Governing through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada after R. v. Labaye [2005]

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Abstract. This paper traces the logics underpinning obscenity and indecency law in Canada from *R. v. Hicklin* (1868) to the present day in *R. v. Labaye* (2005) to discuss the emergence of a precautionary principle in the law governing sexually explicit materials and conduct. The most recent Supreme Court decision on obscenity and indecency law (*R. v. Labaye* 2005) is interesting for its appropriation of a security inspired logic of pre-emption (or precautionary governance) into the heart of obscenity and indecency law. The replacement of the community standards of tolerance test for the undue exploitation of harm with a new, so-called objective test for risk of harm, obviates the need for empirical evidence of harm to justify the exercise of state power. Today, *risk* of harm becomes a stronger element within the rubric of obscenity and indecency law thus enabling criminalization on the basis of a judge's perception of the imagined negative effects of sexual conduct and materials on constitutional values such as liberty and equality.
Key Words: Labaye, harm, risk, obscenity, indecency, governmentality, precautionary principle, security politics, liberty, equality.

Résumé. Cet article retrace les logiques qui sous-tendent la législation sur l'obscénité et l'indécence au Canada depuis la décision R. *c.* Hicklin (1868) jusqu'à celle de R. *c.* Labaye (2005), afin de traiter de l'émergence d'un principe de précaution dans la législation régissant le matériel et les conduites sexuellement explicites. La récente décision de la Cour suprême concernant la législation sur

1. The authors wish to thank Kevin D. Haggerty and the anonymous reviewers of the Canadian Journal of Sociology who provided valuable feedback on an earlier draft of this paper. William D. Watson also provided insightful comments that strengthened our earlier arguments. Nous remercions également Orane Braure Boucher et Stéphane Roussel pour leur aide experte à la traduction. Of course, any errors and omissions are our own. Article 14.03 of the University of Winnipeg Collective Agreement requires that we indicate our affiliation with the University of Winnipeg.

l'obscénité et l'indécence (R. v. Labaye, 2005) est intéressante en ce qu'elle introduit une logique préemptive (ou de gouvernance de précaution) inspirée de la sécurité au c'ur même de cette législation. Le remplacement de la norme de tolérance de la société pour l'exploitation indue par un nouveau test, soi-disant objectif, fondé sur le risque de préjudice, pare à la nécessité d'établir l'existence de preuves empiriques de ce préjudice pour justifier l'exercice du pouvoir de l'Etat. Aujourd'hui, le *risque* de préjudice est devenu un élément plus important dans la législation sur l'obscénité et l'indécence, permettant ainsi une criminalisation basée sur la perception qu'aurait un juge des effets négatifs supposés des conduites ou du matériel sexuel sur des valeurs constitutionnelles telles que la liberté ou l'égalité.
Mots clefs : Labaye, préjudice, risque, obscénité, indécence, gouvernementalité, principe de précaution, politique de sécurité, liberté, égalité.

Introduction

When risks are politically contentious, it is often interpretation all the way down.
David Garland (2003:56)

In 2005, the Supreme Court of Canada ruled on the question of whether the Montréal sex club, Le loft de l'Orage: lounge échangiste ("l'Orage") violated the Canadian bawdy house provision of section 210(1) of the *Criminal Code* for indecency.[2] L'Orage was a sex club that charged admission fees for swingers sex parties and other variously themed sex events which over the years have included "Voyeur – Exhibitionist" and "BDSM/Fetish" sex play. L'Orage advertises itself as world renowned for legalizing swingers sex clubs in Canada because the Supreme Court of Canada overturned the club owner's conviction. In that case, the Court dealt with the question of criminal liability for "indecency" and in doing so reconfigured the harm test for both obscenity and indecency in Canada (Jochelson 2009a, 2009b).[3] The case is interesting for its appropriation of a security inspired logic of pre-emption (or precautionary governance) into the heart of obscenity and indecency law. The Courts use the harm principle in a manner that allows for greater latitude for findings of guilt in these sorts of cases. They do so without the need for evidence

2. *R v. Labaye* [2005] S.C.C. 80.
3. The legal category of indecency applies to sexual conduct (i.e., where bawdy houses were being run for the purposes of indecency or where indecent performances were being held) rather than pornography (sexually explicit print and electronic materials). Indecency law imports the definition of obscenity (pornographic materials are considered "obscene" when they are deemed to cause the undue exploitation of sex which is harmful to the proper functioning of society) into its adjudication rubric.

of harm, without the need for broader consultation with the community and in a manner that stresses harm to constitutional values rather than people. It is now an obscenity/indecency crime to harm, or risk harming, constitutional values. Feminists have embraced this approach because equality is a key constitutional value.

In this paper, we provide readers with a brief history of the present governmental rationalities of obscenity and indecency by examining the jurisprudence from *Hicklin* (1868) through *Labaye* (2005).[4] We undertake this analysis to illustrate how the liberal harm principle provides the Courts with various justifications for criminalizing sexual expression and conduct, and the use of precaution as a governing strategy in the context of security processes that concern feminism (Neocleous 2007:133).

The first section of the paper sets out the tools used to analyse the reconfigured test for obscenity and indecency. We provide a brief overview of the literature on precaution to examine shifts in governing rationalities (Dean 1999/2010). Our goal is to contribute to these diverse research fields to indicate the development of precautionary mode of security governance operationalized through both the obscenity and indecency tests for (risk of) harm reconfigured in *R. v. Labaye* [2005].[5]

In the second section of the paper, we briefly outline the history of the development of the (risk of) harm test for obscenity and indecency and identify four distinct phases: (1) the *Hicklin* era (1868–1962); (2) the community standards era (1962–1992); (3) the community standards of tolerance for harm era (1992–2005); and (4) the "political harm" era (2005–present).[6] This section of the paper examines each decision for its rearticulation of the concept of harm showing how it is used to express juridical power and promote its vision of the "proper functioning of society." The Court's longstanding emphasis on guarding "the proper functioning of society" presumes a consensual moral order and in this regard they embrace law as a means of setting limits on actions using the harm principle. Using this model, the Court has historically identified obscenity and indecency as threats to the social order. We intend this exegesis as a consolidated history of the Canadian Courts' own rationales for exercising power, as well as the juridical knowledge these Courts produce about sexual harm. In this regard our aim is to highlight the

4. We examined all reported cases of obscenity and indecency from the *Hicklin* (1868) case to the present day. The English common law set out in *R. v. Hicklin* was imported into Canadian common law, providing the courts with both the definition and test for obscenity until 1959 when Parliament passed amending legislation (Johnson 1995:42–43).

5. We use the written construction (risk of) harm to communicate that the harms-based test applies both to risk of harm and harm, throughout this paper.

