

# Art in the Dichotomy of Freedom of Expression & Obscenity: An Anti-Censorship Perspective

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FEATURED STUDENT PAPER

## ABSTRACT

This research paper looks at the judicial decisions in Canada including *R v Butler*, *R v Labaye*, and *R v Sharpe* to trace the court's evolving attitudes on obscenity. Specifically, this paper discusses visual arts in relation to censorship, obscenity, and pornography. The purpose of this paper is to show that the obscenity law restricts artistic freedom by requiring an unsubstantiated risk of harm. Consequently, this paper takes an anti-censorship feminist approach arguing there is profound educational value to be had in allowing artists to depict morally taboo subject matter. With this in mind, this paper offers a policy recommendation to eliminate the law of obscenity and indecency.

**Keywords:** *Labaye, Butler, Sharpe, Langer, artistic merit, obscenity, indecency, pornography, anti-pornography, censorship anti-censorship, freedom of expression, Canadian Charter of Rights and Freedoms, risk of harm, artistic expression.*

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## I. INTRODUCTION

Under the banner of ‘pornography’, anti-pornography feminists have historically advocated for new obscenity legislation. Led by Catharine Mackinnon and Andrea Dworkin, these feminists argued that pornography should be suppressed because it leads to discrimination and violence against women.<sup>1</sup> Mackinnon and Dworkin argue that sexually explicit expression is inherently subordinating or degrading to women.<sup>2</sup> Notably, anti-pornography feminists hold the precarious belief that all images have a fixed meaning that can seduce viewers into imitative action.<sup>3</sup> Convinced of the clear and pressing dangers of pornography, these feminists have used the law as a central tool in addressing harm.<sup>4</sup> In 1992, the Supreme Court of Canada interpreted the Canadian obscenity law in *R v Butler*<sup>5</sup> to embody Mackinnon and Dworkin’s concept of pornography and outlawed materials that are “degrading and dehumanizing” to women.<sup>6</sup> Over the years, the courts have attempted to gradually devise a series of “objective” tests to reform the law on obscenity established in *Butler*. However, an inconsistency remains: the difficulty in scientifically establishing and interpreting a clear link between obscenity and harm.<sup>7</sup>

Under the united anti-pornography banner, successful campaigns against a wide range of sexually orientated expressions have been attacked. While pornography is ordinarily reserved for sexually explicit images whose sole purpose is aimed to cause sexual excitement, there are no clear lines between pornography and other areas of life such as visual art, film, literature, and theatre. Therefore, other areas of life are often confronted

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<sup>1</sup> Brenda Cossman & Shannon Bell, “Introduction” in *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 18 [Cossman & Bell Introduction].

<sup>2</sup> *Ibid.*

<sup>3</sup> Lisa Gotell, “Shaping Butler: The New Politics of Anti-Pornography” in *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 94 [Gotell].

<sup>4</sup> Anna Gronau, “Women and Images: Towards a Feminist Analyst of Censorship” in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 95.

<sup>5</sup> *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler*].

<sup>6</sup> *Ibid.*

<sup>7</sup> Gotell, *supra* note 3 at 72.

and suppressed due to the similarities between pornography. In the case of visual art, censorship is rarely supported as artists understand that art prompts new ideas and may be deliberately shocking to challenge prevailing community standards. For example, Robert Mapplethorpe's exhibition "The Perfect Moment" opened on April 7th, 1990 in a climate of national cultural unrest.<sup>8</sup> In his exhibition, he displayed graphic images of underground gay male sex and BDSM to draw on questions of censorship, homophobia, AIDS, and the law.<sup>9</sup> The gallery director, Raphaela Platow said, despite the obscenity charge "[t]he majority of people decided it was really important to show works of art[,] even if they challenge a certain percentage of the population".<sup>10</sup> Contrary to Mackinnon and Dworkin, many have campaigned for free expression.

With these feminist arguments in mind, this paper will argue that freedom of expression is a fundamental right established by the *Charter* that should not be dismissed. This paper recognizes that art has many different meanings. Consequently, by censoring materials based on a risk of harm, we stop the conversation on violence and silence those who try to confront it. In this respect, the law has the ability to moderate expression even when there is no harm in its production and the expression has a weak relationship to the construction of harmful acts.

Holding an anti-censorship view, I believe that sexual imagery should be liberated rather than repressed to allow for free expression. This is because "the right to freedom of expression rests on the conviction" that not only "'good' and popular expression [is protected], but also unpopular or even offensive expression."<sup>11</sup> As such, this paper will argue that censorship, based on narrow viewpoints and unsubstantiated evidence limits the expression of ideas and silences the very voices that can raise awareness toward social change. While strides have been made to refine the law, law reform is not the answer because it compromises the principles for freedom of expression by stifling the development of new and challenging art forms. Moreover, law reform does not prevent artists from defending

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<sup>8</sup> Nathan Smith, "Op-ed After 25 Years, Mapplethorpe's Photo Still Cracking the Bullwhip" *Advocate* (17 October 2014), online: <[www.advocate.com](http://www.advocate.com)>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Grace Dobush, "25 years later: Cincinnati and the obscenity trial over Mapplethorpe art" *Washington Post* (24 October 2015), online: <<https://www.washingtonpost.com>>.

<sup>11</sup> *R v Sharpe*, 2001 SCC 2 at para 21, [2001] 1 SCR [Sharpe].

their work at considerable personal and financial costs. Consequently, this paper moves beyond alteration to suggest obscenity law be eliminated.

There are three parts to this paper. Part I will provide a historical overview of censorship and the arts. By following this history, this section illustrates a framework within which the current censorship of arts can be understood and opposed. In this section, I will outline the feminist split—those who favor legal limits on pornography (anti-pornography feminists) to combat harm versus those who oppose them (anti-censorship feminists). With this history in mind, I will suggest that art gives us knowledge needed to progress, and without access to uncensored art, the attainment of knowledge is hindered.

