"THE DARKER CORNERS": THE INCOHERENCE OF 2(B) OBSCENITY JURISPRUDENCE AFTER *BUTLER*

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L'arrêt rendu par la Cour suprême en 1992 dans l'affaire *Butler* s'est avéré rassurant sur le plan politique, car les catégories de pornographie prohibée qu'il a établies correspondent grosso modo à ce que pensent la plupart des Canadiennes et Canadiens libéraux. Mais lorsqu'on l'examine minutieusement du point de vue juridique, l'arrêt *Butler* semble plus problématique. Le paragraphe 163 (8) fournit une définition de l'obscénité selon laquelle «est réputée obscène toute publication dont une caractéristique dominante est l'exploitation indue des choses sexuelles». Au lieu de déclarer cet article nul en raison d'une imprécision inacceptable en vertu de la *Charte*, la Cour s'est lancée dans une formulation jurisprudentielle des trois catégories de pornographie. La Cour a ensuite tenté d'établir des liens entre le préjudice, la tolérance de la société et les catégories de pornographie nouvellement créées, en se fondant sur des preuves fragiles qui relèvent des sciences sociales. Finalement, la Cour a laissé les vagues dispositions survivre à l'examen constitutionnel en appliquant les critères les plus larges aux articles 2 b) et 1. L'auteur soutient que l'arrêt *Butler* établit un critère constitutionnel de l'obscénité qui est fondé non pas sur les principes relatifs au préjudice réel,

The 1992 Supreme Court ruling of *Butler* proved to be politically soothing, as its prohibited categories of pornography correspond roughly with the views of most liberal Canadians. Scrutinized through a legal lens, however, *Butler* appears more problematic. Section 163(8) defines obscenity as a publication a "dominant feature of which is the undue exploitation of sex." Instead of striking down this section as impermissably vague under the *Charter*, the Court engaged in judicial legislation in formulating the three categories. The Court then attempted to establish, based on frail social science evidence, links between harm, community tolerance and the newly-created categories of pornography. Finally, the Court allowed the vague provisions to survive constitutional scrutiny by applying the most relaxed forms of the tests for sections 2(b) and 1. The author argues that *Butler* lays down a Constitutional test for obscenity based not on principles of actual harm, but on the judge's intuitive role as interpreter of an abstract community standard. This results in horizontally inconsistent and irrational judgement in the Courts below. Furthermore, *Butler*'s relaxed constitutional scrutiny has allowed lower Courts to uphold similarly vague

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mais sur l'intuition du juge, qui est alors l'interprète d'un norme sociale abstraite. Il s'ensuit que les tribunaux inférieurs rendent des jugements incompatibles et irrationnels. En outre, l'examen constitutionnel moins rigoureux auquel on a procédé dans l'arrêt *Butler* a permis aux tribunaux inférieurs de maintenir des lois tout aussi vagues qui criminalisaient d'autres activités de nature à «corrompre les moeurs». L'auteur conclut que bien qu'il soit louable de vouloir réprimer la pornographie, seul un examen constitutionnel complet et légitime peut justifier une intervention législative dans une société libre et démocratique.

laws criminalizing other activities 'corrupting morals.' The author concludes that while curbing pornography is a laudable goal, only through legitimate and thorough Constitutional review can legislative line-drawing be justified in a free and democratic society.

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I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather, that which purifies us is trial, and trial by what is contrary. That virtue therefore which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but excremental whiteness...

Impunity and remissness, for certain, are the bane of a commonwealth, but here the great art lies, to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work.

Milton, *Areopagitica*, 1644, Britain[1]

Much of what the table dancers did or permitted could not be clearly seen from a distance, but some could be observed from nearby tables in spite of the attempt to conceal by means of the covering blouse or shirt.

R. v. *Mara*, 1996, Ontario[2]

I. INTRODUCTION

"And the Word was made flesh..."[3] The 1992 case of *Butler*[4] transformed the impermissibly vague words of the *Criminal Code*[5] obscenity provisions into a catalogue of sexual categories. The link between some categories of pornography and the risk of harm justifies criminal prosecution. While Sopinka J. pays lip service to the principles enunciated in the *Oakes* test,[6] his *Butler* formula for the determination of illegal obscenity is ultimately more palliative than principled. This arises from three judicial sleights-of-hand which Sopinka J. performs under admittedly difficult circumstances. First, he redefines the obscenity law's unambiguously vague phrase, "undue exploitation of sex." Second, he attempts to forge links between harm, community tolerance and categories of pornography. Third, he justifies the law under a regime of minimal

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[1] J. Milton, *Areopagitica* (1644) ed. by J.C. Suffolk (Cambridge: Cambridge University Press, 1982).

[2] *R.* v. *Mara* (1996), 27 O.R. (3d) 643, 133 D.L.R. (4th) 201, 105 C.C.C. (3d) 147 (C.A.), aff'd [1997] S.C.J. No. 29.

[3] St. John 14.

[4] *R.* v. *Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449, 70 C.C.C. (3d) 129 [hereinafter *Butler* cited to D.L.R.], aff'g (1990), 73 Man.R. (2d) 197, 60 C.C.C. (3d) 219 (Man. C.A.) [hereinafter *Butler* cited to C.C.C.], rev'g 60 Man.R. (2d) 82, 50 C.C.C. (3d) 97. All references are to the Supreme Court decision unless otherwise noted.

[5] *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

[6] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*]

constitutional scrutiny. All of these machinations threaten to make a confusing area of the law even more incoherent, by tilting with rhetoric and avoiding a clear delineation of the legal debate.

Since its 1992 arrival, *Butler* has been followed sixteen times.[7] Compared and contrasted, we see a series of inconsistent and intuitive judgment calls by different courts grappling with the problems of offensive speech in a free and democratic society. The recent Ontario Court of Appeal cases of *Mara*[8] and *Ludacka*[9] keep the unpleasant complexities of constitutional scrutiny to a bare minimum in a quasi-abdication of judicial responsibility. Instead of reasoning by reference to the *Oakes* principles, the courts mechanically apply boilerplate quotations of *Butler* and then move on. This results in a constitutional test for obscenity based not on principles of actual harm, but on the judge's intuitive role as interpreter of a non-existent community standard. At the trial level, courts must judge obscenity using the unsteady tools of the *Butler* standards, along with abstract descriptions of pornography drawn from reported cases. Judges are unrepresentative of the community at large, let alone the artistic community, and thus are ultimately ill-suited to this role of village censor. Just as a sloppy kitchen attracts cockroaches, so will a slack jurisprudence attract legions of critical legal theorists denouncing the politicization of law in the very political realm of pornography.

A. *What this essay is not*

At this stage, most papers chart out a plan for their thesis. Given the prickly topic that is pornography, however, it would be prudent at this juncture to disclaim other purposes of which the paper may be prematurely accused. Such prejudgment of the impugned material is one of the central malaises arising from *Butler*, and it is hoped that this phenomenon does not arise here. This paper seeks not to apologize for pornographers, nor to blindly advocate unbridled civil liberties. Two eternal justifications for the principle of free speech are the "marketplace of ideas" and the "revelation of truth."[10] The vast bulk of what Andrea Dworkin calls the $8 billion pornography industry, however, reveals no socially enriching truths.[11] Nor should our faith in human rationality be so blind as to assume that true pornography, when its vile untruths are revealed, will simply slouch away, rejected by a righteous, rational, and

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[7] As of 7 March 1997. This essay will obviously focus on those cases where the central holdings of *Butler*, in the sphere of obscenity, pornography, and other 'moral crimes,' were applied. *Butler* also allowed the Ontario Court (General Division) to uphold broad election blackout laws under that constitution given the "apprehension of harm." *Re. Thomson Newspapers Company Limited et al. and Attorney General of Canada* (1995), 24 O.R. (3d) 109 (Gen. Div).

[8] *Mara, supra* note 2 .

[9] *R.* v. *Ludacka* (1996), 28 O.R. (3d) 19, 105 C.C.C. (3d) 565 [hereinafter *Ludacka* cited to O.R.]. Appeal to the Supreme Court of Canada refused, with costs against the defendants, 21 February, 1997: [1997] S.C.J. No. 28 (File No. 25256).

[10] F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 17-24 [hereinafter *Free Speech*].

[11] A. Dworkin, "Against the Male Flood: Censorship, Pornography and Equality," (1985) 8 Harv. Women's L. J. 1 at 10 [hereinafter *Against the Male Flood*]. Authors with the surname of Dworkin will also be referred to by their first name, given that three appear in this essay: Andrea, Ronald, and Gerald.

unscathed populace.

Nor does this essay seek to rail against judicial incompetence in Canada. Although the cases fall under criticism, the author believes the bulk of the *Butler* jurisprudence has been correctly decided, in a manner which will soothe most Canadian sensibilities. Just as *Butler* suggests measuring pornography against community standards, we can also imagine measuring laws, both legislative and judicial, against those standards. The majority of Canadians will find *Butler* and its progeny to be a seemingly reasonable family of cases. But the *Charter of Rights and Freedoms*[12] and the judiciary fail, of course, if they only protect majority values. Vague laws and minimal constitutional scrutiny will produce victims over time. Furthermore, if judges mechanically accept vague laws, and mechanically apply vague precedents, guided more through intuition than rationality, the notion of judicial review falls into disrepute.

B. *What this essay is*

This essay consists of four main parts. While roughly approximating the *Charter* enquiry of rationality and proportionality, for the sake of style and clarity the essay will not rigidly adhere to this framework. This reflects the structure of *Butler* and subsequent decisions which waft the harm principle over the entire enquiry, therefore obscuring the jurisprudential steps laid out in *Oakes* and *Big M.*[13] The first section discusses the threat posed to the rule of law by vague legislation. It concludes that the logical gymnastics in *Butler* fail to rehabilitate and in fact further befuddle a flawed law. The second section focuses on the rationality of the provision, and the justification for criminal obscenity laws. The third section argues that the vague law only survived judicial scrutiny through the application of a lax proportionality test. In relieving Parliament of its duty to only impair *Charter* rights minimally, *Butler* guts the section 1 enquiry and establishes an absolute dichotomy between banning and permitting a given piece of pornography. The concluding fourth section reviews the central theme of the essay, the tension between democracy and freedom. Each section will show how *Butler*, and the cases in which it is applied, reveals a muddled and arbitrary jurisprudence in the fields of indecency and pornography. This confusion can be traced directly back to their jurisprudential parent, *Butler*.

II. "THE DARKER CORNERS": THE DANGER OF VAGUE LAWS

Vagueness poses such a threat to the rule of law that it attacks three guarantees in the *Charter*. The *Prostitution Reference* states that vagueness alerts section 7, in that it threatens "life, liberty and security of the person" through its arbitrary nature.[14] Vagueness also arises under the "objectives" threshold in the section 1 analysis, which requires a legal infringement on liberty to be "prescribed by law." It further affects the "minimal impairment" enquiry, as a vague law will likely be overbroad in its effects,

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[12] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[13] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 3 W.W.R 481 [hereinafter *Big M*].

