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When Will They Ever Get It Right?

A Gay Analysis of *R. v. Butler*

Paul Wollaston*

In February, 1992, the Supreme Court of Canada released its decision in the case of *R. v. Butler*.¹ This ruling upheld the obscenity provisions in s.163 of the *Criminal Code*,² and in so doing, the court attempted to clarify some of the existing confusion surrounding their interpretation. The court ruled that a work's sexual explicitness alone is insufficient to bring it within the definition of obscenity in s.163(8). In order to qualify as obscene, the impugned materials must combine sex with violence, degradation, or dehumanization. The rationale for prohibiting such materials was that there is a reasonable apprehension that their availability harms society generally, and women's pursuit of equality in particular.

Ironically, on April 30, 1992, the first obscenity charges after the *Butler* decision were laid against Glad Day Bookshop in Toronto for selling a lesbian magazine called *Bad Attitude*, a magazine made by women for women about women's sexuality. Further, on July 15, 1992, the first application of the interpretation of s.163(8) set out in *Butler*, came in the unreported case of *Glad Day Bookshop Inc. and Jearald Moldenhauer v. Deputy Minister of National Revenue for Customs and Excise*.³ In this decision, Justice Hayes ruled that twelve sexually explicit gay magazines, comics, and books being detained by Canada Customs were obscene. One magazine was considered to be obscene because it contained "extensive and excessive descriptions of the acts and professed pleasures and the appreciation of the physical activity,"⁴ and another was obscene because it described sexual activity that "does not arise from any ongoing human relationship."⁵

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¹ [1992] 1 S.C.R. 452 [hereinafter *Butler*].

² R.S.C. 1985, c. C-46.

³ (14, July, 1992), Toronto 619/90 (Ont. Ct.(Gen. Div)) [hereinafter *Moldenhauer*].

⁴ *Ibid.* at 24.

⁵ *Ibid.* at 26.

The foregoing discussion contains the essence of what is a serious shortcoming of the current obscenity provisions of the *Criminal Code* and their subsequent interpretation in *R. v. Butler*. Specifically, while s.163(8) was interpreted in a manner aimed ostensibly at protecting women from the harmful impact of degrading sexual images, there is no recognition or evaluation of its potential impact on gay and lesbian culture. As is often the case in mainstream law, this perspective is simply invisible.

This case comment shows how a gay perspective would impact on each stage of the Supreme Court's *Charter*⁶ analysis in *Butler*. After a synopsis of the *Butler* decision, an analysis of the short-comings of the court's approach to the substantive elements in the decision, (i.e., the freedom of expression and equality guarantees) is undertaken, followed by a critique of the s.1 analysis.

The Butler Decision

Donald Victor Butler owned and operated an adult video store in Winnipeg. In 1987, the police raided his store, seized his entire stock, and charged him with 250 counts of selling, possessing, and possessing for the purpose of distribution under (what was then) ss.163(1)(a) & (2)(a) of the *Code*. The seized items were mostly videos and magazines.

At trial before the Court of Queen's Bench,⁷ Butler argued that s.163 of the *Criminal Code* violated his freedom of expression as protected in s.2(b) of the *Charter* and was not saved by s.1. In the course of his reasons, the trial judge focussed the inquiry on whether or not *the materials* were protected by the *Charter*, rather than on whether s.163 violated the *Charter*. Judge Wilson determined that all the materials in question were covered by the constitutional right to freedom of expression, and only with respect to a few videos was the violation of the freedom of expression right justified under s.1. He therefore convicted Butler on eight of the charges and acquitted him of the remaining 242 charges.

The Crown appealed the acquittals and Butler appealed the convictions to the Manitoba Court of Appeal.⁸ In this court, Huband, J.A. speaking for the majority, concluded that the impugned materials did not convey any meaning and were "purely physical" activities, and, as such, were not protected by s.2(b) of the *Charter*. The Court of Appeal allowed the appeal by the Crown and overturned the acquittals from the court below.

⁶ *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.

⁷ *R. v. Butler* (1989), 50 C.C.C. (3d) 97 (Man. Q.B.).

⁸ *R. v. Butler* (1990), 60 C.C.C. (3d) 219 (Man. C.A.).

In the Supreme Court of Canada, Mr. Justice Sopinka, writing for a unanimous court, addressed the *Charter* issues only with respect to subsection (8) of s.163. That section defines "obscene" for the purposes of the *Code*. He first provided an outline of the history of obscenity legislation leading up to the current provision, and concluded that s.163(8) had been interpreted so as to override all earlier jurisprudence on the definition of obscenity.

