HARM, MORALITY, AND FEMINIST RELIGION: CANADA'S NEW—BUT NOT SO NEW—APPROACH TO OBSCENITY

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> "[T]he 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."
>
> — from the Canadian Supreme Court's opinion in *Regina v. Butler*[1]

> "This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values."
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> — Professor Catharine A. MacKinnon[2]

In its recent decision in *Regina v. Butler*, the Canadian Supreme Court reinterpreted Canada's criminal obscenity law and rejected a constitutional challenge to the law's validity. The Court stated that it was abandoning the traditional, "morality" justification for obscenity regulation. Instead, the Justices embraced a more modern, feminist rationale.

Feminist activists immediately hailed the Canadian decision.[3] Perhaps the most ecstatic was Professor Catharine A. MacKinnon. "This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values," she stated.[4] "This is a stunning victory for women. This is of world historic importance."[5]

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1. [1992] 1 S.C.R. 452, 496 (Can. 1992).

2. Quoted in Tamar Lewin, *Canada Court Says Pornography Harms Women*, N.Y. Times, Feb. 28, 1992, at B7, col. 2 ("*Canada Court*").

3. In this article, I focus primarily on that strand of feminism that advocates substantial restrictions on pornography. Needless to say, feminists do not speak with one voice on this issue.

4. Quoted in Lewin, *Canada Court* (cited in note 2).

5. Quoted in Jeff Sallot, *Legal Victory Bittersweet*, Globe & Mail (Toronto), Feb. 29, 1992, at A4, col. 2. MacKinnon assisted Kathleen Mahoney, a Canadian legal scholar, in a

I agree that the *Butler* decision is important. The Court expounds a legal definition of obscenity that differs to some extent from the American one, and the Court's justification has a very different emphasis. But what I regard as striking are not the differences in the American and Canadian legal approaches, but rather their remarkable similarities. Both include an exceedingly vague definition of obscenity that requires triers of fact to rely on their sense of community standards. Both approaches protect works that have literary or artistic value. And despite the feminist suggestions to the contrary, both approaches defend the constitutionality of obscenity laws on the basis of a similar rationale: that obscenity may cause violence and, in addition, it may undermine prevailing conceptions of morality.

This article proceeds in four parts. In Part I, I describe the legal context in which the *Butler* case arose and the basic elements of the Canadian Supreme Court's reasoning and result. Part II compares *Butler*'s definition of obscenity to the definition used in the United States. In Part III, I turn from doctrine to justification, comparing the traditional rationale that underlies the American law of obscenity with the more modern, feminist reasoning that guided the *Butler* Court. Finally, in Part IV, I end the article with some concluding observations. I suggest that the regulation of obscenity can be seen to have a religious dimension, not only under the traditional approach of the United States, but also under the feminist approach of Canada.

I

As in the United States, the dissemination of obscenity has long been a crime in Canada. Until 1959, obscenity was defined by the judicial test of *Regina v. Hicklin*, which asked "whether the tendency of the matter" was "to deprave and corrupt those whose minds are open to such immoral influences."[6] In 1959, the Canadian Parliament replaced this test with a statutory definition, which remains in effect under Section 163 of the Criminal Code.[7] Under this definition, an "obscene" publication is "any publication a domi-

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brief that Mahoney filed in *Butler* on behalf of the Women's Legal Education and Action Fund. See id. Mahoney explains her defense of "an equality approach to freedom of expression" in Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 L. & Contemp. Probs. 77, 78 (1992). Although her article predates the Canadian Supreme Court's decision in *Butler*, Mahoney praises the decision in a brief postscript. Id. at 103-05.

6. *R. v. Hicklin*, 3 L.R.-Q.B. 360, 371 (1868). See *R. v. Butler*, [1992] 1 S.C.R. 452, 473 (Can. 1992).

7. See *Butler*, [1992] 1 S.C.R. at 473-74.

nant 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."[8] This enactment replaced one vague definition with another, leaving open the question of what constitutes "undue exploitation." The Canadian courts have struggled with this question over the last three decades.

Prior to 1982, Canada had no counterpart to the American First Amendment, and the interpretation of Section 163 therefore was unaffected by constitutional constraints.[9] In that year, however, the Canadian Constitution was amended to include a judicially enforceable Charter of Rights and Freedoms. Section 2(b) of the Charter protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[10] This grant of protection is not absolute, but instead is limited by Section 1 of the Charter. Under Section 1, most Charter rights, including freedom of expression, are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[11] As interpreted by the Supreme Court of Canada, Section 1 requires a type of judicial balancing analogous to that which American courts often conduct in considering constitutional challenges. As in the United States, the government's ends and means are closely scrutinized in certain contexts, but subjected to a more lenient review in others.[12]

Not surprisingly, the adoption of the Charter gave rise to con-

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8. Criminal Code R.S.C., ch. C-46, § 163(8) (1985) (Can.). Between 1959 and 1985, the numbering of this statute was changed on several occasions. For convenience, however, I will consistently refer to the statute as § 163.

9. The Canadian Parliament adopted a statutory bill of rights in 1960, which included protection for freedom of expression, but the criminalization of obscenity was unaffected by this enactment. See *Butler*, [1992] 1 S.C.R. at 497-98. More generally, the statutory bill of rights was of limited practical consequence. See generally Peter W. Hogg, *Constitutional Law of Canada* 639-47 (Carswell, 2d ed. 1985).

10. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

11. Id. at § 1. Section 1 of the Charter should be distinguished from Section 33, which permits Parliament to "expressly declare" that an enactment "shall operate notwithstanding" a right protected by the Charter. Id. at § 33. Parliament has not invoked Section 33 in the context of obscenity.

12. See Andrée Lajoie & Henry Quillinan, *Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution—The Proportionality Test as a Moving Target*, 55 L. & Contemp. Probs. 285 (1992) (discussing Section 1 in general); Yves de Montigny, *The Difficult Relationship Between Freedom of Expression and its Reasonable Limits*, 55 L. & Contemp. Probs. 35, 49 (1992) (noting that the Canadian Supreme Court's flexible approach to Section 1 has extended to cases involving freedom of expression, with the Court recognizing "that the limits placed by legislatures on some types of speech are more easily justified than those placed on others"). For a general comparison of the American and Canadian approaches to freedom of expression, see Kent Greenawalt, *Free Speech in the United States and Canada*, 55 L. & Contemp. Probs. 5 (1992).

stitutional attacks on Section 163 and its definition of obscenity, attacks that culminated in *Regina v. Butler*. *Butler* arose from the obscenity prosecution of a Manitoba shop owner who had sold, or possessed for distribution or sale, a variety of "hard core" video tapes and magazines. The trial court described this material as follows:

> The scenes depicted in this material are entirely sexual in character, are extremely explicit, and represent an exploitation of sex as not only a dominant characteristic but the only characteristic. There is no redeeming feature of a literary, artistic, political, scientific or other social character. The material includes the presentation of sexual intercourse, anal intercourse, acts of *cunnilingus* and *fellatio*, men and women masturbating, men ejaculating in the face and other parts of the body of women and other men, lesbianism, homosexuality, incestuous sexual relations, group sex, very colorful and highly magnified, prolonged and vivid views of male and female genitalia, and use of various kinds and descriptions of sexual devices.[13]

Based upon its interpretation of the Charter, however, the trial court ruled that Section 163 could be applied only to material that contained "scenes involving violence or cruelty intermingled with sexual activity," that depicted a "lack of consent to sexual contact," or that otherwise could "be fairly said to dehumanize men or women in a sexual context."[14] Utilizing this approach, the court found that almost all of the material in question was protected from criminal prosecution, and it convicted the defendant on only eight of a total of 250 counts.[15]

The defendant appealed these convictions, and, consistent with Canadian practice, the government appealed the numerous acquittals. In a split decision, the Manitoba Court of Appeal ruled that all of the material was obscene and that this form of expression, being devoid of intellectual "meaning," fell outside the Charter's protection.[16] As a result, the court entered convictions on all of the

13. *R. v. Butler*, [1989] 50 C.C.C. (3d) 97, 100 (Manitoba Q.B. 1989).

