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# **SUPPRESSING VIOLENT AND DEGRADING PORNOGRAPHY TO “PREVENT HARM” IN CANADA: *BUTLER v. HER MAJESTY THE QUEEN***

Images of violence are not the same thing as violence itself; a picture of a rape is not a rape. If we are honest, we have to admit that we ourselves, at one time or another, have been sexually aroused by images of acts, or situations that we would shrink from in actual experience. In fantasy, we can flirt with the forbidden, the humiliating and the dangerous. In fantasy, we test the boundaries of our feelings in ways that might terrify us in real life. The whole point on which discussions of fantasy and reality turn is that almost all of us know the difference.

- *Lisa Duggan and Ann Snitow*

## **I. INTRODUCTION**

Current Canadian obscenity law is the product of many years of evolution. As in many other countries, initial attempts to regulate sexually explicit materials in Canada stemmed from traditional notions of government responsibility for societal decency and morality.<sup>1</sup> During the twentieth century, however, societal moral standards have gradually changed. This change is evidenced by the nature of the pornographic materials that are readily available today. Society has become more tolerant of extremely graphic sexual materials in which violence against women is a central theme. In today's pornography, women are typically bound, battered, tortured, burned,

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1. In *R. v. Fringe Product Inc.*, 53 C.C.C. (3d) 422 (Ont. Dist. Ct. 1990) (Can.), the court stated that “[w]hen one looks at the legislative history of the obscenity provisions of the Code, it is clear that when the English Court of King's Bench first asserted itself in this field following the demise of the Star Chamber in 1641, it did so as the guardian of public morals.” *Id.* at 441.

harassed, raped and, in materials called "snuff,"<sup>2</sup> sometimes killed. In addition, today's pornography typically eroticizes the submission, degradation and humiliation of women. Changes in moral standards and in the nature of the sexually explicit materials available have sparked considerable debate over whether morality can continue to serve as a sound basis for the regulation of offensive sexual expression.

As a result of the combination of society's changing morality and recent studies regarding the potentially harmful effects of violent or degrading pornography, an alternative rationale for suppressing sexually explicit materials has recently emerged. Proponents of this rationale, the harm-based approach, seek to eliminate the availability of "violent" or "degrading" pornography based on the messages that these materials convey. This approach rests on the premise that violent or degrading pornography causes harm to society, and more particularly to women, by portraying women as appropriate objects of male violence who enjoy domination and humiliation. Proponents of the harm-based approach argue that degrading portrayals of women violate women's civil rights by altering societal attitudes toward them and causing women to be viewed as the inferior gender which, in turn, results in lost opportunities for women in society. Although this approach has been subject to a great deal of scrutiny, it has recently gained increased acceptance among many scholars, feminists, and legislators.<sup>3</sup>

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2. Snuff is now used as a general term to describe movies which eroticize the killing of an actor where the actor is actually killed during the making of the film. "Snuff" was originally the title of a pornographic film which revolve[d] around the . . . stabbing of a pregnant woman and the slow, thorough butchering of another woman that ends by showing her dismembered body strewn about, currents of blood flowing from her mouth, her abdomen slit and insides held above her by the murderer. To the murderer, this is a sexual act from which he receives pleasure, culminating in his ecstatic scream at the end of the film.

Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 5 n.1 (1984).

3. This theory was rejected in the United States. An ordinance giving women a civil cause of action against the distributors, producers, sellers, and exhibitors of

Canada is the first country to alter its obscenity law in response to concern over the potentially harmful effects of violent or degrading pornography. Beginning in the mid-1980s, the harm-based approach emerged gradually in the lower Canadian courts. It was not until February of 1992 that the harm-based approach was adopted by the Supreme Court of Canada as the sole method for determining whether a particular publication is obscene—a determination which allows the legislature to suppress the publication. In *Butler v. Her Majesty the Queen*,<sup>4</sup> the first Canadian Supreme Court case examining the validity of the obscenity law under the Canadian Charter of Rights and Freedoms, Canada's highest court unanimously upheld a statute which defines obscenity as sexually explicit material that is violent or degrading. The Canadian Supreme Court reasoned that violent or degrading pornography harms women by changing societal attitudes towards them, contributing to their victimization, and affecting their rights to equality. The court concluded that suppression of these materials is necessary to prevent these harms and that the obscenity statute is reasonable and demonstrably justified in the context of Canadian society. As a result of the *Butler* decision, Canada is the only country to have upheld a definition of obscenity which is focused on the harm speech causes to women, rather than on whether speech is offensive to moral standards.

This Comment examines the Canadian Supreme Court's decision in *Butler v. Her Majesty the Queen*, where the harm-based rationale was used to justify suppression of violent or degrading pornography under section 163 of the Canadian Criminal Code.<sup>5</sup> This Comment will argue that there was no rational basis for suppressing violent or degrading pornography under harm-based principles because it cannot be clearly

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violent or subordinating pornographic materials was deemed unconstitutional. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

4. [1992] 1 S.C.R. 452 (Can.).

5. Criminal Code, R.S.C., ch. C-34, § 159(8) (1970) (Can.). The section number of the statute was changed to § 163 in 1985.

demonstrated that these materials cause instances of sexual violence in society, or that they play a central role in maintaining gender inequality. This Comment will further contend, assuming arguendo that violent or degrading pornography indirectly promotes gender inequality, that suppressing these materials for the purpose of furthering equality is contrary to the principles underlying the right to free expression. This Comment will then argue that the court's analysis of the validity of section 163 was flawed because the court underestimated the limit section 163 permits on section 2(b) of the Charter, which guarantees the right to free expression. Finally, this Comment will suggest that, since section 163 cannot be justified under harm-based principles, morality is probably the court's real justification for upholding the statute. This Comment will conclude that the *Butler* court should have stated the real justification for upholding the validity of section 163 because the *Butler* decision sets a dangerous precedent for the future of individual rights in Canada.

## II. THE CANADIAN CONSTITUTIONAL STRUCTURE

Prior to 1982 the Canadian constitutional structure was governed by the British Parliament under the British North America Act, 1867 [BNA Act].<sup>6</sup> The BNA Act established a federal system of government in Canada wherein decision-making powers were allocated between the Canadian Parliament and the Canadian provincial governments.<sup>7</sup> Under the BNA Act, the Canadian Parliament had supremacy in all aspects of law. Canadian courts did not have any authority to protect individual rights from actions of the Canadian Parliament or provincial governments because, under Canadian legal theory, individual rights were not "entrenched" in a constitution.<sup>8</sup> Individual rights were merely statutory and could be

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6. The British North America Act, 1867 is now referred to as the Constitution Act, 1867. See *infra* note 11.

7. See ROBERT MARTIN & G. STEWART ADAM, A SOURCEBOOK OF CANADIAN MEDIA LAW 29-31 (1989) [hereinafter MEDIA LAW].

8. Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada*:

limited by subsequent legislation by the Canadian Parliament. In the late 1970s, Canadians began to seek a revision of the constitutional structure established under the BNA Act.<sup>9</sup> However, since the BNA Act was a British act, it could only be amended by a subsequent act of the British Parliament.<sup>10</sup>

In 1982 the Canadian constitutional structure was radically altered. Pursuant to a request by the Canadian Parliament, the British Parliament enacted the Canada Act, 1982 [Canada Act].<sup>11</sup> The second part of the Canada Act is the Constitution Act, 1982 [Constitution Act]. The Canada Act enacted three important changes in the Canadian constitutional structure: first, British authority for amending the Canadian Constitution was terminated so that any future changes in the Canadian constitutional structure would have to occur by amendment by the Canadian Parliament;<sup>12</sup> second, the Constitution Act

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*The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1193 (1984).

"Entrenchment" alters parliamentary supremacy by allowing the Canadian courts to protect individual rights from government interference once these rights are given constitutional status. The Canadian Bill of Rights, enacted by Parliament in 1960, guaranteed certain individual rights and provided that federal laws should be "construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized." R.S.C. pt. I, § 2 (App. III 1970) (Can.). However, the Canadian Bill of Rights was enacted as a statute, and not as a constitutional mandate. Thus, guarantees of individual rights were not "entrenched" and the Canadian Parliament could enact subsequent statutes denying these rights at any time. Sedler, *supra*, at 1193 n.7.

9. Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51, 51 (1984). Canadians sought to establish a new constitutional structure for three main purposes: first, to preserve the unity of the nation "in the face of the threat posed by French Canadian nationalism within the potentially independent Quebec," *id.*; second, to secure the "entrenchment" of individual rights; and third, to relieve Canada from British Parliamentary rule. Sedler, *supra* note 8, at 1193-94.

10. MEDIA LAW, *supra* note 7, at 29.

11. In the Canadian Parliament, the governments of nine provinces consented to pass a resolution requesting the British Parliament to amend the Canadian Constitution for the final time. The Westminster Parliament enacted the Canada Act, 1982, which added the Constitution Act, 1982 to Canada's Constitution. The Canada Act also changed the name of the British North America Act, 1867 to the Constitution Act, 1867. IAN GREENE, *THE CHARTER OF RIGHTS* 43 (1989).

12. MEDIA LAW, *supra* note 7, at 29. See also GREENE, *supra* note 11, at 43.

incorporated all of the previously existing Canadian constitutional documents, elevating the Canada Act to the status of the "supreme law" of Canada;<sup>13</sup> and, last, by incorporating the "Canadian Charter of Rights and Freedoms" as part of the Canadian Constitution, individual rights were finally given constitutional status, terminating the supremacy of the Canadian Parliament.<sup>14</sup>

The Canadian Charter of Rights and Freedoms is the first part of the Constitution Act and is probably the most significant feature of Canada's revised constitutional structure. Since the Canadian Charter has constitutional status, individual rights are now formally "entrenched" in Canadian law. Consequently, Canadian courts now have the authority to restrain governmental infringements on individual rights guaranteed under the Charter.<sup>15</sup> As part of the "supreme law" of Canada, the Charter is binding on all levels of Canadian government. Thus, the Canadian Parliament and the provincial governments are precluded from enacting most legislation that infringes on Charter rights,<sup>16</sup> and Canadian courts have the authority to determine whether a particular infringement on a Charter right is valid.<sup>17</sup>

The Canadian Charter of Rights and Freedoms sets forth individual rights in affirmative terms, unlike the American Bill of Rights in which constitutional rights "are expressed in terms of limitations on governmental action."<sup>18</sup> The most important rights—the "fundamental freedoms"—are set forth in section 2 of the Charter. Section 2 states that "Everyone has the following fundamental freedoms: (a) freedom of conscience and reli-

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Section 2 of the Canada Act, 1982 provides: "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into effect shall extend to Canada as part of its law."

