Canadian Obscenity Law 20 Years after Butler:
The Mainstreaming of Violent Pornography
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INTRODUCTION

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

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

Comparatively little consideration, however, has been given to whether Butler would lead to positive outcomes for women’s equality in its application to commercial adult pornography marketed to a heterosexual male consumer. The purpose of this article is to consider the courts’ application of...
Butler in the twenty years since it was decided, with a focus on the type of commercial heterosexual pornography that was identified in the case as generally harmful and degrading to women.\footnote{For the sake of simplicity, when I use the word “pornography” in this article, unmodified, it is this category of materials to which I am referring.}

A review of available sources shows only a small number of prosecutions for such material were conducted post-Butler, and very few convictions obtained. By any measure, Butler did not lead to a new era of using the criminal law to recognize the harms of pornography to women. In this article, I consider a number of possible explanations for the disinterest in prosecuting such cases and the low number of convictions, despite the existence of a precedent that could have facilitated such a result. In particular, I consider the validity of claims that technological advances have made such prosecutions too difficult or irrelevant as well as the assertion that the link between pornography and violence has been discredited. I also offer two other possible explanations, namely that the normalization of sexualized violence makes it difficult for judges and juries to distinguish a category of materials that are “obscene” and that the understanding of pornography’s harms was too narrowly cast in Butler. A comparison of the legal responses to the pornography of adult women and child pornography is useful for testing some of these claims.

Those of us who supported the approach in Butler find ourselves in the unpalatable position of having a superficially feminist legal framework that is blamed for various negative outcomes but almost never applied. Instead, we continue to face denial that the production and consumption of violent, misogynistic and explicitly sexual materials has any negative consequences for equality between men and women. In this article I hope to use the occasion of Butler’s twentieth anniversary to offer a renewed analysis of the social impact of the commercial pornography market for men, grounded in sex equality, that calls into question some of the claims that drive the results in these cases. Finally, in considering where we might go from here, I consider whether recent developments in England might serve as a model for Canada, or whether they merely replicate the pitfalls of our current scheme.

THE CHANGING UNDERSTANDING OF PORNOGRAPHY PRIOR TO BUTLER

The Criminal Code defines obscenity in s. 163(8) as the “undue exploitation of sex....”\footnote{Criminal Code, RSC 1985, c C-46, s 163(8).} The Code does not prohibit the possession of obscenity, but only its making or distribution.\footnote{Criminal Code, ibid., ss 163(a) and (b). The offences are hybrid offences with a maximum penalty of two years’ imprisonment when prosecuted by indictment.} In the first decades of the twentieth century, policing of obscenity was predominantly based on an assessment...