Sopinka, J. then outlined the two tests to be used to decide if a work or material is obscene. The exploitation of sex must be the work's dominant characteristic, and the exploitation must be "undue." In order to determine if the exploitation is undue, the court applies three further tests.

First is the "community standards" test. A work is obscene if Canadians would not tolerate other Canadians being exposed to it. The community standard is to be measured with respect to the whole community and not with respect to a smaller part of that community, "such as a university community where a film is shown."⁹ There is also no requirement that the Crown adduce any expert evidence to prove a community standard.

Next, the court recognized that the truly insidious nature of pornography lies in its potential for its degrading images to victimize women directly, either through men who copy the pornographic scenarios of rape and abuse, or, indirectly through its endorsement of, and contribution to, sexist attitudes in society generally. This reasoning is apparent in its adoption of a second test in deciding if the exploitation of sex in the impugned material is undue. It states that material which "exploit[s] sex in a 'degrading or dehumanizing' manner will necessarily fail the community standards test."¹⁰ Degrading and dehumanizing material is considered to be harmful to women in particular, and therefore, to society in general. Sopinka, J. states that although this harm cannot be proven with precision, there is nonetheless sufficient evidence that the depiction of degrading and dehumanizing sexual acts harms women, and that "[i]t would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material."¹¹

The third test the court adopted with respect to the interpretation of "undue exploitation" in s.163(8) is the "artistic defence." The exploitation of sex will not be considered to be undue if it is required for the "serious treatment" of a theme of the work.¹² This test was initially added to the interpretation of s.163(8) in the 1960s in response to charges of obscenity brought against serious

⁹ *Supra* note 1 at 476.

¹⁰ *Ibid.* at 490.

¹¹ *Ibid.* at 479.

¹² *Ibid.* at 481.

works of literature (for example, *Lady Chatterley's Lover* in *Brodie*¹³) and film (for example, *Last Tango in Paris* in *R. v. Odeon Morton Theatres Ltd.*¹⁴).

Mr. Justice Sopinka then elaborated on the relationship of these three tests to each other. He said that what the community would tolerate others being exposed to must be determined "on the basis of the degree of harm that may flow from such exposure....The stronger the inference of a risk of harm the lesser the likelihood of tolerance."¹⁵ He divided pornography into three categories and discussed how this determination applies to each: (1) depictions of sex and violence together are "almost always" undue exploitation of sex, (2) portrayals of explicit degrading or dehumanizing sex "may be undue if the risk of harm is substantial" and (3) depictions of explicit non-violent sex that is neither degrading nor dehumanizing "is generally tolerated" by the community and is not undue exploitation of sex unless it involves children.¹⁶

One could argue that in laying out how the tests are to relate to each other, Sopinka, J. all but eliminated the function of the community standards test. By essentially deeming that certain depictions violate the community standard and that other depictions do not, Sopinka, J. renders it almost superfluous for the parties to adduce any evidence in court with respect to the community standard.

Having set out the appropriate interpretation of s.163(8), the Court then turned to the question of whether it violates s.2(b) of the *Charter*. In rejecting the Manitoba Court of Appeal's ruling that pornography is not protected by s.2(b) because it is a violent form of expression, the court said that that argument confused form with content.¹⁷ Pornography is not a violent form of expression because a film or magazine is not a violent act comparable, for example, to an assault with one's fist. The court found that s.163(8) violates s.2(b) of the *Charter* simply because it prohibits certain forms of expression. It also held that "activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning conveyed."¹⁸

Next, the court considered whether the violation of s.2(b) was saved by s.1. This analysis involved determining if the impugned provision is a "limit prescribed by law" or whether it provides "an intelligible standard according to which the judiciary must do its work."¹⁹ In answering this question the court

¹³ *Brodie v. The Queen*, [1962] S.C.R. 681.

¹⁴ (1974), 16 C.C.C. (2d) 185 (Man. C.A.).

¹⁵ *Supra* note 1 at 485.

¹⁶ *Ibid.* at 485.

¹⁷ *Ibid.* at 487.

¹⁸ *Ibid.* at 488.

¹⁹ *Ibid.* at 490, quoting from *Attorney General of Quebec v. Irwin Toy Limited*, [1983] 1 S.C.R. 927 at 983.

should look beyond the "bare words" of the section to how it has been interpreted by the courts. The court decided that the jurisprudence does provide an intelligible standard.