6. Each successive definition provided by the Supreme Court is binding on all lower courts in Canada and informs prosecution and border detention practises.

importance of examining juridical power from a sociological Foucauldian perspective to bring into focus *"differences* between the modes of operation of law" (Tadros 1998:76, emphasis in original).[7] In the field of obscenity and indecency, the law continues to operate in a juridical form to the extent that it controls by denying or setting a threshold justified in relation to the power of the sovereign (state) (Tadros 1998:88). Today that threshold continues to be defined according to a harm principle embracing precaution because it is now expanded to include future harm thereby marking a threshold of transgression *prior to consequence*.

Overall, our aim in this section of the paper is modest in setting out the successive iterations of the risk of (harm) test which informs the criminal law management of sexual materials and conduct. Our methodological approach to case analysis is inspired by the conceptual tools offered by Foucault's work on "governmentality." In that work, Foucault examined successive forms of governing to reveal how these modes of governing depend on particular ways of thinking (rationalities) that in turn operationalize particular ways of acting to intercede in the terrain that is managed by the state (Dean 2010 [1999]; Garland 1997:174; Golder and Fitzpatrick 2009; Foucault 1975, 1980, 1991; Gordon 1991; Rose 1999; Rose, O'Malley, and Valverde 2006). This paper is among the first to examine the rationalities that justify state power over sexual conduct as expressed in Canadian obscenity and indecency jurisprudence. Recently, however, Heath (2010) has shown through meticulous historical research that British obscenity law (out of which Canadian obscenity law emerges) developed as part of the overall governmentalization of the state throughout the 19th century primarily "to manage population through regulating the culture and bodies of the working classes" (Heath 2010:59).

In the third section of the paper, we argue that the *Labaye* test follows a particular logic which has been described as coterminus with shifts in government characterized as neoliberal, advanced liberal, (Garland 2000; O'Malley 2004; Hudson 2003), and a "drift towards law and order" (Garland 2001:25) because it expands the basis upon which courts can produce a finding of guilt. It may also result in enhanced regulation by the state (including its agents of criminal justice: police, customs officers, and the Crown). We argue that this is achieved in part through a (risk of) harm-based precautionary principle regulating sexually explicit materials and conduct on the basis of risk abstractions that usually obviate the demand for social scientific expertise of "tolerance" or "undue exploitation of sex causing harm." Now *risk* of harm (which encapsulates

7. We define juridical power as "any form of power which attempts to prevent a certain type of action through the threat of legal or social sanctions" (Tadros 1998:78).

potential harms that may or may not be empirically knowable) expands the conceptual and practical terrain of government. A precautionary principle now animates the *actus reus* for criminal indecency convictions.

Precautionary Governance

The precautionary principle emerged in the 1970s in the context of the environmental movement to address the failure of both risk assessment and cost-benefit analysis strategies to protect human health and the environment. The principle is linked to the German notion of *Vorsage* which refers to "foresight" or "forward-looking planning" that implements protectionist strategies to forestall environmental damage and protect human health by placing stronger limits on capitalist industrialization (Gardner 2006:35). Jordan and O'Riordan note, quite rightly, that the precaution principle defies uniform definition because risk perception reflects value positions that are deeply entrenched in politics and culture (1999:18; Gardiner 2006:41). Ericson (2007) has argued that the desire to prevent harm at all costs has led to an enhancement of state power and to laws and procedures that undermine liberal legal principles (Hudson 2009:711). The logic of precaution in the field of criminal justice expands the justification for criminalization to manage an uncertain future. According to Zedner (2009:84):

> Whereas agents of criminal justice are required to satisfy tests as to the sufficiency of evidence before they seek to prosecute, precaution, in effect, licenses action even when evidence is not available or, if available, where it cannot or will not be disclosed. Although in origin the precautionary principle is applicable in law only in respect of grave and irreversible harms, the logic of precaution is spreading downward to provide a warrant for decision making in situations of uncertainty even where the anticipated harms are of a lesser gravity. It has come to inform an altogether less principled precautionary approach that serves as a licence for policies formulated to deal with incalculable but threatening futures.

Smith (2006) describes the expansion of the harm principle by courts in the United States dealing with obscenity cases as a concrete example of the rise of "illiberal" legal practices. Whereas others have been inspired by the work of Foucault (1977) have argued that a governmentality of security (of which precaution is an element) has been an historically *integral* feature of liberalism. According to Neocleous (2007:133):

> history reveals that liberalism's central thematic is not liberty, but security. Foucault (1991, 1997, 2000a, b) has shown how rather than resist the

> push to security in the name of liberty, liberalism in fact enacts another form of political rationality that sets in place mechanisms for a "society of security". "Security" here straddles law and economy, police power and political economy, and becomes the dominant mode of what Foucault calls "governmental rationality".

Dean (1991:196) has argued that liberalism is in fact a *technique of security*.

For the *Labaye* Court, certain kinds of sexual materials and conduct present a threat to society and therefore justify preemptive action on the part of the courts and police in relation to protecting society from harm. In this regard, the Court adopts what Haggerty (2003:198) refers to as a "precautionary decision making strategy [which] has a different relationship to scientific knowledge [and] is concerned with a broader range of potentialities, and works in a separate logical register than decisions based on a template of risk." Unlike the risk thinking that seeks to identify individuals (through profiling or the actuarial based risk management of targeted prison populations) precaution treats all possible situations as a threat and uses undifferentiated measures to target everyone (Haggerty 2003; Zedner 2009:84).

In this sense, the precautionary principle aligns well with the juridical form of law which seeks to identify sexual transgressions and prevent any and all conduct it deems risky or harmful to society. According to Jordan and O'Riordan (1999:22), the popularity of a precautionary principle is directly connected to its vagueness. In the context of indecency "harm" is malleable because it acts like a "veritable joker card" with certain risks being much more readily assumed to cause harm to society (Valverde 1999:184). These risks may include fears about children, which Hacking (2003:44) has argued "is an overwhelming addition to risk portfolios, and is above all a fear that our children will be defiled, subjected to unspeakable filth." As will be seen in our discussion below, protecting hypothetical children from hypothetical harm through the use of a precautionary principle is one element of a lower court's concern when adopting the *Labaye* framework.

The jurisprudential strategy to rely on a precautionary principle also blurs the distinction between the direct, tangible, and physical harm(s) and the indirect, often intangible harm(s) such as those "degradation- and dehumanization-based" harms, contemplated by the courts in these cases. (cf. *Butler* 1992; Koppelman 2005, 2006, 2008). As we shall see, because the courts are not required as a matter of law to consider expert forms of evidence of harm (and we are not saying they should or should not) little or no empirical evidence of (risk of) harm caused by obscenity and indecency is required for a conviction. When attitudinal harm is con-

sidered there need only be a risk of harm to attitudes to justify preemptive criminalization, because so-called harmful attitudes are formed in the future as a result of consumption of the sexually explicit materials.

