Working out the kinks:
Advancing the pornography debate

by

May Friedman

Submitted to the Faculty of
Graduate Studies and Research in partial fulfillment
of the requirements for the degree of
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"Working out the kinks: Advancing the pornography debate"

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in partial fulfillment of the requirements for

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ABSTRACT

Pornography has long been a subject with the power to inspire strong opinions and great controversy. While supporters and opponents of pornography disagree about its associated merits and harms, discussions of sexually explicit material regularly acknowledge the great power of such material, whether for good or for bad. Given the perceived power of sexually explicit material, it is not surprising that much of the pornography debate is centered on concerns around its regulation. Ideally, this control should consist of an approach that balances between the suppression of obscene material that could cause harm to Canadians and access to material as guaranteed by the right to free expression under the *Charter of Rights and Freedoms*.

The purpose of this research is to identify the inadequacies of the current Canadian obscenity law, to acknowledge key concerns regarding regulation of pornography and to consider legislative alternatives that may better balance concerns regarding pornography's harmful and empowering potential.

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My family remained proud of my efforts even while they were unable to explain my topic choice to their friends. My friends heard more about pornography than anyone really ought to and remained interested even when they understood that this thesis would have no pictures.

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TABLE OF CONTENTS

ABSTRACT	iii
ACKNOWLEDGEMENTS	iv
CHAPTER ONE: Introduction	1
CHAPTER TWO: Setting the stage	13
Major positions within the debate	13
The challenge of defining our terms	23
Is the obscenity debate irrelevant in the face of new technologies?	33
CHAPTER THREE: Then and now	40
Historical review: Events in Canadian obscenity legislation	40
<i>Butler</i> did it: The case of <i>R. v. Butler</i>	47
Queer Customs	56
<i>Sister's</i> doing it for themselves: The case of <i>Little Sister's v. Canada</i>	61
CHAPTER FOUR: Determining obscenity in Canada: the current context	66
The community standard of tolerance test	67
The internal necessities test	76
The "harm" test	84
The production of pornography	109
CHAPTER FIVE: New directions	122
Step one: Define obscenity	123
Step two: Cabbages, cucumbers and... literature? Establish a tribunal	125
Step three: Govern the process	129
Step four: Feminists who have conversations—Open up the discussion	131
APPENDIX: Relevant legislation and enactments	134
BIBLIOGRAPHY	136

CHAPTER ONE: INTRODUCTION

Pornography has long been a subject with the power to inspire strong opinions and great controversy. While supporters and opponents of pornography disagree about its associated merits and harms, discussions of sexually explicit material regularly acknowledge the great power of such material, whether for good or for bad. Given the perceived power of sexually explicit material, it is not surprising that much of the pornography debate is centered on concerns around its regulation. At its most pragmatic, the debate is often restricted to a question of the efficacy of laws controlling pornography in Canada in both allowing and suppressing access to such material. Ideally, this control should consist of an approach that balances the suppression of obscene material that could cause harm to Canadians with access to material as guaranteed by the right to free expression under the *Charter of Rights and Freedoms*.

While pornography has been regulated in Canada since before the Dominion, the methods and motivations for its control have varied a great deal. Many different forces have shaped Canadian obscenity law, including the influence of religious morality and the civil liberties movement of the 1960s. Since the 1970s, the Canadian feminist movement has been a major presence in the obscenity debate in the legal and legislative arenas (Cossman et al, 1997: 18). Feminist involvement in this argument has, however, encompassed a wide range of opinions and proposed solutions. While the initial feminist response to pornography in the 1970s tended to focus on pornography's potential for harm, some feminists have framed the debate with regard to pornography as a tool of

women's liberation while yet others have discussed the regulation of sexually explicit material from the perspective of concerns about censorship. As yet no legislative or judicial solution that has been applied has adequately addressed the wide range of feminist concerns. Rather, the solutions attempted thus far in the arena of Canadian obscenity law have fallen far short of addressing concerns about either pornography's harmful or liberating potential.

In part this has occurred as a result of proposed feminist solutions that have tended to examine the regulation of pornography in a one-dimensional and generalized way. Debates about pornography tend to resist indifference: very strong and polarized opinions have emerged from both feminists and other stakeholders, culminating in proposed solutions that often lack the subtlety required in dealing with such a challenging topic.