14. Id. at 123.

15. Id. at 124-25. The trial court actually found that sixteen of the 250 counts involved unprotected material. Only eight films, however, were covered by these sixteen counts, so the court entered only eight convictions. See id.

16. *R. v. Butler*, [1991] 60 C.C.C. (3d) 219, 230 (Manitoba Ct. App. 1990). For a somewhat similar argument, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* 181-84 (Cambridge U. Press, 1982); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899, 920-28 (1979). For a contrasting view, see Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 Mich. L. Rev. 1564, 1585-96 (1988).

charges.[17] The defendant then took his appeal to the Supreme Court of Canada.

The Canadian Supreme Court rendered a decision that was unanimous in result and, for the most part, also unanimous in reasoning. Justice Sopinka spoke for seven of the nine justices in his majority opinion. Justice Gonthier, joined by Justice L'Heureux-Dubé, filed a concurring opinion. In this concurrence, Gonthier indicated that he generally agreed with the majority opinion, but he also discussed some additional considerations.

Justice Sopinka's majority opinion proceeded through four basic steps in its reasoning and result. First, the Court offered its interpretation of Section 163's definition of obscenity. Building upon earlier judicial efforts, it stated that the "community standard of tolerance" was the primary test for determining whether the "dominant characteristic" of a work was the "undue exploitation of sex."[18] This test calls for a contemporary and national community standard, with the question being not whether Canadians would personally tolerate the material in question, but whether they would tolerate its exposure to other Canadians.[19]

The Court instructed trial courts, as triers of fact, to "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."[20] More specifically, the Court recognized three categories of sexually explicit portrayals and offered the following observations concerning whether they would violate the community standard of tolerance:

> [T]he 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.[21]

If, after conducting this inquiry, the trial court is prepared to find that the sexually explicit material constitutes an undue exploitation of sex, "[t]he portrayal of sex must then be viewed in

17. In so doing, however, the appellate court agreed with the trial court's ruling that there should be only one conviction for each item of obscene material. *R. v. Butler*, [1991] 60 C.C.C. (3d) at 231. See supra note 15. The Canadian Supreme Court later indicated its own agreement on this point. *R. v. Butler*, [1992] 1 S.C.R. at 510.

18. *Butler*, [1992] 1 S.C.R. at 475-76.

19. Id. at 476-78.

20. Id. at 485.

21. Id.

context to determine whether that is the dominant theme of the work as a whole," or whether, instead, the portrayal of sex is "essential to a wider artistic, literary, or other similar purpose."[22] In this connection, the trial court is to determine "whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole."[23] Because of the importance of artistic freedom, "any doubt in this regard must be resolved in favor of freedom of expression."[24]

As the second basic step in its analysis, the *Butler* Court determined that Section 163 infringes Section 2(b) of the Charter of Rights and Freedoms, thereby constituting a prima facie constitutional violation. Rejecting the court of appeal's opinion to the contrary, the Court found that although obscene materials depict physical activity, the materials have obvious communicative meaning and therefore constitute "expression" within the scope of the Charter. Section 163 restricts this expression on the basis of its content and, as a result, the statute infringes Section 2(b).[25]

In the third step in its reasoning process, however, the Court ruled that despite this infringement, Section 163 is justified under Section 1 of the Charter and therefore is not unconstitutional. The Court ruled that the statute, as interpreted, is not unconstitutionally vague.[26] Turning to the task of judicial balancing, the Court asked whether Section 163 was supported by "pressing and substantial objectives which justify overriding the freedom to distribute obscene materials."[27] The Court rejected as inadequate what it regarded as the traditional objective of obscenity regulation—"to advance a particular conception of morality," any deviation from which "was considered to be inherently undesirable, independently of any harm to society."[28] But the Court accepted a more modern objective, an objective grounded on "the avoidance of harm to society,"[29] particularly to women: "[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material."[30] The Court conceded that the evidence concerning a causal link between obscenity and harm is controversial and inconclusive, but it was content to apply a "reasonable basis"

22. Id. at 486.
23. Id.
24. Id.
25. Id. at 486-90.
26. Id. at 490-91.
27. Id. at 491.
28. Id. at 492.
29. Id. at 493.
30. Id. at 497.

standard in finding "a sufficiently rational link."[31]

As the final step in its analysis, the Court turned to the case at hand. Rather than apply its newly developed definition of obscenity to the materials in question, the Court ordered a new trial on all the charges. In so doing, the Court reversed all of the convictions that had been entered by the lower courts, thereby providing the defendant with at least a partial victory in his appeal.[32]

II

A feminist approach to obscenity might have a variety of doctrinal consequences. First, it might significantly change the substantive law of obscenity by redefining the types of sexual portrayals that the law disfavors. Second, because of its modern and "harm-based" grounding, this redefinition might be more readily understood, not only by triers of fact but also by potential publishers. If so, this might significantly reduce the problem of vagueness that plagues the traditional law of obscenity. Finally, a feminist approach might provide such a persuasive demonstration of harm as to justify the elimination of an exception for works that have literary or artistic value. This would further reduce the problem of vagueness by excluding one vague element from the test. In addition, of course, it would substantially reduce the law's protection of sexually explicit expression.

Does a feminist approach in fact produce these kinds of doctrinal consequences? One can begin to address this question by comparing the doctrine that emerges from *Butler* with the doctrine that prevails in the United States. To be sure, the doctrine of *Butler* is not the only possible feminist formulation, and, for that matter, the law of the United States is only one example of a traditional approach. Even so, the comparison may be revealing, for despite their historical, legal, and cultural differences, Canada and the United States are similar societies. They share a common Western tradition, a similar commitment to freedom of expression, and, given the Canadian Charter of 1982, a similar conception of judicial review. As a result, the *Butler* decision provides at least some indication of how an American court might reformulate the law of obscenity in accordance with a feminist understanding. If so, *Butler* suggests that the doctrinal impact would be relatively limited, for despite some interesting departures, the doctrine that the Canadian Court announced is in many respects similar to that of the United States.

31. Id. at 501-04.
32. Id. at 509-10.

In the United States, as in Canada, the critical doctrinal component of obscenity law is the definition of obscenity, which serves to identify the sexually explicit expression that can be banned on the basis of its content. In its 1973 decision in *Miller v. California*, the United States Supreme Court announced a three-part test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[33]

Although there have been various clarifications and amplifications since 1973, the *Miller* test continues to be controlling.