[14] *Reference Re. ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [hereinafter *Prostitution Reference*].

trapping more than it intends. As section 7 is not considered in *Butler*, we will focus on the latter applications.

In the *Prostitution Reference*, Lamer J. identified two related dangers of a vague law. The first is that it fails to give the citizen fair notice of what acts will attract criminal sanctions. The second is that it fails to give the police clear enforcement standards with which to promulgate the law. The obscenity provisions in the *Criminal Code* fail on both counts, with disastrous and apparent effects. With regard to the first victim, a cornerstore owner will have no way of knowing whether or not the magazines she is selling are actually obscene. The offence is different than those of, for example, murder or theft, the criminality of which are intuitively clear. In contrast to *Butler*, earlier cases firmly insisted upon legislative clarity. *Glassman*,[15] in striking down paragraph 163(2)(b)'s phrase "exhibiting a disgusting object," stated,

> that legislation which purports to regulate the conduct or actions of individuals must be sufficiently clear and precise to permit the individual to know, with a reasonable degree of certainty, that which is forbidden.[16]

Two factors place the storeowner under even greater risk. First, *Prairie Schooner* and *Hawkins* hold that governmental approval of a given piece of material provides no defence to the charge.[17] The second tightening is provided by the recent Supreme Court case of *Jorgenson*. Although the legislation expressly states that the owner must "knowingly" sell the obscene material, *Jorgenson* establishes that the lower *mens rea* of "wilful blindness" will suffice for conviction.[18] The shopowner thus sells materials at his or her own peril. The result, apparent from the styles of cause, is that the smaller fish in the pornographic food chain, rather than the pornographers themselves, are caught. This extends beyond storeowners, who may have some sense of hapless

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[15] *R.* v. *Glassman and Bogyo* (1986), 53 C.R. (3d) 164 at 173, 24 C.R.R. 242 at 251 (Ont. Prov. Ct.) [hereinafter *Glassman*], citing *R.* v. *Pelletier*, [1986] R.J.Q. 595, 49 C.R. (3d) 253 (Que.S.C.). *Glassman* arose after a Toronto bookstore featured an art exhibit entitled "It's a Girl," which included red-painted sanitary napkins and plaster penises.

[16] Chief Justice Brennan expressed a similar principle in the American case of *United States* v. *Harriss*, 347 U.S. 612 at 617 (1954), where he stated that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." In *Paris Adult Theatre I* 413 U.S. 74 at 88, Brennan C.J., in dissent, noted that in the pornography context, a vague law places a chill on the arts community by making bookselling "a hazardous profession."

[17] *R.* v. *Prairie Schooner* (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585 (Man. C.A.). *R.* v. *Hawkins* (1993), 15 O.R. (3d) 549, 86 C.C.C. (3d) 246 (Ont. C.A.) [hereinafter *Hawkins* cited to C.C.C.] states at 266, that "[t]he appellant's reliance on the approval of the Ontario Film Review Board was held not to negate the inference that he acted 'knowingly'". It is significant that the post-*Charter* judgment confirms the pre-*Charter* holding. James P.C.J. of the Alberta Provincial Court recently attacked the *Hawkins* decision vigorously on this point in *R.* v. *Erotica Video Exchange Ltd.* (1994), 163 A.R. 181 [hereinafter *Erotica Video Exchange*]. At 194, he distinguishes the official statements in the earlier cases as being "opinion" and the instant example as being a ruling on which the accused could be expected to rely: "It would be unjust to deprive an accused in an obscenity prosecution of reliance upon a decision made by a government founded, funded and advised body whose primary function is to discern and apply existing community standards of tolerance."

[18] *R.* v. *Jorgenson*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510 [hereinafter *Jorgenson* cited to S.C.R.].

culpability, to their employees, whose arrest is more problematic.[19] This raises a final procedural objection. Imagine the situation faced by Mr. Butler, the accused. Before his arrest, the vague legislation offered no guidance as to the legality of his films. This is remedied, after the charge, by Sopinka J.'s infusion of the section with meaning. This new clarification, however, is not terribly reassuring to Mr. Butler who receives a new trial and is convicted.[20]

With regard to the second victim of vagueness, the *Langer*,[21] *Glad Day*,[22] and *Little Sisters*[23] cases illustrate that the provisions, even after the *Butler* clarification, fail to provide the police and Customs officials with clear guidelines for enforcement. It is no coincidence that the victims of overbroad censorship laws include the works of Andrea Dworkin, and the National Film Board anti-pornography documentary "Not a Love Story."[24] It is all too easy to paint these enforcement agencies as philistinic

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[19] *Mara, supra* note 2; *R.* v. *Ronish* (1993), 18 C.R. (4th) 165 [hereinafter *Ronish*]; *R.* v. *Butler*, (1993) 86 Man.R. (2d) 50, 81 C.C.C. (3d) 248, 21 C.R. (4th) 27.

[20] *Butler, supra* note 4. Counsel, both for the accused and for the intervenors, must have felt the frustration of a shadow-boxer when they read through *Butler*. They had prepared their facta on the basis of the vague wording of the obscenity provisions and the imprecise, mostly pre-*Charter*, caselaw. The law that Sopinka J. runs through the *Oakes* test is not the law on paper, but the law that he has created out of air. In arguing that the law (his law) impairs minimally he points to his rehabilitations: that the artistic defence is to be read liberally, that the law will not catch non-violent, non-degrading material, and that past legislative attempts may be considered. See *Butler, ibid.* at 485-86.

[21] *Ontario (Attorney General)* v. *Langer* (1995), 123 D.L.R. (4th) 289, 97 C.C.C. (3d) 290 (Ont. Ct. (Gen. Div.)) [hereinafter *Langer* cited to D.L.R.].

[22] *Glad Day Bookshop Inc.* v. *Deputy M.N.R., Customs and Excise* (1992), 90 D.L.R. (4th) 527, 6 Admin. L.R. (2d) 256, 32; A.C.W.S. (3d) 925, 15 W.C.B. (2d) 562 (Ont. Ct. (Gen. Div.)) [hereinafter *Glad Day Bookshop*].

[23] *Little Sisters Book and Art Emporium et al.* v. *Canada (Minister of Justice)* (1996) 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (S.C.) [hereinafter *Little Sisters* cited to D.L.R.].

[24] A. C. Hutchinson, "In Other Words: Putting Sex and Pornography in Context," (1995) 8:1 Can.J.Law & Jur. 107 at 132. This raises another problem that even works with a scientific or anti-pornography purpose are vulnerable to seizure. As Hunter, Saunders, and Williamson state, "the interdependence of examination and excitation, knowledge and pleasure, is inescapable." They point out that sexology and gender studies by Ellis, Krafft-Ebing, Kinsey, Kronenhausen, Hite and Andrea Dworkin have all been disseminated as erotic bestsellers. The first volume of Ellis' "Studies in Sexual Psychology" was even threatened with prosecution under obscenity statutes. I. Hunter, D. Saunders, & D. Williamson, *On Pornography: Literature, Sexuality and Obscenity Law* (New York: St.Martin's Press, 1993) at 47 [hereinafter *On Pornography*]. While Sopinka J. does recognize that there is a defence of artistic merit, this is limited in two ways. First, it is not an absolute defence, as the accused artist will have to prove that the impugned obscenity was "internally necessary" to the success of the work. The second problem is that the subtleties of such a defence will more likely be discovered in a courtroom, after police have already seized, disrupted and chilled artistic expression through arrest of the artist. In an otherwise admirable judgment, *Langer, supra* note 21, retains *Butler*'s indifference towards the "failed but sincere artist" who fails to meet an objective test of artistic merit. McCombs J. at 325, essentially shrugs off this objection: "I think it would be the rare case in which an artist, acting with sincerity and integrity in the creation of a work, would run afoul of this law." While the judgment retains the attenuated *Oakes* test established by *Butler* and *Irwin Toy, infra* note 33, it is very thorough in its scrutiny for vagueness in its proportionality test. It notes that the child pornography provisions are much more detailed than those of obscenity, and that the heightened degree of harm associated with the making and viewing of child pornography

institutions. In some cases this is perhaps justified. *Little Sisters*, for example, has caustic words for the arbitrariness of Customs' scrutiny. Yet the impugned material in the above cases not only fell under criminal proscription in the eyes of the police, but also in the eyes of the Crown, which authorized the trials. Nor is it a defence to point to the fact that that *Langer*, *Glad Day*, *Little Sisters*, and *Hawkins* were ultimately acquitted. The shock of arrest, with the legal costs of a court case show that even those acquitted suffer due to the inadequacies of the law.[25] As police and Customs make decisions about obscenity on a daily basis, any vagueness which prompts or permits them to exercise their discretion in an overbroad manner severely threatens individual and artistic liberty.

A. *Criminal Negligence: Vague Sexual Offences in the Criminal Code*

The ambiguous definition of obscenity is found in subsection 163(8): "*any* publication a dominant characteristic of which is the *undue exploitation of sex*...shall be deemed to be obscene."[26] Such vagueness is characteristic of the "Sexual Offences" part of the *Criminal Code*.[27] The recent lap-dancing case of *Mara*, and striptease case of *Ludacka* focused on section 167, which imposes criminal sanction upon anyone who performs or encourages "an immoral, indecent, or obscene performance, entertainment, or representation." While more precise than the obscenity provisions, the child pornography sections examined in the recent case of *Langer* still flirt with ambiguity and overbreadth. Subparagraph 163.1(1)(a)(ii), describing such pornography as "the representation of child...the dominant characteristic of which is the depiction, for a sexual purpose" is not entirely free of vagueness.

For the dissenting Helper J.A. in the appellate judgment of *Butler*, vagueness was fatal to the constitutionality of subsection 163(8). She would have sent it back to Parliament for thorough redrafting.[28] Had Helper J.A. written the majority decision, there is no doubt that the legislature could have improved the law. The more exhaustive obscenity statutes of Florida or Ohio, for example, could have provided a model.[29] Alternatively, Parliament would have been forced to rethink the continuing justification for a nineteenth century law limiting freedom of expression in the age of the *Charter*. Likewise, Parliament would have to contemplate whether the means chosen to realize its legislative goals were the least restrictive and most rational. Had *Butler* struck this subsection down as impermissibly vague in the face of the *Charter*, it could have launched what Hogg conceives of as a dialogue between Parliament and the courts, a

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warrants strong measures.

[25] Little Sisters, a Vancouver bookshop specializing in gay, lesbian and alternative literature, is a dramatic case in point. To date, their legal costs directly related to their 1996 case have totalled approximately $600,000 (telephone interview with Janine Fuller, 13 December 1996). See also J. Fuller & S. Blackley, *Restricted Entry: Censorship on Trial*, 2nd ed. (Vancouver: Press Gang, 1996).

[26] [Emphasis added].

[27] The cases of *Hawkins, Ronish, Jorgenson,* and *Erotica Video Exchange*, all referred to in this article, were tried under this part, Part V of the *Criminal Code*, sections 150-182.