This thesis begins by recognizing the potential for pornography to both liberate and harm Canadian society, particularly those who have been historically disadvantaged (including but not limited to women and gays and lesbians). Because pornography is viewed as a site of great power, suggestions for its regulation are approached in a more complex and nuanced way than has generally been undertaken thus far. Rather than espousing a particular solution or ideology, this study attempts to isolate the ways that Canadian obscenity law fails to adequately facilitate either the protection or liberation of Canadians.

IMPORTANCE TO THE FIELD OF SOCIAL WORK

Graham et al describe Richard Titmuss' notion of social policy:

To [Titmuss] *social* refers to all the non-economic factors that affect people in society and relate to people as social beings. *Policy...* is about enduring the dilemmas of choice created when one objective must be selected over others. (Graham et al, 2000: 3)

Obscenity law is a fascinating example of the governance of people's social lives as well as the "dilemma of choice" that must occur when attempting to prioritize such significant concerns as the protection of the Canadian public from potentially harmful material and the right to access to potentially empowering material.

Obscenity law also reveals some of the motivations for the creation of social policy that may be more difficult to access in a discussion of other policies. Social workers studying social policies must remain aware of the many different influences that shape such laws as well as the challenges present in creating and administering just laws that govern people's social lives. Graham et al write that social policies are "...profoundly influenced by societal values and ideologies..." (Graham et al, 2000: 1) Rarely, however, are the underlying motivations of social policies made transparent. Because obscenity law is such a contentious topic and one which explicitly combines morality with legality, some of the motivations that remain buried in discussions of other policies may be rendered more easily accessible. By examining the lengthy and ongoing debates that have gone into the construction of Canadian obscenity law, insight may be gained into the process of determining social policies more generally.

The impact of obscenity law is not limited to social workers who work in

the area of social policy. This law, and a discussion of the effects of pornography more broadly, is relevant to social workers who work with women, children, gay and lesbian clients and all others who have been affected positively and/or negatively by pornography. Obscenity and pornography touch on major issues in the lives of clients: abuse, sexuality, power and expression, to name but a few of the themes that arise from this discussion. A clear understanding of both the private and public implications of this law are therefore of great relevance to the social work profession.

CONTEXT: BACKGROUND INFORMATION

The regulation of pornography in Canada is covered by the *Criminal Code* in section 163, commonly referred to as "obscenity law". This piece of legislation has its roots in British common law (Johnson, 1995: 42). Canada relied on British precedents, only drafting independent legislation in 1944. Material considered obscene was initially regulated with a concern to its inappropriate moral and religious character (Cossman et al, 1997: 14). In the 1960s, as the civil liberties movement began to gain strength and sexual mores were loosening, the amount of print pornography available in Canada vastly increased (Cowan, 2000).

Beginning in the 1970s, the women's movement began to react to the proliferation of pornographic material. Citing pornography as a chief site of women's exploitation, some feminists theorized that the industry was the standard bearer of a patriarchal system (Dworkin, 1979, 1988; McKinnon, 1987;

Cole, 1989, 1995). By contrast, other feminists argued for the sexual empowerment of women through the unashamed embracing of sexuality (Strossen, 1995; McElroy, 1995 ; Burstyn, 1985). Feminists found themselves enmeshed in a fierce debate.

While the pornography debate began within the women's movement of the 1960s and 1970s, the debate has grown to have broader implications. In 1992, and again in 1999, the Supreme Court of Canada was charged with the task of interpreting Canada's obscenity legislation in an effort to ensure that it did not unduly infringe upon rights protected by the *Charter of Rights and Freedoms*. As these *Charter* challenges were taken to the Supreme Court, feminist organizations acted as interveners, and the decisions made by the Court reflected the arguments provided by these organizations. As such, the pornography debate among feminists has begun to affect the interpretations of obscenity legislation at the judicial level. Feminist language has been incorporated into Supreme Court decisions and an analysis that includes violence against women has been included for the first time into an interpretation of obscenity law. The absence of consensus among feminists regarding pornography has been perceptible at the Supreme Court level as feminist interveners have argued for both anti-pornography and anti-censorship measures.

Arguably, however, the feminist language that has been incorporated into Supreme Court decisions has not substantively affected the ways in which Canadian obscenity law is enforced. While new interpretations of the 1959

obscenity law are radically different in both motivation and language from their predecessors, unfortunately, the law in its application fails to reflect its feminist rationale (Gotell, 1996; Busby, 1994). Some argue that feminist language has been appropriated and is simply a new twist on the same morally driven arguments toward the regulation of sexually explicit material (Gotell, 1996).

Despite the best intentions of feminist interveners and the Supreme Court to emerge with a respectful and rational approach toward the regulation of pornography, much is still left to be done in terms of providing legislation that both effectively minimizes harm and does so in a fashion that is least intrusive to freedom of expression.

