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THE PAPER TIGRESS: CANADIAN OBSCENITY LAW 20 YEARS AFTER *R V BUTLER*

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The Supreme Court of Canada's 1992 decision in R v Butler was viewed by its supporters and its critics as having important and far-reaching consequences. In fact, a survey of the available obscenity cases prosecuted after Butler demonstrates that the offence is rarely used to target sexist and sexually violent pornography, with only one reported conviction in the past fifteen years. There are a number of possible reasons for this outcome, including the normalization and pervasiveness of sexual violence against women and an undue narrowing of the harms identified in Butler. This article examines the limited use of the obscenity offence from 1992-2012 and calls for a renewed consideration of how to address the harms of pornography consistent with a commitment to sex equality.

Tant les partisans que les opposants de la décision rendue par la Cour suprême du Canada en 1992 dans l'arrêt R c Butler, étaient d'accord pour dire que ce jugement aurait des conséquences importantes et une portée considérable. En réalité, une étude des causes portant sur l'obscénité, qui ont été instruites à la suite de l'affaire Butler, démontre qu'on fait rarement appel à l'infraction connexe pour cibler la pornographie caractérisée par le sexisme et la violence sexuelle. De fait, au cours des quinze dernières années, une seule déclaration de culpabilité a ainsi été rapportée. De nombreuses raisons expliquent ce

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résultat; notamment, la normalisation et l'omniprésence de la violence sexuelle à l'endroit des femmes et le fait que l'on minimise, de façon injustifiée, l'importance des effets nuisibles de la pornographie, tels qu'ils ont été identifiés dans l'affaire Butler. Le présent article examine l'utilisation restreinte du recours à l'infraction relative à l'obscénité de 1992 à 2012, et demande que l'on se penche à nouveau sur les façons de s'attaquer aux torts causés par la pornographie d'une manière qui soit compatible avec l'engagement pris en faveur de l'égalité des sexes.

1. Introduction

In February 1992, the Supreme Court of Canada upheld the *Criminal Code* prohibitions on making and distributing obscenity against a constitutional challenge based on the protection of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*.¹ The Supreme Court held in *R v Butler* that the definition of obscenity in section 163(8) of the *Criminal Code*, properly interpreted, restricted expression but was nonetheless a reasonable limit under section 1 of the *Charter*.² In its decision, the Supreme Court directly acknowledged a reasoned basis for arguments that pornography could be harmful to women and to sex equality, and that harm to women was harm to society as a whole.³

Reaction to the decision from both academic and popular commentators was mixed, but mostly critical.⁴ Critics of the decision predicted that the test adopted by the Supreme Court would be difficult to apply, leading to over-prosecution, a chilling effect on sexual expression, and discrimination against sexual minorities including gay men and lesbians.⁵

¹ *R v Butler*, [1992] 1 SCR 452 [*Butler*]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b)

² *Butler*, at para 123; *Criminal Code*, RSC 1985, c C-46, s 163(8)

³ *Ibid*, at para 50.

⁴ See the discussion *infra* at notes 39-44 and accompanying text.

⁵ The application of the definition of obscenity to the imporation of gay and lesbian pornography was considered by the Supreme Court in 2000 in *Little Sister's Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 [*Little Sister's*]. That decision also engendered considerable scholarly and popular commentary; see Janine Benedet, "Little Sisters Book and Art Emporium v Minister of Justice: Sex Equality and the Attack on *R v Butler*" (2001) 29 Osgoode Hall LJ 187 [Benedet, "Little Sisters"]; Bruce Ryder, "The Little Sisters Case, Administrative Censorship, and Obscenity Law" (2001) 39 Osgoode Hall LJ 207; Jo-Anne Pickel, "Taking Big Brother to Court: Little Sisters Book and Art Emporium v Canada (Minister of Justice)" (2001) 59 UT Fac L Rev 349; Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler" (2003) 36 UBC L Rev 77;

Comparatively little consideration, however, has been given to whether *Butler* would lead to positive outcomes for women's equality in its ostensible application to commercial adult pornography marketed to a heterosexual male consumer. In this article, I consider the courts' application of *Butler* in the twenty years since it was decided, with a focus on the type of commercial heterosexual pornography that was identified in the case as potentially harmful and degrading to women.⁶ In particular, I ask whether and how the obscenity law interpreted and upheld as constitutional in *Butler* has been used to respond to those concerns. The debates about whether pornography has negative effects, what they are, and whether attempting to use law to address them does more harm than good, are voluminous. While I consider this question at various points in this article, my purpose is largely to consider a different question, namely, if one starts from the position that pornography can be both harmful to the pursuit of sex equality and merits some legal response, did *Butler* contribute to that end and, if not, why not?

A review of available sources shows only a small number of prosecutions for such material post-*Butler*, and even fewer convictions. By any measure, *Butler* did not lead to a new era of using the criminal law to recognize the harms of pornography to women. In this article, I consider a number of possible explanations for the disinterest in prosecuting such cases and the low number of convictions, despite the existence of a precedent that could have facilitated such a result. I reject the claim that technological advances have made such prosecutions too difficult or irrelevant, as well as the assertion that the link between pornography and violence is so contested that it has effectively been discredited. Instead, I offer two other explanations: first, that the increasing normalization of sexualized violence in society makes it difficult for judges and juries to identify materials that are legally "obscene," and second, that the description of pornography's harms was too narrowly cast in *Butler*.

Those of us who supported the approach in *Butler* find ourselves in the unpalatable position of having a legal framework labelled as feminist that is blamed for various negative outcomes but almost never applied to the kinds of materials that cause the most concern. In addition, denial persists that the production and consumption of violent, misogynistic and explicitly sexual materials has any negative consequences for equality between men and women. In this article I use *Butler*'s twentieth anniversary as an opportunity to reflect on the reasons for the criminal law's limited

Aleardo Zanghellini, "Is Little Sisters Just Butler's Little Sister?" (2004) 37 UBC L Rev 407.

⁶ For the sake of simplicity, when I use the word "pornography" in this article, unmodified, it is this category of materials to which I am referring.

application to the commercial pornography market. Finally, in considering where we might go from here, I note the promise of recent developments in English laws that might serve as a model for Canada, while recognizing their potential to replicate the pitfalls of our current approach.

2. *Changing Understandings of Pornography Prior to Butler*

The *Criminal Code* defines obscenity in section 163(8) as the “undue exploitation of sex”⁷ The Code does not prohibit the possession of obscenity, but only its making or distribution.⁸ In the first decades of the twentieth century, policing of obscenity was predominantly based on an assessment of whether the materials contravened public morals. The history of obscenity prosecution prior to *Butler* has been amply considered in other works and only a brief summary of that history is provided here.⁹ Put simply, the test for obscenity came to be determined by the application of the “community standard of tolerance.” The use of this test was designed to convey that the standard was not what the right-thinking member of the community would approve of for himself, but what he would tolerate others seeing.¹⁰

By the 1970s, public concern about the harmful effects of pornography began to be expressed in terms other than immorality. The rise of mass-produced pornographic magazines and films coincided with the burgeoning women’s liberation movement. Some of the early writers on women’s liberation recognized that the presentation of women in pornography as sexual objects corresponded with the discriminatory treatment they experienced in society, including at the hands of men who considered themselves “radicals” on the progressive left. They began to ask hard questions about whether pornography was really a harmless private male pastime and a reflection of sexual liberation, as its supporters claimed, or rather a re-inscribing of patriarchal sexual norms to generate large profits that flowed almost exclusively to men. One of the first women to make this point was writer Robin Morgan, who argued:

[Marital rape] is less shocking if it can be realized and admitted that the act of rape is merely the expression of the standard, “healthy,” even encouraged male fantasy in

⁷ *Criminal Code*, *supra* note 1 s 163(8).

⁸ *Ibid*, ss 163(a) and (b). The offences are hybrid offences with a maximum penalty of two years’ imprisonment when prosecuted by indictment.

⁹ See eg Kirsten Johnson, *Undressing the Canadian State: The Politics of Pornography from Hicklin to Butler* (Halifax: Fernwood Publishing, 1995); Richard Jochelson and Kirsten Kramar, “Governing Through Precaution to Protect Equality and Freedom: Obscenity and Indecency Law in Canada After *R v Labaye* [2005]” (2011) 36:4 *Can J Soc* 283.

¹⁰ *R v Towne Cinema Theatres Ltd*, [1985] 1 SCR 494 at paras 33-34.

patriarchal culture – that of aggressive sex. And the articulation of that fantasy into a billion dollar industry is pornography.¹¹

Women began to consider whether the use of pornography by men as a masturbatory aid might contribute to sexual violence against women.¹² This analysis was much more complex than simply asserting that pornography incited men to rape. Andrea Dworkin, in particular, saw the violence done to women in pornography as purporting to channel men's aggression away from each other:

The utopian male concept which is the premise of male pornography is this – since manhood is established and confirmed over and against the brutalized bodies of women, men need not aggress against each other; in other words, women absorb male aggression so that men are safe from it.¹³

Most importantly, these early critics also raised questions about harms to the women used to make pornography, linking this form of commercial sexual exploitation to prostitution. For example, Catharine MacKinnon noted in an early work:

The experience of the (overwhelmingly) male audiences who consume pornography is therefore not fantasy or simulation or catharsis but sexual reality: the level of reality on which sex itself largely operates. To understand this does not require noticing that pornography models are real women to whom something real is being done, nor does it even require inquiring into the systematic infliction of pornographic sexuality upon women, although it helps.¹⁴

Feminist critiques of pornography offered a variety of views on the role of the state in addressing the harms of pornography through law. Some supported resistance to the industry outside of law, through protests, boycotts, civil disobedience and consciousness-raising.¹⁵ Others also saw

¹¹ Robin Morgan, "Pornography and Rape" in *Going Too Far: The Personal Chronicle of a Feminist* (New York: Random House, 1977) at 163-69.

¹² One of the earliest feminist scholars to argue for such a connection was Diana Russell; see "Pornography and Rape: A Causal Model" (1988) 9 *Political Psych* 41.

¹³ Andrea Dworkin, "The Root Cause" in *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Harper and Row, 1976) at 102-107.

¹⁴ Catharine MacKinnon, "Not a Moral Issue" (1984) 2 *Yale L & Pol'y Rev* 321 at 327-28. See also Susan Griffin, *Pornography and Silence: Culture's Revenge Against Nature* (New York: Harper, 1980) at 86 ("... the whorehouse is simply an obscene illusion acted out in space and time; it is four dimensional pornography").

