City's lap-dancing by-law, with Chief Justice Dubin writing that "apart entirely from the validity of the by-law, I think it demonstrates that the performances of the "dancers" in this case goes beyond the community standard of tolerance, and is indecent".[72] That the by-law was ostensibly enacted in response to an earlier court ruling which found such activities to be non-criminal was not noted. Further,

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[67] See, *supra*, note 36 and accompanying text.
[68] *OAEBA*, *supra* note 63 ¶ 53.
[69] *Ibid.* ¶ 53.
[70] *R. v. Mara* (1996), 27 O.R. (3d) 643 (WL) [*Mara, OCA*].
[71] *Ibid.* ¶ 28.
[72] *Ibid.* ¶ 49. Notably, "dancers" is written in quotation marks in the judgment.

that the by-law responded to activities in which many Torontonians participated might certainly undermine the argument that it reflected the community's standards. Interestingly, in the perspective of the Court of Appeal, it was the opinion of those who disliked these activities that represented "the community". The codification of this perspective in municipal law gave a particular perspective significant persuasive power and authority. Additionally, it defined some individuals as illicit, thrusting them outside the confines of community membership once again. For Mr. Mara and the other accused, it meant that they might once again be subject to criminal charges.

Invariably, following this decision, courts continued to uphold various municipal prohibitions against lap-dancing and touching in adult entertainment establishments. In 1997, the Supreme Court's upheld the Court of Appeal's finding in *Mara*,[73] and the Court of Appeal upheld the Divisional Court's decision in *Adult Entertainment*.[74] The theoretical perspective of these decisions was given added support after the 2001 decision in *Spraytech v. Hudson (Ville)* [*Spraytech*].[75] In *Spraytech*, the Supreme Court upheld the town of Hudson, Quebec's ban on the use of pesticides for lawn care and related uses, even where the same pesticides were considered non-toxic by provincial and federal regulators.[76] Although municipalities are not able to ban pesticide use altogether, being limited to regulating their use, they can "severely curtail their use even with little evidence of toxicity".[77] In her majority decision, Justice L'Heureux-Dubé concluded that Quebec (provincial) law grants its municipalities "general welfare" powers – "in other words, a police power".[78] As Levi and Valverde point out, this decision marked the most recent and perhaps most definitive aspect of a changed perspective towards cities, with the Supreme Court ruling that lower courts should "respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens ...".[79] Of course, Levi and Valverde also note that "despite

[73] *Mara, SCC*, *supra* note 46.
[74] *Ontario Adult Entertainment Bar Assn. v. Metropolitan Toronto (Municipality)* (1997), 35 O.R. (3d) 161 (Ont. C.A.) (WL) [*OABA, Appeal*].
[75] *Spraytech v. Hudson (Ville)*, [2001] 2 S.C.R. 241 (S.C.C.) (WL).
[76] Levi & Valverde, *supra* note 12 ¶ 26.
[77] *Ibid.* ¶ 26.
[78] *Ibid.* ¶ 26.
[79] *Ibid.* ¶ 26; *Spraytech, supra* note 75 ¶ 23.

the increased judicial willingness to interpret municipal authority broadly, Ontario cities may have gained little by way of new powers or by way of greater flexibility in exercising old powers through their legislation".[80] The courts have thus taken part in the devolution of power to cities, ensuring that they are permitted more deference in exercising their broadened power. What cities are able to do, however, is in practice no different than in the days of *Westendorp*.

Following *Spraytech*, courts have increasingly interpreted "indecency" under the *Criminal Code* in reference to cities' definition of what the community will tolerate. Most significantly, in *Labaye v. R.* [*Labaye*], the majority of the Supreme Court drew on its earlier decision in *Mara* in determining that "in cases of indecency, like obscenity, the community standard of tolerance test amounts to a test of harm incompatible with society's proper functioning".[81] In *Labaye*, the appellant, Mr. Labaye, was convicted at trial of keeping a "common bawdy-house" for the "practice of acts of indecency" under s. 210(1) of the *Criminal Code*. The issue before the Supreme Court was whether the activities that took place in his establishment were indecent within the meaning of the criminal law.[82] Mr. Labaye operated a private club, the purpose of which was to permit couples and single people to meet for group sex.[83] His club, Club L'Orage, had three floors, the third of which contained his "apartment", the door to which was locked with a numeric key pad."[84] Members of the club were supplied with the appropriate code and permitted to access the third floor apartment, where the group sex took place.[85] In finding that the activities in Club L'Orage were not indecent, the majority of the Supreme Court articulated that an activity is indecent if it results in one of three types of harm: interference with the autonomy and liberty of members of the public through unwanted exposure to the conduct at issue; inducing anti-social attitudes through demeaning, abusive, or humiliating treatment of any individual or group; or causing physical or psychological harm to the participants.[86] The

[80] Levi & Valverde, *supra* note 12 ¶ 62.
[81] *R. v. Labaye*, 2005 SCC 80 (WL) ¶ 23.
[82] *Ibid.* ¶ 1.
[83] *Ibid.* ¶ 5.
[84] *Ibid.* ¶ 6.
[85] *Ibid.* ¶ 7.
[86] *Ibid.* ¶ 40 -48.

majority stressed that these harms (and any future harms that might be discovered) are those which "society *formally recognizes* as incompatible with its proper functioning".[87]

Thus, in *Labaye*, the "community standard of tolerance" is rearticulated as a test of fundamental values. Presumably, these values are those that have been given formal recognition in the *Charter of Rights and Freedoms*. The majority suggested that "the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values".[88] Thus, in *Labaye*, the Supreme Court overturned Mr. Labaye's conviction, finding that the operation of a private sex club was not indecent as it did not engage the harms identified or undermine significant Canadian values. It has been suggested that the implications of this decision for adult businesses may be *de facto* decriminalization.[89] As the courts' scale back or limit criminal intervention in private clubs, strip clubs, or body-rub parlours, however, it is likely that the courts' deference to municipal interference in these kinds of businesses will continue.

Indeed, courts have embraced and applied the theory of deference when considering provisions that apply to adult businesses. In 2007, the Court of Appeal upheld a City of Ottawa by-law which prohibited touching between dancers and customers and which required that all live entertainment or services be performed in open designated entertainment areas.[90] This and other decisions have provided a seemingly open door to municipalities' increasing restrictions on adult businesses, some of which do not coincide with the criminal law standards. For instance, courts have permitted municipalities to prohibit private rooms,[91] even though according to the test in *Labaye*, these rooms might not violate the criminal prohibition against indecency. The municipal law has in many ways become more restrictive than the criminal law, a concern raised in the dress code trilogy. Yet, while municipal laws have become more restrictive, trial judges have continued to apply the test in *Labaye* in a liberal manner. In *R. v. Ponomarev*

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[87] *Ibid.* ¶ 32 [emphasis in original].
[88] *Ibid.* ¶ 33.
[89] Elaine Craig, "Re-Interpreting the Criminal Regulation of Sex Work in Light of *R. c. Labaye*" (September 2008) 12 *Canadian Criminal Law Review* 327; Don Stuart, "Annotation" in *R. v. Labaye*, 2005 CarswellQue 11495.
[90] *Adult Entertainment Assn. of Canada v. Ottawa (City)* 2007 ONCA 389 (WL).
[91] See *OABA Appeal, supra* note 73.

[*Ponomarev*"],[92] for example, an Ontario trial judge dismissed charges against the defendant body-rub parlour owner which were identical to those that had been laid against Mr. Labaye. In finding that the case for indecency had not been made out, the trial judge relied on several pertinent facts. In particular, he cited the privacy of the body-rub rooms, the voluntariness of the client and the body-rubber, and the isolated industrial area in which the body-rub parlour was located.[93] These facts resembled those relied upon in *Labaye*; the existence of a private, locked floor and the consent of all practitioners lent support to the Supreme Court's finding that the activities were not indecent. In *Ponomarev*, on the basis of a finding of similar facts, the trial judge determined that the Crown had not met its obligation to prove beyond a reasonable doubt that "the practice of acts of indecency" was present.[94]

In *Labaye* the Supreme Court attempted to articulate a new test that would better reflect what activities the community (or "society", to which the judgment referred) recognized as indecent. The decision appears to have reframed the test of indecency as one involving fundamental values rather than a community standard of tolerance. Regardless of the test used in the determination of indecency, it is mostly irrelevant for practical purposes. Given the courts' general deference to municipal regulation, it is likely that community standards will continue to have an impact as they are reflected in the municipal law. This analysis applies beyond the criminal realm, as evidenced by the subject matter in *Spraytech*. Municipal law is of increasing importance in reflecting the community's moral standards as well as other notions of what makes for a good life and a good community. Indeed, an effect of devolution has been a renewed focus on the community as the site of appropriate norm generation.[95]

Thus, contemporary Canadian municipalities, endowed with considerably broad law-making power, have taken on a larger administrative role and have used by-laws to define boundaries between people and places in an attempt to define the community.[96] While historically the

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[92] *R. v. Ponomarev*, [2007] O.J. No. 2494 (Ont. Ct. J.) (WL).
[93] *Ibid.* ¶ 29.
[94] *Ibid.* ¶ 30.
[95] Schragger, *supra* note 26 at 374.
[96] *Ibid.* at 408-413: in discussing Chicago's Gang Congregation Ordinance the "boundary-creating" role of local norms and questions the usefulness of permitting communities to use local legislation (through zoning and otherwise) in response to social problems.

concept of "community" has enjoyed symbolic and emotional appeal, in its most recent incarnation it has served to bring about "tangible changes in methods of governance and, as importantly, how social problems are conceived and the means by which such problems should be addressed".[97] In particular, municipalities have focused on boundary-creation through the articulation of local norms: "in this community, we will not tolerate...". In so doing, however, municipalities define who or what is desired in the community and who or what (undesirables) is not.[98] In this respect, municipal regulation is increasingly used to define who is "in" and who is "out" of the community.

There is an immense amount of critical literature about the way in which municipal regulations are used to define community. Many scholars have focused how municipalities have used their limited tools – zoning and by-laws – to exclude unwanted individuals and activities from public places, thus limiting their membership in the community, as described above. Scholars have explored how in reaction to homelessness,[99] outdoor prostitution,[100] gangs,[101] and myriad other "social" or "public" problems, municipalities throughout North America have passed legislation to regulate public space in an attempt to rid their streets of these elements. In their analyses, scholars have sketched two major themes which underlie this sort of community-making: they suggest that municipalities have sought to control problem activities (and people) by introducing legislation which "purifies" [102] and privatizes space. These processes, moreover, are intimately connected to the privatization project detailed above. As power is decentralized to the municipal level, and as courts and legislators employ discourse which idealizes and supports this movement, it is left to cities to shape the consequences of this ideological shift. Partly restricted by limited legislative tools and partly emboldened by the absence of resistance from other levels

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[97] Logan, *supra* note 55 at 1412-1413.
[98] Schragger, *supra* note 26 at 375: "Thus, proponents of the Gang Congregation Ordinance support Chicago's inner-city neighborhoods' decision to defend themselves as do many wealth, suburban neighborhoods: by excluding (through zoning or otherwise) undesirable uses of space, and, by extension, undesirables."
[99] See, for example, Donald Saelinger, "Nowhere to Go: The Impact of City Ordinances Criminalizing Homelessness" (Fall 2006) 13:3 *Georgetown Journal of Poverty Law and Policy* 545.
[100] See, for example, Lisa E. Sanchez, "Enclosure Acts and Exclusionary Practices: Neighborhood Associations, Community Police, and the Expulsion of the Sexual Outlaw" in David Theo Goldberg, Michael Musheno, and Lisa C. Bowter, eds., *Between Law and Culture: Relocating Legal Studies* (Minneapolis: University of Minnesota Press, 2001) 122.
[101] Schragger, *supra* note 26.
[102] Damian Collins and Nicholas Blomley, "Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities" in Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003) 40 at 40.

of government – particularly in the realm of criminal law – cities have embarked on a law-making journey over the past thirty years which has drastically reshaped the role of cities and the lives of city-dwellers, as well as definitions of who belongs in the community and of whose ideas the community ought to reflect.

Part II: The Critical Literature: Municipal Legislation and Forces of Marginalization

The increase in legislative and judicial support for municipal decision-making has generated "tangible changes in methods of governance and, as importantly, how social problems are conceived and the means by which such problems should be addressed".[103] As power is deferred to municipalities by higher levels of government and with the support of courts, cities have used by-laws to define new areas of public (municipal) control and to respond to citizens' demands for government action in response to various problems. As municipal authority expands the range of problems that cities must address also increases. In response to some of these concerns, municipalities have passed by-laws that restrict public activities and behaviour, which are often referred to as "civility laws".[104] Civility laws have been extensively critiqued by the legal community, including by lawyers and scholars in Toronto.[105] These critiques are pertinent to any discussion of devolution of legislative power as they underscore some of the consequences of municipal legislative efforts. In the following section, I review these critiques and highlight their focus on certain negative effects of municipal law-making. Thereafter, and in the following sections, I use the example of Toronto's regulation of adult businesses to demonstrate how, in addition to these effects, municipal regulation has a transformative power that the existing literature has failed to explore or explain, but which deserves further analysis.

