AFTER *LABAYE*: THE HARM TEST OF OBSCENITY, THE NEW JUDICIAL VACUUM, AND THE RELEVANCE OF FAMILIAR VOICES

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In R. v. Labaye, *the Supreme Court of Canada finally retired the community standards of tolerance test of obscenity. The test had been the subject of much academic critique, a matter that reached its zenith in the period following* Little Sisters Book and Art Emporium v. Canada (Minister of Justice), *in which a gay and lesbian bookshop contested the procedures and legislative regime of customs officials in detaining its imports. The engagement in the literature on the efficacy of the community standards test that followed was often heated, always interesting, and ultimately unresolved. To date, we have not seen any clarifying applications of the newly proposed harm test by the Supreme Court, nor have we seen a profound articulation in any lower courts. Subsequently, the academic discussion has slowed to a crawl. In this article, the author reviews four accounts of the community standards test that were prominent following* Little Sisters, *and asks if the newly proposed* Labaye *standard meets their concerns. The* Labaye *case provides much fodder for the previous critics and supporters of a community standards of tolerance approach to analyze. After a critical analysis of the new* Labaye *test, the author concludes that the concerns have not been muted by the retirement of the community standards test, even if the voices have been. The engaged voices heard in the aftermath of* Little Sisters *should not hold back and they should not abandon the work to be done in obscenity law and freedom of expression discourse generally.*

Dans R. c. Labaye, *la Cour suprême du Canada a finalement abandonné la norme sociale du test de tolérance à l'égard de l'obscénité. Le test a fait l'objet de beaucoup de critique académique, critique qui a atteint son point culminant après l'affaire* Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice), *où une librairie desservant la communauté gaie et lesbienne contesta les procédures et le régime législatif des Douanes pour l'obtention de livres importés. La mobilisation sur l'efficacité du test de la norme sociale qui a suivi fut souvent passionnée, toujours intéressante et en définitive n'a jamais été réglée. À ce jour, on n'a pas encore vu d'applications clarifiant le nouveau projet de test de préjudice de la Cour suprême ni d'ailleurs de mouvements profonds à cet égard aux instances inférieures. Par la suite, la discussion théorique s'est énormément ralentie. Dans cet article, l'auteur examine quatre versions du test de norme sociale dominant suite à l'affaire* Little Sisters, *et demande si le nouveau projet du test* Labaye *calme les inquiétudes. La cause* Labaye *donne beaucoup de matière aux critiques et partisans de la première cause sur une approche de norme sociale à analyser. Après une analyse critique du nouveau test* Labaye, *l'auteur conclut que l'abandon du test de la norme sociale n'a pas calmé les inquiétudes, même si les voix l'ont été. Les voix engagées entendues à la suite de* Little Sisters *ne devraient pas se retenir et ne devraient pas abandonner le travail qui reste à faire en matière de discours sur la loi sur l'obscénité et la liberté d'expression en général.*

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I. INTRODUCTION

Finally!! In *R. v. Labaye*[1] the Supreme Court of Canada retired the community standards of tolerance test of obscenity. The statutory definition of obscenity in the *Criminal Code*[2] establishes that publications are obscene when their "dominant characteristic … is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."[3] The determination of the content of the phrase "undue" became the judicial vacuum which the community standards of tolerance test filled — what was intolerable to the average member of the national community would determine obscenity.

The community standards of tolerance test, though, was never an uncontroversial one. Over the years it has drawn more than its fair share of academic and activist ire. However, the high watermark of the debate was undoubtedly marked by the period following the Supreme Court of Canada's decision in *R. v. Butler*[4] and in the several years following the Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.[5] *Butler*, of course, was the landmark case that considered the constitutionality of the obscenity provisions of the *Criminal Code*. In that case, the Court reconstituted the community standards of tolerance test to account for harms that may be inherent in sexually explicit materials, in part, by melding the approach with other "tests" for harm. However, this reconstitution did not occur in an apolitical context. The divide that ensued amongst certain feminist scholars was indicative of what some have described as the Canadian follow-up to the "sex wars" — a division between "those who framed sexuality primarily as a site of danger and oppression for women and those who saw sexuality more ambivalently, as also a site of pleasure and liberation."[6] Outside of the feminist context, there were those who were simply dissatisfied with the problems inherent in trying to establish prevailing community standards and the nebulous harms of sexually explicit expression.[7]

These problems presented again in *Little Sisters*, where the Court examined the constitutionality of a customs regime and administrative practice to determine whether a gay and lesbian bookshop was being unfairly targeted and having its freedom of expression suppressed by customs' alleged discriminatory practices. In this adjudication, the Court launched into a passionate defence of the *Butler* test, suggesting that the community standards test, given that it was really a "harm" test, was here to stay. Reconstituted

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1 2005 SCC 80, [2005] 3 S.C.R. 728 [*Labaye*].
2 R.S.C. 1985, c. C-46.
3 *Ibid.* at s. 163(8).
4 [1992] 1 S.C.R. 452 [*Butler*].
5 2000 SCC 69, [2000] 2 S.C.R. 1120 [*Little Sisters*].
6 Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject" (2004) 49 McGill L.J. 847 at 851.
7 See Part III.B, "The Evidentiary Approach," below.

arguments by academics ensued again, this time with more nuance.[8] This was not simply a "sex war" but a vibrant and multivalent discussion about the efficacy of the *Butler* test in the context of expression that had impacts on women, children, alternative sexualities, and society at large. The engagement in the literature was often heated, always interesting, and ultimately unresolved. This lack of resolution was no doubt in part due to the *Labaye* decision, which, in retiring the community standards test (and on a superficial reading), called for evidentiary demonstrations of harm in order to found an obscenity conviction. Complicating matters was the fact that this judicial proclamation occurred in the context of an indecency charge, another *Criminal Code* term that had previously been given form and substance by virtue of the community standards of tolerance approach. To date, in the context of obsecenity, we have not seen a clarifying application of the newly proposed test by the Supreme Court, nor have we seen a profound articulation of application in any lower courts. Subsequently, the academic discussion has slowed to a veritable crawl. Undoubtedly, some of the major players have moved on from the debate while others are lying in wait for the next big application (perhaps some are in press while this is being written).

We approach the topic somewhat agnostically. Just as there are interesting jurisprudential concepts to consider in the *Labaye* decision, there are interesting notions to explore about the scholarship that immediately preceded the case. Has the *Labaye* case answered the concerns raised by the main opponents of the *Butler* test? Alternatively, should those who saw *Butler*, and subsequently *Little Sisters*, as a victory still be satisfied with the way we conceive of obscenity in Canada?

In this article, we undertake a critical analysis of *Labaye* with a view to answering these questions. We conclude ultimately that *Labaye* leaves a multitude of open spaces of discussion for those who were harsh critics of the *Butler* approach and for those who were supporters. We are undoubtedly in an interstitial period of flux in terms of the Canadian approach to obscenity law. This context provides interesting academic lacunae to fill with discussion of the potential long term outcomes.

In Part II of this article, we briefly review the history and content of the *Butler* approach to community standards of tolerance test, culminating in the *Little Sisters* approach. In Part III, we identify four accounts of the test in the post *Little Sisters* context. The accounts are not intended to be watertight, nor are they intended to be "the last word" of accounts that persisted at that time. They are merely four snapshots of ideas that persisted in the aftermath of *Little Sisters* (they are four types of thoughts, not four philosophies). They are an academic tool to establish content in order to answer our ultimate question: has *Labaye* responded to the concerns of those who maligned the community standards of tolerance approach or appeased those who were already satisfied? This critical analysis and our attempts to answer this question are the subject of Part IV.

Any time one chooses to write on a topic as controversial as obscenity, they should be advised that they are entering a potential minefield. The simple use of a word like

[8] I will be describing some of these accounts in detail as this article progresses.

"pornography," for instance, will cause consternation for some.[9] In this article, the term pornography will be used only when the scholars cited use the term. In other cases, we will refer only to sexually explicit expression as a means of describing depicted and/or descriptive materials that have strong sexual content. We are not trying to lob value judgments at any form of expression and do not wish for this to distract from our analysis. This article is an attempt to galvanize. We do not wish for the discussion to be stunted as we lie in wait for the next important Supreme Court of Canada case or for the next activist cause. Ultimately, we conclude that *Labaye* is a judgment that has something for everyone and nothing for everyone who thinks, reads, writes, or teaches about obscenity law.

Last, this is not an article analyzing harm in the constitutional context. In the main, we are not entering a discussion of constitutional harm as is the case in constitutional justification analysis, where a court determines whether a violation of freedom of expression by government was excusable or reasonable in part due to the nature of the "evil." We are discussing the nature of harm in the context of liability, mainly criminally, through the court's use of a jurisprudential tool that once imported community standards. Discussing issues of harm in the constitutional context is a laudable objective but one that is beyond the ambit of this narrower project. We begin by reviewing a brief history of community standards before the *Labaye* decision.