13. Sedler, *supra* note 8, at 1193-94.

14. Sedler, *supra* note 8, at 1202.

15. Sedler, *supra* note 8, at 1194.

16. See *infra* text accompanying note 20.

17. CAN. CONST., (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 24. See *infra* note 21 and accompanying text.

18. Sedler, *supra* note 8, at 1194 n.11.

gion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and, (d) freedom of association.<sup>19</sup>

However, there is a significant restriction on the scope of the guarantees of individual rights in the Canadian Charter of Rights and Freedoms (the Charter). This restriction is of such vital importance that it was placed in the first section of the Charter, demonstrating the priority of the restriction. Section 1 of the Charter states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>20</sup>

Under section 1 of the Charter, the judiciary, not the Canadian Parliament, is responsible for determining whether a particular limitation of a Charter right is demonstrably justified in a free and democratic society.<sup>21</sup> In *R. v. Oakes*,<sup>22</sup> the Canadian Supreme Court created a test to determine which limitations on Charter rights would satisfy a section 1 analysis [*Oakes test*].<sup>23</sup> Under the *Oakes test*, two central criteria must be met for a limitation on a Charter right to be valid: first, the government objective for limiting the Charter right must be sufficiently important to warrant the limitation of that right; and, second, the limitation on the Charter right must be "proportional" to the government's objective.<sup>24</sup> A determination of proportionality involves three separate inquiries: (1) whether a rational connection exists between the limitation on the individual right and the government objective; (2) whether the limitation only minimally impairs the Charter right; and, (3) whether the effects of the limitation so severely infringe the protected Charter right that the legislative objective is out-

19. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

20. *Id.*

21. Weiler, *supra* note 9, at 61.

22. [1986] 1 S.C.R. 103 (Can.).

23. GREENE, *supra* note 11, at 55.

24. [1986] 1 S.C.R. at 139.



weighed by the limitation.<sup>25</sup> Under the section 1 analysis, the burden of proof is on the party seeking to limit a guaranteed Charter right to demonstrate that the limitation is reasonable and demonstrably justified.<sup>26</sup> Without evidence to the contrary, the presumption is that any limitation on a guaranteed Charter right is not reasonable or demonstrably justified.<sup>27</sup>

### III. THE CANADIAN DEFINITION OF OBSCENITY AND THE EMERGENCE OF THE JUDICIAL CLASSIFICATION OF OBSCENITY BASED ON HARM

#### A. *The Canadian Standard for Obscenity Prior to Butler*

Limitations on the production and distribution of pornographic materials in Canada were initially justified as a means of promoting societal morality. Canadian courts initially adopted the English standard for obscenity set forth in *Regina v. Hicklin*.<sup>28</sup> The test for obscenity under *Hicklin* was "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 a publication of th[e] sort may fall."<sup>29</sup> However, the *Hicklin* standard was soon challenged in the Canadian courts,<sup>30</sup> resulting in the imposition of various

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25. *Id.*

26. GREENE, *supra* note 11, at 54-55.

27. GREENE, *supra* note 11, at 55.

28. 3 Q.B. 360 (1868) (Eng.). *Hicklin* involved a pamphlet entitled *The Confessional Unmasked*, which was written by an Anglican to discredit the Catholic church for the purpose of electing more Protestants to Parliament. To illustrate the lack of morals of Catholic priests, the pamphlet contained obscene depictions of events which had allegedly occurred in the confessional.

29. *Id.* at 371. The main objection to the *Hicklin* test was that it fixed the standard for the community's reading matter to the feeblest mentality or most suggestible individual in the community. See *infra* note 30 (describing cases in which *Hicklin* was first criticized).

30. See *Conway v. The King*, [1944] 2 D.L.R. 530 (Que. K.B. 1943) (Can.); *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494 (Can.). In *Towne*, the court stated that *Hicklin* "had been criticized for its focus on the reactions of the weakest and least capable members of society, for its disregard of serious purpose or artistic merit in the impugned material and for its excessive dependence on subjective conjecture on the part of the trier of fact." *Id.* at 503.

inconsistent modifications and qualifications to the standard.<sup>31</sup>

A clarification of the Canadian standard for obscenity came from the legislature, not the courts. In 1952 a special committee of the Canadian Senate was created to resolve the obscenity issue. In 1957 the committee made recommendations to the House of Commons and the resulting addition to the Canadian Criminal Code (section 163) clarified the definition of obscenity. Section 163 states: "For the purposes of this Act, 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."<sup>32</sup> Section 163 superseded, rather than supplemented, the much-criticized *Hicklin* standard.<sup>33</sup> With the exception of a new section number, section 163 remains unchanged and is the standard for defining obscenity in Canada today.

To be deemed obscene under the statute, a publication must depict "undue exploitation of sex." Whether there has been undue exploitation of sex depends on the accepted standards of tolerance in the contemporary Canadian community.<sup>34</sup> The standard to be applied is a national one and determinations of obscenity are based on standards of tolerance, not

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31. See *Conway*, [1944] 2 D.L.R. 530; *R. v. Martin Secker Warburg, Ltd.*, [1954] 2 All E.R. 683 (Cent. Crim. Ct.) (Can.); *R. v. American News Co.*, [1957] O.R. 145 (C.A. Can.).

In *Conway*, *Hicklin* was altered by adding a *mens rea* requirement to the test. The *Conway* decision followed the American decision in *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

In *Warburg*, the court imposed two qualifications on the *Hicklin* standard: the element of contemporariness and the idea that the work must be considered as a whole. *Warburg* was influenced by the American decisions in *Commonwealth v. Buckley*, 86 N.E. 910 (Mass. 1909) and *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930).

In *American News*, the court rejected the application of *Warburg* and criticized *Hicklin* as being too vague and impossible to apply objectively.

32. Criminal Code, R.S.C., ch. C-34, § 159(8) (1970) (Can.).

33. See *Towne*, [1985] 1 S.C.R. at 502.

34. *Id.* at 508-09.

taste. A publication will only be deemed obscene if most Canadians would not tolerate other Canadians being exposed to it.<sup>35</sup>

Shortly after the enactment of the Canadian Charter of Rights and Freedoms, the accepted judicial interpretation of obscenity in Canada began to reflect a sensitivity to the role that violent and degrading pornography plays in promoting societal violence against women and in maintaining gender inequality. The gradual evolution of a judicial classification of obscenity based on harm commenced with the decision of the Ontario County Court in *R. v. Doug Rankine Co.*<sup>36</sup> The *Rankine* court was the first to conclude that materials which consist "substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities . . . [degrade or dehumanize] . . . the people upon whom they are performed"<sup>37</sup> are obscene under section 163. The *Rankine* court determined that violent or degrading pornographic materials exceed the community standard of tolerance because they exploit women, regardless of their degree of sexual explicitness. In finding the particular films at issue to be obscene, the court concluded:

Several of the films have scenes which couple violence and cruelty with sex. These scenes, such as scenes of bondage, frequently involve men perpetrating indignities on women in a sexual context. In [our] opinion many of the films are exploitive of women, portraying them as passive victims who derive limitless pleasure from inflicted pain and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming fea-

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35. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 478 (Can.) ("[T]he community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to.") *Id.*

36. 36 C.R. (3d) 154 (Ont. Co. Ct. 1983) (Can.). *Rankine* involved two defendants in the business of distributing video cassettes to video rental stores. The defendants were convicted for distributing obscene materials under section 163 with respect to 10 of 25 films. The court found that the 10 films would "even exceed the community standards of tolerance of Sodom and Gomorrah." *Id.* at 173.

37. *Id.*

tures are their genital and erotic zones, which are prominently displayed in clinical detail.<sup>38</sup>

However, since the defendant in *Rankine* did not raise a constitutional objection to section 163, the *Rankine* court did not examine the validity of section 163 under the freedom of expression provisions of the Charter.<sup>39</sup>

The judicial classification of obscenity based on harm principles was further refined in *R. v. Wagner*<sup>40</sup> where the Alberta Queen's Bench first articulated the distinction between explicit erotica<sup>41</sup> and violent or degrading pornography.<sup>42</sup> The *Wagner* court held that the primary focus in a determination of obscenity is the message that a particular publication sends, not its degree of sexual explicitness.<sup>43</sup> The *Wagner* court reasoned that "explicit erotica" portrays "positive and affectionate

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38. *Id.* at 170.

39. The defendant did not raise a constitutional objection to section 163 on the ground that the statute represents an invasion of the right to free expression guaranteed by section 2(b) of the Charter. *Id.* at 168.

40. 43 C.R. (3d) 318 (Alta. Q.B. 1985) (Can.). The defendant operated Your Choice Video, a "membership only" video rental store. On two separate occasions, Calgary police seized a total of 266 allegedly obscene films from the store. In the opinion of the court, Judge Shannon gives an in-depth description of seven of the films at issue. *Id.* at 325-30.

41. The court determined that "sexually explicit erotica portrays positive and affectionate human sexual interaction, between consenting individuals, participating on a basis of equality. There is no aggression, force, rape, torture, verbal abuse or portrayal of humans as animals." *Id.* at 331.

42. The *Wagner* court explained that, within the category of violent sexually-explicit materials, one would find the overt infliction of pain and the overt use of force, or the threat of either of them. Within the category of nonviolent sexually-explicit materials that are degrading or dehumanizing, the court determined that:

[M]en and women are often verbally abused and portrayed as having animal characteristics. Women, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts. Thus in such films professional women, such as nurses and secretaries, are hired solely for the purpose of sexual gratification, without regard for their professional qualifications and abilities.

*Id.*

43. The court stated that "[i]t is the message that counts, not the degree of explicitness." *Id.*

human sexual interaction, between consenting individuals participating on a basis of equality<sup>44</sup> and concluded that, regardless of the degree of sexual explicitness, explicit erotica is always tolerated by the Canadian community because it sends acceptable messages.<sup>45</sup> On the contrary, the court reasoned that the Canadian community would not tolerate either violent pornography, which contains threats, use of force, or infliction of pain, or nonviolent pornography where men and women are verbally abused and portrayed as having animal characteristics,<sup>46</sup> because these materials send harmful messages. The court based its final determination on expert testimony which established that repeated exposure to violent or degrading pornography results in social harm in the form of increased callousness toward women and lessened receptiveness to women's claims for equality and respect.<sup>47</sup>

The judicial classification of obscenity based solely on harm was subsequently embraced by the British Columbia Court of Appeal in *R. v. Red Hot Video Ltd.*<sup>48</sup> The *Red Hot* court determined that violent or degrading pornography causes or threatens to cause real and substantial harm to the community<sup>49</sup> because it creates a social climate which encourages

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 336. The court accepted the findings of Dr. Check, an Assistant Professor of Psychology at York University, who concluded:

[B]oth sexually violent and degrading and dehumanizing pornography convey the message that women enjoy abusive and anti-social behaviour. Men who are repeatedly exposed to such films become more sexually aggressive in their relations with women and more tolerant of such behaviour in others. That leads to increased callousness towards women on a personal level and less receptiveness to their legitimate claims for equality and respect.