PROBLEMATIC

The need for effective obscenity legislation cannot be underestimated. Legislation which is too lax can result in the proliferation of harmful material that can support gender inequality, violence against women or other ills. On the other hand, very stringent legislation can severely limit the material to which Canadians have access; in particular minorities (people with disabilities, lesbians, transgendered people and bondage enthusiasts, for example) whose sexuality is rarely portrayed in mainstream publications may find themselves completely unable to find access to representative material. In this way, rigorous legislation can support heterosexism and homophobia. More generally, limiting access to material may allow Canadians to maintain overly restrictive normative attitudes toward sexuality by prohibiting any material which challenges notions of "normal"

sexual relations. Such strictures do not exclusively impact upon sexual minorities; Canadians may be denied access to material which portrays women's unashamed sexuality or material which represents any non-mainstream sexual practice.

THEORETICAL CONTEXT

This thesis is guided by feminist principles that recognize inequality and differential power relations. My notion of feminism is further informed by a postfeminist stance. Ann Brooks defines postfeminism as:

...a useful conceptual frame of reference encompassing the intersection of feminism with a number of other anti-foundationalist movements including postmodernism, post-structuralism and post-colonialism... Postfeminism represents...feminism's 'coming of age', its maturity into a confident body of theory and politics, representing pluralism and difference and reflecting on its position in relation to other philosophical and political movements similarly demanding change (Brooks, 1997: 1).

Postfeminism allows me to draw on postmodernism and other ideological shifts while grounding myself in feminism and an acknowledgement of the need for social change. By challenging dichotomies that rely on an empirical assessment of obscenity as either positive or negative, postfeminism stands outside the usual positions taken in this debate (anti-pornography, anti-censorship and pro-pornography), potentially allowing for a more nuanced analysis. As Modlesky writes, "If there ever was a quintessential postfeminist issue, pornography is it" (in Brooks, 1997: 205).

In addition to postfeminism, I rely on the postmodern concept of deconstruction as a method of framing this debate. In resisting the static categories that have defined the debate thus far, I hope to arrive at potential

positions that are flexible and creative. This is consistent with a Foucauldian approach that advocates the shaking up of static truths as a method of transforming knowledge (Chambon: 53). As Cossman et al write,

Postmodern feminism holds that there are many feminisms (both named and unnamed); that there is no one reality and no one site of transgression and resistance; and that bringing reality down to one truth... absents more than it encompasses...pornography and sexuality must be understood as a terrain of struggle and contradiction—a site of ambiguity (Cossman et al, 1997: 22).

A postmodernist approach, by locating pornography as “a site of ambiguity”, may particularly facilitate resistance to the dichotomies that have traditionally framed this debate (for example pornography/not pornography, harm/not harm or consent/non-consent). Such dichotomies have implicitly upheld power relations based on differential degrees of power in naming and determining the precise nature of material and practices (in particular deviance/not deviance). By questioning these dichotomies, the underlying motivations and outcomes of this policy may be better revealed. Furthermore, a refusal of the notion that any item must be either empirically obscene or non-obscene necessitates the suggestion of more complex approaches to pornography's regulation than might otherwise be attempted.

While postmodern feminism provides a creative framework to understand the challenges of the pornography debate, postmodernism is generally antithetical to policy-making, particularly in a neo-liberal state emphasizing conformity (Brotman and Pollack, 1997:11). While a relinquishing of static truths provides the groundwork for an innovative analysis of Canadian obscenity law, it may also obscure potential avenues of resolution. My investigation therefore

attempts to preserve the multiplicity of the debate while grounding it in the pragmatic challenges posed by a formal legal analysis.

METHODOLOGY

In this thesis, I undertake a critical examination of secondary literature coupled with an analysis of two recent and relevant Supreme Court decisions. I examine the Supreme Court decisions in an attempt to note the changing language around obscenity legislation, particularly in light of feminist intervention at the Supreme Court level. My analysis of the secondary feminist literature on pornography informs my critique of the current Canadian regulatory scheme for determining and controlling sexually explicit material.

The purpose of this research is to identify the inadequacies of the current Canadian obscenity law, to acknowledge key concerns regarding regulation of pornography and to consider legislative alternatives that may better balance concerns regarding pornography's harmful and empowering potential.

