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The Difficulty in Defining Obscenity along Feminist Lines: Rethinking Canada's Butler Decision

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The Difficulty in Defining Obscenity Along Feminist Lines: Rethinking Canada's Butler Decision

I. INTRODUCTION

In a 1992 landmark decision, Butler v. Her Majesty the Queen,1 a unanimous Canadian Supreme Court upheld legislation that criminalized obscenity,2 thus stating that freedom of expression can be limited with respect to certain pornographic materials if the limitation is necessary to ensure equality for women.3 This ruling made Canada "the first place in the world that says what is obscene is what harms women, not what offends [a community's] values."4 The Butler Court attempted to create a uniform test to interpret existing obscenity standards, which were vague and inconsistently applied by previous courts. Despite the Court's efforts, however, the Butler test has proven to be equally difficult to interpret, apply, and enforce.

1. 1 S.C.R. 452 (1992) (Can.).
2. Courts and legal theorists often fail to make a distinction between the terms obscenity and pornography. Joel Feinberg, Pornography and the Criminal Law, in PORNOGRAPHY AND CENSORSHIP 105, 109-11 (David Copp & Susan Wendell eds., 1983). Although the two terms are used interchangeably to encompass all sexually explicit material, regardless of the legal protection afforded it, some writers define "obscenity" in terms of the content of the material and "pornography" in terms of the harm caused by the material. See James Lindgren, Defining Pornography, 141 U. PA. L. REV. 1153, 1159 (1993). For the purposes of this Note, the author adopts the view espoused by most state and federal legislatures that obscenity is the statutory test used to criminalize and regulate pornography. FRANKLIN M. OSANKA & SARA L. JOHANN, SOURCEBOOK ON PORNOGRAPHY 4 (1989). In other words, legislation in the United States and Canada criminalizes obscenity and indecency. This legislation is then "aimed at the publication, distribution and display of [pornographic] material which is regarded as obscene and indecent." Catherine Itzin, Legislating Against Pornography Without Censorship, in PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 401 (Catherine Itzin ed., rep. 1993).
3. Butler v. Her Majesty the Queen, 1 S.C.R. at 479.
4. Tamar Lewin, Canada Court Says Pornography Harms Women, N.Y. TIMES, Feb. 28, 1992, at B7 (quoting Catharine A. MacKinnon, a University of Michigan law professor and well-known feminist activist who worked with the women's advocacy group that argued for the Butler standard).
This Note will analyze (1) obscenity standards in Canada prior to the Butler decision, (2) obscenity standards as set forth by the Canadian Supreme Court in Butler, and (3) Canadian judicial, legislative, and societal responses to the Butler decision. This Note will also examine various local attempts to legislate pornography in Canada and the United States as an alternative to the Butler national standard. This Note will also suggest enforcement procedures that are more compatible with the goals of the Butler Court. Finally, this Note will conclude that the feminist obscenity standard developed by the Butler Court is ineffective because it fails to protect women from the harm that the Court perceived to be caused by pornography while creating a new type of harm: censorship of art and literature.

II. PRE-BUTLER OBSCENITY STANDARDS

Prior to the Butler decision, lower courts applied the obscenity standard as defined in Section 163(8) of the Canadian Criminal Code, which provides: "[f]or 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." 6

Canadian courts employed several tests to determine whether pornography contained "undue exploitation of sex" as set forth in Section 163(8) of the Code. These tests included (1) the community standard of tolerance test, (2) the degradation or dehumanization test, and (3) the internal necessities test, also known as the artistic defense. 7

A. The Community Standard of Tolerance Test

Canadian courts first implemented the community standards test to measure obscenity in 1962. 8 In Regina v. Brodie, the

5. This Note uses the term "pornography" merely as an efficient means of reference to all types of sexually explicit material and is not indicative of the type of legal protection afforded to the subject material.
7. Butler v. Her Majesty the Queen, 1 S.C.R. at 476-83.
8. Regina v. Brodie, S.C.R. 681 (1962) (Can.). This test was modeled after similar tests used by Australian and New Zealand courts. Id. at 706.
Supreme Court acknowledged that "[t]here are certain standards of decency which prevail in the community" and that it is the Court's duty to represent and apply those standards. Subsequent courts extensively analyzed this test and defined it more precisely as a national test that must be contemporary and capable of adapting to changing times, ideas, and mores.

The community standards test was eventually elaborated by the Canadian Supreme Court in Regina v. Towne Cinema Theatres Ltd. In Towne Cinema, the Court explained that the community standards test is relevant to the level of the Canadian community's tolerance of sexually explicit material, not to the community's particular tastes or opinions regarding the subject material. The Court recognized the existence of a community standard of tolerance test, which measured obscenity according to "what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it." By using a tolerance standard, the Court acknowledged that the level of toleration is subjective and thus varies "depending upon the audience and the circumstances."

B. The Degradation or Dehumanization Test

As Canadian courts applied the community standards test, they began to recognize that certain obscene materials that depict degrading and dehumanizing subject matter will always fail the community standards test because they exceed the level of commu-

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9. Id. at 706 (citing Regina v. Close, V.L.R. 445, 465 (1948) (Can.)).
11. 1 S.C.R. 494 (1985) (Can.).
12. Id. at 508.
13. Id.
14. Id. at 509.
nity tolerance. Thus, Canadian courts eventually adopted a degradation and dehumanization test, which provided a stricter standard of review for pornographic materials than the limits of tolerance set by the community standards test.