¹⁵ Griffin, *ibid.* See also Margaret Stafford, "Fighting Against Violent Pornography" *Associated Press* (23 February 1985), online: AP News Archive <www.apnewsarchive.com> for a discussion of the actions of Melissa Farley and Nikki Craft as an example of civil disobedience protesting against violent pornography.

a role for law but rejected the use of criminal law, and obscenity law in particular, for combating pornography.¹⁶ These scholars and activists tended to favour the availability of civil remedies for breaches of women's human rights, embodied in the civil rights anti-pornography ordinance later invalidated as unconstitutional in *American Booksellers v Hudnut*.¹⁷ Still others also supported, in addition to civil remedies, the reframing of criminal obscenity law to recognize the harms of pornography to women.¹⁸

These were timely and provocative analyses. The debates they engendered were the subject of considerable public attention in the 1980s and 1990s.¹⁹ The mainstream descriptions of the debate, however, often reduced the concerns raised by feminists to the question of whether pornography causes men to rape.²⁰ This equation was bolstered by the release in 1986 of the Meese Commission Report in the United States, which used some language consistent with feminist arguments and considered that such a link was supported by available social science

¹⁶ This critique mostly focused on US obscenity law, which defined obscenity in terms of the appeal to the prurient interest. MacKinnon observed: "If part of the kick of pornography involves eroticizing the putatively prohibited, obscenity law will putatively prohibit pornography enough to maintain its desirability without ever making it unavailable or truly illegitimate;" see "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" (1983) 8 Signs 635 at 644.

¹⁷ 771 F2d 323 (7th Cir, 1985), aff'd 475 US 1001 (1986).

¹⁸ Andrea Dworkin disagreed with LEAF's position defending the constitutionality of the criminal obscenity provisions in *Butler*. Catharine MacKinnon, although deeply critical of American obscenity law, advised and supported LEAF's counsel in *Butler*; see Catharine A MacKinnon and Andrea Dworkin, "Statement on Canadian Customs and Legal Approaches to Pornography" in Diane Bell and Renate Klein, eds, *Radically Speaking: Feminism Reclaimed* (North Melbourne, Vic: Spinifex Press, 1996) 218 at 219. See also Karen Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9 Can JL & Soc 168.

¹⁹ In Canada, this debate was reflected in Paul Fraser, "Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution" (Ottawa: Minister of Supply and Services, 1985).

²⁰ For example, newspapers from this time abound with articles debating whether pornography causes rape and referencing the women's movement's opposition to pornography. See e.g. Walter Sullivan, "Violent Pornography Elevates Aggression, Researchers Say", *The New York Times* (30 September 1980) C1; Martin Weil and Peter Eng, "Women March Against Pornography", *Washington Post* (27 September 1981) B8; Alexandra Radkewycz, "Link cited between rape and use of non-violent porn", *The Globe and Mail* (Toronto) (16 June 1986) A14; "Psychologist links rape to porn", *The Windsor Star* (24 September 1988) C8. Social scientists also took up this question. For example, Neil Malamuth (UCLA) has spent decades studying the connection between pornography and sexual aggression; for a recent publication, see Neil Malamuth and Mary Koss, "Pornography, Individual Differences in Risk and Men's Acceptance of Violence Against Women in a Representative Sample" (2012) 66 Sex Roles 427.

research.²¹ While feminist opponents of pornography were certainly concerned about the effects that pornography had on its consumers, this characterization narrowed the debate to a single question. It also reflected the assumption that the issue was whether pornography was doing something to render otherwise egalitarian men violent, avoiding the deeper and more troubling issues of male privilege and the construction of “normal” male sexuality and masculinity raised by the analyses of Morgan, Dworkin and other writers. As I argue in more detail below, this narrowing of the feminist case against pornography proved to be an important factor in limiting its influence in law.

The landscape was further complicated by continued expressions of opposition to pornography based on its threat to the traditional family and its tendency to degrade human beings by undermining essential human dignity. For example, at the outset of the Meese Report, Commissioner Miller rejected the idea that materials that were sexually explicit but non-violent and non-degrading could exist, noting that “such materials profoundly indignify the very state of marriage and degrade the very notion of sexuality itself and are therefore seriously harmful ...”²² The American Episcopal Church responded to the Meese Report by passing a resolution in 1988 in favour of “enforcing existing laws that deal with pornography which abuses the self image of children, women, and men.”²³ These critiques, in my view, had the potential to be more complex than some of their detractors were willing to recognize. The idea that human beings can be treated in ways that are degrading regardless of whether they express consent to participate, is as grounded in basic philosophy and ethics as it is in religious moralism.²⁴ Nonetheless, some supporters of pornography oversimplified and then dismissed these arguments as simply an expression of conservative religious morality²⁵ and accused anti-pornography feminists of “collaborating” or being “in bed” with the religious right.²⁶

²¹ US, Department of Justice, *Attorney General's Commission on Pornography: Final Report* (Washington, DC: US Government Printing Office, 1986) at Part 4, Chapter 3.

²² As quoted in Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* (New York: Columbia University Press, 2011) at 200.

²³ General Convention, *Journal of the General Convention of The Episcopal Church, Detroit, 1988* (New York: General Convention, 1989) at 277, Resolution 1988-C015.

²⁴ Martha Nussbaum explores this idea under the concept of objectification, for example, without religious connotations; see “Objectification” (1995) 24 *Philosophy & Public Affairs* 249.

²⁵ This is certainly the case that Strub makes in his book, *supra* note 22.

²⁶ In Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way* (Cambridge, Mass: Harvard University Press, 1997) at 9-11, the authors make explicit their goal of dispelling the myths created to discredit their movement by publishing the full evidentiary

Thus concerns about pornography and its effects in the two decades prior to the *Butler* decision came from different sources and overlapped in different ways. These arguments went beyond a restatement of the idea that certain forms of sexuality, or their depiction, could deprave or corrupt human morals, although that conviction undoubtedly persisted among some of pornography's detractors. In particular, this feminist analysis was a new way of understanding pornography and its impact on society.

These critiques were reflected to some degree in the Canadian case law through a test adopted by some courts that pornography was obscene if it was degrading and dehumanizing to others, and in particular to women.²⁷ This test appeared to accept that materials that portrayed women in sexually servile positions were degrading not only to the participants, but also (or even especially) to women generally. For example, in *R v Doug Rankine Co*, Borins Co Ct J rejected the argument of defence counsel Edward Greenspan that criminalizing distribution of the films at issue would reflect endorsement of the "fashionable notion of militant feminism."²⁸ Borins Co Ct J drew the following distinction for the purposes of community standards:

In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrades and dehumanizes the people upon whom they are performed, exceed the level of community tolerance. Most of the films which I have found to be obscene fall into this category.²⁹

This test was one of the most widely quoted in subsequent cases as encapsulating the "degrading and dehumanizing" standard.

records of hearings held in US states regarding pornography law reform. While anti-pornography feminists were accused of forming reprehensible alliances, the allegation that defenders of free speech and civil liberties were collaborating with a multi-billion dollar commercial industry, or that they were in bed with pimps, did not find any traction with the progressive left.

²⁷ *R v Red Hot Video* (1985), 45 CR (3d) 36 at para 30 (BCCA).

²⁸ *R v Doug Rankine Company Ltd and Act III Video Productions Ltd*, [1983] 9 CCC (3d) 53 (Ont Co Ct).

²⁹ *Ibid* at para 37.

3. *The Decision in Butler*

Butler attempted to reconcile these different legal tests into a unified framework. The Court did this by combining the tests into a community standard of tolerance test that focused on harm to society.³⁰ This harm was described as harm that the community recognizes as incompatible with its proper functioning, including the “physical or mental mistreatment of women by men, or what is perhaps debatable, the reverse.”³¹ The Court divided pornography into three categories, pornography that included violence or used children; pornography that was degrading or dehumanizing but not violent; and pornography that was neither violent nor degrading. The Supreme Court held that in the first category, harm could be presumed; in the second, proof of harm was needed; and in the third, harm would rarely be found.³²

Once this definitional work was done, the constitutional analysis was arguably a foregone conclusion. Of course the law infringed section 2(b), given that the guarantee of freedom of expression had been defined so widely as to include any act intended to convey a meaning, and certainly any deliberately created film or photograph. A law which targeted photos and films based on their content would inevitably violate section 2(b).³³ This meant that the real *Charter* analysis would take place in section 1. The result of the section 1 analysis was dictated by the definitional exercise, which had been designed to limit the reach of the law by focusing on objective harm.

The appellant *Butler* argued that the legislation lacked a pressing and substantial objective, and that it was an attempt by the state to subjectively regulate morals through the imposition of criminal laws. To define the legislation’s objective as the avoidance of objective harm would be to adopt the “shifting purpose” doctrine, which the Court had previously rejected. The Court acknowledged that legal moralism, as an objective, was indefensible under the *Charter*.³⁴ However, all previous versions of

³⁰ *Butler*, *supra* note 1 at paras 44-46.

³¹ *Ibid* at para 59.

³² *Ibid* at para 60.

³³ The Women’s Legal Education and Action Fund (LEAF) argued unsuccessfully that materials that presented acts of violence should not be considered “expression” protected by s. 2(b), based on a *dictum* in *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 [*Irwin Toy*], which stated that acts of violence intended to convey a meaning would not be protected speech; see *Butler*, *supra* note 1 (Factum of LEAF at paras 28-31). One could consider how that argument could be recast in light of the Supreme Court’s subsequent recognition that threats of violence are not protected expression; see *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 at 585.

³⁴ *Butler*, *supra* note 2 at para 79.

obscenity legislation were directed, to some extent, at the avoidance of harm incompatible with society's proper functioning, regardless of whether "harm" was defined as moral corruption, or attitudinal harm and violence against women. The changing definition of harm constituted a permissible shift in emphasis, and not a forbidden shifting purpose.³⁵

Having defined Parliament's objective as the prevention of harm, the Court was able to establish a rational connection by pointing to the causal relationship between obscenity and the risk of harm to society at large. While the evidence pertaining to a direct link was inconclusive, the Court adopted the approach taken in *Irwin Toy Ltd v Quebec*, noting the sufficiency of a "reasoned apprehension of harm"³⁶ regarding exposure to obscene materials.

Minimal impairment was met on the grounds that non-violent, non-degrading erotica and material with artistic or scientific value would not be covered by section 163. The argument that manner and place restrictions would be less intrusive was rejected; having defined the objective as prevention of violence against women and the harmful attitudinal shifts associated with exposure to pornography, merely restricting access would be insufficient to obviate the risks. Finally, the salutary effects of the ban clearly outweighed the infringement, given that the particular form of expression only appealed to "base" aspects of individual fulfillment, and was primarily economically motivated.