[28] *Butler, supra* note 4 at 266 (C.A.). Her Ladyship also found that the legislation failed the "least drastic means" test.

[29] R.A. Posner and K.B. Silbaugh, *A Guide to America's Sex Laws*, (Chicago: University of Chicago Press, 1996) at 192 and 200.

dialogue which could formulate a comprehensive, principled, and effective new law against pornography.[30] Instead we are left with an 'olde curiosity shoppe' of criminal law, which combines vague exhortations against obscenity with quaint admonitions against hawking abortificients, venereal disease cures, and "crime comics."[31]

B. *Judicial Defence of Vagueness*

Instead of insisting that Parliament create a clear law, *Butler* establishes a deferential precedent that courts should not strike down vague legislation in the already foggy sphere of sexual criminality.[32] Instead, the judiciary must attach ideas to otherwise empty words. This dilution of the void-for-vagueness doctrine is consistent with the Supreme Court's recent retreat from vigorous *Charter* scrutiny. So long as the law provides "an intelligible standard according to which the judiciary must do its work," vague legislation will not be sent back to its drafters.[33] Sopinka J. dedicates little space in his judgment to the threat posed by vagueness. He argues by precedent, pointing to the *Prostitution Reference*'s defence of the term "acts of indecency" as a "flexible" rather than vague term. He then argues by analogy, stating that as the *Criminal Code* also fails to define the terms "indecent," "immoral" and "scurrilous," we cannot expect precision with regard to obscenity.[34] The need to defend the legislation by reference to other vague pieces of pre-*Charter* legislation merely emphasizes the need to strike down this particular section as impermissibly vague.

C. *Fleshing Out Obscenity*

Despite this, Sopinka J. states that the judiciary must seize hold of the "intelligible standard," however vague, and flesh out the legislation. To compensate for this vagueness, Sopinka J. therefore posits three categories of pornography:

> the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex, explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.[35]

While these categories are superficially satisfying, and probably correspond with the

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[30] P. Hogg, Law Review Seminar, University of Toronto Faculty of Law, September 12, 1996.

[31] See *Criminal Code* paragraphs 163(1)(b), (2)(c), and (2)(d).

[32] In *Mara, supra* note 2 at 647-48, Dubin C.J.O. applies in a boilerplate fashion almost the entirety of Sopinka J.'s justification for vague laws. In March 1997 the Supreme Court dismissed the appeal of the defendants, who had raised the constitutional question of whether section 167(1) of the *Criminal Code* was so vague and overbroad as to infringe section 7 of the *Charter*, and not be saved by section 1.

[33] *Attorney-General of Quebec* v. *Irwin Toy*, [1989] 1 S.C.R. 927 at 983, 58 D.L.R. (4th) 577 at 617 [hereinafter *Irwin Toy* cited to D.L.R.], cited in *Butler, supra* note 4 at 475.

[34] *Butler, supra* note 4 at 475.

[35] *Ibid.* at 471.

average liberal Canadian's classification of 'good pornography' and 'bad pornography,' there are two grave problems with this radical reconstruction of a previously empty law. The first is that it is more the product of curial conjecture than scientific evidence. This objection will form the focus of the next part of the essay. The second objection is that such an extreme judicial construction of an otherwise vague law amounts to judicial legislation. It is conceded that the *Charter* does "not require that a law be absolutely certain: no law can meet that standard."[36] It is also conceded that judges have a duty to discern the meaning of legislative language, which is inherently open to multiple meanings. This is achieved through a careful examination of purpose and context in the overall scheme of the legislation. Yet where a judge must spend one quarter of the entire judgment creating a definition, alarm bells should sound that judicial legislation, rather than interpretation, is afoot. These two objections raise the question of whether *Butler* and subsequent judicial forays into sexual crimes are based on principles of constitutional review and rationality, or whether they are thinly-disguised versions of judicial morality.

III. ERSATZ RATIONAL OBJECTIVE: THE *BUTLER* HARM PRINCIPLE

Harm underlies Sopinka J.'s conception of the governmental objective behind the anti-obscenity legislation, and addresses the first part of the section 1 enquiry into the section's constitutionality: "the overriding objective is not moral disapprobation, but the avoidance of harm to society."[37] Sopinka J.'s decision to focus on harm is strategically sound. It could be argued that the *Criminal Code*, and indeed all government intrusions, are founded upon John Stuart Mill's axiom that "[t]he only purpose for which power can be rightfully exercised is to prevent harm to others."[38] To establish this harm, however, Sopinka J. must make several judicial leaps. He defines harm in the broadest possible manner. Harm is anything "...resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a 'decent society'."[39] This objective starts as broad and ambiguous and grows in rhetorical size throughout the judgment. By the minimal impairment stage of the section 1 enquiry, for example, Sopinka J. speaks of the "the gravity of the harm and the threat to the values at stake."[40] Downplayed is the threat to the *Charter* rights at stake. In examining Sopinka J.'s claim of the necessity of controlling expression in order to combat an alleged harm, we must remember Schauer's warning:

> Throughout history many of the arguments for restricting freedom of speech, either generally or in specific instances, have been made under the umbrella of 'necessity'. But a *claim* of necessity does not make necessity a fact. If we examine more critically the claims of necessity, many of them will be seen to be false claims.[41]

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[36] *Prostitution Reference, supra* note 14 at 1156.

[37] *Butler, supra* note 4 at 477.

[38] J. S. Mill, "On Liberty", Chapter I, in R. Wollheim, ed., *John Stuart Mill: Three Essays* (Oxford: Oxford University Press, 1975) 5 at 15.

[39] *Butler, supra* note 4 at 475.

[40] *Ibid.* at 487.

[41] *Free Speech, supra* note 10 at 206.

This second section posits that *Butler* inflates a "false claim" or at best, a debatable claim, in order to soften the constitutional review of a rationally dubious law.

A. *Anti-Social Attitudes Versus Anti-Social Behaviour*

In order to combat harm, and to justify *Charter* infringements in fighting that harm, one must understand its cause, effects, and extent. Two enquiries arise. First, we must ask what harm Sopinka J. and the government fear. Second, we must question if there is a rational connection between the stimulus of pornography and the effect of harm. *Butler* and its progeny speak both of 'attitudinal harm,' and physical harm. The first sort of harm is immediately problematic. In its concern with what Canadians think, rather than what Canadians do, the obscenity and related provisions occupy a unique role in criminal law.[42] Presumably even when the courts speak of attitudinal harm, they do so with an eye to an eventual actual manifestation of the depicted act. Yet the government does not ban films or other expressive material which romanticize murder, kidnapping, and other violent crimes. Thus while we will accept the notion of 'attitudinal harm' for the time being, we must recognize that obscenity, along with the offence of "public incitement of hatred"[43] are extremely rare instances where the government criminalizes free expression for the thoughts that it *may* place in the heads of other people.[44]

In this conception of harm, pornography will affect the attitudes of its readers in such a manner as to promote behaviour incompatible with the well-being of society. This seems to cover a broad spectrum of potential harms. The most innocuous and general is provided in *Towne Cinema* by Wilson J., whose judgment is quoted at length by the majority and minority in *Butler*:

> The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.[45]

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[42] The criminalization of pornography is even out of step with other "morals offences," which present a more clear risk of harm than does obscenity. "Keeping a common bawdy house" (section 212(3)) likely involves contractual relation of dubious consent; the link between "keeping a gaming house" and crime over unenforceable contracts would not be difficult to prove (section 201); "procuring" for the purpose of prostitution (section 212(1)(a)) likely promotes venereal disease, pimping, and a more clear threat of physical violence and harm to women.

[43] *Criminal Code* section 319(1), from which the case of *R.* v. *Keegstra* (1990) 1 C.R. (4th) 129, 61 C.C.C. (3d) 1 (S.C.C.) arose.

[44] In this, the *Butler* test, like the former *Hicklin* test which looks to the inspiration of "a prurient interest" by the work, excessively focuses on the subjective interpretation of the reader or viewer. As Murphy points out, however, different criminal minds will be motivated by different stimuli. He offers the humorous example of the British vampire John George Haigh, who was moved to kill his victims and suck their blood from watching the "voluptuous" procedure of an Anglican High Church service. E.F. Murphy, "The Value of Pornography," (1964) 10 Wayne L.Rev. 655 at 668-69.

[45] *R.* v. *Towne Cinema Theatres Ltd.* [1985] 1 S.C.R. 494 at 524, 18 D.L.R. 1, 18 C.C.C. (3d) 193, Wilson J [hereinafter *Towne Cinema* cited to S.C.R.], cited in *Butler, supra* note 4 at 467, Sopinka J.

This statement honestly admits that it is not clear how the material harms, but that it probably does in some indirect manner. If the harm is so imprecise and hypothetical, however, the government must craft legislation that impairs liberty relative to the threat posed by the material.

The next two levels of harm are more gender specific. Pornography, in degrading women, will promote negative social attitudes. Sopinka J. acknowledges "the negative impact exposure to such material has on perceptions and attitudes towards women."[46] The third, and more extreme form of this argument is presented by Andrea Dworkin and Catherine MacKinnon. Pornography goes beyond attitudinal distortion and directly causes violence to women. Sopinka J. also incorporates this harm which

> ...predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men. Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.[47]

Throughout the judgment, Sopinka J. alternates between these degrees of harm. This section of the essay will argue that while the most sympathetic evidence indicates the harm associated with pornography is of the mild form elucidated by Wilson J. above, Sopinka J.'s references to the more extreme end of the harm scale allow him to justify a vague, disproportionate, and rationally unsound law.

B. *The First Prop: No Link Between Attitudes, Behaviour and Pornography*

The first fatal flaw in *Butler* is the lack of a scientific connection between pornography and the harms which Sopinka J. hypothesizes.[48] MacKinnon cites the work of Dr. Edward Donnerstein to support the harm connection and indeed, the *Butler* defence team called him as an expert witness at the trial.[49] Yet Donnerstein himself admits that his research is much more tentative than its citors would indicate: "We can show a causal link between exposure to porn and effects on attitudes; but no one can

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[46] *Butler, supra* note 4 at 487.

[47] *Ibid.* at 471.

[48] It is here conceded that *Irwin Toy, supra* note 33 at 622-23, states that courts should not second guess legislatures faced with "conflicting social science evidence." This requires several responses. First, it is argued that in the case of pornography and the causation of harm, it is not the case of conflicting social science evidence, but rather only conjectural evidence. Furthermore, *Irwin Toy* involved a provincial statute limiting children's advertising, and did not impose a criminal ban on such materials, as is the case with obscenity legislation. Finally, while conflicting social science evidence can inform the analysis of the legitimacy of the government objective, the *Irwin Toy dicta* should not reduce judicial insistence that the means to realize this objective be both rational and proportional. *Irwin Toy* does not give the Parliament *carte blanche* to institute unconstitutionally imprecise legislation where conflicting evidence exists. Given the abundance of, and debate over, social science evidence on any given issue, Parliament could always produce a study in order to justify broad and instrusive legislation.