The Supreme Court, in *Regina v. Towne Cinema Theatres Ltd.*, concluded that “exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.” The Court was concerned “that the community may tolerate publications that cause harm to members of society and therefore to society as a whole.” Thus, the judiciary extended the definition of “undue exploitation” in Section 163(8) of the Canadian Criminal Code beyond the standard of community tolerance to include publications that are harmful, regardless of whether the community was willing to tolerate them. Initially, Canadian courts limited the application of this test to sex in conjunction with violence and cruelty. Later, the courts expanded this view to include materials that did not include violent subject matter as well as those that did.

C. The Internal Necessities Test

The internal necessities test functioned as a defense to protect works of “genuine artistic and literary merit” against the undue exploitation standard. The test, as set forth by the Supreme Court in *Regina v. Brodie*, states that undue exploitation of sex does not exist if there is “no more emphasis on the theme of sex than is required in the treatment of ... a serious work of fic-
Subsequent courts used this artistic defense "to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent 'dirt for dirt's sake' but has a legitimate role when measured by the internal necessities of the work itself." Despite the recognition of the internal necessities test by the Brodie Court in 1962 and its codification in subsequent cases, works of art were not necessarily protected from Section 163(8) enforcement by police officers and customs officials. The following are some examples of pre-Butler seizures: in the 1970s, police seized a children's educational book entitled Show Me: A Picture Book of Sex for Children and Parents; police charged the acclaimed film Last Tango in Paris as obscene; and customs officials detained the 1977 novel The Young in One Another's Arms by Jane Rule because of its title, which was a quote from the Irish poet W.B. Yeats. In the 1980s, customs officials confiscated "a film on masturbation that was headed for the University of Manitoba Medical School"; police in Toronto "targeted a painting that depicted the rape of a Mayan woman by Guatemalan soldiers even though the painting was reportedly a political statement sympathetic to Guatemalan women"; customs officials confiscated a sixth-century Greek anthology, Erotic Poems; and Alberta police seized materials that belonged to an anti-pornography organization. In December 1991, just months

23. Butler v. Her Majesty the Queen, 1 S.C.R. 452, 483 (1992) (Can.).
28. Id.
29. Id.
30. Id.
before the Butler ruling, a manuscript by Seattle author Paul Doyle entitled *Nioka: Bride of Bigfoot* was detained by a customs official who found a sex scene among the pages of the Christmas gift sent to Doyle's daughter in Victoria. Other modern era seizures by Canadian customs officials include *The Naked Lunch* by William Burroughs, *The Hotel New Hampshire* by John Irving, *The Way* by John Steinbeck, *Last Exit to Brooklyn* by Hubert Selby, and the *Kama Sutra*.

D. The Relationship of the Tests

Lower courts in Canada applied the obscenity tests inconsistently and independently of one another. Thus, it was difficult to determine whether the materials were obscene for any of the following reasons: (1) they were intolerable to the community; (2) they were degrading or dehumanizing; or (3) they were offensive to some other moral standard. Moreover, it was difficult to decipher how much weight was given to the artistic merit of the materials. Thus, a new, uniform obscenity test was needed.

III. OBSCENITY STANDARD AS SET FORTH BY THE BUTLER COURT

A. Factual and Procedural History

On August 21, 1987, the City of Winnipeg police entered an adult video store owned by Donald Victor Butler and seized its entire inventory, which included "hard core" videotapes, magazines, and sexual paraphernalia. Butler was charged with three counts of selling obscene materials, forty-one counts of possess-

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33. Butler v. Her Majesty the Queen, 1 S.C.R. 452, 483 (1992) (Can.).
34. Id.
35. Id. at 461.
36. Butler was originally charged for this offense under § 159(2)(a) of Canada's Criminal Code. Section 159(2)(a) is now § 163(2)(a), which states: "Every one commits an offence who knowingly, without lawful justification or excuse, sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever." Crim. Code, R.S.C., ch. C-46, § 163(2)(a) (1985) (Can.).
ing obscene materials for the purpose of distribution, 37 128 counts of possessing obscene materials for the purpose of sale, 38 and one count of exposing obscene materials to public view. 39

On October 29, 1987, Butler's employee, Norma McCord, was arrested at the video store, which had reopened ten days earlier. Police once again seized the store's inventory. Butler was arrested at a later date. Butler and McCord were jointly charged with two counts of selling obscene materials, 40 seventy-three counts of possessing obscene materials for the purpose of distribution, 41 one count of possessing obscene materials for the purpose of sale, 42 and one count of exposing obscene materials to public view. 43

The trial judge convicted Butler on eight counts relating to eight of the seized films and convicted McCord on two counts relating to two of the films. The trial judge entered acquittals on the remaining 242 charges against Butler and McCord. 44

The Crown appealed the acquittals, and Butler cross-appealed the eight convictions. The appellate court entered convictions against Butler with respect to all 250 counts. 45 The majority, in reaching its decision, relied on Section 163(8) of Canada's Criminal Code 46 in conjunction with the application of the community standards test. 37 Butler appealed the appellate court decision, claiming that Section 163(8) violated his constitutional right to freedom of speech.