The next question in the s.1 analysis is whether there is a pressing and substantial objective which justifies infringing the right to distribute obscene materials. The court held that imposing a "certain standard of public and sexual morality, solely because it reflects the conventions of a given community" is not legitimate objective.²⁰ In this case, however, the objective of s.163(8) is "the avoidance of harm to society,"²¹ which is caused by the reinforcement of gender stereotypes.

Sopinka, J. rejected the argument that if the purpose of the provision is now the protection of women's equality interests, it was not so when it was brought into the *Code* in 1959. He said that while our ideas concerning the harm caused by obscene materials has "developed considerably"²² since the inception of s.163(8), its purpose was then and still is today, the protection of society from harm. When Mr. Justice Sopinka wrote that our notion of the harm caused by obscene materials had developed considerably, he referred specifically to the impact of the feminist analysis on jurisprudence. In 1959, when the amendment to the *Criminal Code* was passed, the courts may have been more concerned with the impact of pornography on society as a whole. Today, however, the courts will consider its impact on the traditionally less powerful groups, and specifically women.

The Supreme Court then embarked on the proportionality section of the s.1 analysis. In applying the proportionality test, it noted that it is important to bear in mind the values informing the freedom of expression guarantee: "the search for truth," "participation in the political process," and "individual self-fulfillment."²³ With respect to these, the court cited the description of pornographic materials by Shannon, J. in *R. v. Wagner*:²⁴

Women, particularly are deprived of unique human character or identity and are depicted as sexual playthings, hysterical and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts.

Sopinka, J. wrote that, "the kind of expression which is sought to be

²⁰ *Ibid.* at 492.

²¹ *Ibid.* at 493-494.

²² *Ibid.* at 494-495.

²³ *Ibid.* at 499.

²⁴ (1985), 43 C.R. (3d) 318 at 331.

advanced does not stand on the same footing with other kinds of expression which directly engage the 'core' of the freedom of expression values."²⁵

In applying the first branch of the proportionality test, the court determined that there is a rational connection between s.163(8) and the parliamentary objective of avoiding harm to society. In this respect, the court noted that although it is difficult, "if not impossible," to prove that pornography causes this harm directly, "it is reasonable to assume" the connection exists.²⁶

In the second part of the proportionality test, the minimal impairment analysis, the court found that the obscenity provision minimally impairs the freedom of expression for four reasons. First, s.163(8) does not prohibit non-violent sexually explicit depictions which are not degrading or dehumanizing. Second, this section of the *Code* does not apply to works with artistic or literary merit. Third, attempts in the past to make the law more exhaustive and explicit have failed, and the only "practicable alternative" is a less precise definition: "[I]t is appropriate to question whether, and at what cost, greater legislative precision can be demanded."²⁷ Fourth, the provision does not extend to include the viewing of obscene materials in private; "it is only the public distribution and exhibition of obscene materials which is in issue here."²⁸

The final question with respect to the proportionality test is whether the infringement of the protected right outweighs the legislative objective of the provision. In this regard the court reiterated its earlier point that the distribution of obscene materials is not at the "core" of the freedom of expression guarantee, whereas the parliamentary objective of protecting women from harm goes to the root of freedom and democracy in our country.

The Supreme Court thus concluded that while s.163(8) of the *Criminal Code* violates the freedom of expression provision, s.2(b), of the *Charter*, it is nevertheless saved by s.1.

In its reasoning in *Butler*, the Supreme Court is mindful of the importance of the freedom of expression interest, while trying to inform that right with a recognition of the equality rights of women. There is one equality interest, however, which the Court has completely overlooked: the equality interest of gays and lesbians.

Gay Critique

In its reasons in *Butler*, the Supreme Court focusses almost exclusively on

²⁵ *Supra* note 1 500.

²⁶ *Ibid.* at 502.

²⁷ *Ibid.*

²⁸ *Ibid.* at 507.

how pornography made for straight men affects women's equality interests. There is no attempt to justify the infringement of the freedom of expression interest with respect to gay and lesbian materials. As a result, the court came to an underinclusive determination; it should have either narrowed the interpretation of s.163(8) to apply only to materials which could reasonably be said to infringe women's equality interest, or, concluded that the obscenity provisions of the *Criminal Code* violate the right to freedom of expression in s.2(b) of the *Charter* and are not saved by s.1.