In practical terms, this meant a new trial for Donald Butler, the Manitoba video store owner whose entire inventory had been seized by police. Butler may have actually benefited from the decision, as a large number of pending charges against him were withdrawn, presumably because the materials were sexually explicit but not proven to be violent or degrading. Butler was ultimately convicted in relation to some videos and given a six-month conditional sentence.³⁷

4. *Reacting to Butler*

Butler's own case is an example of the paradox of the *Butler* decision, in that the law as newly defined appeared to significantly liberalize the

³⁵ *Ibid* at paras 84-86.

³⁶ *Ibid* at para 107, applying the test developed in *Irwin Toy*, *supra* note 33, which held that section 1 of the *Charter* required the government to demonstrate a "reasonable basis" for the harm it sought to address in order to justify a s 2(b) infringement (at para 81).

³⁷ He died of a heart attack in 1994; see Gay Abbate, "Donald Butler Owner of sex shop lost landmark case", Obituary, *The Globe and Mail* (13 July 1994).

availability of sexually explicit materials, in comparison to the previous test. Possession of obscenity, no matter how violent or degrading, had never been criminalized, and now it was legal to sell or distribute any sexually explicit material involving adults, regardless of the acts depicted, so long as they were not degrading, dehumanizing or violent. The previous approach to prosecuting obscenity, which in some jurisdictions included arrests for the sale of any materials presenting full intercourse, would have to be abandoned.³⁸

While this liberalization of access was noted by some commentators,³⁹ overall the scholarly and popular response to the decision was critical and predicted negative consequences from the ruling. Many of those critics blamed feminists or “radical feminists” for promoting the approach adopted in *Butler*, with a particular focus on the submissions of the intervener Women’s Legal Education and Action Fund (LEAF).⁴⁰

Those criticisms fell into three overlapping categories. It was argued that the new standards were too vague and could lead to the chilling or repression of all manner of sexual and other expression. It was predicted that the courts would apply the language of degradation and harm to women to re-inscribe conservative morality. In this critique, playing on the idea of radical feminism as anti-sex, feminists became the new thought police.⁴¹ For example, Brenda Cossman asserted that “when we scratch beneath the surface, we find a conservative sexual morality that sees sex as bad, physical, shameful, dangerous, base, guilty until proved innocent, and redeemable only if it transcends its base nature.”⁴² Second, it was claimed

³⁸ For a survey of the kinds of materials caught by what the Court describes as the “dirt for dirt’s sake” approach, see *R v Pereira-Vasquez*, (1988) 43 CCC (3d) 82 (BCCA).

³⁹ See “Briefly”, *The Ottawa Citizen* (9 December 1993), A3, which notes the withdrawal of 60 to 70 obscenity charges against Randy Jorgensen (the owner of several Ontario Adult Video stores) following the release of *Butler*.

⁴⁰ LEAF’s factum can be found in Women’s Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) at 201.

⁴¹ Nadine Strossen, *Defending Pornography, Free Speech, Sex, and the Fight for Women’s Rights* (New York: New York University Press, 1995) at 60, 199 and 201; Jodi Aileen Kleinick, “Suppressing Violent and Degrading Pornography to ‘Prevent Harm’ in Canada: *Butler v Her Majesty the Queen*” (1993) 19 *Brook J Int’l L* 627 at 673; Jack Glascock, “*Regina v Butler: The Harms Approach and Freedom of Expression*” (1996) 1:1 *Comm L & Pol’y* 117; Richard Moon, “*R v Butler: The Limits of the Supreme Court’s Feminist Re-Interpretation of Section 163*” (1993) 25 *Ottawa L Rev* 361 at 369-372.

⁴² Brenda Cossman *et al*, *Bad Attitudes on Trial: Pornography, Feminism, and the Butler Decision*. (Toronto: University of Toronto Press, 1997) at 107.

that the decision opened the door for discrimination against minority sexual practices and communities. Paul Wollaston argued that such a conclusion was not merely a misapplication of *Butler* but inherent in the decision itself, since it relied on the standards of a heterosexist community.⁴³ Finally, it was asserted that there was no reliable evidence that pornography was harmful. Jodi Kleinick argued that the studies feminists relied on as showing such a link were contradicted by later studies and that violent pornography can “have a cathartic effect, providing a release for viewers who would otherwise be predisposed to violent behavior.”⁴⁴

Of course, these criticisms were not universal. Some scholars supported the decision and endorsed its recognition of the harms of pornography to women. For example, Debra McAllister described the decision as “a milestone not only for its clarification of obscenity law, but the for the advancement of equality rights in Canada ...”⁴⁵ Ann Scales argued that the meaning of *Butler* was being distorted by critics invoking gay and lesbian rights, undermining the decision’s promise for protecting victims of violent pornography.⁴⁶

5. *Post-Butler Prosecutions*

With this background in mind, I turn to the actual impact of *Butler* on the prosecution of obscenity in Canada. In attempting to answer this question I have considered all reported and unreported obscenity court decisions as well as available news reports of arrests and convictions for adult obscenity

⁴³ Paul Wollaston, “When Will They Ever Get it Right? A Gay Analysis of *R v Butler*” (1993) 2 Dal J Leg Stud 251 at 257. See also Susan R Taylor, “Gay and Lesbian Pornography and the Obscenity Laws in Canada” (1999) 8 Dal J Leg Stud 94 at 95; Cossman *et al*, *ibid*, at 130, 141; Carl Stychin, “Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography” (1992) 16 Vt L Rev 857. For the view that this represents a misapplication of *Butler*, and also that same-sex pornography can be harmful, see Ann Scales, “Avoiding Constitutional Depression: Bad Attitudes and the Fate of *Butler*” (1994) 7 CJWL 349 at 360-61; Christopher Kendall, *Gay Male Pornography: An Issue of Sex Discrimination*, (Vancouver: UBC Press, 2004); and Zanghellini, *supra* note 5.

⁴⁴ Kleinick, *supra* note 41 at 665. For a rebuttal of this argument, see Richard Delgado and Jean Stefancic, “Pornography and Harm to Women: ‘No Empirical Evidence?’” (1992) 53:4 Ohio St LJ 1037 at 1049-51. For the argument that it obscures the harms to women used to make pornography, see Scales, *ibid* at 370 and Kathleen Mahoney, “Obscenity, Morals and the Law: A Feminist Critique” (1985) 17 Ottawa L Rev 33 at 54.

⁴⁵ Debra A McAllister, “*Butler*: A Triumph for Equality Rights” (1992) 2 NJCL 118.

⁴⁶ Scales, *supra* note 43.

occurring after *Butler*.⁴⁷ This is likely not a perfectly comprehensive list of arrests and prosecutions. For example, it would not include cases where there was an arrest, the accused pled guilty, there were no reasons for sentence recorded and the case did not attract the attention of the news media. Nonetheless, such a review gives a good indication of the extent to which the obscenity law is being enforced, and against what kinds of materials.⁴⁸ I am confident that large numbers of convictions are not being overlooked by this method, since the news media tends to find stories about the policing of pornography (adult or child) newsworthy. It is clear that police enforcement efforts have moved away from active investigation of adult obscenity. For example, the Ontario Provincial Police Project “P” unit, which was set up to investigate obscenity offences and which had the highest profile in Canada with respect to such investigations, has since the mid-1990s shifted to investigating child pornography exclusively.⁴⁹ Many other local police “vice” units, which would have been responsible for obscenity investigations, have renamed themselves anti-sexual exploitation units, with a focus on children and youth.⁵⁰ There is no evidence that police are engaging in significant policing of adult obscenity that simply does not result in charges.

This review suggests that there have been very few obscenity charges laid since *Butler*, and in particular after 1996. An even smaller subset of these cases concerned charges directed at the making or distribution of pornography that is violent or degrading to women. Many of the cases I could find involved materials that were described as presenting child pornography or bestiality. The numbers listed below were counted in the

⁴⁷ The search included all cases involving obscenity charges under the *Criminal Code* available in QuickLaw and LexisNexis as well as global newspaper database searches that included major national and regional newspapers as well as smaller local newspapers. In the first few years after *Butler*, a small number of cases of child pornography proceeded under the obscenity offence since the distribution or production on which the charges were based had taken place before the enactment of the child pornography provisions in 1993. I excluded those cases in favour of those that included at least some adult pornography.

⁴⁸ By comparison, a simple search for cases involving charges for child pornography offences under s. 163.1 of the Code in roughly the same time period (1993-2012) turns up nearly 325 distinct cases in Quicklaw and LexisNexis (counting multiple proceedings involving one accused as one case) without even resorting to a newspaper search.

⁴⁹ Remarks of Frank Goldschmidt, Ontario Provincial Police, Borders Conference: Rethinking the Line, April 20, 2013, available at <http://www.justice.gc.ca/eng/rp-pr/other-autre/op01_20-po01_20/p2b.html> (accessed September 23, 2014).

⁵⁰ See for example the description of the Vancouver Police Department Counter Exploitation Unit (formerly known as the Vice Squad) available online at <<http://vancouver.ca/police/organization/investigation/investigative-services/special-investigation/vice.html>> (last accessed September 24, 2014).

following way. Each judicial decision on obscenity charges is counted as one case and listed in the year that it was decided at first instance, regardless of the number of accused. News reports are counted only once for each case, in the year that they first appeared, and only if they did not also produce an available judicial decision.

A) Phase 1 (1992-1996)

There are several newspaper reports of obscenity charges being laid in the first couple of years following the *Butler* decision. For example, in December 1993, eight men, including two young offenders, were charged with distributing obscenity through computer bulletin boards after a 14 year old boy complained to police about something his sister had viewed.⁵¹ A search warrant against one of these accused was later quashed for failing to describe the materials sought.⁵² In 1994, it was reported that 2500 tapes were seized from Richard Roth in Stratford, Ontario. The materials were described as including children, teenagers and bestiality.⁵³ Also in 1994, it was reported that David and Karen Needham of North York, Ontario were charged for operating a mail order pornography business that sold materials involving “bestiality and violence towards women.”⁵⁴ None of these cases appears to have produced any written reasons or further media coverage. The cases in these early years are summarized in the following table:

Year	Case Reports	News Reports	Total Cases
1992	3*	1	4
1993	4	2	6
1994	1**	4	5
1995	0	1	1
1996	0	2	2
1997	0	0	0
*These cases involved charges laid before <i>Butler</i> but reasons written after the decision was released.			
**The 1994 case <i>R v Erotica Video Exchange</i> (1994), 163 AR 181 (Prov Ct) involved three separate corporate accused who were tried together.			

⁵¹ “8 Manitobans face charges in computer porn crackdown”, *The Toronto Star* (18 December 1993) A14.

⁵² *R v Jonnason*, (1993) 89 Man R (2d) 72 at para 10 (QB).

⁵³ “Pornographic tapes seized in Stratford and Toronto raids”, *The Hamilton Spectator* (10 November 1994) C8.