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37. Butler was originally charged for this offense under § 159(1)(a) of Canada's Criminal Code. Section 159(1)(a) is now § 163(1)(a), which states: "Every one commits an offence who makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever." Crim. Code, R.S.C., ch. C-46, § 163(1)(a) (1985) (Can.).
40. Id.
43. Id.
44. Butler v. Her Majesty the Queen, 1 S.C.R. 452, 462 (1992) (Can.).
45. Id.
47. For a discussion of the community standards test, see supra text accompanying notes 8-14.
B. Issues Before the Canadian Supreme Court

The two constitutional issues confronted by the Canadian Supreme Court in *Butler* were: (1) whether Section 163 of the Canadian Criminal Code violated Section 2(b) of the Canadian Charter of Rights and Freedoms; and (2) if the first issue was decided in the affirmative, whether Section 163 of the Canadian Criminal Code was justified under Section 1 of the Canadian Charter of Rights and Freedoms "as a reasonable limit prescribed by law." The Supreme Court limited its discussion to the constitutionality of Section 163(8) of the Canadian Criminal Code because both the parties and the lower courts focused almost exclusively on the Section 163(8) definition of obscenity. The Supreme Court did suggest, however, that other subsections of Section 163 also gave rise to constitutional questions under Section 2(b) of the Canadian Charter of Rights and Freedoms.

The *Butler* Court determined that Section 163(8) violated Section 2(b) of the Canadian Charter of Rights and Freedoms because "both the purpose and effect of [Section] 163 is specifically to restrict the communication of certain types of materials based on their content." The Court found that the "[m]eaning sought to be expressed need not be 'redeeming' in the eyes of the court to merit the protection of [Section] 2(b) whose purpose is to

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49. Section 2(b) of the Canadian Charter of Rights and Freedoms states: "Everyone has the following fundamental freedoms . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Constitution Act, R.S.C., No. 44, § 2(b) (1982) (Can.).
50. Section 1 of the Canadian Charter of Rights and Freedoms "guarantees the rights and freedoms set out in [the Charter] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Constitution Act, R.S.C., No. 44, § 1 (1982) (Can.). Canada's Constitution was adopted only ten years before *Butler* was decided. Thus, the legal implications of §§ 1 and 2(b) to Canadian jurisprudence were still being defined at the time of the *Butler* decision. Charles Trueheart, *Canadians Debate New Curbs on Speech, Press*, WASH. POST, Jan. 31, 1994, at A13.
52. *Id.*
53. *Id.* The two subsections specifically cited by the Court were Sections 163(3) and 163(6). *Id.*
54. *Id.* at 489.
ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure.”

Nevertheless, the Court concluded that the violation of Section 2(b) was justified under Section 1 of the Canadian Charter of Rights and Freedoms as a “reasonable limit prescribed by law,” and created a test for the application of Section 163(8).

C. The Butler Obscenity Standard

The Butler Court divided pornography into three categories in order to facilitate Section 163(8) analysis. These categories are: “(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing.” The Court analyzed these categories in the following manner:

[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 within the definition if the risk of harm is substantial. Finally, explicit sex that is not violent and not degrading or dehumanizing is generally tolerated in society and will not qualify as the undue exploitation of sex unless it employs children in its production.

The Court incorporated the community standards of tolerance test into its analysis when it went on to state:

The court must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse.

The Butler Court focused on the harm to society in general, and women in particular, when it observed that “degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. [The
materials] run against the principles of equality and dignity of all human beings. The Court further suggested that the harm caused by pornography can occur on an individual level:

[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance'.

The Butler test thus incorporated all existing tests into an obscenity standard designed to protect society in general, and women and children in particular, from the harm created by pornography.

IV. RESPONSE TO THE BUTLER DECISION

Canadian response to the Butler decision has manifested itself in all areas of society. The judiciary has struggled to apply the obscenity test, the Legislature has codified the obscenity test, and society has adopted polarized views regarding the effectiveness and enforcement of the test.

A. Judicial Response to Butler

The Canadian judiciary has been unable, thus far, to apply the Butler obscenity standard consistently. Courts have varied in their application of the Butler test by placing different emphases or restrictions on the criteria set forth in the obscenity test. As a result, courts have produced decisions that are inconsistent with one another and often incompatible with the underlying purpose of the Butler decision.

1. Strict Interpretation of the Degradation and Dehumanization Component of the Butler Test

In October and November of 1989, Canadian customs officials seized five shipments of various publications imported by Glad Day Bookshop and Jearald Moldenhauer. The customs officers determined that the materials violated various sections of the

61. Id. at 479.
62. Id. at 497 (citing Regina v. Red Hot Video Ltd., 45 C.R.3d 36 (1985) (B.C. Can.)).
Customs Act, which defined obscenity pursuant to Section 163(8) of Canada's Criminal Code.\textsuperscript{64} After a re-determination by the Tariff and Values Administrator and a decision by the Deputy Minister in favor of the Crown,\textsuperscript{65} Glad Day and Moldenhauer appealed the decision to the Ontario Court of Justice.\textsuperscript{66}

In applying the undue exploitation of sex standard, the Glad Day court focused, in large part, on the lack of human relationships in the publications, thus finding the publications to be obscene.\textsuperscript{67} While some of the publications reviewed by the court described sexual acts involving violence and children,\textsuperscript{68} acts that were expressly contrary to the Butler obscenity standard,\textsuperscript{69} the remaining publications consisted of graphic scenes of consensual, nonviolent sex, and the court applied a narrow community standards test with regard to these publications.