Parts (a) and (b) of *Miller* attempt to identify the sexual portrayals that the law disfavors. Part (b)'s requirement of specific statutory definition, designed to alleviate the problem of vagueness, in fact permits extremely general statutory prohibitions, making this requirement essentially meaningless.[34] Moreover, the remainder of part (b), which requires that the sexual portrayals be patently offensive, is largely superfluous in light of part (a)'s requirement of prurient appeal. According to the Supreme Court, materials that appeal to the prurient interest are those that appeal to a "shameful or morbid" interest in sex.[35] This being the case, it is almost inconceivable that a trier of fact would find prurient appeal but fail to find patent offensiveness.[36] As a result, *Miller*'s description of dis-

33. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

34. In *Miller* itself, for example, the Court stated that the requirement of specificity would be satisfied by a law that defined the sexual conduct in terms of "ultimate sexual acts, normal or perverted" or "lewd exhibition of the genitals." Id. at 25. The Court also noted that the requirement could be met either by the statute itself or by authoritative judicial construction. Id. at 24. The Court went even further in *Ward v. Illinois*, 431 U.S. 767 (1977), holding that a state law need not provide "an exhaustive list" of sexual conduct as long as the law, on its face or as construed, recognizes "limitations on the *kinds* of sexual conduct which may not be represented or depicted." Id. at 776 (emphasis in original); cf. id. at 777 (Stevens, J., dissenting) (stating that the Court had "silently abandon[ed]" the specificity requirement).

35. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498-99 (1985). The Court in *Brockett* noted that prurient appeal had sometimes been defined in terms of "lustful thoughts," but that this did not include "normal sexual responses" that were neither shameful nor morbid. Id.

36. The question of patent offensiveness generally is resolved by reference to the same community standard as the question of prurient appeal. See *Smith v. United States*, 431 U.S. 291, 300-01 (1977). On the other hand, the Supreme Court has ruled that the sexual portrayals must be in some sense "hard core" before any community can regard them as patently offensive, or, presumably, as appealing to the prurient interest. See *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974).

favored sexual portrayals can be reduced to part (a) of the test. Thus, the critical question is whether the work as a whole appeals to the prurient interest—that is, a shameful or morbid interest in sex—with this question to be answered by reference to a contemporary community standard.

At this point, one can compare *Miller*'s treatment of disfavored sexual portrayals to that of the Canadian Supreme Court in *Butler*. Under both approaches, the overarching standard is what the Canadian Supreme Court describes as a "community standard of tolerance."[37] The community is defined nationally in Canada and more locally in the United States,[38] but this element of the test is otherwise similar. Likewise, both approaches include a requirement that the disfavored portrayals in some sense constitute the essence of the work. Under *Miller*, the question is whether the work "as a whole" appeals to the prurient interest. To the same effect, the Canadian focus is on the "dominant characteristic" of the work, that is, "the dominant theme of the work as a whole."[39]

Butler's embrace of a community standard and its focus on the work as a whole are significant, because by following *Miller* on these issues, *Butler* rejects a major portion of the feminist argument that was attempted in *American Booksellers Ass'n, Inc. v. Hudnut*.[40] The Indianapolis ordinance invalidated in *Hudnut* not only would have eliminated the community standard, but also would have made individual depictions unlawful regardless of the overall character of the work.[41] *Butler* accepted neither of these aspects of the *Hudnut* argument.

In their descriptions of the particular types of sexual portrayals that the law disfavors, on the other hand, the American and Canadian approaches diverge in interesting ways. Under *Miller*, the disfavored portrayals are those that appeal to the prurient interest, meaning a shameful or morbid interest in sex. *Butler*, by contrast, defines the disfavored portrayals in terms of "the degree of harm that may flow" from them.[42] Under *Butler*'s tripartite division, the community standard will "almost always" be violated by depictions of sex coupled with violence; "may" be violated by "degrading or dehumanizing" depictions "if the risk of harm is substantial"; and will not be violated by other sexual portrayals.[43]

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37. *R. v. Butler*, [1992] 1 S.C.R. 452, 476 (Can. 1992).
38. Compare *Butler*, [1992] 1 S.C.R. at 476-77 with *Miller*, 413 U.S. at 30-34.
39. *Butler*, [1992] 1 S.C.R. at 475, 486.
40. 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).
41. See id. at 324-25.
42. *Butler*, [1992] 1 S.C.R. at 485.
43. Id. The Court noted that sexual materials employing children in their production

Butler's first category represents a significant departure from the *Miller* formulation. Under *Miller*, there is no explicit reference to the linkage of sex with violence, much less a strong statement that such linkage generally will violate the community standard. *Butler* makes this a point of doctrinal emphasis, which clearly will have an impact on triers of fact. It also provides a relatively clear warning to potential publishers and thereby mitigates the problem of vagueness.[44]

Even so, one should not exaggerate the differences between the American and the Canadian approaches to violent portrayals. In the first place, *Butler* says only that these portrayals will "almost always" violate the community standard of tolerance. Conversely, under *Miller*, the linkage of sex with violence often will support a finding of prurient appeal and therefore a violation of the community standard. The question under *Miller* is whether the portrayals are shameful or morbid—whether they appeal to a sexual appetite that the community would regard as sick or gruesome. Many depictions of sex and violence are sick, if not gruesome—shameful, if not morbid—and they therefore should readily meet this standard. Indeed, the Supreme Court has specifically upheld a finding that sado-masochistic materials appeal to the prurient interest within the meaning of *Miller*.[45] In so doing, the Court emphasized that these kinds of violent depictions are not entitled to constitutional protection.[46]

Although *Miller* is properly read to encompass many violent portrayals, *Butler*'s explicit approach is considerably more certain and is therefore preferable from the standpoint of vagueness. Yet significant vagueness remains. While the *Butler* Court assumes that violent portrayals will not always violate the community standard of tolerance, it gives no examples of the exceptional cases, nor does it explain what would make them exceptional. Even in the case

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would be treated differently and that they might violate the community standard even if they were nonviolent and neither degrading nor dehumanizing. Id.

44. This warning to publishers is enhanced by the reference to violence in the statute itself. See supra note 8 and accompanying text. The Court noted this statutory language in support of its treatment of violent depictions. *Butler*, [1992] 1 S.C.R. at 484.

45. *Ward v. Illinois*, 431 U.S. 767, 773 (1977). For an argument that sado-masochistic materials should not necessarily be treated in the same way as other violent depictions, see Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 Am. B. Found. Res. J. 681, 701-05. See also infra note 72.

46. "[T]here was no suggestion in *Miller* that we intended to extend constitutional protection to the kind of flagellatory materials that were among those held obscene in *Mishkin v. New York*, 383 U.S. 502, 505-10 (1966)." *Ward*, 431 U.S. at 773. The materials in *Mishkin* included depictions of "scantily clad women being whipped, beaten, tortured, or abused." *Mishkin*, 383 U.S. at 505.

before it, the Court inexplicably did not affirm the trial court's convictions for violent materials, but instead reversed and remanded.[47] At the same time, *Butler* says that its category of violent portrayals includes portrayals of the threat of violence.[48] This presumably includes implicit as well as explicit threats. Both the exclusion of unexplained exceptions and the inclusion of threats reduce the clarity of *Butler*'s first category.

With respect to nonviolent sexual portrayals, *Miller* adheres to the test of prurient appeal. Thus, nonviolent portrayals will violate the community standard if they appeal to a shameful or morbid interest in sex; by contrast, if they appeal only to "normal, healthy sexual desires," they are protected expression.[49] *Butler* treats nonviolent portrayals in its second and third categories. Nonviolent portrayals will violate the community standard of tolerance if they are "degrading or dehumanizing" to such an extent that "the risk of harm is substantial."[50] "[T]here is a range of opinion as to what is degrading or dehumanizing,"[51] but examples include depictions that "place women (and sometimes men) in positions of subordination, servile submission or humiliation."[52] Portrayals may qualify even if they depict sexual activity that is or appears to be purely consensual.[53] Relatedly, "the risk of harm" is not limited to those persons, typically women, who are actually depicted in the materials. Instead, the focus is on society at large, and thus on women in general.[54] The harm in question, moreover, includes not only sexual violence, but also other types of abuse or disadvantage.[55] If this test is satisfied, the nonviolent portrayals will violate the community standard; if not, they are protected expression.[56]

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47. *Butler*, [1992] 1 S.C.R. at 510. Given the trial court's description of the materials, it seems doubtful that the Canadian Supreme Court believed that they might be protected on a theory of redeeming value. See supra text accompanying note 13.