[49] C.A. MacKinnon, "Pornography as Defamation and Discrimination" B.U.L. Rev. 793 at 800 [hereinafter *Defamation and Discrimination*].

show a causal link between exposure to porn and effects on behaviour."[50] The bulk of studies draw the exact opposite conclusion. Indeed, in countries where government restrictions on pornography are most relaxed, as in Denmark and Sweden, the incidence of violence towards women is lowest.[51] Some studies offer the theory that pornography curbs crime through the draining of otherwise dangerous sexual impulses.[52]

Sopinka J. recognizes that the link between harm and pornography "is not susceptible to exact proof."[53] To combat this weakness, he brandishes a bevy of studies. In this, *Butler* and its progeny show how judges select and manipulate evidence to prop up the harm principle. In the past twenty years, Parliament has commissioned two major studies of pornography, the 1978 MacGuigan *Report on Pornography*,[54] and the 1985 Fraser *Report on Pornography and Prostitution in Canada.*[55] The earlier and less wide-reaching report concluded that attitudinal harms do exist. In contrast, the more recent and exhaustive Fraser Report concluded that,

> [a]lthough the Committee was frequently told that studies clearly demonstrate that harms to society and to individuals were associated with the availability and use of pornography, we have to conclude, very reluctantly, the available research is of very limited use in addressing these questions. . . the research is so inadequate and chaotic that no consistent body of information has been established.[56]

Sopinka J. alludes briefly to the Fraser Report, but gives higher billing to the MacGuigan Report's assertion that pornography creates a "clear and unquestionable danger."[57] *Ludacka* and *Mara* likewise ignore the inconvenient Fraser Report altogether and leapfrog back to the MacGuigan Report to justify their reliance on the *Butler* harm principle in upholding the law. It is telling that judges perform the opposite trick, citing

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[50] A.A. Borovoy, *When Freedoms Collide* (Toronto: Lester & Orpen Dennys, 1993) at 63 [hereinafter *When Freedoms Collide*]. These and other studies measure the effect of pornography stimuli on penile tumescence. Yet it is still a mighty leap from noting that a person is aroused by pornography, violent or otherwise, to a conclusion that the material will make such action desirable, or even motivate him to perform acts of violence. For general criticisms of the studies cited by anti-pornography activists, see F.R. Berger, *Freedom, Rights, and Pornography*, ed. by B. Russell (Dordrecht: Kluwer, 1991) at 169-75 [hereinafter *Rights and Pornography*].

[51] Conversely, sexual assault occurs in countries such as South Africa and Islamic nations, where pornography is less accessible. S. Lee, *The Cost of Free Speech* (London: Faber and Faber, 1990) at 36.

[52] See e.g. M.J. Goldstein and H.S. Kant, *Pornography and Social Deviance* (Berkeley: University of California Press, 1973) at 31.

[53] *Butler, supra* note 4 at 467.

[54] The American Meese Report drew similar conclusions that pornography could be linked to harm, but has fallen under fire for its methodology. See R. West, "The Feminist-Conservative Anti-Porn Alliance and the 1986 Attorney-General's Commission on Pornography Report" (1987) 4 Am.B. Found. Res.J. 681, and Z. Eisenstein, "Reconstituting the Phallus II: Reagan and the Courts, Pornography, Affirmative Action and Abortion" in *The Female Body and the Law* (Berkeley: University of California Press, 1988) at 167-68.

[55] *Butler, supra* note 4 at 470 citing *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol.1 (Ottawa: Government of Canada, 1985) at 99 [hereinafter *Fraser Report*].

[56] *Fraser Report, ibid.* at 99.

[57] *Butler, supra* note 4 at 477.

Fraser and ignoring MacGuigan, where they desire to acquit the accused, as in *Langer*, *Tremblay*, and *Ronish*.

The passive application of the vague *Butler* harm principle usually produces an unsatisfying but inoffensive result, as in *Ludacka* and *Langer*. *Little Sisters*, however, reveals how *Butler*'s blunt absolutism encourages anti-contextual and irrational judgments on courts below. The applicants in that case argued that *Butler*'s gender-based harm concerns spoke only to the creation, distribution and effects of heterosexual pornography. The consensual and equal nature of homosexual pornography does not lead to such harm. Nor does there exist in gay and lesbian communities the gender-based power imbalances which underly the *Butler* harm. Smith J., however, was bound by precedent to reject this purposive and contextual submission. Instead, the Court applied the *Butler* harm principle, a harm, in the words of Cossman and Ryder, "that need not be proven and, in fact, harm that need not even be clearly articulated."[58]

In a judgment such as *Ronish*, it is clear that the trial judge applies *Butler* out of precedence, and not out of enthusiasm for its logic. This is because the harm ascribed to obscenity is one step removed from the usual harms that the *Criminal Code* seeks to avoid. If a person murders or rapes another, it is clear that harm has resulted. This cause and effect is clearly missing, both empirically and notionally, from pornography. Being sane and reasonable people, judges are likely sceptical that pornography could ever impel them to commit the crimes attributed to it. If anything, the 'reasonable person,' upon viewing degrading or violent pornography, would be sexually repelled. Exposure to such materials would prompt more people to make a donation to a women's shelter, than to commit violent acts against women. This reasonable and intuitive response to pornography hysteria prompts one to question the veracity of the threat of *Butler* harm.

A true harm principle, in keeping with the aims of the *Criminal Code*, would look to a 'clear and present danger' before violating *Charter* rights and imposing penal sanctions. Holmes' hypothetical of yelling 'fire!' in a crowded theatre serves as the classic example of expression as harm.[59] Here expression is less communication than an act with immediately harmful effects.[60] In contrast, even where a particular piece of pornography can be linked to a particular rape, examples of which abound in MacKinnon's work, these links do not establish a universal and objective pattern of harm justifying overly broad criminal and constitutional sanctions.[61] Furthermore, even

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[58] B. Cossman & B. Ryder, "Customs Censorship and the *Charter*: The *Little Sisters* Case" (1996) 7:4 *Constitutional Forum* 103 at 107 [hereinafter *Customs Censorship*].

[59] *Free Speech*, *supra* note 10 at 30.

[60] Judges could infer from the context whether or not the accused knew or ought to have known that the expression would likely cause immediate harm. Borovoy contrasts the examples of an anti-Semitic speech in a park, versus an anti-Semitic speech before an angry crowd in a ghetto. Law Review Seminar, University of Toronto Faculty of Law, November 21, 1996.

[61] C. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993) at 18-19 and 36-37. Both conservative and feminist critics of pornography have a well-stocked garrison of anecdotal evidence putatively connecting a specific piece of pornography with a specific crime. In his 1969 Presidential Commission on Pornography, J. Edgar Hoover provided several pages of such crimes. *On Pornography*, *supra* note 24 at 225. Andrea Dworkin, MacKinnon, and Sunstein provide a less drastic response than criminalization of pornography to such situations, in proposing a civil law remedy for victims who can establish a link between specific pornography

if a person was inspired by pornography to commit an assault, it would be difficult to posit that the material actually took over his free will in such a manner as to justify its criminalization.

These objections cast doubt on the assertion that the harm of pornography justifies infringing *Charter* rights. Through his three categories of pornography, Sopinka J. envisions a sliding scale of criminality, based on the harm posed by each category: "[t]he stronger the inference of a risk or harm, the lesser the likelihood of tolerance."[62] Yet if this harm is amorphous and dubious in the light of scientific evidence, then the law should fail the first part of the section 1 enquiry. A counterfactual argument presents a more dramatic rhetorical question. If there is no link between violent pornography and harm, and no link between "healthy" pornography and harm, why ban one and not the other? If this vague harm is limited to the Wilson J. conception of desensitization, then why not ban all pornography, consensual or not? Indeed, MacKinnon and Andrea Dworkin hypothesize that first-category pornography such as *Playboy* poses a greater threat to women because of its prevalence and relative benignity.[63] Society should thus place a criminal ban on everything that could possibly demean women — including tasteless advertising and high-heeled shoes. Divorced from rationality, the answer to these concerns is that the judges have quasi-arbitrarily chosen this level of pornography to be acceptable for Canadians.

C. *The Second Prop: No Link Between Harm and Community Standards*

Sopinka J. distinguishes between tolerance and taste to justify his formulation of harm. In establishing this dichotomy, Sopinka J. cites the words of Dickson C.J.C. in *Towne Cinema*:

> [t]he cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.[64]

With respect, although this test seems satisfying at first, it fails through its assumptions and leaps in logic. Even given this dichotomy, it is still not clear if there is any substantive element to 'tolerance.' Rather, 'community tolerance' serves as a proxy for the concept of harm:

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and their violation. See Andrea Dworkin's Model Anti-Pornography Law in *Against the Male Flood, supra* note 11 at 26; and C. Sunstein, *Democracy and the Problem of Free Speech* (New York: Macmillan, 1994) at 218 [hereinafter *Democracy and Free Speech*]. For better or worse, such a solution would offer a lower balance of probabilities and given *Dolphin Delivery, infra* note 116, would be beyond *Charter* scrutiny.

[62] *Butler, supra* note 4 at 471.

[63] N.M. Malamuth & B. Spinner, "A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines" 16 *Journal of Sex Research* 226 (1980), cited in C. MacKinnon, "Not a Moral Issue" in *Feminism Unmodified: Discourses on Life and* Law (Cambridge: Harvard University Press, 1987) at 269 n. 36ff.

[64] *Butler, supra* note 4 at 465 [emphasis in original].

> [W]e must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole.[65]

The link between community standards and harm is a tenuous one, to be decided not by members of the actual community, describing actual levels of community tolerance, but through judicial construct: "[t]he courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that *may* flow from such exposure."[66]

The concurring opinion of Gonthier J. shows that "community standards" serves as an overly approximate substitute for harm. In his judgment, he enthusiastically embraces the construct of Sopinka J.:

> In this context, tolerance must be related to the harm. It must mean not only tolerance of the materials, but also tolerance of the harm, which they bring about. It is a more complicated and reflective form of tolerance than what was considered by Dickson C.J.C. in *Towne Cinema.* Such a development is fully in accordance with the emphasis put by this court on harm as the central element in the interpretation of s.163(8)[67]

Translated into practice, however, community tolerance *qua* harm *qua* definition of obscenity leads to a wider scope for Gonthier J. For him, the law could catch even the 'good pornography' *sans* violence or humiliation, represented by the third category of Sopinka J.[68]

Without a firm link between community standards and harm, the distinction between tolerance and taste becomes blurred. Is tolerance merely taste multiplied by the masses — a tyranny of majority morality? The benchmark of Sopinka J. seems intuitively correct, but is it truly anchored in actual community tolerance? One could imagine varying degrees of tolerance: that of an extremely tolerant community — such as Sweden, for example — or, indeed, that of an extremely intolerant society.[69] If tolerance is based primarily on a perception of harm, rather than a certain or probable harm (and in defence of Sopinka J., he does waver back and forth between 'probable' and 'possible' harms) then this is a relative, sliding standard.