Part II will illustrate that the obscenity legislation restricts freedom of expression for at best an uncertain outcome. I will begin my analysis by explaining *R v Butler*, a case from 1992 that looked at whether obscene materials were fundamental freedoms protected under section 2(b) of the *Charter*.<sup>12</sup> This case chronicles the anti-pornography feminist belief and its continued influence on popular attitudes, public policy, and law. I will continue this section by reviewing the new harm-based test established in *R v Labaye*,<sup>13</sup> which cited *Butler* to say that indecency can be determined by looking at harm or risk of harm.<sup>14</sup> While artistic subject matter is not the principal controversy in these cases, I have nevertheless reviewed them in order to provide important insight into the relationship between freedom of expression, harm, and artistic merit. In this section, I will also discuss the cases *R v Sharpe* and *R v Langer*.<sup>15</sup> The aim of this analysis is to show that artists are not properly protected under the current system due to the legacy of harm and morality.

Part III offers a policy recommendation. Holding the beliefs established above notably that the regulation of censorship is a hindrance to the acquisition of knowledge, an inconclusive recommendation to eliminate violence, and an imprecise law—this section will suggest censorship need not be criminal in nature.

In writing this paper, I situate myself as a female law student with an academic background in fine arts. I studied painting in London, Ontario and obtained my Bachelor of Fine Arts (Honours). I have a keen interest in

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<sup>12</sup> *Supra* note 5.

<sup>13</sup> *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [*Labaye*].

<sup>14</sup> *Ibid* at para 32.

<sup>15</sup> *Sharpe*, *supra* note 11; *R v Langer* (1995), 123 DLR (4<sup>th</sup>) 289, 97 CCC (3d) 290 [*Langer*].

ensorship laws but have admittedly no experiential grounding in it. I have concluded that censoring art offers an authoritarian, catchall solution to the societal problem of harm. As someone who studied painting and imagery, I believe artists can confront taboo subject matter in their work, by creating work that reveals hidden subtext. I believe the more we confront and understand violence and sexuality, the better we will be at acting against it.

## II. BRIEF SURVEY OF ART HISTORY & FEMINISM

In this section, I will draw on the notion that censorship does not last, and does not work. Notably, history has shown that artworks accused of obscenity are normally reconsidered or reversed. This shows us that “while censors may be the enemy of art and other types of expression, time is usually the enemy of the censor.”<sup>16</sup> Consequently, the artwork that censorship targets has a tendency of reappearing “even though this may occur after the death of the [maker], the judge, or the originally intended [viewers].”<sup>17</sup> However, in the interim, censorship eradicates art from society by removing an artist’s ability to shed light on issues which in turn help viewers confront and understand violence and sexuality. In this vein, I will draw upon John Stuart Mill’s stance that multiple perspectives enrich judgment and intellect.<sup>18</sup> Therefore, anti-pornography feminists’ fight for censorship ignores the fact that imagery is subject to multiple interpretations. In turn, they disregard the notion that an image may be offensive to some and thought provoking to others.

### A. Censorship and the Arts

In Canada, early obscenity law was centered around preventing materials that would deprave and corrupt our society.<sup>19</sup> For instance, the novel *Ulysses* by James Joyce was banned in Canada in 1922 for its explicit sexual content.<sup>20</sup> Notably, the book was attacked because it contained

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<sup>16</sup> Steven Dublin, “Arresting Images: Impolitic Art and Uncivil Actions” (1993) 23:3 J of Arts Management, L, & Society 255.

<sup>17</sup> *Ibid.*

<sup>18</sup> John Stuart Mill, *On Liberty* (Kitchener, Ont: Batoche Books Limited, 2001) at 42-43 [John Stuart Mill].

<sup>19</sup> *R v Hicklin* (1868), LR 3 QB 360.

<sup>20</sup> Brenda Cossman, *Censorship and the Arts: Law, Controversy, Debate, Facts* (Toronto:

profanity and sexually suggestive narratives.<sup>21</sup> Today, the book is widely available and considered a literary masterpiece as societal views on indecency and obscenity have changed. Specifically, Judge John M. Woolsey asserted that the novel was “transcendent, that it turned filth into art.”<sup>22</sup>

In 1949, Robert Roussil displayed the sculpture *Family Group* outside the Montreal Museum of Fine Arts. The sculpture depicted a nude abstract family including a mother, father, and child. Police officers from *The Bureau for Prevention of Juvenile Delinquency* seized the work and Roussil lost his job as an art instructor.<sup>23</sup> Again, in 1951 Robert Roussil received protests regarding his work. This time, his sculpture portrayed a nude male and female embrace outside of the Agnes Lefort Gallery in Montreal.<sup>24</sup> However, complaints came from the public and the police were called to administer a city bylaw which forbade public displays of nudity. The sculpture was vandalized as a protest against its “obscene” nature. Today, Roussil’s work can be found in public parks and gardens in Canada and around the world. His expressions of sensuality, eroticism, and love are no longer rejected as society has progressed to recognize new literary methods and refrain from paternalistic attitudes.

By the 1980s, censorship battles began to center around a defence of women against violent, degrading, and sexist male aggression.<sup>25</sup> Consequently, the focus of the harm in pornography shifted from the representation of sex and nudity to the representation of the sexual subordinate women. Particularly, Canadian feminists began to make connections between violent and degrading imagery and sexual violence.<sup>26</sup> Many of these feminists even argued that pornography was the foundation of essentially all forms of exploitation and discrimination against women.<sup>27</sup>

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Ontario Association of Art Galleries, 1995) at 81 [Cossman, *Censorship*].

<sup>21</sup> *United States v One Book Entitled Ulysses by James Joyce*, 72 F (2d) 705 (2d Cir 1934).

<sup>22</sup> Laura Miller, “The Most Dangerous Book’: When “Ulysses” was obscene” *Salon* (15 June 2014) online <www.salon.com>.

<sup>23</sup> Cossman, *Censorship*, *supra* note 20 at 84.

<sup>24</sup> *Ibid.*

<sup>25</sup> Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (New York: Scribner, 1994) at 43 [Strossen].

<sup>26</sup> Cossman & Bell Introduction, *supra* note 1 at 18.

<sup>27</sup> Lisa Duggan, Nan Hunter & Carole S Vance, “False Promises: Feminist Anti-Pornography Legislation” (1993) 38 *NYL Sch L Rev* 133 at 136.