*Id.*

48. 45 C.R. (3d) 36 (B.C.C.A. 1985) (Can.).

49. The British Columbia Court of Appeal found that violent and degrading sexually-explicit materials

constitute a threat to society because they have a tendency to create indifference to violence insofar as women are concerned. They tend to dehumanize and degrade both men and women in an excessive and revolting way. They exalt the concept that in some perverted way domi-

men to act in a discriminatory manner towards women.<sup>50</sup> Consequently, the court concluded that true equality between the sexes will never be achieved if male audiences are exposed to violent or degrading pornography.<sup>51</sup> Based on these determinations of harm, the British Columbia Court of Appeal held that regulation of violent or degrading pornography under section 163 of the Canadian Criminal Code is justified under section 1 of the Charter.

The Canadian Supreme Court examined section 163 for the first time in 1985 and suggested that sexually explicit publications that are harmful to members of Canadian society are proscribed by the statute, notwithstanding the fact that these materials may be tolerated by the Canadian community.<sup>52</sup> In *Towne Cinema Theatres Ltd. v. The Queen*,<sup>53</sup> the Canadian Supreme Court found that, because the Canadian community may tolerate materials that cause harm to society,<sup>54</sup> there are two ways to determine whether a particular publication is unduly exploitive of sex under section 163—by application of the community standards test or, alternatively, under the harm-based rationale.<sup>55</sup> However, because no objection was raised as to the constitutional validity of section 163, the

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nation of women by men is accepted in our society.

*Id.* at 59.

50. *Id.*

51. *Id.*

52. *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, 505 (Can.).

53. *Id.*

54. The Canadian Supreme Court recognized that a check on the contemporary community standards test was necessary to set the standard for obscenity. The court stated:

Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of "undue" must also encompass publications harmful to members of society and, therefore, to society as a whole.

*Id.* at 505.

55. *Id.* at 504-05.

*Towne* court did not decide whether the statute was a reasonable and demonstrably justified limitation on the right of free expression guaranteed under section 2(b) of the Charter.

The British Columbia Court of Appeal revisited the obscenity issue in 1988 and departed from the trend of cases which focused on harm as the sole basis for determinations of obscenity under section 163. In *R. v. Pereira-Vasquez*,<sup>56</sup> the court concluded that both the harm and morality approaches are applicable to a section 163 analysis because the plain language of the statute contradicts the view that violence and degradation should constitute an exclusive definition of obscenity.<sup>57</sup> The court noted that:

Section [163] may be divided into two parts. The first provides that a publication is obscene if its dominant characteristic is the undue exploitation of sex. The second part provides that a publication is obscene if its dominant characteristic is the undue exploitation of sex combined with any one of several subjects: crime, horror, cruelty, or violence. While it is correct to say that the Canadian community will not tolerate publications falling within the second part of the definition, that statement does not mean that the absence of crime, horror, cruelty, or violence will preclude a finding of obscenity. If that were so, the first part of the definition would be redundant.<sup>58</sup>

Having concluded that neither violence nor degradation are necessary prerequisites to a determination of obscenity, the *Pereira-Vasquez* court held that "skin flicks"<sup>59</sup> could be

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56. 64 C.R. (3d) 253 (B.C.C.A. 1988) (Can.).

57. *Id.* at 268.

58. *Id.* at 268.

59. *Id.* at 264. The court endorsed the definition of "skin flicks" which was first articulated in *R. v. Odeon Morton Theatres Ltd.*, [1974] 3 W.W.R. 304 (Man. C.A.). In *Odeon*, the court stated: "The basic characteristic of "skin flicks" is that they are either wholly destitute of plot or, if they do have anything resembling a story-line, it is one that is transparently thin, a palpably meagre framework on which to hang one erotic episode after another." *Id.* at 312. It is important to note that "skin flicks" are the equivalent of "explicit erotica," as defined by Canadian courts. See *supra* text accompanying notes 41-43.

deemed obscene under section 163 based solely on their degree of explicitness.<sup>60</sup>

Inconsistent application and interpretation of section 163 by lower Canadian courts necessitated an authoritative clarification of the Canadian definition of obscenity. This clarification was made in the 1992 Canadian Supreme Court decision in *Butler v. Her Majesty the Queen*.<sup>61</sup>

## B. *The Butler Decision*

### 1. Facts

Donald Victor Butler was the owner of Avenue Video Boutique in Winnipeg, Manitoba, a shop that sold and rented "hard core" videotapes, magazines and sexual paraphernalia.<sup>62</sup> On August 21, 1987, pursuant to a search warrant, the City of Winnipeg police raided Butler's shop and seized Butler's entire inventory.<sup>63</sup> Under section 163 of the Canadian Criminal Code,<sup>64</sup> Butler was charged with 3 counts of selling obscene materials, 41 counts of possessing obscene materials for the purpose of distribution, 128 counts of possessing obscene materials for the purpose of sale, and 1 count of exposing obscene material to public view.<sup>65</sup>

On October 19, 1987, Butler re-opened his shop at the same location and, ten days later, City of Winnipeg police

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60. *Pereira-Vasquez*, 64 C.R. (3d) at 269.

61. [1992] 1 S.C.R. 452 (Can.).

62. *Id.* at 461. See also *R. v. Butler*, 60 Man. R.2d 82, 84-85 (Man. Q.B. 1989) (Can.). The court noted that the "sexual paraphernalia" seized included:

[P]lastic replicas of penises and vaginas of different shapes and sizes, vibrators and other sexual stimulators obviously intended for use for masturbation purposes or for use in the course of sexual activity involving two or more persons. Certain of the items appear to be intended for insertion in the vagina; others for insertion in the anus. Unattractive dolls with penes that can be activated to expand and provide a simulated ejaculation are also included.

*Id.* at 85-86.

63. *Butler*, 60 Man. R.2d at 84-85.

64. Criminal Code, R.S.C., ch. C-34, § 159(8) (1970) (Can.).

65. *Butler*, 60 Man. R.2d at 85.



raided the shop for a second time. After producing a search warrant, the police arrested one of the employees of the shop, Norma McCord, and again seized Butler's entire inventory.<sup>66</sup> As a result of the raid, Norma McCord and Avenue Video Boutique were jointly indicted.<sup>67</sup> The section 163 charges included two counts of selling obscene material, seventy-three counts of possessing obscene material for the purpose of distribution, one count of possessing obscene material for the purpose of sale, and one count of exposing obscene material to the public view.<sup>68</sup>

## 2. Procedural History

The Manitoba Court of Queen's Bench convicted Butler under section 163 for possession of obscene materials for the purpose of sale and distribution with respect to only eight films and convicted McCord under section 163 with respect to only two films.<sup>69</sup> In making his determination, the trial judge reluctantly applied the community standards of tolerance test<sup>70</sup> and concluded that all eighty of the films seized from Avenue Video Boutique were obscene under case law interpretations of section 163 because all of the films fell into the category of "hard porn."<sup>71</sup> Nonetheless, the trial judge held that, because the films at issue contained expression that conveys meaning, the films were protected by the guarantee of free expression in section 2(b) of the Canadian Charter of Rights and Freedoms.<sup>72</sup> Thus, the trial judge found it necessary to ascertain whether section 163 was a reasonable and

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66. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 461 (Can.).

67. *Id.* at 461-62.

68. *Id.* at 462.

69. *Butler*, 60 Man. R.2d 82. McCord was convicted under Section 163 for possession of obscene materials for the purpose of distribution, not sale. *Id.* at 103-04.

70. *Id.* at 87-96. Judge Wright expressed serious difficulties in applying the community standards test, stating that to render a factual decision on the basis of experience is contrary to the judicial role, and that he regards his own views drawn from his experience to be unreliable. *Id.*

71. *Id.* at 95-96.

72. *Id.* at 96-99.

demonstrably justified limitation on the right to free expression under section 1 of the Charter.<sup>73</sup>

Noting the applicability of the *Oakes* test,<sup>74</sup> the trial judge analyzed section 163 under section 1 of the Charter and concluded that the legislature may not limit a section 2 fundamental freedom for the purpose of controlling societal morality, but that certain forms of expression may be proscribed where the objective is to further equality, other Charter rights, or human rights.<sup>75</sup> The trial judge reasoned that, on a prima facie basis, the legislature had a legitimate objective for proscribing only those films containing sexual scenes with violence or cruelty, scenes that depict a lack of consent to sexual contact, or sexual scenes that dehumanize men or women.<sup>76</sup> The trial judge determined that only eight films, identified in sixteen counts of the indictment against Butler and in four counts of the indictment against McCord, contained scenes of violence, cruelty, or nonconsensual sexual relations that could legitimately be legislatively proscribed.<sup>77</sup> Thus, Butler and McCord were acquitted on the remaining counts.<sup>78</sup> The Crown appealed the 242 acquittals relating to Butler and Butler cross-appealed his convictions.<sup>79</sup> McCord appealed her convictions, but the Crown did not cross-appeal McCord's acquittals.<sup>80</sup>

The Manitoba Court of Appeal dismissed both Butler and McCord's appeal of their convictions and entered convictions against Butler on the remaining 242 counts of the indictment.<sup>81</sup> The court of appeal accepted the trial court's finding that all of the films at issue were obscene.<sup>82</sup> However, the

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73. *Id.* at 99.

74. *Id.* at 99-100. See *supra* notes 22-27 and accompanying text (describing the *Oakes* test).

75. *Butler*, 60 Man. R.2d at 101.

76. *Id.* at 103.

77. *Id.* at 103-04.

78. *Id.* at 103, 105.

79. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 462 (Can.).

80. *R. v. Butler*, [1991] 1 W.W.R. 97, 103 (Man. C.A. 1990) (Can.).

81. *Id.*

82. *Id.* at 317-19. The court of appeal noted that no objection had been made by either defendant as to the finding that all of the materials were obscene. *Id.* at

court concluded that the approach used by the trial judge in his analysis of the validity of section 163 under the Charter was incorrect because the trial judge focused his section 1 analysis on the individual films, rather than on the validity of the statute.<sup>83</sup>

The court of appeal proceeded directly to an analysis of the validity of section 163 under the Charter. The court initially noted that the Canadian Supreme Court has held that not all forms of expression were intended to be protected under section 2(b) of the Charter. Thus, the court found it necessary to inquire whether the films at issue could be characterized as falling within the protection of section 2(b) of the Charter before testing the validity of the statute under section 1.<sup>84</sup> The court concluded that the films were not of the type that section 2(b) of the Charter was intended to protect because they were "purely physical," did not attempt to convey any meaning whatsoever, and degraded human sexuality.<sup>85</sup> Having concluded that section 2(b) was not intended to protect materials such as those at issue, the court of appeal found it unnecessary to proceed to a section 1 analysis of the validity of section 163 of the obscenity statute.<sup>86</sup>

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83. *Id.* at 316-17.