⁵⁴ *Ibid.*

In the first few years after *Butler*, there were two major prosecutions of pornography under the obscenity laws that did make it to court, one in Alberta and one in Ontario. Both were largely unsuccessful. In 1993, 16 video outlets in Alberta were charged with multiple counts of distributing obscene material. The charges were laid after dozens of University of Calgary law students volunteered to review videotapes from the stores and identify those that failed the community standards test as set out in *Butler*. Some of these charges, involving three retailers, made their way to court in 1994 in *R v Erotica Video Exchange*.⁵⁵ The videos that formed the subject matter of the charges involved “degrading sex with varying degrees of violence.” The trial court found them to be obscene within the meaning of *Butler*. In their defence, the three accused video stores relied on the fact that their tapes had been approved for sale by the British Columbia and Quebec Film Review Boards (Alberta had no review board of its own at this time.) Applying a defence of officially induced error, the trial judge acquitted Rogers Video and After Dark Video, which had relied on the approvals of the BC Board, noting evidence that the BC Board tried to apply the criminal standard for obscenity. The store relying on the Quebec Board, Erotica Video, was convicted because no evidence was adduced as to the standards applied in that province.

In Ontario, the Court of Appeal heard appeals in 1993 of five obscenity cases involving videos alleged to be degrading to women. In each of these cases, investigations had taken place and/or charges had been laid prior to the *Butler* decision. In *R v Jorgensen* (Scarborough), the accused was charged with selling obscene videotapes at his Scarborough “Adults Only Video” stores.⁵⁶ The tapes had been approved by the Ontario Film Review Board. At trial, Newton J, applying *Butler*, held that the tapes that combined sexual activity with violence, including sexual assault and slapping or spanking hard enough to leave marks, were obscene. She held that those tapes that presented explicit sexual activity without violence were not dehumanizing and degrading to the extent of demonstrating a substantial risk of harm and were not obscene.

In a separate case, Jorgensen was also charged in relation to tapes sold in other stores in Hamilton.⁵⁷ In that case, Mitchell J held that the materials in question, while not violent, were degrading and dehumanizing, because “they were totally devoid of anything other than the purely physical act and that the physical act was an automatic response, an automatic acceptance

⁵⁵ (1994), 163 AR 181 (Prov Ct) [*Erotica Video*].

⁵⁶ *R v Jorgensen*, [1992] OJ No 2889 (QL) (Prov Ct). Randy Jorgensen was the dominant retailer in the pornography industry in Ontario for many years; see D’Arcy Jenish, “The King of Porn”, *Maclean’s* (11 October 1993).

⁵⁷ *R v Jorgensen* (27 May 1992) Hamilton (Sup Ct).

amongst interchanging adults.” He found the materials to present a substantial risk of harm and convicted.

In *R v Ronish*, the Court found the accused not guilty of possessing obscene material for the purpose of sale.⁵⁸ Cole J found that the videos in question, which were similar to those at issue in *Jorgensen*, were not obscene. The trial judge relied in part on the surge in popularity in pornographic video stores in recent years and the fact that evidence as to a risk of harm from viewing degrading and dehumanizing materials was inconclusive. Despite evidence from a Crown expert as to a strong correlation in laboratory studies of sex offenders, he concluded:

... [T]he necessity of proof of social harm generally applies, regardless of whether the impugned material can be classified as being in the second [non-violent but degrading] or third Butler category [neither violent nor degrading]. Both Misener J. and Nosanchuk Prov. Div. J. read the reasoning of Sopinka J. as indicating that only in the clearest of cases involving material in the second category can social harm be assumed. I agree.

In essence, these are the difficulties I have with the argument of the Crown in this case. First, it is not clear to me whether the acts displayed in these films fall into the second or third Butler categories. Assuming (without deciding) that the acts displayed in these films fall into the second Butler category, and taking Dr. Marshall’s evidence at its highest, I am of the opinion (and I think that Dr. Marshall himself would probably concede) that there is no clear proof of social harm being caused by the exposure of these films, even to those who may be pre-disposed to contemplate or actually commit violence against women.

Applying a similar analysis, the trial court also acquitted the accused in *R v Hawkins*, in relation to videotapes which the court characterized as the sort of material that could be rented in any hotel room. Misener J noted that the materials presented every conceivable form of sexual activity in graphic detail, and that the video he selected showed women as seeking out sexual activity or demanding it from men as punishment for the men’s behaviour. He found the materials to be neither violent nor degrading and dehumanizing. He confirmed that while such materials would have been considered obscene prior to *Butler* as amounting to nothing more than “dirt for dirt’s sake,” the effect of *Butler* was that such materials could not be considered obscene.

The decisions in the Scarborough and Hamilton *Jorgensen* cases, *Hawkins*, and *Ronish*, along with the case of *R v Smeenk*, were appealed to

⁵⁸ (1993), 18 CR (4th) 165 (Ont CJ (Prov Div)).

the Ontario Court of Appeal.⁵⁹ The Court largely affirmed the trial decisions, but went further and also entered acquittals with respect to the videos leading to Jorgensen's convictions.⁶⁰ The Court of Appeal described the videos, with the exception of the Jorgensen-Scarborough videos, as presenting explicit sexual activity between consenting adults with little plot and without violence. The Crown argued that the materials were degrading and dehumanizing. The Crown's submissions were summarized by the Court of Appeal as follows:

... the Crown contends that in determining whether a work is degrading or dehumanizing the focus must be on the manner in which sex is treated in the context of the work in question. Degradation may be found in sexually explicit material where, for instance, people are depicted as sexual playthings existing solely for the sexual satisfaction of others, or in subordinate roles in their sexual relationship with others, or in engaging in sexual practices that would, to most people, be considered humiliating. While degrading or dehumanizing pornography differs from violent material in that there is no overt exertion of force, there are other forms of abuse, such as verbal abuse or the portrayal of people as having animal characteristics, that can render material degrading or dehumanizing. This kind of material, the Crown argues, differs from "explicit erotica" where positive and affectionate human sexual interaction between consenting individuals participating on a basis of equality is portrayed.

In the Crown's submission, once sexually explicit material is found to be degrading or dehumanizing, the substantial risk of harm to society required by *Butler* can be inferred or assumed. By reducing sexual activity to the "merely physical dimension" these films cause "attitudinal harm" in the sense that, among other things, they encourage unrealistic and damaging expectations, "contribute to a process of moral desensitization", and reinforce the view that a primary value of human life is sensual stimulation to the detriment of the values of individual dignity and responsibility.⁶¹

A number of observations can be made about these arguments. First, it is remarkable that, despite relying on *Butler*, they are entirely gender-neutral. While the Crown distinguished the materials at issue as distinct from erotica in which individuals participate on a basis of equality, no mention is made of sex inequality in the tapes, or that it is women who are in subordinate roles or subjected to sexual humiliation. Second, the arguments elide practices such as humiliation and verbal abuse with an absence of affection or the portrayal of human sexuality as animalistic or

⁵⁹ *R v Hawkins* (1993), 15 OR (3d) 549 (CA) [*Hawkins-Jorgenson*].

⁶⁰ Smeenk was convicted at trial in relation to materials shown via satellite television in a bar that included violence, necrophilia and vampirism.; see *Hawkins-Jorgenson*, *ibid*. His convictions were upheld and he did not seek leave to appeal those convictions to the Supreme Court of Canada.

⁶¹ *Hawkins-Jorgenson*, *ibid* at paras 46-47.

merely physical. Thus feminist arguments are almost entirely bypassed in favour of an approach grounded in a general appeal to human dignity.

The Court of Appeal rejected both the approach to degradation and dehumanization advanced by the Crown and the contention that proof of harm could be assumed. The Court of Appeal held that the film board approval of such films was some evidence that the community tolerates their sale and does not find them degrading and dehumanizing.⁶² While a reasoned basis for harm might be sufficient for a constitutional challenge in a section 1 analysis, individual charges required proof “that the material or type of material in question is such as to cause the harmful effects that constitute an integral element of the offence.”⁶³ Proof in relation to the specific films at issue was not required, but rather proof as to films of the same genre. Thus the convictions in *Jorgensen* (Hamilton) were overturned and acquittals entered.

The Crown’s application to the Supreme Court of Canada for leave to appeal the various acquittals was dismissed.⁶⁴ *Jorgensen* was granted leave to appeal his Scarborough convictions on the issue of the *mens rea* required to be convicted of distribution of obscenity. The Supreme Court overturned the convictions and ordered a new trial, holding that proof that the accused had knowledge of the contents of the films was required for conviction. The knowledge requirement could be satisfied, however, by proof of wilful blindness.⁶⁵ Lamer J, concurring, suggested in *obiter* that reliance on approval by provincial film review boards might, in the appropriate case, give rise to a defence of officially induced error of law.

B) Phase 2 (1998-2012)

In the fifteen years following *Hawkins/Jorgensen*, there are fewer than 10 available newspaper reports of arrests for obscenity offences.⁶⁶ Some of these reports involve obscenity charges ancillary to other offences, such as child pornography. In terms of cases proceeding to trial, I can find only three judicial decisions and one jury verdict in obscenity cases involving pornography that was alleged to be violent or degrading to women during this fifteen year period. One of these cases eventually resulted in a

⁶² *Ibid* at para 56.

⁶³ *Ibid* at para 55.

⁶⁴ Leave to appeal to SCC refused, 23913 (April 25, 1994) .

⁶⁵ *R v Jorgensen*, [1995] 4 SCR 55.

⁶⁶ I have included reports where the sexual acts were described as “bestiality” in these numbers, even though my focus here is pornography that involves women, since some of this material may involve women having sexual contact with animals for the sexual arousal of male consumers.

conviction (with a lowered sentence on appeal),⁶⁷ and three resulted in acquittals.⁶⁸ These cases are discussed in more detail below, since each of them contributes to an understanding about the reasons for the lack of prosecution of this offence. The available cases are summarized in the following table:

Year	Case Reports	News Reports	Total Cases
1998	0	0	0
1999	0	2	2
2000	0	1*	1
2001	0	0	1
2002	0	1	1
2003	0	0	0
2004	1	0	1
2005	1	0	1
2006	0	1**	1
2007	1	0	1
2008	0	0	0
2009	0	0	0
2010	0	1	1
2011	0	0	0
2012	0	0	0
* Starnet Communications, operators of online gaming and pornography sites, were raided by police. Charges were eventually laid only in relation to gambling offences; see “Police Raid Internet Firm” (Vancouver Sun Sept 21, 1999)			
** It is unclear from this report in the <i>Globe and Mail</i> whether the crimes were committed in Canada or the United States, but the lengthy jail sentences makes it highly likely that the convictions were registered in the US; see “Peddlers of rape videos set to begin jail sentences” (The <i>Globe and Mail</i> Sept 15, 2006).			