The Glad Day court's decision exemplifies a strict interpretation of the Butler obscenity standard, in light of the Butler Court's observation that there is little likelihood of harm resulting from the depiction of an explicit portrayal of "plain" sexual intercourse.\textsuperscript{70}

2. Broad Interpretation of Butler's Harm Requirement\textsuperscript{71}

Allen Peter Hawkins was charged with one count of possession of obscene materials for the purpose of distribution,\textsuperscript{72} one
count of exposing obscene materials to the public, and one count of possession of obscene materials for the purpose of circulation. The Ontario Court of Justice, the same court that adjudicated the Glad Day case, viewed one video cassette as representative of all ten films related to the three counts against Hawkins to determine whether the videotapes were obscene within the meaning of Section 163(8).

The Hawkins court analyzed this case under the pre-Butler and post-Butler obscenity standards. Applying the pre-Butler obscenity test, the court focused on community standards, appeal of the work to the prurient interest, and lack of serious artistic value. This analysis utilized all three pre-Butler "undue exploitation of sex" tests. The court found that the films would clearly be obscene under this standard.

Nevertheless, the court observed, "with genuine regret," that the post-Butler obscenity standard required a risk of harm that was not present in any of the films. The Hawkins court interpreted the Butler standard as protecting films that depict explicit sex in the absence of harm to society. This interpretation is clearly inconsistent with the Glad Day decision.

3. The Demise of the Artistic Defense

The most publicized example of the Butler Court’s failure to protect the internal necessities test is the case of Robert Lally. Lally, a retired psychologist, penned a novel based on a composite of child molesters with whom he had worked in his group-therapy practice. The purpose of the novel was to educate the public about pedophiles in an effort to protect society from sex crimes.

75. Regina v. Hawkins, 86 C.C.C.3d at 246.
78. See supra notes 7-23 and accompanying text.
80. Id.
81. Id.
82. Mary Williams Walsh, Effect of Canada Pornography Limits Debated, DALLAS MORNING NEWS, Sept. 12, 1993, at 18A.
83. Id.
Ironically, instead of being applauded by the anti-pornography lobby, Lally became one of the first victims of the inconsistent application of the Butler standard. When Lally’s manuscript, *Heroes, Dreams and Incest*, was returned to him by a literary agent in Colorado, Canadian customs intercepted the book at the border, and the Royal Canadian Mounted Police seized a copy of Lally’s manuscript and his computer at his Alberta home. Lally was arrested but later released when the Alberta Attorney General ruled that the scenes in Lally’s book depicting physical and sexual abuse of children were not obscene, “given the broader test of the novel.” Despite this assurance, customs shredded the manuscript.

While Kathleen Mahoney, prosecuting attorney in the Butler case, admits that some of the post-Butler seizures “show ignorance,” she suggests that the Attorney General’s ruling demonstrates that “the system has its checks and balances so that [cases such as Lally’s] don’t go forward.” Others argue, however, that nothing has changed since the Butler decision.

The Butler standard seems to have had little practical effect on the seizures of materials protected by the internal necessities test. Materials of artistic and literary merit are as susceptible to seizures after Butler as they were before the adoption of the new obscenity standard. The same system of checks and balances exists to protect the post-seizure works of art. No standard, however, has been created to prevent arbitrary seizures and enforcement of Section 163(8) by police and customs officials. Many other examples of post-Butler seizures exist. For example, customs officials seized two books by U.S. anti-pornography supporter and censorship advocate Andrea Dworkin at a political bookstore in Montreal. “Customs claimed that the books ‘Woman Hating’ and ‘Pornography: Men Possessing Women’ illegally eroticized pain

84. Id.
85. Id.; see also Andrews, supra note 32.
86. This subject matter was specifically categorized as obscene by the Butler Court. See supra text accompanying note 59.
87. Andrews, supra note 32.
88. Walsh, supra note 82 (quoting Kathleen Mahoney, a University of Calgary law professor who argued the Butler case before the Canadian Supreme Court on behalf of the Women's Legal Education and Action Fund).
89. Id.
90. Id.
and bondage." At a Toronto bookstore, "censors carted off some 1950s cheesecake trading cards, a scholarly tome on dominance and submission, and a non-sexual punk magazine," even though the store refused to stock "conventional soft pornography, such as 'Playboy,' on the ground that it is sexist." Custom officials' post-Butler seizures include books shipped to "such murky dens of iniquity as the Children's Book Store in Toronto, the Christian Provident Bookstore in Waterloo, Ontario, and four university bookstores . . . ." As recent as February 1994, Customs officers confiscated a book on vegetarian critical theory headed for a Toronto bookstore because of its title, The Sexual Politics of Meat.

B. Legislative Response to Butler

Armed with the new Butler obscenity standard, the House of Commons and Parliament immediately codified the Supreme Court decision by writing legislation that bans child pornography and serial-killer trading cards. Although these laws represent a laudable attempt by the legislature to work with the judiciary toward a common goal, they also pose further threats to Lally and others who disseminate works of genuine literary, scientific, or

91. Mary Williams Walsh, Chill Hits Canada's Porn Law, L.A. TIMES, Sept. 6, 1993 at A17. For a discussion of Andrea Dworkin's involvement in anti-pornography legislation, see infra text accompanying notes 137-38. "Ironically, Ms. Dworkin's book 'Pornography,' which trumpets the feminist anti-porn agenda, was briefly banned as suspected hate literature. The legal foundation for banning hate literature was used as precedent for Butler." Barry Brown, Canada's New Pornography Laws Drawing Charges of Censorship, BUFFALO NEWS, Jan. 10, 1994, at 7.