Even if we were to assume that community standards were actually based on community values, and not on judicially-constructed norms, it is not clear what community mores the courts should attempt to measure. Sopinka J. seems to imply the existence of a national community standard. This oxymoron creates two problems. First, it is unreflective of reality: what is tolerable in downtown Vancouver will be intolerable in the Fraser Valley.[70] Subsequent cases indicate that judges are not clear

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[65] *Ibid.* at 470.

[66] *Ibid.* [emphasis added].

[67] *Ibid.* [emphasis added].

[68] *Butler, supra* note 4 at 499. Sopinka J. uses the term *ibid.* at 481.

[69] Not to mention the added dimension of time. In *R.* v. *Tremblay*, Cory J. quotes Dickson C.J.C. in *Towne Cinema, supra* note 45: community "standards must be contemporary as times change and ideas change with them, one manifestation being the relative freedom with which the whole question of sex is discussed." [1993] 2 S.C.R. 932 at 958, 106 D.L.R. (4th) 413 at 432. [hereinafter *Tremblay* cited to S.C.R.].

[70] A 'Bible belt' neighbouring Vancouver.

whether the community standard is national or local, and whether or not they should actually attempt to gauge a real community standard through evidence.[71] For example, the trial division and trial appeal courts applied a local community standards test in *Jacobs*, a case arising from a woman's topless stroll through Guelph. The Court of Appeal recently held that these lower courts were in error for attempting to relate the community standards test to actual community standards.[72] While this is a reassuring brake against local parochialism and bigotry, it emphasizes that community standards are judicial constructs, rather than reflections of reality.[73]

Second, the national standards idea flies in the face of federalism, both legal and notional: it is for this reason that we have provincial classifications for films. While it is conceded that the national *Criminal Code* would seem to demand a national standard, the artificial imposition of such a standard by the judiciary betrays the frailties of that construct.

Even if we were to permit the national community standard, it would still be divorced from reality. The community standards cipher exacerbates the conflict between the rights of individuals and the rights of the majority which a coherent section 1 analysis seeks to resolve. In their recent exhaustive study of Canadian political values, Peter Russell and a team of political scientists indicate that actual community standards do not mesh with those of *Butler*.[74] On the issue of pornography, over half of the members of the general public were in favour of censoring sexually explicit films. Even more tellingly, "the side of the issue that favours censorship holds its ground even when the risk of infringing on the principle of freedom is explicitly called to their

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[71] See e.g., *R.* v. *Yorke*, [1997] N.B.J.No.24 (January 21, 1997) (N.B. Prov. Ct.) at para.50-53 and 59, where the judge gauged community tolerance through the number of complaints received about a sexually explicit act of performance art. If the community standard is a national and abstract standard, then the local reaction should not determine the obscenity of the impugned art or action in question.

[72] *R.* v. *Jacobs*, [1996] O.J. No. 4304 (unreported, December 9, 1996) (Ont. C.A.). The trial judge sought evidence of local community standards by reference to the editorials in a local newspaper. The American test, under *Miller* v. *California*, 413 U.S. 15 (1973) actually takes into account local community standards, so an application of this test should not be considered bizarre.

[73] Even with a national community standard as a pure judicial construct untainted with reality, actual community standards, occasionally tinged by elements contrary to the *Charter*, arise. In *Tremblay*, *supra* note 63 at 964, for example, the expert psychological witness, Dr. Campbell, stated: "the fact that the activities in question involved consensual and heterosexual adults increased the likelihood that they would be tolerated." Mandel observes that the court failed to explore this innuendo that were the activities between consenting homosexuals, community standards would be less tolerant. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994) at 388. Cossman and Ryder (*Customs Censorship*, *supra* note 58) point out a particularly egregious example of homphobia *qua* community standards. In *Priape Engineering* v. *Deputy Minister of National Revenue* (1979), 52 C.C.C.(2d) 44 at 49 (Qué. S.C.) the judge stated that "the community standard of contemporary Canada is less tolerant with regard to overt homosexual acts than with regard to similar acts committed between persons of opposite sex." This must be qualified with the important caveat that this case was pre-*Butler*, pre-*Egan*, and, of course, pre-*Charter*.

[74] P.M. Sniderman, J.F. Fletcher, P.H. Russell, & P.E. Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1997) at 75 [hereinafter *Clash of Rights*].

attention."[75] This should not lead to a conclusion that the judiciary should look to opinion polls. Yet if the court bases its decision on neither reason nor rigid constitutional process, and cannot even claim democratic support, judicial review becomes judicial decree.

Thus community values are revealed to be uncertain, vague, and ultimately divorced from actual community standards. Yet *Butler* affirms community standards as the deciding norm in obscenity. The undesirable alternative, Sopinka J. fears, would be to "leave it to the individual tastes of judges."[76] With harm and community standards unclear, however, judges must themselves gauge a level which they consider "liberal, but not too dirty." *Hawkins* quotes Borins J. in *Doug Rankine*, a case seeking this reasonable middle ground a decade before *Butler*:

> *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.[77]

Whether or not this is a reasonable assessment of community standards, either real or constructed, is not the point. While the judges in all of the cases surveyed are reasonable and liberal citizens well-versed in the mores of contemporary society, we must enquire whether judges possess the legitimacy or competence to act as national censors.

D. *The Harmful Effects of* Butler*: A Shifting Purpose of Harm*

Tremblay marks the application of *Butler* by the Supreme Court itself. It also reveals the limits and confusion surrounding the harm principle. The case arose from activities at the "Pussy Cat" Lounge. Customers would pay forty dollars to enter a cubicle with a nude dancer. During the performance the customers were permitted to undress, and many masturbated to the show. The court cited Philip Roth and Dr. Spock in praising the healthiness of masturbation, and acquitted the accused. As there was no

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[75] *Ibid.* at 77. The authors conclude that given the question of censorship, even in the face of violating rights, two-thirds of citizens would favour censoring sexually explicit films.

[76] *Butler, supra* note 4 at 470.

[77] *R.* v. *Doug Rankine Co. and Act III Video Productions Ltd.* (1983), 36 C.R. (3d) 154, 9 C.C.C. (3d) 53 at 70 (Ont. Co. Ct.) [hereinafter *Doug Rankine* cited to C.C.C.] adopted in *Hawkins, supra* note 17 at 264-65 [emphasis added]. The phrase "in my opinion" appears more frequently in obscenity cases, particularly near the assessment of community standards. See *Ludacka, supra* note 9 at 24, 25, and 27, where Dubin C.J.O. couches his findings in a similar phrase. It is significant that *Hawkins* does not cite Borins J.'s doubt that judges were suitable or competent to perform a censorial role: "The judge, who by his very nature of his calling is required to distance himself or herself from society, for the purposes of the application of the test of obscenity is expected to be a person for all seasons familiar with and aware of the national level of tolerance." See *Doug Rankine, ibid.* at 69-70.

touching, and all was consensual, the court concluded that no one was harmed.[78]

This analysis completely focuses on the contented customer, and ignores the dancer. Most notably, it ignores the gender concerns which apparently underlie *Butler*. The Pussy Cat performance objectifies the dancer in the highest sense as a pure masturbatory tool. Surely the male customer who can go to a public club and hire a private dancer is 'desensitized' in his attitudes towards women, in the manner which concerned Sopinka and Wilson JJ. This dissonance between *Tremblay* and *Butler*, through its shifting notion of harm, has caused confusion in the courts below. In *Ludacka*, the female dancers involved members of the audience in various sex games where the dancers would rub their breasts and buttocks against the spectators. In contrast to the command performance in *Tremblay*, the dancers in *Ludacka* appeared to be in control of the situation, and indeed surprised some patrons.[79] Likewise, the lap-dancers in *Mara*, while hired to perform, were in control of their routine.[80] Nor does the private-public dichotomy clarify the harm principles. If we focus on the risk to the dancer, surely a performance in private is more likely to result in sexual assault than a dance taking place in a full bar. These examples are not raised to imply that the acts therein are acceptable or unacceptable to community standards, or that they do or do not cause harm. These cases do betray, however, an inconsistency in the jurisprudence attributable back to *Butler*.

Similarly, if one compares the impugned material in the various cases, at both trial and appellate levels, the results are revealed to be incongruous and far from intuitive or rational. In *Erotica Video Exchange*, vigorous spanking did not constitute first-category violence but verbal coercion did.[81] In *Ronish* the trial judge agreed that the impugned film's depiction of mere spanking would not constitute violence so as to put the material in the first category. The film thus fell into the second category, of 'degrading or dehumanizing' pornography. While *Butler* contemplated that some second category films would be obscene, *Ronish* stated that no second category films will ever be considered obscene as "there is no clear proof of social harm being caused by the exposure of these films, even to those who may be predisposed to contemplate or actually commit violence against women."[82] *Hawkins* (an omnibus appeal which also reviewed the *Ronish* decision) was more optimistic that harm could be proven for films in the second category but did not contradict the *Ronish* trial judge's sweeping statement

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[78] *Tremblay*, *supra* note 69 at 970.

[79] I do not wish to imply that consent in this area is highly problematic, or to deny that the dancers' actions were dictated by the immediate orders of the owner of the bar, the encouragement of the patrons, or the financial situation of the dancers themselves. Here, the contrast is between the passive and submissive roles of the dancers in *Tremblay*, and the active performance in *Ludacka* and *Mara*. In *Ludacka* the dancers clearly set the rules of the performance, choosing and bringing a patron onto the stage, removing the patron's shirt, and slapping the patron's wrist when he did not obey their orders.

[80] As observed in the judgment, even with the most extreme aspects of the lap-dancing performance, the customers were passive and the dancers active. According to the allegations, the dancers were masturbating the customers, and permitting the customers to touch their bodies, and not vice-versa.

[81] *Erotica Video Exchange*, supra note 17.

[82] *Ronish*, *supra* note 18 at 184.

about materials in that category.[83] The liberality of *Hawkins* and *Tremblay* subsequently befuddled other judges. In permitting lap-dancing, the trial judge in *Mara* stated that "[t]he conduct complained of in this present case is innocuous by comparison to the conduct dealt with by the Supreme Court of Canada [*R.* v. *Tremblay*] and the Court of Appeal of Ontario [*R.* v. *Hawkins*]."[84] Some of this confusion arises from the fact that judges must compare the severity of obscene acts and films with those of other cases, based only on description. This groping for a standard, however, further undermines the possibility of a coherent and consistent standard of review. The general confusion in the jurisprudence indicates that there is neither consensus nor clarity in the application of the obscenity laws even following the *Butler* clarification.