This belief was carried forward in 1984 when the Maximum Art Gallery in Toronto displayed a painting by Bill Stapleton in its front window. The painting showed a Mayan woman being raped by a Guatemalan soldier. When asked about the piece Bill Stapleton said, “[i]t was a hard subject to do, and I considered the effect it would have on people, but that’s what is happening down there....[i]t’s just awful, and it’s my responsibility as an artist to reveal what’s happening.”<sup>28</sup> As such, Stapleton saw his painting as an opportunity to shed light on the inequality and injustice faced around the world. He believed that art was a tool for bearing witness, and a weapon for achieving change. The explanation given by Stapleton supports John Stuart Mill’s opinion that “multiple viewpoints enhance judgment and intellect.”<sup>29</sup> Notably, Mill said, “only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.”<sup>30</sup> Consequently, throughout his text, Mill argues that silencing expression robs society of public debate. Therefore, Mill believes that artists need complete freedom of expression, which is free from censorship, in order to confront social issues. Mill contends, “the truth would lose something by their silence.”<sup>31</sup> Yet, despite these liberal views, Stapleton’s voice was silenced as the police told the gallery curator to remove it from the window or risk obscenity charges.<sup>32</sup> This is because the law of obscenity is justified by its supposed usefulness of protecting women from harm.

In contemporary obscenity and indecency cases, protecting society from harm continues to be a central feature of the law. In modern cases, morally evil images are repressed based on the notion that viewing harm promotes the commission of harm and immoral effects. However, as Mill’s harm principle contends, not all materials that are offensive to public morality are automatically harmful. Mill holds the belief that free speech can only be restricted if the speech causes harm to others.<sup>33</sup> Mill believed that in order

<sup>28</sup> Lynn King, “Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?” in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 87 [King].

<sup>29</sup> Jochelson & Kramar, *Sex & The Supreme Court: Obscenity and Indecency Laws in Canada* (Nova Scotia: Fernwood Publishing, 2011) at 15 [Jochelson & Kramar, *Sex & the Supreme Court*].

<sup>30</sup> John Stuart Mill, *supra* note 18 at 46.

<sup>31</sup> *Ibid.*

<sup>32</sup> King, *supra* note 28 at 87.

<sup>33</sup> Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto:

to judge “whether a practice is harmful, one need not take into consideration the repercussion of such a practice on the general moral code.”<sup>34</sup> In respect to Stapleton, although his painting may have been morally repulsive to some viewers, there was no harm in its creation. Therefore, according to Mill’s theory, there would not be sufficient grounds for criminalization. However, Andrea Dworkin and Catharine Mackinnon refuse this notion. Their argument draws on the analogy between vice and treason, which assumes that both have the same damaging consequence on society and women.<sup>35</sup> In other words, they assume that exposure to representations of bad acts cause bad thoughts, which in turn cause bad behavior. In *R v Butler*, the Court affirmed this by effectively holding that viewing pornography is a catalyst for the commission of violent crimes against women.<sup>36</sup> This concept of imaginable harms has continued today in the new harm-based test established in *R v Labaye* which convicts based on mere risk of harm.<sup>37</sup>

Arguing the aforementioned belief, Dworkin and Mackinnon have maintained the notion that pornographic images assert male dominance and the expression of male sexual power.<sup>38</sup> However, such a stance “decontextualizes sex and pornography from the social relations in which they take form and reduces them to a single force or truth: an aggressive male nature and culture desiring to oppress women.”<sup>39</sup> Nevertheless, Dworkin, Mackinnon and other anti-pornography feminists lobby for reform of the obscenity law to address violence against women. In this interest, anti-pornography feminists believe that the law should be used to ensure some form of sexual moral order.<sup>40</sup> Adopting an anti-pornography perspective, scholar Karen Busby wrote on behalf of Women’s Legal Education and Action Fund (LEAF) and stated that there are four options when considering the obscenity law. She said:

We could have accepted the law as it has been interpreted; supported a position that would have eliminated any criminal regulation of pornography; asked the

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University of Toronto Press 1994) at 29-40 [Lacombe].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 22.

<sup>37</sup> See Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29.

<sup>38</sup> Strossen, *supra* note 25 at 75.

<sup>39</sup> Lacombe, *supra* note 33 at 42.

<sup>40</sup> Gotell, *supra* note 3 at 64.



court to strike down the *Criminal Code* provision and to invite Parliament to introduce new legislation; or, asked the court to redefine the rationale for the *Criminal Code* obscenity provisions by focusing on its equality implication for women and children.<sup>41</sup>

In turn, LEAF chose the fourth option in an effort to reshape obscenity legislation. LEAF believed that the obscenity law was a central tool in addressing harm to women. LEAF grounded their legal argument on under s. 15 under 'equality of rights' in the *Canadian Charter of Rights and Freedoms*.<sup>42</sup> Section 15 of the *Charter* prohibits certain forms of discrimination perpetrated by the government of Canada. LEAF challenged this section suggesting that pornography's harm to women is three-fold; it harms women in its creation, it glorifies sexual violence, and it maintains the patriarchal system thereby effecting women's right to equality under the law.<sup>43</sup> However, LEAF'S stance relied heavily on inconclusive social science evidence.<sup>44</sup>

While these theorists mainly discuss erotica as feminist political speech, the concerns they raise, mainly violence against women, may be found in artworks including painting, sculpture, and photography. For instance, in 1983, Dworkin and Mackinnon drafted an ordinance for the Minneapolis City Council that treated pornography as a form of sex discrimination, making its production and distribution a ground for civil rights action. The ordinance defined pornography as the "graphic, sexually explicit subordination of women."<sup>45</sup> While the distinction between erotic art and pornography is debated, the criterion of pornography raised by Dworkin and Mackinnon frequently presents itself in art as artists depict abuse, rape and objectionable views of women and sexuality. For instance, Susan Gubar said, "in many instances art and pornography are indistinguishable" even though they construct their images differently and address dissimilar audiences.<sup>46</sup> Likewise, Nadine Strossen said, the term pornography "has

<sup>41</sup> Karen Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9:1 CJLS 165 at 168 [Busby].

<sup>42</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>43</sup> Lacombe, *supra* note 33 at 27.

<sup>44</sup> Gotell, *supra* note 3 at 92.

<sup>45</sup> Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day For Women's Equality* (Minneapolis: Organizing Against Pornography, 1988) at 138.