84. *Id.* at 319-22.

85. *Id.* at 324. The court stated:

In my opinion, the activities for which charges have been laid against the accused do not fall within any of [the categories for which claims to protection for expression can be made]. There is nothing of the quest for truth in the materials before the court. They add nothing to the democratic process. They are the antithesis of individual self-fulfillment and human flourishing. Instead, men and women are debased and degraded by being portrayed as constantly on an animalistic pursuit.

*Id.*

86. *Id.*

### 3. The Canadian Supreme Court Decision

In *Butler v. Her Majesty the Queen*,<sup>87</sup> the Supreme Court of Canada seized the opportunity to address the three main questions that have arisen in the obscenity debate since the Canadian Charter of Rights and Freedoms was enacted: first, whether section 163 infringes on the right to free expression under section 2(b) of the Charter; second, which approach should be used to determine whether a particular publication is obscene under the statute; and, finally, whether section 163 is a reasonable and demonstrably justified limitation on freedom of expression under section 1 of the Charter.<sup>88</sup>

#### a. *The Majority Opinion*

Unlike the Manitoba Court of Appeal, the Canadian Supreme Court determined that violent or degrading pornography is protected under section 2(b) of the Charter and, therefore, that section 163 of the Canadian Criminal Code restricts the right to free expression.<sup>89</sup> Writing for the majority, Judge Sopinka reasoned that violent or degrading pornography can convey, or attempt to convey, meaning and thus is not without expressive content.<sup>90</sup> The court recognized that “[sexual] activity is part of the human experience . . . . The depiction of such

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87. [1992] 1 S.C.R. 452 (Can.).

88. The Canadian Supreme Court noted that the appeal was confined to the examination of section 163(8) of the Criminal Code, not the entirety of section 163 of the Criminal Code. *Id.* at 471.

89. *Id.* at 486-90.

90. The Supreme Court of Canada took notice of the words of Judge Twaddle, the dissenter at the Manitoba Court of Appeal level, who stated:

The subject matter of the material under review . . . is sexual activity. Such activity is part of the human experience . . . . The depiction of such activity has the potential of titillating some and of informing others. How can images which have such effect be meaningless?

In my view, the content of a video movie, the content of a magazine and the imagery of a sexual gadget are all within the freedom of expression.

*Id.* at 487.

activity has the potential of titillating some and of informing others" and, thus, is not meaningless.<sup>91</sup> The court reasoned that the free expression provision in the Charter protects all materials attempting to convey meaning, regardless of their content,<sup>92</sup> whereas both the purpose and effect of section 163 is to restrict materials that may convey meaning based solely on their content. Consequently, the court held that section 163 infringes on the right to free expression and that the statute must satisfy the requirements of section 1 of the Charter.<sup>93</sup>

Before reaching the issue of whether the obscenity statute is a reasonable and demonstrably justified limit on the right to free expression, the court concluded that harm should be the central focus of analysis under section 163.<sup>94</sup> The court noted that "harm" in the context of obscenity means that exposure "predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."<sup>95</sup> The court reasoned that, in statutory determinations of obscenity, the community standards and the harm-based approach are necessarily linked, requiring lower courts to determine what the Canadian community would tolerate based on the degree of harm that may flow from exposure to these materials.<sup>96</sup> As a general rule, the court stated that the stronger the inference of

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91. *Id.*

92. *Id.* at 487-89. The court noted that the guarantee of free expression includes protection even for those materials that convey offensive meanings, or those materials that are not "redeeming" in the eyes of the court. *Id.* at 488-89.

93. *Id.* at 489-90. See *supra* notes 20-27 and accompanying text (describing the test to be applied in analysis under section 1 of the Charter).

94. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 485 (Can.).

95. *Id.*

96. *Id.* The court held that only after a determination has been made that the suppression of a particular material is justified does the need for the application of the "internal necessities" test (more commonly known as the artistic defense) arise. The internal necessities test will save a particular material from suppression under section 163 if the court determines that the portrayal of violent or degrading sexual activity is essential to a wider literary or artistic purpose. Only if the material depicts sexual activity for the sole purpose of unduly exploiting sex will the publication be deemed obscene under section 163. *Id.* at 486.

a risk of harm, the less the likelihood of tolerance.<sup>97</sup> Applying this rule, the court concluded:

[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>98</sup>

Finally, the *Butler* court held that section 163 is a reasonable and demonstrably justified limitation on freedom of expression under section 1 of the Charter. In reaching its conclusion, the court applied the two-part *Oakes* test.<sup>99</sup> First, the court examined whether the objective sought by the statute is sufficiently pressing and substantial to warrant a limitation on freedom of expression. Second, the court examined whether the limitation on the right to free expression is "proportional" to the objectives of the statute.

The court concluded that the objective of section 163 is sufficiently pressing and substantial to warrant a limitation on the right to free expression. The court held that suppression of sexual expression is no longer warranted for the purpose of imposing a standard of public and sexual morality based on the conventions of Canadian communities. However, the court concluded that the overriding objective of section 163 is not moral disapprobation, but the avoidance of harm to society.<sup>100</sup> The court noted the types of "harm" that the statute intended to diminish: the victimization of women and children, the reinforcement of sexual stereotypes which may threaten equality by negatively affecting attitudes toward women, and the portrayal of women as objects of sexual exploitation which may

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97. *Id.* at 485.

98. *Id.*

99. See *supra* notes 22-27 and accompanying text (describing the *Oakes* test).

100. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 493 (Can.).

have a negative impact on their self-worth and acceptance.<sup>101</sup> The court concluded that "the harm caused by the proliferation of materials which seriously offend the values fundamental to [Canadian] society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression."<sup>102</sup>

Before addressing the issue of the "proportionality" of section 163, the court noted two important bases underlying its analysis. First, the court noted that a proper application of the proportionality test should not suppress "good pornography," otherwise referred to as "explicit erotica."<sup>103</sup> The court defined "good pornography" as pornography that:

[H]as value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography (when it is good) celebrates both female pleasure and male rationality.<sup>104</sup>

Second, the court noted that pornography which is not "good" does not stand on equal footing with other forms of expression for purposes of section 1 analysis because it does not directly engage the "core" of the freedom of expression values<sup>105</sup> and because it is motivated by economic profit.<sup>106</sup>

In the first part of its analysis of the "proportionality" of section 163, the court concluded that a rational relationship exists between suppression of violent or degrading pornogra-

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101. *Id.* at 478-79.

102. *Id.* at 496. The court noted that it has previously accepted the argument that prevention of the influence of hate propaganda on society was a legitimate and substantially pressing objective based on the harm that hate speech causes to those it is directed at. *See R. v. Keegstra*, [1990] 3 S.C.R. 697, 747-58 (Can.).

103. *Butler*, [1992] 1 S.C.R. at 500.

104. *Id.*

105. *Id.* The court noted that "[t]he values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfillment." *Id.* at 499.

106. *Id.* at 501. The court stated that "an economic motive for expression means that restrictions on the expression might be easier to justify than other infringements." *Id.*

phy and the prevention of harm to society. The court noted that, in the context of obscenity, the rational link is the actual causal relationship between obscenity and the risk of harm to society.<sup>107</sup> The court then recognized that an actual link between exposure to violent and degrading pornography and either the commission of violent crimes or the disintegration of society would be impossible to establish and that empirical studies on the subject are conflicting.<sup>108</sup> Nonetheless, the court stated that "it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs."<sup>109</sup> Thus, the court found that the first prong of the proportionality test had been satisfied.<sup>110</sup>

In the second part of the analysis of the "proportionality" of section 163, the court concluded that the obscenity statute

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107. *Id.* at 501.

108. *Id.* at 502.

109. *Id.* at 502-03. The court reasoned that the absence of proof of a causal link was not determinative in recent decisions involving hate propaganda and television advertising directed at children. See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.); *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 (Can.).

In *Keegstra*, the Court assessed the validity of the hate literature provisions of the Criminal Code (section 319(2)) and stated:

First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group.

*Keegstra*, [1990] 3 S.C.R. at 776.

In *Irwin Toy*, the court determined that television advertising directed at children is per se manipulative. In finding that there was a rationale link between the statute at issue and the government's objective, the court recognized that the government is afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence. *Irwin Toy*, [1990] 1 S.C.R. at 990.

110. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 504 (Can.). The court stated:

[We] are of the view that there is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and which restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective.

*Id.*



only minimally impairs the right to free expression guaranteed under section 2(b) of the Charter. There were five factors which led to the court's decision. First, the statute only restricts pornography that creates a risk of harm to society, rather than all forms of pornography.<sup>111</sup> Second, the statute does not allow suppression of materials with scientific, artistic, or literary merit.<sup>112</sup> Third, past parliamentary attempts to define obscenity in a more precise manner were unsuccessful.<sup>113</sup> Fourth, the statute does not apply to private use or viewing of materials deemed obscene.<sup>114</sup> Finally, less restrictive measures to combat the harms associated with violent or degrading pornography could not be as effective as section 163 because the statute prevents the harm from ever occurring by deterring the distribution of obscene materials.<sup>115</sup> Taking all of these factors into account, the court found that the second prong of the proportionality test had been met.

In the final part of its analysis of the "proportionality" of section 163, the court concluded that the legislative objective

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111. *Id.* at 505. The court determined that the statute does not proscribe "explicit erotica."

112. *Id.* at 505-06. Canadian courts have read the "internal necessities" test, more commonly referred to as the "artistic defense," into the obscenity statute. See *supra* note 96 (discussing the operation of the test).

113. *Butler*, [1992] 1 S.C.R. at 506. The court reasoned that, because the attempt to provide a more exhaustive definition of obscenity has failed, the only practicable alternative is to adopt a more abstract definition of obscenity that is sensitive to the legislature's objective.

114. *Id.*

115. *Id.* at 507-09. In reaching its conclusion, the Court reasoned that:

Once it has been established that the objective is the avoidance of harm caused by the degradation which many women feel as "victims" of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women, it is untenable to argue that these harms could be avoided by placing restrictions on access to such materials.