48. *Butler*, [1992] 1 S.C.R. at 484.

49. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

50. *Butler*, [1992] 1 S.C.R. at 485.

51. Id. at 484.

52. Id. at 479.

53. Id. The Court stated that "[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing." Id.

54. Id.

55. "Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning." Id. at 485. In its constitutional analysis, the Court elaborated, noting that the societal harm that obscenity might cause included not only "abject and servile victimization," but also the reinforcement of male-female stereotypes and injury to women's "sense of self-worth and acceptance." Id. at 493-94, 496-97 (citation omitted).

56. The Court also recognized what appears to be a separate category for child pornog-

There is a difference in focus between the *Miller* and *Butler* approaches to nonviolent portrayals. The American test asks whether the materials appeal to a sexual appetite that is unhealthy; the Canadian inquiry looks beyond appetite to the potentially harmful impact of consumption. As a result, Canadian triers of fact may be less willing to make findings against nonviolent portrayals that are "shameful" only because they depict sexual behavior that is unconventional. At the same time, they may be more likely to make findings against depictions of women as mindless and servile sex objects. As before, however, this doctrinal difference should not be overstated. Even under the Canadian approach, it seems inevitable that depictions of unconventional behavior are more likely to be found degrading or dehumanizing. More generally, most portrayals that are shameful or morbid under American law are likely to be found degrading or dehumanizing under Canadian law, and vice versa.[57] To this extent, it appears that there is only a modest substantive difference in the two approaches.

The full statement of the *Butler* test, however, suggests a more significant difference than is first apparent: according to *Butler*, triers of fact 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*,"[58] and, in the case of degrading or dehumanizing depictions, "the risk of harm" must be "substantial."[59] This language suggests that triers of fact must consider whether the reading or viewing of particular sexual portrayals might effect attitudinal changes that would ultimately cause women to suffer violence, abuse, or disadvantage.[60] As the Court concedes, however, this issue is not susceptible to "exact proof"[61] or to "proof in the traditional way."[62] As a result, the issue of harm is to be resolved not on the basis of proof of causation as such, but rather by

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raphy. See supra note 43. In this respect, the Canadian law is analogous to the American. See *New York v. Ferber*, 458 U.S. 747 (1982).

In his concurring opinion in *Butler*, Justice Gonthier stated that he would extend the obscenity law to reach not only the depictions described by the majority, but also those that "distort[ed] human sexuality by taking it out of any context whatsoever. . . ." *Butler*, [1992] 1 S.C.R. at 519 (Gonthier, J., concurring).

57. In his concurring opinion in *Butler*, Justice Gonthier noted that obscene materials reduce human sexuality to "pure animality." See id. at 513 (Gonthier, J., concurring). As this language suggests, one can understand sexually explicit depictions to be "dehumanizing" in a sense that is quite traditional.

58. Id. at 485 (majority opinion) (emphasis added).

59. Id.

60. "The stronger the inference of a risk of harm," according to the Court, "the lesser the likelihood of tolerance." Id.

61. Id. at 479.

62. Id. at 484.

reference to what the community would regard as harmful even in the absence of demonstrable proof. Indeed, although other evidence is "desirable," the trier of fact is authorized to make this determination on the basis of nothing more than a perusal of the materials in question.[63]

The *Miller* test is notoriously vague. But if the *Butler* Court means what it says on the issue of harm, it has created a test for nonviolent depictions that makes *Miller* seem clear. In the abstract, the words of each test—"shameful or morbid" on the one hand, "degrading or dehumanizing" on the other—seem equally capacious and indeterminate. When tied to a community standard, however, the words of each test become somewhat more meaningful, because they now are anchored to the sensibilities of the community. Indeed, precisely because the words have little meaning apart from community sensibilities, their linkage to a community standard creates what at least approximates a test of community tolerance simpliciter. As such, the inquiry remains exceedingly imprecise, but triers of fact and potential publishers may have at least some idea of the types of sexual portrayals that are commonly accepted in the community and that therefore appear to be tolerated.

Butler's harm-based language, however, seems to forfeit the vagueness-reducing benefits of a community standard. Under this language, the question is not simply whether the community would regard particular sexual portrayals as degrading or dehumanizing. Instead, triers of fact must search for a more specific community sentiment, asking whether the community would regard the portrayals as impermissibly degrading or dehumanizing because they create a substantial risk of societal harm, regardless of whether this risk of harm can actually be demonstrated. Common knowledge of the community's acceptance or rejection of particular kinds of sexual portrayals is not adequate to answer this question, for the focus is no longer on community tolerance simpliciter. Rather, the Court is asking triers of fact to determine whether particular sexual portrayals, even in the absence of demonstrable proof, would be "perceived by public opinion to be harmful to society, particularly to women,"[64] and whether this risk of harm would be perceived as "substantial." This seems an impossibly speculative inquiry and therefore an impossibly vague standard for publishers to follow.

Because the Court's harm-based language seems entirely impracticable, I suspect that the question of "degrading or dehumanizing" will ultimately be treated more as a matter of community

63. Id. at 485.
64. Id. at 479.

tolerance simpliciter.[65] If so, the test will look very much like *Miller*.[66] If not, and if Court's harm-based language is to be taken literally, the *Butler* test for nonviolent portrayals does differ significantly from *Miller*. Due to its extraordinary vagueness, however, the *Butler* test on this understanding will lead to unpredictable results, making it impossible to evaluate its ultimate substantive impact.

Butler's uncertain implications for nonviolent depictions can be examined further by recalling the materials at issue in *Butler* itself. As to most of the materials, the trial court concluded not only that they were nonviolent and did not depict a lack of consent, but that they otherwise could not "be fairly said to dehumanize men or women in a sexual context."[67] In remanding the entire case for a new trial, the Canadian Supreme Court refused to approve either the trial court's acquittals or the appellate court's convictions with respect to these materials.[68] In refusing to affirm the trial court's acquittals, the Court stated that it would be speculative for it "to conclude that the same result would have been obtained" if the Court's new test had been applied: "Specifically, in considering whether the materials were degrading or dehumanizing, [the trial court] did not address the issue of harm."[69]

As I have discussed, the element of harm does not clarify, but rather obscures, *Butler*'s test for nonviolent materials. More generally, the *Butler* Court gives very little guidance concerning the proper treatment of particular types of nonviolent sexual depictions, including those that were present in the very record before it.[70] For example, are explicit depictions of conventional intercourse "degrading or dehumanizing" in the impermissible sense? Never, as

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65. In his concurring opinion, Justice Gonthier described a "harm-based" community standard that sounded very much like a standard of community tolerance simpliciter:

> [T]he criterion of tolerance of harm by the community as a whole is one that, by definition, reflects the general level of tolerance throughout all sectors of the community, hence generally of all its members. It is therefore a very demanding criterion to meet as it must be by definition generally known or apprehended.

Id. at 525 (Gonthier, J., concurring).