<sup>46</sup> Susan Gubar, "Representing Pornography: Feminism, Criticism, and Depictions of

assumed such negative connotation that it tends to be used as an epithet to describe – and condemn—whatever sexually oriented expression the person using it dislikes.”<sup>47</sup> As such, legislation originally centered on pornography has often shifted its attention to art if the viewer dislikes the message portrayed.

In Hans Maes and Jerrold Levinson’s book, *Art and Pornography*, Levinson argues that the distinction between erotic art and pornography is that erotic art is intended to induce “sexual thoughts, feelings, imaginings, or desires that would generally be regarded as pleasant in themselves,” whereas pornography is described as “the physiological state that is prelude and prerequisite to sexual release”.<sup>48</sup> Thus, pornographic images are principally aimed at sexual arousal, whereas erotic images are aimed at stimulation. Levinson’s conclusion is that erotic art and pornography are mutually exclusive. However, In “Concepts of Pornography: Aesthetics, Feminism, and Methodology”, the author, Andrew Kania argues that distinction between pornography and erotic art is not as distinct as Levinson articulates.<sup>49</sup> The basis of Kania’s argument is that the main substance of pornography, the “eroticiz[ation] of women’s subordination,” has also been “a commonplace in art history,” which contributes to women’s oppression.<sup>50</sup> Kania contends that the role of some erotic art (which he calls “pornographic art”) can eroticize the subordination of women just as easily as pornography.<sup>51</sup> With this relationship in mind, this paper views different feminist perspectives on pornography as synonymous or at least comparable to pornographic art.

In their book, *Bad Attitudes*, Cossman, Bell, and Gotell contend that anti-pornography feminism offers a “literalist approach to representation, within which images are understood to have a clear and unequivocal meaning that can be interpreted objectively.”<sup>52</sup> Challenging anti-pornography feminism, Cossman, Bell and Gotell maintain that

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Female Violation” (1987) 13:4 *Critical Inquiry* at 741 (Jstor).

<sup>47</sup> Strossen, *supra* note 25 at 18.

<sup>48</sup> Andrew Kania, “Concepts of Pornography: Aesthetics, Feminism, and Methodology” in Hans Maes & Jerrold Levinson, eds, *Art and Pornography: Philosophical Essays* (Oxford, United Kingdom: Oxford University Press, 2012) 254.

<sup>49</sup> *Ibid* at 257.

<sup>50</sup> *Ibid* at 273.

<sup>51</sup> *Ibid*.

<sup>52</sup> Cossman & Bell Introduction, *supra* note 1 at 25.

pornography is subject to more than one meaning: “any one sexual image provides dissonant interpretations of disgust, indifference, and arousal.”<sup>53</sup> Further, they argue, that “just like language, there is no intrinsic meaning in a visual image, the meaning of an image is decided by the way it is articulated, how the various elements are combined together.”<sup>54</sup> As such, they reason that sexual imagery should not be criminalized and the anti-pornography feminist approach is unsound in its denial to recognize this multiplicity of meaning. Cossman, Bell, Gotell and Ross believe freedom of speech furthers a number of valuable objectives including “truth seeking through open debate (free speech), participation in social and political decision-making, and individual self-fulfillment and human flourishing.”<sup>55</sup> Further, Cossman, Bell, and Gotell are generally unsupportive of the notion that exposure to sexually explicit materials provokes violent behavior. Thus, their thoughts closely align with Mills and his theory on harm.

In Bell’s chapter of *Bad Attitudes*, she advances the concept that multiple meanings reside in the same image, therefore, “the image can never be seen; it is and is not.”<sup>56</sup> Bell contends that MacKinnon and LEAF argue their belief as the one truth. However, Bell believes that pornography is “composed of many different genres that are open to many readings and thus many truths.”<sup>57</sup> Therefore, pornography is not direct or forthright.<sup>58</sup> Instead, it is “multiple, layered and highly contextual.”<sup>59</sup>

Like pornography, erotic art can be open to many readings. For instance, like Stapleton, artists may depict taboo subject matter to show that violence and other wrongs against women continue to exist. As such, there are other compelling argument against censorship that feminist must consider. By censoring these materials, we stop the conversation on violence and silence those who try to confront it. With this in mind, I will adopt the anti-censorship feminist perspective put forth by Cossman, Bell, and Gotell

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<sup>53</sup> *Ibid* at 8.

<sup>54</sup> *Ibid* at 26.

<sup>55</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 25.

<sup>56</sup> *Ibid* at 9.

<sup>57</sup> Shannon Bell, “On ne peut pas voir l’image [the image cannot be seen]” in *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 201 [Bell].

<sup>58</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 42.

<sup>59</sup> *Ibid*.

that rather than being clear and unequivocal, the meaning of sexual representations is a site of political and discursive struggle that should be liberated rather than repressed to allow for free expression. Further, this paper will argue that not all materials that are offensive to public morality are automatically harmful. Therefore, the “risk of harm” element in case law is unsubstantiated. Unlike anti-pornography feminist who argue in favor of censorship to reduce harm, this paper will maintain the belief that censorship “cuts off critical analyses of the messages it sometimes endorses about human sexuality.”<sup>60</sup>

### III. EVOLUTION OF THE OBSCENITY LAW & FREEDOM OF EXPRESSION:

The following section will give a brief overview of current legislation regarding obscenity. Recognizing the complexity of sexual imagery as established by Cossman, Bell, and Gotell, I will argue that “risk of harm” or “harm” as suggested is not an appropriate standard for addressing obscenity in art. Finally, I will show that despite the artistic merit defence, artists continue to fight censorship battles and struggle to find precise meaning in the law. Taken congruently, this section will show that the law is imprecise in leaving artists at the mercy of the judicial system while simultaneously failing to address the perception of harm that the legislation and anti-pornography feminists strive to combat.

#### A. Harm & Risk of Harm

In Canada, the court case *R v Hicklin* set the governing standard for obscenity for nearly a century.<sup>61</sup> The Court held that all materials tending “to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall” were obscene, regardless of its artistic or literary merit.<sup>62</sup> While more recent cases have attempted to move from a discussion on morality to a discussion on harm, the standard of morality continues to linger in contemporary court

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<sup>60</sup> *Ibid* at 32.

<sup>61</sup> *Supra* note 19.