*Id.* at 507. The court also found that addressing the harms of violent or degrading pornography by other means, such as by counselling rape victims to charge assailants, providing shelter for battered women, and campaigning for antidiscrimination laws and education, are merely responses to the harm caused by violent or degrading pornography, as opposed to "control[ling] the dissemination of the very images that contribute to such attitudes." *Id.* at 508.

for enacting the statute was not outweighed by the infringement on the right to free expression. In assessing the degree of infringement on the right to free expression, the court reiterated that the statute is limited to violent or degrading pornography, which it had already concluded is less worthy of protection than other forms of speech.<sup>116</sup> The court then noted that the objective of preventing direct or indirect harm to society is of "fundamental importance."<sup>117</sup> Consequently, the court struck the balance in favor of the legislative objective and concluded that the obscenity statute satisfies the requirements of section 1 of the Charter.<sup>118</sup>

*b. The Concurring Opinion*

The concurring opinion, written by Judge Gonthier,<sup>119</sup> differed from that of the majority in one main respect: Gonthier concluded that the harm-based rationale of section 163 is applicable to explicit erotica, as well as to violent or degrading pornography.<sup>120</sup> Gonthier found that even explicit erotica is harmful because it "convey[s] a distorted image of human sexuality, by making public and open elements of the human nature which are usually hidden behind a veil of modesty and privacy."<sup>121</sup> Gonthier conceded that most explicit

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116. *Id.* at 509. The court concluded that violent or degrading pornography was less deserving of protection than other forms of speech because these materials are not at the core of the guaranteed freedom of expression and are economically motivated. See *supra* notes 103-06 and accompanying text.

117. *Butler*, [1992] 1 S.C.R. at 509. The court noted that:

The objective of the legislation . . . is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.

*Id.*

118. *Id.* at 509-10.

119. Judges Gonthier and L'Heureux-Dubé were the only concurring.

120. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 516 (Can.).

121. *Id.* at 513.

erotica was harmless.<sup>122</sup> However, he reasoned that the context in which explicit erotica is presented may turn otherwise harmless material into material that could be legitimately proscribed under section 163. For example, where explicit erotica is publicly displayed on a billboard or in a children's book, it may cause societal harm.<sup>123</sup>

#### IV. ANALYSIS

##### A. *The Rational Connection Between Exposure to Violent or Degrading Pornography and Instances of Sexual Violence in Society*

Causation is an essential element of any harm-based rationale calling for suppression of expression. Without the existence of a relationship between exposure to the expression and the harm, the justification for suppressing expression under harm-based principles is nonexistent. When the state seeks to use harm-based principles in the context of obscene materials, the state has the burden of demonstrating the existence of a causal relationship between exposure to violent or degrading pornography and instances of sexual violence in society. Because actual harm is the *raison d'être* of the harm-based approach to obscenity, the burden cannot be met if the causal link between the expression and the harm is presumed, if there is only a remote possibility that the harm will result, or if the harm is too indirect. If the state cannot meet its burden, suppression of protected expression cannot be justified under harm-based principles.

The *Butler* court has allowed the Canadian legislature to suppress otherwise protected expression even though the burden of proof logically required by the harm-based approach has not been met. The court conceded that the causal relationship between exposure to violent or degrading pornography and instances of sexual violence is difficult, if not impossible, to

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122. *Id.* at 516.

123. *Id.* at 518.

establish.<sup>124</sup> Nonetheless, the court found the existence of a sufficiently rational basis for suppressing protected expression based on principles of harm. To date, however, there is no social science data that presents a sufficient basis for suppressing any form of pornography based on its effect on societal behavior. In fact, the causal connection between exposure to violent or degrading pornography and instances of violent behavior has not been established and remains a matter of considerable debate.<sup>125</sup>

Proponents of pornographic censorship who claim that there is a causal link between exposure to violent or degrading pornography and increased sexual violence against women rely on various empirical studies conducted in laboratory situations. These studies were designed to measure the response of males when exposed to large amounts of violent or degrading pornography.<sup>126</sup> While some studies have suggested that exposure to these materials produces short-term increases in aggressive behavior towards women in the laboratory,<sup>127</sup> the reliability and relevance of these studies is highly questionable. As discussed in further detail later in this section, not only do these studies have many internal limitations that call into question any findings of a causal link, but they are also entirely contradicted by further studies which have concluded that there is no evidence to support the conclusion that exposure to violent or degrading pornography leads to instances of violent behavior in society.<sup>128</sup>

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124. *Id.* at 502.

125. See *infra* notes 126-51 and accompanying text (describing various studies designed to demonstrate a causal link between exposure to pornography and instances of violence).

126. See Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 HARV. C.R.-C.L. L. REV. 27, 65-73 (1986).

127. See, e.g., Edward Donnerstein, *Aggressive Erotica and Violence Against Women*, 39 J. PERSONALITY & SOC. PSYCHOL. 269, 269-77 (1980) [hereinafter Donnerstein Study]. See also *infra* text accompanying note 131.

128. Professor Jonathan Freedman, Chairman of the Psychology Department at the University of Toronto, stated the following:

The *Butler* court found it sufficient to rely on a report prepared in the United States (Meese Report)<sup>129</sup> as its strongest evidence of a necessary causal link. The Meese Report was based, in substantial part, on a study done by a psychologist, Edward Donnerstein (Donnerstein Study).<sup>130</sup> The Donnerstein Study is often cited by proponents of the harm-based approach as providing evidence that a causal link exists between exposure to violent or degrading pornography and instances of violent behavior toward women in society.<sup>131</sup>

The Donnerstein Study involved a laboratory experiment in which volunteer undergraduates were separated into four groups of twenty students, and each group was exposed to sexually explicit materials containing violence in varying degrees.<sup>132</sup> Each group was shown one of the following types of

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[T]hose who are in favour of censoring pornographic material appear to justify such an act at least in part on the basis that pornography is harmful. In particular, they claim that scientific evidence has proven that pornography increases the likelihood of people committing sexual offenses . . . . If one were to accept the laboratory research entirely, it still would not provide convincing evidence that pornography is harmful even inside the laboratory, much less outside it.

Appendix to brief presented by the Canadian Civil Liberties Association to the Special Committee on Pornography and Prostitution (Fraser Committee), "Re Pornography and the Law," Ottawa, April 6, 1984, reprinted in Louise Arbour, *The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression*, in LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 294, 298 (Joseph M. Weiler & Robin M. Elliot eds., 1986) [hereinafter Arbour].

The British Committee on Obscenity and Film Censorship, headed by the highly regarded British philosopher Bernard Williams, concluded: "[W]e unhesitatingly reject the suggestion that the available statistical information for England and Wales lends any support at all to the argument that pornography acts as a stimulus to the commission of sexual violence." REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, 1979, Cmnd 7772, at 80.

129. 1 U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT, (1986).

130. Donnerstein Study, *supra* note 127, at 269-77. Donnerstein is a psychologist at the Center for Communication Research at the University of Wisconsin and is largely responsible for much of the research on the effects of violent pornography on society.

131. Thomas A. McWatters III, Comment, *An Attempt to Regulate Pornography Through Civil Rights Legislation: Is It Constitutional?*, 16 TOLEDO L. REV. 231, 306 (1984).

132. Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive-*

films: a neutral talk show; a sexually explicit representation of consensual intercourse; a presentation where women were positively responding to various acts of sexual violence, including rape, being performed upon them [positive-outcome aggressive erotica]; and a representation in which women were negatively responding to acts of sexual violence being performed upon them [negative-outcome aggressive erotica].<sup>133</sup> After exposure to these materials, the male subjects of the experiment were then asked to play a game with female subjects (who were laboratory assistants). The men were told to deliver electric shocks of varying intensity to the women whenever they "made a mistake" in the game.<sup>134</sup> The intensity of the shocks was measured in each of the respective groups. The results showed that the mean intensity of shocks was higher in the group that was exposed to the positive-outcome aggressive erotica than in any of the other groups.<sup>135</sup>

Even if the Donnerstein Study and those similar to it are given a most generous interpretation, these studies still do not demonstrate that exposure to violent or degrading pornography causes violent behavior against women in society. These studies merely measure the correlation between exposure to certain types of pornography and changing attitudes in the laboratory.<sup>136</sup> Studies such as these cannot show direct, deterministic causation because they are limited to self-reported levels of aggression in the laboratory and do not examine behavioral changes.<sup>137</sup> Donnerstein himself has concluded that these studies cannot establish a causal link between exposure to

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*Erotic Films As a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOL. 710, 713 (1981) [hereinafter Donnerstein & Berkowitz].

133. *Id.* See also Lynn, *supra* note 126, at 65. The terms "positive-outcome aggressive erotica" and "negative-outcome aggressive erotica" were used by the psychologists to describe the results of the study.

134. See Lynn, *supra* note 126, at 65.

135. See, e.g., Dolf Zillmann & Jennings Bryant, *Effects of Massive Exposure to Pornography in* PORNOGRAPHY AND SEXUAL AGGRESSION 115, 135-36 (Neil M. Malamuth & Edward Donnerstein eds., 1984) [hereinafter Zillmann & Bryant].

136. See Lynn, *supra* note 126, at 66.

137. DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 169 (1989).

violent or degrading pornography and behavior in society.<sup>138</sup> Donnerstein has stated that "[w]e can show a causal link between exposure to porn and effects on attitudes; but no one can show a causal link between exposure to porn and effects on behavior."<sup>139</sup>

Even if these studies could establish a causal link between exposure to pornography and subsequent effects on behavior, the Donnerstein Study, and those similar to it, have severe internal limitations that call into question any finding of causation.<sup>140</sup> These studies do not take into account the initial sexual attitudes of the subjects of the experiment or their initial predispositions to violence.<sup>141</sup> Some studies have shown that antisocial effects of exposure to violent pornography are likely to occur only with respect to those persons predisposed to negative sexual attitudes.<sup>142</sup> In addition, the duration of any aggressive effects resulting from exposure to violent or degrading pornography has not been conclusively determined. In one study, where aggression was not measured until one week after exposure to these materials, there was no significant difference in the level of aggression displayed by group members who were exposed than by those in the unexposed control group.<sup>143</sup> These limitations severely undermine any finding of a causal link between exposure to violent pornography and instances of violent behavior in society.

More importantly, however, assuming *arguendo* that these studies demonstrate increased levels of aggression in the laboratory resulting from exposure to violent pornography, behavioral scientists have determined that it is unreasonable to infer that aggressiveness in the laboratory will lead to aggressive behavior in society.<sup>144</sup> The laboratory setting and society dif-

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138. Aric Press et al., *The War Against Pornography*, NEWSWEEK, Mar. 18, 1985, at 62.