66. This would essentially eliminate the element of harm from the *test* for obscenity, but it would not necessarily mean that the obscenity prohibition could not be justified under a harm-based *rationale*. For example, one could defend a basic test of "degrading or dehumanizing," judged by a community standard, on the ground that it roughly identifies materials that may cause harm. Under this approach, however, triers of fact would not be expected to consider the issue of harm in their evaluation of particular sexual portrayals.

67. *R. v. Butler*, [1989] 50 C.C.C. (3d) 97, 123 (Manitoba Q.B. 1989).

68. *Butler*, [1992] 1 S.C.R. at 510.

69. Id.

70. For the trial court's description of these depictions, see supra text accompanying note 13.

the concurring opinion in *Butler* suggests?[71] Sometimes? Continuing down the trial court's list, how about anal intercourse, or acts of cunnilingus or fellatio? What about men and women masturbating? Or men ejaculating on women or other men? Sometimes? Always? Are the results under *Butler* likely to differ from the results under *Miller*? Are some of these depictions shameful but not dehumanizing, for example, or dehumanizing but not shameful? If harm is in fact a critical touchstone, which of these depictions creates a "substantial risk" of harm to society, particularly to women? None of them? Some of them? All of them? To what extent should the trier of fact focus on the particular sexual acts that are depicted, and to what extent on the context in which they are presented? Does everything depend on context?[72]

Beyond their descriptions of the disfavored sexual portrayals, *Miller* and *Butler* both recognize an exception for works with redeeming value. Under *Miller*, a work is protected despite its sexual content if, taken as a whole, the work has serious literary, artistic, political, or scientific value. To a similar effect, *Butler* protects sexual portrayals if they are "essential to a wider artistic, literary, or other similar purpose."[73] This phrasing, as well as certain language elsewhere in the opinion,[74] implies that *Butler*'s exception for seri-

71. See *Butler*, [1992] 1 S.C.R. at 518 (Gonthier, J., concurring) ("an explicit portrayal of 'plain' sexual intercourse, where two individuals are making love . . . falls within the third category [of the majority opinion]").

72. In its constitutional analysis, the *Butler* Court quoted the following passage from West, 1987 Am. B. Found. Res. J. at 696 (cited in note 45):

> Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography (when it is good) celebrates both female pleasure and male rationality.

Butler, [1992] 1 S.C.R. at 500. "A proper application of the test," the Court continued, "should not suppress what West refers to as 'good pornography'. The objective of the impugned provision is not to inhibit the celebration of human sexuality." Id. The Court contrasted pornography that depicted women simply "as sexual playthings, hysterically and instantly responsive to male sexual demands." Id. (citation omitted). If this discussion is designed to inform the Court's test for nonviolent depictions, it does not provide much help. When does a portrayal stop celebrating human sexuality and begin to treat women as sexual playthings? To what extent, if any, does this question turn on the particular sexual acts that are depicted?

Should homosexual depictions be treated altogether differently? In the wake of *Butler*, homosexual activists have argued that graphic portrayals of spanking, bondage, and other forms of sado-masochism in homosexual literature are "sexual theatre" that, for purposes of the obscenity law, should be regarded neither as violent nor as degrading or dehumanizing. See Gail Swainson, *"Rough Sex" Not Degrading to Gays, Porn Hearing Told*, Toronto Star, May 13, 1992, at A7 (available on NEXIS); *Rough Sex Seen as "Sexual Theatre" by Gay Community, Activist Testifies*, Toronto Star, May 14, 1992, at A24 (available on NEXIS). Cf. West, 1987 Am. B. Found. Res. J. at 701-05 (cited in note 45) (arguing that sado-masochistic materials should not necessarily be treated in the same way as other violent depictions).

73. *Butler*, [1992] 1 S.C.R. at 486.

74. Id. at 482 ("Even material which by itself offends community standards will not be

ous value may be more limited than *Miller*'s.[75] Other language in *Butler*, however, suggests that the exception should not be narrowly construed. Thus, the Court says that the trier of fact should view the sexually explicit material "in the context of the whole work," should determine "the dominant theme of the work as a whole," and should resolve "any doubt . . . in favor of freedom of expression."[76] To the extent that there is a difference in the two approaches, it seems relatively modest. More important is *Butler*'s basic decision, despite its feminist reasoning, to recognize an exception of this type. Here, as elsewhere,[77] the Canadian Supreme Court rejects the feminist approach that was unsuccessfully advocated in *Hudnut*,[78] which would have entirely eliminated the exception for redeeming value.[79]

From the standpoint of vagueness, *Butler*'s treatment of redeeming value is no improvement over *Miller*. If anything, once again the Canadian phrasing is more problematic. *Miller* requires one indefinite inquiry: whether the work as a whole has serious literary or artistic value. *Butler* seems to require a very similar inquiry, but it may also add another, one that asks courts to decide whether a work, even if serious on the whole, contains sexual portrayals that are not "essential" to the work's artistic or literary purposes. If so, *Butler* adds one vague element on top of another,

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considered 'undue', if it is required for the serious treatment of a theme."); id. at 482-83 ("[The test] has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, . . . has a legitimate role when measured by the internal necessities of the work itself.").

75. Using the language of prior cases, the *Butler* Court sometimes referred to the redeeming value inquiry as the "internal necessities" test, a label that would seem to support a restrictive interpretation. At other times, the Court referred to the "artistic defence," using the two phrases interchangeably. See id. at 481-83, 486.

76. Id. at 486. Even the Court's restrictive language, quoted in the text, appears in a context that makes its meaning ambiguous: "The portrayal of sex must . . . be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose?" Id. See also id. at 505-06.

Miller abandons a community standard on the issue of redeeming value. See *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). *Butler*, by contrast, does not, stating that the question ultimately is "whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole." *Butler*, [1992] 1 S.C.R. at 486. Given the nature of the inquiry that the *Butler* Court describes, however, it is not clear what the community standard adds to this part of the analysis.

77. See supra notes 40-41 and accompanying text.

78. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).

79. The invalidated Indianapolis ordinance applied without regard to whether the work had literary, artistic, political, or scientific value. See id. at 324-25. Cf. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 21 (1985) ("if a woman is subjected, why should it matter that the work has other value?").

making it even more difficult for courts to apply the test and for publishers to predict the courts' decisions.

Overall, then, a comparison of *Miller* and *Butler* suggests that their doctrinal differences are relatively modest. *Butler* takes one significant doctrinal step: it singles out portrayals of sex coupled with violence for special condemnation. This goes beyond *Miller*, even though *Miller* would also disfavor many such portrayals. For nonviolent depictions, both approaches seem to embrace a similar test of community tolerance, whether phrased in terms of "shameful or morbid," as in the United States, or "degrading or dehumanizing," as in Canada. Likewise, both approaches include an exception for works with redeeming value.[80] There are statements in *Butler* that might reflect other doctrinal departures from the American approach. For example, *Butler* includes harm-based language that may modify the "degrading or dehumanizing" standard for nonviolent depictions, and its exception for redeeming value may include a focus on whether the sexual depictions are in some sense "essential." Even so, if *Butler* exemplifies the feminist approach to obscenity, it is an approach that moves the law far less than one might expect.

At least for nonviolent depictions, *Butler* does nothing to ameliorate the vagueness of *Miller*. Rather than clarify, its harm-based language can only make matters worse, and the same is true for its discussion of "essential" sexual depictions. Except with respect to violent portrayals, then, if *Butler*'s feminist approach does move the law, it moves it in a direction that is quite uncertain.