<sup>62</sup> *Ibid* at 371.

decisions by maintaining a conviction based on the finding of indirect harm.<sup>63</sup>

***R v Butler: Community Standards Test***

In February 1992, the Supreme Court of Canada, in the unanimous *R v Butler* decision, upheld the obscenity provision under s. 163(8) of the *Criminal Code*.<sup>64</sup> Section 163(8) of the *Code* provides that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of (...) crime, horror, cruelty and violence, shall be deemed to be obscene".<sup>65</sup> While this case did not involve art specifically, the decision continues to shape what artistic expression will be granted protection.

In *Butler*, the Court concentrated on the anti-pornography campaign by the Women's Legal Education and Action Fund (LEAF). LEAF's legal team sought to have obscenity described as an exercise of sex discrimination that harms women's equality. Notably, intervening in *Butler* LEAF argued that pornography "increase[s] propensity to, or tolerance of physical aggression including sexual assault against women."<sup>66</sup> Consequently, LEAF advocated an anti-pornography and pro-censorship position informed by Mackinnon and Dworkin.

Disagreeing with LEAF, The British Columbia Civil Liberties Association (BCCLA) sought to protect freedom of expression. This lobby group was more concerned with the effects of criminal regulation on sexual freedom than the speculative harms associated with obscene materials.<sup>67</sup> In their factum BCCLA stated that pornography forces society to question conventional notions of sexuality. This in turn launches society into an

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<sup>63</sup> Richard Jochelson & Kristen Kramar maintain that the history of the development of the (risk of) harm test for obscenity and indecency can be identified in 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)." See "Governing through Precaution to protect Equality and Freedom: Obscenity and Indecency Law in Canada after *R v Labaye* [2005]" (2011) 36:4 *Canadian J of Sociology* 283 at 285 [Jochelson & Kramar, "Governing"].

<sup>64</sup> *Criminal Code*, RSC 1985, c C-46, s 163(8).

<sup>65</sup> *Ibid.*

<sup>66</sup> Busby, *supra* note 41 at 170.

<sup>67</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 41.

inherently political discourse that should not be stifled. However, the Court agreed with the main argument in LEAF's intervention modified the test for obscenity to account for harms that may be intrinsic in sexually explicit materials.<sup>68</sup>

In the majority decision, Justice Sopinka writing for the Court states that there is sufficient evidence that depictions of degrading and dehumanizing sex harms society, and, in particular, adversely affects attitudes towards women.<sup>69</sup> However, the Court acknowledged that there is no direct link between pornography and discrimination or violence against women.<sup>70</sup> Nevertheless, the mere belief that such a connection exists was enough to justify the suppressing.<sup>71</sup>

Mr. Justice Sopinka states that the Court must determine as best 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. He said,

[T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.<sup>72</sup>

Accordingly, a new test for determining whether representations are obscene emerged. However, the problem with this test is that it is grounded in sexual morality which categorizes sexual expression as either bad or good.<sup>73</sup>

This decision, sparked controversy amongst feminist scholars. While some feminist claimed that this new test clarified the law, many anti-censorship feminists, argued that the *Butler* decision reinforced censorship of unconventional or alternative sexualities. This is because in applying this test, courts cannot help but continue to make judgments about legitimate

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<sup>68</sup> Richard Jochelson, "After *Labaye*: The Harm Test of Obscenity, The New Judicial Vacuum, and the Relevance of Familiar Voices" (2009) 46:3 *Alta L Rev* 741 at 742 [Jochelson, "After *Labaye*"].

<sup>69</sup> *Butler*, *supra* note 5 at para 122. Justice Sopinka writing for Chief Justice Lamer (as he was then), La Forest, Cory, McLachlin, Stevenson, and Iacobucci.

<sup>70</sup> *Ibid* at para 117.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at para 62.

<sup>73</sup> Cossman & Bell Introduction, *supra* note 1 at 20-21.

and illegitimate sexual representations on the basis of their own subjective understanding of appropriate sexual norms and values.<sup>74</sup> In turn, this prevails the notion that some sex is good and some sex is bad.<sup>75</sup> As such, in applying this test, courts are required to make judgments about legitimate and illegitimate sexual representations on the basis of their own subjective beliefs towards appropriate sexual norms.

The concern regarding legitimate and illegitimate sexual representations is important to the consideration of art because artistic purpose is not readily distinguishable from pornography. Bell says, “[t]he majority of sexual depictions are somewhere in between pornography and art, are both pornography and art, both pornography and erotica, both pornography and philosophy.”<sup>76</sup> Thus, artists who wish to explore the boundaries of sex through provocative erotic art would be subject to similar regulations. Once again, because the “eroticiz[ation] of women's subordination,” has also been “a commonplace in art history,” similar arguments can be made against erotic art if subject to obscenity charges. For instance, A.W. Easton in “What’s Wrong with the (Female) Nude? A Feminist Perspective on Art and Pornography” argues that the traditional female nude in ‘high art’ sends a message of female inferiority promoting sexual inequality.<sup>77</sup> As such, Easton elaborates on the idea developed by MacKinnon on female subordination, a phenomenon that significantly maintains sex inequality. However, by reinforcing expression as either legitimate or illegitimate artists are forced to conform to legal notions of right and wrong. This inherently ignores the fact that there is educational value to be had in “wrong” or “morally evil” ideas. By classifying something as either good or bad, *Butler* assumes that society is not capable of critical analysis.

According to Koppelman, “[t]he state does not know enough about the consumers of pornography to intelligently censor what they get to think

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<sup>74</sup> Brenda Cossman, “Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision” in *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 107.

<sup>75</sup> *Ibid* at 127.

<sup>76</sup> Bell, *supra* note 57 at 202.

<sup>77</sup> A W Eaton, “What’s Wrong with the (Female Nude)? A Feminist Perspective on Art and Pornography” in Hans Maes & Jerrold Levinson, eds, *Art and Pornography: Philosophical Essays* (Oxford, United Kingdom: Oxford University Press, 2012).

about, nor does it have any basis to feel confident that the readers deserve to be treated as if they were children in this way.”<sup>78</sup> As such, Koppelman holds that criminalizing pornography is a mistake because the notion that obscenity is harmful is not proven.<sup>79</sup> Cossman explains that this search for “harm” is ill-fated because “the harm attributed to pornography cannot be proven.”<sup>80</sup> Indeed, this is significant because this analysis does not consider the fact that there are multiple interpretations of one image. An image may be illegitimate to the subjective belief of the court while informative and thought provoking to another. However, because the test under *Butler* (and subsequent cases) is vague, the court will ultimately decide what they believe is legitimate and illegitimate sexual representation on their own subjective beliefs.