Any critical discussion of municipal regulation and the creation of community invariably includes a review of the privatization project and its impact on traditional conceptions of "public" and "private". As Janet Mosher suggests, "the public/private divide occupies a central

[103] Logan, *supra* note 55 at 1412-1413.
[104] Beckett & Herbert, *supra* note 9 at 9.
[105] See Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer and Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 41; Collins & Blomley, *supra* note 102.

place in liberal thought".[106] The divide between public and private is often conceived as a bright line distinction, with the public as the antithesis, or opposite, of the private; the values of one incompatible with the other.[107] Broadly, norms associated with private space are those of "exclusion and partiality" and those associated with the public are those of "fairness, equality and impartiality".[108] Standard archetypes of public and private space are the public street and the private home. As traditionally conceived, public spaces like the street are open to everyone, often held in common for all. Private space is considered exclusive, access to which is legitimately controlled and selective. In addition to the exclusivity of norms, it is also expected that only certain uses will be made of each type of space. Thus, traditionally private behaviours are believed to have no place in public space and *vice versa*; one is expected to sleep in one's bedroom, but not on the street. Of course, there are many places, such as movie theatres and shopping malls, which are seemingly both public and private and where one may be expected to engage in a private behaviour (disrobe) in an otherwise public place (a store). While somewhat discordant, these exceptions are recognized and tolerated. Problem activities (and people) primarily pose a challenge to social order because they blur the distinction between public and private. The transgression of social norms "creates a sense of unease, which is often seen as disruptive to society", and which "is dealt with through socio-spatial control".[109] When this blurred distinction is connected with other anxieties, however, such as concerns about sex and sexuality, demands for a legislative response to control or curtail such behaviour often follow. In responding to myriad demands, from constituents to the interests of capital, municipalities have engaged in legislative processes by which public space is redefined as private space. Nowhere is this "privatization" more evident than in the regulation of the homeless and in the related phenomenon of legislation that restricts activities in public space.[110]

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[106] Mosher, *ibid*. at 41.
[107] *Ibid.* at 41-42.
[108] *Ibid.* at p. 42.
[109] Marcia England, "Stay Out of Drug Areas: Drugs, Othering and Regulation of Public Space in Seattle, Washington" (2008) 12:2 *Space and Polity* 197 at 199.
[110] See Mosher, *supra* note 105; Collins & Blomley, *supra* note 102; Saelinger, *supra* note 99; Randall Amster, "Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness" (2003) 30:1 *Social Justice* 195; Jason Leckerman, "City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless' Ordinance in Philadelphia" (2001) 3 *U. Pa. J. Const. L.* 540; Don Mitchell, "The Annihilation of Space By Law: The Roots and Implications of Anti-Homeless Laws in the United States" (1997) 29:3 *Antipode* 303; Patrick Parnaby, "Disaster through Dirty Windshields Law, Order and Toronto's Squeegee Kids (Summer 2003) 28:3

Panhandling is an activity that blurs the distinction between public and private. In part, it resembles an economic or "market" activity that "has occupied the heart of the private realm within much liberal thought".[111] Yet, it is also a public act which may be made subject to "prohibitive public regulation in the form of by-laws restricting when, where, and how it can occur."[112] Thus, contemporary regulations prohibit not necessarily the bodies themselves, but the activities in which those bodies engage.[113] In the case of anti-panhandling (and other "civility laws"), the prohibited activities are conspicuously those "most often associated with persons in dire financial need."[114] Rather than prohibit "sitting", for example (which many panhandlers do, but which non-panhandlers might also do), these by-laws might prohibit sitting for an extended period of time within a certain distance of a shopping mall or business complex. Additionally, these laws prohibit activities that are expected to take place in private: "without a home, many private functions associated with the home (sleeping, bathing, eating) must be performed in public places, visible to anyone who cares to look."[115] Indeed, these laws "have the effect of criminalizing common behaviors—such as drinking, sleeping and urinating—when those behaviors occur in public spaces, and therefore have a disproportionate impact on the homeless".[116] For Janet Mosher, this disproportionate impact on the poor confirms the presence of privatization; given its association with partiality and exclusion, an increase in private space means the further marginalization of certain individuals and their uses of space in favour of others.[117]

While Mosher and the other scholars discussed in this paper strongly criticize these laws, others argue that they are appropriate responses to crime and criminality.[118] According to the "broken

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Canadian Journal of Sociology 281; Jeremy Waldron, "Homelessness and Community" (2000) 50 *University of Toronto Law Journal* 371; Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39 UCLA Law Review 295 [Waldron, "Freedom"].

[111] Collins & Blomley, *supra* note 102 at 40.

[112] *Ibid.* at 40.

[113] Mosher, *supra* note 105 at 50.

[114] *Ibid.* at 50.

[115] *Ibid.* at 46.

[116] Beckett & Herbert, *supra* note 9 at 9.

[117] Mosher, *supra* note 105 at 51.

[118] Influential scholarship includes Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing" (1997) 97 *Colum. L. Rev.* 551; Robert Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning" (1996) 105 *Yale L. J.* 1165; and Dan Kahan and Tracey Meares, "When Rights are Wrong" (April/May 1999) *Boston Review*, online: http://bostonreview.net/BR24.2/meares.html.

windows" theory, which became popular in some criminological and sociological circles, visible displays of crime and poverty must be eliminated as they are sources of further crime and poverty. Neighbourhoods will only improve and crime will only be eradicated, they argue, if we take seriously this visible display of social problems and take steps to eliminate them. Of course, while scholars are seemingly divided on the merits of these laws, the overwhelming majority argue that they are problematic and inherently unfair to particular, marginalized groups.[119]

Privatization is a multi-faceted process that involves a simultaneous expansion of private places and a constriction of public spaces. It also involves a focus on particular interests at the expense of others. Thus, anti-panhandling laws are seen to serve the private interests of business or property owners who want to remove undesirable people and exclude undesirable activities from the public sidewalks in front of their homes and businesses. It is in this manner that public spaces are "privatized". Conceptually, private space is exclusive and accessible only to designated individuals or groups; privacy acts as a shield to keep the public out. In the case of the homeless, however, there is "no space to which they can control access; rather they constantly brush up against the private property claims of others, which are used to exclude them and to deny them shelter, warmth and comfort."[120] Once the public places in which the homeless live or in which activities such as squeegeeing and panhandling occur are privatized, more private property claims may be made. Indeed, in the 20th century, "private spaces devoted to consumption, leisure, and luxury (supplemented by private and public security agents) have expanded" while public spaces have contracted.[121] This regulation of space is "privatization; the norms of partiality (the interests of the middle and upper classes are preferred and protected) and exclusion (of the economically marginalized) are both present."[122]

The privatization of public space may be achieved through activities such as the fencing of formerly public parks or lots, the introduction of private security into public spaces, and the large-scale gentrification of public housing developments. Collins and Blomley argue that anti-panhandling legislation is part of this "effort to purify the urban landscape, to create the right

[119] See Mosher, *supra* note 105; Collins & Blomley, *supra* note 102; Mitchell, *supra* note 110.
[120] Mosher, *ibid*. at 45-46.
[121] Beckett & Herbert, *supra* note 9 at 7.
[122] Mosher, *supra* note 105 at 45-46.

image to attract both domestic middle-class consumers and international capital".[123] As anti-panhandling regulations remove unwanted populations "by the force of law and money" from "new spaces of consumption and development", they also remove "images of alternative identity" through the control of public space and public identity.[124] Certainly, for some municipalities, this exclusion approach is intentional. Former New York Mayor Rudolph Guiliani declared that "the removal of poor people in areas slated for redevelopment was 'not an unspoken part of our strategy. That [was] our strategy'".[125] This strategy, moreover, is intended to privatize space in order to feed the "aggressive demands of market capital".[126] Once legislation to restrict public space and to expand private control is passed, the state becomes a "servant of the market, rather than a check to the market. As it relies more on the corporate populism of private consumers and less on public citizens, it elaborates its rhetoric and its institutions to a normalized population and its forms of privacy."[127] As Michael Warner argues, whether any one individual wants to live next door to a porn shop is "irrelevant to the question whether porn shops should be allowed next door by law."[128]

While the public is eroded through privatization, privacy itself is made into a precious legal commodity, with privacy protections reserved for those who already engage in normative behaviour and whose identities subscribe to existing ideals.[129] Thus, privacy does not apply to "intimate associations, or control over one's body, or for sexuality in general, but only for the domestic space of heterosexuals".[130] Anti-panhandling legislation, for instance, erodes the privacy of panhandlers, as anti-homeless legislation erodes the privacy of the homeless. As always-public bodies, the homeless are deprived of privacy. Privacy is thus not only a space that can be carved out against intruders, but a tool that belongs to a particular group, which subscribes to particular norms. Thus, the imposition of civility laws is, in the words of Jeremy Waldron, "one of the most callous and tyrannical exercises of power in modern times by a

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[123] *Ibid.* at 51.
[124] Jeff Ferrell, "Remapping the City: Public Identity, Cultural Space, and Social Justice" (2001) 4:2 *Contemporary Justice Review* at p. 175. See also: Amster, supra note 125 at 199.
[125] Beckett & Herbert, *supra* note 9 at 17.
[126] Michael Warner, "Zones of Privacy" in Judith Butler, John Guillory, and Kendall Thomas, *What's Left of Theory? New Work on the Politics of Literary Theory* (New York: Routledge, 2000) 75 at 84.
[127] *Ibid.* at 85.
[128] *Ibid.* at 107.
[129] *Ibid.* at 94.
[130] *Ibid.*

(comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings".[131] It is this majority that wields this tool to the disadvantage the poor, the sexual dissidents, and any other group that cannot or can no longer claim the protection of privacy.

In addition to the concept of privatization,[132] scholars have argued that the introduction of laws that govern and regulate space must be understood as part of a project of purification.[133] In particular, municipal regulation of the sex industry and of homelessness has proved fertile ground for the application of these ideas. Both privatization and purification rely on a process of exclusion whereby dissident bodies and practices are written off the pages of the city. It matters not whether these bodies seek refuge in traditionally public or private places; what is necessary is only that their presence or actions challenge established norms. Certainly, the more visible the non-normative practice, the more likely a group will be targeted. Even if a practice takes place in private, however, it may still be defined as a social (public) problem and subjected to regulation. In these cases, private acts are made public and identified as potentially threatening to the public because they are seen to seep from the private into the public, where they do not belong. In all respects, such legislation creates a discursive "other" by regulating dissident groups or activities in a manner that identifies them as apart from or unlike those who belong in the community. This process cleanses public space of threatening elements and isolates the dissident as the target for the community's anxieties, however diffuse.

The process of purification is based on the notion of abjection, which was first expressed in psychoanalytic literature and in the research of Mary Douglas.[134] The theory of abjection contends that when faced with the unclean or the taboo one's response is to reject it or to cast it

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[131] Waldron, "Freedom", *supra* note 110 at 321.
[132] See Amy Adler, "Girls! Girls! Girls!: The Supreme Court Confronts the G-String" (October 2005) 80 *New York University Law Review* 1108; Phil Hubbard, Roger Matthews, Jane Scoular and Laura Agustín, "Away from prying eyes? The urban geographies of 'adult entertainment'" (2008) 32 *Progress in Human Geography* 363; Beckett & Herbert, *supra* note 9.
[133] See: Penny Crofts, "Brothels and Disorderly Acts" (2007) 1:2 *Public Space: The Journal of Law and Social Justice* 1 [Crofts, "Disorderly Acts"]; Kate Sutherland, "Legal Rites: Abjection and the Criminal Regulation of Consensual Sex" (2000), 63 *Sask. L. Rev.* 119 [Q.L.].
[134] See Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Routledge, 2002); William Miller, *The Anatomy of Disgust* (Cambridge, Mass.: Harvard University Press, 1997); Julie Kristeva, *Powers of Horror: An Essay on Abjection*, trans. Leon S. Roudiez (New York: Columbia University Press, 1982). For a discussion about abjection and Canadian criminal law, see: Sutherland, *ibid.*

out, creating a boundary between oneself and the abject.[135] This process inherently requires the identification of an abject or polluting element. Primarily, objects that are abject or polluting are those that are "out of place". According to Douglas, humans have a predilection to create clear-cut classifications of the objects in our world. Objects that are out of place are considered "dirty" and are disturbing to us. An example of an object out of place is a human hair found in one's food; an object that might in its rightful place be described as beautiful is, when out of place, disgusting. It is disgusting because, as Douglas suggests, we consider individuals, things, or ideas that cross lines or boundaries as polluted and polluting – they are disorderly and threaten disorder. As Penny Crofts describes it, Douglas's theory shows that "[t]aboo and dirt are regarded as dangerous in part because of their potential for instigating change".[136] Thus, Crofts suggests that in response to disorder, which disgusts and frightens us, "we can seek to eliminate, punish, expunge or condemn the offending substance, or we can change our systems of order, at the individual or social level, to incorporate and accept the anomalous or ambiguous".[137]

In her analysis of New South Wales's regulation of legalized brothels, Crofts invokes William Miller's discussion of disgust to explain how municipal regulation is used to achieve the goals of purification.[138] Drawing on Miller's analysis, Crofts explains that disgust is a moral and social sentiment that conveys aversion to something that is perceived as dangerous because it has the power to "contaminate, infect, or pollute by proximity, contact, or ingestion".[139] Municipal regulation responds to concerns of pollution by regulating space to isolate and eliminate the sources of disgust. In part, municipal law is ideally situated to respond to concerns about pollution and contamination. In Canada, as is noted above, municipalities have been accorded responsibility for maintaining the health and safety of citizens. Thus, when citizens raise concerns about the polluting effects of various activities or individuals, they often employ health and safety discourse. In Crofts's example of Australia's brothels, concerned citizens often claim that the presence of prostitutes and their customers in their neighbourhood raises the risk that

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[135] Sutherland, *ibid.* ¶ 17.
[136] Crofts, "Disorderly Acts", *supra* note 133 at 16.
[137] *Ibid.* at 15-16.
[138] Penny Crofts, "Visual Contamination: Disgust and the Regulation of Brothels" (Paper presented at Passages: Law, Aesthetics, Politics, 13–14 July 2006) in P. Rush, ed., *Passages: Law, Aesthetics, Politics*, (Melbourne: University of Melbourne Law School, 2006) 1 at 5 [Crofts, "Visual Contamination"].
[139] *Ibid.* at 5.

children might be "contaminated" by these individuals and places.[140] Municipal regulation can be used to respond to these concerns by shoring up the boundary between the citizen and the abject through the regulation of space. Thus, regulations that isolate brothels to industrial areas ensure that contamination of citizens by abject elements (prostitutes and customers) is minimized. Under this framework, the "citizen" is set in opposition to the source of disgust; often, this source is a group of identifiable individuals. In particular, this process and the images of disease are often employed with respect to the poor and sexual dissidents. Seemingly, all possess the ability to contaminate space and to infect well-meaning citizens. Consequently, they are often the targets of the appropriately-named "clean-up" campaigns.