By abandoning the community standards test of tolerance the Court constructs what Garland (2003:56) has referred to as a false opposition between objective versus subjective risk. *Labaye* fashions an "objective" (risk of) harm test abstracted from the sort of feminist and/or queer arguments that have informed legal interpretations of obscenity and indecency post-*Charter*, and affected the broader discourse on sexual transgression. Instead the decision simply reads in a consensual moral order with respect to the presumed harmful nature of say, public nudity, and thus mere offensiveness (read as danger to liberal freedom) has become one standard for criminal sanction and security foreclosing broader discussions about sexual freedom. Insofar as cases as important and controversial as these become subjects of broader conversations, they are significant in that they affect how different groups of people reflect on issues of sexuality and choice.[8]

Today, sexual securitization is justified in relation to exercising precaution. This takes us back to (or extends) the "I know it when I see it" test in the context of advanced liberalism where law has become focused upon risk and its management through enhanced security measures in a myriad of forms (cf. Ericson and Doyle 2003). What is more, it may now be possible to marshal a feminist iteration of (risk of) harm that aligns with the protection of constitutional equality, albeit through the use of criminal sanction and censorship in a complex securitization process. Elsewhere we have argued in line with Harris (2006:1543) who argued, in the context of recent US legal decisions on gay marriage, that law rebrands liberalism by neutralizing emancipatory claims. The recent Canadian Supreme Court decision in *R v. Labaye* [2005] rebrands liberal law in feminist and queer friendly terms insofar as it facilitates securitization to protect equality as a feature of its "properly functioning society"[9] (Jochelson & Kramar 2011: 27).

History of the Present Canadian Harms-based Tests for

8. The abandonment of the community standards test forecloses these kinds of broader conversations.

9. It is important to note for a generalist audience that obscenity jurisprudence has repeatedly presumed a consensual status quo each time the Court declares its vision for promoting a "properly functioning society" through its intervention. In legal terms, criminal sexual materials and conduct are conceived of as "obscenity" or "indecency" which threaten this *status quo*; which these laws bring into focus.

Obscenity and Indecency

For the Court, when dealing with obscenity and indecency, setting juridical boundaries has involved creating legal tests for obscenity and indecency that arguably seek to ensure that regulation reflects and supports the moral individualism envisioned by Durkheim (cf. Cotterrell 2010). In respect of obscenity and indecency jurisprudence, the Court has consistently provided justifications of the legal values it enforces in these Durkheimian terms where justice is "an expression of requirements for stable social interactions and for predictable expectations in social relations" (Cotterrell 2010:17). To the extent that Durkheim's sociology of morals "emphasizes that legal and moral values usually associated (in legal and moral philosophy) with the rights and responsibilities of individuals should be thought of primarily as prerequisites of society's *solidarity* and unity" (Cotterrell 2010:17) the Court has for more than a century adopted a position in relation to the regulation of sexually explicit materials and conduct that aims to protect the proper functioning of society. In our view, this conception of society and the work of the Court in relation to it, aligns very much with a Durkheimian "conception of social solidarity as focused mainly on functional … co-ordination and interdependence" (Cotterrell 2010:17). While we take issue with many of the assumptions underpinning a Durkheimian sociology of morals in which social solidarity is viewed as functional to complex contemporary society, our goal is not to provide that critique here, but rather to flag the Court's adoption of what can be seen as a kind of tacit acceptance of many of the assumptions underpinning a Durkheimian sociology of morals. The Court views its own work as both a reflection of morality (social consciousness, or shared beliefs and ultimate values) and a determiner of morality, which it sets out to delimit through criminal law operating in its juridical form, insofar as it relies upon the principle of harm to define transgressions thereby setting limits on actions (Tadros 1998:93). In practice, the Court engages in this work first through the judiciary (phase one), shifting to community standards (phases two and three), and then political values (phase four).

Phase One: The Hicklin Era (1868–1962)

In Canada, both obscenity and indecency, despite having undergone several discursive shifts, ultimately derive their content from value judgements about sexual danger to society's "proper functioning." The earliest and formative juridical common law obscenity test was articulated in *Hicklin* (1868). The court's decision was based not on concern for up-

per class pornography consumers but, rather, for the "dangerous classes" whom were most in "need" of regulation. For this court, the dangerous classes included the poor, working-class men, juveniles, and the uneducated, though increasingly literate, masses. The court was concerned with managing those populations of concern whose minds were susceptible to corruption by the provocative influences of obscenity (Cossman and Bell 1997:12; Johnson 1995:43–45). The legal test for obscenity formulated by the *Hicklin* court responded to its own question of "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 is likely to fall" (*Hicklin* 1868:373). The justification for regulation was a paternalistic, class-based excuse for the exercise of power by one class over another to consolidate the heterosexual monogamous family form. Following this codification of both the test and definition of obscenity, only five Canadian obscenity cases were reported between 1900 and 1940, all of which followed the *Hicklin* precedent (Johnson 1999:294). In the period that followed, obscenity was defined as a "vice" akin to drugs or alcohol that needed to be controlled to maintain social cohesion. Like those other vices, obscenity was something against which society must be inoculated because of its influence on the so-called "dangerous classes" whose minds were already weakened, causing them to reject the monogamous heterosexual family form. Through this logic, unregulated vice would lead to moral corruption and impede society's "proper functioning." Theirs was a logic aimed at conjoining the social and the economic to promote a properly functioning society.

Phase Two: The Community Standards Era (1962–1992)

In *R. v. Brodie* (1962), the Supreme Court introduced the community standards test in its consideration of D.H. Lawrence's novel *Lady Chatterley's Lover* that described an affair between an aristocratic woman and a working-class man. Here the Court began to appeal to positivist research in the human sciences as a technique for determining tolerance for "undue exploitation" by the community. The *Hicklin* Court saw itself as a guardian of the social and economic sphere and regulated access to sexually explicit materials of the inherently corruptible unruly subjects on the basis of its own judgements about those materials and activities that interfered with the properly functioning monogamous hetero-normative moral social order. The *Brodie* Court attempts to create

an objective technique by authorizing "the community" as the arbiter of sexual morality. The Court might seek evidence about the community in order to establish the harm done by obscenity. Thus, we see the creation by the Court of a nominal space for the use of empirical evidence to determine what "the community" would tolerate others being exposed to in relation to sexual danger. In practice, this work was done by the Courts, rather than the community.[10] However, implicit in the test was the notion that the judiciary represents the view of "the community." According to the *Brodie* Court the best arbiter of community standards was not the judiciary, but representatives of the community — a jury:

> There does exist in any community at all times — however the standard may vary from time to time — a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that there is any better tribunal than a jury to draw it. (*R. v. Brodie* 1964:116)

In practice, few, if any, obscenity trials were held before juries. In this regard, the technique for constituting what kinds of sexually explicit materials are harmful to society is not much different from the rationale underpinning the *Hicklin* test. Under the newly passed obscenity statute (adopted from the English statute) the Canadian Courts appeal to the fantasy of a tolerant or intolerant "community" to justify state censorship and sanction.[11] According to Cossman (1997:135) the community standards test of tolerance later served to reinforce heteronormativity.