More recently, the Supreme Court of Canada, in *Labaye*, attempted to redefine the community standards of tolerance test.<sup>81</sup> The problem with the new harm-based test in *Labaye* is that it continues to regulate unproven harms, silencing sexual representation. This in turn, may have negative repercussions for artists.

#### ***R v Labaye: New Harm-Based Test***

In 2005, in *R v Labaye*, the accused operated a private club in Montreal that permitted couples and individuals to meet each other for group sex.<sup>82</sup> The accused was charged with the crime of public indecency.<sup>83</sup> However, the Court largely analyzed the case under the Canadian obscenity doctrine as it had evolved from *Hicklin* through *Butler*. In this decision, the Supreme Court suggested that the community standard of tolerance approach is impossible to apply objectively. The Court said,

In a diverse, pluralistic society whose members hold divergent views, who is the “community”? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges

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<sup>78</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 24.

<sup>79</sup> Andrew Koppelman, “Why Phyllis Schlafly is right (but wrong) about pornography” (2008) 31:1 Harv JL & Pub Pol’y 105 at 123.

<sup>80</sup> Jochelson, “After *Labaye*”, *supra* note 68 at 751.

<sup>81</sup> *Supra* note 13.

<sup>82</sup> *Ibid* at para 5.

<sup>83</sup> *Ibid* at para 1.



and jurors. In the end, the question often came down to what they, as individual members of the community, would tolerate.<sup>84</sup>

With this inadequacy in mind, the Supreme Court replaced the community standard test in *Butler* with a new objective harm-based test.<sup>85</sup> The Court stated, “[h]arm or significant risk of harm is easier to prove than a community standard.”<sup>86</sup> The Court went on to establish the guidelines as to how to measure harm. The Court said, “[i]ndecent criminal conduct will be established where the Crown proves beyond a reasonable doubt the following two requirements:”

1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:

(a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or

(b) predisposing others to anti-social behaviour; or

(c) physically or psychologically harming persons involved in the conduct, and

2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.<sup>87</sup>

As such, the first question is whether the conduct at issue harms, or presents a significant “risk of harm” to individuals or society. According to the Court, these categories of harms are grounded in values recognized by our Constitution and other fundamental laws in order to connect this area of law with the vast majority of criminal offences, which are based on the need to protect society from harm.<sup>88</sup> The second question asks whether the alleged harm rose to the level of incompatibility with the “proper functioning of society.”<sup>89</sup> In order to determine this, the Court suggested that, in most cases, expert evidence would be needed to establish actual

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<sup>84</sup> *Ibid* at para 18.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* at para 24.

<sup>87</sup> *Ibid* at para 62.

<sup>88</sup> *Ibid* at para 30.

<sup>89</sup> *Ibid*.

harm.<sup>90</sup> However, if the Crown relies on establishing a risk of harm rather than an actual harm, such evidence may be absent.<sup>91</sup>

The goal of this new test was to achieve objectivity and focus more directly on harm regarding political or constitutional values.<sup>92</sup> However, even with the harm-based test, there is still uncertainty as to what conduct causes harm. This is because the trier of fact is not required to weigh social scientific evidence of harm.<sup>93</sup> Notably, a mere risk of harm rather than actual harm is sufficient. Thus, the claim that obscenity is dangerous continues to rest on unexamined conventions on societal beliefs and actions.

This finding of harm will continue to affect artists as artists often depict subject matter that may be unforeseen or alarming. This is especially relevant in cases of child pornography. While there has been no clarification in the application of the new harm-based test established in *Labaye* by either the Supreme Court or the lower courts, we can apply the standard theoretically to previous cases to show that its application would not be favourable to artists.

### B. New Harm-Based Test: Application to *Sharpe* and *Langer*

The aim of this section is to show that the current law under *R v Labaye* is detrimental to society because it suppresses expression that involves no harm. While the *Labaye* test was an attempt to reconstruct the law established in *Butler*, the ruling is fundamentally flawed in that it criminalizes material without “empirical evidence of harm to justify the exercise of state power.”<sup>94</sup> In what follows, I will analyze the court case *R v Langer* [1995] and *R v Sharpe* [2001] to show that under the new standard of *Labaye*, these artists would be criminalized based on the “imagined negative effects of sexual conduct.”<sup>95</sup>

In the pre-*Labaye* and post-*Butler* era, the problem of harm presented itself in the case of *R v Langer*.<sup>96</sup> In this decision, the Court examined Eli Langer’s sketches and paintings which depicted children engaged in sexually

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<sup>90</sup> *Ibid* at para 60-61.

<sup>91</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 67.

<sup>92</sup> *Ibid* at 69.

<sup>93</sup> *Labaye*, *supra* note 13 at para 60.

<sup>94</sup> Richard Jochelson & Kristen Kramar, “Governing”, *supra* note 63 at 283.

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

<sup>96</sup> *Langer*, *supra* note 15.

explicit activity. The Court referenced *Butler* stating that the purpose of obscenity legislation is to protect society from harm. The Court stated that the community standard of tolerance test established in *Butler* would apply to the case at hand. Notably, the Court stated, “it would be incongruous to measure harm with reference to community standards of tolerance when dealing with obscenity, and yet ignore those same standards when dealing with child pornography.”<sup>97</sup> Thus, the Court considered whether there was a risk of harm to children. In the Court’s view, there did not seem to be a realistic risk of harm to children. The Court reached this conclusion after comparing the paintings and drawings to the other types of child pornography which were filed as exhibits. In addition, the Court considered the differing opinions of the experts concerning the risk posed by Langer’s paintings.