This purification impulse extends to those whose presence invokes sexual anxieties, as well as other anxieties about citizenship and community. In his review of the exclusion of the homeless from public space, Randall Amster identifies how the homeless are demonized and targeted through a process of purification of space.[141] Amster notes that the homeless and the space they occupy are "often viewed as dirty and disorderly and thus require regulation and sterilization".[142] Interestingly, he suggests that both the homeless and their spaces are imbued with "democratic intoxications, risks, and unscented odors."[143] It is the very *public*ness of this space that is seen to breed disorder and, consequently, to demand purification. In part, this purification may be seen to take place through the privatization of this wild, homeless-occupied space. The homeless are stigmatized because they are associated with "the disease and decay image, which leads to processes of sanitization, sterilization, and quarantine".[144] This discourse is easily and widely employed by numerous individuals in letters to the editor and in editorials in Canadian papers which draw analogies between panhandlers and trash, robbers, and the plague."[145] The identification of the homeless as diseased and dirty focuses on the body of the homeless person. Like the bodies of prostitutes, these bodies are abject and are thus easily

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[140] Crofts, "Disorderly Acts", *supra* note 133 at 25. Crofts notes that in Australia, a brothel can be closed if it is too close to a place frequented by children.
[141] Amster, *supra* note 110.
[142] *Ibid.* at 197. Amster discusses Henry Miller, *On the Fringe: The Dispossessed in America* (Toronto: Lexington, 1991).
[143] *Ibid.*
[144] *Ibid.*
[145] Raewyn Brewer, "Deconstructing the Panhandling Norms: *Federated Anti-Poverty Groups of B.C. v. Vancouver (City) and Western Print Media*" (2005) 10 *Appeal* 25 at p. 30.

excluded on the basis that they are "'sick,' 'scary,' 'dirty,' and 'smelly,' and a host of other pejoratives used to create social distance" between these homeless bodies and citizens.[146] Scholars suggest that this descriptive process not only identifies the homeless as abject, but defines them as "other"; that external pollutant that threatens "us". "Othering" the poor excludes the poor "from the so-called public: from public space, from public debate, from public consciousness (entering consciousness only as a perceived threat to safety and order)".[147] The homeless, prostitutes, and others are not part of the public, of community, of society; rather, they are outside of these places, from which position they threaten those who do belong.

Of course, the "poor" is not a singular category, nor is it one that is isolated from other social statuses, like "prostitute"; both are categories of people who many seek to exclude from public places and from communities. In her discussion of the targeting of drug users in Seattle, Washington, Marcia England explains how the same principles of abjection apply to public drug use, which is perceived as disruptive to the social order and as generally increasing the threat of disease.[148] England documents how Seattle introduced a "Stay Out of Drug Areas" ("SODA") ordinance which was intended to create drug-free zones by physically excluding individuals who used drugs in public from being in these areas. England argues that a focus on the control of disorder and disease was crucial to the creation of these zones, which were depicted as public spaces that would be safe and attractive to citizens. England adds that since the SODA ordinances constructed drug users as abject and, thus, as outsiders, they were "unwelcome in the public sphere and unqualified for the designation, 'citizen'."[149] The targeting of drug users as "others" results in the further marginalization of already othered groups, "leaving the illusion of orderly public space intact and strengthening discourses of abjection for those who do not fit narrow definitions of 'citizen'."[150] Certainly, the existence of municipal regulation may imply an acceptance of a particular activity or group; it wouldn't be regulated if it were not tolerated or accepted. Yet, regulations often come about because a particular activity or group has been identified as a source of disorder. The Seattle response is not one whereby a particular system

[146] Amster, *supra* note 110 at 198.
[147] Mosher, *supra* note 105 at p. 52.
[148] England, *supra* note 109 at 200.
[149] *Ibid.* at 210.
[150] *Ibid.*

of order was adjusted to accept the abject. Rather, it is a response which defends the existing order against that which is perceived to challenge it.

England also highlights the important link between abjection and citizenship; those defined as abject are continually policed and surveilled "to uphold local government, police and community definitions of public space and to maintain social standards of public order and public health".[151] In this fashion, municipal licensing or zoning laws that define and regulate certain groups or categories of activities work to further marginalize dissidents and to exclude them from the category of "citizen". The inference to be drawn from these regulations is that "citizens" are not to be subject to such restrictions and are to be permitted access to and use of public (and often private) space, without constraint. The abject, non-citizen does not fit the socio-cultural model of citizenship and is therefore incapable of being a citizen and of enjoying the freedoms accorded this status.[152] In her study of Portland's similarly memorably named "Stay Out of Areas of Prostitution" ("SOAP") ordinance, Lisa Sanchez suggests that the purpose of the law – to exclude women charged with prostitution offences from particular city areas – in effect characterizes the body of women in prostitution as abject and the women themselves as non-citizens. As "dangerous women who threaten the health, well-being, and quality of life of the general population", the law positions prostitutes "outside the normative structures of legitimate community."[153] Sanchez adds that the exclusion law "expels the visibly sexualized bodies of these women both literally and symbolically, enabling the community to constitute itself as the collective victim of these outlaws."[154]

A focus on the body as the site of disease is integral to many purification efforts. Douglas notes the symbolic power of the body, writing that it is "a model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or precarious."[155] The female body is targeted by municipal regulations because it is perceived as being inherently dangerous and because of its association with deviant sexualities. In the case of Australia's brothel regulations, the sex worker is targeted in part because of other anxieties about morality

[151] *Ibid.*
[152] *Ibid.*
[153] Sanchez, *supra* note 100 at 134.
[154] *Ibid.* at 134.
[155] Adler, *supra* note 132 at 1145, citing Mary Douglas, *supra* note 134 at 4.

and sexuality. The sex worker, unlike a teacher or shopkeeper or any other citizen, can be controlled. Unlike them, the sex worker "is" sex. Her body is therefore the site that can be manipulated or directed through law and, consequently, her body is the site where fears about morality and sexuality are targeted. It is the prostitute, the abject, which can be singled out for regulation. In controlling her, municipal regulations also limit and constrain the immoral sexuality that she is seen to represent. In the case of prostitution, this immoral sexuality is the offer of sex outside of marriage or sex for money.[156] The prostitute body represents the boundary between moral and immoral sexuality. In targeting it, those concerned about morality may vicariously shore up this boundary against attack.

Whether in respect of the homeless or of prostitution, the body is identified as the site of the pollutant that threatens to contaminate the public. Thus, beyond symbolic segregation or exclusion, municipal regulation also physically excludes certain bodies from the community. Arguably, the intent of the SODA and SOAP ordinances was not to merely alert dissidents that they were not welcome, but to physically remove targeted bodies from areas and to exclude their re-entry. By focusing on the body of the abject and its potential for disease and contamination, cities are able to justify intervention on the basis of public health.[157] In respect of the SODA ordinances, for example, England notes that in turning to the expertise of its public health agency, the city establishes itself as the authority in respect of hygiene and makes a "claim 'to ensure the physical vigor and the moral cleanliness of the social body' by eliminating "defective individuals, degenerate and bastardised populations".[158] Likewise, those who employ disease discourse in reference to the homeless are empowered as the voice of "'the community' in devising and implementing schemes to remove the perceived threat" while the homeless are disempowered, prevented from "having effective domains of self-presentation and resistance."[159] The city successfully grounds its purification efforts in the laudable goal of maintaining public health and often finds support for this pursuit from the courts. Nevertheless,

[156] Crofts, "Disorderly Acts", supra note 133 at 19.
[157] England, *supra* note 109 at 200.
[158] *Ibid.* at 200.
[159] Amster, *supra* note 110 at 199.

as England warns: "This exclusion in the name of public safety often has unintentionally negative effects on public health and welfare".[160]

When enacted ostensibly for purification purposes, municipal regulations often cede to public health agencies broad power over dissident bodies. Thus, as Chan and Reidpath document in New South Wales, where brothels are de-criminalized and regulated under provincial legislation, an authorized medical practitioner may make a public health order that requires sex workers "suspected of placing others at risk of HIV infection to do any one, or more, of the following: refrain from specified conduct e.g. sex work, undergo specified treatment or counselling, submit to supervision, undergo treatment, and be detained''.[161] Under similar provisions elsewhere in Australia, "HIV-positive sex workers are not permitted to continue their employment and restrictions can be placed on their movement, including a curfew."[162] The community's fear is not of the disease, itself, for the law does not target anyone who might have the disease and who might transmit it. Rather, the community's fear is that sex workers might infect "the public".[163]

Additionally, as Chan and Reidpath argue, these regulations make the sex worker responsible both for herself and for her client.[164] Arguably, she is also responsible for protecting the public from herself. Under this rubric, which mirrors the personal responsibility ethos of the privatization project, the HIV-positive sex worker may be seen to fail her own self-care and the care of her client. By placing the responsibility for HIV-infection on the sex worker, these regulations create a "symbolic boundary" between the stigmatised sex workers and the un-stigmatised client.[165] Ultimately, Chan and Reidpath suggest that these Australian regulations create a category of deviant sex worker that is "uncannily reminiscent of the Frankenstein-like transformation of Mary Mallon into the monster that was Typhoid Mary."[166] The creation of deviant women is not isolated to the rare jurisdiction in which prostitution is legal. More

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[160] England, *supra* note 109 at 201; Warner, *supra* note 126 at 78-79.
[161] Kit Yee Chan & Daniel D. Reidpath, "''Typhoid Mary'' and ''HIV Jane'': Responsibility, Agency and Disease Prevention" (2003) 11(22) *Reproductive Health Matters* 40 at 44.
[162] *Ibid.* at 44.
[163] *Ibid.* at 44.
[164] *Ibid.* at 44.
[165] *Ibid.* at 44 citing V. Sacks, "Women and AIDS: An Analysis of Media Misrepresentations (1996) 42(1) *Social Science and Medicine* 59.
[166] Chan & Reidpath, *ibid.* at 44.

insidiously, laws that regulate and license adult businesses also focus on the female body as a dangerous site in need of control and containment.

In this respect, Amy Adler underscores the association at law of the female body with disease and infection in her analysis of U.S. municipal legislation about exotic dancing.[167] As Adler notes, in a prominent case, the U.S. Supreme Court accepted and reiterated the assumption of the Erie, Pennsylvania city council which passed a local ordinance on the basis that nude dancing poses a threat to "public health" and that, even if there was no contact between dancers and customers, it led to the "spread of sexually transmitted diseases".[168] In her analysis, Adler demonstrates how this and other court and municipal decisions draw on two assumptions: first, that prostitutes spread diseases; and, second, that the female body itself is impure and diseased.[169] Arguably, these decisions also make a third assumption: that all women in adult business are prostitutes. These decisions give merit to the perception that the female body is so impure and diseased that it can pollute the very building that houses it.

In her study of legalized brothels in Australia, Penny Crofts argues that in discussing the appropriateness of various brothel regulations courts and legislatures habitually employ discourse which suggests that the activities and bodies inside the brothels are able to infect "the bricks, mortar, roof of the entire building. It is almost as though the building is magically irradiated from within, polluting all who see it."[170] As a result, both brothel regulation and planning law include provisions which state that a brothel may be closed if it operates "near or within view from a church, hospital or school or other place regularly frequented by children".[171] Crofts suggests that under this framework, "simply *knowing* a brothel exists in your community and being able to see the building, even if you cannot see what goes on inside it, is contaminating."[172] As common understanding teaches that diseased bodies may contaminate

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[167] Adler, *supra* note 132 at 1142
[168] *Ibid.*
[169] *Ibid.* at 1143.
[170] Crofts, "Disorderly Acts", *supra* note 133 at 26.
[171] *Ibid.* at 20.
[172] *Ibid.* at 26. *C.f.* Warner, *supra* note 126 at 96, discussing the "moral panic" about public indecency following George Michael's arrest in a public washroom: Warner notes that a FOX news team went undercover to catch perverts in "very lewd acts in very public places", but suggests that the "need to resort to an undercover camera contradicts the claim that these places are already "very public". It also contradicts the claim that "you or your child" could be an "innocent victim" of cruising, since it implicates you in the aggressional and voyeuristic project

buildings and potentially "the public", "the cure is to remove the disease which "threatens the boundaries of personal, local and national space".[173] Similarly, scholars have suggested that the visible presence of the homeless is perceived as a threat to the integrity of public spaces and, as such municipal regulation pursues the goal of purification by targeting the "'visible' homeless with the goal of making them 'invisible.'"[174]

Also invisible, but paramount to many municipal regulations, is the "compulsory heterosexuality" that is "[n]early invisible because it is universalized and naturalized [...] inscribed in public as well as private spaces as the dominant ideology."[175] In seeking to control those who do not subscribe to dominant sexual norms, municipal regulations enforce the notion that, by default, heterosexuality is the norm. So conceived, compulsory heterosexuality is not limited to the enforcement of opposite-sex relationships; rather, it functions to construct all non-traditional sexualities, including non-traditional heterosexualities, as abnormal. Compulsory heterosexuality is an insidious social ordering which also affects the ordering of public and private space. Philip Hubbard notes that cities organize and naturalize "heterosexuality in so much as it divides and confines sexual identities across public and private spaces, defining the locations appropriate for specific sexual performances".[176] In this respect, Nancy Duncan argues that there are greater spatial restrictions placed on sexual minorities than on those who conform to societal standards.[177] She asserts that these limits alternately hide from public view, and thus privatize, problems connected to these dissident sexualities or force them into public view "to be subjected to surveillance and segregating practices of the police".[178] This segregation and publicizing is often accomplished through the use of municipal zoning legislation, which works to ensure the spatial exclusion of dissident sexualities. Thus, the isolation of sex shops, clubs, and bars to marginal and industrial locations through zoning "is indicative of the anxiety which

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of "catching" those who have no desire to be caught, and who share a reasonable presumption that they will not be spied on."

[173] England, *supra* note 109 at 201.

[174] See Maria Foscarinis, "Downward Spiral: Homelessness and Its Criminalization" (1996) 14 *Yale Law and Policy Review* 1 at 23.

[175] Nancy Duncan, "Renegotiating Gender and Sexuality in Public and Private Spaces" in Nancy Duncan, ed., Body Space: Destabilizing Geographies of Gender and Sexuality (New York: Routledge, 1996) 127 at 138.

[176] Philip Hubbard, "Desire/disgust: mapping the moral contours of heterosexuality" (2000) 24 *Progress in Human Geography* 191 at 211 [Hubbard, "Desire/disgust"].

[177] Duncan, *supra* note 175 at 140.