139. *Id.*

140. Lynn, *supra* note 126, at 66; DOWNS, *supra* note 137, at 169-70.

141. See Lynn, *supra* note 126, at 66.

142. Lynn, *supra* note 126, at 66 n.138.

143. See Zillmann & Bryant, *supra* note 135, at 135-36.

144. Daniel Linz & Edward Donnerstein, *Research Can Help Us Explain Vio-*

fer in that there is nothing to counteract the negative stimuli created by the experiment in the laboratory, whereas norms and fear of punishment restrict antisocial behavior in society. In addition, experimenters have determined that the subjects of these laboratory experiments may not believe that they are inflicting real harm because violent aggression is condoned or even suggested by those conducting the experiments.<sup>145</sup> Thus, even the most convincing studies demonstrate that it is unlikely that violent or degrading pornography plays a directly causal role in the conditioning of behavior in society.

In sharp contrast to the conclusions of the Canadian legislature, which were found to be "rational" by the *Butler* court, many studies have shown that there is no causal relationship between exposure to violent or degrading pornography and violent behavior in society.<sup>146</sup> Studies involving rapists and other sex offenders have indicated that violent pornography is not a significant factor in the behavior of the subjects. The majority of rapists did not commit their first offense after exposure to violent pornography.<sup>147</sup> A study cited by the Commission on Obscenity and Pornography, performed by researchers at UCLA, concluded that rapists had repressive sexual backgrounds and much less exposure to violent pornographic materials than did nonrapists.<sup>148</sup> Another study that compared "sex offenders with members of similar age and neighborhood groups revealed no substantial difference between the two groups in terms of exposure to violent pornography."<sup>149</sup> One

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*lence and Pornography*, CHRON. HIGHER EDUC., Sept. 30, 1992, at B3 [hereinafter Linz & Donnerstein].

145. DOWNS, *supra* note 137, at 169.

146. See James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J.L. & PUB. POL'Y 429, 455-57 (1986).

147. See Fred R. Berger, *Pornography, Feminism and Censorship*, in FREEDOM, RIGHTS AND PORNOGRAPHY: A COLLECTION OF PAPERS BY FRED R. BERGER 156, 174 (Bruce Russell ed., 1991) [hereinafter Berger].

148. *Id.*

149. Branit, *supra* note 146, at 457.

In the United States, however, claims by sex offenders that their actions were "caused" by exposure to violent pornography prompted the introduction of the Pornography Victims Compensation Act of 1991, S. 983, 102d Cong., 1st Sess.



study involving rapists even indicated that rapists have a higher degree of arousal to outside stimuli than do nonrapists and that rapists interpret various types of nonsexual materials to suit their sexual needs.<sup>150</sup> It has even been suggested that pre-existing, deeply rooted anger towards women is the most important factor causing sexual violence against women in society.<sup>151</sup>

Since it is unclear that any relationship exists between exposure to violent or degrading pornography and instances of sexual violence in society, the *Butler* court's basis for concluding that the legislature had a rational basis for enacting sec-

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(1991) [hereinafter Senate Bill]. Senator McConnell (KY) introduced Senate Bill 1521 on July 22, 1991, which limited the scope of Senate Bill 983 to obscenity and child pornography. The title of the Act was amended to the Pornography Victims' Compensation Act of 1992 and the Bill was amended to reflect these changes. S. REP. NO. 102, 102d Cong., 2d Sess. 6 (1992) [hereinafter Senate Report].

The purpose of the Senate Bill is to "hold producers, distributors, exhibitors, renters and sellers of obscene material or child pornography liable for damages resulting from sex offenses in which the offender's exposure to obscene material or child pornography was a substantial cause of the commission of the sex offense." Senate Report, *supra*, § 2(b). The proposed Bill seeks to provide a civil cause of action for monetary damages to any person who is a victim of a sexual offense and can establish by a preponderance of the evidence that the perpetrator's exposure to obscene material of child pornography was the substantial cause of the commission of the sexual offense. Senate Report, *supra*, § 4(c).

The Senate Bill has been more commonly referred to as the "Bundy Bill", named after serial killer, Theodore Bundy. Bundy was sentenced to death in Florida for the 1978 murder of a 12-year-old girl. Bundy had already been serving an earlier death sentence for two 1978 murders of students at Florida State University. Hours before his execution, Bundy granted an interview with Methodist minister, James Dobson, during which Bundy asserted that violent pornography drove him to murder and sexually mutilate young women. See Laura Parker, *Bundy's Last-Minute Appeals Rejected; Visitor Says Serial Killer Remorseful as Execution Hour Nears*, WASH. POST, Jan. 24, 1989, at A3.

The Senate Bill was reported favorably out of committee, but has yet to be presented to the full Senate for discussion and a vote. Senate Report, *supra*, 1, 6.

150. MICHAEL J. GOLDSTEIN & HAROLD S. KANT, *PORNOGRAPHY AND SEXUAL DEVIANCE* 98-109 (1973).

151. DOWNS, *supra* note 137, at 169. See Susan H. Gray, *Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male*, 29 SOC. PROBLEMS 361, 394 (1982). See also Martin Roth, *Pornography and Society: A Psychiatric View*, in *THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOR* 1-23 (Maurice Yaffé & Edward C. Nelson eds., 1982).

tion 163 is unfounded. Viewed in the most favorable light, one may conclude that, although violent or degrading pornography may play a limited role in isolated instances of sexual violence by a predisposed perpetrator, these materials do not seem to substantially affect the actual behavior of sex offenders. This conclusion is especially convincing in light of other materials which are readily available and more likely to cause instances of sexual violence by predisposed perpetrators. For example, some studies have shown that a greater link exists between exposure to various types of nonsexual, violent materials and sexual violence in society than between exposure to sexual, violent materials and sexual violence in society.<sup>152</sup> Donnerstein himself has suggested that exposure to detective magazines or "slasher" films plays a greater role in affecting the behavior of those who commit sexually violent crimes than exposure to violent pornography.<sup>153</sup> However, the Canadian Supreme Court would presumably not permit suppression of nonsexual forms of expression based on harm principles, even when suppressing those materials is shown to be closer in relation to the legislature's objective.

There is no rational basis for restricting expression under a harm-based approach where it cannot be demonstrated that the expression directly causes the alleged harm. Under the harm-based approach, prevention of harm is the sole reason for the regulation. By allowing a presumption of harm to satisfy the requirements of section 1 of the Charter, the *Butler* court has removed the legislature's burden and effectively bypassed the harm-based approach it claims to have adopted. Because the court recognized that a causal link between exposure to violent pornography and instances of sexual violence cannot be established,<sup>154</sup> the court incorrectly concluded that a rational

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152. See, e.g., Linz & Donnerstein, *supra* note 144, at B3-B4.

153. Linz & Donnerstein, *supra* note 144, at B3-B4.

154. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 502 (Can.).

relationship exists between section 163 and the legislative objective.

*B. Regulating Violent or Degrading Pornography Because of Its Effect on Societal Attitudes*

The Supreme Court of Canada has also permitted suppression of violent or degrading pornography because of the "central role that these materials play in maintaining women's subordinate status in society."<sup>155</sup> Canadian courts have accepted arguments that harm to women's societal status is caused by the alteration of attitudes of those exposed to violent or degrading pornography in three ways: (1) repetitious demonstration that women enjoy being used sexually for the purpose of male domination leads to an increased acceptance of violence against women and a tendency to blame women for acts of sexual violence against them,<sup>156</sup> (2) repetitious depictions

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155. The same argument was made by the drafters of the Ordinance at issue in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). The authors of that ordinance have stated that:

[P]ornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; create public harassment and private denigration; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

*Id.* at 329.

156. One study has shown that exposure to violent or degrading pornography leads to acceptance of "rape myths." A rape myth is that women actually enjoy being raped, even when they protest and resist. This theory came from an experiment conducted by Neil Malamuth, a psychologist at the University of Manitoba in Canada. Malamuth exposed several hundred students to a number of pornographic films containing varying degrees of violence, including two films containing scenes which depicted rapes of women. Both before and after exposure to these films, surveys were given to the subjects which contained specific questions about their attitudes regarding violence toward women. Malamuth found that "exposure

of negative images of women reinforce male views that women are inferior to men, so that women cannot compete with men in the work force and are not given the same opportunities as men;<sup>157</sup> and, (3) repetitious depictions of women in degrading roles lead women to internalize these images and cause them to lower their own aspirations.<sup>158</sup>

Although the *Butler* court concluded that the link between exposure to violent or degrading pornography and gender inequality was sufficiently established, the allegation that these materials play a central role in the subordination of women in society is both unproven and implausible.<sup>159</sup> First, the women's equality movement has achieved its greatest gains simultaneously with the historically highest levels of distribution of violent or degrading pornography.<sup>160</sup> In the nineteenth century, when pornography was mostly printed, rarely distributed, and did not contain the levels of violence, degradation and explicitness contained in today's pornographic materials, the status of women was far worse than it is today.<sup>161</sup> In addition, there is no indication that violent or degrading pornography plays any greater a role in the subordination of women than other materials that depict women in subordinate roles. Women are typically depicted as having inconsequential roles in most television commercials and sitcoms,<sup>162</sup> in many books,<sup>163</sup> in advertisements,<sup>164</sup> and even in many children's

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to films portraying violent sexuality increased male subjects' acceptance of interpersonal violence against women." Seymour Feshback & Neil Malamuth, *Sex and Aggression: Proving the Link*, PSYCHOL. TODAY, Nov. 1978, at 111, 111.

157. See, e.g., Marilyn J. Maag, Note, *The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women?*, 54 U. CIN. L. REV. 249, 254 (1985).

158. See Jacobs, *supra* note 2, at 18-20.

159. Lynn, *supra* note 126, at 72.

160. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 137 (1990).

161. *Id.*

162. See Berger, *supra* note 147, at 165. Television commercials and sitcoms rarely depict women taking a serious role in societal decision-making. Rather, women are concerned with the whiteness of their wash, the sparkle on their floors, and the softness of their toilet paper. Berger, *supra* note 147, at 165.

163. See Lynn, *supra* note 126, at 73. In many of today's romance novels, wom-

cartoons.<sup>165</sup> For example, in "All in the Family"—an American sitcom widely viewed in Canada in the 1970s and 1980s—the main female character, Edith Bunker, was a housewife who spent her every waking moment catering to a domineering husband who constantly belittled her. An equally plausible argument can be made that sitcoms such as "All in the Family" or any similar materials play a central role in maintaining gender inequality. Why have the Canadian Parliament and the *Butler* court directed their concerns about women's inequality only to materials of a sexual nature?