In *R v Sharpe*, the accused was charged “with simple possession, and possession for the purposes of distribution or sale, of both his own written work and hundreds of pictures of teenage boys.”<sup>98</sup> John Robin Sharpe was acquitted on the charges relating to his written work. Ultimately, the Court decided that his work did not “advocate or counsel” the commission of crimes.<sup>99</sup> Although the written materials were “extremely violent” and “extremely disturbing”, the Court determined that they had some “literary merit.”<sup>100</sup>

If *Langer* and *Sharpe* were revisited under the two-prong test established in *Labaye*, the accused would likely face tremendous difficulty due to the Courts commitment to safeguarding a normative, “properly functioning society.”<sup>101</sup> Under the new harm-based test, a court would claim that depicting “child pornography” threatens autonomy, liberty and equality because this type of expression is not a “positive source of human expression, fulfillment and pleasure” in the traditional sense.<sup>102</sup> As such, a court would likely argue that the images cause a risk of harm to society by “predisposing others to anti-social conduct.”<sup>103</sup>

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<sup>97</sup> *Ibid* at para 80.

<sup>98</sup> Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36:1 UBC L Rev 101 at 125 [Ryder].

<sup>99</sup> *Sharpe*, *supra* note 11 at para 37.

<sup>100</sup> *Ibid* at para 138 and 107-15.

<sup>101</sup> Jochelson & Kramar, “Governing”, *supra* note 63 at 298.

<sup>102</sup> *Labaye*, *supra* note 13 at para 48.

<sup>103</sup> *Ibid* at para 58.

In Langer's artwork, he did not use live models. Instead, he drew from his imagination. Likewise, in Sharpe's written material, there were no children involved in the making of the novel. As such, a court would not be able to argue that there was harm to individuals participating in the conduct. However, under the new standard articulated in *Labaye*, a court would be able to rely on the element of risk of harm rather than an actual harm in respect to Langer and Sharpe's work. When the Crown is relying on establishing a risk of harm rather than an actual harm, evidence is not required.<sup>104</sup> This standard essentially allows a judge to substitute his or her own opinions in place of experts.<sup>105</sup> This is problematic because the question of whether materials can even be shown to cause people to act "in an anti-social" manner remains highly questioned. Consequently, June Ross contends, "a court *must* weigh expert evidence, and *must* be careful not to replace expert opinion with personal assessment."<sup>106</sup> Quoting *R v Cameron*,<sup>107</sup> Ross states,

[E]ven the most knowledgeable adjudicator should hesitate to rely on his own taste, his subjective appreciation, to condemn art. He does not advance the situation by invoking his right to apply the law and satisfying it by a formulary advertence to the factors which must be canvassed in order to register a conviction.<sup>108</sup>

However, under *Labaye*'s analysis the justice system is able to convict artists based on the dislike of the idea expressed by permitting a risk of harm standard. As a result, the judicial system maintains the power to convict someone based on the notion of moral corruption. When harm is constructed on this basis, it is easy to find artists guilty of obscenity.

This line of thinking can be traced back to Dworkin and Mackinnon's analogy between vice and treason. As mentioned earlier, Dworkin and Mackinnon view images as having a fixed meaning that can seduce viewers into imitative action. In *Butler*, the Court assumed this notion and held that exposure to representations of bad acts cause bad thoughts, which in turn cause bad behavior. In 2005, the Court in *Labaye* is essentially doing the same thing. Therefore, if *Langer* and/or *Sharpe* were re-tried today, a court could adopt the notion that exposure to art that displays or illustrates

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<sup>104</sup> *Ibid* at para 60.

<sup>105</sup> June Ross, "R v Sharpe and The Defence of Artistic Merit" (2001) 12:1 Const Forum Const 23 at 28 [Ross].

<sup>106</sup> *Ibid*.

<sup>107</sup> *R v Cameron* (1966) 2 OR 777, 58 DLR (2d) 486 (Ont CA).

<sup>108</sup> *Ibid* at 512.

violence causes bad behavior such as abuse and cruelty. Consequently, this belief will continue to criminalize a variety of creative expression in the absence of any persuasive evidence of a risk of harm. While imagery of this nature may be offensive to some people, it is not necessarily harmful. As Mill alleged and as this paper agrees, “having one’s morals challenged, is not a justification for censorship because offence falls short of a threshold of harm required to trigger the coercive power of the state.”<sup>109</sup> To find otherwise, would cause danger to artists as harm can mean many things.

In art, harm often represents a problem that needs to be challenged. It may also be cathartic for the inner psyche. For instance, Langer, in defending his work said that he has several close friends who were abused as children, and they have shared their memories with him.<sup>110</sup> As such, he felt compelled to paint the actual experiences and the devastating impacts on the youthful victims. He said, “[t]o deny it is to deny a large part of our humanity.”<sup>111</sup> Therefore, while Langer’s artworks may be seen as abhorrent to some, it may help shed light on important issues to others. This in turn, helps viewers and victims combat and recognize violence and sexuality. Thus, there is “no intrinsic meaning in a visual image” the meaning of an image is decided by various elements.<sup>112</sup> Consequently, the meaning of sexual representations is a site of political and discursive struggle that should be liberated rather than repressed to allow for free expression.

In *R v Sharpe*, the Court supported my belief that art should be protected. The Court said, “works of art, even of dubious artistic value, are not caught at all” by the child pornography provisions of the *Criminal Code*.<sup>113</sup> However, with the decision in *Labaye*, a court would now be required to assess whether there was a risk of harm based in the two-step harms-based test which removed the artistic merit defence recognised by *Sharpe*. Therefore, courts will have the power to trench unduly on civil liberties such as freedom of expression. Consequently, the courts give little or no consideration to freedom of expression guaranteed by the *Charter*.

With the evolution of *Labaye*, courts continue to govern expression based on the beliefs of a well-ordered society. In turn, this leaves artists at

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<sup>109</sup> Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 13.

<sup>110</sup> D’Arcy Jenish, “Sensitive or Obscene?”, *Maclean’s Toronto* (24 January 1994) 68, online: <[www.proquest.com](http://www.proquest.com)>.

<sup>111</sup> *Ibid.*

<sup>112</sup> Cossman & Bell Introduction, *supra* note 1 at 26.

<sup>113</sup> *Sharpe*, *supra* note 11 at para 73-4.

the mercy of the subjective opinion of the court. As a result, the test in *Labaye* continues to ignore the fact that an image may be harmful in the subjective belief of the court while informative and thought provoking to a member of society. By censoring materials based on a risk of harm, we stop the conversation on violence and silence those who try to confront it.