[178] *Ibid.*

the presence of such facilities provoke amongst many urban dwellers."[179] Indeed, as Gill Valentine argues, regulatory regimes, particularly in the form of municipal law, are set up in such a way that they effectively "constrain the possible performances of gender and sexual identities, in order to maintain the 'naturalness' of heterosexuality."[180]

Similarly, in his analysis of England's "anti-cottaging" law, Paul Johnson argues that rather than being relegated to private space, heterosexuality is in fact a fundamental ordering principle of public space. The anti-cottaging law was introduced to criminalize sex in public lavatories. Although written in a gender-neutral manner, it was drafted in response to concerns about male sexual activity in public lavatories, and only men have been prosecuted under the law.[181] Johnson documents how in the debates leading up to its introduction, parliamentarians and commentators "incited and recited heteronormative discourse about public sex which demarcates cottaging outside the parameters of 'conventional' sex – both public and private – and as an activity that is beyond the threshold of what can be considered socially acceptable behaviour."[182] These voices justified the anti-cottaging law as reasonable by relying on a particular trope: the presumed inherent difference between the acceptable public sex of the heterosexual "courting couple" frolicking on the moors and the problematic public sex of homosexual men in the public lavatory. Johnson argues that to commentators the former was an example of "good" public sex, which does not automatically invoke moral anxiety, because "although it *may* cause offence, it has an accepted and tolerated place within a hegemonized narrative of heterosexual intimacy and love."[183]

The frolicking "courting couple" represents sex in relation to romantic love, which is a part of the heterosexual public sphere. Individuals talk about and show love in public as it is part of heterosexual discourse; it is a part of being heterosexual and, consequently, of being "normal". If one re-imagines the "courting couple" as homosexual, it is not difficult to imagine a reaction to them as being out of place. Johnson argues that this is because homosexuality is thought to be

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[179] Hubbard, "Desire/disgust" *supra* note 176 at 202.
[180] Gill Valentine, "(Re)Negotiating the 'Heterosexual Street': Lesbian Productions of Space" in Nancy Duncan, ed., *Body Space: Destabilizing Geographies of Gender and Sexuality* (New York: Routledge, 1996) 146 at 148.
[181] Paul Johnson, "Ordinary Folk and Cottaging: Law, Morality, and Public Sex" (December 2007) 34:4 *Journal of Law and Society* 521 at 521.
[182] *Ibid.* at 532.
[183] *Ibid.* at 533-534.

properly enclosed "in private" and censured from public view.[184] The anti-cottaging law demonstrated how the regulation of public space and of "forms of public sexual activity deemed deviant, can be understood in terms of how public space is policed according to (hetero)sexual norms."[185] The enforcement of these norms, moreover, through laws and even through social approbation (as discussed by Valentine[186]), is accomplished through the relegation of homosexuality (and arguably other dissident sexualities) to the private sphere. Yet, heteronormativity is insidious; even private activities between consenting adults may be characterized as "public problems". Indeed, as Mary Douglas notes, as abject behaviours, challenges to heterosexuality are dangerous in part because they may instigate change. One response to the disorder posed by these dissident sexualities is their condemnation. Thus, private sexual activity may be defined as a public "problem" because it poses a challenge to "public" (heterosexual) values.[187] These heterosexual values, moreover, are not only about sex. Thus, Sommers suggests that homeless men living on Vancouver's skid row, "who are not in monogamous, procreative, heterosexual relations mark out the edge of a danger zone between immoral and respectable identities, defining norms of heterosexual order in the process."[188] According to many scholars, compulsory heterosexuality extends to order all aspects of public and private life and space.

The bulk of the privatization/purification literature assumes that in response to challenges to order, we seek to eliminate or condemn the offending abject elements or people. Thus, the critical literature examines legislative responses through this lens. Anti-homeless and other legislation is seen as attempts to expunge public space of homeless people, to make it impossible for them to exist. Municipal law, moreover, is targeted as especially effective and heinous in this regard. Municipal law, buoyed by court deference and political and philosophical weight, has been used successfully to privatize public space and to marginalize already marginal populations. Yet, although the critical literature does not entertain it, the other half of Crofts's suggestion might also be achieved through the use of municipal law. Below, I critique this

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[184] *Ibid.* at 534.
[185] *Ibid.* at 533.
[186] Valentine, *supra* note 180 at 148
[187] Philip Hubbard, "Sex Zones: Intimacy, Citizenship and Public Space" (2001) 4 *Sexualities* 51 at 65.
[188] Hubbard, "Desire/disgust", *supra* note 176 at 203, citing Jeff Sommers, "Men at the margin: masculinity and space in downtown Vancouver 1950–86 (1998) 19 *Urban Geography* 287 at 289.

critical literature in reference to Toronto's regulation of adult businesses. While purification and privatization efforts have a part to play in the latter, there are other factors at work that cannot be explained through these lenses alone. Arguably, Toronto's regulation of adult businesses reflects how municipal regulation may be used to marginalize groups, but also to transform understandings of what is and is not acceptable in the city.

Part III: The *City of Toronto Act, 2006* and the Transformative Power of Municipal Law

The introduction of the *Toronto Act* marked the latest step in a lengthy journey of legislative and judicial deference to municipal decision-making. Over the past several decades, cities have been permitted by higher levels of government and the courts to make a broader range of decisions in a wider scope of subject areas. There are certainly many areas of municipal decision-making that could be discussed, from cities' increased taxing powers to their authority in respect of planning and development decisions. Below, I discuss this increased authority in reference to Toronto's authority over the regulation of adult businesses. This subject matter is ripe for analysis as it underscores the tension between the benefits of devolution and the problems that arise when cities are permitted or expected to address significant social problems through municipal laws. In the following section, I discuss the transformative power of municipal regulation in reference to three areas. First, I explore the process through which municipal regulation brings certain businesses, activities, and individuals into the community or casts them out of it. Second, I analyse various substantive parts of Toronto's municipal laws and explain how they reflect particular and exclusionary notions of community membership. Third, I demonstrate how the judicial and legislative support for devolution to municipalities engendered a rhetorical shift from a focus on moral contamination to one that emphasizes public health and safety. In each case, I discuss the critical literature and explore whether elements of purification and privatization are present. Additionally, I argue that devolution to municipalities also highlights other themes. In particular, I demonstrate how rather than being subject to the ostensibly marginalizing effects of municipal law, many individuals and groups claim the transformative power of the law, which may have both positive and negative consequences for

those groups and for others.

The Process of By-Law Creation: Defining a Subject and Claims to Law's Power

In discussing Toronto's adult businesses, city councillors, police, and citizens generally employ a particular discourse; that of an omnipresent, omniscient threat that must be rooted out. The implication of this discourse is that as sex finds a new place to infect, it must be wrestled under the city's control through regulation. The chase is never over, with the sex industry always "one step ahead". The consequence is a cycle without end.[190] Since the city is empowered by statute and the courts to regulate adult businesses, once a subject activity has been isolated as problematic or the source of disorder, the city is able to step in and regulate it. Businesses that were once beyond the purview of municipal law – and largely beyond the weakened arm of the criminal law's "indecency" provisions – are now subject to more governmental surveillance, interference, and sanction. While this process in many ways reflects the privatization/purification themes discussed above, in the following section I demonstrate that it also involves forces that are unexplained by the existing critical literature. In particular, as is discussed in this section, some Toronto groups seek out municipal regulation as a source of legitimacy. These groups, moreover, have a voice because of the fact that municipal laws exist. Thus, as is discussed below, in Toronto, groups able to influence municipal decision-making may include those who pay significant taxes and fees to the city and those who are located in a particular area of the city and represented by a particularly powerful councillor. Those groups, moreover, are not necessarily those that are traditionally considered part of the moneyed, property-owning class. Rather, because they are subject to municipal regulation and identifiable as groups, they are able to participate in the dialogue surrounding the creation of municipal by-laws. Further, as is discussed below, once subject to legislation they are, in part, brought into the fold of what is considered licit and acceptable.

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[190] Dave McGinn, "Are strip clubs losing their sex appeal?; High licence fees, a new bylaw and the rise of massage parlours are giving some peeler-bar owners a less-than-happy ending" *The Globe and Mail* (1 December 2007) M3 "Losing their sex appeal": One Toronto city councillor suggested that: ""Whatever you do to close a gap, the industry will find it somewhere else, [...] First, it was holistic health centres, now it might be nail bars, next it's going to be bakeries"."

The City of Toronto licenses and regulates adult businesses out of perceived necessity and as a result of a philosophical shift that emphasized the "decentralization of norms down to the neighbourhood level".[191] The *Toronto Act* provides that the city may legislate for the provision of any service or thing that it considers desirable to the public.[192] It has authority to pass by-laws covering a significant number of areas, including the economic, social, and environmental well-being of the City;[193] the health, safety, and well-being of persons;[194] the protection of persons and property, including consumer protection;[195] and business licensing.[196] Under the *Toronto Act*, the city is explicitly permitted to license adult businesses as a part of its general business licensing power.[197] All by-laws passed under the *Toronto Act* are compiled in the *City of Toronto Municipal Code* (the "*Municipal Code*").[198] The *Municipal Code* contains by-laws that regulate body-rub parlours and adult entertainment establishments ("strip clubs") (collectively, "adult businesses").

A strip club is any premises in which is provided "services appealing to or designed to appeal to erotic or sexual appetites or inclinations".[199] According to the *Municipal Code*, erotic or sexual appetites or inclinations are satisfied by "the nudity or partial nudity of any person ... [and] in respect of which the word "nude," "naked," "topless," "bottomless," "sexy" or any other word or any other picture, symbol or representation having like meaning or implication is used in any advertisement".[200] According to this definition, a strip club might be a place offering burlesque, live peeps shows, or exotic dancing. In comparison, a body-rub parlour (or massage parlour) is defined as "any premises or part thereof where a body-rub is performed, offered or solicited".[201]

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[191] Schragger, *supra* note 26 at 383-384; See *supra* note 118.
[192] *Toronto Act*, *supra* note 32, s. 8(1).
[193] *Ibid.*, s. 8(2)(5).
[194] *Ibid.*, s. 8(2)(6).
[195] *Ibid.*, s. 8(2)(8).
[196] *Ibid.*, s. 8(2)(11).
[197] *Ibid.*, s. 8(2)(11).
[198] *City of Toronto Municipal Code*, c. 315, online: http://www.toronto.ca/legdocs/municode/index.htm [*Municipal Code*].
[199] *Ibid.* at s. 545-1.
[200] *Ibid.* at s. 545-1.
[201] *Ibid.* at s. 545-1 and s. 545-327 to 545-361.

A body rub is "the kneading, manipulating, rubbing, massaging, touching, or stimulating, by any means, of a person's body or part thereof".[202] The establishments that this by-law regulates are different than a spa or massage clinic where registered massage therapists work. It is widely believed that body-rub parlours offer what is colloquially known as a "rub-and-tug", which is a body-rub (the rub) accompanied by sexual services such as manual release (the tug).[203] Toronto's municipal regulations do not address the "tug" and instead establish certain sanitation and advertisement standards for body-rub parlours. Yet, that rub-and-tugs may be provided is not itself an issue in Canada, where the exchange of sexual services for money (prostitution) is not a criminal offence. Rather, it is illegal to operate or to be found in a bawdy-house, which is a premises kept for the purposes of prostitution or indecency.[204] Thus, although prostitution is not illegal, a body-rub parlour in which sexual services are offered might in theory fall under the definition of a criminal bawdy-house (because of the presence of prostitution or indecency). The city's regulations cannot address the criminal aspect of body-rub parlours because prohibiting bawdy-houses is an activity that falls under the sphere of the federal government and its criminal power. The city is permitted to have body-rub parlour regulations, however, because in theory, they relate to a municipal power (public health and safety) and exist harmoniously alongside the criminal law; complying with the body-rub regulations would not mean violation of the criminal law.[205]

In practice, however, as one Toronto city employee suggested, the municipal regulation of body-rub parlours has meant that the city has gone into the "rub-and-tug business".[206] The perception of many is that by regulating body-rub parlours – when even legal operations are believed to offer prostitution[207] – Toronto has in some way legitimized this activity. Likewise, the same

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[202] *Ibid.* at s. 545-1.
[203] See: Rob Shaw, "Massage parlour bylaws rub Milczyn wrong way" *The Globe and Mail* (27 July 2005) A10; McGinn, *supra* note 190.
[204] *Criminal Code*, R.S.C. 1985, c. C-46, s. 210(1) & (2). S. 211 of the Criminal Code also makes it an offence punishable by summary conviction for anyone who knowingly "takes, transports, directs, or offers to take, transport, or direct any other person to a common bawdy-house".
[205] See Rio Hotel, *supra* note 56.
[206] Robert Cribb & Dale Brazao, "What can Toronto do about sex dens?" *Toronto Star* (10 May 2005) A01, citing Toronto City Councillor Howard Moscoe [Cribb & Brazao, "Sex Dens"].
[207] See Dan Gardner, "How Cities 'License' Off-Street Hookers" *Ottawa Citizen* (16 June 2002): "Mark Dimuantes, the City of Toronto policy researcher, is almost as blunt. Toronto has hundreds of unlicensed "rub-and-tugs," as he calls them, which are often charged and convicted as bawdy houses. As for the licensed body-rub parlours, "I

charge might apply in the case of cities such as Vancouver and Winnipeg, which regulate and licence escort agencies.[208] Indeed, it is important to distinguish between what is legal and what is considered legitimate. Although prostitution is not illegal, many express concern that Canadian cities, including Toronto, regulate businesses in which prostitution is widely believed to take place. What appears to be troublesome is the existence of ambiguity. Thus, body-rub parlours are not problematic only because they ostensibly offer prostitution or might be illegal bawdy-houses. Rather, body-rub parlours evoke concerns about morality and sexuality that extend beyond the criminal law; their existence challenges a traditional sense of the social order. Their licensing by the city suggests that this social order is under transformation. This is an important point, for reactions to adult business regulations underscore the power these regulations have to define what is licit and illicit. Additionally, they highlight how municipal regulations may be used to address ambiguous criminal/non-criminal entities like body-rub parlours and to incorporate them into the social order. Further, by getting into the "rub and tug business", the city has engaged in a reframing of prostitution which the criminal law cannot directly accomplish.