These efforts to cloak the community standards test in objectivity through community standards were further refined and reinforced in *R. v. Towne Cinema Theatres Ltd* (1985). There, the Court underscored the importance of liberal *tolerance* towards *others* to avoid projecting "one's own personal ideas of what is tolerable" (R. v. *Towne Cinema Theatres Ltd* 1985: para. 33). This development suggested that the judiciary could infer the standard from her or his knowledge of Canadian attitudes towards sexuality. Additionally, the legal definition of "undue exploitation" was connected specifically to harm to society's proper functioning. Sex was exploitative when it was coupled with violence; a liberal harms-

10. In a later decision, the Court explicitly addressed the question of imposing individual judges' values and attempted to 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" (*R. v. Dominion News and Gifts* 1964:116).

11. Adopted into the *Canadian Criminal Code* in 1959, the new statute defined obscenity as: "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene." The Court devised a test, deemed to be objective, that relied upon its own interpretation of the community standard of tolerance for the undue exploitation of sex.

based test of obscenity was emerging (Johnson 1999:296). In this newly developing language of the post-*Charter* era, the terms "corruption" and "degradation" of morals were transformed into the ostensibly value neutral liberal legal language of "harm to society."

Phase Three: The Community Standards of Tolerance for Harm Era (1992–2005)

The community standards test of tolerance for undue exploitation of sex causing harm was further refined in *R. v. Butler.*[12] The *Butler* Court revised and rearticulated the common law definition of obscenity for the purposes of criminal liability while addressing the jurisdictional question of whether Parliament had the necessary legal justification to enforce an obscenity provision under the new *Charter of Rights and Freedoms* (1982). In *Butler* the Court set out a three-tiered test for determining which materials would fail the community standards of tolerance for undue exploitation/harm test. The three tiers were: explicit sex with violence; explicit sex without violence but which subjected people to treatment that was degrading and dehumanizing; and explicit sex without violence that was neither degrading nor dehumanizing that did not involve children (*Butler* 1992:484). The first two tiers would amount to materials that were "obscene" under the law, with the caveat that the second tier would *only* be obscene if the "risk of harm was substantial" to "the proper functioning of society" (*R. v. Butler* 1992). The Court would not consider the final tier (pornography/erotica) harmful to the proper functioning of society. The grounds set out by the Court for the criminal liability were firmly linked to the (risk of) harm to the proper functioning of society as determined by the Canadian community as a whole. Tier one would always be considered obscene and intolerable to the community and thus harmful to society, tier two might be intolerable to the community and might be obscene if the risk of harm was significant, and tier three would be tolerable, not obscene and unlikely to substantiate any risk of harm to society's proper functioning. The artistic merit defence, would require a court to consider the artistic, literary, or other merits of a work that might otherwise be deemed obscene.

The Court advanced the notion that the community would not tolerate the undue exploitation of sex, because such exploitation caused harm to the participants and to men and women more broadly as citizens of a liberal democracy who ought to be protected from harm. Harm in this

12. In *R. v. Butler*, the Supreme Court of Canada considered the constitutional question of whether section 163(8), the obscenity section of the *Criminal Code of Canada*, violated the freedom of expression guarantee of the *Charter of Rights and Freedoms*. The Court found those provisions to be a justifiable infringement of the freedom of expression of the aggrieved video store owner.

context ran a broad spectrum from harm to those who participate in making violent pornography to the attitudinal harms ostensibly flowing from sex coupled with degradation and dehumanization. For some commentators it was considered a victory for equality-seeking feminists that the Court argued that attitudinal harm could include harm to equality (both men and women), guaranteed under s. 15 of the *Charter* (*R. v. Butler* 1992:479). Post-*Charter* we begin to see the balance shift towards (or begin to include) a vision of securitization that marshals the notion of inoculating society against (risk of) harm to equality.

In reasoning that parallels that of the *Hicklin* Court, the *Butler* Court considers the impact of obscenity in terms of men's and women's attitudes (and the effects of those changes in attitudes on society). Like the Court in *Hicklin* the *Butler* Court is concerned with the negative societal effects from altered or negative sexual attitudes (which may lead to the sexual abuse of women and men). There, attitudinal changes are *caused* by obscenity, rather than exist as part the fabric of the sexist or patriarchal society conceived of in broad feminist terms. These envisioned *changes* justify censorship and state sanction. Of course, the societal dangers of obscenity also included putative physical harms to men and women engaged in the production of obscene materials; only through censorship and punishment does the Court take action in regard to harm to sex trade workers. In *Butler* we see a Court that is beginning to be concerned with threats to the constitutional values that the Court was charged with guarding, with a special emphasis on the Canadian guarantee of equality before and under the law. In relation to social cohesion, harm to equality resulting from exposure to violent and degrading pornography was flagged as one element justifying state action that infringed upon freedom of expression because it interfered with "the proper functioning of society."[13] The Court focused some of its decision on equality because obscenity law was identified as an important element in protecting women's equality by the Women's Legal and Education Action Fund (LEAF) intervener (Busby 1994). Criminalization was

13. Here the Court was examining the constitutional reasonableness of Parliament passing an obscenity law rather than adjudicating whether actual harm occurred in the case at hand. Thus the Court had only to consider whether Parliament had a reasonable objective in passing a law that respected the rights of the accused to a rational degree (this is known as the *Oakes* test [1986]). Thus the Court did not have to articulate the evidentiary strictures of criminal liability analysis. The Court noted that in the face of "inconclusive social science evidence," Parliament need only have a "reasonable basis" for passing a law (*R. v. Butler* 1992:502–3). This question is different than considering what evidence a prosecutor would need produce to achieve a criminal conviction. Indeed the conflation between constitutional harm, and harm for criminal liability was a complete fiction in the absence of suitable expert evidence (Cossman 2003:92).

therefore justifiable to prevent harm to political values such as equality, thereby ensuring society's "proper functioning."

In *R. v. Tremblay* (1993), the Court considered whether the accused, charged with running a "common bawdy house" known as the Pussy Cat in Montreal, QC, had violated the community standards of tolerance for indecency.[14] Unlike the commercial strip clubs, the Pussy Cat was a "club" in a residential home where women performed erotic dances on mattresses in rooms equipped with peep-holes, installed for the stated purpose of ensuring the women's safety while men watched and engaged in masturbation. There was informed consent on the part of both parties and no complaints by the public about the activities in the home. Customers paid a fee of $40 for a private dance, and for an extra $10 the women used a vibrator to masturbate for the client. The official policy prohibited any physical contact between the clients and the women. The private setting and consensual nature of the sex acts was appropriated into the Court's logic to justify its acquittal of the defendants. Here the logic of the court is to suspend the indecency law in the private sphere. The Court accepted expert testimony from a sexologist who normalized masturbation as healthy, and the Fraser Committee Report on Pornography and Prostitution that concluded that the community tolerates common bawdy houses (because of their private nature) while distancing the activities in question from prostitution that, in their view, are potentially harmful because sexual intercourse invites public health risks, from which the Court is charged with protecting society (*R. v. Tremblay* 1993). Healthy masturbation, in private, involving no exchange of bodily fluids becomes framed as an act of liberty free from state power. This strand of thought is later adopted in *R. v. Labaye* [2005] when the Court marshals the logic of sexual autonomy to secure liberty.