A large amount of feminist literature has been written about pornography. Because feminist arguments regarding pornography have played an important role in affecting interpretations of Canadian obscenity law, a majority of the literature used comes from a feminist position. While I specifically examine pornography within Canada, the writing of American and British feminists has been influential in guiding the thinking of their Canadian colleagues and furthermore contributes insight into the larger issues around the effect of pornography on society. The writing of prominent American and British feminists

is therefore also considered.

The literature may be divided broadly into several cohesive positions including those that are fiercely critical of pornography and those that champion the cause of sexually explicit material. Critical analysis of these positions in order to suggest approaches that begin to recognize concerns about pornography's potential for both harm and liberation is a key aim of this thesis. Because the pornography debate has generated passionate and divisive opinions, little literature exists which critically examines the range of different feminist positions on pornography. Thus exemplary literature representing each position will be selected and an effort will be made to move the debate to a more successful resolution.

PARAMETERS OF THIS THESIS

While I examine a considerable amount of material, some concerns necessarily fall outside the domain of this thesis. This study is set within the English Canadian debate regarding pornography and therefore French Canadian material is not considered.

While some of the issues surrounding the regulation of adult pornography are relevant to a discussion of child pornography, overall the two are quite distinct. Currently child pornography is fairly strictly governed through a separate law enacted in 1993. While not all agree, I believe that different solutions are required for the regulation of child and adult pornography. I therefore focus exclusively on the regulation of adult pornography.

My analysis does not extend to an examination of sexually explicit material itself. While an exhaustive study of pornographic material could be very useful in resolving disputes regarding the specific nature of pornography (determining, for example, what percentage of pornography is violent), such a study would be far beyond the scope of this project. Furthermore, such an attempt is simply not the focus of this thesis. Rather than attempting to achieve my own conclusions regarding the differential effects of pornography, I consult secondary theoretical literature that both praises and condemns pornography in an attempt to suggest both theoretical and legislative approaches that best reconcile these two opinions.

ORGANIZATION OF THE STUDY

This study begins with an examination of the major positions held within the debate surrounding pornography. While I focus primarily on the feminist literature regarding pornography, I also provide a brief discussion of other key positions. Furthermore, an examination of the terminological challenges which plague this debate will be undertaken. Finally, I will conclude by establishing the relevance of this debate in light of new technological innovations that may change access to obscene material.

A discussion of the history and roots of the regulation of obscenity in Canada will provide background information regarding obscenity law. The Supreme Court decisions in *R. v. Butler* (1992) and *Little Sisters v. Canada* (2000), both of which had a profound impact on the interpretation of the

legislation, will then be examined in detail.

I then undertake an analysis of the three major “tests” currently used to determine obscenity within Canada and at our borders. These three tests are the “internal necessities” test—meant to measure the artistic merit of a piece of work to judge whether potentially obscene material contained within is warranted; the “community standards” test—meant to gauge the level of tolerance of the Canadian community toward explicit material; and the “harm” test—meant to determine the potential of any work to cause harm to Canadian society. A critical analysis of these three tests will form a major part of my thesis.

Other issues recur within this debate. Not least of these is the discussion of the merits and pitfalls of material that includes both sex and violence. A discussion of both the potentially liberating and potentially dangerous aspects of violent sexual material will be undertaken in the context of the “harm” test. Following this, I examine the process of creating pornography and critique concerns regarding the exploitation of actors within the pornography industry.

Finally, I attempt to provide suggestions to address the shortcomings of current Canadian obscenity legislation. By undertaking an analysis of the multiplicity of concerns and issues within this debate I hope to both expose the complicated nature of this problem and provide pragmatic solutions to the regulation of obscenity in Canada.

CHAPTER TWO: SETTING THE STAGE

In order to better understand the challenges of regulating obscenity, the context of the debate must be examined. The major positions taken in this debate must be identified and clarified. An analysis of the challenge of providing consistent definitions of words like obscenity and pornography will be undertaken. Finally, the relevance of the obscenity debate will be considered in light of new technologies.

MAJOR POSITIONS WITHIN THE DEBATE

While the regulation of sexuality has long been a contentious topic, the nature of the debate shifted somewhat in the 1960s with the birth of the civil liberties movement and a stronger focus on freedom of speech. At around the same time, moral conservatives pushed for more stringent laws that would suppress the "immoral" influence of explicit sexual depictions. Cossman discusses the debates between moral conservatives and civil libertarians: "The religious conservatives portrayed pornography as a sin because it promoted sexual pleasure and the satisfaction of desire without any procreative purpose... The civil libertarians argued that obscenity legislation should be repealed on the grounds that interest in sex is normal, healthy and good (Cossman et al, 1997:18).