III

Butler does not embrace the doctrinal approach that feminists had advocated in *Hudnut*. More generally, the Canadian Supreme Court's innovations are relatively modest, and they leave the law of obscenity exceedingly vague. Viewing *Butler* through a doctrinal lens, it is difficult to find "a stunning victory,"[81] whether for women or anyone else. But perhaps the true significance of *Butler* lies not

80. In light of this exception, "mainstream" movies clearly are beyond the reach of obscenity law, both in the United States and Canada, despite the increasing tendency of these movies to include graphic depictions of sex mixed with violence. Ironically, this Hollywood trend was featured as the cover story of Canada's leading news weekly only a month after *Butler* was decided. See Brian D. Johnson, *Killer Movies:* Basic Instinct *Pushes the Boundaries of the Hollywood Mainstream*, Maclean's 48 (Mar. 30, 1992). On the cover, *Maclean's* referred to Hollywood's "grisly mix of sex and death." The story made no mention of *Butler*, although it did note that "[t]he line between art and pornography, like that between sex and violence, has become increasingly blurred." Id. at 51.

81. See supra note 5 and accompanying text.

in the Court's doctrine, but rather in the justification that is offered to support it. Here, the question is not the legal definition of obscenity as such. Rather, the issue is whether the government constitutionally can ban the dissemination of obscenity, however defined, even as to recipients who are willing adults.[82] In the United States and Canada alike, this issue has been resolved in favor of the government. In both countries, the analytical process involves judicial balancing, with the interest in freedom of expression being balanced against the governmental interests that favor regulation. Using *Butler* once again as our example of a feminist approach, we can compare the justificatory reasoning of *Butler* to that of the United States Supreme Court in an attempt to determine the jurisprudential significance of a feminist rationale.

The American and Canadian rationales both include a determination that the expressive value of obscenity is modest at best, whether under the American First Amendment or under Section 2(b) of the Canadian Charter. In rejecting a First Amendment challenge to the regulation of obscenity, the *Miller* Court wrote that "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment."[83] In upholding Canada's ban on obscenity despite the infringement of Section 2(b), the *Butler* Court likewise concluded that obscenity "does not stand on equal footing with other kinds of expression"[84] and "lies far from the core of the guarantee of freedom of expression."[85]

As for the government side of the balance, the United States Supreme Court considered this part of the analysis in *Paris Adult Theatre I v. Slaton*,[86] a companion case to *Miller*. The Court evaluated two basic types of governmental interests: first, that of preventing violence, and second, that of promoting morality. The Canadian Supreme Court addressed similar interests in *Butler*.

On the government's interest in preventing violence, the critical issue is that of causation. Is there a causal link between the reading or viewing of obscenity and the commission of antisocial acts of violence? If so, what is the nature and strength of any such link? More precisely, given that violent acts are the product of multiple causes, is the causal role of obscenity, if any, sufficient to justify its prohibition?

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82. The issues of definition and justification actually are interrelated, because the definition of obscenity is formulated in light of constitutional considerations.

83. *Miller v. California*, 413 U.S. 15, 34 (1973). See id. at 34-36.

84. *R. v. Butler*, [1992] 1 S.C.R. 452, 500 (Can. 1992).

85. Id. at 509. See id. at 499-501.

86. 413 U.S. 49 (1973).

In their analyses of the prevention of violence and the issue of causation, it is difficult to distinguish *Butler* from *Paris Adult Theatre*. Each Court noted the scientific controversy concerning a causal link between the reading or viewing of obscenity and the commission of antisocial acts of violence. Each Court, however, was content to defer to the legislature's judgment that a sufficient link does or might exist. Thus, *Paris Adult Theatre* recognized that a ban on obscenity might further the government's interest in "public safety," noting that there is "an arguable correlation" between obscene material and sex crimes.[87] In relying upon this interest despite the "empirical uncertainties,"[88] the Court applied a rational basis analysis: "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist."[89] *Butler*'s reasoning was almost identical. Notwithstanding the uncertainty about a causal relationship between obscenity and sexual violence, the Court found it "reasonable to presume" that a sufficient connection might exist.[90] Such a "reasonable basis," moreover, was all that Parliament needed.[91] The Court conspicuously cited and quoted *Paris Adult Theatre* as support for this conclusion.[92]

The government's second interest, that of promoting morality, actually subsumes at least two possible types of moral concern. First, the government might regard obscenity as immoral without regard to its social consequences. The government might be concerned for the spiritual salvation of individual readers or viewers, for example, or it might simply be expressing the majority's disgust for materials of this kind. Second, the government might regard obscenity as immoral precisely because it has adverse social implications, albeit difficult to demonstrate and perhaps less serious than violence. This kind of "harm-based" morality is concerned especially about the impact of obscenity on the attitudes and beliefs of readers and viewers, which in turn can affect their moral standards, which in turn can affect society at large. Historically, the first type of morality may well have supported the law of obscenity. It seems

87. Id. at 58-59.
88. Id. at 60.
89. Id. at 60-61.
90. *Butler*, [1992] 1 S.C.R. at 502. The Court relied in part on the conclusions of the 1986 report of the United States Attorney General's Commission on Pornography: U.S. Dep't of Justice, *Att'y Gen.'s Comm'n on Pornography, Final Report*, Vol. 1, at 325-26 (1986). See *Butler*, [1992] 1 S.C.R. at 502. For an interesting range of commentary on this report, see *Symposium on the 1986 Commission on Pornography*, 1987 Am. B. Found. Res. J. 639.
91. *Butler*, [1992] 1 S.C.R. at 502-03.
92. Id. at 503-04.

likely, however, that the second type was also at work, because societies long have believed that individuals are affected by what they read and view and that these effects extend beyond the individuals in question.[93]

A close examination of *Paris Adult Theatre* and *Butler* indicates that each Court rejected the first kind of moral concern but accepted the second. In referring to the "right of the Nation and of the States to maintain a decent society"[94] and "the social interest in order and morality,"[95] the Court in *Paris Adult Theatre* clearly was relying on a harm-based conception of morality:

> If we accept the unprovable assumption that a complete education requires certain books and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real."[96]
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> . . .
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> . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole. . . .[97]

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93. Consider the argument of the Attorney General in *R. v. Curl*, 93 Eng. Rep. 849 (K.B. 1727), the early English case holding that an obscene book was punishable as a libel: "I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature." Id. at 850.

94. *Paris Adult Theatre*, 413 U.S. at 59-60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

95. *Paris Adult Theatre*, 413 U.S. at 61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957) and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (emphasis omitted).

96. *Paris Adult Theatre*, 413 U.S. at 63 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 103 (1946)) (other citations omitted).

97. *Paris Adult Theatre*, 413 U.S. at 69.

The Court also recognized the legitimacy of what could be described as an aesthetic interest, citing "the interest of the public in the quality of life and the total community environment [and] the tone of commerce in the great city centers." Id. at 58. This interest, however, represented much more than an unadorned statement of societal disgust for obscene material. Instead, it was closely tied to the Court's other concerns about societal injury. Quoting Professor Alexander Bickel, the Court suggested that the public availability of obscenity, even if limited to consenting adults, may affect

> the tone of the society, . . . the style and quality of life, now and in the future. . . . [To grant the right to purchase this material in a public market] *is to affect the world about the rest of us*. . . . Even supposing that each of us can, if he wishes, effectively

By "morally neutral," the Court could only have meant neutral in terms of a morality independent of social harm,[98] because the normative judgment that the Court described obviously is moral—and certainly is not neutral—under a harm-based conception. As with the link between obscenity and violence, the link between obscenity and nonviolent harm may be indirect and to some extent "unprovable." But here again, under a rational basis standard of review, the Court was satisfied that a legislature might reasonably find a sufficient link, and that is all the Court required.[99]

As suggested by the Court's concern with character formation, the harm-based morality of *Paris Adult Theatre* is properly described as traditional. Due to the possible effects of obscenity on attitudes and moral standards, the Court believed that obscenity could debase and distort "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."[100] Although the Court was concerned about the impact of obscenity on society as a whole, including both men and women, it showed no special concern for the interest of women in social equality.