E. *Hygiene as a Proxy for Harm*

Given the ambiguous purposes underlying the harm principle, it is no wonder that subsequent judges have sought solace in more tangible definitions of harm. These formulations of harm, if still artificial and tenuous, strive to move away from dubious and foggy notions of 'attitudinal harm' to something approximating 'clear and present danger.' The judges thus point to unhygienic practices as a basis for harm. After the judges brandish *Butler*'s broad harm principle for rhetorical weight, they essentially conclude that the criminal and *Charter* implications of the activity in question be determined according to a standard of hygiene. This pattern emerges in *Tremblay*, *Mara* and *Ludacka*. Cory J., for example, states in *Tremblay*:

> There was no harm caused by the activities. The peep holes, if anything, provided a means of ensuring that no harm came to the dancers or the clients... In these times when so many sexual activities can have a truly fatal attraction, these acts provided an opportunity for safe sex with no risk of any infection.[85]

Mara quotes this section of *Tremblay* at length.[86] While the dance in *Ludacka* provided more distance and third-party scrutiny, taking place on stage, it nonetheless provided "a risk of spreading infectious diseases by oral and genital contact."[87] While hygiene-as-harm seems appropriate and publicly persuasive in our epoch of AIDS, it does not provide a satisfactory excuse why the activities in question should justify the infringement of a *Charter* right, let alone attract criminal sanctions.[88] As unsavoury as

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[83] Is the phrase "degrading or dehumanizing" clear? I am sure that neither Sopinka J. nor the other judges in these decisions would allow criminal charges against a purveyor of *Playboy*, for example. Yet MacKinnon would put "*Playboy*, in which women are objectified and presented dehumanized as sexual objects or things for use", in the vulnerable second category: *Only Words*, *supra* note 61 at 22-23.

[84] *Mara*, *supra* note 2 at 646.

[85] *Tremblay*, *supra* note 69 at 970-71.

[86] *Mara*, *supra* note 2 at 652-54.

[87] *Ludacka*, *supra* note 9 at 28.

[88] The recent case of *Yorke*, *supra* note 71 at para. 59, cited the *Ludacka* concern over disease. There, a male and a female performance artist performed oral sex on one another in a Sackville, New Brunswick art gallery before several spectators. Although no spectators were involved in the show, and no evidence was introduced as to the relationship or medical records of the 'perfomers,' the judge cited the risk of disease as a major factor in deeming the performance

the lap-dancing and interactive stage shows in *Mara* and *Ludacka* may have been, it is unlikely that such contact could have spread disease. The use of such an excuse reflects judicial ill-ease at the amorphous harm used in *Butler* to justify the obscenity laws. It also raises the question of whether the spreading of disease, unless committed intentionally, should serve as the basis of a criminal law. The 1985 removal of "communicating a venereal disease" from the *Criminal Code* indicates that Parliament thinks it should not.[89]

F. *The Guardians: Judicial Values or Community Values?*

Once the twin supports of community standards and harm are kicked out, Sopinka J.'s categorization comes under fire from all quarters. Social conservatives can claim that these categories are too permissive. Likewise, feminists will complain that as *Butler* permits some pornography, negative images of women will continue to thrive.[90] In spite of *Butler*'s seeming liberality, various constituencies, feminist and otherwise, can claim that it presents an overly rigid view of sexuality.[91] Is it safe to say that in the infinitely complex world of sexuality, there are no people who desire humiliation, domination or even violence? This objection could even extend to the third category, of sex with violence. One doesn't have to go far off the beaten sexual path to discover aficionados of violent first-category pornography. From various fetishist and sado-masochist behaviour to Nancy Friday's pioneer work on female fantasies,[92] evidence abounds of alternative, yet presumably legitimate sexual preferences which challenge Sopinka J.'s pat categories.[93] If one expands these objections to include the non-literal realms of art and political speech, which often depict sexual violence and humiliation as a means of criticizing it, Sopinka J.'s categories are even more problematic.[94] Parliament has the right to create categories and set laws. Yet if these laws are not anchored in rationality, legislation becomes an exercise in balancing various interests, such as those mentioned above. In the complex world of sexuality and pornography, these interests will reach a stalemate. Only through legitimate and thorough constitutional review can legislative line-drawing be justified in a free and

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as obscene. Once again, the author does not condemn the results of this judgment over a case which, in the words of the judge at para. 62, "virtually shout[ed] out for condemnation by the Court." Instead, the reasons given for judicial censure sully the jurisprudence through their ill-definition and irrationality.

[89] The former sub-section 253(1) read, "Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction."

[90] Arguably we see in the minority decision of Gonthier and L'Heureux-Dubé JJ. a "conservative-feminist" alliance representing these first two objections.

[91] See N. Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (New York: Scribner, 1995).

[92] N. Friday, *My Secret Garden: Women's Sexual Fantasies* (New York: Pocket Books, 1973) at 138-140. Berger raises the controversial example of a rape-fantasy in *Rights and Pornography, supra* note 50 at 167.

[93] See G. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in C.S. Vance, ed. *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge and K.Paul, 1984).

[94] As has already been argued, the vagueness of the law threatens to silence such expression as well.

democratic society.

G. *In Search of a Government Objective*

Much of this confusion arises from the fact that Sopinka J., rather than Parliament, established the objectives of harm. This leads to accusations of judicial moralizing.[95] Yet Parliament arguably could intrude into the so-called moral sphere.[96]

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[95] A traditional starting point for discussions of the legal enforcement of morality is the famous Hart-Devlin debate, sparked by the Wolfenden Report on Homosexual Offences and Prostitution. The report made the recommendation that "it is not the duty of the law to concern itself with immorality as such." *Report of the Committee on Homosexual Offences and Prostitution*, 1957, Cmd. 247 at para. 257 (U.K.). It is possible that Sopinka J. wished to avoid a clichéd lip service to what could be considered the leading legal debate of his generation. This paper suggests, however, that the debate was not mentioned for fear of possible comparison. Hart is generally regarded as the victor in the exchange; Devlin the last trumpeter of a bygone age. Yet a close reading of *Butler* reveals that while cloaked in a seemingly nuanced discussion of pornography and societal harm, the judgment adheres more closely to the conservative Devlin view. According to Devlin, an attack on social mores is an attack on society itself: "if society has the right to make a judgment and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence." Lord P. Devlin, "Morals and the Criminal Law" (1959) in *Law and Morality* (Philadelphia: Fortress Press, 1987) at 35-36. Stripped of a firm link between societal disapprobation and actual harm, the *Butler* enquiry is but a more modern retelling of the Devlin thesis: "The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole." *Butler, supra* note 4 at 471. Hart's criticism of Devlin reminds us of the tenuous link between pornography and harm: "Lord Devlin's belief [is] at points traceable to an undiscussed assumption. This is that all morality — sexual morality together with the morality which forbids acts injurious to others such as killing, stealing, and dishonesty — forms a single seamless web so that those who deviate from any part are likely or *perhaps* likely to deviate from the whole." H.L.A. Hart, "Law, Liberty and Morality" (1963) in *Law and Morality, ibid.* at 49 [emphasis added]. *Butler*'s supposed harm-tolerance morality of the eighties is not Devlin's Christian morality of the sixties. But it is, in itself, a moral construct, unsupported by firm evidence and justified under the banner of community standards. The Gonthier J. judgment recognizes this outright: "In my opinion, the distinction between the two orders of morality advanced by my colleague is correct, and the avoidance of harm to society is but one instance of a fundamental conception of morality." *Butler, supra* note 4 at 497.For Sopinka J. as for Lord Devlin, an attack on public morality is thus within the ambit of the criminal law: "the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression." *Butler, supra* note 4 at 479. At 476 Sopinka J. makes an obligatory dismissal of "legal moralism" as a legitimate governmental objective. He does, however, conclude by quoting the assertion of Dyzenhaus, *infra* note 133, that "[m]oral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values." The use of the quotation here is problematic in two ways. First, he uses what Dyzenhaus originally used as a qualified positive comment in a normative way. Second, one can ask what is left of these "*Charter* values" if they are so vaguely defined and loosely applied. It is the thesis of this essay that without a tight fit, these values, like the impugned obscenity test, become indeterminate.

[96] Robert George has proposed a vision of legislative morality compatible with the *Oakes* test. He critiques Devlin from a more conservative stance, arguing that moral values are not so frail that they must cling to a purely divine or societal justification. Rather, moral values in themselves can, and must, be proved independently. The non-cognition of the Devlin approach,

A good anti-obscenity law would state a more rationally sound objective, with provisions carefully tailored to remedy the harm. Although Ronald Dworkin expresses scepticism about the link between pornography and harm, he also accepts the governmental right to pass laws even where the risk of harm is moderate or indirect:

> one may be able to give reasons for condemning the [pornographic] practices (that they cause pain, or are sacrilegious, or insulting, or cause public annoyance) which do not extend to producing or savoring fantasies about them.[97]

In the face of adverse scientific evidence, Parliament could establish less ambitious but more constitutionally palatable government objectives: pornography is harmful because it is an eyesore, and because it promotes, if not perpetuates, negative and imbecilic images of humanity. The government could likely prove such a legislative thesis in court, without relying on a judicial manipulation of evidence. This objective would allow such a law to pass the first stage of the section 1 enquiry, which demands a rational objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[98] This objective would also allow the law to pass the 'rational connection' enquiry: it would not be difficult to prove that restrictions on such materials would diminish the impact of their attendant harms. A final test of constitutional legitimacy would remain: the court would also have to apply a rigorous test of proportionality, to ensure that the measures chosen minimally infringe upon *Charter* rights.[99] In the next section, this essay will argue that *Butler* and *Ludacka* sacrifice *Charter* rights to dubious objectives, in testing their impugned laws against a weakened proportionality test.

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and the circular equations of *Butler* would both be criticized as evasive. Society may enforce its own morality, and is fully capable of defining and justifying that morality in concrete, rational terms. R.P. George, "Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate" (1990) Am.J. Juris. 15 at 45. Gerald Postema makes a similar argument that society can erect mechanisms to ensure reflective judgments: "One such mechanism in a large and diverse community is the enactment and enforcement of laws designed to encourage respect for social forms constituting the community's moral life and the values which they make concrete. For these reasons, I conclude, a community has standing to enact and enforce its public morality." G.J. Postema, "Public Faces - Private Places: Liberalism and the Enforcement of Morality" in G. Dworkin, *Morality, Harm, and the Law* (Boulder: Westview Press, 1994) at 90.

[97] Purely attitudinal harm would not be the subject of criminal sanctions, but would have to manifest itself in some provable and real harm. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 258.

[98] *Big M, supra* note 14 at 352. *Big M* was, of course, one of three rare instances where a law did not pass the rational objective test. See D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 72.

[99] In this, a law attacking the makers of pornography, rather than the distributors, may be more proportional.