92. Walsh, supra note 91.


94. Id.

95. The Child Pornography and Corrupting Morals Amendment was passed in June 1993. Clyde H. Farnsworth, Canadian Test Case: 'Pornography' vs. Imagination, N.Y. TIMES, Jan. 7, 1994, at 10. "The new law makes it a crime to own, make, exhibit or sell anything that depicts a sexual act by anyone under 18. If convicted, defendants face up to 10 years in prison and fines." Id. The law prohibits "any visual or written work about sexual activities of those under 18 years of age or depicted as under 18," even if no live models or actors are used to create the work. Barry Brown, Artist's Works Face Destruction Under Canadian Law, BUFFALO NEWS, Feb. 28, 1994, at 3. The new law also charges "crime comics and drugs that claim to restore hair or virility" as obscene. Id. The criteria for judging materials under the law are laid out in Bill C-128, which was rushed through the Canadian Parliament in the summer of 1993. Christopher Hume, Why Should Judges Be Judging Art For Us?, TORONTO STAR, Mar. 5, 1994, at J2.

96. Walsh, supra note 91.
artistic merit by particularizing grounds for seizure and censorship without placing emphasis on the overall themes of the sexually explicit materials.

On December 16, 1993, the Police Morality Squad brought the first criminal charges under the new anti-child pornography statute against Eli Langer, a Toronto artist, and Sharon Brooks, art director of Mercer Union Gallery in Toronto. The law, which was supposed to exempt works of art, was applied to an exhibition of thirty-five drawings and five paintings by Langer that depicted scenes of sex between children and sex between children and adults.

Canadian enforcement officers and customs officials have been using these pornography laws to shut down computer bulletin boards, seize artwork from galleries and restaurants, ban thousands of books at the border, and charge video retailers for distributing materials that had previously cleared strict provincial censors. These same pornography laws, revived by the Butler decision, also inspired the cancellation of the Miss Canada pageant because it degraded women. Furthermore, the Ontario Human Rights Commission is conducting an investigation to determine whether the sale of Playboy magazine constitutes harrassment of women.

97. Citizen News Services, Briefly, OTTAWA CITIZEN, Jan. 19, 1994, at B6; Ann Duncan, It Was a Banner Year for Art Bashers, MONTREAL GAZETTE, Dec. 31, 1993, at B6; Farnsworth, supra note 95. The charges against Langer and Brooks were eventually dropped, but the drawings and paintings were the subject of a forfeiture hearing. Hume, supra note 95.

98. Id. It has been argued that obscenity legislation has historically “been used to censor art and literature, suppress homosexuality and to control women’s reproduction” because most laws fail to address “the key issue of pornography: the power imbalance of society—male dominance, female subordination and sexual inequality.” Itzin, supra note 2, at 401, 415. Ironically, Canadian legislation still fails to overcome this censorship despite the Butler decision that was constructed on the theory of ending female subordination.


100. Id.

101. Id. “Exemptions exist for works of artistic merit or an educational, scientific or medical purpose. But the law puts the burden of proof on the accused.” Farnsworth, supra note 95. The United States passed a similar law in 1982 entitled The Protection of Children From Sexual Exploitation Act. United States attorneys claim, however, that the statute could not be used against Langer. Id.
C. Societal Response to Butler

Initial societal response to the Butler decision was favorable among many groups affected by the new standard. While feminist groups in Canada hailed the Butler decision as a "watershed event" for women,\(^{102}\) the press advocated a more selective seizure procedure under the new laws, one in which vice squads would honor artistic freedom of expression.\(^{103}\) Furthermore, while pornographers reopened shop in some of the provinces previously governed by more restrictive community standards,\(^{104}\) women in the United States renewed their efforts to encourage legislation mimicking the Butler standard, despite previous failures when confronted with judicial review.\(^{105}\) The celebration among many of these groups chilled, however, as the Canadian courts and legislature began applying the new standard.

Feminists were encouraged when the Court ruled that the obscenity law is justifiable despite its limitation on freedom of expression, because pornography "harms women personally, harms their right to be equal, affects their security and changes attitudes toward them so they become more subject to violence."\(^{106}\) According to some feminists, acknowledgment of the difference between male and female perceptions of, depictions in, and attitudes toward pornography is arguably one of the greatest strengths of the Canadian decision. It treats pornography not as a mere idea, but as a concrete act of discrimination against women which degrades both their self-respect and their social status.\(^{107}\)

Not all Canadians, however, viewed the Butler decision as a milestone in North American jurisprudence. Initially, some groups were dismayed by the Butler standard because they believed that excluding obscenity from protection under Section 2(b) of the

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102. Walsh, supra note 91.
103. Id.
104. A Manitoba video store owner was subject to seizures of up to 10,000 video cassettes and 1,700 charges per raid under strict provincial obscenity standards. After the Butler decision, the province has been much more tolerant of the adult entertainment industry. Police now confiscate only 1% of the films seized under previous standards. Id.
105. Id.
106. Lewin, supra note 4.
Canadian Charter of Rights and Freedoms was inconsistent with "a uniform theory of freedom of expression." Eventually, many other groups became disillusioned with the Butler decision as the judiciary and law enforcement officials began applying the new standard inconsistently.

The most notable problems resulted from the application of the Butler standard to Canada's Tariff Code 9956. The Tariff Code establishes a system of prior restraints that allows federal customs officials to screen imported publications and detain questionable materials for further review. This system of prior restraints has been criticized for a number of reasons. First, the Code infringes on the freedom of speech guarantee in Canada's Constitution, the Charter of Rights and Freedoms. Second, the Tariff Code fosters a system of self-censorship that creates "a 'chilling effect' whereby writers, editors and publishers are afraid to publish anything that might offend because of the cost of a trial."