In *R. v. Mara* [1997] the Supreme Court considered whether sexual contact between patrons at Cheaters Tavern in Toronto were indecent. According to the Court:

> A performance is indecent if the social harm engendered by the performance, having reference to the circumstances in which it took place, is such that the community would not tolerate it taking place. The relevant social harm to be considered under s. 167 of the *Criminal Code* is the attitudinal harm on those watching the performance as perceived by the community as a whole. Here, as found by the Court of Appeal, the conduct exceeded the standard of tolerance in contemporary Canadian society. The activities were indecent insofar as they involved sexual touching between dancer and patron. This type of activity — the fondling and sucking of

14. The Appeal Court of Quebec set aside the acquittal of the Municipal Court and convicted the appellants (*R. v. Tremblay* 1993).

> the dancer's breasts by patrons, as well as contact between the dancer or patron and the other person's genitals — is harmful to society in many ways: it degrades and dehumanizes women; it desensitizes sexuality and is incompatible with the dignity and equality of each human being; and it predisposes persons to act in an antisocial manner. (*R. v. Mara* 1997:3)

The Court invokes the security apparatus to sanction "lap dancing" that involved heavy petting and oral sex (distinguishing law from *Tremblay* where liberty was protected). The Court's perception of the sexual conduct being "public" rather than "private" triggered both the risk and harm bells in relation to the risk of public lap dancing engendering antisocial attitudes that risk causing harm to the proper functioning of society. The women's working conditions (potential direct harm to actual persons) were irrelevant. Their rationale for government focused upon population management by targeting the imagined negative effects of public sex to provoke antisocial behaviour in men that would, in turn, promote societal harm (Johnson 1999:311). Because the activities at Cheaters looked more like public prostitution than the activities at the Pussy Cat, they were deemed in *Mara* to violate the community standards of tolerance test for indecency on the grounds that they may promote antisocial attitudes. The management of liberty is less of a central concern given the disparity between the commercial successes of the two venues (Pussy Cat and Cheaters). Harm to liberty interests give way to concerns about equality interests while sexual conduct is framed as promoting antisocial attitudes causing societal harm. In other words, our society cannot be *seen* to tolerate visible commercialized sex because of the implications for women's equality.

In the Little Sisters case, the Court returned to the community standards of tolerance of (risk of) harm test in the obscenity context. In *Little Sisters* (2000) the Court considered the state's power to limit the importation of sexually explicit materials it considers harmful to society. The case dealt with the discriminatory seizure of erotica, sex education materials, anthologies, and essay collections imported by the Vancouver, BC based gay and lesbian bookstore Little Sisters Book and Art Emporium. The bookstore owners argued that the harm-based interpretation of obscenity jurisprudence ought not to apply to gay and lesbian erotica in the same way it does to heterosexual erotica; that the harms-based community standards test for tolerance was "majoritarian"; and, more likely to be viewed by "the community" as "degrading and dehumanizing" and therefore "harmful to society" on the basis of homophobic prejudice towards anal intercourse between men (*Little Sisters* 2000:53, 60). Queer legal theorists challenged the community standards test on the grounds that the majoritarian logic of community would ensure that minority val-

ues, even if heard and respected, would be rejected by the Courts. The harms-based community standards test was seen to provide no protection for minority rights (including equality rights) when they were at odds with national standards of tolerance (read as homophobic because community standards are based on heterosexual norms) (*Little Sisters* 2000:para 55, citing Cossman 1997:107–8). The Court disagreed that the obscenity jurisprudence ought not to apply to gay and lesbian erotica (*Little Sisters* 2000:para 42), refusing to accept that queer sexual expression created by and for the queer community was distinct from heterosexual sexual expression or that the obscenity section of the *Criminal Code* would be applied differently by gay and lesbian sexually explicit materials by the state. The Court's view was that its aim in *Butler* was to prevent (risk of) harm, and that the state "is indifferent to whether such harm arises in the context of heterosexuality or homosexuality" (*Little Sisters* 2000:para 44). From the perspective of government, the (risk of) harm test did not work against the interests of "homosexuals" because they too were members of society who benefitted from state intervention to protect society from (risk of) harm (*Little Sisters* 2000:para. 58). Harm to society became a more abstract value replacing majoritarian community standards of tolerance for harm because it no longer required even cursory judicial consideration of contextualized sexual identity or difference.

Phase Four: "Political Harm" Era (2005–present)

In *R. v. Labaye* (2005), the Court reconfigured the community standards of tolerance test (for harm to society) established in *Butler* and *Little Sisters* in the context of indecency.[15] There were three types of harm identified: (risk of) harm to those whose autonomy and liberty was restricted by being confronted with "inappropriate" conduct; (risk of) harm to society by predisposing others to antisocial conduct (the obscenity standards delineated in *Butler)*; and (risk of) harm to individuals participating in the conduct (*Labaye* 2005:para. 36). This new harms-based test analyzes first the *nature* of the (risk of) harm, and second the *degree* of (risk of) harm. A two-step process that incorporates three types of (risk of) harm set the standards for criminality. This two-stage analytical process is described by the Court as follows:

> The first step is concerned with the *nature* of the harm. It asks whether the

15. Unlike in *Butler* where the offence charged was selling/possessing obscene material under s. 163 of the *Criminal Code*, *Labaye* dealt with the offences of keeping a common bawdy house for the purpose of practicing acts of indecency (s. 210 and s. 197, respectively).

> Crown has established a harm or significant risk of harm to others that is grounded in norms which our society has formally recognized in its Constitution or similar fundamental laws. The second step is concerned with the *degree* of harm. It asks whether the harm in its degree is incompatible with the proper functioning of society. Both elements must be proved beyond a reasonable doubt before acts can be considered indecent under the *Criminal Code*. (*R. v. Labaye* 2005:para 30)

It is this second step that marshals a harm calculation to consider the *degree* of (risk of) harm for developing negative attitudes (or of infringing upon a person's autonomy/liberty by unwitting exposure to sexual conduct) which in turn affect the proper functioning of society.

In any case dealing with obscenity and indecency the Crown must first establish that the impugned sexual conduct meets the "nature test" (i.e., it must be something that causes harm to liberty/autonomy, attitudes, or participants)[16] and then the "degree test" (i.e., it is of a significant enough degree to warrant security measures to protect the "proper functioning of society" both beyond a reasonable doubt). The Crown does not have to prove actual harm (unless presumably the harm is physical harm to a participant), but simply that the conduct is of the nature of harms contemplated by obscenity and indecency law and that these harms are of a degree that interfere with the proper functioning of society. The Court is largely silent on the sorts of sexual materials and conduct that would trigger the nature and degree of harm that would transgress the legal boundary incorporating only the "*Butler*" standards for criminality (*R. v. Labaye* 2005:para 36).