When feminists initially became involved in the pornography debate in the 1970s, the first arguments came from an anti-pornography position. As the women's movement began to recognize many different sites of patriarchy,

pornography was duly noted by many feminists as a potential site for gender discrimination. To many anti-pornography feminists at the time, this seemed like the obvious and universal feminist opinion on pornography. As Jillian Ridington writes, "We seemed united; we agreed that pornography degraded women, lied about our sexuality, and encouraged violence against women and children. We were sure that all feminists would share our views, once they had seen violent pornography" (Ridington, 1994: 17). To many feminists, the anti-pornography movement was (and is) a clear example of the women's movement in opposition to the patriarchal establishment. Anti-pornography feminists were the first to shift a discussion of pornography away from ideas of morality, instead considering pornography as a cause of *harm*.

While anti-pornography feminists initially supposed that all feminists would unite against pornography, other feminists strongly disagreed, arguing that censorship posed a greater threat to women's liberation than pornography (Ridington, 1994: 20). While allying themselves somewhat with the civil libertarians, anti-censorship feminists maintained a focus on gender as central to their analysis. The anti-censorship feminist movement reached its height with the publication of *Women against censorship* in 1985 (Burstyn, 1985).

Most recently, there has been a new breed of feminist pornography theorist: pro-pornography feminists¹. Largely writing in the 1990s, these feminists have entered the debate as a result of their chagrin at what they view

¹ This term is my own. Others refer to these feminists as sex radicals (see Cossman) or simply include them with anti-censorship feminists (see, for example, Gotell), from whom I think they are distinct.

as the women's movement's failed attempts at sexual liberation in the 1960s. The following discussion will highlight the nuances of these different positions.

While pornography is an issue that tends to polarize the feminist community, it is important to note that a continuum of opinions exist among the anti-censorship, anti-pornography and pro-pornography positions. Furthermore, feminist organizations that are involved in policy-making or those who intervene at the Supreme Court level do not necessarily epitomize the positions to which they may be narrowly assigned. For example, the Legal Education and Action Fund (LEAF), in intervening in landmark Supreme Court cases regarding obscenity, has advocated from both anti-censorship and anti-pornography positions, and has encountered a great deal of criticism from feminists committed to either of these perspectives. An analysis that necessarily begins with only key opinions must therefore be recognized as simplistic. Nonetheless, certain generalizations regarding the dominant feminist positions on this topic may help clarify the debate.

ANTI-PORNOGRAPHY FEMINISTS

Feminists who take an anti-pornography position argue that pornography is profoundly harmful (to women particularly, and society in general) in a variety of ways. First, they hold that pornography (even non-violent pornography for some), in normalizing women's subjugation and degradation, can contribute to violence against women (Dworkin, 1979: 26). Furthermore, pornography is antithetical to healthy sexual relations and instead has much more to do with

male power over women. Andrea Dworkin argues that “[the] strains of male power are intrinsic to both the substance and production of pornography; and the ways and means of pornography are the ways and means of male power” (Dworkin, 1979: 24). Many anti-pornography feminists feel that women who enjoy pornography have simply been brainwashed by misogyny and patriarchy. In speaking with the *San Francisco Examiner* in 1992, Catherine McKinnon made the following comment: “If pornography is part of your sexuality, then you have no right to your sexuality” (in Strossen, 1995: 161).

Anti-pornography feminists argue that pornography objectifies women by reducing them to sexual receptacles, body parts edited for male enjoyment (Ridington, 1994: 18; Dworkin, 1979: 113). Pornography also supports dangerous notions of what constitutes the ideal woman. This ideal extends to both body image and mental state: women are expected to be slim with very large breasts, and are meant to be constantly aroused and ready (though perhaps not willing). Bonnie Klein, in her film *Not A Love Story* discussed her concerns for her daughter, who had seen pornographic magazines in the corner store on the way home from school: “Here was this eight-year-old who I knew, as she reacts to everything in the world, had to have a reaction. What could she think of her own self and her own little body surrounded by this?” (Klein: 1981) Anti-pornography feminists feel that pornography hurts women both by subjecting them to an unrealistic ideal, and by continuously presenting that ideal to men who punish women for failing to achieve it.