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[9] Developing a cogent definition of pornography is a difficult task to undertake because different interests define pornography differently. See e.g. Sheila Noonan, "Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee" (1985) 45 C.R. (3d) 61 at 62, who writes:

> All feminist definitions of pornography stress the presence of violence, inequality, and objectification within such sexual representations. The danger in pornography is that it may legitimize and encourage force, coercion, degradation, and dehumanization within sexual relationships. The concern focuses not only on pornography as it endorses violence against women and creates false representations of female sexuality, but also on the manner in which it reduces women as a group to mere objects of sexual access by depicting them as "sexual playthings ... instantly responsive to male sexual demands."

However, see Mary Joe Frug, "The Politics of Postmodern Feminism: Lessons from the Anti-Pornography Campaign" in Drucilla Cornell, ed., *Feminism and Pornography* (Oxford: Oxford University Press, 2000) 254 at 261-62, who contrasts this definition of pornography arguing that pornography can be actualizing. Others simply argue that "pornography" is more simply defined – "pornography" is harm, and both a reflection and catalyst of myths and stereotypes about women: see e.g. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) [MacKinnon, "Unmodified"] at 156. The back and forth as to what "pornography" is or is not could be perpetuated indefinitely without resolution. What is clear is that "pornography" has many different meanings and is incapable of a singular definition. It means different things to different players in expressive discourse. It seems that when academics and jurists speak of "pornography," they generally are speaking of expressive descriptions and/or depictions that involve, in large measure, individuals engaging in explicit (and often graphic) sexual acts and the concomitant surrounding context. The benefits or detriments achieved by being exposed to that material form the locus point of the debate.

II. A TRUNCATED SUPREME COURT HISTORY OF COMMUNITY STANDARDS IN OBSCENITY CASE LAW BEFORE *LABAYE*[10]

Many years prior to the inception of the community standards test, in *R. v. Hicklin*,[11] the Court developed a test for obscenity. Lord Cockburn proposed an obscenity test that was to influence obscenity cases in Canada, the United States, and England. The work in question in the case, the Court noted, was sold on the streets and could fall into the possession of all classes and age groups. Lord Cockburn was worried that exposure to the work could corrupt the "public mind."[12] Inherent in the Court's decision was not concern for the members of the upper class who might take possession of obscene materials, but rather, it was for the morally vulnerable: the lower classes, women, the young, and the uneducated, who were "irrational" and unable to resist the material's influences.[13] The test asked "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the publication of this sort may fall."[14] If the answer to this question was in the affirmative, then the impugned expression was declared to be obscene.

The Supreme Court introduced the community standards test shortly after the enactment of what is now s. 163(8) of the *Criminal Code*. The Court had to decide how it would apply the *Hicklin* test in light of the new legislation. In *R. v. Brodie*,[15] the criminal prosecution of D.H. Lawrence's *Lady Chatterley's Lover*[16] was at issue. Justice Judson, writing for the majority of the Supreme Court of Canada, noted that the test in *Hicklin* would be applied differently in light of the new legislation.[17] The test for obscenity was now whether "the undue exploitation of sex is a dominant characteristic."[18] The application of such a test required that the work must be read as a whole in order to determine its dominant purpose.[19] Justice Judson noted that community standards were relevant in deeming whether undue exploitation of sex had occurred since a community had tangible views of decency, cleanliness, and dirtiness.[20]

For Judson J., if the dominant purpose of the speech in question was the undue exploitation of sex, then the material contravened the legislation.[21] However, if the dominant purpose of the material was not the undue exploitation of sex, the material was acceptable.[22]

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10 See L.W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004) at 88-125, where a complete, chapter-length history and critique can be found.

11 (1868), L.R. 3 Q.B. 360 [*Hicklin*].

12 *Ibid.* at 372.

13 Brenda Cossman & Shannon Bell, "Introduction" in Brenda Cossman *et al.*, eds., *Bad Attitude/s on Trial: Pornography, Feminism and the* Butler *Decision* (Toronto: University of Toronto Press, 1997) 3 at 12.

14 *Hicklin*, *supra* note 11 at 371.

15 [1962] S.C.R. 681 [*Brodie*].

16 D.H. Lawrence, *Lady Chatterley's Lover* (Whitefish, Mont.: Kessinger, 2004).

17 *Brodie*, *supra* note 15 at 701.

18 *Ibid.* at 702.

19 *Ibid.*

20 *Ibid.* at 705.

21 *Ibid.* at 702.

22 *Ibid.*

The court must consider whether the author had a serious literary purpose or whether the purpose was merely exploitation.[23] In order to determine the dominant purpose, a court must consider the artistic or literary merit of the work.[24]

The test for obscenity was further developed in *R. v. Dominion News and Gifts (1962) Ltd.*,[25] wherein the Supreme Court of Canada agreed with Freedman J.A.'s dissent in the Manitoba Court of Appeal,[26] which noted that community standards should be an average of the community's thinking.[27] The community standard was somewhere between the lowest, most base, and most puritan tastes.[28] This approach would, according to Freedman J. A., avoid a "subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular judge who happens to be trying the case."[29] Using this test, the views of the margins of Canadian society would be excised from the consideration of community standards to produce a more acceptable, "middle of the road" standard.

The test was further articulated by the court in *R. v. Towne Cinema Theatres Ltd.*[30] There, Dickson C.J.C. noted that the task for the court was to determine, in an objective way, what "is tolerable in accordance with the contemporary standards of the Canadian community,"[31] and to avoid projecting "one's own personal ideas of what is tolerable."[32] The test was supposed to be "a standard of tolerance, not taste."[33] The test was concerned not with what Canadians would tolerate being exposed to themselves, but with what they would tolerate other Canadians seeing.[34] The standard was that of the "community as a whole."[35] The judge, rather than using evidence of Canadian attitudes, might instead infer the standard from his knowledge of those attitudes. This view of community standards was further advanced and reformulated in *Butler*, the first Supreme Court case to apply the approach under the *Canadian Charter of Rights and Freedoms*[36] in the context of obscenity.

In *Butler*, the Supreme Court of Canada was adjudicating the constitutionality of the obscenity provisions of the *Criminal Code*. The Court indeed found those provisions to be a justifiable infringement on the freedom of expression of the aggrieved video store owner. However, prior to undertaking this analysis, the Court considered how best to apply a community standards of tolerance test for the purpose of criminal liability. While the Court did not make a finding on any materials being obscene (as no materials were before it for this purpose), it did articulate a reconstituted test. Justice Sopinka recast the community standards

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23 *Ibid.* at 702-703.
24 *Ibid.*
25 [1964] S.C.R. 251.
26 *Ibid.* at 251.
27 *R. v. Dominion News & Gifts (1962) Ltd.* (1963), 42 W.W.R. 65 (C.A.).
28 *Ibid.* at 80.
29 *Ibid.*
30 [1985] 1 S.C.R. 494 [*Towne*].
31 *Ibid.* at 508.
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.* at 509.
36 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

test as a type of harm test. Justice Sopinka assumed that if the decision that material was harmful and subject to restriction did not depend on community standards, then it would be based on "the individual tastes of judges."[37] According to Sopinka J., a court should determine what the community would tolerate; "[t]he stronger … the risk of harm [to society], the lesser the likelihood of tolerance."[38] Justice Sopinka considered that the purpose of the obscenity provision was to prevent harm rather than to police conservative morality. For instance, unlike the moral conservative approach to sexual expression, the community standards test was not concerned with the prevention of "dirt for dirt's sake."[39] Justice Sopinka noted that the test from *Towne* was that materials which "exploit sex in a 'degrading and dehumanizing' manner necessarily fail the community standards test."[40] Such materials place women "in positions of subordination, servile submission or humiliation … [t]hey [violate] the principles of equality and dignity."[41]

Thus, Sopinka J. was able to, by implication, categorize sexual expression as either bad or good.[42] Whereas explicit sex with violence would violate the community standards test (and hence be bad sexual expression), explicit sex without violence, but which was degrading and dehumanizing to women, might be considered bad sexual expression if "the risk of harm [was] substantial."[43] Good sexual expression would include explicit sex without violence that does not degrade or dehumanize women and that does not involve children.[44] Justice Sopinka noted that assessing artistic merit was the final step in determining whether material was obscene. In particular, the portrayal of the sexual activity "must then be viewed in context to determine whether that is the dominant theme of the work as a whole … or … essential to a wider artistic, literary, or other similar purpose."[45] In sum, Sopinka J. formulated a harm test that determined the degree of harm by virtue of its correlation with the community standards test. By defining categories of sexual expression (as good or bad), Sopinka J. was able to provide a construction of what types of obscenity were harmful.

The Supreme Court would return to the community standards of tolerance test in the *Little Sisters* case. Here, the Court was considering the constitutionality of a customs regime and the actions of its officials in suppressing a host of sexually expressive material from crossing into Canada from the U.S. to a gay and lesbian community bookstore.[46] The material that had

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37 *Butler, supra* note 4 at 484.

38 *Ibid.* at 485.

39 *Ibid.* at 492, quoting *Brodie*, *supra* note 15 at 704-705.

40 *Butler*, *ibid.* at 478.

41 *Ibid.* at 479.

42 Brenda Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in Cossman *et al.*, *supra* note 13, 107 at 107 [Cossman, "Drag"].

43 *Butler*, *supra* note 4 at 485.

44 *Ibid.*

45 *Ibid.* at 486.