Substantive

In *Butler*, Sopinka, J. argues that pornography is less worthy of the constitutional protection of s.2(b) than political speech because "[i]t only appeals to the more base aspect of individual fulfillment, and is primarily economically motivated."²⁹ For gays and lesbians, however, the sexual is the political. What defines us as a group is our sexuality, one cannot separate the sexual agenda from the political.³⁰ As Moldenhauer notes:

[A]s gay people we know how important literature is in informing our own evolving identity and furthering our social empowerment. Because our 'difference' as gay and lesbian people is largely defined by our sexuality, it is especially important for us to be able to communicate and share experiences about this subject.³¹

The freedom of expression provisions of the *Charter* must be interpreted in a manner which is consistent with the fundamental constitutional value of equality contained in s.15. The courts have increasingly interpreted this provision to include the right to be free from discrimination on the basis of sexual orientation.³²

The application of the community standard in *Butler* to the definition of obscenity, however, directly imports a heterosexist bias of the community. The community as a whole, and therefore the community standard, is not as tolerant of explicit gay sexual material as it is of explicit heterosexual material. For example, a survey conducted in Canada in 1987 in two separate communities by *Schell et al.*³³ demonstrated that Canadians are less tolerant³⁴ of the depiction of

²⁹ *Ibid.* at 509.

³⁰ J. Moldenhauer, *Censorship Bulletin #4* (Toronto, Ontario: Glad Day Bookshop and the Glad Day Censorship Fund, 1986), at 13.

³¹ *Ibid.*

³² *Haig v. Canada* (1992), 9 O.R. (3d) 495 (Ont.C.A.). This case read sexual orientation into the *Canadian Human Rights Act* based on its interpretation of s.15 of the *Charter*.

³³ "Development of a Pornography Community Standard: Questionnaire Results For

"sexual activity between consenting male adults" generally,³⁵ and anal intercourse specifically,³⁶ than of "intercourse between consenting adults."³⁷

As Lynn King writes in "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?"³⁸ one of the reasons the state is able to harass gay bookshops and magazines is because of the jurisprudential concept of "community standards." These standards must include the views of everyone, even the most sexist or homophobic of men.

How is the heterosexist bias applicable to the community standard to be resolved in light of a constitutional commitment to equality? Should the court simply disregard a community intolerance to representations of homosexual activity to the extent that that intolerance reflects the community's heterosexism? It seems that the *Charter's* equality guarantees mandate that the courts either filter out the heterosexist bias of the community standard when applying it to gay materials, or, discard the community standards approach altogether.

Section 1 Analysis

As Mr. Justice Sopinka noted in *Butler*, the standard employed with respect to the definition of obscenity in s.163 is an "intelligible standard," and may not be vague or imprecise.³⁹ The standard articulated by Sopinka, J. that "material which may be said to exploit sex in a *degrading* or *dehumanizing* manner will necessarily fail the community standards test"⁴⁰ (emphasis added) *is*, however, vague and imprecise. The terms "degrading" and "dehumanizing" are neither defined nor expounded by the court. It is only said that "the appearance of consent is not necessarily determinative."⁴¹ As June Callwood writes in *Feminist Debates and Civil Liberties*, "there are shoals of hazard when a law seeks to prohibit what it cannot describe."⁴²

Because of this uncertainty, the concept of degradation seems highly susceptible to subjective interpretation. As Lisa Duggan, Nan Hunter, and Carole Vance write, "degradation is a sufficiently inclusive term to cover most

Two Canadian Cities" (1987), 29 Can. Jo. Crim. 133.

³⁴ The study measured tolerance on a scale of 1 to 100, with 100 as the maximum level of tolerance.

³⁵ Mean = 18.8.

³⁶ Mean = 19.4.

³⁷ Mean = 37.2.

³⁸ See V. Burstyn (ed.), *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985), at 85.

³⁹ *Supra* note 1 at 490.

⁴⁰ *Ibid.* at 478.

⁴¹ *Ibid.* at 479.

⁴² *Supra* note 38 at 129.

acts of which a viewer disapproves.”⁴³ What is very degrading to one person might not be at all so to the next. The image of a man kneeling before another man and sucking his penis, or a film of one man anally penetrating another might seem degrading to a straight middle-aged male judge, for example, but not at all to a gay man. Men in our society are taught from a nearly age that homosexual acts are, by definition, degrading and emasculating. Indeed, this attitude has been institutionalized. For example, Canada Customs Memorandum D9-1-1, which contains guidelines to determine if material imported into Canada is obscene under the *Criminal Code*, deems depictions of anal penetration – but not vaginal penetration – to be obscene.