The strategy suggested by anti-pornography feminists for the suppression of pornography is usually criminalization (Busby, 1994: 168, MacKinnon, 1987: 179). While there are major debates within anti-pornography feminist circles regarding *which* material should be criminalized and *how* laws should be enforced, the basic conclusion of anti-pornography feminists is that pornography is harmful and must therefore be illegal (Busby, 1994: 172; Cole, 1989: 61). While the pornography debate has always tended to defy the categorization of feminists into specific "camps" of liberal, socialist and radical feminism, the push by anti-pornography feminists is generally consistent with contemporary liberal feminism and the push to "try... to fit women into existing social structures" (Mandell, 1998: 5). Anti-pornography feminists generally want to work with the existing criminal justice system to control what they view as harmful pornography.

ANTI-CENSORSHIP FEMINISTS:

Feminists who approach the debate from an anti-censorship position sometimes acknowledge some of the problems with aspects of pornography identified by anti-pornography feminists, but fear that suppression of material will have an even more negative effect on society and on women specifically than pornography does (Ridington, 1994: 20; King, 1985: 79; Granau, 1985: 98). However, anti-censorship feminists have a very different analysis from that of pro-pornography feminists. Rather than arguing for pornography, anti-censorship

feminists are specifically concerned about the ramifications of censorship.

Author and anti-censorship activist June Callwood writes that

None of us believe that hard-core pornography is harmless. We all see it as a gross dehumanization of women, and we all know that whenever one group in society-- in this case, men-- convinces itself that another group is a subspecies, it becomes permissible to inflict suffering and humiliation on the inferiors... [but] laws against pornography will do nothing to change the bully-victim relationship that is sustained by the poverty of women (Callwood, 1985, 129).

Anti-censorship feminists may furthermore disagree with the anti-pornography feminist supposition of pornography as a powerful patriarchal force. While acknowledging major concerns with pornography, some anti-censorship feminists simply feel that, within a sexist society, pornography is but one symptom of a larger ill. Lynn King, who argues that "much pornography is abhorrent" nonetheless writes that, "...pornography is a telling symptom of a patriarchal society and censoring pornography is like using an Aspirin to cure cancer: it might ease the pain, but does not eliminate the disease, and may well have serious side effects" (King, 1985: 79).

Anti-censorship feminists are concerned with the perceived targeting of gay and lesbian material under Canadian obscenity law (Strossen, 1995: 231) and do not view this targeting as accidental. Despite an acknowledgement that harmful pornography exists, such feminists argue that censorship always impacts most severely those who are already marginalized. As such, censoring pornography will only limit access to potentially good material while failing to hold back the majority of misogynistic material (Strossen, 1995: 232; King, 1985: 81).

While some anti-censorship feminists may feel that pornography is problematic, solutions coming from an anti-censorship position differ greatly from

those proposed by anti-pornography feminists. The chief difference in these solutions comes from a deep reluctance by the anti-censorship camp to trust existing social structures to control any aspect of sexuality. Concerns about the hijacking of feminist terminology for thinly disguised moral crusades are often put forward by anti-censorship feminists. As feminist language gains currency, so, too, does a return to conservative “family values”—anti-censorship feminists fear that obscenity legislation designed to appease both feminist audiences and moral conservatives can only be enforced inequitably (Gotell, 1996: 301).

PRO-PORNOGRAPHY FEMINISTS

Unlike anti-pornography and anti-censorship feminists, pro-pornography feminists begin with the premise that pornography can be inherently good for women. Consider the first sentence of Wendy McElroy’s book, *XXX: A woman’s right to pornography*: “Pornography benefits women, both personally and politically” (McElroy, 1995: vii). Pro-pornography advocates argue that women have long been denied access to their sexuality, and that pornography can be a productive avenue to counter repressive influences. Furthermore, by portraying women who seem to be enjoying themselves, pornography is opening the door to a whole new palette of acceptable sexual responses for women. Sallie Tisdale, author of *Talk dirty to me*, gives the following critical response to anti-pornography feminist assertions: “That branch of feminism tells me my very thoughts are bad. Pornography tells me the opposite: that *none* of my thoughts

are bad, that anything goes... The message of pornography... is that our sexual selves are real" (in Strossen, 1995: 161).

Pro-pornography feminists acknowledge the power imbalance between men and women in Western society, but like anti-censorship feminists, they generally feel that gender imbalances would only be exacerbated by any attempt to control pornography (Strossen, 1995: 218). Some, like Strossen and Tisdale (1994), argue that the images in pornography are much less offensive than images found elsewhere in mainstream television and film, and suggest that honest efforts to fight sexism are misplaced when aimed solely at pornography (Strossen, 1995: 262).