46 Karen Busby, Legal Education and Action Fund's (LEAF) counsel in the case, is careful to note that the store was not a shop for pornography but rather something of a community centre for Vancouver's gay and lesbian population: see Karen Busby, "*Little Sister's v. Canada*: What Did the Queer-Sensitive Interveners Argue about Equality Rights and Free Expression?" in Brian Burtch & Nick Larsen, eds., *Law in Society: Canadian Readings*, 2d ed. (Toronto: Thompson Canada, 2006) 4 at 5 [Busby, "Interveners"]. However, some have contested the content of this material, for example, "[i]n examining the exhibits before the Supreme Court of Canada in *Little Sisters*, many of which were defended by Little Sisters and their supporters, and all of which would have been legal had Little Sisters' arguments been accepted, we also find sexually explicit materials that sexualize racist stereotypes and degrade

been seized over the years not only included queer[47] erotica but also ranged from sex education materials for the community to anthologies and essay collections.[48]

The Supreme Court of Canada, per Binnie J., found that with the exception of the reverse onus provision in s. 152(3) of the *Customs Act*,[49] the legislation constituted a reasonable limit on the freedom of expression of the *Charter*. The majority noted that the appellants suffered differential treatment when compared to importers of heterosexually explicit material, let alone more general bookstores that carried at least some of the same titles as the appellant bookstore. The majority was thus able to conclude that the customs officials' discretion was not exercised in accordance with equality values under s. 15 of the *Charter*. In addition, the administration of the scheme was violative of freedom of expression.[50] However, the impugned scheme was not, save for a reverse onus provision, itself violative of the *Charter*.

Despite its analysis in the justification phase of constitutional analysis, the Court did engage, in a limited basis, on the meaning of community standards for the purposes of determining obscenity (although it made no such finding on this point since no impugned expression was before the Court per se). *Little Sisters* and its supporting interveners[51] argued that the community standards of tolerance test either needed to be applied so as to account for the unique needs of queer communities or was not the appropriate test to apply to queer communities. According to *Little Sisters*, the speech in question resulted in actualization through sexual affirmation of the targeted community and could benefit its community. Further, the community standards of tolerance test, when applied using a majoritarian approach to community harm, could never adequately consider the needs of the targeted community; such a test silences the voices of the queer community. The Court considered and dismissed each of these arguments in respect of *Butler*. It did so notwithstanding its acknowledgment that it could not engage in a wide-ranging consideration of *Butler*, as no party provided a constitutional notice of this issue.[52]

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members of racial minorities for the purpose of sexual arousal": Christopher N. Kendall, "Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse" (2004) 49 McGill L.J. 877 at 903 [Kendall, "Gay Male 1"].

47 I propose to use the term to refer to any and/or all of the following: people who identify themselves as gay, lesbian, bisexual, questioning, transgendered, transsexual, two spirited, or intersexed.

48 *Little Sisters*, *supra* note 5 (Factum of the Intervenor Women's Legal Education and Action Fund at para. 6) [LEAF, "Factum"].

49 R.S.C. 1985, (2nd Supp.), c. 1, s. 152(3), provides that "in any proceeding under this Act, the burden of proof in any question relating to … the compliance with any of the provisions of [this] Act or the regulations in respect of any goods" lies on the importer.

50 *Little Sisters*, *supra* note 5 at para. 124 where Binnie J. wrote:

> While here it is the interests of the gay and lesbian community that were targeted, other vulnerable groups may similarly be at risk from overzealous censorship. Little Sisters was targeted because it was considered "different". On a more general level, it is fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department. The appellants' constitutional right to receive perfectly lawful gay and lesbian erotica should not be diminished by the fact their suppliers are, for the most part, located in the United States. Their freedom of expression does not stop at the border.

51 The factums of the interveners were diverse, varied, and highly contextualized. We could not do justice to their many arguments in this short space. See Busby, "Interveners," *supra* note 46, for an articulation of the specific minutiae.

52 *Little Sisters*, *supra* note 5 at para. 53.

In particular, the majority of the Court refused to accept that queer sexual expression created by and for the queer community was in any way distinct from heterosexual sexual expression or deserving of unique consideration. The Supreme Court, per Binnie J. for the majority, noted that the critique of the community standards test as overtly majoritarian and unduly reliant on a judge's personal taste was unfounded.[53] Rather, "[a] concern for minority expression is one of the principle factors that led to the adoption of a national community standards test."[54] In addition, the Court noted that the test for obscenity was aimed at criminalizing expression that was incompatible with Canadian society as informed by equality concerns.[55] Therefore, the test could not discriminate against homosexuals.[56] Indeed, unwitting heterosexuals could inadvertently come into contact with "homosexual" sexual expression as they happened by the bookshop; surely uncensored homosexual sexual expression would result in such harm.[57]

Further, the Court rejected the claim that the harm-based approach in *Butler* was mere morality in disguise, since no evidence existed "that the arbiter [of harm] (the broader community) is incapable of being [focused on harms instead of majoritarian will]."[58] In making this determination, the Court considered three previous obscenity cases,[59] all of which determined harm according to community standards.[60] The Court concluded its review of the *Butler* test by noting that the test was not "exclusively" gender-based, and that violence against women was only one concern behind the *Butler* formulation.[61] Therefore, the Court held that the application of the obscenity provision to the queer community was appropriate.[62]

More recently, the Supreme Court of Canada, in *Labaye*, retired the community standards of tolerance test, and in its place suggested a harm test in order to assess criminal liability for obscenity and indecency charges.[63] The case purported to increase the threshold of evidentiary causality in establishing criminal liability. Prior to discussing this case, we will explore four relatively recent accounts of the community standards of tolerance test. These accounts are emblematic of the common positions and arguments made for and against the community standards of tolerance test in the period following the *Little Sisters* case. We do this in order to determine if, in fact, the *Labaye* test meets the challenges that these accounts posited following *Little Sisters*.

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53 *Ibid.* at para. 56.
54 *Ibid.*
55 *Ibid.* at para. 58.
56 *Ibid.*
57 *Ibid.* at para. 57.
58 *Ibid.* at para. 62.
59 *R. v. Hawkins* (1993), 15 O.R. (3d) 549 (C.A.); *R. v. Jacob* (1996), 31 O.R. (3d) 350 (C.A.); *R. v. Erotica Video Exchange Ltd.* (1994), 163 A.R. 181 (Prov. Ct.).
60 *Little Sisters*, *supra* note 5 at para. 62.
61 *Ibid.* at paras. 63-64.
62 *Ibid.* at para. 64.
63 S*upra* note 1.

III. FOUR ACCOUNTS OF COMMUNITY STANDARDS OF OBSCENITY

In this section, we explore four accounts of the community standards of tolerance test in the context of obscenity law. In undertaking this analysis, a word of caution is in order. These accounts are sketches of positions; they are not dogmatic statements of intent from notable scholars. The scholars who first raised these issues on occasion may cross the boundaries we create, and their work may support one or more of the accounts we will review. The sophistication of their full positions cannot be fully explored here, but the general thrusts of their positions can be briefly reviewed. The articulation of these accounts gives form and content to the questions we can ask about the relative success of *Labaye* in meeting the concerns raised. The four accounts we consider are disguised conservatism, the evidentiary approach, cautious evolution, and *Butler* community standards as success.

A. DISGUISED CONSERVATISM

The central thesis of the disguised conservatism approach posits that while in some circles *Butler* was heralded as victory for women, for others "*Butler* merely provides a new feminist language to legitimize and modernize what is really an old conservative, moral agenda."[64] The *Butler* articulation of community standards represents "a conservative sexual morality that sees sex as bad, physical, shameful, dangerous, base, guilty until proven innocent, and redeemable only if it transcends its base nature."[65] Put succinctly, the community standards test articulated in *Butler* sees sex defined as appropriate by reference to its place in the sexual hierarchy.[66]

Brenda Cossman argues that the *Little Sisters* articulation of community standards goes even further in advancing this conservatism by making clear that consensual sex can still cause harm. The Court now appears to be worried about the actions of the sexual voyeur, who is constituted in "negative terms"; the voyeur is "malleable," "dangerous," and

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64 Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography" in Cossman *et al.*, *supra* note 13, 48 at 99. See also John Fisher, "Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill L.J. 1183; Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8 Soc. & Leg. Stud. 181 at 194 [Valverde, "Risks"]; Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003); for a libertarian feminist discussion of *Butler* from a more American perspective, see Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995); even aside from feminist rhetoric, some have noted *Butler's* moralistic underpinnings: see Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R. v. Butler*" (1992) 37 McGill L.J. 1135.

65 Cossman, "Drag," *supra* note 42 at 107; arguably, this account of *Butler* was proposed by the intervener Equality for Gays and Lesbians Everywhere (EGALE) in *Little Sisters*, *supra* note 5 (Factum of the Intervener EGALE at para. 40):

> The *Butler* analysis of the harmful effects of mainstream pornography is so embedded in a heterosexual context that it does nothing to elucidate the effects of lesbian, gay, and bisexual pornography…Not only is the substance of the imagery and text significantly different…but the entire framework of production and consumption is also different. Hence it does not even make sense to infer that *analogous* harms might be caused by lesbian, gay, and bisexual pornography.