IV. JUDICIAL MANIPULATION OF THE PROPORTIONALITY TEST

The previous section has cast doubt on the rationality of the government objective for the obscenity provisions, as established by Sopinka J. Under this overarching shadow of vagueness and definitional deference, the judgment goes on to further dilute the individual branches of the section 1 proportionality test. In essence, Sopinka J. not only nurtures a tenuous legislative objective, but also lowers the proportionality hurdles this objective must surmount. Here Sopinka J. does not have to weaken these standards himself, but can rely on the increasingly deferential proportionality jurisprudence. The originally tight 'rational connection' test of *Oakes* is now satisfied so long as "Parliament had a *reasonable basis*" for the law.[100] In part two, the original *Oakes* test demanded the strict standard that Parliament choose the least intrusive means to an objective. By the time of *Butler*, however, it has become a quest for *less* intrusive legislation, which need not be the "perfect scheme."[101] Part three, the examination of salutary and deleterious effects, serves not as a test at all, but as a repetition of the tautology cited above: "*As I have already concluded*, this kind of expression lies far from the core of the guarantee of freedom of expression"[102] Thus all three sub-tests in the proportionality enquiry are flattened to allow smooth passage of the legislative objective under *Charter* scrutiny. The objections to the lax 'government objective' discussed in the first section will also apply to the 'rational connection test': if the harm the government professes to combat is illegitimate, then the banning of pornography cannot be rationally connected to this goal. This section will thus not repeat these arguments. Nor will it concentrate on the little-used third part of the proportionality test, the 'salutary and deleterious effects.' Rather, the section will focus on the essence of the proportionality test — the examination of 'least drastic means.'

A. *The Dilution of the Overall Proportionality Test by the Core-Periphery Distinction*

Sopinka J. immediately tilts the scales in favour of the anti-obscenity legislation by distinguishing between materials at the core and the periphery of the infringed *Charter* right. In section 1, core expression, such as political speech, is to be protected strongly.[103] Restrictions on fringe expression, such as pornography, are to be scrutinised less stringently.[104] This, however, relies on circular reasoning, and a prejudgment of whether or not the impugned material is obscene. The relationship between actual expressive material and abstract Constitutional scrutiny becomes discordant. At the appellate stage an impugned piece of work becomes but a prejudged example of the general class of pornography examined in a Constitutional

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[100] *Irwin Toy, supra* note 33 at 626, cited in *Butler, supra* note 4 at 483 [emphasis in original].

[101] *Butler, supra* note 4 at 484-85.

[102] *Ibid.* at 488. [emphasis added, to emphasize that this conclusion is foregone].

[103] *Ibid.* at 481-82.

[104] *Ibid.* at 482.

enquiry—context is lost.[105] This abstraction of the questioned material unravels as follows. A judge deems a piece of expressive material to fall into a marginal category. No matter how worthy the actual impugned material may be, the law criminalizing the work will be tested under a relaxed standard, under the preclassification of that work as pornographic.[106] This is especially problematic in the case of art, which by its very nature often seeks to shock us into introspection. As McLachlin J. said in *Zundel*, "it is often the unpopular statement which is most in need of protection under the guarantee of free speech."[107]

This core-periphery distinction has its origins in the *Prostitution Reference*, which holds that "the expressive activity, as with any infringed Charter right, should also be analysed in the particular context of the case."[108] Yet this contextual approach only serves to help justify the law, rather than save the actual expressive material. Both the pornography and profit core-fringe pre-categorizations distort the constitutional task at hand. While much pornography is obscene, it does not follow that a specific piece

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[105] The same criticism could be levelled against MacKinnon's work on pornography. As a rhetorical device she speaks not of specific pieces of pornography, or genres of pornography, or degrees of pornography, but of the entire class of pornography. She then focuses on the most vile examples of this form of expression: "Pregnant women, nursing mothers, amputees, other disabled or ill women, and retarded girls, their conditions fetishized, are used for sexual excitement. In the pornography of sadism and masochism, better termed assault and battery, women are bound, burned, whipped, pierced, flayed, and tortured. In some pornography called "snuff", women or children are tortured to death, murdered to make a sex film. The material features incest, forced sex, sexual mutilation, humiliation, beatings, bondage, and sexual torture, in which the dominance and exploitation are directed primarily against women." *Defamation and Discrimination, supra* note 44 at 797. Such blanket classifications warp rational discussion in both academic and legal spheres. As Schauer states, "It is not incorrect to say that war or gory violence is obscene, nor is it incorrect to describe a pornographic work as beautiful or important." *Free Speech, supra* note 10 at 179.

[106] While not of high persuasive value, the commendable judgment of Harris Prov. J. in *Glassman, supra* note 15 at 172, is especially germane here: "I do not feel that a portion of a work of art, whether that work be a photograph, a sculpture, a painting, a collage or a construction, can be separated from the whole — any more than a chapter, page or paragraph in a novel or other literary work can be excised and considered, so to speak in a vacuum."

[107] *R.* v. *Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202 at 261. Another kind of prejudgment tilting of the scales immediately follows. Sopinka J. states that as most of the targeted obscenity is motivated by profit, *Charter* breaches by anti-obscenity provisions might "be easier to justify than other infringements." *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 at 79, cited in *Butler, supra* note 4 at 482. It is significant that McLachlin J., the author of this *obiter dicta*, seems to have recanted this sentiment in the recent case of *RJR -MacDonald* v. *Canada (Attorney General)*, where she says that "motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression." [1995] 3 S.C.R.199, 127 D.L.R. (4th) at 348. *Langer, supra* note 21 does not attempt to use this second prejudgment categorization. Again, the example of art problematizes this tautological reasoning. Most art has been motivated in some way by profit. Should a law catching *Lolita* be upheld merely because Nabokov happened to make money on the venture ? What of "pure" art for art's sake, untainted by profit? It, too, would be lumped in with profit, as the general category, if not the specific example, is motivated in part by profit.

[108] *Prostitution Reference, supra* note 14 at 73-74, cited in *Butler, supra* note 4 at 481. See also *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326 at 1355, 64 D.L.R. (4th) 577, Wilson J.

of material is obscene. Simply because much pornography is for profit, does not make a specific piece of material profit-oriented and less worthy of *Charter* protection. These internal presuppositions run directly counter to the contextual approach which Sopinka J. himself praises in the judgment.

The recent case of *Langer* employs the same overarching strategy of abstractly subsuming the context of the material at bar to the context of the general, presupposed category of expressive materials:

> In assessing the proportionality of the limitation of the freedom of expression protected in s. 2(b) of the *Charter*, it must be born[e] in mind that the expressive activity which the state seeks to restrict is child pornography, a form of expression which can hardly be said to be crucial to the principles which lie at the core of s. 2(b).[109]

Langer shows more acutely the danger of this distortive technique and the danger of an abstract approach to obscenity. In *Butler*, few would question the assertion that the purpose and form of the materials was gritty, old-fashioned pornography, seized by police from a self-proclaimed video sex shop. In *Langer*, the materials were paintings, seized from an art gallery. It is conceded that we must separate findings of fact by the trial judge, in classifying the materials as obscene or not, and findings of law by the appellate court with regard to the constitutionality of the law. In the first case, the 'art' is scrutinized; in the second, the law is scrutinized. Yet in the constitutional review, the actual 'art' in question is forever trapped in the obscenity classification. Its actual merit and purpose is irrelevant to its ultimate fate. The inherent tension between provocative yet sincere expression and a perhaps overbroad law is relegated to the realm of the purely abstract, and ignored.

B. *Denial of Rights: Core-Periphery Invades Section 2(b)*

The recent Ontario Court of Appeal decision in *Ludacka* goes beyond *Butler* in extending core-periphery principles beyond section 1, in order to limit the definition of "expression" in section 2(b).[110] *Butler* at least retained Dickson C.J.C.'s large and liberal interpretation of "expression" in *Keegstra* : "...all activities conveying or attempting to convey a meaning are considered expression for the purposes of s. 2(b)."[111] In finding that the obscenity provision did, in fact, violate the section 2(b) right, Sopinka J. states that,

> I cannot agree with the premise that purely physical activity, such as sexual activity, cannot be expression.... The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases,

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[109] *Langer, supra* note 21 at 321.

[110] This analysis, of course, is not part of the proportionality test. The essay will discuss this issue alongside the proportionality enquiry as evidence of "categorical balancing." This technique duplicates the proportionality enquiry in deciding whether or not given expression should in fact be afforded expressive rights under section 2(b).

[111] *R.* v. *Keegstra,* [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 at 26. This is in keeping with the wording of the Canadian expressive right, which refers to "thought, belief, opinion and expression..." and is therefore much wider than that of the United States.

> may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author.[112]

In *Ludacka*, Dubin C.J.O. squeezes *Irwin Toy* to argue that,

> In my opinion, the activity in issue here, particularly the activity involving physical contact between the performers and patrons, and between the performers, is not a form of expression within the meaning of freedom of expression in the *Charter*. It is purely physical activity which does not convey or attempt to convey meaning. The activity does not manifest ideals, thoughts, opinions, or beliefs that have inherent value to the community and the individual.[113]

Similarly in *Butler*, the Attorney-General for Ontario argued that pornography conveys only expression of physical arousal. This serves as the American justification for drawing the contorted conclusion that pornography does not even constitute expression, and thus not protected by the Constitution.[114]

Three immediate objections arise to this analysis. While American courts[115] often resort to such 'categorical balancing' of its constitutional rights, the inherent balancing mechanism of section 1 of the Canadian *Charter* makes this kind of prejudgment confusing at best and a denial of rights at worst.[116] The proportionality stage core-periphery distinction already tilts the enquiry towards justifying an infringement of the right in question. Categorical balancing would deny the right altogether. Section 2(b), like other *Charter* sections, is a "fundamental right and freedom." Any violation of a *Charter* right is textually and notionally assigned to section 1's enquiry into "reasonable limits in a free and democratic society."

It is clear that obscenity, whether on film or on stage, does convey a meaning. Even the basest forms of pornography convey an erotic message, albeit in a mindless and physical form. Thus central to MacKinnon's thesis is the assertion that pornography conveys the message that women are lesser creatures to be violated by men.[117] In claiming that an exotic dance conveys no meaning and is thus not protected as expression, Dubin C.J.O. commits the same error as Huband J.A. in the Manitoba Court of Appeal review of *Butler*. To his credit, Sopinka J. states that the court below had erred on this point and affirms that expression must be interpreted largely and

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[112] *Butler, supra* note 4 at 474.

[113] *Ludacka, supra* note 9 at 24.

[114] For arguments that pornography does not constitute "speech" see *Democracy and Free Speech, supra* note 61 at 210, and *Free Speech, supra* note 10 at 181-83.

[115] See *e.g. New York* v. *Ferber* (1982), 458 U.S. 747.

[116] For another leading example of categorical balancing under 2(b), see *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.]. At 588, McIntyre J. admits that "there is ... always some element of expression in picketing", yet denies it section 2(b) protection as its primary purpose was economic leverage, and not communication.