By the mid-2000s, the *Toronto Star* had exposed a new threat to the community of Toronto: "'rub and tug' parlours fronting as holistic medicine centres".[209] Holistic centres had become part of the city's licensing scheme in 1998.[210] Under the 1998 by-law, holistic centres were defined as premises offering "holistic services", which are "any modality used as a tool for therapeutic and wellness purposes but does not include body rubs".[211] By 2004, it was clear that many businesses were masquerading as holistic centres, offering sexual instead of holistic services,[212] which the *Toronto Star*'s undercover work confirmed. The by-law had been sloppily

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haven't personally inspected any of those," he says, so "I don't really know what goes on in those. But I assume, you know, one can make the assumption that it's the same thing the illegal ones are doing."

[208] Gardner, *ibid*; City of Winnipeg, By-Law No. 91/2008, *Doing Business in Winnipeg*, s. 23; City of Vancouver, By-Law No. 4450, *License By-Law* (1January 2010), s. 25.3.

[209] Catherine Porter, "Body rub staff must dress for work, city says" *Toronto Star* (25 June 2004) B07.

[210] City of Toronto, By-Law No. 806-1998, "To amend further Metropolitan Toronto By-law No. 20-85, a by-law "Respecting the licensing, regulating and governing of trades, callings, businesses and occupations in the Metropolitan Area", a by-law of the former Municipality of Metropolitan Toronto" (30 October 1998) [By-Law 806]; Municipal Code, *supra* note 198 at Article XI.

[211] *Ibid*., s. 1.

[212] Allison Erdmann, Victoria Lorient-Faibish, Paul Overy, & David Pinto, "Body Work or Bawdy Work?: Holistic Healers Push City to Clarify Bylaw Categorizing Them with Sex Trade Workers" (March 2005) *Vitality: Toronto's Monthly Wellness Journal*, online: http://www.vitalitymagazine.com/node/327.

drafted and functioned not as a regulation of holistic practitioners but as a tool to combat the spread of body-rub parlours into new and uncharted territory. The by-law failed to achieve this goal, partly as a result of the haphazard way in which the city's adult business by-laws relate to each other. For instance, although the *Municipal Code* caps the number of strip club and body-rub licenses issued, there is no cap on the number of holistic practitioner licenses. Thus, while the city permits only 25 body-rub parlour licenses[213] and no more than 63 strip club licenses,[214] by 2005 it had licensed a total of over 300 holistic centres.[215] Since many of these holistic centres were *de facto* (illegal) body-rub parlours, rather than decrease the number of body-rub parlours in operation, the introduction of the holistic centre category arguably facilitated the industry's growth.

Not surprisingly, by 2005, holistic practitioners successfully petitioned the city to amend the *Municipal Code* by adding a further requirement for obtaining a license to operate a holistic centre. [216] Prior to the 2005 amendment, an applicant for a holistic practitioner's license needed only to demonstrate successful completion of a course of training from a recognized school, in their form of treatment.[217] Holistic practitioners complained that since the Toronto by-law did not adequately define the qualifications one must have to offer holistic services, anyone could claim to practice reiki, aromatherapy, and shiatsu, since those practices have no service mark protection for their name.[218] Thus, given the lack of centralized control over these disciplines, it was very easy for individuals to obtain fraudulent diplomas and other evidence of qualification. Subsequent to the amendment, every applicant for a holistic practitioner's licence or licence renewal must submit proof "that the applicant is a member in good standing of a professional holistic association".[219] For added security, the *Municipal Code* contains a list of approved holistic organizations, including, for example, the Canadian Federation of Aromatherapists, The Ontario Herbalist Association, and The Iridologists Association of Canada.[220]

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[213] *Municipal Code, supra* note 197 at s. 545-361.
[214] *Ibid.* at s. 545-394.
[215] Robert Cribb & Dale Brazao, "Sex & City Hall" *Toronto Star* (7 May 2005) A01.
[216] Dale Brazao, "New rules for holistic spas" *The Toronto Star* (27 July 2005) B02.
[217] By-Law 806, *supra* note 210, s. 4(1).
[218] Erdmann, et al., *supra* note 212.
[219] *Municipal Code, supra* note 198 at s. 545-161(A).
[220] *Ibid.* at Appendix I to Chapter 545, added 7 December 2005 by By-law No. 1056-2005.

Holistic practitioners were not alone in their concerns about confusion between their services and the services offered by body-rub parlours. Given that holistic centres were sullied by the *Toronto Star*'s exposé, many individuals who practiced traditional Chinese medicine wanted to ensure that they were not associated or confused with businesses providing sexual services. In response, in July 2004, while the holistic centre by-law remained a live issue, Toronto City Council introduced another by-law to explicitly and separately regulate traditional Chinese medicine.[221] This by-law's preamble states that it was introduced to "help to ensure the protection of consumers and the health and safety of members of the public when evaluating the qualifications of establishments and practitioners and receiving acupuncture and traditional Chinese medicine services".[222] In particular, the need for the creation of a separate by-law for Chinese medicine was raised by a Toronto city councillor whose ward encompassed Toronto's Chinatown and who expressed the concerns of her constituents, some of whom were traditional Chinese medicine practitioners and customers.[223] While to some extent the by-law was passed to address concerns about health and safety, it was also the product of a campaign by particular community members and by a particularly powerful city councillor. In this respect, the by-law acted more as a stamp of credibility than as a protective health and safety measure for those seeking traditional Chinese medicinal procedures.

Interestingly, the voices of holistic and traditional Chinese medicine practitioners were joined by voices from within the adult business community. Concerned strip club owners, such as business owner Spiro Koumoudouros, chair of his neighbourhood business association and owner of the House of Lancaster Gentlemen's Club,[224] wanted body-rub parlours of all stripes out of their areas. Mr. Koumoudouros argued: "These people are running illegal whorehouses. I don't understand why nobody is doing anything."[225] Mr. Koumoudouros is the same

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[221] City of Toronto, By-Law No. 658-2004, *To amend City of Toronto Municipal Code Chapter 545, Licensing, to establish a licence requirement for traditional medicine establishments and traditional medicine practitioners* (22 July 2004), online: http://www.toronto.ca/legdocs/bylaws/2004/law0658.pdf; Municipal Code at Article XXXVIII.
[222] *Ibid.*
[223] The motion was brought by then-City Councilor (now Member of Parliament) Olivia Chow.
[224] Robert Cribb and Dale Brazao, "Holistic spa under scrutiny" *Toronto Star* (20 July 2005) B01.
[225] *Ibid.* Note that in *Koumoudouros*, the Superior Court of Ontario struck a clause in a city by-law which stated that exotic dancers working in adult entertainment parlours licensed under the provincial *Liquor Licence Act* may not provide services except while wearing opaque clothing fully covering their pubic area. The court found that the "true object and purpose of s. 28(2) is not the regulation of the trade and business of an adult entertainment parlour,

Koumoudouros who in the 1990s fought the city's lap-dancing ban, which case forms part of the dress code trilogy.[226] Although he ultimately lost that fight, he found another. By the mid-2000s, now the *legitimate* businesses, strip clubs were positioned in opposition to "criminal" body-rub parlours and alongside the city.[227] Thus the former chair of the city's licensing committee voiced his dismay that with so many illegal body-rub parlours operating in disguise, "strippers are in competition with sex workers".[228] Although strip clubs and "whorehouses" are subject to the same criminal law provisions – and are often prosecuted under them – those associated with the former were cited by city councillors and the *Toronto Star* as upstanding members of the community. Indeed, strip club owners on Yonge Street – those same individuals whose businesses were targeted in the clean-up campaign of the 1970s – were lauded as upstanding businessmen, working to save a declining neighbourhood.[229] They have also been identified as a group in need of protection; small business owners whose businesses are one of the many charms of the downtown core.[230]

As the story unfolds, it is clear that the city was engaged in not merely the process of privatization and purification, but a transformative process through which some individuals were included in or excluded from the community. Since they were first targeted as social problems in the 1970s, Mr. Koumoudouros and other strip club owners have been repositioned as legitimate, in part through the operation of Toronto's by-laws. Where services appealing to "erotic or sexual appetites or inclinations" might once have been deemed indecent (and criminal), they have become just one of many services offered by city businesses. Arguably, the introduction of legislation functioned as a transformative mechanism. What once might have been perceived as "out of place" and a challenge to the social order has been redefined as a part of the social order. Certainly, strip clubs might have been widely accepted by the public in the 1970s, despite the concerns documented in the *Toronto Star* and by city councillors. The crack-

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but the regulation of public morals, and hence is legislation in relation to a matter coming within s. 91(27) of the Constitution Act, 1867".

[226] See, *supra* note 42.

[227] Robert Cribb and Dale Brazao, "What can Toronto do about sex dens?" *Toronto Star* (10 May 2005) A01 [Cribb & Brazao, "Sex Dens"].

[228] Tralee Pearce, "Naked ambition: Erin Nicholson wants to change how strip clubs in the city operate. Her goals? To ban full nudity onstage – and bring back the lap dance." *Toronto Star* (11 September 2004) M1.

[229] Peter Kuitenbrouwer, "A walk on steamy side of the street" *National Post* (25 June 2008) A12.

[230] *Ibid.*; Dave McGinn, *supra* note 190.

down campaign may have represented only particular voices motivated by particular concerns, such as the voice of those who perceived their investment in Eaton Centre to be threatened by its unsightly surrounds. It may also be the case that by the mid-2000s, strip clubs had been accepted as part of the social order. Yet, to discount the possible effect of municipal regulation is to ignore that over this same period of time, cities have taken on much of the task of defining what is appropriate or inappropriate, licit or illicit.

Although no other significant legal changes have taken place, including to the criminal law, by 2007 one Toronto city councillor confirmed that "strip clubs are no longer dens of prostitution. "It's passed on to illegal body-rub parlours."".[231] In this respect, Toronto's regulation of adult businesses demonstrates Schragger's argument that the effects of decentralization and privatization have resulted in a shift in how social problems are conceived and addressed.[232] Thus, rather than a moral/criminal problem, body-rub parlours and other sex-related businesses are seen as structural/financial problem. This redefinition opens up the possibility for different (municipal) responses to the perceived problem. Municipal regulations may accomplish a purification goal through, for example, restricting body-rub parlours to isolated, industrial areas, but they also permit other actions to be taken and other changes to be effected. The shift in attitude toward strip clubs is highly indicative of the symbolic and practical power of municipal regulations. As new social problems are identified through regulation, shifts in the definition and framing of old problems (like body-rub parlours) will likely also occur. As part of this process, governments and the courts have supported the notion that cities must take the forefront. In Toronto, this shift has resulted in significant social transformation, which continues as the city defines and grapples with new and old (but different) social problems.

Of course, the introduction of municipal regulation has also given Mr. Koumoudouros and other strip club owners the title of licensed business and property owner and, thus, a voice in the debate. That Mr. Koumoudouros's opinion carries weight may be explained by Ranasingh and Valverde who note that since municipal law is grounded to a large extent in the regulation of property rights, the party that often influences the outcome of the discussion is that party with

[231] McGinn, *ibid.*
[232] Schragger, *supra* note 26.

the most property interests in the dispute.[233] It is the propertied class whose uses, interests, and values become desirable and it this class that is often protected through municipal regulation at the expense of others. This argument helps to explain why Mr. Koumoudouros and other strip club owners have found themselves on the side of City Council and quoted by the newspaper that once campaigned to eliminate their business entirely. Strip club licenses for owner/operators initially cost $10,240.00, annually, and $9,875.00 for annual renewal.[234] Mr. Koumoudouros, for example, pays these fees for each of his two establishments which, in combination with property and other taxes, generate for the city fairly significant and reliable revenue each year. Yet, that Mr. Koumoudouros has a voice and has been repositioned as a legitimate businessman could only have occurred as a result of the political and legal shift to municipal law-making. By definition, municipalities regulate in various legitimate subject areas, like health and safety and business licensing. Once made subject to these regulations rather than other laws, like the criminal law, strip clubs and other businesses are redefined and redeemed. Further, the payment of fees alone cannot account for the transition; body-rub parlours are also expected to pay licensing fees, but the same welcome has not greeted owners or practitioners, who continue to be deemed outsiders.

The political shift towards municipalities as the locus of law-making in combination with decisions such as *Labaye*, arguably shifts the responsibility for the determination of what is and is not illicit to municipalities, allowing for significant social transformation at the local level. Rather than further marginalize the marginalized, municipal law has had the effect of bringing them into the fold. Additionally, the local level implicates different actors, with different concerns. Thus, arguably, Mr. Koumoudouros is a businessman, a certainly central community archetype and not a member of any marginalized group. Yet, thirty years prior the same businessman was cast as a pariah, traumatizing and degrading women and feeding on the basest elements of Toronto society.[235] Municipal legislation did not purge the public of Mr. Koumoudoros's presence; rather, it made him and his business part of the public sphere. Notably, however, municipalities' responsibilities also extend to legislating in line with

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[233] Prashan Ranasinghe & Mariana Valverde "Governing Homelessness through Land-Use: A Sociolegal Study of the Toronto Shelter Zoning" (Summer 2006) 31:3 *Canadian Journal of Sociology* 325 at 328-329.
[234] Municipal Code, *supra* note 198, Appendix A to Ch. 545.
[235] See Mara, *supra* notes 59 and 70.

community values such as those fundamental values discussed in *Labaye*. In so doing, the city has rearticulated what is licit and illicit. Once morally reviled, strip clubs are now perceived as licit entertainment; illicit are those who challenge this business and this social order. Indeed, while Mr. Koumoudouros has the ear of the *Toronto Star* and City Council, in comparison, the owners and operators or body-rub parlours appear to have less political clout. In part, this may be because unlike strip clubs, many body-rub shops are run by women. Indeed, studies have shown that self-employment in sex work is "higher among those who work off the street."[236] While the privatization/purification analysis may explain why body-rubbers and body-rub parlours are marginalized, however, these analyses do not seemingly help us to fully understand the effects of adult business regulations on women's entrepreneurship and agency.