The most vocal opposition to Customs' power of prior restraint comes from booksellers who no longer order books that will likely be detained because the financial impact of a detention is too great for independent bookstores that need to stock new titles immediately. This economic hardship has a dispropor-

109. Tariff Code 9956 includes rules prohibiting the importation of publications that depict subject matter such as incest, rape, anal sex, child sex, bestiality, bondage, and necrophilia. "These rules are based on [Customs'] interpretation of [Section] 163(8) of the Criminal Code." Paul Gessell, Gay Erotica Bypassing Customs, OTTAWA CITIZEN, Aug. 22, 1993, at Al.
110. Still, supra note 65. This screening by customs officials has been widely criticized. According to Greg Gatenby, the organizer of Toronto's International Authors Festival, the "literary critics at the border... are scary people. They boast that their 14-week course on literary appreciation qualifies them for their job [to determine whether or not a work is obscene]." Brown, supra note 91. In October 1993, Gatenby was forced to make a public issue of the seizure of a book by prize-winning gay author David Leavitt, who had arrived at the Festival, one of the world's largest literary events, for a reading. Customs released the book but noted that Leavitt would have "been barred from Canada if he had been carrying his own book." Id.
111. Still, supra note 65. The First Amendment protection of free speech is the reason for the hostility of the U.S. Supreme Court toward any attempts at prior restraints. REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, PORNOGRAPHY AND PROSTITUTION IN CANADA 227 (1985).
112. Andrews, supra note 32.
113. Abley, supra note 26. According to the Book and Periodical Council, "customs seizures of book shipments at the [Canadian] border are 'so pronounced and so frequent..."
ditionate effect on small bookstores and publishers, specifically those that publish and distribute material with homosexual themes. According to Kimberly Mistyshyn, manager of the Glad Day Bookshop: “There are only two lesbian magazines in existence, and there’s millions of sex magazines out there for men . . . . It’s really sad that the Butler decision, which was supposed to be positive for women, has deeply affected the lesbian community.”

Little Sisters Book and Art Emporium and the British Columbia Civil Liberties Union are challenging the constitutionality of Tariff Code 9956, which permits the prior restraint of homosexual publications. This case has cost the plaintiffs over $100,000 and four years of delays and postponements. Most bookstores are unwilling to bear this economic burden, even though many of the materials seized are informational and anthropological in nature. Instead, publishers and distributors have opted for self-censorship, electronic importation, and/or the importation of publications with the words and phrases that do not meet Code requirements blacked out. Thus, it appears that the Butler test does not provide sufficient protection to sexually explicit materials that have artistic and/or educational merit.

that it is now impossible to catalogue each instance.” Editorials From Across Canada, supra note 93.

114. Over the last four years, Canadian customs detained almost 250 books and magazines imported by one Connecticut supply company that represents 2,500 academic publishers and small presses worldwide. Approximately 99% of the publications contained homosexual themes. Id.

115. See Walsh, supra note 91.

116. Still, supra note 65.


118. Id.

119. Gessell, supra note 109. Ironically, X-rated computer CDs that contain material too explicit for U.S. manufacturers to produce are manufactured in Canada and imported into the United States without any customs problems. Peter H. Lewis, The Executive Computer; Multimedia (Especially the X-Rated) Stars at Comdex, N.Y. TIMES, Nov. 21, 1993, at 12. Furthermore, an Ottawa-based company transmits Triple X-rated hard-core pornographic films via satellite into over 18,000 U.S. homes for a sizeable profit, despite its inability to obtain licensing to broadcast the same films in Canada. Reuters Textline, Canada: Canadian Firm Beams Hard-Core Porn into U.S. Homes, REUTER, Feb. 1, 1994.
V. ALTERNATIVES TO THE BUTLER TEST

A. Local Control and Regulation of Pornography

1. Local Control of Pornography in Canada

Canadian history shows that some of the most effective control of obscene materials has come not from the judiciary or the legislature, but from the community itself.120 For example, parents in British Columbia "threatened to impose economic sanctions on stores that openly displayed [pornographic] materials."121 Similarly, in May 1993, the Ontario Film Review Board discarded a proposal to relax its standards in order to allow films and videos to depict some types of bondage and other explicit acts when "government offices were inundated with angry telephone calls from the public."122 Other municipalities also have had similar success by denying patronage to businesses that promote sexually explicit material.123 It should be noted, however, that the initiatives of private citizens can sometimes be extreme, as in the case of a group that firebombed an adult video store in order to force its closure.124

Regulation by legislation has been a tedious process of trial and error for many local lawmakers. While specific and well-defined ordinances are likely to be upheld, many regulatory laws are struck down by the courts as vague and uncertain.125 Although a uniform obscenity statute is necessary both to ensure protection of citizens against certain pornographic materials and to
provide guidelines for enforcement agencies, local efforts should be encouraged to flourish as a means of molding the statute to effectuate the particular needs of individual communities.

2. Obscenity Standards and Controls of Pornography in the United States

Unlike Canada, which regulates pornography through federal legislation, criminal regulation of pornography in the United States is left to state governments.126 The federal government in the United States has limited its enactments to prohibitory laws rather than regulatory legislation.127 Federal laws apply to interstate commerce issues such as “sending pornographic material through the mails, importing pornography and transporting pornography across interstate boundaries.”128

Many problems are inherent with the genesis of pornography regulation at the state level. The most significant of these problems is the lack of uniform guidelines for publishers and distributors of sexually explicit materials.129 Thus, in order to protect the First Amendment guarantee of free speech, the U.S. Supreme Court places limits on state and municipal regulation of pornography.