66 Cossman, "Drag," *ibid.* at 127.

potentially both a "victim" and an "offender."[67] "The voyeur, the s/m subject, the sexual subject engaged in sexual excess, the sexual subject engaged in sexual abjection can all cause harm.… In the *Butler* world, there is harm in looking."[68]

Cossman writes that the community standards of tolerance test is one jurisprudential tool by which the Supreme Court of Canada "set out to discipline sexual subjects and to normalize and regulate good sexual subjects."[69] Cossman explains that *Butler*'s search for "harms" is likely doomed to failure because "the harm attributed to pornography cannot be proven," that "expert evidence" was not required to establish community standards, and that in such an evidentiary vacuum prevailing standards of morality will fill the gap.[70]

Other scholars describe the conservative premise of the community standards of tolerance test as an evolution that is only realized as a result of *Little Sisters*. On this view, *Little Sisters* allows for other moral viewpoints "in addition to the egalitarianism of radical feminism" so that expression can be "regulated on the basis of considerations of conservative morality and sexual propriety."[71] *Little Sisters* represents a discursive turn from *Butler*, under such accounts, because while *Butler* was mainly concerned with the purported harms against women, *Little Sisters* was also concerned about harms to the unwitting passerby and a multitude of other viewpoints — it represents a dilution of the original premise of concern for women.

Therefore, the accounts discussed under this section converge on the notion that *Little Sisters* ramped up the majoritarian premise within the *Butler* community standards paradigm, informing its constituent parts with potentially discriminating effect. Further, the net result is an account of sexuality by the judiciary that seeks to discipline the viewer or observer and to normatively label various sexualities.

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67 Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*" (2003) 36 U.B.C. L. Rev. 77 at 92 [Cossman, "Unruly"]; see also Jo-Anne Pickel, "Taking Big Brother to Court: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*" (2001) 59 U.T. Fac. L. Rev. 349 at 362 [Pickel, "Big"]. For a discussion of the attitudinal harm to a "voyeur" in the context of indecency, see Valverde, "Risks," *supra* note 64 at 193.

68 Cossman, "Unruly," *ibid.* at 98-99; see also at 91-92: "the Court is beginning to make clear that the harm is no longer about harm towards women but a more ephemeral kind of harm — an attitudinal harm or a harm in the changes in behavior of the voyeur."

69 *Ibid.* at 88.

70 *Ibid.* at 90; see also Carissima Mathen, "*Little Sisters v. Canada*," Case Comment, (2001) 13 N.J.C.L. 165 at 173:

> In my view the concerns about the language in *Butler*, together with the evidence of systemic problems within the customs regime, provide a compelling study of how obscenity law has been wrongly applied — at least in the customs context — to lesbian and gay materials. Instead of addressing the issue, the Court simply casts every controversial element…as unproblematic and benign. Thus, the appellants' argument that the 'community standards of tolerance' is majoritarian and dangerous for homosexuals is rejected as 'underestimating' *Butler*'s potential.

71 Aleardo Zanghellini, "Is *Little Sisters* Just *Butler*'s Little Sister" (2004) 37 U.B.C. L. Rev. 407 at 443-44.

B. THE EVIDENTIARY APPROACH

The community standards test is, for some scholars, "a judicial construct filling a legislative vacuum."[72] L.W. Sumner, for instance, queries whether it is possible in as heterogeneous a country as Canada to have national community, and if we did, how would we determine its level of tolerance?[73] Further, "[h]ow do we avoid having judges substitute their own personal tolerance level for that of the community?"[74] For Sumner, misogynist attitudes can be expressed in the absence of erotic content, and therefore the focus of sexual expression regulation on the sexual aspects of speech is "fundamentally misdirected."[75] Rather, the appropriate legislative vehicle for regulation of such misogynist speech would target "not the obscene but the hateful."[76] Sumner calls for an approach that is harm based rather than morality based.[77]

Bruce Ryder echoes some of the concerns raised in our last account in noting that the causal hypothesis that purportedly underlies the arguments for the repression of obscene speech, particularly in the cases of fictionalized depictions, is nothing more than "moral corruption" style argumentation reminiscent of the *Hicklin* court.[78] Ultimately, Ryder concludes that materials that involve harm in production, regardless of the sexual nature of the speech, ought to be subject to criminal sanction, and that materials that do not involve harms in production should be subject to criminal sanction only in the event that such speech meets the definition of hate propaganda in the *Criminal Code*.[79] Further, material which falls short of harm or of being hate propaganda ought not to be sanctioned since the evidence of causation of harms by such materials is weak.[80]

Leslie Green takes a slightly different approach than the aforementioned scholars in distinguishing between different types of sexual expression. Green notes that whatever role straight sexual expression plays in "the complex causal network" that subordinates women, queer pornographies play a different role.[81] This is so because "the oppressor class, if there is one [in the case of queer pornographies], is in the wrong socio-erotic location."[82] Since the causal nexus between queer sexually explicit expression and harm is very weak, it is implausible to argue for suppression of queer pornographies created by and for queer communities.[83] Therefore, Green contends that treating "pornographies" as if they were but

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72 Sumner, *supra* note 10 at 125.
73 *Ibid.*
74 *Ibid.*
75 *Ibid.* at 193.
76 *Ibid.*
77 *Ibid.* at 125.
78 Bruce Ryder, "The Harms of Child Pornography Law" (2003) 36 U.B.C. L. Rev. 101 at 121 [Ryder, "Child"].
79 *Ibid.* at 135.
80 *Ibid.*; see also Bruce Ryder, "The *Little Sisters* Case, Administrative Censorship, and Obscenity Law" (2001) 39 Osgoode Hall L.J. 207.
81 Leslie Green, "Pornographies" (2000) 8 Journal of Political Philosophy 27 at 41-42; see generally Leslie Green, "Men in the Place of Women, from *Butler* to *Little Sisters*" (2005) 43 Osgoode Hall. L.J. 473 [Green, "LS"].
82 Green, "Pornographies," *ibid.* at 42.
83 *Ibid.* at 43.

a single type of sexual expression cannot truly reflect the values of autonomy or equality in society — one would always be sacrificed.[84]

This evidentiary account draws a line in the proverbial sand between types of speech that can support the case for regulation and types of speech that cannot support such a case. In the view of some, regulation of sexual expression is justified when obscene speech is actually hate speech. For Green, a line is drawn between straight sexual expression and queer pornographies. However, when one views the reason for which Green does not generally support queer sexual expression regulation, the distinction between Green's views and those of his contemporaries is somewhat diminished. Green notes that queer sexual expression is qualitatively different from straight sexual expression with respect to the equality-based harms suffered by the groups targeted: such harms are delivered by an "oppressor" class of expresser only in the case of straight "pornographies."[85] Essentially, the thrust of this argument reduces to a lack of an acceptable causal nexus between queer sexual expression and harm.[86]

C. CAUTIOUS EVOLUTION

A third account of the community standards of tolerance stemmed from the notion that the community standards of tolerance test was undergoing an evolution, one that had the potential for optimistic outcomes, particularly for some interested communities.[87] The account has much in common with the evidentiary perspective because it, too, calls for more evidentiary harms to be established in the context of the community standards of tolerance test.[88] This emphasis on harms would be a useful outcome because it would ensure that the sexually explicit expression in, for instance, the queer community, much of which could be educational, artistic, and instructive, would not be unfairly rendered obscene by virtue of a majoritarian reading of the community standards of tolerance test.[89] For instance, Karen Busby notes that the intervener, the Women's Legal Education and Action Fund (LEAF), asked the Court in *Little Sisters* to ensure that "mere assumptions about harm and merit without an evidentiary foundation [would not suppress expression absent] specific and

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84 *Ibid.* at 52.

85 *Ibid.* at 43.

86 See generally Leslie Green, "Pornographizing, Subordinating, and Silencing" in Robert C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles: Getty Research Institute, 1998) 285.

87 Busby, who would later appear as counsel for LEAF in *Little Sisters*, first displays this cautious optimism, disputing that *Butler* marked a return to majoritarian moralism but notes that the case advocated a moral standard rooted in concerns of harm for women: see Karen Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" 9 C.J.L.S. 165, n. 20; Busby also writes that "While *Butler* recognizes the relationship between pornography and inequality, thereby marking a new era in Canadian obscenity law, no one expected that discriminatory enforcement of obscenity law would end … Feminists and other equality seekers must participate in the debate … LEAF looks forward to continuing this work" (at 192).