Pro-pornography advocates also see pornography as an arena in which women need to get involved. While they do not consider pornography inherently harmful, they feel that the involvement of more women as consumers of pornography may open the door to more sites of sexual liberation. Furthermore, they attempt to access the debate in a pragmatic way:

Whether or not pornography should or shouldn't exist is pretty much beside the point. It does exist, and it's not going to go away. Why it exists, what it has to say, and who pornography thinks it's talking to, are more interesting questions than all these doomed, dreary attempts to debate it, regulate it, or protest it. Just what is pornography's grip on the cultural imagination? (Kipnis, 1996: xi)

OTHER POSITIONS—STRANGE BEDFELLOWS

Obviously, feminists are not the only stakeholders in discussions of pornography. Other major positions exist and have influenced both past and present legislation to varying degrees. Because both feminists and non-feminists have attempted to bring about changes in legislation in the past thirty years, it is

often difficult to assess where feminist influences begin and other positions take over. While the feminist debates surrounding pornography are the focus of this thesis, it is useful to set the feminist literature in the context of the broader debate regarding pornography and obscenity. A cursory examination of other positions will provide a broader understanding of this controversy.

Social conservatism has long been a factor in the governance of sexuality, affecting not only obscenity legislation, but also laws concerning divorce, homosexuality, and access to abortion and contraception (Cole, 1985: 69). The motivation for such laws was the maintenance of a morally pure society. Beginning in the 1960s, such laws began to come under closer scrutiny. Both feminists and non-feminists began to question the right of the state to provide moral guidance. Pierre Trudeau, then Minister of Justice stated that "the state [had] no business in the bedrooms of the nation", and in 1969 homosexual activity between two consenting adults was decriminalized. Divorce laws became more lenient, and birth control and abortion were eventually legalized. Despite considerable inequality in both the letter and the application of law, Canadians, like citizens of many liberal democracies, had decided that "immorality was no longer sufficient grounds for legal restriction" (Gotell, 1996: 286). Many of these changes were guided by a growing movement toward civil liberty that argued for privacy and the right to guide one's own morality unless or until danger of harm could be proven.

Civil libertarians generally take the stance that all censorship is inappropriate and that the right to freedom of expression is sacrosanct.

Furthermore, with regard to obscenity, some civil libertarians argue that pornography itself is liberating and should never be controlled. Rather than focussing the debate on morality or harm, a civil libertarian approach is premised on the sanctity of freedom and privacy, epitomizing a liberal approach (Cole, 1989: 57; Gotell, 1996: 287).

Opposite the spectrum from civil libertarians are moral conservatives. While a focus on morality has long underpinned Canadian policy, neoconservative ideology and the New Right have reaffirmed the need for the state to get *back* into Canadian bedrooms. Groups such as REAL Women and Canadians for Decency continue to express concern over the perceived liberalization of Canadian laws (Gotell, 1996: 290). While arguing for much tougher obscenity laws alongside anti-pornography feminists, moral conservatives have very different concerns from feminists and are generally concerned about sexual explicitness, indecency and moral turpitude.

HOW HAVE FEMINIST POSITIONS GAINED CURRENCY IN THIS DEBATE?

Lise Gotell places the major positions in the Canadian pornography debate on a continuum, beginning with civil libertarians, then anti-censorship feminists followed by anti-pornography feminists and ending with moral conservatives (Gotell, 1996: 287)². This approach must be approached cautiously, with a reminder that a simple continuum cannot capture the complexity of this debate. Nonetheless, looking at the spectrum of positions

² Gotell considers pro-pornography feminists as a sub-group of anti-censorship feminists.

reveals some interesting aspects of the feminist positions within this debate and the strange alliances that have formed as a result of this contentious issue.

Perhaps unusually, the feminist positions in this debate are generally the most moderate. Civil libertarians advocate for the total absence of censorship while moral conservatives would criminalize virtually any depiction of nudity. In seeking a balanced law, it is perhaps not as surprising as it initially may seem that feminist intervention into this debate has gained such prominence. The question of whether interpretations guided by feminist discourse remain true to feminist ideals in their application is rather more complicated: do stronger obscenity laws betray "moral" motivations despite the presence of feminist terminology? Alternatively, are the equality claims heard by the courts judged with a feminist perspective, or are they simply ill-disguised civil libertarianism? A closer examination of both the language of law and court decisions and the eventual outcome of Canada's most recent interpretations of *Criminal Code* section 163 may shed some light on this complicated problem.