Like *Paris Adult Theatre*, *Butler* rejected the claim that a ban on obscenity could be justified on the basis of nothing more than an interest in morality independent of social harm. Thus, the Court found that the government had no legitimate interest in banning obscenity simply to "safeguard[] the morals of individuals,"[101] or to advance a morality that was grounded "solely [on] the conventions of a given community" and that regarded deviations as "inherently undesirable, independently of any harm to society."[102] Also like *Paris Adult Theatre*, however, *Butler* accepted a harm-based conception of morality. The Court sometimes implied that the government's interest in preventing societal harm was distinct from its interest in promoting morality.[103] In making these comments, how-

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avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.

Id. at 59 (quoting Alexander Bickel, 22 *The Public Interest* 25-26 (1971) (untitled commentary) (emphasis added by *Paris Adult Theatre* Court).

98. Cf. *Paris Adult Theatre*, 413 U.S. at 67 (rejecting the claim that obscenity regulation is designed to control "the moral content of a person's thoughts") (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

99. The Court stated that it was up to the legislature "to resolve [the] empirical uncertainties" concerning whether "exposure to obscene material adversely affects men and women or their society." *Paris Adult Theatre*, 413 U.S. at 60.

100. Id. at 63.

101. *Butler*, [1992] 1 S.C.R. at 492.

102. Id. The Court concluded that the government cannot ban obscenity simply to prevent "dirt for dirt's sake." Id. at 492-93.

103. See, e.g., id. at 493 ("the overriding objective of [the ban on obscenity] is not moral

ever, the Court in *Butler* meant only that the law could be defended on grounds that were "morally neutral" in the same, limited sense that *Paris Adult Theatre* had suggested. In an explicit discussion of the relationship between the government's interest in morality and its interest in preventing societal harm, the *Butler* Court properly recognized that the latter interest is a type of the former: "[T]he notions of moral corruption and harm to society are not distinct, . . . but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society."[104]

On the question of whether obscenity in fact produces the kind of moral corruption that leads to social harm, the Court recognized that "a direct link between obscenity and harm to society may be difficult, if not impossible, to establish."[105] Earlier in its opinion, the Court tied the troublesome issue of causation to its interpretation of the community standard for obscenity, noting that "[t]he community is the arbiter as to what is harmful to it."[106] Quoting from another opinion, the Court continued:

> The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said . . . 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.[107]

In its constitutional discussion, the Court essentially concluded that this "common sense" of the community, supported by some of the scientific evidence, was sufficient to answer the question of causation. Applying a rational basis analysis, the Court found it "reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs,"[108] and that, in the case of obscene images, the resulting "desensitization" bears a causal relationship to patterns of behavior that are harmful to society.[109]

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disapprobation but the avoidance of harm to society"). The Court also hinted that there might be a difference between moral objectives in general and moral objectives, such as the pursuit of equality, that can be traced to the Charter itself. Id.

104. Id. at 494. Justice Gonthier echoed this point in his concurring opinion, noting that "the avoidance of harm to society is but one instance of a fundamental conception of morality." Id. at 522 (Gonthier, J., concurring).

105. Id. at 502 (majority opinion).

106. Id. at 481.

107. Id. (quoting *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, 524 (Can. 1985) (opinion of Wilson, J.)).

108. *Butler*, [1992] 1 S.C.R. at 502.

109. Id. at 504. See id. at 524 (Gonthier, J., concurring) ("[A]s is reiterated by my

As this discussion indicates, the morality justifications of *Paris Adult Theatre* and *Butler* are substantially similar in many respects. Both agree that the government has a legitimate interest not only in preventing violence, but also in preventing other societal harms that are believed to arise from the morally corrupting impact of obscenity. Both permit the government to proceed on the basis of an assumption—scientifically controversial, but supported by the common sense of the community—that exposure to obscenity has a significant and adverse effect on the moral standards of readers and viewers and therefore causes injury to the society at large. Precisely how obscenity has this effect is left uncertain. It may affect "character" and "personality," according to *Paris Adult Theatre*, having an impact that may be "intangible" or "indistinct." In like fashion, *Butler* is concerned that the reading or viewing of obscenity may have an adverse effect on "attitudes and beliefs," leading to a "moral desensitization" that "must be harmful in some way."

Despite these important similarities, the moral justification of *Butler* is not the same as that of *Paris Adult Theatre*. The difference lies in the types of nonviolent harms that are assumed to flow from the moral corruption of obscenity. The Court in *Paris Adult Theatre* apparently is concerned that the reading or viewing of obscenity may lead to changing sexual mores, and that these changes might adversely affect not only the traditional family structure, but also the social community that this structure has helped support. The Court also suggests that obscenity may have a more general effect on personality and character, leading to a deterioration in moral standards that might adversely affect society in areas that extend well beyond the context of sex.[110]

The morality of the Court in *Butler*, by contrast, is a morality based not on traditional considerations, but rather on the modern interest of women in social equality.[111] Thus, the Court is concerned that the reading or viewing of obscene material might effect

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colleague in his reasons, scientific proof is not required, and reason and common experience will often suffice.").

110. Professor Robin West has described what she calls the "standard conservative view" of obscenity: "Satisfaction of the 'prurient interest' most decidedly will not produce value but rather will encourage laziness, promiscuity, and anti-family and anti-marriage attitudes. It frustrates, rather than promotes, the development of the productive and reproductive character traits necessary to the good life." West, 1987 Am. B. Found. Res. J. at 683 (cited in note 45). Under this view, West continues, obscenity "is not harmless—it is an assault on virtue." Id.

111. It seems undeniable that this is a moral interest, one that reflects a particular morality. But cf. Catharine A. MacKinnon, *Not a Moral Issue*, 2 Yale L. & Policy Rev. 321, 322-23 (1984) (claiming that although the traditional approach to obscenity "is concerned with morality," the feminist approach is concerned with "politics," meaning "power and powerlessness").

attitudinal changes that would hinder the achievement of "true equality between male and female persons."[112] Because of their possible effect on moral standards, these attitudinal changes might result in such nonviolent harms as "mental mistreatment of women by men," the reinforcement of male-female stereotypes, and injury to women's "sense of self-worth and acceptance."[113]

No less than *Paris Adult Theatre*, *Butler* proceeds on the assumption that obscenity offends societal values in a harmful way. "[T]he harm caused by the proliferation of materials which seriously offend the values fundamental to our society," wrote the Court in *Butler*, "is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression."[114] *Paris Adult Theatre* and *Butler* likewise agree that the potential harm of obscenity should be understood to include not only violence, but also nonviolent injuries that are less conspicuous and to some extent intangible. But in its definition of these nonviolent harms, *Butler* departs from the traditional reasoning of *Paris Adult Theatre* by invoking a feminist morality. In this respect, the two decisions are dramatically different.[115]

IV

As Justice Harlan wrote, the problem of obscenity is intractable.[116] In *Miller* and *Paris Adult Theatre*, the United States

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112. *Butler*, [1992] 1 S.C.R. at 497.