88 Busby, "Interveners," *supra* note 46.

89 Note that this approach would never assume that all sexually explicit material by and for the queer community is beneficial: "The Supreme Court of Canada stated in the *Little Sister's* (2000) decision, that 'LEAF took the position that sadomasochism performs an emancipating role in gay and lesbian culture.…' There was nothing, *nothing at all*, in LEAF's factum, oral argument or any other representation, to support this": *ibid.* at 13 [emphasis in original].

compelling evidence."[90] Subsequently, Busby expresses concern that the Court, in *Little Sisters*, was silent on the key issue of "what kind of evidence on harm … is required before materials can be prohibited."[91]

However, *Little Sisters*, on this evolutionary reading, does establish some positive outcomes. For instance, it makes clearer than did *Butler* that "sexual expression, including queer sexual expression, is not, per se, obscene but rather is protected by the *Charter*'s free expression and equality guarantees."[92] *Little Sisters*, like *Butler*, marked "an important step in the decriminalization of sexual expression"[93] despite that it said "little about the benefits of sexual speech."[94]

On this evolutionary reading of the community standards of tolerance test, the investigation of harms would need to be informed by a clearer, more fulsome appreciation of harms. Thus, a more nuanced analysis of harms might be one step taken in the right direction. For instance, Jo-Anne Pickel has argued for a harm test that takes into account factors such as

> the sex, race, age, disability, and sexual orientation of the participants; the purposes of the materials; the intended audience, the existence of real or apparent violence; the existence of consent; the nature of the publication; and the benefits to viewers and readers from the production and dissemination of the materials.[95]

Arguably, an enriched harm-based context would satisfy the concerns inherent in this account. This would be the case in the context of sexually explicit materials created by and for queer communities, particularly when that context was enriched by factors that were tailored to account for members of those communities.

D. *BUTLER* COMMUNITY STANDARDS AS A POTENTIAL SUCCESS

The central thesis of this account starts with the presumption that *Butler* was a realization of qualified success for equality rights advocates in the Canadian context, and that the community standards of tolerance test articulated by the Court represented a potentially sound victory for those equality seekers. The thesis builds on the cautious optimism account but looks for new harms through analogies and inferences.

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90 *Ibid.* at 14.

91 *Ibid.* at 15.

92 *Ibid.* at 10.

93 *Ibid.* at 9.

94 *Ibid.* at 10.

95 Pickel, "Big," *supra* note 67 at 363-64 [footnotes omitted]; these are similar to the harm-based approach advocated by LEAF in LEAF, "Factum," *supra* note 48 at para. 30:

> It is neither desirable nor possible to set out an exhaustive list of the factors that must be considered in determining whether or not the impugned materials cause harm and therefore unduly exploit sex. However, the harms-based obscenity analysis must be sensitive to a myriad of factors, some of which include: the sex, race, age, disability and sexual orientation of the participants, characters, and creators; the purposes of the materials; the intended audience; real or apparent violence; consent and dialogue; the nature of the publication, including the relationship of the impugned materials to the entirety of the publication; the framework and manner of production, distribution and consumption; and, the benefits to viewers/readers from the production and dissemination of the materials.

These accounts have roots in an earlier brand of feminism that emphasized that heterosexual explicit sexual expression ought to be censored because it is degrading and dehumanizing,[96] because it defames and libels women,[97] and because it subordinates women.[98] In short, heterosexual sexually explicit expression reconstitutes the hierarchy and supports a patriarchal society. Understandably, the requirement of substantial causality of harm is muted under such approaches because of the intangibles advanced. While most legal scholars in the Canadian context have migrated to the other three accounts discussed in their analysis of queer sexually explicit expression, there are some whose roots directly trace back to this account.

For instance, Christopher N. Kendall argues that queer sexually explicit expression (and in particular homosexual male sexually explicit expression) should be subject to censure because it sells a sexuality of dominance — one in which women are re-violated by the depictions of a superior male dominator and submissive male/female violatee (for example, by perceiving the submissive participant as an archetypal "woman").[99] Not only do such depictions re-victimize women, they also reinforce social norms that make "heterosexuality compulsory and male dominance the interconnected and oppressive constructs that they are."[100] The net result is the maintenance and cultivation of systemic discrimination against queer men and all women.[101]

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96 MacKinnon writes that sexual expression causes harm not because it leads to a particular violent act against women; rather, the harm of sexual expression lies in its negative impact on a consumer's understanding of gender and sexuality — it generates a social environment in which women are devalued and in which sex is eroticized violence by which men seek gratification: see MacKinnon, "Unmodified," *supra* note 9 at 156. In addition, "[t]he fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, a political idea, does not make the pornography itself a political idea" (at 154); see also Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 122.

97 Helen E. Longino, "Pornography, Oppression, and Freedom: A Closer Look" in Laura Lederer, ed., *Take Back the Night: Women on Pornography* (New York: William Morrow, 1980) 40 at 46: "Pornography lies when it says that our sexual life is or ought to be subordinate to the service of men, that our pleasure consists in pleasing men and not ourselves, that we are depraved, that we are fit subjects for rape, bondage, torture, and murder … [this] fosters more lies about our humanity, our dignity, and our personhood"; see also Judith M. Hill, "Pornography and Degradation" in Robert M. Baird & Stuart E. Rosenbaum, eds., *Pornography: Private Right or Public Menace?* (Buffalo: Prometheus Books, 1991) 62 at 72: "Pornography *libels* women as a class, in impugning the nature of women" [emphasis in original]. The argument is rooted in the notion that pornography implies that women are "generally masochistic nymphomaniacs" (at 73).

98 Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality" in Baird & Rosenbaum, *ibid.*, 56 at 57:

> The oppression of women occurs through sexual subordination. It is the use of sex as the medium of oppression that makes the subordination of women so distinct from racism or prejudice against a group based on religion or national origin. Social inequality is created in many different ways … the radical responsibility is to isolate the material means of creating the inequality so that material remedies can be found for it.

99 Christopher N. Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: University of British Columbia Press, 2004) at 44-68 [Kendall, "Gay Male 2"]; see also John Stoltenberg, *Refusing to be a Man: Essays on Sex and Justice* (Portland: Breitenbush Books, 1989) at 41-56 for a defence of Kendall's thesis in embryonic form.

100 Kendall, "Gay Male 2," *ibid.* at xv.

101 Some have lamented that this type of argumentation does much to recreate the sex wars of the 1980s and 1990s where anti-pornography and pro-pornography feminists argued bitterly about the harms of sexually explicit expression: see Busby, "Interveners," *supra* note 46 at 15; see Kendall, "Gay Male 1," *supra* note 46 at 906-907:

Indeed, such arguments have also been supported by some scholars who argue that regardless of whether or not the targets are gay men or lesbians, the underlying harm of sexually explicit expression is still the marginalization of women. For instance, Janine Benedet writes that when gay men identify with the dominant "abuser," queer "pornographies" "contribute[s] to the normalization of [sexual assault]"; it promotes self-loathing since the underlying message is that the submissive deserves abuse, "just like a woman."[102] Further, "[t]his encourages gay men to reject any identification with women rather than to condemn the abuse that is visited on women and on them when they challenge compulsory heterosexuality."[103] According to Benedet, "[t]hose who have a stake in maintaining the sexual status quo of inequality know that the most effective way to achieve this is to make those who are being dominated believe that what they are experiencing is really freedom."[104]

However, Kendall is cautious about the application of a community standards of tolerance approach that would state that "gay pornography can be harmless for gay men themselves but nonetheless harmful to society as a whole."[105] Kendall argues that these two categories of expression are "harm-producing (in which case the distribution of both types should be prohibited), or neither is harm-producing (in which case neither should be prohibited)."[106] Kendall writes that the harms produced in heterosexual and homosexual sexually explicit expression derive from "sexist gender hierarchies," and therefore, "the harms to women that have been ascribed to heterosexual pornography"[107] are recreated for gay men in the context of their same sex sexually explicit expression. Kendall cautions of the futility of addressing the

> wider social harms of pornography unless we recognize and address the extent to which the attitudes and inequalities promoted in gay pornography harm gay men and, in so doing, *then* serve to reinforce the biases and inherent gender hierarchies that result in the systemic inequality referred to in *Butler*, through which both gay men and all women are harmed.[108]

Kendall also takes umbrage with claims that his contentions lack causal effect. He writes, although there is "no social science data on the links between gay male pornography and harm … there is irrefutable evidence to this effect with respect to heterosexual

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> The materials summarized here, many of which were defended in *Little Sisters* as free of harm and central to gay liberation, and all of which would have been legal had *Little Sisters* won, provide but a small overview of the content of the types of pornography available to and consumed by gay men. They are, however, indicative of what is available and, if Little Sisters, and those who intervened in the case on their behalf, prove successful in their bid to throw out the Supreme Court of Canada's *Butler*-based sex equality analysis of pornographic harm, would be readily available throughout Canada.

102 Janine Benedet, "*Little Sisters Book and Art Emporium v. Minister of Justice*: Sex Equality and the Attack on *R. v. Butler*" (2001) 39 Osgoode Hall L.J. 187 at 201. Benedet acted as counsel for Equality Now in *Little Sisters*.

103 *Ibid.* [citations omitted].

104 *Ibid.* [citations omitted].

105 Kendall, "Gay Male 1," *supra* note 46 at 891.

106 *Ibid.*

107 *Ibid.*

108 *Ibid.* at 892 [emphasis in original].

pornography."[109] In short, he argues by analogy for harm in the context of community standards.[110] Benedet also supports this analogical work and she views the Court's failure to reconsider the community standards of tolerance test in *Little Sisters* as a victory for women and queer communities:

> Little Sisters' attack on the administrative scheme in place for the review of materials by Customs was less effective because of the bookstore's insistence that pornography, or gay and lesbian pornography, or gay and lesbian pornographic books, were not harmful at all…. Specifically, they were unable to convince the Court that the glorification of sexual violence is not harmful, that the imitation of the worst of heterosexual sex by two men or two women is transformative, or that sexism, homophobia, and racism are much fun at all.[111]

In short, this account is informed by the notion that the community standards of tolerance test is a powerful force for policing the equality rights of queer communities and women. This is qualified support because it is based on a community standards of tolerance approach that is informed by a harm-based hypothesis that views sexually explicit expression as suggestive of harms to women, by analogy to members of queer communities, and subsequently reconstitutive of harms to women in a queer context. Shoring up the causal hypothesis of harm to require more cogent evidence of "attitudinal" changes would risk undoing this pledged affinity.