In 1957, the U.S. Supreme Court made its first modern attempt to regulate pornography in Roth v. United States.130 The Roth Court defined obscenity as sexual material that is “utterly without redeeming social importance.”131

The Roth definition of obscenity proved unsatisfactory because the Court did not provide a practical test for defining obscenity.132 The Roth Court “failed to formulate a standard

126. Id. at 225.
127. Id.
128. Id.
129. There is, however, a trend toward uniformity among the states. Since the U.S. Supreme Court created the Miller test, more than forty states have incorporated the test into their criminal statutes, resulting in “a high degree of uniformity in the legislation enacted by the various states.” Id. at 226. For a discussion of the Miller test, see infra note 135 and accompanying text.
130. 354 U.S. 476 (1957). Prior to the Roth decision, the relevant precedent was an 1868 British court decision, Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). “Between 1868 and 1957 American appellate courts commonly applied the Hicklin test in judging appeals of convictions under vaguely worded federal and state statutes against obscenity.” Feinberg, supra note 2, at 116.
131. Roth v. United States, 354 U.S. at 484.
132. Feinberg, supra note 2, at 120.
that sharply distinguishes protected from unprotected speech."

Thus, the Supreme Court expanded the language, sixteen years later, in *Miller v. California.* The *Miller* Court reaffirmed the *Roth* holding but rejected the *Roth* obscenity test and laid out the following basic guidelines for the trier of fact:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

After the *Miller* decision, the U.S. Supreme Court followed virtually the same path of decisions as the Canadian Supreme Court. The similarities between U.S. and Canadian obscenity jurisprudence ended, however, with the attempt to define obscenity using a feminist standard.

As in Canada, local attempts to regulate pornography have taken place in the United States; however, these attempts have been more successful in the private sector than in the form of local legislation. For example, a feminist-oriented ordinance to control pornography, advocated by feminist writers and anti-pornography crusaders Andrea Dworkin and Catharine MacKinnon, was passed in Indianapolis but overturned by the Supreme Court as unconstitutional. The ordinance provided:

Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following: (1) women are presented as sexual objects who enjoy pain or humiliation; or (2) women are presented as sexual objects who experience sexual pleasure in being raped; or (3) women are presented as

135. *Id.*
sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as dismembered or truncated or fragmented or severed into body parts; or (4) women are presented being penetrated by objects or animals; or (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.\textsuperscript{138}

A similar ordinance was proposed in Minneapolis and was passed by the City Council, but was subsequently rejected by the Mayor.\textsuperscript{139}

Despite the failure of feminist-oriented ordinances, the \textit{Miller} test and the First Amendment allow the enactment of anti-pornography legislation that serves a compelling interest in the community.\textsuperscript{140} Furthermore, some states and municipalities successfully control pornography with civil suits based on public nuisance ordinances.\textsuperscript{141}

Like Canada, informal regulation of pornography has been prolific in the United States.\textsuperscript{142} An example of private policing in the United States is best demonstrated by Cincinnati's efforts to assuage the proliferation of pornography by filing civil actions based on nuisance statutes rather than criminal prosecutions. These efforts have resulted in the closure of many pornography outlets.\textsuperscript{143}

Despite successes in informal regulation of pornography, many problems of enforcement still exist in the United States. These include: a multitude of laws that vary from state to state; the

\textsuperscript{138} City-Council General Ordinance No. 24, June 1984, § 16-3(v).


\textsuperscript{140} The Supreme Court has determined that anti-pornography legislation that protects the interest of children is compelling. \textit{See} Ginzburg v. United States, 390 U.S. 629 (1968) (upholding legislation that prohibited the sale of certain publications to minors); Young v. American Mini Theatres Inc., 427 U.S. 50 (1976) (upholding a municipal ordinance restricting the location of adult movie theatres); New York v. Ferber, 458 U.S. 747 (1982) (upholding legislation that bans child pornography).

\textsuperscript{141} 1 REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, \textit{supra} note 111, at 226.

\textsuperscript{142} RICHARD S. RANDALL, \textit{FREEDOM AND TABOO: PORNOGRAPHY AND POLITICS OF A SELF DIVIDED} 229 (1989).

\textsuperscript{143} 1 REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, \textit{supra} note 111, at 227.
voluminous pornographic material still in circulation; and a shortage of law enforcement agencies to regulate the trafficking of pornography.\textsuperscript{144} Because resources are limited, they have primarily been directed at the more urgent problems of child pornography and the involvement of organized crime in the pornography industry.\textsuperscript{145}

B. Enforcement and Defenses

Legislation is useless without an effective system of regulation and enforcement. Canada's citizens have been subjected to many arbitrary seizures by police and customs officials since the Butler obscenity test was devised.\textsuperscript{146} In order to avoid this problem, a procedural checklist should be created to prevent law enforcement officials from seizing sexual materials outside the purview of Canada's obscenity statute. The following three criteria, derived from U.S. standards of review, should precede an initial investigation into the allegedly obscene materials.\textsuperscript{147}

The first criterion should analyze the content of the material in terms of the overall dominant theme of the work. The dominant theme must involve the undue exploitation of sex; otherwise, the materials would not be subject to criminal liability under Section 163 of Canada's Criminal Code. Exceptions to the dominant theme requirement apply if the material involves sex that depicts violence or includes juveniles. If the dominant theme is sex or if one of the exceptions applies, the material must be analyzed under the next two criteria. Otherwise, criminal liability should not attach, and the work should not be subject to seizure.