⁶⁷ *R v Smith* (2005), 76 OR (3d) 435, (2005), 198 CCC (3d) 399 (CA).

⁶⁸ *R v Price*, 2004 BCPC 103, [2004] BCJ No 814 (QL) [*Price*]; *R v Latreille*, 2007 QCCA 1330, [2007] JQ No 11274 [*Latreille*]. The case of Remy Couture is discussed in “Horror filmmaker stuck in chilling legal limbo; Canadian special-effects artist accused of corrupting morals through his work”, *The Hamilton Spectator* (1 May 2012), A6.

These numbers include criminal charges of obscenity brought in relation to gay and lesbian materials. While there was a conviction involving the lesbian magazine *Bad Attitude* soon after the *Butler* decision,⁶⁹ legal decisions on gay and lesbian pornography have been focused on the actions of Canada Customs⁷⁰ and provincial film review boards⁷¹ rather than specific criminal charges. I have not been able to find any other cases in which criminal obscenity charges were laid in relation to same-sex pornography marketed to a gay or lesbian audience.⁷²

To put these numbers in context, one can compare them to the number of prosecutions for child pornography between 1993 and 2012. Considering only available judicial decisions, there are 283 separate cases of child pornography charges available through online sources involving a final verdict. If evidentiary or constitutional rulings where the final verdict is unknown are included, the number of charges rises to 325.⁷³ The annual number of charges has increased each year since the child pornography offences were enacted. This does not include newspaper reports of cases that did not generate written reasons, which would push the numbers much higher for comparative purposes.

By contrast, it can be asserted with some confidence that adult pornography that depicts or presents sexual violence against women is clearly not an enforcement priority for police in Canada today, and it has not been a priority since at least the mid-1990s. Indeed, most of the cases in which charges were laid after the mid-1990s involved either the discovery of the material in the course of some other investigation (e.g.

⁶⁹ *R v Scythes*, [1993] OJ 537 (Ont Ct J (Prov Div)).

⁷⁰ *Little Sister's*, *supra* note 6.

⁷¹ See e.g. *R v Glad Day Bookshops Inc* (2004), 70 OR (3d) 691 (Sup Ct); *Satschko v Ontario (Minister of Government Services)*, [2007] OJ No 1600 (QL) (Sup Ct); *Ontario Film and Video Appreciation Society v Ontario Film Review Board et al* (1986), 6 LW 630-001.

⁷² While the cases involving gay and lesbian materials are important on their own terms, the focus of this paper is adult pornography marketed to male heterosexual consumers. This is not because I think that same-sex pornography cannot be harmful (I have argued elsewhere to the contrary, see Benedet, "Little Sisters," *supra* note 5), but rather because this type of pornography was the focus of the arguments in *Butler* about harm to women and my purpose here is to consider how *Butler* has been applied to these kinds of materials.

⁷³ These numbers were obtained by looking at all decisions in QuickLaw that dealt with charges of possessing, accessing, making or distributing child pornography under the various *Criminal Code* subsections of section 163.1 and excluding multiple cases involving the same accused.

gambling,⁷⁴ piracy,⁷⁵ or child pornography⁷⁶) or specific complaints to police from members of the public, some of whom wondered if they might have viewed internet recordings of rapes or murders.⁷⁷

C) Explanations for the Lack of Prosecutions after Butler

1) Degrading and Dehumanizing Pornography after Hawkins/Jorgensen

How should we understand the overall failure of obscenity prosecutions after *Butler*? The lack of successful early prosecutions, coupled with low sentences, doubtless contributed to a lack of interest in further arrests.

⁷⁴ Jeff Lee and Lindsay Kines, “Police raid Internet porn firm: Shareholders in Sarnet, an Internet gambling provider, react with a massive selloff”, *The Vancouver Sun* (21 August 1999) A1.

⁷⁵ “1,000 Plus Pirated Items Seized: Unreleased Disney Videos, CD-Rom’s, CD-I’s, Music CD’s Video Games, Computer Software Arrests and Charges Laid, More Pending”, *Canada NewsWire* (27 November 1996) 30.

⁷⁶ In 1997, two Toronto area men were charged with selling obscene material following a police raid and seizure of approximately 3000 pornographic films. Although obscenity charges were filed, the primary focus of the investigation related to the sale of child pornography; see John Duncanson, “Child porn videotapes seized”, *The Toronto Star* (18 November 1997) E2. One of the accused, Andrus Remmelkoor, was the subject of a previous child pornography raid in 1993 which also resulted in obscenity charges; see “Police seize pornographic videotapes”, *The Gazette* (Montreal) (11 April 1994) A8. In a recent case, a young offender pleaded guilty to making and distributing obscenity when he photographed the alleged group rape of a teenage girl at a house party. Originally charged with child pornography offences, he pled guilty to obscenity charges in a plea bargain; see “Teen admits to taking gang rape photos”, *The Globe and Mail* (6 December 2011), British Columbia News S3. It is worth noting that, for adult offenders, convictions for child pornography offences now lead to mandatory sex offender registration, while obscenity convictions do not. It will be interesting to see if this collateral consequence of conviction for child pornography results in more convictions for obscenity in the future.

⁷⁷ See e.g. “Jury deliberating in special-effects obscenity case: Rémy Couture charged with corrupting morals over graphic online images” *CBC News* (21 December 2012), online: CBC News Canada <<http://www.cbc.ca/news/canada/montreal/story/2012/12/21/quebec-remy-couture-obscene-trial-jury.html>>. In July 2013, obscenity charges were laid against Mark Marek for allegedly posting online a video of Luka Magnotta killing and dismembering a man in Montreal. Interestingly, none of the news reports on the case indicate that the murder was presented in a sexual context, although it is unclear whether Magnotta had a sexual relationship with the alleged victim. News reports refer to the charge as “corrupting morals,” which is the heading used for the offence in the *Criminal Code* and describe it as “rarely used;” see “Edmonton gore site owner charged in Magnotta video investigation released on bail” (Global BC, July 18, 2013), online: <<http://globalnews.ca/news/723495/police-charge-edmonton-gore-site-owner-in-magnotta-video-investigation/>>.

Police were soon encouraged to turn their attention to policing child pornography, where both possession and accessing are prohibited, and where arrests regularly produced guilty pleas and convictions. In particular, the decisions in *Hawkins/Jorgensen* made it difficult to prosecute for materials classified as degrading and dehumanizing, for at least three reasons.

First, the relevance of provincial film review board approval was unclear. While a majority of the Supreme Court of Canada in *Jorgensen* held that such approval was not a defence in the manner of a lawful excuse, Lamer J's *dictum* on the availability of a common law defence of officially induced error of law suggested that it might be relied on in subsequent cases. This reasoning received the approval of the full Supreme Court in a later decision, albeit in an unrelated factual context.⁷⁸ Several of the trial judges in these early cases also relied on provincial film board approval as evidence of the community standard of tolerance, a practice approved by the Ontario Court of Appeal in *Hawkins/Jorgensen*.

Evidence as to the standards applied by film review boards suggests that some of these bodies took a fairly strict approach to the presentation of sex with violence, at least in the years immediately following *Butler*, but that videos not explicitly presenting sexualized violence were almost all approved. Films were not rejected for being degrading to women, nor were the boards interested in evidence of any harm to women used to make the films.⁷⁹

Second, the Court of Appeal did not provide any guidance on when activity that is not overtly violent will be considered degrading and dehumanizing. The Court of Appeal never analyzed the materials in a framework of sex inequality as in *Butler*, where Sopinka J noted that the appearance of consent may actually enhance the degradation of the act. The category of degrading and dehumanizing materials was treated as almost incapable of definition. The court simply assumed that the materials could be classified as falling in this category because of the absence of overt violence, and turned immediately to the scientific evidence of harm.

⁷⁸ *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec Inc*, 2006 SCC 12, [2006] 1 SCR 420.

⁷⁹ For example, I wrote to the Ontario Film Review Board to object to the approval of a screening by the Bloor Cinema in Toronto of the film *Deep Throat*, pointing out the evidence that the woman in the film had reported that her participation was coerced through physical and sexual abuse. The Board responded that it was concerned only with presentations of violence in the film, and not with evidence of violence in the making of the film. (Letter from RH. Warren, Chair, Ontario Film Review Board, September 20, 2000 on file with the author).

Finally, the Court of Appeal's decision made clear that proof of harm specific to the genre of materials at issue will be required and that harm cannot be assumed in most cases. This makes prosecutions expensive and uncertain in a domain in which there are both competing expert opinions and a small number of experts who can testify on this issue. Thus after *Hawkins/Jorgensen* the prosecution of obscenity charges involving materials that were alleged to be dehumanizing or degrading, but did not present discrete acts of violence accompanying the sexual act, became almost impossible. The few cases prosecuted in the years that followed all involved materials that were overtly sexually violent.

2) *Policing the Internet*

Hawkins/Jorgensen seemed to take a clear position that explicit sexual material coupled with violence can be considered obscene, so long as the distributor is aware of, or wilfully blind as to, its contents. Given that sexually violent pornography is widely available in Canada today,⁸⁰ a further explanation is needed for the lack of obscenity prosecutions involving this material. One point that is made in more recent discussions of pornography is that today it is mostly accessed through the internet, a development that could not have been anticipated when *Butler* was decided in 1992.⁸¹ At that time, the main technological focus was the video cassette player, which made possible the viewing of pornographic movies in the home. This increased substantially men and boys' access to pornographic movies, which previously had to be viewed in public theatres or arcades. Even video technology, however, required that a physical object be sold or rented in a store or via mail order. It also required such films to be submitted for provincial film board review prior to distribution.

The internet made access to pornography much easier through the digital transmission of video and photographs that no longer required any tangible connection between the vendor and the consumer. This could be accomplished between any two points in the world in seconds. The recent developments of wireless internet and portable tablet displays means that

⁸⁰ Gail Dines has written extensively about the increasingly violent nature of popular pornographic materials, arguing that what was previously considered "gonzo porn" has now gone mainstream and become highly profitable. For example, films presenting ejaculation on the face, penetration in multiple orifices or by multiple men, and expressions of pain are now much more commonplace in the most popular commercial pornographic titles; see Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010).

⁸¹ Hon John Sopinka, "Sopinka on cyberspace: A Supreme Court Justice analyses the legal issues surrounding privacy, free speech and libel on the Net", *The Ottawa Citizen* (18 September 1997) A19.

this pornography is now immediately accessible at any time in almost any location, public or private.