Certainly, a purification analysis would suggest that the introduction of adult business regulations is in some sense a response to concerns by citizens about the presence of disorder. Arguably, body-rub parlours – which represent disorder – are cast out of public space and marginalized by laws that restrict their operation. Additionally, there is evidence that the interests of sex workers – those who admittedly offer sexual services either explicitly or under the guise of adult businesses – are marginalized. Although cited in newspaper articles as the voice of sex workers, organizations such as Sex Professionals of Canada and other lobby groups seem to have little impact on municipal regulation. In part, this may be because they are dispersed through the City and cannot successfully lobby any one city councillor, unlike the Chinese medicine community. Alternatively, as scholars have suggested, sex workers are a marginalized group and regulatory efforts work to further marginalize already marginalized populations. Under this perspective, the effect (or the goal) of such regulation is to render their voices impotent and to exclude them from membership in the community. Additionally, however, since municipal regulation is about the regulation of business, only those whose work truly falls within that category will be subject to inclusive regulation.

As noted, however, Toronto regulates body-rub parlours even though it is widely believed that the 25 licensed body-rub parlours, and thousands of unlicensed body-rub parlours, offer sexual services. The purification and privatization analyses do not provide much in the way that might

[236] Shaver, "Morality Trap" at p. 141.

explain this fact. Those body-rub parlours that are licensed, however, may make a claim to legitimacy that others cannot. In this manner, regulation serves to redefine what is licit and illicit in both a literal and more philosophical manner. Thus, by definition, anything that is subject to law is licit; it is allowable and permitted.[237] In Toronto, strip clubs that feature topless or nude women, and body-rub parlours that offer non-medical touching and manipulation of bodies, including bodies of the practitioners, are all licit activities. Illicit – improper, unlawful, and forbidden[238] –are those activities that are prohibited by regulation, including lap-dancing. The determination of what is licit or illicit is no longer a function of the nature of the act. What is indecent is in some ways irrelevant. In many cases, the municipal law's prohibitions and permissions both pre-empt and respond to the way in which the criminal law is interpreted by courts. Thus, following the *Mara* trial decision, Toronto introduced a ban on lap-dancing that contradicted the findings of the court. The city determined that the criminal law's definition of indecency was not the gauge of what was acceptable. Further, the Court of Appeal agreed with the city and overturned the lower court's decision, citing the city by-law as evidence of what the community found decent or indecent, licit or illicit. This does not involve privatization or purification, which seeks to eliminate or condemn disorder, but a transformative process by which disordered elements are redefined as part of the social order.

In addition, rather than always being *subject* to municipal regulation, many individuals and groups actively seek to be the object of municipal regulation as a way of gaining authority within the community. Thus, holistic and Chinese medicine practitioners sought municipal regulation over their industries seemingly because they considered that it would bestow upon them a legitimacy that they did not necessarily have before. Thus, in Windsor, where escorts are licensed, one woman explained her perspective on the benefits of licensing: "A lot of people are still going to be prejudiced against us, but now that we have our license, we're self-employed. It shows we are legally working. ... So, if I want to lease a car, I can say I'm an escort, here's my license. It's easier that way because before ... there was no proof you were doing it".[239] The general critical argument is that restrictions on sex work demonstrate "...an extreme exclusion

[237] Oxford English Dictionary Online (2d Ed.) 1989, op cit. "licit".
[238] Oxford English Dictionary Online (2d Ed.) 1989, op cit. "illicit".
[239] Eleanor Maticka-Tyndale, Jacqueline Lewis, & Megan Street, "Making a Place for Escort Work: A Case Study" (February 2005) 42:1 *The Journal of Sex Research* 46 at 50.

from the market process [that] would hardly be socially acceptable in other areas of activity."[240] Perhaps, in part, this means that so long as sex work remains marginalized, women's entrepreneurial activity – and engagement in the market – will also be marginalized. However, the observation that "it is when women take charge of their own lives—when they cease to be victims—that they are most likely to be stigmatized for their sexual activities" does not coincide with the above-noted first hand-account.[241] As the testimony of the Windsor escort suggests, it may only be through licensing that sex workers are afforded a real opportunity to take charge of their work and of their role in the community. Body-rubbers thus remain marginalized because unlike Windsor's escorts, under the by-law the sexual aspect of their work is only implicit and not explicit. In this respect, only in acknowledging the sexual nature of their work are sex workers truly set free of stigma and marginalization.

While "forces of law and money" have a powerful influence on municipal decision-making, the latter is not just the tool of capital, wielded against the victimized public. Rather, municipal regulations are disputed ground over which various interests, even within particular groups, can stake their interest and have influence. As noted above, in the 1990s many Toronto strip clubs introduced lap-dances and VIP rooms, in response to which many Toronto strippers petitioned the city to ban lap-dancing and touching.[242] In 1995, the city enacted its by-law banning these activities. Since then, others have sought to eliminate the ban, arguing that both should be permitted in VIP rooms, where strippers are permitted by club owners to keep what they earn.[243] With the ban in place, these strippers allege that they are at a financial disadvantage, unable to earn money in a lucrative enterprise but continuing to pay substantial venue fees per shift to strip club owners, who are primarily male.[244] By and large, the critical literature is unable to properly explain how these multiple forces interact or influence municipal decision-making. Much of the literature depicts the process of privatization of one where public space and public goods are privatized, almost without debate or challenge. As evidenced in the case of holistic centre licensing, municipal regulation reflects many interests. Sub-communities within the city, such

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[240] Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of Sexuality" in Carol S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge & Kegan Paul, 1984) 267 at 289.
[241] Shaver "Morality Trap" at p. 140.
[242] Pearce, *supra* note 228.
[243] *Ibid.*
[244] *Ibid.*

as the Chinese medicine community, have an interest in being acknowledged through regulation, while the city itself has an interest in obtaining licensing and tax revenue from legitimate (or licit) businesses. It is not the case that all parties are seeking the same goal through the institution of municipal regulation; rather, the latter represents what emerges through the contestation of interested groups.

The critical literature for the most part relies on binary categories that do not adequately depict the complexity of cities. For example, in discussions about anti-panhandling legislation, Mosher as well as Collins and Blomley position the city and private interests (non-panhandlers) against those who panhandle; the forces of capital defeating the forces of non-capital. These scholars' analyses depict an all-or-nothing game, whereby municipal law is used by an omnipotent majority to its advantage. In part, the critical literature assists in explaining that as power is devolved to municipalities, municipal regulations offer new "strategies of control" which may be used to "extend and reinforce the boundaries between "legitimate citizens" and "outsiders".[245] Regina Austin, for example, demonstrates what appears to be an unintended consequence of relying on culturally-specific understandings of public and private. She argues that in targeting "disorder" on public streets, municipal public order laws have the effect of defining black leisure and commercial activities as "disordered". Austin suggests that this occurs because unlike white leisure and commercial activities, which occur in private and constitute the default definition of public/private, black Americans disproportionately play and work in public.[246] Thus, in relying on one group's definition of public/private, the privatization of public space has disproportionate impacts on other groups, whose definition of same may differ. In Austin's view, the dominant view is that of white Americans who, seemingly, also dominate municipal politics. While Austin's argument highlights an additional layer to the privatization process – that of minority cultural understandings of space – her analysis, and the critical literature more generally, is unable to fully explain how these regulations are passed and implemented. Rather, these analyses depict the municipal process as one of consensus, whereby forces of privatization and purification assert their will without debate or conflict. As Levi and Valverde's analysis of the

[245] Sanchez, *supra* note 100 at 135.
[246] Regina Austin "'Not Just for the Fun of It!': Governmental Restraints on Black Lesiure, Social Inequality, and the Privatization of Space" (1998) 71 *S. Cal. L. Rev.* 667 at 695-698; Regina Austin, "'An Honest Living': Street Vendors, Municipal Regulation, and the Black Public Sphere" (1994) 103 *Yale L. J.* 2119 at 2121.

debates surrounding Toronto's shelter by-law demonstrates, however, the way in which city councillors propose and pass legislation is not one-dimensional.

In Toronto, generally beneficial public goals were pursued by many councillors and citizens' groups who petitioned the city in support of the expansion of shelters and their location in multiple areas throughout the city. Levi and Valverde document how city councillors did not succeed in introducing a by-law which redistributed homeless shelters throughout the city not because of a vengeful majority but because the tools available to the city were inadequate for the task. Most analyses of anti-homeless legislation and civility laws, however, do not adequately take into account the active role that individuals and groups play in determining local laws, including those laws to which they are directly subject. As Schragger suggests, city residents may seek to manipulate the line between private and public to simultaneously define the internal membership of their community and to estrange that community from its neighbours.[247] Indeed, to characterize all city by-laws or zoning as ill-advised or as malicious attempts to destroy the public or to benefit certain interests must certainly be mistaken. Various groups have a part to play in the determination of municipal laws and, in particular, those laws themselves can be used to transform the status of groups and individuals. In practice, however, many municipal laws contain elements that strongly reflect the concerns in the critical literature. In particular, Toronto's adult regulations have a purifying focus which suggests that while groups may gain legitimacy through municipal regulation, its effects can often be the marginalization of other groups.

In the following section, I explore various substantive features of Toronto's municipal regulation of adult businesses in an attempt to understand the effects of municipal decision-making and legislation. In part, I argue that several provisions of the body-rub by-law evince a focus on surveillance and contamination that supports the purification analysis. Yet, I also suggest that the absence of similar provisions in the strip-club by-law cannot be explained through this lens alone. I demonstrate that the city's regulations differentiate between different groups. I argue that this differentiation is made possible by the unique features of municipal forms of regulation.

[247] Schragger, *supra* note 26 at 443.

The Substance of Municipal Regulations: Transformation and Marginalization

Anyone applying for a body-rubber's licence must provide the Medical Officer of Health (the "Medical Officer") with a form completed by a qualified medical practitioner that certifies that the applicant is "free from communicable diseases and is medically fit to perform or receive body-rubs".[248] Unfortunately, the *Municipal Code* does not indicate what standard one must meet to be "medically fit" to perform or receive body-rubs. One former body-rubber noted that this examination involved "a physical examination and a blood test for hepatitis and HIV. Although the city tests for infections associated with sexual contact, municipal employees do not discuss the sexual nature of the work."[249] On receipt of this test, the Medical Officer has the discretion to make its own report to the Municipal Licensing and Standards Division (the "MLSD"),[250] presumably depending on whether it deems the applicant "medically fit". In addition, the Medical Officer,[251] the MLSD, and the Toronto Licensing Tribunal are each granted their own discretion to require a body-rubber to be medically examined by a doctor. They may make such a demand if they have reasonable grounds to believe that the conduct of the body-rubber "may not be in accordance with this chapter, or may endanger the health or safety of other persons".[252] Thus, pursuant to this provision, if these municipal authorities suspect that a licensed body-rubber is injured or ill or mentally impaired, she must submit to an examination by a medical practitioner or risk having her license revoked. Notably, only body-rubbers must demonstrate that they are free of communicable diseases and "medically fit" for their jobs. Neither holistic practitioners nor strippers need to provide such evidence when applying for or renewing a license.

It is not immediately evident why only body-rubbers need to submit to such intensive and intimate surveillance. One answer may be that the adult business by-laws were introduced at different times. Yet, although the holistic practitioner by-law was added in the 1990s, the strip

[248] Municipal Code, *supra* note 198 at s. 545-333(A).
[249] Emily van der Meulen & Elya Maria Durisin "Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability" (2008) 20 *Canadian Journal of Women and the Law* 289 at 398.
[250] Municipal Code, *supra* note 198, s. 545-333(B).
[251] *Ibid.*, s. 545-346(C).
[252] *Ibid.*, s. 545-333(C).

club by-law was introduced at the same time as the body-rub by-law, and yet does not include any medical requirements. Since 1995, however, strippers have been prohibited to "touch or have physical contact with any other person in any manner whatsoever involving any part of that person's body".[253] These provisions were challenged in *Adult Entertainment* and upheld by the court. The *Municipal Code* also tasks owners of strip clubs with ensuring that no prohibited touching occurs.[254] Interestingly, although Toronto's stripper dress code provisions were initially struck down by the courts, which decision the Supreme Court found to be wrongly decided, the city has not introduced any provisions since. In fact, the *Municipal Code* explicitly acknowledges that strip clubs involve full or partial nudity.[255] Perhaps the difference between the two may be explained with reference to the language of the by-laws themselves. As excerpted above, the applicable provision notes that body-rubbers must be fit to perform *or receive* body-rubs. The inference is that the regulations reflect an implicit understanding that, on occasion, customers request to offer a body-rub to body-rubbers. This is not likely an event that occurs in strip clubs very often. Further, since the prohibition on touching and lap-dancing was introduced in 1995, there is even less risk that strippers will touch (and infect) their clients. Likewise, it is perhaps only the former who are believed to be in the business of offering sexual services.[256]

Arguably, the structure of Toronto's by-law and the nature of the test to which applicants must submit implicitly acknowledge that the kind of contagion that a body-rubber might possess and communicate is one that is transmitted sexually. Yet, as Van der Meulen and Durisin note, the *Municipal Code* contains dress code and no-touching provisions that apply only to holistic practitioners and strippers. Further, these provisions reflect a similar belief that sexual services may be on offer in those adult businesses.

Although body-rubbers continue to be defined as deviant sexual outsiders, the same does not apply to strippers. Although the no-touching and anti-lap-dancing aspect of the strip club by-law in some respects positions strippers as dirty and potentially contaminating, the underlying

[253] *Ibid.*, s. 545-396.
[254] *Ibid.*, s. 545-395.
[255] *Ibid.*, s. 545-1.
[256] van der Meulen & Durisin, *supra* note 249 at 299.

rhetoric relies on a finding that dancers might also be at risk of contracting diseases. Yet, despite this, strip clubs are not targeted in the same way as body-rub parlours. While they are not necessarily desired by residents, they are not as widely targeted as bastions of pollution. Indeed, even strip club owners attack body-rub parlours as social problems. This transformation is also seen when one considers the presence of strip clubs on Toronto's streets. While the purification framework suggests that strip clubs and body-rub parlours alike are likely to be purged from public space and from public visibility, Toronto's strip clubs have not retreated into side-streets or dark alleys. Rather, they have remained part of the public sphere and the city streetscape. More powerful an explanation of this phenomenon is the transformative power of municipal regulation, which has the effect of legitimizing and cleaning-up what was formerly perceived of as a dangerous presence in this city.