Relying on its new logic to manage perceived and actual harm to society/individuals, the Court determined that the autonomy and liberty of members of the public were not affected in the context of the l'Orage swingers club because everyone involved had consented to the sexual acts (no risk of harm to innocent persons). Sex in private was deemed compatible with "the proper functioning of society": "consensual conduct behind code locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society" (*R. v. Labaye* 2005:para 71) because "the autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question" (*R. v. Labaye* 2005:para 66). There was nothing here that looked anything like prostitution because there was no solicitation, no one paid for

16. For those readers familiar with the three-tiered definition of pornography described in the *Butler* decision, it would appear that the first 2 tiers (violence coupled with sex and degrading and dehumanizing depictions coupled with sex) are now subsumed under harm to attitudes (which in turn may or may not be interpreted as causing harm to women's equality).

sex, or was paid for sex, and no one was treated as a "mere sexual object for the gratification of others" (*R. v. Labaye* 2005:paras. 66–71; see also *R. v. Kouri* (2005). So whilst the Court rejected the Crown's arguments, they nevertheless significantly broadened the purview of both obscenity and indecency doctrine to include governing "pre-crime" to "protect society from harm" especially in that area of harm perceived to threaten attitudes about political values (harm the predisposes one to have social attitudes that interfere with equality).

The Court ostensibly agreed with itself in *Little Sisters* but abandoned the community standards of tolerance for undue exploitation test. In its place, they operationalized an explicitly harms-based test for invoking the security apparatus in a manner that connects criminalization almost entirely to infringement upon constitutional values in its adjudication of (risk of) harm. Focusing on (risk of) harm to abstract political values such as freedom, autonomy, and equality enabled the Court to dispense with any contextualized debates about representations of sexuality and sexual practices so long as the latter were not exposed to the public (thereby risking attitudinal harm) and did not infringe upon the autonomy or liberty interests of the unwitting passer-by. The Court dispenses with these contexts and debates partly as a means of promoting an "objective" test. Of particular importance this time around was the creation of an "objective" test for obscenity and indecency. According to the Court criteria based in harm are firmly connected to "societal norms" and are therefore "objective."

To achieve the goal of "objectivity" the Court abandoned the community standards of tolerance test of harm for obscenity and indecency and focused the calculus more directly on harm to political, or constitutional, values to achieve this "objectivity." The community standards of tolerance test was criticized by the Court as functioning

> as a proxy for the personal views of expert witnesses, judges and jurors … judges and jurors were unlikely, human nature being what it is, to see themselves and their beliefs as intolerant. It was far more likely that they would see themselves as reasonable, representative members of the community … the result was that despite its surficial [*sic*] objectivity, the community standard of tolerance test remained highly subjective in application. (*R. v. Labaye* 2005:para 18)

The Court abandoned the position taken throughout the 20th century that judges and juries provisionally apprised of social mores either through social scientific expertise or their own knowledge, are the best arbiters of community standards. In its place is a test that marshals constitutional

values (liberty, autonomy, and equality) to regulate peoples' sexual activities to protect society from harm. (*Labaye* 2005:para 18).

If the sexually explicit materials or practices interfered with a citizen's liberty, harmed participants, or resulted in perceived attitudinal changes to the viewer or consumer they would be obscene or indecent because they interfere with the proper functioning of society that is regulated through the *Constitution*. And so while the Court is careful at the outset to attach the security apparatus to the violation of known and agreed upon societal norms they also establish justification(s) for criminal sanction for indecency to preempt risks to society's proper functioning. These extend, largely, to the inculcation of antisocial attitudes (harm to equality) and to protect innocent populations (harm to the autonomy/liberty of a passer-by) where harm is measured by assessing the *nature* and *degree* of the purported dangers before the Court. In articulating a (risk of) harm, the *Labaye* Court also provisionally seeks empirical evidence for a finding of indecency or obscenity. This requirement differs from the *Butler* Court that asked whether the reasonable member of the community would *tolerate* others being exposed to indecent acts or obscene materials — and would seek evidence of community standards of tolerance of undue exploitation causing harm. In practice, this allowed intervener legal arguments to form part of the judicial discourse of tolerance and harm. The community standards of tolerance test had been criticized by interveners and academic commentators for allowing majoritarianism to operate at the heart of obscenity and impose heterosexual norms on minority sexual communities (Cossman 1997), while others argued that community standards ought not tolerate gender-based sex inequality even when the participants are gay or lesbian (Benedet 2001). In *Butler*, the Court imposed limits based on what a reasonable member of the community *ought* tolerate and set out definitions of the kinds of sexual materials and conduct that was tolerable. This approach was advanced as an objective approach since it was not the personal tastes of the judiciary that mattered, but rather the opinion of the community interpreted by courts. Yet, as we have seen, this approach was criticized for being too subjective. The *Labaye* Court identifies the seeds of the objective test in both *Butler* and *Little Sisters* where both set limits according to the "degree of harm that may flow from such exposure" (*R. v. Labaye* 2005:para 21). Harm is now "an essential ingredient of obscenity" (*R. v. Labaye* 2005:para 22). Still, we are left with no idea about the sorts of human conduct that cause harm to formally endorsed societal values. Are we to police those boundaries ourselves and for others? Relying on the harm principle in this way leaves that question an open one for judges to determine.

> 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. (*R. v. Labaye* 2005:26)

The Court grounds criminal responsibility in seeking to set limits on conduct that is incompatible with society's proper functioning as defined through values formally endorsed in the *Constitution* (*R. v. Labaye* 2005:paras 32–33).

> The requirement of formal endorsement ensures that people will not be convicted and imprisoned for transgressing the rules and beliefs of particular individuals or groups. To incur the ultimate criminal sanction, they must have violated values which Canadian society as a whole has formally endorsed. (*R. v. Labaye* 2005:35)

The *Labaye* court sees the same problem of subjectivity with the community standards of tolerance test because it allowed for interposition of subjective judgements about tolerance by judges (*R. v. Labaye* 2005:para 18). The *Labaye* Court believes it has solved this messy problem by using the wild card term "harm." Before *Labaye*, judges could be influenced by partisan political values (sometimes read as provoking judicial activism). Now, their authority operates outside of the political fray through the operationalization of constitutionally enshrined values to which the Court imputes societal consensus (since the *Constitution* is formally endorsed). And yet, it is precisely the rules and beliefs of particular individuals or groups at stake whenever an issue affects a perceived threat to women's equality or the liberty interests of the abstract liberal subject confronted with public nudity. Indeed, the Court constructs for us a kind of sex-free liberal bubble to secure us from the harm cased by "public confrontation with unacceptable and inappropriate conduct" (*R. v. Labaye* 2005:para 40). What is more, the policing of this sex-free liberal bubble is justified to secure autonomy and liberty:

> One reason for criminalizing indecent acts and displays is to protect the public from being confronted with acts and material that reduce their quality of life. Indecent acts are banned because they subject the public to unwanted confrontation with inappropriate conduct.… The value or interest protected is the autonomy and liberty of members of the public, to live within a zone that is free from conduct that deeply offends them.… Tolerance requires that only serious and deeply offensive moral assaults can be kept from public view on pain of criminal sanction. We live in an age when sexual images, some subtle and some not so subtle, are widely dispersed throughout our public space. However, this does not negate the

> fact that even in our *emancipated society*, there may be some kinds of sexual conduct that public display of which seriously impairs the liveability of the environment and significantly constrains autonomy.… Sexual conduct and material that presents a risk of seriously curtailing people's autonomy and liberty may justifiably be restricted. The loss of autonomy and liberty to ordinary people by in-your-face indecency is a potential harm to which the law is entitled to respond. (*R. v. Labaye* 2005:paras 40–41 emphasis added)

Thus, we see the familiar liberal logic that justifies security in the name of autonomy and liberty. According to Neocleous (2007:144), from the vantage point of liberal democratic societies:

> … this loss of liberty 'for security reasons' is quite minor compared to, say, what takes place in a fascist regime, the practices involved, the wider state of emergency to which it gives rise, and the intensification of the security obsession, have a disquieting tendency to push contemporary politics further and further towards entrenched authoritarian measures. Liberalism is not only unable to save us from this possibility, but actually had a major role in its creation and continuation.

Ironically, feminist commentators see potential here insofar as harm to equality (the harm of predisposing others to engage in sexist antisocial acts or attitudes) can be marshalled as the chief vehicle for achieving society's proper functioning (Craig 2008). According to the Court this is the second source of harm.

> The second source of harm is based on the danger that the conduct or material may predispose others to commit anti-social acts. As far back as *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. The threshold for criminal indecency is higher under *Butler* than that envisioned by Cockburn C.J. almost a century and a half ago, but 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 manner: *Butler* at p. 484. (*R. v. Labaye* 2005:para 45).

Thus, the class-based regulation of the work-class expands to include the gender-sensitive regulation of men (and women) whose attitudes may be altered by antiegalitarian constructions of degrading and dehumanizing sexually explicit materials.

And of course, actual harm to participating individuals is a third source of harm irrespective of whether the participating persons consent:

> A third source of harm is the risk of physical or psychological harm to

> individuals involved in the conduct at issue.… Sexual conduct that risks this sort of harm may violate society's declared norms in a way that is incompatible with the proper functioning of society, and hence meet the *Butler* test for indecent conduct under the *Criminal Code.* (*R. v. Labaye* 2005:para 48–49).

Because this third type of harm involves real persons as objects of physical and psychological assault this sort of harm may occur in private and still be subject to an indecency sanction "so long as the minimal element of publicity is satisfied to bring it within the scope of the indecency provisions, by showing it to be a place kept for the purposes of practising such acts, for instance" (*R. v. Labaye* 2005:para 50).

Minority Report: Obscenity and Indecency Law and the Precautionary Principle[17]

> *…the logic of 'security' is the logic of an anti-politics … in which the state uses 'security' to marginalize all else, most notably the constructive conflicts, the debates and discussions that animate political life, suppressing all before it and dominating political discourse in an entirely reactionary way (Neocleous 2007:146).*

The Supreme Court's operationalization of a precautionary principle provides the potential for many different iterations of the regulation of sexually explicit materials and conduct in the name of securing liberal values to promote a properly functioning society. Their justification for criminalization is a fairly good example of what Ericson (2007) described as the concept of "pre-crime" that underpins a precautionary logic. The logic of pre-crime is to prevent predicted crime before it happens rather than punish the criminal after the Crown has successfully established both the *mens rea* and *actus reus* elements of the crime (Hudson 2009:712; see also McCulloch and Pickering 2009). Now the negative effect of obscenity or indecency is regulated through preemption. The Court's use of a precautionary principle illustrates what Ashworth and Zedner (2008:40) have called the "preventative state" which "describe[s] a temporal shift in state governance from managing the present to managing (or seeking to manage) the future." For the most part, the literature describes the trend towards the usage of preventative measures in the field of suspected terrorism and its associated activities (Agamben 2005; Aradau and van Munster 2009; Ashworth and Zedner 2008; Butler

17. "The Minority Report" is a science fiction short story by American author Philip K. Dick published in the science fiction magazine *Fantastic Universe* in 1956. Here the author introduced the notion of policing "pre-crime." It was made into a film in 2002 directed by Steven Spielberg starring Tom Cruise.

2004; Gardiner 2006; McLean, Patterson and Williams 2009; Mythen and Wakelate 2006; Neocleous 2007; Zedner 2009). But the practice has also extended to

> risk averting orders such as the Sexual Offences Prevention Orders and Risk of Harm Orders under the Sexual Offences Act 2003. Both orders depart from retributive, proportionate attribution of responsibility in favour of risk aversion in respect of wrongs not yet committed. (Ashworth and Zedner 2008:40–41)

Moreover, Ashworth and Zedner point out that

> [a]lthough prevention is often licensed in the name of the gravest security threats such as terrorism, this license percolates down tariff to permit a blurring of the criminal process also in respect of everyday crimes and nuisance (as is the case of the ASBOs). (2008: 41)[18]

It perhaps not so surprising then, that the *Labaye* Court grounds its discussion of evidentiary requirements for proof of harm in terrorism:

> Where actual harm is not established and the Crown is relying on risk, the test of incompatibility with the proper functioning of society requires the Crown to establish a significant risk. Risk is a relative concept. The 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. Sometimes, a small risk can be said to be incompatible with the proper functioning of society. For example, the risk of a terrorist attack, although small, might be so devastating in potential impact that using the criminal law to counter the risk might be appropriate. However, in most cases, 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 (*R. v. Labaye* 2005:para 61 emphasis added).

Thus, we may or may not need evidence of risk of harm to the proper functioning of society (as if there were any to provide, or that the Courts would readily appeal to, or indeed accept sociological expert testimony), and the sexual conduct should present a possible (probable?) risk of harm to the proper functioning of society as determined by the judiciary on a case by case basis dealing with the three types of harm identified. The precaution principle works well in reducing the Crown's evidentiary burden (after all they made the decision to prosecute) that in turn authorizes the judiciary to make its own judgements about sexual danger to protect society from (risk of) harm and ensure its proper functioning (courts are not well known for promoting sexual freedoms that under-

18. Anti-social Behaviour Orders (ASBOs).

mine hetero-normative liberal values). The question of whether the reduced evidentiary parameters which accompany the abandonment of the community standards test of tolerance erase the Crown's need to prove sexual danger beyond a reasonable doubt is left open to the interpretations of the lower courts. The new *Labaye* test thus grounds security in the protection of liberal values absent discussion of those values and their meaning(s). While the Court attempts to create a causal standard of demonstrating that a probability of (risk of) harm is established by the Crown, it is admittedly repeating the analytics of the *Hicklin* court (the "I know it when I see it test") that are extended through the common law to the present day.