[117] *Only Words, supra* note 61 at 30-32. Berger argues that this assertion rebuts Schauer's argument that pornography does not constitute speech. *Rights and Pornography, supra* note 50 at 177.

liberally.[118]

While *Butler* does not condone such a narrow interpretation of the section 2(b) right, its limited view of the principles underlying freedom of expression encourages analyses such as that of Dubin C.J.O. Sopinka J. affirms the *Keegstra* assertion that there exist three rationales for freedom of expression: "[t]he values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfilment."[119] Yet this list of objectives is in itself overly narrow. David Lepofsky, for example, has posited no less than 13 objectives of free speech.[120] Yet even within the shorter list, pornography can be justified. In our age of sexual empowerment, the expressive purpose of arousal does contribute to 'individual self-fulfilment.' Furthermore, even at this basic level of titillation, so-called pornographic materials could, of course, play a role in political expression, and the search for truth in challenging sexual conventions. Thus, in fact, all three values underlying freedom of expression are potentially furthered.[121] The core-periphery prejudgment is thus at best redundant and at worst a true manifestation of prejudice against the impugned materials.

C. *Abandonment of "Least Drastic Means"*

Central to the proportionality enquiry is the question of whether the government minimally impaired the *Charter* right in order to achieve its objectives. Schauer argues that courts and society must guard against overbroad infringements on free speech:

> [c]lose scrutiny both of the ends that are argued to be sufficient to justify restrictions on freedom of speech, and of the means that are argued to be necessary to accomplish those ends, will in many cases show that it is possible to recognize free speech interests and other important interests without undue sacrifice of either.[122]

Whatever the threat posed by pornography, we must always remember that we are in the realm of criminal law, Parliament's most extreme coercive instrument, and one where *Charter* concerns should be on full alert. As Doherty J.A. states,

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[118] *Butler, supra* note 4 at 472. The recent controversy surrounding Jubal Brown, an Ontario College of Art student who protested against banal and conventional art by vomiting on works in various art galleries, reveals the artifice of categorically stating that violent acts, such as murder or vandalism, cannot constitute expression.

[119] *Butler, supra* note 4 at 581.

[120] D. Lepofsky, "Towards a Purposive Approach to Freedom of Expression and its Limitations" in F.E. McArdle, ed., *The Cambridge Lectures 1989* (Montréal: Yvon Blais, 1990).

[121] Mahoney presents a stronger argument that pornography should not receive protection under section 2(b). While pornography is expressive material, and dangerous because it is so, it has no right to protection as it is a form of violence analogous to a threat or other form of criminal communication. This argument is based upon Dickson C.J.'s statement in *Irwin Toy, supra* note 29 at 607, that although violence may be expressive behaviour, and "[w]hile the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection." K. Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (1992) 55 Law & Contemp. Probs. 77.

[122] *Free Speech, supra* note 10 at 206.

> ...criminal law is not the only means of bolstering values. Nor is it necessarily always the best means. The fact is, criminal law is a blunt and costly instrument — blunt because it cannot have the human sensitivity of institutions like the family, the school, the church or the community, and costly since it imposes suffering, loss of liberty and great expense... criminal law must be an instrument of last resort.[123]

In presenting a world where pornography is either banned or allowed, *Butler* wields the clumsy and coercive tool of criminal law where more subtle and less intrusive means could perhaps achieve the same ends.

As an example of less intrusive means, the intervening Civil Liberties Association had recommended time, manner, and place restrictions as less drastic means to achieve the government objective.[124] Parliament could limit the selling of pornography to certain registered stores away from the view of members of the public who may not wish to be visually assaulted by the sight of porn-sellers.[125] Sopinka J., however, responds that "[o]nce Parliament has reasonably concluded that certain acts are harmful to certain groups in society and to society in general, it would be inconsistent, if not hypocritical, to argue that such acts could be committed in more restrictive conditions."[126] Yet in the judgment he has just argued that the law impairs minimally because it does not extend to private use of pornography.[127] Is this

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[123] *R.* v. *McDougall* (1990), 7 O.R. (3d) 247, 3 C.R. (4th) 112 at 127 (C.A.), quoting The Law Reform Commission, *Our Criminal Law* (1976) at 27.

[124] *Butler, supra* note 4 at 486.

[125] This would address Thomas Emerson's statement, quoted in *Only Words, supra* note 61 at 108, that the imposition of pornography on members of the public "has all the characteristics of a physical assault." The government could also insist upon a "pornography licence" requiring a psychological assessment, similar to the proposed gun control laws. While this would be more restrictive, it would be in keeping with the idea of pornography, like guns, as a potential harm possibly actualized in the wrong hands. Alternatively, the government could erect a "porn-tax" to dissuade users, or direct laws against producers of pornography, as such persons create direct victims in the subjects of the pornography, whose consensual participation may be problematic. It is not the purpose of this essay to craft the perfect means of limiting the effects of pornography, but rather to show that there exist a wide range of less intrusive means, and that Sopinka J. chose not to examine these means in his judgment.

[126] *Butler, supra* note 4 at 487. A registration system could also allow the government to monitor from a distance those who use pornography. Borovoy advocates this as a minimally-intrusive yet prudent way of ensuring that hate-mongers do not threaten society. *When Freedoms Collide, supra* note 50 at 53.

[127] Some readings of *Glad Day Bookshop, supra* note 18, might suggest that Sopinka J. cannot simultaneously assert the threat posed by pornography, and the solace that this governmental control of pornography will not extend to private residences. Moreover, there is nothing in *Butler* that suggests that the dissemination of obscenity is not criminal conduct if the end result is personal use of that material. The ultimate purpose of most, if not all, obscenity is use by individuals. Indeed, it is that very result that the criminalization of the dissemination of obscenity is intended to prevent. It is the use of obscenity by individuals that produces harm to society and it is irrelevant whether the use is in public or in private: see *R.* v. *Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1 at 22-23, 45 C.R. (3d) 36, 15 C.R.R. 206 (B.C. C.A.), Anderson J.A. The criminalization of the propagation of obscenity has as its aim the limiting or preventing of such use. The American case of *Stanley* v. *Georgia* (1969) 394 U.S. 557 recognizes the right of the individual to use pornography in the privacy of his or her own home.

moderation in the face of the "grave harm" posed by pornography "hypocritical"?[128] Sopinka J.'s tautological and rhetorical response seeks to destroy the very notion of "least drastic means." We will apply his reasoning to the debate over cigarette advertising. In contrast to pornography, there is a scientifically proven link between tobacco consumption and harm. The governments recognize this threat through various governmental limitations on advertising and selling tobacco, as well as time and place restrictions. The fact that Parliament does not criminalize smoking, or put tobacco executives in jail, does not indicate "inconsistency" on the part of the government. Rather, it shows a recognition that the government must strive to achieve its goals through minimal impairment of individual rights. The Civil Liberties Association's recommendations offered a reasonable way to control where, by whom, and how, pornography of various classifications would be used, stopping short of the twin ham-fisted policy of a full ban bolstered by criminal sanctions.

Sopinka J. offers two faulty arguments to defend the use of criminal law. First, he weakly and pessimistically states that since the proposed anti-pornography Bill C-54 had faltered, superior legislation was impossible.[129] He then holds that Parliament may use complementary means to achieve its objectives. Less intrusive means such as education, legal and police reform to facilitate the punishment of criminals who actually commit violence against women, or general societal campaigns against sexism and violence, are dismissed as ineffective to combat the gravity of pornography.[130] Yet education, rather than criminal sanctions, would presumably be the appropriate antidote to the "attitudinal harm" Sopinka J. links to pornography. Sopinka J., however, is loath to launch a rigorous enquiry into less restrictive means because such an enquiry would remind readers of the loose fit between the cause and effects of pornography and harm.[131] Instead he advocates an imprecise grapeshot volley of "multi-pronged" and "complementary" means of combating pornography. This slack review permeates the post-*Butler* cases. *Little Sisters*, for example, frankly admits that "[t]he means chosen here by Parliament are not the least drastic means available of achieving the objective."[132] Thus just as *Butler* lightly reviews the rationality of the law, it also relieves the government of its duty to pursue such goals in a precise and rights-respecting manner. The final section will briefly examine the implications of such lax *Charter* review for the legitimacy of judicial review, and its relation to democracy.

V. CONCLUSION: RULE OF LAW OR RULE OF CENSORS?

Pornography, more than any other issue, reveals the tension between democracy and freedom. On the one hand, even socially disagreeable expressions of individual rights must not be trammelled. Canada affirms this principle in its *Charter*. On the other hand, the majority has a right to create laws to protect society. It is

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[128] *Butler, supra* note 4 at 487.

[129] *Ibid.* at 506.

[130] For other less drastic means, see *When Freedoms Collide, supra* note 50 at 65.

[131] Here it is useful to compare the three pages in *Butler* dedicated to the "minimal impairment" enquiry (and mostly dedicated to an active rebuttal of the civil liberties position) to the eleven pages dedicated to building up a governmental purpose.

[132] *Little Sisters, supra* note 23 at 543.

conceded that these laws cannot be scientifically perfect; legislators are not omniscient soothsayers. Section 1 of the *Charter* reveals a certain genius for accommodating both the majority and minority interests in society through judicial confirmation that laws are rational and proportional in their effects. If we are to escape the dangers of majoritarian moralism and arbitrary enforcement thereof, we must ensure that the process of legal review, commanded by the *Charter*, is undertaken in a rigorous and thorough manner. A deferential stance towards vague or irrational legislation renders constitutional review nugatory, and reduces the judiciary to a sub-senate function of purely political review. Such danger is amplified if the judiciary have essentially written themselves the laws under review, as is the case in the vaguely-worded obscenity realm. If the concepts of harm and community standards have become devoid of any meaning, such that they are mere judicial constructs of what their Lordships and Ladyships perceive to be harmful or contrary to community standards, then the judiciary should question the appropriateness of their task. As Dyzenhaus states,

> [i]t might seem, furthermore, that, as many *Charter* critics claim, the *Charter* is a licence to judges to decide cases in accordance with their own moral preferences, since the *Charter* does not provide judges with standards capable of genuinely determining their decisions. Even worse for such critics is that they think most judges hold the ideal of freedom dearer than that of democracy, which means that the *Charter* will in fact be used as a brake on democracy.[133]

The democratically-elected Parliament is in a more legitimate and informed position to investigate the danger of harm, and to gauge community standards. Thus even if rights are abandoned through relaxed judicial review, democracy, albeit with a dangerously majoritarian tilt, should rule. Yet this bleak vision offers no solace, in wishing away judicial protection of the rights enshrined in the *Charter*. Rigorous judicial review demands a rejection of vague, irrational, and disproportionate laws. As we have seen through a review of recent obscenity decisions, deferential review will leave in its wake an inconsistent and arbitrary jurisprudence. This reflects the lack of vigour in the original constitutional enquiry. A return to thorough judicial review would legitimize Parliamentary forays into the sexual realm by insisting that the resultant legislation adhere not to personal predilections, but constitutional principles. A regime of firm constitutional review would move the obscenity debate out of the inconsistent, inarticulated, and incoherent "dark corners" of judicial obfuscation. Under this disciplinary rule of law, new anti-obscenity legislation, based on rational considerations and implemented in measured degree, could address the harms of pornography without need for juridical genuflection.

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[133] D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" 1 C.R. (4th) 367 at 372.