Rational Connection

One might also question whether there is any rational connection between the prohibition of some gay materials (i.e., those which fall within the definition of obscene set out in *Butler*), and the stated objective of the prohibition, which is the prevention of harm to society and particularly harm to women. It is questionable that this rationale is applicable to gay material.

Heterosexual pornography is often said to victimize women as a gender group, women being depicted as submissive and passive receptacles of violence by male producers for male consumers. The same cannot be said of homosexual male pornography, however, in which gay male producers, models, and consumers all come from the same gender group and cultural community.

The heterosexual male consumer, by virtue of his gender and place within patriarchal power relations, is automatically constrained to look at a woman in a sexual representation in terms of “otherness” and imposed objectification. In contrast, the homosexual male consumer, looking at gay sexual depictions, is offered a range of identification choices determined not by his gender but by his individual cultural and erotic predispositions. The argument that women as a group are victimized by heterosexual pornography has no equivalent argument with relation to gay pornography: in this sense, gay pornography is primarily a “victimless cultural phenomenon.”⁴⁴

⁴³ L. Duggan, N. Hunter, and C. S. Vance, “False Promises: Feminist Antipornography Legislation in the U.S.” in Burstyn (ed.), *Women Against Censorship*, *supra* note 38, at 137.

⁴⁴ See *Pornography and Prostitution in Canada: Report of the Special Committee on*

The physical violence that gays experience in this society comes generally from the hands of straight men. There is no evidence, however, that gay pornography incites or causes straight men to assault gays, or even that gay pornography contributes to discrimination against gays, or even women, for that matter.

In *Moldenhauer*, Barry Adams, a Professor of Sociology at the University of Windsor, testified that there is a fundamental difference between material written by men and for men, showing women enjoying violence, and, for example, a "situation that is consistently written from the viewpoint of the man seeking self-abasement and going out of his way to find someone to help him engage in that process."⁴⁵ The first situation may be seen as giving licence to men to be aggressive towards women, but in the second situation, it is the man who seeks self-abasement. The man "is in control and thereby there is no warrant to give to any unqualified exertion of force or coercion upon the subordinate party."⁴⁶

It might also be said that the community standard is not rationally connected to the goal of protecting women from harm. In a patriarchal society, there is no reason to believe that the sexual materials the community tolerates others viewing bear any relation to the harmful effect of those materials on women.

It seems intuitive that what the community is not willing to tolerate likely has more to do with sexual activities about which the public feels uncomfortable, than with harm to women. In the survey by Schell et al.,⁴⁷ of 22 sexual acts in magazines, only "kissing between consenting adults"⁴⁸ and "fondling among consenting adults"⁴⁹ had mean scores of over 50 in the communities surveyed. In movies, "scenes of masturbation," a presumably victimless act, had a mean score of 23.0, just slightly more tolerated than "fondling among *non-consenting* adults" (emphasis added) which had a mean of 21.4.

Minimal Impairment

The minimal impairment branch of the s.1 analysis is problematic from the gay perspective. Section 163(8) of the *Criminal Code* does not infringe the freedom of expression interest as little as possible because it applies blindly to

Pornography and Prostitution, 1985 (Fraser Report) at 81.

⁴⁵ *Supra* note 3 at 17.

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 33.

⁴⁸ Mean = 87.2.

⁴⁹ Mean = 52.5.

gay and lesbian literature, and to material which does not play a detrimental role in the perpetuation of women's inequality. In fact, if anything, argues Carl Stychin in his article "Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography," gay erotica and pornography have a subversive effect on the patriarchal culture: "Gay male pornography is a point of resistance because it runs counter to male dominance and makes visible what the male heterosexual culture has made invisible."⁵⁰

While gay pornography may be likened to heterosexual pornography in its use of images of masculinity and its focus on dominance and submission, the context is completely different. It is one of a marginalized group. It is this different context, argues Stychin, that completely alters the meaning of the material. "As masculinity is reappropriated into a new unauthorized context, the representation of that masculinity appropriates a new unauthorized signification."⁵¹

Similarly, since male hegemony in our society depends on certain gender constructs, gay pornography undermines patriarchy by presenting images that deviate from our societal understanding of gender roles, because it deconstructs those concepts of gender.⁵²

Carl Stychin also remarks that in the context of the historical oppression of gays, "gay male pornography not only destabilizes heterosexual male values, but also liberates a marginal sexual group," and that the regulation of pornography should consider the interests of sexual minorities.⁵³

In more general terms, although the goals of achieving real equality for women and protecting women from harm are undeniably legitimate, obscenity legislation will not achieve them. Feminists do not control the enforcement of obscenity laws in Canada, rather it is the function of customs officers, police forces, morality squads, censor boards, and juries. There is no reason to believe that they will use their powers to chop, cut, shred, retain, arrest, fine, and jail against the dominant patriarchal value system. These powers have typically been used, and will undoubtedly continue to be used, against marginal groups and, in particular, gays and lesbians.