We now turn our attention to the content of the Supreme Court of Canada's decision in *Labaye*. In particular, we limit our description to those aspects of the decision that focus on the community standards of tolerance test in the context of obscenity law. We caution that the case was decided in the context of indecency, but that the Court's decision has obvious sweeping implications for the community standards of tolerance test. After undertaking an analysis of the case, we then conclude by querying whether the decision meets any of the concerns inherent in the accounts discussed above.

IV. *LABAYE* AND THE COMMUNITY STANDARDS OF TOLERANCE TEST

A. DECISION

In the Supreme Court of Canada case *Labaye*, the Court had occasion to review the community standards of tolerance test in a non-constitutional context and a context focused on sexual activities rather than representations of those activities (as in obscenity law). Nonetheless, the Court retired the community standards of tolerance test. If the case has any impact on obscenity, it certainly would be to modify the criminal standard required for conviction. However, we would cautiously suggest that the case explicitly does little to alter

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109 *Ibid.* Certainly this "irrefutability" is contested by many: see Cossman, "Unruly," *supra* note 67 at 89; Sumner, *supra* note 10; Ryder, "Child," *supra* note 78.

110 Kendall argues with an impressive array of social science data: Kendall, "Gay Male 1," *ibid.* at 909. Note that many of his contemporaries whose arguments we have explored in our other accounts do not agree on this point: see Green, "LS," *supra* note 81 at 492, citing Michel Foucault, *A History of Sexuality*, trans. by Robert Hurley (New York: Vintage Books, 1990) vol. 1 at 43, where Green disputes analogous harms given that "[u]nconventional masculinity is no longer necessarily interpreted as femininity." This unconventionality is not merely "hermaphrodism of the soul."

111 Benedet, *supra* note 102 at 204-205.

the causal standards of harm that the Court would require in a constitutional analysis in justifying laws that violate the freedom of expression.

In *Labaye*, the accused was charged with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the *Criminal Code*.[112] The accused operated a club in Montréal which permitted couples and single people to meet each other for group sex. The majority, per McLachlin C.J.C. and Major, Binnie, Deschamps, Fish, Abella, and Charron JJ., held that the community standards of tolerance test, which must be violated in order to establish a charge of indecency, was to be replaced with a harm-based standard.

The majority noted that the community standards of tolerance test was originally a replacement for the *Hicklin* test, in which "Cockburn C.J. stated that the test for obscenity was whether the material would tend to deprave and corrupt other members of society."[113] However, since convictions under that test often "depended more on the idiosyncrasies and the subjective moral views of the judge or jurors than objective criteria of what might deprave or corrupt,"[114] the Court in *Brodie* adopted a test based on the community standards of tolerance. "On its face, the test was objective, requiring the trier of fact to determine what the community would tolerate … in practice it proved difficult to apply in an objective fashion."[115]

The majority noted the following concerns with the way the original community standards of tolerance test was applied. How is it possible to determine "what the 'community' would tolerate were it aware of the conduct or material?"[116] In a diverse and multicultural society "whose members hold divergent views … [a]nd how can one objectively determine what the community … would tolerate, in the absence of evidence that community knew of and considered the conduct at issue?"[117]

Therefore, according to the majority, the personal views of expert witnesses, judges, and jurors dictated the results of the community standards of tolerance test.[118] According to the majority, the net result was that despite the purported objectivity of the test, "the community standard of tolerance test remained highly subjective in application."[119]

The majority then reasoned that by the time *Butler* was decided, the Supreme Court of Canada had, in substance, shifted to a harm-based approach in assessing the community standards of tolerance test.[120] The test, as proposed in *Butler*, was that the courts must determine as best as they can what the community would tolerate others being exposed to "on the basis of the degree of harm that may flow from such exposure."[121] The Court reviewed

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112 *Supra* note 2, s. 210(1): "Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

113 *Labaye*, *supra* note 1 at para. 15.

114 *Ibid.* at para. 16.

115 *Ibid.* at para. 18.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

120 *Ibid.* at para. 20.

121 *Ibid.* at para. 21, quoting *Butler*, *supra* note 4 at 485.

the basic tenets of the test. Harm, in this context, "predisposes persons to act in an anti-social manner."[122] Antisocial conduct was that "conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser likelihood of tolerance."[123] According to the majority in *Labaye*, the Court in *Little Sisters* held that "harm [was] an essential ingredient of obscenity"[124] since, as the Court pointed out in that case, "the phrase 'degrading and dehumanizing' in *Butler* is qualified immediately by the words '*if* the risk of harm is substantial.'"[125]

The majority, while noting that harm was more demonstrable than community standards, was compelled to develop a modified theory of harm to rectify the community standards of tolerance test's limitations. The majority cautiously encouraged merely an "incremental" reassessment of the community of standards of tolerance test ("step by cautious step"[126]) since the case at hand required only "the further exploration of what types of harm, viewed objectively, suffice to found a conviction for keeping a bawdy-house for the purposes of acts of indecency."[127]

For a finding of indecency, the majority proposed analyzing the nature of the harm. Three types of harm had emerged from the case law: "(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct."[128]

According to the majority, these harms were "grounded in values recognized by our Constitution and similar fundamental laws" and were "not closed; other types of harm may be shown in the future to meet the standards for criminality established by *Butler*."[129]

Of the three aforementioned harms, harm to society by predisposing others to antisocial conduct was the harm most often associated with the propagation of pornography throughout society. The majority expanded on this harm by noting that this type of harm was not completely dissimilar to *Hicklin*-esque reasoning. In *Hicklin*, "Cockburn C.J. spoke of using the criminal law to prevent material from depraving and corrupting susceptible people, into whose hands it may fall."[130] While the indecency threshold was higher under *Butler*, "the logic is the same: in some cases, the criminal law may limit conduct and expression in order to prevent people who may see it from becoming predisposed to acting in an anti-social

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122 *Ibid.*

123 *Ibid.*

124 *Labaye*, *ibid.* at para. 22.

125 *Ibid.* [emphasis in original], quoting *Little Sisters*, *supra* note 5 at para. 60.

126 *Labaye*, *ibid.* at para. 27.

127 *Ibid.* at para. 27. The Court's insistence on an incremental approach is set out at para. 26 where the majority wrote:

> Developing a workable theory of harm is *not a task for a single case*. In the tradition of the common law, its full articulation will come only as judges consider diverse situations and render decisions on them. Moreover, the difficulty of the task should not be underestimated. *We must proceed incrementally, step by cautious step* [emphasis added].

128 *Ibid.* at para. 36.

129 *Ibid.*

130 *Ibid.* at para. 45.

manner."[131] Further, the inquiry as to harm in *Butler* included surveying "attitudinal harm," since "[c]onduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them."[132] The majority was careful to limit this type of harm to situations where the public may be exposed to the material.[133]

Once the nature of the harm was established, the majority proposed that the degree of harm must be assessed. The majority noted that the degree was assessed in part by ascertaining whether the material or conduct was "incompatible with the proper functioning of society."[134] However, the threshold for establishing such a standard must be high, since membership in a diverse society mandates tolerance of conduct or material of which one disapproves, unless it is "objectively shown beyond a reasonable doubt to interfere with the proper functioning of society."[135] However, given the propensity of human nature towards biased value judgments, judges, according to the majority, should maintain an "awareness of the danger of deciding the case on the basis of unarticulated and unacknowledged values or prejudices."[136] A judge should determine harm on the basis of evidence and with a full appreciation of "the relevant factual and legal context, to ensure that it is informed not by the judge's subjective views, but by relevant, objectively tested criteria."[137]

The Court held that

> [i]f the harm is based on predisposing others to anti-social behaviour, a real risk that the conduct will have this effect must be proved. Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence to anti-social behaviour will not suffice. The causal link between images of sexuality and anti-social behaviour cannot be assumed; [rather, a link must be established] first between the sexual conduct at issue and the formation of negative attitudes, and second between those attitudes and real risk of anti-social behaviour.[138]

The Court suggests that, in most cases, expert evidence will help to establish harm but that when the Crown relies on establishing a risk of harm rather than an actual harm, such evidence may be absent.[139]

This seemingly stringent degree of harm was mitigated by the majority's contention that "[t]he more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law."[140] This sentiment echoed the majority's holding in *Butler* that harm could be determined by assessing the strength of the inference of a risk of harm; "[t]he stronger the inference of a risk of harm the lesser the likelihood of tolerance" and that such an "inference may be drawn from the material itself