Even assuming *arguendo* that studies could conclusively link violent or degrading pornography to gender inequality and greater tolerance of sexual violence against women in society,<sup>166</sup> the *Butler* court should not have allowed suppression of these materials. Indirect harms, such as those produced when attitudes and beliefs are altered, are not of the type which can be remedied by limiting the right to freedom of expression and suppressing controversial speech. The *Butler* court failed to adequately balance the legislative objective against the infringement of the right to free expression because the court refused to recognize that the right to free expression was guaranteed to protect controversial expression that the majority may not agree with or approve of from would-be censors. By adopting the position that only "good pornography," not violent or degrading pornography, is deserving of full protection under section 2(b) of the Charter, the approach adopted by the *Butler* court seriously undermines the

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en are painted as the helpless heroine, spending life pining away for a strong male to rescue her and take her to "fantasy land."

164. See Lynn, *supra* note 126, at 73. A typical advertisement for Bijan perfume urges consumers to "chain her in 14 Kt. gold."

165. See Lynn, *supra* note 126, at 73. The Smurfs, a popular cartoon, tells of every-day life in Smurf World. Smurf World is run by smurf men and there is only one female smurf in the society, Smurfette. Smurfette is "air-headed" and never makes her own decisions. Male smurfs must come to her aid in each episode. See Lynn, *supra* note 126, at 73.

166. See *supra* note 156 and accompanying text.

most important value promoted by the principle of free expression in a democratic society.

The *Butler* court's approach to analysis under section 163 presupposes that the right to free expression should not protect effective speech; that is, speech that may alter attitudes and beliefs. A guarantee of the right to free expression is necessary because it is assumed that speech is effective in conveying thoughts and messages. The fact that violent or degrading pornography can influence attitudes is the reason why these materials must be protected by guarantees of freedom of expression—such influence demonstrates “the power of pornography as speech.”<sup>167</sup> Political propaganda, which also affects attitudes and invites action that shifts the distribution of advantages between groups, is clearly protected under the Canadian Charter.<sup>168</sup> If the fact that expression plays a role in the process of conditioning thoughts and beliefs were enough to permit governmental suppression, as contended by the *Butler* court, section 2(b) of the Charter is meaningless.

In balancing the legislative objective of section 163 against the degree of infringement on the right to free expression, the *Butler* court failed to consider the fact that free expression assists in the advancement of knowledge and discovery of the truth. An uncensored clash of opposing ideas and opinions will result in the emergence of the truth because the truth is reflected in the power of a thought to get itself accepted in the competition of the marketplace of ideas.<sup>169</sup>

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167. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985).

168. See *Arbour*, *supra* note 128, at 297.

169. John Milton argued that if speech were unfettered, truth would always prevail over falsity. He stated “who ever knew truth put to the worse, in a free open encounter” and that truth needed no governmental intervention to prevail in the end. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785 (1988).

This is more commonly referred to as the “marketplace of ideas theory.” Support for the marketplace of ideas theory can be found in several Canadian Supreme Court decisions. Robin M. Elliot, *Freedom of Expression and Pornography: The Need for a Structured Approach to Charter Analysis*, in *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 308, 319 (Joseph M. Weiler & Robin M. Elliot eds., 1986).

Under the approach adopted by the *Butler* court, the main justification for suppressing violent or degrading pornography is that it affects thoughts which may indirectly shift the distribution of advantages between the sexes. However, the ability of these materials to bring about inequality depends on their power to persuade viewers that there is sexual satisfaction in the subordination of women. To say this much is to necessitate the conclusion that these materials convey ideas that must be allowed in the marketplace and must be protected from government suppression. The *Butler* court has concluded that the ideas entering the marketplace should be controlled to provide Canadian citizens only with the version of the truth that the government approves: equality between the sexes. If section 2(b) of the Charter is to have any meaning at all, unfavorable ideas must be allowed to flourish in the marketplace so that they may be ultimately accepted or rejected, and control over the acceptance or rejection of ideas may not be forced by governmental bodies. This is not to say, however, that government may not legitimately promote equality by sending messages contrary to those contained in violent or degrading pornography that arguably promote negative stereotypes of women. An important premise behind the marketplace of ideas theory is that the proper remedy for the effects of "bad speech" is "good speech"—not censorship.<sup>170</sup>

By affording violent or degrading pornography less protection from infringement than other forms of expression, the *Butler* court has de-emphasized the importance of the role that all expression plays in ensuring that each individual may develop his or her own intellect, interests, tastes and personality without government interference. This theory is commonly referred to as "self-realization."<sup>171</sup> For the human personality

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170. See *infra* notes 192-94 and accompanying text.

171. See Elliot, *supra* note 169, at 318. "Self-realization" was recognized by the Canadian Supreme Court in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 (Can.). In *Saumur*, the court described freedom of speech as a freedom which is a necessary attribute and mode of self-expression of human beings and the primary condition of their community life within a legal order. *Id.* at 306-07; Elliot, *supra* note 169, at 319.

to flower, individuals must be able to choose not only what they wish to say, but what they wish to see or hear. Prior to its decision in *Butler*, the Supreme Court of Canada has recognized the "centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."<sup>172</sup> However, the *Butler* court has not realized the importance of applying the principles of self-realization consistently to all forms of expression, including expression of a sexual nature.

Even violent or degrading pornography can assist an individual in his or her quest for self-realization. These materials may be educational,<sup>173</sup> or therapeutic. Some studies have suggested that exposure to violent or degrading pornography may have a cathartic effect, providing a release for viewers who would otherwise be predisposed to violent behavior.<sup>174</sup> These materials may allow viewers to face the realities of existence, such as sexuality of diverse kinds, brutish passions and the association of sexuality and violence.<sup>175</sup> Violent or degrading pornography may even promote the "joys of passivity, of helplessness abandon, or response without responsibility."<sup>176</sup> Most im-

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172. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 346 (Can.).

173. In the most basic sense of the term "educational," violent or degrading pornography can show viewers what people can do and how they do it, suggest what viewers might or might not enjoy trying or watching, and alter attitudes toward what would otherwise seem like unpleasant activity. See Lynn, *supra* note 126, at 48.

174. See Maurice Yaffé, *Therapeutic Uses of Sexually Explicit Material*, in *THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOR* 119 (Maurice Yaffé & Edward C. Nelson eds., 1982).

175. HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* 255-56 (Midway Books 1985) (1969).

176. Ann Snitow, *Mass Market Romance: Pornography For Women is Different*, in *POWERS OF DESIRE* 245, 256 (Ann Snitow et al. eds., 1983), cited in Lynn, *supra* note 126, at 49.

Many proponents of the harm-based approach to obscenity would find a depiction of semen being ejaculated over a woman's breasts to be degrading; an expression of contempt for women. However, others have found there to be "no reason to interpret ejaculation as a hostile gesture . . . Some women and men enjoy the silky feel of fresh semen, some enjoy the smell and some find it excites the imagination." BEATRICE FAUST, *WOMEN, SEX AND PORNOGRAPHY: A CONTROVERSIAL AND UNIQUE STUDY* 18 (1980).



portantly, these materials may enlighten one who enjoys what most would consider "deviant" sexual practices. That others share the same sexual desires and fantasies, and that the enjoyment of these practices does not mean that the viewer is "abnormal."

The *Butler* court has failed to make the distinction between prohibiting the act of discrimination and the concept of discrimination. The court should always permit legislation which prohibits actual discrimination against women. The *Butler* court, however, permitted the restriction not of actual discrimination but of speech that arguably encourages discrimination. Freedom of expression principles, however, encompass the value of trying to promote an ideological viewpoint and allowing individuals to decide whether to accept or reject it.<sup>177</sup> This is true even if the ideology suggests that women are inferior to men or that women deserve to be the objects of male domination. Fundamental to the idea of freedom of expression is the notion that government has no power to restrict expression because of its messages or ideas, no matter how offensive.<sup>178</sup> Freedom of expression encompasses one's freedom to contribute to the social definition of other people.<sup>179</sup> The *Butler* court does not account for the fact that negative attitudes about women are ideas about the proper role of women in society. Freedom of expression must guarantee the right to hold and even to advocate stereotypical notions about women, as offensive and false as they may be.

If the Canadian Supreme Court allows suppression of speech whenever the speech leads to acceptance of undesirable beliefs or behavior, section 2(b) of the Charter serves no purpose. Under the harm-based rationale that the *Butler* court has adopted, any form of expression that sends the wrong message is open to censorship, with no foreseeable limitations. Consider the following hypothetical:

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177. See Elliot, *supra* note 169, at 320.

178. *R. v. Butler*, [1992] 1 S.C.R. 452, 488-89 (Can.).

179. Karst, *supra* note 160, at 95.

Married spouses are exposed to soap operas which depict adulterous acts in a positive and even glamorous light. A survey is administered both before and after exposure to the soap operas. The survey is designed to reflect attitudes toward adultery among married individuals. The survey reveals that those exposed to "positive-outcome soap opera adultery" report that they are more likely to commit adultery and accept adultery in society than they were before they had watched the soap opera.

The legislature claims that regulation of soap operas depicting adultery is warranted because the government has an interest in maintaining the family unit and keeping the divorce rate down, whereas soap operas: (1) lead to the commission of acts of adultery; and (2) alter attitudes towards a greater acceptance of adultery which will eventually lead to an increase in the divorce rate.

Under Canadian law, soap operas depicting adultery in a glamorous light could be censored under the same harm-based rationale adopted by the *Butler* court. Canadian courts would allow the presumption of a causal link between exposure to soap operas and adulterous behavior based on the responses to the survey. This approach could then be extended to hundreds of other types of expression which may alter attitudes and lead to societal acceptance of undesirable behavior; For example, movies depicting violence, drug use, teenage pregnancy or gang membership in a glamorous light. There is no telling where the line can be drawn and what types of expression could fall subject to the censor's pen.

The *Butler* court also fails to account for the importance of the context in which stereotypical messages are being sent, including the identity of the sender. Many groups choose to embrace the stereotypes of their own groups for political reasons or as a means of fostering change in their societal or economic status. For example, many African Americans may choose to call each other "niggers" while lesbians and gay men may choose to call themselves "queer." The television show, "In Living Color," a show produced in the United States by African

Americans to attract an African American audience, is entirely comprised of typical African American stereotypes for the purpose of demonstrating the audacity of these stereotypical roles. Feminists may want to make a satirical pornographic movie containing scenes of violence or degradation of men or of women to demonstrate the lack of value in these types of materials. Does the *Butler* court truly believe that judges have the ability or should have the authority to ascertain the value of the messages in a particular publication when the publication contains "violence or degradation"?