For example, in 1986, Canada Customs refused to allow *The Advocate* into British Columbia because some of its advertising was considered obscene. *The Advocate* is the largest gay *political* publication in North America. At that time it had to rely almost exclusively on personal ads, phone sex ads, and ads for sex

⁵⁰ C.F. Stychin, "Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography," [1992] 16 Vermont L. Rev. 857 at 875.

⁵¹ *Ibid.* at 877.

⁵² *Ibid.* at 883.

⁵³ *Ibid.* at 896.

videos for its advertising revenue because few other businesses were willing to advertise in a gay magazine. Political speech was censored in the name of protecting the readers from the harmful effects of reading personal sex ads.

Another example of how obscenity laws are applied is the *Moldenhauer* case.⁵⁴ The decision in that case was released a few months after the *Butler* decision. The following quotation is the entire reasoning of Justice Hayes explaining why a gay magazine that the plaintiff attempted to import into Canada was obscene:

This magazine contains explicit descriptions of consensual oral and anal sex with oriental males. The article "Adonis" contains extensive excessive descriptions of the acts and professed pleasure and the appreciation of the physical activity.

The description in the magazine of this sexual activity is degrading, I am of the opinion that this particular material does indicate a strong inference of a risk of harm that might flow from the community being exposed to this material. I am of the opinion that the community would not tolerate others being exposed to this item. The dominant characteristic is an undue exploitation of sex. It is obscene.⁵⁵

This decision provides a limited description of the magazine's content. There are descriptions of consensual oral and anal sex and that the participants appear to be deriving pleasure from these activities. We can only infer that the court considered this kind of activity degrading since it does not allude to anything else in the magazine which might be considered degrading. It is very difficult to imagine how the descriptions of two men engaged in consensual and pleasurable sex could, even remotely, cause harm to women (or any other group in society).

Another serious effect of this vague standard is its "chilling effect." Most of the gay literature and periodicals available in Canada are imported from the United States. Almost all of it is pre-censored by the publishing houses themselves in an attempt to conform to the Canada Customs guidelines. They also censor out more than is likely necessary so as not to run the risk of running afoul of the *Criminal Code* obscenity provisions.

Many publishing houses refuse to pre-censor, and so either do not attempt to import the material, or are refused entry at the border. An example is Oxford University Press which refused to distribute in Canada *Gay Ideas*, a book written by Richard Moore, Professor of Philosophy at the University of Illinois. The

⁵⁴ *Supra* note 3.

⁵⁵ *Ibid.* at 24.

press did not want to wrangle with Canada Customs over photographs by Robert Mapplethorpe printed in the book.⁵⁶

Conclusion

Although this case comment has focussed on the short-comings of the Supreme Court's reasoning in *R. v. Butler*, in fairness, the law of obscenity did take a few significant steps forward in this decision. It is now clear that depictions of non-violent explicit sex that neither degrade nor dehumanize are not caught by the definition of obscenity in the *Criminal Code*. Filmmakers and artists are no longer completely shackled by Victorian notions of modesty, and are now free to represent the more innocuous and unchallenging aspects of human sexuality.

Clearly too, the court's reasoning reflects its concern with images of violence against women and their effect on the safety and equality interests of women. The interpretation of the obscenity provisions of the *Code*, however, is not carefully tailored to meet these interests of women. As a result, the interests of lesbians and gays are adversely affected.

In interpreting obscenity law, the court must consider the impact of each stage of its analysis on the gay and lesbian community. In particular, it needs to recognize the importance of the freedom of expression guarantee of the *Charter* to the future equality of this disempowered sexual minority. The court should either eliminate or define more precisely the community standard and the degrading and dehumanizing tests. It must do so in order to avoid infringing the freedom of expression and equality interests of lesbians and gays.

⁵⁶ Interview by telephone with Bruce Walsh, Chair of Canadian Committee Against Customs Censorship (27 February 1992), Toronto.

APPENDIX

Criminal Code, R.S.C., 1985, c. C-46

163.(1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes or distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

...

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

...

(6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

...

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.