While these are dramatic technological developments, it would be a mistake to think that they make it impossible to police pornography, as the cases on online child pornography demonstrate. Police have infiltrated online child pornography networks, acted on tips from around the world, collaborated with other jurisdictions and developed technologies that will help them to identify offenders.⁸² Parliament has expanded the number of criminal offences applicable to sexual exploitation of young people via the internet, creating the offence of internet luring and adding the offence of accessing child pornography because of possible difficulties in applying the legal definition of “possession” to the online environment.⁸³

There is no practical reason that the same kinds of policing could not be deployed against pornography presenting adult women. There is no technological difference as compared to child pornography in terms of how to identify the material or its distributors. The problem is not identifying the materials but the relative difficulty of proving that they are obscene. Unlike with child pornography, the *Criminal Code* does not cover mere accessing or possession of adult obscenity, meaning that proof of manufacture or distribution to others (which could include posting online) is required. In addition, since adult pornographic materials may be legal in other jurisdictions, global cooperation in enforcement is less likely than for child pornography cases. Nonetheless, there are individuals and corporations with a real connection to Canada who make and distribute sexually violent adult pornographic materials. In the few cases where charges have been laid in relation to online materials involving adults, police appear to have used the same investigative techniques that they do for internet child pornography. Technological changes alone do not explain the near absence of obscenity charges.

⁸² For example, in 2011 the Canadian government passed *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service*, SC 2011, c4, which requires Internet service providers to report on-line child pornography. Additionally, the RCMP has created the National Child Exploitation Coordination Centre to facilitate investigations and prosecutions of on-line child pornography offences both within Canada and internationally; see “Fighting Child Sexual Exploitation in Canada”, online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/ncecc-cncee/about-ausujet-eng.htm>>.

⁸³ *Criminal Code*, *supra* note 2, ss 172.1, 163.1 (4.1).

3) *Pervasiveness of Pornography and the Normalization of Sexualized Violence*

In my view, a better understanding of this lack of enforcement can be gleaned from the reasoning in the small number obscenity cases since *Hawkins/Jorgensen* involving sexually violent material. These cases demonstrated that sexualized violence against women has gone mainstream. In all of these cases the defence adduced evidence about the widespread availability of similar or worse material elsewhere as relevant to the community standard of tolerance. In 2004, the British Columbia Provincial Court considered such arguments in *R v Price*.⁸⁴ The accused was charged with the creation, publication and distribution of obscenity pursuant to sections 163(1)(a) and 163(2)(a). The films in question depicted a range of violent sexual activity. One video, entitled *Rage*, involved a man urinating into a woman's mouth and using her head to scrub a toilet. The Court found that all of the videos coupled sex with violence, and as such it was possible to find that they failed the community standards of tolerance test based upon harm that may be inferred solely from their contents.⁸⁵ The Court went on to note, however, that it could still find that the totality of evidence did *not* establish that material exceeded community standards even where it could infer a risk of harm from content alone.⁸⁶

Although the trial judge found that the videos presumptively carried a risk of harm because of their combination of explicit sex and violence, he was of the view that expert evidence nonetheless raised a reasonable doubt that the material exceeded the tolerance of what ordinary Canadians would allow other Canadians to view.⁸⁷ The judge pointed to the fact that massive volumes of "pornography" that were similar to the films at issue were available to the public through the internet.⁸⁸ The judge also noted that it is possible to engage in BDSM activity in public venues well known to police,⁸⁹ and pointed to the existence of fictional works (including the film *American Psycho*) which, although presented in context of more sophisticated plots, contained extreme sexualized violence that was effectively indistinguishable from the violence in the impugned material.

The material found not to be criminally obscene in *Price* appears to be considerably more graphic and violent than the material found criminally

⁸⁴ *Price*, *supra* note 69.

⁸⁵ *Ibid* at para 79.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at para 100.

⁸⁸ *Ibid* at paras 92-93.

⁸⁹ *Ibid* at paras 99-100.

obscene a decade earlier in *Jorgensen* (Scarborough) and *Erotica Video*, where violence against women in a sexual context (such as striking of the buttocks) was found to be obscene. *Price* reasons that the broad availability of violent and potentially harmful BDSM material must mean that the Canadian public tolerates its existence and judges should not find it criminally obscene. It could equally be argued, however, that the reason the material is so freely available is because distributors are aware that courts are not enforcing the obscenity provisions. This suggests that once the market is flooded, police cannot turn the tide and begin to target such materials – the opportunity is lost because community tolerance has been demonstrated.

The argument that other similar works have not been the subject of charges is also logically weak. It should not be a bar to conviction that prosecutors are not arresting others committing the same criminal offence as the accused unless some sort of malicious prosecution argument is being advanced. Here, the accused seems to be arguing not merely that there are others involved in making and distributing similar materials, but that he is being singled out because of his minority sexual practices or “fringe” status while similar but more mainstream fare is unchallenged.

This argument only makes sense if the community standard of tolerance test is one that measures the degree of acceptance of particular materials in Canadian society on the basis of their popularity or accessibility. By the time of its 2005 decision in *R v Labaye*,⁹⁰ however, which dealt with the related offence of public indecency, the Supreme Court made clear that the court was to focus only on objectively measurable harms, and not the tolerance of the community for particular sexual acts based on factors other than harm.⁹¹ The endorsement of the community standards test in *Butler* led some commentators to express concern that *Butler* was conservative morality concealed in feminist rhetoric. In fact, the case law suggests the opposite, in that rhetoric of sexual liberalism or tolerance is being used to re-cast sexual violence against women into a form of sexuality whose expression must be protected, somewhat paradoxically, both because it is a minority sexual practice and because it is pervasively “normal.”

In *Price* the defence took great pains to present “BDSM” as a sexual orientation or sexual practice that was engaged in by regular people in contexts that were respectful and consensual. Expert evidence was called to support the claim that the sexualisation of pain was part of “normal” human sexuality for many people. The argument seemed to be that if

⁹⁰ 2005 SCC 80, [2005] 3 SCR 728.

⁹¹ *Ibid* at paras 21-22, 33, 60, 62-63.

BDSM could be labeled “normal,” and the films in question labelled as part of that genre, then to convict where films presenting similar acts were not prosecuted in other contexts amounted to persecution of a minority sexual practice. The Court seemed to follow this line of reasoning in acquitting Price, stating that “the contents of the [materials alleged to be obscene], coupled with their wide spread availability, satisfies me that Canadians, *for better or for worse*, tolerate other Canadians viewing explicit sexual activity coupled with graphic violence.”⁹² The Court seemed to accept that any sexualized violence could be categorized as BDSM so long as the participants paid to appear in the film consented to be there.

This reasoning would make the obscenity provisions applicable to nothing except perhaps an actual snuff film. It is hard to imagine that this was *Butler*’s intent, nor does this seem consistent with the definition of BDSM sexual practices advanced by their proponents.⁹³ Certainly the Supreme Court in *Butler* did not limit its definition of obscenity to cases in which it is proven that the woman presented was actually forced. The recurring problem is that violence against women disappears when it is sexualized – it becomes sex and not violence and the harm becomes invisible.

A similar argument was made in the trial of Rémy Couture in Montreal on obscenity charges in 2012. Couture was arrested in October 2009 after an internet viewer in Germany contacted police about films posted on Couture’s website of teenage girls and young women being sexually tortured.⁹⁴ The person reporting the videos thought that they might be real and reported them to police. Couture said that the women in the films were paid actresses and that he was trying to promote his career as a special effects expert and horror filmmaker. Although there were concerns that some of the women appeared to be girls under 18, this was apparently not proven at trial. After many delays, the trial finally proceeded in front of a judge and jury and Couture was acquitted.

⁹² Price, *supra* note 69 at para 99 [emphasis added].

⁹³ It is beyond the scope of this article to debate the harms of sadomasochistic sexual activity. However, it appears clear that not every combination of violence and sexual activity could fall under this label, even for its proponents. Materials that do no more than present a woman being raped because she deserves it would not seem to be part of this genre. Nor would the act of choking someone into unconsciousness for a sexual purpose; see Karen Busby, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24 CJWL 328.

⁹⁴ “Trial begins for Quebec gory filmmaker, accused of corrupting morals with sexually explicit horror films”, *Canadian Press* (12 December 2011), online: National Post (Canada) <<http://news.nationalpost.com/2012/12/11/trial-begins-for-quebec-gory-filmmaker-accused-of-corrupting-morals-with-sexually-explicit-horror-films/>>.

It appears from news reports that Couture presented himself, if not as a sexual minority, then as an artistic one. He pointed to popular horror movie franchises such as *Saw* and *Hostel*, which include graphic scenes of the sexual torture of young women, but are screened in mainstream cinemas. He argued this was evidence that his films were not different from what is tolerated in the community. *Butler's* critics were concerned about sexual minorities, specifically gays and lesbians, being targeted in the application of the obscenity laws because their sexual practices would reflexively be considered harmful simply by virtue of not being understood by the mainstream. What has actually happened, however, is that the men accused in these cases have secured acquittals by pointing to the prevalence of misogynistic sexually violent material as part of the mainstream. The community standards test has allowed the pervasiveness of pornography to become its own defence. *Price* goes further and equates sexual violence against women with a sexual orientation or identity. Sexual violence against, and the sexual humiliation of, women is incorrectly equated with BDSM, which is in turn analogized to homosexuality in terms of its benefits to the individual. The analysis and arguments in both cases are mostly gender-neutral, even though it is women who are on the receiving end of the violence. An analysis of the prevalence of sexual violence against women in society, or the ways in which it reflects and reinforces sex inequality, is entirely absent from the decision-making.

A similar approach is evident in the post-*Labaye* case of *R v Latreille*, in which the accused was charged for taking photographs of a woman who was naked, bound and had clothespins on her breasts.⁹⁵ While the lower courts convicted on the basis that the photos were degrading to women, the Quebec Court of Appeal in brief reasons overturned the conviction and acquitted Latreille. The Court of Appeal relied on the fact that there was no evidence that the woman had not consented and that it was unlikely that viewers would be exposed to the photos without their consent. As such, there was no proof of harm to the participants or to society that might result in harm incompatible with the good functioning of society.⁹⁶

4) *The Need for Scientific Proof of Harm*

There is only one judicial decision on obscenity since *Butler* in which a finding of harm has been upheld on appeal. In *R v Smith*, the accused was charged in Ontario for operating a website that distributed photographs and films of naked women, presented as being killed by men by various means, and who were shown with wounds from arrows, bullets and knives.⁹⁷ The

⁹⁵ *Latreille*, *supra* note 69.

⁹⁶ *Ibid* at paras. 5-7.