The reconfigured (risk of) harm test for obscenity and indecency is an example of what Zedner calls the "downward spread" into the field of sexual politics; a field that has generally been an area of moral regulation animated by political disagreements about sexuality. Now, the disagreements are rooted in debates about harm to society and its "objective values," shifting the conversation to that which causes harm to so-called agreed upon political values endorsed through the Canadian *Constitution*. Positioning (risk of) harm as a threat to political values allows the judiciary to more easily accomplish what they have previously done, which is to insert their own knowledge to criminalize certain kinds of sexual materials and practices; now by marshalling a precautionary principle to protect their vision of a properly functioning society. By using the precautionary approach, without the need to provisionally calculate future risks (as if that were possible) or engage in the sort of broader consultative processes required under the community standards test, the law may now expand the boundaries of what counts as criminal sexual transgression — at present we have that which has been criminalized by past courts. What causes harm to political values is an open-ended question. The trouble from the perspective of those who seek to govern themselves according to the logic of the Court is how to determine what degree of dangerousness will give rise to a criminal prosecution. The boundaries of the precautionary principle are conveniently amorphous and can satisfy any political program of regulation.

What we do know is that security operates with more force in the public sphere. The harm-based test draws a boundary around the private sphere whilst widening the boundaries of state intervention in the public sphere irrespective of *any* nominal empirical consideration of the sorts of harm established in the human sciences. This is unlike those sorts of risk calculations that rely on actuarial knowledge of past events to predict future ones, or scientific knowledge of the effects of chemicals in the environment to forestall their use in manufacturing or food pro-

duction. For example, in *R. v. Sheikh* (2008) the Ontario Court of Appeal interpreted the *Labaye* framework and its evidentiary requirements. The accused, Abdul Sheikh, was observed by police in a high school parking lot putting a condom on his penis in his car and charged and convicted of indecency. The nature and degree of the harm to the proper functioning of society was very easily connected to securing the freedom of others in relation to a person who possesses the sort of name typically associated with terrorism. Part of the appeal related to the question of whether the trial judge ought to have relied upon expert opinion evidence of harm in rendering a guilty verdict. According to *R. v. Sheikh* (2008:para 32) *Labaye* established that "the requirement for evidence is … only established as a 'general rule'" but that "there are obvious cases where no one could argue that conduct proved in evidence is compatible with the proper functioning of society." Therefore there are cases "which are exceptions to the general rule, where no evidence is required because the nature and degree of harm which makes it incompatible with the proper functioning of society is *obvious* (*R. v. Sheikh* 2008:para 33 emphasis added).[19] In the context of innocuous semiprivate public nudity (who among us has *not* gotten or given a blow job in a car when they were a teenager?) the shibboleth of liberalism is security over sexual freedom absent any nominal discussion of real or imagined harm to society's proper functioning (if one were to be drawn onto that terrain of debate). Whether Canadian society was secured from harm to constitutional values or secured against a different sort of threat from the sort of person typically associated with criminality in the field of security (or perhaps both) is an open question for the reader.

Conclusion

The Court's reconfiguration of its justification for exercising power extends a strand of thought established in *R. v. Butler* [1992] in which a partially preemptive rationality justifies the regulation of sexual materials and conduct through juridical determinations of (risk of) harm which in turn inform the Court's vision of how best to preserve the "properly functioning society." Today however, the scope of regulation has moved beyond targeting the working-class population expanding its scope to include queer and/or nonmonogamous sexual depictions and conduct deemed to cause harm to society. Whereas obscenity law tended to secure heterosexuality and monogamy up until the mid-1990s, post-

19. *R. v. Sheik* (2008:para 34) also relied upon *R. v. Mohan* (1994) 2 S.C.R. 9 to obviate the requirement of expert evidence of harm caused because the sexual conduct (erect penis in a parked car) was an obvious case of harm to the proper functioning of society.

Labaye its rationality leans more towards securing liberal political values using a harm principle rooted in a precautionary logic of (risk of) harm. It is through security that the Court envisions itself promoting the "properly functioning society," thereby protecting the values of equality and freedom. We are able to show that the articulation of the successive tests for the societal harms ostensibly caused by obscenity and indecency operationalizes a "precautionary principle" that has become the dominant technical apparatus of security for governing society's forms of sexual expression and conduct. This precautionary principle vitalizes the governmental tactics employed by the state which define/justify the parameters for state intervention and the sociosexual problem(s) to be managed through the security apparatus of the criminal law.

The emphasis on precaution as a basis for criminal regulation (rather than a basis for justification for the obscenity/indecency law itself) enables the deployment of imagined future effects of obscenity and indecency on the part of the courts and police as the basis for penal sanction, or "precriminalization." If a person were to accidentally come into contact with an erect penis in a public space (potential danger to the constitutional value of liberty/autonomy) or if sexually explicit materials are offensive to women (potential danger to the constitutional value of equality) the security apparatus of the state is justified to intervene into the social terrain and punish people using criminal sanction for these sorts of human conduct if the risk of harm is significant (*R. v. Labaye* 2005). Therefore, in the context of Canadian obscenity and indecency law, material and conduct deemed *only* a risk of harm to political values can be subject to criminal sanction — harm does not have to be proven for the security apparatus to be justified within this rubric of security.

Prior to *Labaye* the justification for criminalization was more firmly connected to the jurisdictional question of whether the state had the authority to legislate. And while the new developments may appear attractive from a feminist activist perspective which seeks to marshal the power of the state to secure equality, there can be no doubt that the precautionary principle facilitates authoritarian measures in the name of protecting liberal values through the security apparatus of the state. Thus we conclude that the *Labaye* Court has used the reasoning behind risk management and conflated such assessments with the precautionary principle — the idea that a court can criminalize conduct on the basis of imputed dangers is referred to as prior restraint in the United States legal framework. The *Labaye* Court conflated a juridical justification for government action (imputed danger) with the establishment of criminality. In short, the court's perception of danger to society's proper functioning allows for criminal conviction for an indecency or obscenity offence

which is a securitizing speech act (Neocleous 2007). The result is criminalization on the basis of how one's actions *might* threaten the political values that a court guards in the *Constitution*, as opposed to criminalization because one has committed a tangible criminal offence. Imputed dangerousness has traditionally justified legislation, policy work by governments, discipline at the administrative margins, and sentencing and rehabilitation protocols. It has been rare to see the notion of imputed dangerousness inculcating the legal techniques that judges use to establish criminal conduct under the *Criminal Code.* Such reasoning is based on the idea of danger management inculcating the determination of the criminal act. This kind of reasoning provides the court with the ability to both proscribe dangerousness and to criminalize it, on a case by case basis using precautionary principles.

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