If the approach by the Canadian Supreme Court is followed to its logical end, resulting restrictions could be limitless. An argument can be made that any group's status is harmed whenever that group is not depicted equally or is depicted in stereotypical roles. For example, all non-sexual expression depicting women in inconsequential roles or depicting women as "barefoot and pregnant" in the kitchen could be regulated.<sup>180</sup> Additionally, any materials depicting African Americans in stereotypical roles, such as servants or thieves, could be prohibited on the ground that they promote racial discrimination.<sup>181</sup> All uncomplimentary depictions of the handicapped,<sup>182</sup> the homeless, or any minority group<sup>183</sup> could be barred under the *Butler* court's harm-based rationale. Once society allows limits on expression merely because the expression negatively affects attitudes and reinforces stereotypes about groups, there can be no end to the invasion on the right to free expression.

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180. Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 NOVA L. REV. 159, 231 (1991). See also *supra* notes 162-65 and accompanying text.

181. See Campbell, *supra* note 180, at 231; Maag, *supra* note 157, at 261.

182. Maag, *supra* note 157, at 261.

183. For instance, publications that depict Irish Catholics as heavy drinkers unable to maintain employment could be banned.

*C. The Limit That Section 163 Places on the Right to Free Expression*

In its analysis of the proportionality of section 163, the *Butler* court clearly underestimated the limit section 163 places on the right to free expression. Although the court noted that the statute only restricts pornography that poses a risk of harm to society,<sup>184</sup> the statute is arguably applicable to most of the pornographic materials that are available today. Additionally, the court did not require a demonstration that a particular publication causes harm before its suppression is justified. Therefore, trial judges have the authority to suppress any publication that contains the slightest degree of violence or degradation, and criminal proceedings may be instituted against the sellers or distributors of the materials.

Because the terms "violent" and "degrading" are open to interpretation, there will be an especially chilling effect on the right to free expression. An extremely wide range of materials may be proscribed based on the subjective viewpoints of trial judges. For example, the spreading of semen over a woman's body may be considered degrading to one judge, but not to another.<sup>185</sup> Some might consider playfully restraining a woman's hands with a necktie during the course of sexual relations to be violent. Distributors and sellers of pornographic materials can not know which materials will be deemed harmful until they are at risk of a criminal violation of section 163. Therefore, until a court has authoritatively stated which specific materials cause harm, a nonlegislative form of censorship will take place. This form of censorship is clearly a major impairment on the right to free expression.

When the *Butler* court noted that the statute does not apply to private use or viewing of materials deemed obscene,<sup>186</sup> it again underestimated the limit section 163 plac-

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184. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 505 (Can.). See *supra* text accompanying note 111.

185. See *supra* note 176.

186. *Butler*, [1992] 1 S.C.R. at 506. See also *supra* note 114 and accompanying

es on the right to free expression. In a practical sense, by criminalizing the distribution and sale of violent or degrading pornography, these materials will no longer be available for private use or viewing. Because the principle of self-realization encompasses not only the right to speak, but the right to hear, the statute consequently limits the right of all individuals to self-realization.<sup>187</sup> This is more than a minimal impairment on the right to free expression.

By rejecting the use of available, less intrusive, measures that are equally effective in redressing pornography's harm in favor of suppressing the expression entirely, the *Butler* court again underestimated the statute's restriction on the right to free expression.<sup>188</sup> Studies have shown that educating viewers about the effect of pornography on women's status can change the attitudes of those exposed to these materials, so that the materials will have little effect on a viewer's attitude toward women and no effect on a viewer's behavior in society.<sup>189</sup> Although the *Butler* court acknowledged that education is an effective means of combatting negative attitudes toward women, it nonetheless concluded that the legislature need not rely on education alone.<sup>190</sup> However, principles of free expression

text.

187. See *supra* notes 171-76 and accompanying text.

188. The court stated, "given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested." *Butler*, [1992] 1 S.C.R. at 508.

189. See Transcript of Proceedings, United States Department of Justice, The Attorney General's Commission on Pornography, Public Hearing, Houston, Texas, 24 (September 11, 1985). (testimony of Edward Donnerstein). At the hearing, Donnerstein stated:

The research . . . on mitigating the effects of television violence and some of the research we have been doing [on violent or degrading pornography] . . . strongly suggests that people can become critical viewers, that you can sensitize them, you can change, perhaps, their attitude beforehand, so that when they do see the material, it isn't going to impact upon them.

The legislature could even impose a tax on all pornographic materials to fund "pornographic education," or it could require that all pornographic films contain an introduction explaining the effects of pornography on women's status.

190. *Butler*, [1992] 1 S.C.R. at 508.

mandate that if there is any time to expose the falsehood of speech or to avert its evil through education, "the remedy to be applied is more speech, not enforced silence."<sup>191</sup>

Speech has consistently been an effective means of disrupting centuries of sexual inequality.<sup>192</sup> The effects of "bad speech" can be counteracted by the introduction of "good speech"; speech that encourages conceptions of sexuality that are consistent with full and equal status for all individuals.<sup>193</sup> Free speech even guarantees the right to advocate against other forms of expression. Public demonstrations urging people not to purchase violent or degrading pornography are a legitimate form of democratic censorship that do not involve government infringement on the right to freedom of expression.<sup>194</sup> Satirical representations of negative attitudes toward women can even be used to demonstrate the outrageousness of the depictions. Since additional speech and education are effective alternative means of addressing the harms of violent or degrading pornography, the *Butler* court was mistaken in its conclusion that section 163 only minimally impairs the right to free expression.

*D. The Canadian "Harm-Based" Approach: A Smokescreen For Suppressing Violent or Degrading Pornography To Preserve Societal Morality*

The *Butler* court went out of its way to justify upholding section 163 under harm-based principles, like a child playing a game tries to fit a square peg into a round opening. In both situations, the result is the same; even if there is room for interpretation, it simply won't work. The Canadian obscenity

191. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

192. See Maag, *supra* note 157, at 266.

193. See Andrea Dworkin, *Pornography: The New Terrorism*, 8 N.Y.U. REV. L. & SOC. CHANGE 215, 217 (1978-79). The author states: "We women are raising our voices now, because all over this country a new campaign of terror and vilification is being waged against us." *Id.*

194. See Maag, *supra* note 157, at 267.

statute cannot be justified under a harm-based rationale. It cannot be clearly demonstrated that violent or degrading pornography causes instances of sexual violence in society, or that it plays a central role in maintaining gender inequality. Furthermore, even if violent or degrading pornography indirectly promoted gender inequality, the right to free expression clearly outweighs the legislative objective in preventing harm caused by altered attitudes, especially where there are other available and effective means of combatting this type of harm. Since section 163 cannot be justified under a harm-based rationale, it becomes apparent that there is some other basis underlying the *Butler* court's decision to uphold the obscenity statute.

Given that social values have always played a role in the regulation of sexually explicit speech, morality is probably the *Butler* court's real justification for upholding section 163. However, the court could not simply state that it was permitting suppression of expression based on morality because the court recognized that morality is no longer an appropriate basis for regulation of expression under the Canadian Charter.<sup>195</sup> Thus, it was necessary for the court to find an acceptable alternative rationale in order to uphold the statute.

At the outset, one must ask why the Canadian legislature and the *Butler* court have focused their efforts on suppressing violent or degrading pornography, especially in light of the availability of other kinds of materials more likely to cause the kind of harm that section 163 was intended to redress. Even if the court is correct in its conclusion that violent or degrading pornography leads to gender inequality or instances of violence against women in society, the decision to prohibit only this type of material is itself a value judgment based on notions of morality. If gender inequality is the ultimate harm the legislature sought to redress, all subordinating nonsexual depictions of women should have been the subject of section 163, rather

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195. *Butler v. Her Majesty the Queen*, [1992] 1 S.C.R. 452, 498 (Can.). The court determined that "[t]he objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the Charter." *Id.*

than only sexual depictions. If societal violence is the ultimate harm the legislature sought to redress, all violent, nonsexual depictions such as “slasher movies” or detective films should have been the subject of section 163. Because these nonsexual forms of expression are blatantly absent from the language of section 163, and studies show that there is no distinction between these types of expression and violent or degrading pornography in terms of the harm resulting from exposure, it is apparent that the legislature sought to regulate only sexual forms of expression based on notions of sexual morality.

This conclusion becomes even more apparent when one considers that the underlying basis of the *Butler* decision rests on a morally based foundation; that violent or degrading pornography, “bad pornography,” is less deserving of protection under section 2(b) of the Charter than other forms of expression.<sup>196</sup> Once the court concluded that violent or degrading pornography is a low-value form of expression, it became easy to skew the entire analysis of the proportionality of section 163. If “bad pornography” is devalued, not only can it be said that the obscenity statute only minimally impairs the right to free expression, but there is an apparent winner in the balance between the importance of the legislative objective and the degree of infringement on the right to free expression. Arguably, had the *Butler* court not devalued violent or degrading pornography as a form of expression, an examination of the proportionality of the obscenity statute would have reached the opposite result and, consequently, the court would have held that section 163 is not a reasonable or demonstrably justified limitation on the right to free expression.

The distinction made by the *Butler* court between explicit erotica and violent or degrading pornography is simply a reflection of today’s social norms. The battle over pornography is not really about sex, but about deviance. “Normal” depictions of sexual relations—otherwise referred to as “explicit erotica”—will be tolerated because society accepts normal sexual

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196. *Id.* at 500.



relations as morally acceptable. "Unconventional" depictions of sexual relations, such as men and women engaging in sado-masochistic practices or being portrayed as animals—otherwise referred to as "violent or degrading pornography"—will be suppressed because these materials fall outside the realm of what many people believe to be morally acceptable. Even though the current battle over pornography is couched in terms of harm, determinations of obscenity under the court's reasoning in *Butler* will ultimately come down to a matter of what lower court judges find to be offensive.

## V. CONCLUSION

Although the *Butler* decision is couched in terms of "harm," the decision to permit suppression of violent or degrading pornography cannot be justified under harm-based principles. The state failed to demonstrate that violent or degrading pornography actually causes an increase in societal violence or that it plays a central role in maintaining gender inequality. In addition, principles of free expression preclude the conclusion that suppressing violent or degrading pornography is the appropriate means of remedying the harms that may result from exposure to these materials. This is especially true in light of the availability of other equally effective means of counteracting any possible harms that may result from widespread exposure to pornographic materials.

As the court recognized, a decision to uphold the obscenity statute on the basis of morality would have been somewhat problematic in light of the individual freedoms guaranteed under the Charter. Nonetheless, had the court been honest in its approach, its decision would have been easier to justify and would not have had such serious future implications. By attempting to fit section 163 into a harm-based mold, the court has set a dangerous precedent; that the individual freedoms guaranteed in the Charter may be easily bypassed by legislation enacted to address speculative harms based on loose standards of causation. If the Supreme Court of Canada is as will-

ing to limit “fundamental freedoms” in future cases, individual rights in Canada will be meaningless.

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