⁹⁷ *R v Smith*, [2002] OJ No 5018 (Sup Ct) at paras 5-7 [*Smith* No1 Sentencing].

women were paid to participate and access to parts of the website was sold to subscribers. The site also contained written material describing violent sex and mutilation. Smith summed up the purpose of the site as “to show beautiful women getting killed.”⁹⁸ Violence against the women was presented as justified because of their loose morals or sexual manipulation of men. Smith was convicted by a jury and sentenced to a \$100,000 fine and three years’ probation during which he was not to access the internet or be associated with any website. In sentencing Smith, Pierce J noted that Smith had continued to own and operate the websites and to draw attention to the charges. Pierce J summarized the evidence of the Crown as follows:

The Crown called expert psychological and psychiatric witnesses. They testified as to the risk of harm to society from both the visual and written materials. Evidence that persons who were predisposed would be attracted to the materials was not contradicted. These include sexual sadists, and men aroused by sexual violence or domination over women.

As well, expert psychological evidence established that Internet exposure is more powerful, as an individual may select his material and focus on it in the privacy of his home as often as he likes. Deviant fantasies and cognitive distortions are reinforced when there is validation from others on the net who share those fantasies.

Crown witnesses testified that this exposure has the potential to change attitudes toward women, such that violence toward women is tolerated, and is seen as entertaining.

A further risk of harm is the effect that the exposure of women to sexually violent material has, where women are the victims. That is, it may have a negative impact on their self-esteem, as well as on their sense of safety or equality.

Finally, the Crown’s evidence established that access to these materials by adolescents could have a powerful negative effect⁹⁹

Defence experts testified that the works were part of an identifiable horror genre. Both defence and Crown witnesses agreed that the targets of sexual violence in such films are invariably women. Pierce J condemned this trend in the following terms:

These are not victimless crimes. The undue exploitation of sex and violence directed at women is a poison in our society. It comes to us increasingly in films, literature and on the Internet. It has become acceptable and increasingly graphic entertainment. It

⁹⁸ *Ibid* at para 4.

⁹⁹ *Ibid* at paras 14-18.

has the power to change our perceptions, our attitudes toward each other. It may even prompt us to act on those negative attitudes. And then to justify ourselves.

This poison threatens to overrun our conviction that the individual has dignity and worth.¹⁰⁰

She noted that Smith had chosen profit over dignity, and had a house, boat, new vehicle and vacations despite claiming to have no income. It is striking how different the language and the approach is in this case as compared to *Price* with respect to the prevalence of sexually violent material.

Smith appealed these convictions to the Ontario Court of Appeal. The Court of Appeal upheld the conviction relating to the written material, but overturned the convictions relating to the audiovisual material and ordered a new trial.¹⁰¹ The Court of Appeal found that the trial judge had erred in her charge to the jury in relying too directly on the definition of “explicit sex” from the child pornography offence, which could include depictions of nudity. It was wrong to analogize from this to conclude that depictions of adult nudity, with nothing more, amounted to “explicit sex” for the purposes of the obscenity provision. Instead, the jury needed to consider the entire circumstances and context, including the parts of the body depicted; the nature of the depiction; the context of the depiction; the accompanying dialogue, words or gestures, and all other surrounding circumstances.¹⁰²

The Court of Appeal noted that violence alone is not obscene, even if some people derive sexual gratification from it. While the Crown pointed to numerous features of the site that could meet the definition of explicit sex, the danger was that the jury might have focused on the nudity alone. The Court of Appeal held that the appropriate sentence for the remaining convictions for the stories was a \$2,000 fine, with no term of probation.¹⁰³

Smith was retried on the charges relating to the audiovisual material and convicted again by another jury after a three-week trial. He appealed these convictions and his sentence of a \$28,000 fine and two years’ probation with community service. The Ontario Court of Appeal dismissed the appeals from conviction and sentence.¹⁰⁴ In upholding the sentence,

¹⁰⁰ *Ibid* at paras 31-32.

¹⁰¹ (2005), 76 OR (3d) 435 at para 70.

¹⁰² *Ibid* at para 46.

¹⁰³ Applications for leave to appeal and cross appeal to the Supreme Court of Canada were dismissed, [2005] SCCA No 464.

¹⁰⁴ [2012] OJ No 5968 (CA). A further application for leave to appeal to the Supreme Court of Canada was dismissed on July 4, 2013: 2013 SCCA No 70.

the Court of Appeal referred to the sentencing judge's conclusion that Smith had remained unrepentant and possessed of "a certain defiance" toward the juries' conclusions.¹⁰⁵

Why were two juries willing to convict Smith when Price (and Couture) were acquitted for material that was even more graphically violent and explicitly sexual? There are a number of possible explanations. Unlike in *Price*, Smith did not attempt to prove that his materials were part of "normal minority" sexual activity. Instead, he tried to place them within the horror/fantasy genre and argue that they had artistic merit and were not explicitly sexual. In both of Smith's trials, the Crown called experts Peter Collins and Neil Malamuth, whose work on this issue goes back three decades, and who have testified in many of these cases,¹⁰⁶ to give evidence as to the potential harms of the materials in question. In *Price*, the expert evidence for the defence focused on whether the community would tolerate the materials notwithstanding a risk of harm. Smith did not call experts to offer a contrary opinion on the potential of the material to cause harm or on the community standard of tolerance.

While these cases were decided in different provinces, the courts are not really purporting to apply different tests. Nonetheless, the results are not consistent or predictable. The Crown cannot possibly hope to prosecute obscenity charges with any degree of reliance on the outcome. The only possibility of conviction would seem to be where materials clearly mix explicit sexual activity with violence, but only if the distributor or maker does not claim that they are part of BDSM sexual practices; where uncontradicted expert evidence of harm is accepted; and where the accused does not point to widely accessible similar materials elsewhere. Given the cost of such prosecutions, I expect *Smith* to remain an anomaly rather than to be the catalyst for a new wave of prosecutions in Canada.

These cases might also cause us to question the way in which the recognized harm of pornography has been limited to scientific proof of increased likelihood of sexual violence or other mistreatment of women. There is a large body of literature arguing for and against aspects of this claim.¹⁰⁷ It is hardly surprising that feminists concerned about the

¹⁰⁵ *Ibid* at para 42.

¹⁰⁶ Peter Collins testified as an expert witness in *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 ; *R v Henricks* (1999), 10 BCTC 81 (LexisNexis) (BCSC); *Re Paintings, Drawings and Photographic Slides of Paintings [by Eli Langer]* (1995), 123 DLR (4th) 289 (Ont Ct J), leave to appeal to SCC refused, [1995] SCCA No 290; *R v Pecciarich*, (1995), 22 OR (3d) 748 (Ct J). Neil Malamuth testified as an expert witness in *Little Sister's*, *supra* note 5.

¹⁰⁷ There are many interesting and nuanced studies that explore the ways in which consumption of certain kinds of pornography or sexually violent media can affect and/or

pornography industry would focus on the evidence that such a link exists. This approach has the advantage of appealing to dominant conceptions of proof through scientific method. Focusing on the harm to women used to make pornography, by contrast, opens up debates identical to those so prominent in discussions about prostitution as to who is and is not “choosing” to participate. This is much less concrete and certainly more difficult to prove in court. Focusing on changes in men’s attitudes towards women, sexuality and the nature of masculinity and femininity could be another approach to harm. However, this opens the door to “slippery slope” free speech arguments that pornography is indistinguishable from sexist advertising or music videos.

Karen Boyle has argued that the focus on proof of an increased likelihood of sexual violence is misguided and damaging for anti-pornography feminism because it obscures the responsibility of men for their acts of violence:

While pornography may be an influence it is not the abusive agent. The men who make and use pornography *choose* to accept its message To hold individual perpetrators accountable for their actions while nevertheless examining the broader social and cultural conditions in which that violence is possible, it is necessary to move beyond the effects discourse. Such an approach has to begin – not, as effects research and much anti-pornography work does – with the pornographic text, but with the existence of real world violence. This is a key difference that makes it far more difficult to negate the experiences of real women, men and children and to dodge the issue of personal accountability. We are no longer asking whether pornography causes violence – or is, in *all* circumstances a record of abuse – but examining how specific

reinforce the attitudes of men and boys about women and sex. Some examples include Drew A Kingston *et al.* “Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use Among Sexual Offenders” (2008) 34 *Aggressive Behavior* 341; Colleen Bryant, “Adolescence, Pornography and Harm” (2010) 29 *Youth Studies Australia* 18; Christina Mancini *et al.* “Pornographic Exposure over the Life Course and the Severity of Sexual Offences” (2012) 40 *J Crim J* 21. This research should not be entirely surprising; it is uncontroversial that we are influenced by the media we consume, that the effect is greater for children and youth, that saturation is associated with desensitization and that immersive media experiences can have a greater impact. For a key study in this regard, see Craig A Anderson *et al.* “Violent Video Game Effects on Aggression, Empathy and Prosocial Behaviour in Eastern and Western Countries: A Meta-Analytic Review” (2010) 136 *Psych Bull* 151. It seems odd in the face of this evidence that so many people argue strenuously that pornography has absolutely no effect on sexual behaviour or attitudes, often through correlation studies or analysis of narrowly drawn exposure experiments, as if acknowledging any effect would amount to conceding defeat to feminists. For an example, see Milton Diamond, Eva Jozifkova and Petr Weiss, “Pornography and Sex Crimes in the Czech Republic” (2011) 40 *Arch Sex Behav* 1037.

pornographic texts are made and used by producers and consumers in particular ways that are harmful to others.¹⁰⁸

I agree with Boyle that such an approach is much truer to the actual analysis of anti-pornography feminists. However, it is probably not a workable blueprint for the criminal law, which depends less on specificity and more on categorization. It does, however, support the kinds of civil claims and remedies that could allow the stories of individual women to be heard. It could also support paying attention to the presence of pornography in actual sexual assault cases, and recognizing its frequent role in so-called “cyberbullying.”¹⁰⁹

6. *Looking Forward*

Securing convictions under the obscenity offences has been exceedingly difficult after *Butler*, notwithstanding the increased availability of pornography generally. Convictions have been obtained where the material overlapped with child pornography, or contained acts such as bestiality or necrophilia, but there have been almost no convictions for materials that were argued to be degrading to women or in which women were subjected to sexual violence.

What, then, might the future hold for pornography regulation in Canadian law? The present situation is in my view, untenable. We retain a legal conclusion that certain kinds of pornography can be harmful and discriminatory toward women, yet virtually none of the large quantity of materials meeting that definition can be successfully prosecuted without enormous expense, for minimal results. Feminists opposed to the pornography industry in Canada are in the unenviable position of receiving the criticism with none of the presumable benefits of such a law. This might be defensible if other fora such as human rights tribunals were being used instead, with the criminal law acting as merely a denunciatory statement of social principle, but that does not appear to be the case today. Film review boards and Canada Customs do not regulate the internet. For the materials they do review, their role is to reflect the criminal law as applied by the courts.