Indeed, in Toronto strip clubs are for the most part seemingly treated as salacious entertainment. Toronto's largest strip clubs, for example, are located on Yonge Street and on other major business and retail streets.[257] In particular, following the Supreme Court's decision in *Mara* and the Court of Appeal's decision in *Adult Entertainment*, strip clubs have been largely tamed. They may simply offer sexual entertainment or titillation, but by and large prostitution is associated with and believed to be endemic to body-rub parlours. The perceived connection between body-rub parlours and sex arguably provides the rationale for the contamination and disease discourse. Indeed, while the dress code and no-touching provisions are problematic, they are arguably included in the *Municipal Code* to prevent in strip clubs and holistic centres the very activities that occur in body-rub parlours and to which the municipality turns a blind eye.

While Toronto's regulations work to make body-rub parlours invisible, comparatively, Toronto strip clubs are plainly visible to anyone passing one on their way to work, lunch, or shop. As noted above, the locations of Toronto's most popular strip clubs are quite conspicuous. Several, including The Brass Rail (which features female dancers) and Remington's (which features male dancers and caters to Toronto's gay community) line Yonge Street, which is the formerly

[257] Mr. Koumoudouros's clubs, The House(s) of Lancaster, are located on Bloor Street West in Toronto and on the Queensway in Etobicoke, Ontario, a community that forms part of the Greater Toronto Area and is located immediately to the west of downtown Toronto. See: http://www.thehouseoflancaster.com/contact.php.

maligned "sin strip" of the 1970s. Further, these clubs advertise their services by way of flashing neon signs and oversized posters of featured dancers. The clubs are known to exist and assert a clear presence along sidewalks, in public space. Additionally, Toronto strippers are quite visible and organized, with their concerns often forming part of the public debate.[258] Indeed, although Toronto imposes general business signage restrictions on all adult businesses, body-rub parlours are singled out and targeted under several specific provisions. Body-rub parlours are permitted only two small signs, one which indicates that the business is a licensed body-rub parlour and one non-illuminated sign which indicates only in words the name of the business, its phone number, and address.[259] Body-rub parlours cannot advertise on sandwich boards or by any other means on the street.[260] Additionally, advertisements may not be placed inside a body-rub parlour if it can be seen by a person outside the body-rub parlour.[261] These regulations seek to make body-rub parlours as inconspicuous as possible.

The critical literature cannot satisfactorily account for the prominence and blatant visibility of Toronto's strip clubs in light of the restrictions placed on body-rub parlours. It explains the distinction between these two categories partway, but does not fully explain it. In part, the perceived connection between body-rub parlours and sex may explain the disproportionate advertising restrictions placed on these businesses. These restrictions likely respond to concerns that the presence of neon signs advertising massages or topless body-rubs drive away "families and legitimate businesses" from city neighbourhoods.[262] Body-rub parlours' ability to advertise may be curtailed more than strip clubs because they are considered to be fronts for prostitution and thus their existence more directly triggers concerns about sex and immorality. Indeed, Crofts suggests that Australia's brothels are generally considered contaminating and problematic "because of their association with sex and immorality"; they "break the rules of morality that are closely entwined with sex".[263] Likewise, purification would also suggest that anxieties about sexuality and morality underlie the impulse to purify the public of the contaminating presence of body-rub parlours. Arguably, body-rub parlours, like Crofts's brothels, are seen to contaminate

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[258] See, *infra*, p. 41 and p. 35.
[259] Municipal Code, *supra* note 198, s. 545-349(C) and (F).
[260] *Ibid.*, s. 545-349(H)
[261] *Ibid.*, s. 545-349(J)
[262] Kelly Patrick, "Rub rooms impossible to rub out" *The Windsor Star* (2 September 2005) A8.
[263] Crofts, "Visual Contamination", *supra* note 138 at 7.

by their very existence or because they are known to exist.[264] By limiting their visible presence on the streets, these regulations work to purge body-rub parlours from public space, hiding them from public view. In hiding body-rubbers from public view, this regulatory framework also privatizes "many of the aesthetically and morally offensive physical, psychological, medical, and social problems" surrounding their highly marginalized identities".[265] Additionally, a purification analysis might suggest that they work to ensure that body-rub parlours, which are things "out of place" and potentially dangerous to the social order, are made as invisible as possible.

Neither the purification or privatization analysis satisfactorily explains why there is a legal and conceptual difference between strip clubs and body-rub parlours. Certainly, it is feasible that strip clubs engage the same moral and sexual anxieties as body-rub parlours and brothels. In part, the indecency case law reflects these anxieties; strip clubs have had a significant part to play in the evolution of Canada's indecency laws.[266] Yet, the purification analysis does not quite fit when applied to strip clubs. Although arguably engaging the same anxieties, Toronto's strip clubs are public and conspicuous. Further, operators like Mr. Koumoudouros are cited as upstanding businesspeople, positioned against body-rubbers and body-rub parlours. Thus, strip clubs seemingly operate in a unique space; formerly illicit, strip clubs have been in some ways exonerated of this status through regulation. Additionally, the introduction of new forms of sexual entertainment has repositioned strip clubs as offering legitimate entertainment. This has not been accomplished through a legislative amendment to the indecency laws; the entertainment offered inside strip clubs is still potentially subject to indecency charges. Rather, it is in part a function of the courts' interpretation of indecency laws in a way that favours the exercise of municipal over criminal intervention. In this respect, municipal regulation has a powerful transformative effect because it deals with the issues differently than does the criminal law.

Arguably, this transformative process is gradual and is predicated on negotiation among members of the community. Thus, in Toronto, the holistic and Chinese medicine communities

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[264] Crofts, "Disorderly Acts", *supra* note 133 at 26 [footnote omitted]; Crofts, *ibid*. at 7.
[265] Duncan, *supra* note 175 at p. 140.
[266] See, *supra*, text accompanying footnotes 41-47.

demanded that the city introduce regulations which would differentiate them from body-rub parlours. In this respect, municipal regulations can be used in an exclusionary way. Separate regulations work to purify licit businesses like holistic centres of the pollution that is associated with illegal body-rub parlours, which are perceived as illicit. Yet, although licensed body-rub parlours are also suspected of offering sexual services, that they are licensed provides some assurance that they are "under control". Indeed, the focus of the holistic and Chinese medicine community (and of the media) was on unlicensed body-rub parlours which operated in disguise. It was this element of disorder that caused such consternation. In some sense, the concern was not that body-rub parlours existed, but that they pretended to be something they were not. Thus, rather than merely demonizing the illicit, which is sought to be eliminated, Toronto's regulations restructure the relationship between these businesses and between these businesses and the public. The *Municipal Code* distinguishes holistic centres and Chinese medicine services from body-rub parlours, but all are subject to municipal regulations and none are banned or outlawed. Each category of business, including body-rub parlours, is regulated; even the anonymous and ambiguous is incorporated into the social order. While body-rub parlours may not be desirable, they are in some sense (and to a lesser extent than strip clubs) tolerated provided they are kept in their place.

Toronto's patchwork of regulations is also evidence of a rhetorical and philosophical shift that has taken place over time. In their analysis of the city of Ottawa's strip club by-laws, Bruckert and Dufrense note a discursive shift in discussions and laws addressing these businesses, from one of moral contamination to one of morality/health/risk, which they argue was solidified through a series of jurisdictional disputes.[268] In Toronto, a similar process has occurred, with early laws reflecting the rhetoric of moral contamination and with more recent legislation and discussion embracing the discourse of health and safety. Thus, when it was introduced after the moral panic of the 1970s, the body-rub by-law adopted and implemented the disease and contamination discourse employed by newspaper reporters, citizens, and city councillors. The provisions that require the medical surveillance of body-rubbers bodies, in particular, reflects the focus of this discourse. The city's response to the holistic centre by-law issue, however,

[268] Chris Bruckert & Martin Dufresne, "Re-Configuring the Margins: Tracing the Regulatory Context of Ottawa Strip Clubs, 1974-2000" (2002) 17:1 *Canadian Journal of Law and Society* 69 at 84.

illustrates a change in focus to health and safety. Likewise, court decisions have also embraced this approach and endorsed cities' legislation in the health and safety area. As a result, it is evident that the shift from criminal to municipal law has also resulted in a more impressionistic approach to the determination of harm. Thus, in deferring to cities' expertise, courts have permitted a more malleable determination of harm than as is seen in the criminal law. The result is that cities are able to act on concerns about harm that are loosely constructed and supported.

Thus, when Toronto's collective attention first turned to body-rub parlours in the 1970s, reporters, politicians, and citizens alike used public/private rhetoric in their demands for city control over the industry. In particular, they invoked the image of the "public" as a place that had been tainted by disorderly private elements. Thus, media coverage at the time emphasized the disorder that adult businesses created, which permeated the street. As part of their campaign to encourage a power transfer to the city to deal with this threat, newspaper reporters and politicians relied heavily on the language of purification. By the mid-2000s, however, when the *Toronto Star* had turned its attention to holistic centres, the rhetoric employed by reporters, politicians, and others to discuss the dangers of adult businesses had evolved. Perhaps most noticeable because of its absence, the comments made in respect of holistic centres were largely devoid of comments about pollution and contagion. While the concerns raised were still about disease, they were expressed through the discourse of public health and safety. In the following section, I argue that, in part, this shift can be attributed to the presence in this sphere of the municipal law itself. As a municipality, Toronto is endowed with the power to legislate in the realms of "health and safety" and "consumer protection". These subject areas lend themselves more to the discourse of public health and safety than to that of moral contamination. In this section, I demonstrate that as the criminal law – the realm of morality – retracted from these areas, the municipal law and its accompanying health and safety discourse stepped in. Additionally, I identify that one consequence of this shift has been the courts' more flexible interpretation of cities' enactment of by-laws. Using the example of adult business by-laws, I demonstrate that the courts have analysed the appropriateness of the by-laws through a health and safety lens rather than a moral lens. Thus, cases are characterized less as *Westendorp* and more as *Adult Entertainment*; the goals of municipal legislation are understood to be protective rather than oppressive. I further show that this consequence, moreover, is supported by a

privatization analysis, which suggests that as legislating is devolved to the municipal level, laws are more hidden and subject to less scrutiny than if they are drafted by Parliament and passed under the guise of the moral (criminal) law.

Support for Municipal Authority and the Rhetorical Shift from Moral Harm to Health and Safety

The shift from the disease and contagion discourse employed in the 1970s to the more recent health and safety discourse parallels the increasing intervention of municipal law and retraction of federal law from this realm. In the 1970s, as part of their demand for increased authority, city councillors claimed that adult businesses "*infect[ed] the street* with pimps, drug addicts and agents of organized crime".[269] Likewise, they argued that municipal regulations would help the city to "get rid of some of this *pollution*"[270] and "sweep the goings-on of Yonge St.'s sex merchandisers *inside where they belong*."[271] Once the city obtained the power to pass regulations, they greatly reflected this focus on purification; in particular, the advertising restrictions noted above evince a concern about moral contamination.[272] Through the 1990s and the early 2000s, the rhetoric employed by politicians and citizens alike was noticeably different. By this time, cities had the power to regulate in the areas of public health and safety and consumer protection. The problem of adult businesses (and many other city concerns) was likewise recast as business rather than moral or criminal concerns. Like a dangerous industrial plant, the rhetoric employed identified the *place* of work as dangerous, rather than the people who worked there. For example, during a raid on body-rub parlours, the Police Chief of a community adjacent to Toronto opined that given the apparently known presence of "HIV-infected adults" in body-rub parlours, the "health hazards associated with these places are incredible."[273] Some strippers employed similar language in the 1990s when they demanded improved working conditions and sanitation in strip clubs. Their demands were met by the city,

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[269] "Yonge strip is a blight on Toronto" (Editorial) (7 June 1977) *Toronto Star* B4 [emphasis added].
[270] Councillor Papa of Richmond Hill, quoted in *Tresann Management* (Gen Div) in the Factum of the applicant at para. 15, para. 11 of the decision.
[271] *Supra* note 269 [emphasis added].
[272] See, *supra*, text accompany footnotes 260-262.
[273] Peter Edwards, "Massage parlour laws cut crime, prostitution down, says chief: Next target manicure shops" *Toronto Star* (14 July 2006) B02.

which amended the existing strip club by-law to create greater protection for strippers' health and safety.[274] In this respect, after the Ontario Labour Minister found as a fact that lap-dancers could be exposed to fatal disease, lap-dancing was defined as "a potential health hazard for workers contrary to the *Occupational Health and Safety Act*".[275] So described, strippers were "in principle, afforded recourse from compulsory lap-dancing inasmuch as owners could be charged under the provincial statute."[276] Again, through the rhetoric of health and safety, the focus shifts from the body of the worker to the nature of the work and the place in which it is conducted.

This rhetoric alone cannot support these laws, but must be accompanied by some evidence that health and safety concerns are really driving the introduction of regulation. In ruling on challenges to various health and safety municipal laws, courts have determined that cities need provide only impressionistic rather than "cogent evidence" that a danger to public health and safety is present.[277] In deciding whether a municipality's decision to enact a health and safety by-law is reasonable, "the court may consider and draw inferences of risk from human nature, the nature of things, and the social conditions of the time".[278] Thus, a consequence of courts' deference to municipal decision-making is that established and perhaps unfounded worries about contagion go unchallenged. In this respect, while a rhetorical shift may have taken place, underlying worries (like the visible threat of sexuality) persist, with courts simply upholding these fears on the basis of "the nature of things". Further, in not requiring "cogent evidence" that a particular by-law is necessary for public safety or health the courts may *de facto* rely on the protestations of a vocal minority or of an organized lobby group.[279] Thus, as is evidenced in an Ottawa case involving a challenge to a city by-law, although there was evidence both in support of and against the finding of a public health risk, the court deferred to the expertise of the municipality. The concerns of those who worked in the subject business, and who opposed the introduction of the by-law, were outweighed by the city.

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[274] Pearce, *supra* note 243.
[275] Bruckert & Dufresne, *supra* note 268 at 82.
[276] *Ibid.*
[277] *OABA, Appeal*, *supra* note 80 ¶ 33.
[278] *Fountainhead Fun Centre Ltd. v. Montreal (Ville)*, [1985] 1 S.C.R. 368 at p. 382.
[279] In the case of OAEBA, the court cited affidavits by many strippers who were organized into an advocacy campaign against lap-dancing. They by no means spoke for the majority of strippers. See: Pearce, *supra* note 243.