#### IV. ARRIVING AT A POLICY

As I have attempted to show, Canada has continuously attempted to ban, destroy and outlaw representations that too drastically depart from the moral and aesthetic conventions of the day. However, as society evolves, charges are often overturned and new standards of tolerance emerge. Nevertheless, Canada continues to regulate images by formulating new tests to understand obscenity. In doing so, Canada has reframed the judicial test for obscenity over and over again. This in turn, has led to indefinite meaning in the law which criminalize harms that may be intrinsic in sexually explicit materials.

June Ross argues that if expression is to be controlled, “it should not be because of a risk of harm only, but on the basis of proven harm.”<sup>114</sup> However, she qualifies this argument by stating that “[t]his would not make artistic expression, or other valuable forms of expression such as political expression, immune from all regulation, but it would make such expression immune from regulation based on only a reasoned apprehension of harm.”<sup>115</sup> While this is a reasonable stance, it still allows artists to become entangled in an obscenity trial which requires artist to defend their work at considerable personal and financial cost. Therefore, the only way to eliminate this burden would be to strike down the obscenity law. However, because children are especially susceptible to harm there needs to be some measure to protect them. Consequently, it is difficult to think of a reasonable standard which allows for a balance of safekeeping and a complete pursuit of truth and intellect. With this and the earlier cases in mind, I ask: is the next step in history abolishing the law of obscenity or continuing to redefine the standard? In light of the limited actuarial data on the risk of harm caused by obscenity or indecency, I believe the obscenity law must be struck down to allow for freedom of expression and meaningful content.

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<sup>114</sup> Ross, *supra* note 105 at 29.

<sup>115</sup> *Ibid.*

As illustrated, history has shown that those who try to suppress expression are seldom successful. Consequently, society's perspective on obscenity is flexible and responds to shifts in public acceptance of explicit material. Earlier this paper mentioned that images that are suppressed have a tendency of reappearing. In the age of technology, I believe if we try to censor imagery it will nevertheless find a way of reappearing on the Internet. Therefore, I believe it is time to retire the obscenity law as it allows for artistic freedom to be suppressed. Lynn King said, "when dealing with images – which ones should go and which ones can stay – no amount of tinkering with words can guarantee women a just law."<sup>116</sup> Consequently, I believe there are better ways to confront violence and sexuality than law reforms on obscenity/indecency. For instance, Varda Burstyn argues:

If women find themselves coerced into sexual activity for pornography production, they should lay assault and rape charges against those responsible (...). If their pictures are published without their consent, they can sue for harassment, slander, libel and damages (...). But to suggest, as Andrea Dworkin and Catherina Mackinnon do in the U.S., and Susan Cole does in Canada, that the makers of the pornography in question be sued because the pornography itself is responsible for the assault is dangerous.<sup>117</sup>

In this, Burstyn believes that no matter how offensive or grotesque a work is, it should not be criminalized as obscene under the *Criminal Code*. However, if a work harms someone directly in its production, then there are other avenues of recourse to remedy the matter. Thus, she believes there is already proper legislation to address harm and obscenity laws only make it easier for educational materials to be suppressed.<sup>118</sup>

With Burstyn's perspective in mind, a similar argument can be made in regards to child pornography. If children are coerced into sexual performance, assault and abuse legislation can be used to lay a conviction. Therefore, there are appropriate cases for legal action when there is actual harm and a direct link between the material and harm to children. However, the obscenity law limits freedom of expression and is not the appropriate recourse as it can be used to target freedom of artistic expression based on intrinsic harm as established in *Labaye*. Bruce Ryder said:

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<sup>116</sup> King, *supra* note 28 at 79.

<sup>117</sup> Varda Burstyn, "Beyond Despair: Positive Strategies" in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 160-161.

<sup>118</sup> *Ibid.*

...the law causes harm to society by suppressing thoughts and expression concerning child and youth sexuality that involved no harm in production, fall short of advocating harm and that have at best a tenuous connection to the commission of harmful acts.<sup>119</sup>

In order to remedy this, the obscenity and indecency sections in the *Criminal Code* need to be eliminated as there are other means to address actual harm.

Supporting Burstyn, I believe that the element of “physical or psychological harm to individuals” in the *Labaye* test can be remedied by other legislation. Further, the other elements namely, “confronting members of the public with conduct that significantly interferes with their autonomy and liberty” or “predisposing others to anti-social behaviour” of the *Labaye* test should not be criminalized because being offended is not a justification for state interference. Without challenging moral norms, the society we live in stays static. As a result, eliminating obscenity and indecency from the *Criminal Code* would allow for charges in more appropriate circumstances. Moving forward, regulations could replace the criminal aspect of obscenity and indecency. Regulations would prevent members of the public from unwillingly confronting conduct or expression they do not wish to see. This could be done by restricting the expression to certain locations or requiring artists to incorporate explicit warnings in their exhibitions to caution their viewers.

## V. CONCLUSION

In the foregoing analysis, I have examined the history of censorship, the reforms in case law to arrive at a policy recommendation regarding the practice of censorship within the artistic realm. I illustrated that censorship has always been justified in the name of public good and social order and has always been opposed in the name of freedom of expression and progress. Moreover, I explored the idea that the desire to censor has stemmed around the notion that pornography results in sexual violence and discrimination against women and children. I rebutted this belief by highlighting the competing anti-censorship feminist view on pornography and censorship.

Taking these opinions into account, I suggested that these theorists’ concerns relating to pornography apply to artworks including painting, sculpture, as well as photography. Subsequently, I outlined the *Butler* case

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<sup>119</sup> Ryder, *supra* 98 note at 103.



as a starting point for understanding how harm and violence is understood by the courts in the context of obscenity. I then outlined subsequent cases such as *Langer*, *Sharpe*, and *Labaye* to show that defining what is, and is not, harmful is highly debated. Consequently, I argued that risk of harm is not an appropriate standard especially in the context of visual art. This is because it is when art challenges prevailing aesthetics, morals, and subject matter that it is most likely to draw attention, receive notoriety, and provoke discussion. Without challenging artistic and moral norms, the society we live in stays static. Thus, censorship limits the ability of the artistic community to challenge the society we live in. While there is no easy conclusion on how to solve the paradox within artistic freedom and harm, courts must acknowledge that censorship hinders societies ability to learn and combat violence. Consequently, government needs to re-evaluate the obscenity and indecency and consider replacing it with regulation