¹⁰⁸ Karen Boyle, “The Pornography Debates: Beyond Cause and Effect” (2000) 23 *Women’s Stud Int’l Forum* 187 at 192.

¹⁰⁹ The non-consensual distribution of “intimate images” is now criminalized by Bill C-13, the *Protecting Canadians from Online Crime Act*, SC 2014, c 31 (Royal assent 9 December 2014). This could extend to so-called revenge porn, as well as to the distribution of sexual assaults filmed by bystanders or participants.

One option might be to pass a much narrower law that applies more clearly to a smaller range of extreme pornographic materials. Taking a cue from child pornography laws, this might be extended to simple possession as well as manufacture and distribution. Such a law would presumably be more attractive to enforce in that it would provide added definitional clarity and would not require proof of distribution or an intent to distribute. England passed such a law in 2009, in sections of the *Criminal Justice and Immigration Act*.¹¹⁰

The law was passed after a public campaign spearheaded by the mother of a woman murdered in 2003 by a man who was a heavy user of violent and sadistic pornography.¹¹¹ The man had viewed this pornography immediately prior to the murder. A Home Office consultation report from 2005 noted that while the evidence was not conclusive, the government believed that such materials could cause criminal behaviour and be harmful to those involved in its production.¹¹² The same report noted that the materials, despite their widespread availability, would be considered abhorrent by most people and that they should have no place in British society. The hope in passing such a law was that, as with the child pornography law, there would be a tool for controlling materials produced in other countries and reducing some of the market for them.¹¹³

The law criminalizes the possession of extreme pornographic images or films, which are defined according to three requirements. The image must be pornographic (defined as reasonably assumed to be produced solely for the purpose of sexual arousal); it must be grossly offensive, disgusting or otherwise obscene; and it must explicitly or realistically portray a life-threatening act, an act resulting in or likely to result to serious injury to a person's anus, breasts or genitals, or a sexual act involving a corpse or bestiality. The image must be one that a reasonable person would believe involves a real human being, thus excluding drawings and animations. The section does not apply to works classified by the British Board of Film Classification. Various defences are also available in the statute.¹¹⁴ The offences are hybrid offences with no minimum penalties.

¹¹⁰ *Criminal Justice and Immigration Act 2008* (UK), c 4, ss 63-67.

¹¹¹ UK, HC, *Parliamentary Debates*, vol 464, cols 91-92 (8 Oct 2007) (David Lepper); Lorraine Fisher, "These protesters say it's their right to watch sadistic porn online. Tell that to the mother of the girl murdered by a man addicted to it ..." *The Daily Mail* (London) (3 January 2009) 28.

¹¹² UK, Home Office, *Consultation: On the possession of extreme pornographic material* (London: Home Office, 2005) at 9-10.

¹¹³ *Ibid* at 9.

¹¹⁴ These include a defence of legitimate possession; accidental possession; unwilling possession; lack of knowledge or wilful blindness; as well as limited defences for the direct participants in the material.

The law was supported by victims' rights groups and some feminist groups, as well as many members of the public. The law also attracted criticism from civil libertarians and others concerned about censorship. The fact that the pornography in question was "extreme" may have tipped the balance in favour of the law, but it did not materially change the tenor of the debates. Initial academic scholarship on the new law was also mixed, but for the most part thoughtful and not mired in blind adherence to the notion that extreme pornography was either incapable of definition or inevitably classed as valuable speech.¹¹⁵

The law has been applied most often in cases where child pornography charges have also been laid or where the materials depicted bestiality.¹¹⁶ The Crown Prosecution Service statistics on charges laid under the section between 2009 and 2012 confirm this trend.¹¹⁷ For example in 2010-2011 there were 995 cases involving allegations of bestiality images that reached a hearing, while only 170 involved pornographic materials that portrayed acts that threatened life or were likely to result in serious genital injuries.¹¹⁸ I have not been able to find any judicial reasons or newspaper articles about convictions in this second category involving harm to adult women.¹¹⁹ While it is probably still too early to draw firm conclusions about this new law, it does seem that materials that present extreme sexualized violence against women are not regularly falling within its scope, even though that was the reason the law was passed in the first place.

¹¹⁵ For a range of views, see Feona Attwood and Clarissa Smith, "Extreme Concern: Regulating 'Dangerous Pictures' in the United Kingdom" (2010) 37 *JL & Soc'y* 171; Susan Easton, "Criminalising the Possession of Extreme Pornography: Sword or Shield?" (2011) 75 *J Crim L* 391; Julia Hornle, "Countering the Dangers of Online Pornography – Shrewd Regulation of Lewd Content" (2011) 2 *Eur J L and Tech*; Paul Johnson, "Law, Morality and Disgust: The Regulation of 'Extreme Pornography' in England and Wales" (2010) 19 *Soc & Leg Stud* 147; Clare McGlynn and Ian Ward, "Pornography, Pragmatism, and Proscription" (2009) 36 *JL & Soc'y* 327.

¹¹⁶ See *R v L*, [2010] All ER (D) 56 (May), [2010] EWCA Crim 1212 ; *R v Neal*, [2011] EWCA Crim 461 [*Neal*]; *R v Toone*, [2010] All ER (D) 186 (Dec) ; *Steven Ryder v Her Majesty's Advocate*, [2013] ScotHC HCJAC 63.

¹¹⁷ Crown Prosecution Service Information Management Unit, "Freedom of Information Act 2000 Request: Statistics regarding Prosecutions under Section 63 of the Criminal Justice and Immigration Act 2008" *The Crown Prosecution Service* (11 January 2012), online: <http://www.cps.gov.uk/publications/docs/foi_disclosures/2012/disclosure_2.pdf>.

¹¹⁸ In addition, the number of hearings appears to have peaked in 2010-2011. In 2011-2012 (as of November 11, 2012), there were only 83 hearings in the endangering life/serious genital injury categories.

¹¹⁹ See *Neal*, *supra* note 116; and Caroline Davies, "Former Boris Johnson aide cleared of possession of 'extreme pornography'", *The Guardian* (August 8, 2012) online: *Guardian News and Media Ltd* <<http://www.theguardian.com/uk/2012/aug/08/boris-johnson-aide-extreme-pornography-cleared>>.

More recently, English parliamentarians have worked with internet service providers to offer support to those who want to limit the availability of pornography on their home computers and other devices linked to a home Wi-Fi network, as well as to discourage online searches for illegal materials¹²⁰. This includes introduction of default “family-friendly content filters” created by internet service providers that restrict adult material from all electronic devices accessing a Wi-Fi network. Once implemented, all home and public Wi-Fi networks would have family-friendly content filters engaged by default, though private account holders could easily deactivate the filters for home Wi-Fi networks upon request. The British government also made an appeal to internet search engine companies requesting that they introduce new measures to blacklist certain search terms or to identify obviously illegal searches in an effort to ultimately block illegal content from appearing as search results, with the threat of legislation that restricts illegal content if companies do not adopt these new measures voluntarily. Additionally, the government clarified that online pornography will be subject to the same content restrictions that apply to pornography sold in licensed sex shops, and stated that possession of rape-depicting pornography will become a new criminal offence in England, consistent with Scottish laws that already criminalize this type of pornography.¹²¹ These initiatives respond to persistent concerns about the harms of violent pornography, in particular to young people who have easy access to online materials.¹²²

¹²⁰ Cabinet Office and Prime Minister’s Office, “The internet and pornography: Prime Minister calls for action” (22 July 2013), (speech) online: Government Digital Service <www.gov.uk>.

¹²¹ *Criminal Justice and Courts Act, 2015* (UK), c 2, s 37. Other initiatives include increasing the powers of the Child Exploitation and Online Protection Centre in order to better examine peer-to-peer and file-sharing networks, and the creation of a secure database of illegal images containing digital hashtags that enable investigators to scan, block, and remove illegal images. In Scotland, s 42 of the *Criminal Justice and Licensing (Scotland) Act, 2010* ASP 13 criminalized extreme pornography which includes in its definition images of rape or non-consensual penetrative activity. For more information see “Tightening the Law: Extreme Pornography”, online: The Scottish Government <<http://www.scotland.gov.uk/Topics/Justice/crimes/pornography/ExtremePornographicMaterial>> The group CAAN (Consenting Adult Action Network) reports that there have been 5 convictions under the new law: <<http://caan.org.uk/caan-scotland/pornography-and-visual-sex/extreme-pornography-cjlb/>>. Newspaper reports suggest that cases have, as in England, focused on bestiality and child pornography.

¹²² Alexandra Topping and Zlatina Georgieva, “Protect children from internet pornography, report demands” *The Guardian* (24 May 2013), online: Guardian News and Media Limited <<http://www.theguardian.com/education/2013/may/24/protect-children-internet-pornography-report>>; Anna Richardson, “Porn: the new sex education” *The Guardian* (30 March 2009), online: Guardian News and Media Limited <<http://www.theguardian.com/education/2009/mar/30/porn-the-new-sex-education>>.

The Supreme Court's conclusion in *Butler* that Parliament had a reasonable basis for finding that certain kinds of pornography cause attitudinal harms that may contribute to the mistreatment of women by men, seemed like a victory to feminists opposing the pornography industry. This research into what happened after *Butler* shows that this has not been the case. *Butler* has only rarely been applied to adult obscenity, and almost never to pornography marketed to a heterosexual male consumer. In particular, even material that presents explicit sexualized violence against women has been found to meet the community standard of tolerance. *Butler's* critics predicted that the retention of the community standards test would serve as a vehicle for the reassertion of conservative sexual morality. In fact, the test has been used to validate materials that present the sexual degradation and violation of women in part because of the widespread availability of such materials in Canada. Pornography thus validates itself.

The English and Scottish laws targeting "extreme pornography" have the virtue of defining much more clearly the materials that are the subject of the law, rather than using a judicial interpretation of the general definition of obscenity into broad categories. Were Canada to follow this approach, a section 2(b) constitutional challenge would be inevitable. One would hope that any such law would be justified by objectives that recognize the fuller analysis of the connection between pornography and sex inequality. Alternatively, we might choose to move away from the criminal law and towards mechanisms that focus on quantifiable civil harms or media regulation. The purpose of this article is simply to call for such a conversation in light a recognition that *Butler* has not achieved its aims. For any of these approaches to achieve a measure of success, however, requires recommitting ourselves to the notion that what the pornography industry is making and selling is a product that we ought to be concerned about as part of a commitment to sex equality.

theguardian.com/society/joepublic/2009/mar/30/teenagers-porn-sex-education?INTCMP=SRCH>. For scholarly support for laws like those in place in Great Britain and Scotland see Mark Huppín and Neil Malamuth, "The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency" (2012) 23 *Stan L & Pol'y Rev* 31.