Ottawa city council passed a by-law which prohibited touching and lap-dancing on the basis that they posed a health and safety risk. The city's decision-making, and its review by the court, illustrates the degree to which impressionistic findings will support municipal action and legitimized by the courts. The applicants, a consortium of adult businesses, challenged the by-law on various grounds, including that there was insufficient evidentiary basis upon which the city council could have concluded that health and safety or consumer protection matters were of any real concern. In support of their argument, the applicants demonstrated that there was expert evidence that lap-dancing did not result in the transmission of infectious diseases and that the city had received no complaints from dancers who feared for their health or safety.[280] Although the judge did not dismiss this evidence, he found that other factors were also important and ultimately supported the city's reasons for passing the by-law. He reasoned that the city Department of Health had its own concerns about health risks to dancers, and had gone so far as to promote a vaccination program and distribute a "risky business" flyer.[281] The city had also collected reports and studies which suggested that lap-dancing posed a risk to those involved.[282] Additionally, the judge noted that the city's public health nurse, the police, dancers, and by-law officers were all involved in the consultation process respecting the drafting of the by-law. Further, some of these groups had in fact submitted reports expressing health and safety concerns in connection with lap-dancing.[283]

On reviewing this evidence, the judge found that while the evidence of health risk was not conclusively established and was somewhat "impressionistic", the concerns underlying the "no touch" and no lap-dancing provisions of the by-law were reasonable and genuine as were the safety concerns in relation to the dancers.[284] The same "impressionistic" finding of health and safety concerns was also sufficient to uphold Toronto's anti lap-dancing by-law. In that case, the Ontario Court of Appeal endorsed the Divisional Court's finding that "there is evidence, *although somewhat impressionistic*, that lap dancing gives rise to health and safety concerns. The impugned by-law addresses such concerns" [emphasis added].[285] Cities can thus in some

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[280] *Adult Entertainment Assn. of Canada v. Ottawa (City)* 2007 ONCA 389 (WL) ¶ 25.
[281] *Ibid.* ¶ 26.
[282] *Ibid.* ¶ 26.
[283] *Ibid.* ¶ 26.
[284] *Ibid.* ¶ 27.
[285] *OABA, Appeal,* supra note 80 ¶ 171.

way serve their own purposes: a city council may define and regulate an activity because it poses a health and safety concern and the city's own health agency may provide a report confirming this danger. Further, this report, and any other submitted to city council need only demonstrate an impression that there is a health and safety danger. In this fashion, the discovery of new health risks, like those the city claimed were posed by lap-dancing, [286] are easily categorized as problematic and easily regulated. The result is that city decision-making is privatized and subject to less scrutiny than an otherwise "public" decision might face. The courts' demands for proof of harm are low and the expertise of the city and its employees are seemingly prioritized over those of other interested groups, like adult business owners.

Seemingly, while the purported dangers need not be supported by facts about the transmission of infection or disease, for example, they are supported by "impressions". These impressions amount to fears about threats to the community and common perceptions about disorder that, by and large, also motivated the earlier contagion discourse. Yet, the 1970s contagion discourse differs because of its seemingly unadulterated "moral" aspects. Where once there was "pollution", there are now "risks" to health and safety, the sources of which are shifted from particular people to places, things, or "hazards". Further, where the contagion discourse supported the argument that public space be cleansed of abject elements, the health and safety discourse advocates a different type of reaction. Instead of purifying public space, this rhetoric accompanies a kind of begrudging understanding that these activities exist and will persist, but can be controlled. The city may prohibit an activity in a strip club, but the strip club remains. Additionally, while the anti-lap-dancing by-law is obviously a prohibition, it arguably reframes what might be a criminal offence as a municipal, regulatory offence. Certainly, the existence of both prohibitions may mean that a stripper who dares to conduct a lap-dance will face both a criminal and a municipal charge. It may also be the case, however, that when given this choice, a police officer will choose to lay the lesser, municipal offence. Given the uncertainty of the criminal law and the difficulty in proving the indecency test post-*Labaye*, it is certainly plausible that this easier route will be taken. While the consequence for a stripper is still serious in that her license may be compromised, this outcome is surely more palatable than a criminal trial and

[286] Bruckert & Dufresne, *supra* note 268 at 83.

record.

Courts have endorsed the devolution of many areas of authority to municipal regulation. Not surprisingly, courts have also by and large also endorsed a similar rhetorical shift by supporting municipalities' claims that by-laws regulating adult businesses were introduced for the protection of public health and safety. This support, moreover, is directly connected to courts' increasing willingness to defer to municipalities. Since municipalities are seen to have jurisdiction over local health and safety, they are given wide berth to decide what constitutes a danger to the public. The difference here between a *Westendorp* and *Spraytech* approach is quite evident. In the case of the former, a moralistic law was deemed *ultra vires* the City of Calgary because it was not sufficiently connected to a municipal purpose. In the latter, deference to municipal decision-making – even if it differed from provincial or federal findings – was encouraged in areas of municipal authority. Thus, seemingly analogous subject matter is re-characterized as very different, and laws that address them are understood as having been instituted for different, and permissible, purposes. As the criminal law retreats and municipalities take on more responsibility in what might otherwise be criminal (moralistic) areas, judicial deference allows for significant transformations to take place at the municipal level. The transformative power of municipal law, moreover, can have both positive and negative effects; while the critical literature's reliance on purification and privatization arguably focuses on the latter, the purpose of this paper was to acknowledge the possibility of the former.

Conclusion

While this paper used the case study of Toronto's institution of adult regulation by-laws, its conclusions and observations have a broader scope. As cities continue to legislate within their spheres, they will inevitably demand more authority to address new and unforeseen social and political issues. It is at the level of the city, where most Canadians live, that these issues will manifest. Indeed, in 2006, Canada's census confirmed that 80 percent of Canadians live in urban areas, with only 20 percent of the population defined as rural residents.[287] In Ontario, this

[287] Statistics Canada, "Population urban and rural, by province and territory (Canada)", online: http://www40.statcan.ca/l01/cst01/demo62a-eng.htm.

divide is even greater, with 85 percent of Ontarians identified as living in urban areas.[288] This same census revealed that as of 2006, the population of the City of Toronto was 2,503,281.[289] Comparatively, this totals more than half the population of the country of Norway.[290] The population of Canadian cities, moreover, is incredibly diverse, as are citizens' needs and interests. The governance tools available to Toronto, however, are significantly more limited than those available to most national parliaments. Particularly, Toronto and other Canadian cities are limited to introducing by-laws and zoning restrictions to achieve particular goals and, often, to enforce particular norms. While much of the existing literature has criticized how these laws are used to marginalize existing populations – either *de facto* or intentionally – municipal law permits significant transformation at the local level. Indeed, the transformative power of municipal law holds the potential for both exclusion, as critics have suggested, and for inclusion.

This paper is intended to establish a counter-point to the existing literature. It touches on issues of contemporary concern, including the ongoing question of how Canadians ought to construct their communities. Its intention, however, is also to demonstrate how recent shifts in Canada's division of government power has opened up a sphere of decision-making that may afford Canadian communities a great degree of transformative power at the local level. The introduction of by-laws may thus alter traditional understandings of belonging. As discussed above, by-laws may be used to redefine an illicit behaviour or activity as licit. Consequently, individuals once associated with illicit behaviour may themselves be redefined; no longer excluded from the community, they are redefined as a part of it. This transformation, however, is not necessarily egalitarian. Women are seemingly often less able to use its transformative power to their advantage. Thus, while strip clubs and strip club owners are increasingly viewed as legitimate businesses and business people, the same cannot necessarily be said for strippers or for other women providing sexual services or operating sexual businesses. In fact, the transformative power of municipal regulation can work to more precisely pin-point just who in the community is "bad". Toronto's detailed regulations about holistic and traditional Chinese

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[288] Statistics Canada, "Population urban and rural, by province and territory (Ontario)", online: http://www40.statcan.ca/l01/cst01/demo62g-eng.htm.

[289] Policy and Research, City Planning Division, City of Toronto, "Release of 2006 Census Results: Population and Dwelling Counts" (13 March 2007), online: http://www.toronto.ca/demographics/pdf/2006_population_and_ dwelling_count_backgrounder.pdf.

[290] World Bank, World Development Indicators: Population Totals (3 February 2010), online: http://datafinder.worldbank.org/population-total?cid=GPD_1.

medicine centres demonstrate how by-laws can be used to further clarify the proper target of community scorn. In this instance, both holistic and Chinese medicine practitioners sought municipal regulation over their industries to ensure that the public would not confuse them with body-rub parlours. Indeed, unlike strip clubs and strippers, the status of body-rub parlours and body-rubbers has seemingly not improved through the introduction of municipal regulation. This limitation, however, may be due to existing and systemic social inequalities in society, which may be beyond the realm of what municipal regulation can correct.

In addition to this limitation, the transformative power of municipal regulation may also be tempered by the courts. Although municipal regulation may be subject to judicial review, the courts have shown a propensity for deference to local decisions. Furthermore, courts will generally uphold a bylaw if a city leads impressionistic evidence that it is connected to a legitimate municipal sphere of authority. In recent years, the courts have demonstrated a willingness to support cities' reliance on the almost all-encompassing category of "public health and safety" as justification for the passage of intrusive by-laws, including those which regulate adult businesses. Unfortunately, this deference may allow for cities to pass legislation based on thinly sketched evidence of legitimate purposes which might also be self-serving. Thus, studies by the city's own public health department may be used to justify the passing of public health-related legislation, without any substantial external input or oversight. While cities may arguably best know their challenges, as this paper has demonstrated, there are multiple voices within a city and many ways in which these challenges may be characterized and addressed. Yet, judicial deference certainly enables cities to better meet the demands that devolution has placed on them. Through devolution, cities have been tasked with providing social services and benefits, such as public housing and policing. In delivering these services, cities are often faced with legal and social concerns that might arguably be beyond their traditional scope of powers. Thus, in determining entitlement to subsidized housing, cities may also need to address the intertwined issues of homelessness and poverty. Yet, cities may not be equipped to address these issues both due to the limited legislative tools available to them and the expansive nature of the problem. Nevertheless, the expansion of municipal regulation into new realms is likely. In part, this expansion may afford an opportunity for cities to adopt new approaches to old problems.

The use of city regulations allows for the redefinition of these problems and, thus, for a transformation in legal response. Even in the seemingly innocuous realm of building codes and property regulations, cities implement legislation which has transformative effects. Thus, Toronto's *Municipal Code* contains a section governing marijuana grow operations ("grow operations").[291] Changes to the *Toronto Act* allowed for the involvement of by-law enforcement officers and of the city's public health department in locating and shutting down such establishments.[292] The story of the city's response to grow operations mirrors the story of the regulation of adult businesses; Toronto was ceded authority by the province to take the lead in locating and shutting down such operations and in regulating the rehabilitation of the properties in which they are found. Although cast as an issue of public health and safety – grow operations are often associated with mould and other hazards – the regulation of grow operations is also related to the enforcement of the criminal law. Like the regulation of adult businesses, the existence of municipal regulation makes it easier for the police to lay criminal charges and for the city to demarcate its limit of tolerance for such activities. Further, it permits the city to generate additional revenue in the form of grow operation rehabilitation licenses[293] and fines.[294] Presently, this regulation does not legitimate grow operations nor regulate them. Rather, it identifies a particular problem, just as the 1970s by-laws identified and articulated the problem of adult businesses and manufactured a solution through regulation. Through this articulation – regardless the criminalization of the activity – the opportunity arises for transformation.

As discussed throughout this paper, municipal regulations are not always thrust upon city dwellers by an ill-meaning majority, but often demanded by them because of their legitimating effects. Of course, that they are invoked by some residents does not mean that city regulations would benefit all citizens by legitimating their membership in the community. In part, this may be because the transformative nature of such regulations has largely been unacknowledged or undocumented. Most literature, for instance, has shown how some local laws have targeted

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[291] *Municipal Code*, *supra* note 198 at Chapter 565.
[292] *Toronto Act*, *supra* note 32 at s. 388.1.
[293] *Municipal Code*, *supra* note 198 at s. 363.7(L): "Any demolition or building permit application associated with the renovation, remediation, demolition of a property identified as a marijuana grow operation shall be assessed a fee of $5,000 for plan review, inspection and administration in addition to any fee prescribed under § 363-6A, and an additional fee of $750 for an assessment report, remediation plan review and clerical administration costs of Toronto Public Health".
[294] *Municipal Code*, *ibid.* at s. 565-5.

undesirable populations and worked to limit their presence in the city. In particular, this literature has demonstrated how some cities have introduced civility and anti-panhandling laws explicitly for exclusionary purposes. Additionally, it has shown how other laws may be introduced to achieve unrelated goals, but have had a disproportionate impact on the poor and disenfranchised. In part, these effects may be a function of the nature of municipal regulation itself. Municipal laws have always been preoccupied with property interests and, until recently, municipal power has been largely limited to property concerns. Thus, the very nature of municipal regulations – particularly their focus on property interests – has meant that the interests of certain propertied groups and individuals are prioritized, to the disadvantage of others. As the ambit of municipal regulation expands, however, and as municipalities are increasingly permitted to pass legislation in areas that extend beyond property concerns, the possibilities of this regulation are also broadened.

Indeed, Toronto's flirtation with a shelter by-law indicates how devolution and expanded municipal powers may be used to assist marginalized groups and may be invoked by city dwellers as a tool to address distinct social problems. While many of these issues are too broad for municipal regulations to resolve, they may work to reframe problems in novel ways. Municipal laws need not only be viewed as tools of exclusion. In acknowledging particular groups of citizens, municipal laws may include once disparate or disaffected groups within the community. Certainly, a proliferation in municipal laws and regulation is not a panacea; it is a legitimate concern that municipal law may be used to further marginalize the marginalized. Yet, municipal regulation also holds greater promise. It may act as a counterpoint to federal or provincial legislation, sometimes supporting but also sometimes challenging existing laws and legal frameworks. Ultimately, municipal regulation must be understood as affording cities the opportunity to, in some way, forge their own path. Regulations may be both inclusive and exclusive. Cities' challenge is to emphasize the former: as Jacobs writes, a city meets its citizens' needs only when and if it is created by everybody.

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