Canadian Obscenity Law 20 Years after *Butler*:

The Mainstreaming of Violent Pornography

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Presented by:
Prof. Janine Benedet
University of British Columbia
Vancouver, British Columbia

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THE MAINSTREAMING OF VIOLENT PORNOGRAPHY

Janine Benedet[1]

INTRODUCTION

In February 1992, the Supreme Court of Canada upheld the *Criminal Code* prohibitions on making and distributing obscenity against a constitutional challenge based on the protection of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[2] 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*.[3] 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.[4]

Reaction to the decision from both academic and popular commentators was mixed, but mostly critical.[5] 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.[6]

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

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[1] Associate Professor, Faculty of Law, University of British Columbia. This work was supported by the Law Foundation of British Columbia. Many students contributed to the research for this article, including Brendan Ward, Tamlin Cooper, Rebecca Coad and Karen Segal.

[2] *R. v. Butler*, [1992] 1 SCR 452, [1992] SCJ no 15 (QL) [*Butler*].

[3] *Ibid at* para. 123.

[4] *Ibid at* para. 50.

[5] See the discussion *infra* at

[6] The application of the definition of obscenity to the importation of gay and lesbian pornography was considered by the Supreme Court in 2000 in *Little Sister's Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120. That decision also engendered considerable scholarly and popular commentary: See: Janine Benedet, "Little Sisters Book and Art Emporium v. Minister of Justice: Sex Equality and the Attack on R. v. Butler" (2001) 29 Osgoode Hall LJ 187; Bruce Ryder, "The Little Sisters Case, Administrative Censorship, and Obscenity Law" (2001) 39 Osgoode Hall LJ 207; Jo-Anne Pickel, "Taking Big Brother to Court: Little Sisters Book and Art Emporium v Canada (Minister of Justice)" (2001) 59 UT Fac L Rev 349; Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler" (2003) 36 UBC L Rev 77; Aleardo Zanghellini, "Is Little Sisters Just Butler's Little Sister?" (2004) 37 UBC L Rev 407.

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.[7]

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…."[8] The *Code* does not prohibit the possession of obscenity, but only its making or distribution.[9] In the first decades of the twentieth century, policing of obscenity was predominantly based on an assessment

[7] 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.
[8] *Criminal Code,* RSC 1985, c C-46, s 163(8).
[9] *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.