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131 *Ibid.*, citing *Butler*, *supra* note 4 at 484.
132 *Labaye*, *ibid.* at para. 46.
133 *Ibid.* at para. 47.
134 *Ibid.* at para. 52.
135 *Ibid.*
136 *Ibid.* at para. 54.
137 *Ibid.*
138 *Ibid.* at para. 58.
139 *Ibid.* at para. 60.
140 *Ibid.* at para. 61.

or from the material and other evidence."[141] However, in *Labaye*, the majority conceded that "the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct."[142]

Using a nature and degree of harm test applied to the facts of the case in *Labaye*, the majority found that the autonomy and liberty of members of the public were not affected by unwanted confrontation with the sexual conduct in question since they were volunteers.[143] Further, only those already disposed to this sort of sexual activity were allowed to participate and watch.[144] There was also no evidence of antisocial acts or attitudes toward women, or for that matter men, and "[n]o one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others."[145]

B. ANALYSIS AND THE CONCERNS OF THE ACCOUNTS

In this section, we critically analyze the new *Labaye* test to determine if it is a significant deviation from the community standards of tolerance test previously articulated by the Court. Following this discussion, we briefly analyze whether concerns raised in the four accounts discussed still persist as a result of the decision. The impact of the newly proposed nature and degree of harm test at this point is less than clear.[146] The majority went to great lengths to ensure that the decision only be incrementally applied to bawdy-house indecency, yet in the process it espoused greater evidentiary standards in undertaking sexually explicit speech analysis. The decision reinforces the Court's view that predisposing others to antisocial behaviour is a legitimate type of harm that legislation can address, but the majority purports to call for a tighter causal nexus in establishing that the material does indeed cause a viewer to hold antisocial views and that those views cause a risk of antisocial behaviour. Yet the majority cites *Butler* and *Little Sisters* approvingly as successful variants of a harm-based analysis, notwithstanding that in *Butler*, the Court conceded that causal harm was all but impossible to demonstrate on the facts, and despite the fact that in *Little Sisters* no evidence was tendered to establish a causal link between the importation of sexually explicit queer expression and antisocial attitudinal change (principally because no impugned expression was before the Court for this purpose). Indeed, the majority cited *Butler* and *Little Sisters* as examples of cases that adopted the harm test in place of abject community standards; the Court in *Labaye*, according to the majority, was merely clarifying what those past cases had already established.[147] If *Butler* and *Little Sisters* represent the gold standard by which causal attitudinal change (that is, harm) is established, then the tighter exposure-attitudinal nexus

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141 *Supra* note 4 at 485.

142 *Supra* note 1 at para. 61.

143 *Ibid.* at paras. 66-71.

144 *Ibid.* at para. 66.

145 *Ibid.* at para. 67. An identical approach was also applied in the companion case, *R. v. Kouri*, 2005 SCC 81, [2005] 3 S.C.R. 789.

146 Few reported cases have, thus far, used the newly created test in the context of sexually explicit materials, or in the freedom of expression context, and the results of those cases do not provide ultimate clarity on the new approach: see e.g. *R. v. Colalillo*, [2005] Q.J. No. 19771 (Qc. Sup. Ct.) (QL); *R. c. Latreille*, 2007 QCCA 1330, [2007] Q.J. No. 11274 (QL) [*Latreille*].

147 *Supra* note 1 at paras. 21-22: "The shift to a harm-based rationale was completed by this Court's decisions in *R. v. Butler* and *Little Sisters*" (at para. 21) [citations omitted].

(and subsequent risks) proposed by the majority in *Labaye* is rendered less meaningful in the context of sexually explicit expression.

Perhaps the majority in *Labaye* believed that *Butler* and *Little Sisters* represented cases where the risk of harm was so severe that the stringent nexus between exposure and attitudinal change (and subsequent risks) was accordingly loosened, in spite of the majority's caveat in *Labaye* that such a relaxation of the nexus would be rare in cases involving sex and sexuality. If that were indeed the case, then it would appear that an exception to the stringent nexus rule would be made in all cases of sadomasochistic or otherwise violent or degrading sexually explicit expression based not on causality but on principles of previous categorization — hardly the reasoned and objective analysis of degree of harm that the majority in *Labaye* was espousing.

It is also interesting to note that *Labaye* represents the second time that the Supreme Court has purported to recast the community standards of tolerance test as the harm test. The first occasion was indeed in *Butler*. Consider the following passages from *Butler*: "Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing."[148] Further, "[a]nti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence."[149]

The harm test in *Labaye* does not completely alter this test of harm proposed in *Butler*. The *Labaye* case would essentially remove references to the community from the equation. In a sense though, the Court in *Butler* had already minimized this community consideration by holding that evidence of community standards was desirable, but not essential. There is nothing in *Labaye* to suggest that the three categories of sexually explicit expression proposed in *Butler* would cease to exist. Removing reference to the community as the arbiter of harm does not change the fact that these three standards express a community value. Removing references to the majoritarian community is one positive step in contextualizing speech. However, the *Butler* categories implicitly maintain majoritarian bias. It is the three types of harms from *Butler* that are the real legacy of the community standards of tolerance test. Violent depictions of sex may very well be the type of depiction in which the nature of harm was extreme enough such that a lower degree of risk would permit criminal sanction as contemplated by *Labaye*. In terms of a tangible harm, such as harms from production, this may be a reasonable approach; but what about the depictions of consensual and seemingly violent sadomasochistic sex in which participants are not actually injured and indeed when those depictions are experienced as actualizing and pleasurable? Does it necessarily follow that this type of depiction is categorically harmful? The categories themselves are the ultimate expression of majoritarian permissibility and therefore community harm.

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148 *Supra* note 4 at 484.

149 *Ibid.* at 485.

The objections some lobbed at the community standards of tolerance test have principally struck at its categorical nature and its application through a majoritarian lens. The majority in *Labaye* has virtually enshrined the second category of *Butler* harms: dehumanizing and degrading depictions that may be obscene if the risk of harm is substantial (a matter ascertainable by inference or direct reference to the material). Consider the following passages from *Labaye:*

> [A] particular harm envisaged in *Butler* was the "predispos[ition of] persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."[150]

> [T]he inquiry embraces attitudinal harm. Conduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them. Such conduct may violate formally recognized societal norms, like the equality and dignity of all human beings.[151]

In the *Butler* categorical approach, only one category required analysis. Violent depictions were obscene. Non-violent and non-degrading or dehumanizing depictions that did not involve children were not obscene. But degrading and dehumanizing depictions could be obscene if the risk of harm was substantial (based on inferential evidence or even upon just viewing the material). The above passage makes clear that the degrading and dehumanizing category continues to persist. The passage also makes clear that intangible harms are contemplated in this analysis — harms such as undermining respect, harms to equality, the perpetuation of demeaning views through expressive materials, and harms to human dignity outside of production harms. Further, in *Butler*, the risk of harm could be determined to be substantial by inferential analysis or by simply viewing the materials and logically analyzing the risk. Is this degree of harm any different than the *Labaye* contention that "[t]he more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law" and that "the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct?"[152] Such a probability could be established by inference or by viewing the material.

The *Labaye* case at this point does little to alter the *Butler* categories of sexually explicit expression; it continues to enshrine the types of harm envisioned by *Butler* in the case of sexually explicit expression and it allows for a mere probability of harm to justify criminal sanction in cases of more extreme risks.

Arguably, the most substantial advance in respect of obscenity advocated by the Court is a new causal standard delineated by the Court — a real risk of antisocial behaviour as demonstrated (usually by expert evidence) by a link between the sexual conduct and negative attitudes, as well as a link between those attitudes and a risk of antisocial behaviour. While such a nexus was beneficial to the aggrieved parties in *Labaye*, it seems less than clear what

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150 *Supra* note 1 at para. 45, quoting *Butler*, *ibid.*

151 *Labaye*, *ibid.* at para. 46.

152 *Ibid.* at para. 61.

benefit such a test would have had for the aggrieved parties in a case such as *Little Sisters* (for instance, recall that the Court was concerned with the attitudinal change in the mainstream passerby as well as other harms that may accrue in society at large). The *Labaye* standard, then, continues at least one flaw inherent in the former community standards of tolerance test — the mainstream cognitive lens. Next to actual physical harms to participants, attitudinal change is what society at large is afraid of when it comes to the indecent and obscene. It certainly was not a fear in the minds of the swingers who attended the club in *Labaye.* Indeed, those swingers might have been more concerned that the practice at issue was central to the way in which they lived their lives — to their actualization in society. Rather than recognizing the integral nature of the practice to the aggrieved community and then utilizing that affirmative principle to buttress the right to practice the lifestyle, the Court instead arrives at its conclusion by considering the negative implications of swinging as a lifestyle. The underlying messages are that swinging appeals to base interests, that the average member of society is not likely to suffer, and that swingers are not harmed since they are already attitudinally changed; therefore the practice in the case at bar was permissible.[153] The focus does not consider all of the stakeholders in a meaningful manner, most notably the beliefs of the aggrieved swingers. The members outside of mainstream society were analyzed as "others" and were left to behave as they wished so long as "our" interests were not harmed.