113. Id. at 485, 493, 497 (citation omitted). The problem of multiple causation may be especially pronounced with respect to harms of this type:

> It seems unlikely that [pornography] has remotely the influence over how women's sexuality or character or talents are conceived by men, and indeed by women, that commercial advertising and soap operas have. Television and other parts of popular culture use sexual display and sexual innuendo to sell virtually everything, and they often show women as experts in domestic detail and unreasoned intuition, and nothing else.

Ronald Dworkin, *Liberty and Pornography*, N.Y. Rev. Books 12, 14 (Aug. 15, 1991). Cf. Johnson, Maclean's (Mar. 30, 1992) at 51 (cited in note 80) ("It is hard to say how much movies and television warp the society that they reflect.").

114. *Butler*, [1992] 1 S.C.R. at 496.

115. As I have explained in the text, both the American and the Canadian approaches to obscenity are morally partisan. In this sense, at least, neither can hide behind a mantle of "neutrality." Cf. Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum. L. Rev. 1, 28-29 (1992) (arguing that the traditional and feminist approaches to obscenity cannot be distinguished on the ground that one is neutral and the other impermissibly partisan). On the related issue of whether the feminist approach is impermissibly "viewpoint-based" in a way that the traditional approach is not, compare Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 609-17 (arguing that the feminist approach should not be condemned on this ground) with Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 Harv. J.L. & Pub. Pol'y 461 (1986) (arguing that it should).

116. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., dissenting).

Supreme Court addressed this problem in a traditional way, whereas the Canadian Supreme Court, in *Butler*, has attempted a more modern, feminist approach. Standing alone, each approach could be supported or criticized, but that is not the point of this article. Instead, I have attempted to compare the two approaches in order to determine how they differ, and to what extent.

Although my analysis is limited to a single traditional approach and a single feminist approach, it suggests that both the law of obscenity and its constitutional justification may be largely the same under both types of reasoning. Doctrinally, *Butler*'s substantive departures from the American test are not trivial, but are relatively modest, and the standards that emerge are no less vague. The Court's constitutional justification also tracks the American: that obscenity has minimal expressive value, and that, under a rational basis analysis, the government legitimately can act on the premise that obscenity might not only cause violence, but might also cause nonviolent societal harms by undermining the moral standards of those who read or view it.

Given these similarities, where is the "stunning victory for women" that Professor Mackinnon described?[117] It appears to lie in the *Butler* Court's "particular conception of morality"[118]—its adoption of a feminist as opposed to a traditional understanding of the moral harm that obscenity might cause. As I have indicated, this shift in focus does not affect the basic constitutional analysis of obscenity regulation, and it therefore can hardly be considered a theoretical breakthrough. Given the doctrine to which it is joined, moreover, its practical implications are relatively modest—certainly not, in MacKinnon's terms, "of world historic importance."[119]

The essence of the feminist victory in *Butler* is neither theoretical nor practical. Instead, it is ideological[120]—indeed, it might even be described as religious. On this view, both the American and the Canadian approaches to obscenity can be viewed as religious, but they represent competing religious visions. Religion, in the sense I have in mind, concerns itself not merely with the tangible and the empirically demonstrable; it is willing to rely in part on faith. This faith, in turn, is grounded not only in experience and reason,[121] but

117. See supra note 5 and accompanying text.

118. *R. v. Butler*, [1992] 1 S.C.R. 452, 492 (Can. 1992).

119. See supra note 5 and accompanying text.

120. Cf. David P. Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 Const. Comm. 147, 175 (1985) (suggesting that feminist efforts to reformulate the law of obscenity may be designed as much "to publicize an ideology" as to change the law).

121. Needless to say, experience, reason, and faith are not exclusive of each other. See H. Richard Niebuhr, *Radical Monotheism and Western Civilization* 3-4 (U. of Neb. at Lin-

also in deep-seated moral commitment.[122] Unlike many secular philosophies, moreover, religion gives preeminent attention to the meaning of human life, both individually and in common. It defines our sense of who we are, why we exist, and how we should relate to the world around us. It influences our conduct, but it also struggles for our hearts and minds. From a religious perspective, it is not enough that we maintain particular rules to govern our common life. Religion looks deeper, focusing on our underlying values and motivations: what are the ultimate values that give meaning to our lives, and are the rules of our society, and our compliance with them, in fact designed to honor these values?[123]

In this religious sense, *Butler* is an extraordinary decision. It shows that the Canadian society, or at least the Canadian Supreme Court, now views obscenity primarily as an affront to women. Further, it may have broader implications, for *Butler* suggests that the hearts and minds of Canadians, or at least those of the Canadian Supreme Court, include a particular understanding of the meaning of social life. This understanding regards the social equality of women as a fundamental value of the highest order. Although *Butler*'s immediate implications for the law of obscenity may not be terribly significant, its religious dimension is. The decision reflects an important shift in basic values, one that may have broad and lasting implications in the decades to come.

Writing in 1963, Professor Louis Henkin declared that the regulation of obscenity is a religious undertaking. "Obscenity, at bot-

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coln, 1960). For example, "reason permeates the activity of faith; it organizes, compares, reflects, criticizes, develops hypotheses in the midst of believing." Id. at 4.

122. Whether or not they would accept the "religious" label, it is obvious that many feminists, like many supporters of traditional values, have deep and passionate moral commitments. Moral commitments of this strength, moreover, cannot help but affect one's perceptions of reality, whether or not this effect is characterized as "faith." Professor MacKinnon, for example, writes as follows concerning the law's tolerance for pornography: "How can it be officially permitted? How can the law be so twisted as to collaborate in it? What are people thinking? Don't they know? Don't they see? Don't they care? . . . Why have those who have seen the pornography not seen it in this way?" Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. Rev. 793, 815 (1991). Compare what Protestant theologian H. Richard Niebuhr described as the "primary questions of faith": "Do you believe me? Do you trust me? Are you trustworthy and believable? Are you faithful to me and to our common cause?" H. Richard Niebuhr, *Faith on Earth: An Inquiry into the Structure of Human Faith* 22 (Richard R. Niebuhr, ed., Yale U. Press, 1989). Cf. Gey, 86 Mich. L. Rev. at 1609 (cited in note 16) (arguing that MacKinnon's is "a religious point of view" in the sense that "it is predetermined, unchanging, and unchallengeable").

123. One of the major themes of the Protestant Reformation was that the purpose or belief that informs our actions may be just as important as the actions themselves. See Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 223-25 (Harv. U. Press, 1989).

tom, is not crime," he wrote. "Obscenity is sin."[124] This statement might imply that the law of obscenity is not designed to prevent harm to society, but that would be an erroneous conclusion. Both the traditional approach of the United States and the feminist approach of Canada proceed on the assumption that obscenity harms society. Even so, as Henkin suggests, the regulation of obscenity can fairly be described as a religious enterprise. This is true regardless of whether the religion is animated by traditional or feminist concerns. These two religions converge in concluding that obscenity offends their values in a harmful way—that obscenity is "sinful" in this sense—and they define the sin in comparable ways. At a deeper level, however, the two religions diverge, for they espouse competing views on the ultimate values that are at stake.

It is at this deeper level that the Canadian approach departs from the American. On this view, *Butler* reflects a kind of religious conversion, and it is a dramatic one at that. So perhaps Professor MacKinnon is right. Perhaps, in the end, *Butler* is "a stunning victory for women." And perhaps, in this religious—and therefore fundamental—sense, the decision is "of world historic importance."

124. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 395 (1963).