The second criterion should analyze the existence of any literary, artistic, educational, scientific, political, ideological, or informational defenses to the imposition of liability. When the overall theme of the subject material is sex, it is useful to analyze

\textsuperscript{144}. Id.  
\textsuperscript{145}. Id.  
\textsuperscript{146}. For example, customs officers seized more than 8,100 publications in 1992. Abley, \textit{supra} note 26.  
\textsuperscript{147}. These criteria are a variation of the test devised by the \textit{Miller} Court. \textit{See supra} note 135 and accompanying text. These guidelines, however, have a much broader scope and are meant to be a tool to guide law enforcement officials in preliminary decision-making, which will ultimately relieve some of the judicial and administrative burdens that accompany wrongful seizures. Unlike the \textit{Miller} test, not all of the criteria must apply to relieve the material from criminal liability.
the availability of defenses by looking to the target audience and the purpose of the work. For example, a film about sexual reproduction for use in medical school instruction is clearly subject to educational, informational, and scientific defenses. Presumably, this test would avoid censorship of anti-pornography works that are not currently protected from confiscation under the *Butler* feminist standard. This is a particularly important balancing test for sexual materials involving children or violence. Both Canada and the United States have upheld child pornography laws\(^\text{148}\) and have afforded special protection to minors.\(^\text{149}\) Yet, recent history has demonstrated that even statutes that seem impermeable in their scope eventually confront exceptions. Consequently, law enforcement officers must carefully discern the purpose of the material and the designated audience and then balance these criteria against a possible conflict with legislation protecting the interests of individual members of society. If the work is not subject to any defenses, then the material must be scrutinized under the third criterion.

The third criterion should analyze the degree of sexual explicitness in the material to determine whether to invoke criminal liability. Enforcement officials must look to the content of the materials as well as the appropriate remedies available. Censorship should always be a last resort if the potential exists to restrict legitimate freedom of speech. In terms of content, officials should concentrate on the existence of violence in conjunction with sex\(^\text{150}\) or subversive themes that are not subject to any defense.\(^\text{151}\) Certain types of “hard-core” pornography always fall under the definition of obscene. Presumably, these are the types

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149. The *Butler* court specifically held that pornography involving children is always obscene. Butler v. Her Majesty the Queen, 1 S.C.R. 452, 485 (1992) (Can.).

150. Rape scenes in popular films or anti-pornography works that discuss graphic violence in conjunction with sex should be protected under one or both of the prior criteria. Thus, this third criterion should be construed narrowly so that it applies primarily to works labeled as “adult entertainment.”

151. Subversive themes should be limited to the types of hard-core pornography that are generally not tolerated by society and/or are marketed toward specific fetishes. This list should include necrophilia, bestiality, incest, and sex with child proxies such as persons with severe mental and physical handicaps. This is a derivation of the *Butler* Court’s adherence to the community standards test, which is consistent with local control principles.
of material that the Butler Court intended to criminalize when it concluded that sex in conjunction with violence is almost always obscene.\textsuperscript{152} Enforcement officials should also seek appropriate remedies that may not include the imposition of criminal liability. For instance, a movie that is not obscene but displays graphic nudity may legitimately be restricted through zoning ordinances from drive-in venues because it may be considered a nuisance to unconsenting viewers, especially children.\textsuperscript{153}

The function of the last two criteria is to guard against discrimination based on ideas and viewpoints, which is inherent in subjective standards. The possibility that enforcement officials might interpret the first criteria based on a standard of harm is much less of a threat. If the material is not protected under any of the three criteria, liability should attach under Canada's Criminal Code.

Once the criteria for enforcement are analyzed, law enforcement officers must look to the obscenity statute itself to determine the degree of liability, if any, that will attach to the subject material.

VI. CONCLUSION

The current feminist approach to pornography adopted by the Butler Court has proven difficult to interpret, apply, and enforce. Canada's national obscenity standard is ineffective because it promotes censorship but fails to protect the women that are allegedly harmed by pornography.

Canada's Special Committee on Pornography and Prostitution disavowed the feminist approach to pornography when it stated: "[w]hile the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can

\textsuperscript{152} Butler v. Her Majesty the Queen, 1 S.C.R. at 485. This type of "hard-core" pornography, involving sadism and masochism, depicts women as "bound, burned, whipped, pierced, flayed, and tortured. In some pornography called 'snuff,' women or children are tortured to death, murdered to make a sex film. The material features incest, forced sex, sexual mutilation, humiliation, beatings, bondage, and sexual torture." Catharine A. MacKinnon, Pornography As Defamation and Discrimination, 71 B.U. L. Rev. 793, 797 (1991).

\textsuperscript{153} Erzonzik v. Jacksonville, 422 U.S. 205 (1975). See also FCC v. Pacifica Found., 438 U.S. 726 (1978) (limiting the hours of the day in which obscene language can be used on radio broadcasts).
be achieved through *Criminal Code* provisions." The Committee recognized that the harm to women as defined by the feminist perspective was so pervasive in the media that the "re-orientation" of values necessary to improve conditions for women was beyond the scope of legal effectiveness. In accordance with this view, Canada should encourage regulation of pornography at the local level. This type of regulation gives women the freedom to protect their own values and make their own distinctions between art and obscenity.

Finally, Canada should develop an objective standard to ensure consistent and reasonable enforcement procedures by customs officials to protect legitimate works of art and literature from arbitrary seizures at its borders.

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