Some will argue, then, that because of *Labaye*, the Court will require more in the way of an evidentiary nexus between exposure and harm, though we hasten to add that the Court in *Labaye* was quick to describe *Butler* and *Little Sisters* as examples of a harm test properly applied. One must take the Court at its word. *Butler* and *Little Sisters* were, in its view, rightly decided. How can the Court presume to have raised its causal standard while simultaneously endorsing its previous approach?

Let us also make clear any perceived "shoring up" of the community standards of tolerance test may not have any effect on the constitutional approach to freedom of expression. To the extent that the Court in *Labaye* has raised the evidentiary bar established in the community standards of tolerance test, it has done so only in the context of liability for an indecency charge.[154] The optimism that some would glean for the tighter causal nexus of harm envisioned in *Labaye* is misplaced when it comes to freedom of expression matters,

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[153] *Ibid.* at paras. 66-68 where the majority wrote:

> The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question.
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> …
>
> Unlike the material at issue in Butler, which perpetuated abusive and humiliating stereotypes of women as objects of sexual gratification, there is no evidence of anti-social attitudes toward women, or for that matter men.… The case proceeded on the uncontested premise that all participation was on a voluntary and equal basis.
>
> The only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease.

[154] Green, "LS," *supra* note 81 at 483-84 [emphasis in original]:

> First, there is evidence necessary for *constitutionality* … [determining whether] there is a sufficiently rational connection between Parliament's aims … and the restrictive policy.… Second, there is the evidence required for political *justifiability*.… Third, there is the evidentiary standard for *liability* — the sort of evidence a judge and jury need before they may convict on an obscenity charge.

principally because obscenity cases may well engage a constitutional right. On this analysis, the harm test (replacing the community standards of tolerance test) would be applied as in *Labaye* in determining whether an accused was criminally guilty of obscenity. However, in determining whether the criminal prohibition (assuming a new, re-jigged criminal prohibition) unduly violated the freedom of expression of the accused, the former *Butler* and *Little Sisters* approach would apply. This would certainly allow the Court to rely on all of its previous contortions in assuming harm in cases of sexually explicit speech for the purposes of examining constitutional limitations of freedom of expression.

The above analysis therefore has implications for the four accounts we previously visited. If our analysis is correct, then the Court still sees sex as bad, physical, and shameful. The Court still views the attitudinal change as the principal harm of sexually explicit materials. Even if a tight causal nexus were available between the formation of antisocial attitudes and exposure to sexually explicit materials (and the concomitant formation of antisocial behaviours, another nebulous term), this would not alleviate, for instance, Cossman's contention that the Court is concerned with a sexual voyeur who is constructed negatively — a victim and an offender.[155] The participants in the sexual activity are neither celebrated nor encouraged. So long as their influence does not permeate into other corners of society, we must continue to accept the behaviours. This is not because the Court sees the behaviour as benign or beneficial, but rather because there has not been an opportunity for infection in society at large. On this reading of the case, this construction continues the discipline that the Court metes out over sexual subjects. If Cossman's presumption about the inability of proving the intangible harms of sexually explicit materials persists,[156] then the construction of the mainstream cognitive lens will fill the evidentiary vacuum left behind. While the Court's reference to the use of expert evidence may give some hope for filling the evidentiary vacuum, the Court's construction of causality, as we will discuss below, may temper any optimism. In short, this "reading" of *Labaye* certainly leaves those who prescribe to a disguised conservatism account much to contest. Their battle is not over.

Similarly, those who called for an evidentiary overhaul of the community standards of tolerance test should, on a close reading of *Labaye*, be concerned. Yes, the Court, using the same type of skepticism that Sumner invoked about the amorphous nature of community, banished the community standards of tolerance test. However, the Court then managed to reinject those same flaws back into the harm analysis. Removing references to the community does not alter that the *Butler* categorization of sexually explicit materials is informed of those same community values. More to the point, it is less than clear the nature and quality of the evidence that the Court will be looking for in future cases. The Court speaks about evidentiary links between exposure, attitudinal change, and antisocial behavior, but cites approvingly the harm-based tests proposed in *Butler* and *Little Sisters*. While the Court pays lip service to the presentation of expert evidence, it states that when harm is of an extreme nature, a lesser causal nexus will be required to justify the long arm of criminal sanction — but not to worry, the Court in *Labaye* argues, this will at least require a probability of a risk of antisocial attitudes and behaviours forming (here the Court echoes Sopinka J.'s contention in *Butler* that "[t]he stronger the inference of a risk of harm [to

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155 Cossman, "Unruly," *supra* note 67 at 92.

156 *Ibid.* at 90.

society] the lesser the likelihood of tolerance."[157]) In *Butler*, this risk could have been "drawn from the material itself or from the material and other evidence."[158] The appeal to the *Butler* categorization and the move of nomenclature in divorcing the test from the term "community," in short, do not immunize the newly proposed test from the critiques of those who subscribe to an evidentiary approach.[159] Those who called for a tighter causal nexus of harm during the life of the community standards of tolerance approach must continue to stand on guard — their concerns have not been met.

Those who found cautious optimism in the Court's approach to community standards in *Butler* and *Little Sisters* have further cause for cautious optimism. For one thing, the Court did not consider the sexual acts of an alternative sexual practice to be indecent. Incrementally, then, the Court is displaying a measure of toleration for these sexualities. However, the Court is doing so not because such behaviour is to be celebrated but because members of the public experienced no ill effects. The behavior was still marginalized. The purported shoring up of the causal standard might give hope to cautious optimists because ramping up the evidentiary nexus would make it less likely that their communities would be successfully prosecuted for simply being sexual. If we are correct in our assessment of the causal assessment in *Labaye*, then this may be cold comfort. Most importantly, whatever causal hypothesis the Court has formulated it certainly does not amount to an enriched harm-based context replete with a multitude of variables that would fully situate the harm analysis in a contextually sensitive manner. Any progress on the evidentiary front has been made in a traditional way — if others are not harmed, then the expression is allowed. We still have no clarity on the meaning of harm. That lack of clarity provides a further mission even for cautious optimists.

Last, those who saw relative success for women and queer communities in the community standards of tolerance test have some cause for disappointment. While the meaning of *Butler* has not been altered dramatically, its language has been tweaked. The central concern of antisocial conduct is no longer "the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."[160] The nature of harm is no longer even couched in the dilution of *Little Sisters*, in which the Court eschewed "special standards"[161] for any one community and noted that "violence against women was only one of several concerns, albeit an important one, that led to the formulation of the *Butler* harm-based test, which itself is gender neutral."[162] The Court now is centrally concerned with attitudinal changes in the voyeur. If the causal story has not changed, the pivot point has, and there is no vulnerable community inhabiting the locus. If the axis has changed, there may be some comfort in that the causal hypothesis has not, in our view, been raised from a quantitative perspective. Those

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157 *Supra* note 4 at 485.

158 *Ibid.*

159 Such scholars might see hope in at least one decision. In *Latreille*, *supra* note 146, the Court found no harm in sadomasochistic photos using *Labaye* and the notion that few members of the public would be exposed to the materials unwittingly. Many more decisions of this stripe would have to be assembled before those seeking greater causality can claim their concerns have been met. Note, however, that at para. 6, the Court says the material does not exceed the tolerance standards of members of the Canadian community — language from the old community standards of tolerance test.

160 *Butler*, *supra* note 4 at 485.

161 *Supra* note 5 at para. 57.

162 *Ibid.* at para. 64.

who supported the *Butler* approach may continue to raise the same causal arguments they previously posited, and in some contexts they may experience success. No doubt, there is, much for those who subscribe to this account to talk about.

V. CONCLUSION

The *Labaye* case provides much fodder for the previous critics and supporters of a community standards of tolerance approach to analyze. Their concerns have not been muted by the retirement of the community standards of tolerance test, even if their voices have been. Nor should their activism abate by virtue of the comfort of a newly formed harm test. The ultimate content of a newly formed test is a matter that will be measured and established over years, and we are likely to witness many evolutions before achieving equilibrium. We suggest that we are not at that equilibrium point yet.

Perhaps the relative quiet is due to the slow pace of legal evolution. If the acceptance (indeed, celebration) of alternate sexualities is a comet destined to blaze its way into society, the legal precedents might be the tail end. Cossman writes "while the law is busy trying to discipline these unruly sexual subjects, these sexual subjects are actually being normalized through other competing discourses."[163] Undoubtedly, continued heated debates about evolving jurisprudential tools that affect these sexual subjects must be one part of the legitimization process, even if it is the slowest part. Let the legal and academic debates continue and ensue while other cultural manifestations progress and even evolve beyond legal discourse. Let us not descend into ennui.

Labaye, in the final analysis, is a skeletal outline. So far, the Court has added the flesh by reference to *Butler* and *Little Sisters*. Lower courts may well do otherwise, and ultimately the picture may change. We must help drive the development. The anxious, persistent, and engaged voices heard in the aftermath of *Little Sisters* should not hold back and they should not abandon the work to be done in obscenity law and freedom of expression discourse generally. *Labaye* presents an opportunity for open textured discussions. We should not leave the judiciary unadvised as they ultimately give content to the vacuum.

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[163] Cossman, "Unruly," *supra* note 67 at 99. For a book-length elaboration, see Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford: Stanford University Press, 2007).