THE CHALLENGE OF DEFINING OUR TERMS

A debate on the worth of pornography and other erotic material cannot proceed without a clear definition of the terms involved. In fact, this is a chief stumbling block encountered by legislators and theorists alike. Obvious ideological differences divide stakeholders in this debate. These differences colour the definitions used, making an honest argument much more challenging. Two feminists arguing about the relative merits and dangers of pornography may

be referring to completely different material, blurring actual ideological differences as a result.

Consider two definitions, by way of example. Andrea Dworkin, an anti-pornography feminist, gives the following definition, drawn from the etymology of the word: "[pornography] means the graphic depiction of women as vile whores" (Dworkin, 1979: 200). By contrast, Wendy Elroy, a pro-pornography feminist, uses the following working definition: "Pornography is the explicit artistic depiction of men and/or women as sexual beings" (McElroy, 1995: 51). If Dworkin and McElroy meet to discuss their mutual concerns regarding pornography, can they have a fruitful discussion? Semantics aside, are they in fact discussing the same material?

Certainly, even if unilateral definitions could be agreed upon, the divide between Dworkin and McElroy's positions is vast and cannot be explained away as simply a semantic dispute. It is likely that the proposed solutions of staunch anti-pornography and pro-pornography feminists have so little in common that terminology is the smallest point of disagreement. The vagueness of the terminology currently in use, however, makes it yet harder to understand the intricacies of various points of view.

Anti-pornography feminists often speak of the harm caused by pornography; pro-pornography feminists speak of pornography's liberating potential. Is there any sexually explicit material that an anti-pornography feminist would find empowering? Is there any material with the intent to arouse that a

pro-pornography feminist would view with dismay? *What*, in particular, are different positions reacting to in pornographic material?

An image of a woman being restrained, for example, would potentially be viewed very differently by an anti-pornography and a pro-pornography feminist. Even if they agreed to disagree, however, in describing the particulars of why they found the image either disturbing or arousing, each might learn from the other's position. Despite the vast chasm between their opinions, perhaps each point of view would be somehow refined by such an explicit discussion.

Part of the challenge of definition is that so much is being taken for granted by so many within this dispute. Pro-pornography feminists may agree that it is "obvious" that child pornography falls beyond the pale of acceptable behaviour. Anti-pornography feminists may condemn pornography but praise "erotica" (another definitionally-challenged term). As a result of these assumptions, the tiny points of understanding and agreement are never made accessible.

Once again, even if the world's store of sexually explicit material could be catalogued and exhaustively divided into its component parts, and even if all stakeholders were to accept these unilateral definitions, there would still be debate and dispute. Currently, however, the major ideological differences between players within this debate are all too often obscured by the inability to explicitly define what we are defending or opposing.

THE PORNOGRAPHY-EROTICA CONTINUUM—WHAT ARE WE TALKING ABOUT?

Some feminists use definitions similar to that of McElroy, defining pornography simply as any sexually explicit material. This definition is expansive, covering a huge range of material. Many people, covering many different positions within this debate, however, discuss the continuum of material including “erotica”—presumably sexually explicit material that does not have the same potential for harm. The line between acceptable and unacceptable material is quite fluid, however, and difficult even for theorists espousing similar positions to achieve consensus on.

Janis Cortese, for example, refers to the writing and art she creates as “erotica” (Cortese, 1996). For her, the clear divide between pornography and erotica has to do with the quality of material produced. Drawing on the work of Aristotle, Cortese uses six criteria to judge all artistic works: Plot, characterization, dialogue, spectacle, music and theme. In her opinion, pornography is consistent with the standards of bad entertainment in any genre, whereas erotica is simply “good” pornography. Cortese compares erotica and pornography with good and bad science fiction, writing that,

Both are sex entertainment, just as both “The Crawling Eye” and “Silent Running” are science fiction. But one has innovative and fresh ideas, perhaps a little political subversion, characters you care about and identify with, and good writing and acting—speculative fiction or erotica. The other has cheap, lazy, mass-produced images that anyone with a half ounce of skill could have produced and has been seen a dozen times before... space opera or pornography (Cortese, 1996: 3).

Cortese acknowledges that her definition does little to aid legislators or law enforcement officers in determining the precise boundaries of pornography and erotica. Ironically, since Cortese’s material involves bondage and non-

consensual sex (Cortese, 1996: 4) her material would come under attack by many anti-pornography feminists—although Cortese herself condemns “pornography”.

Other feminist theorists have more trouble defining the erotica/pornography continuum. “Jen Durbin” is the pen name of a Women’s Studies professor from California who teaches a class on pornography that includes the viewing of a wide array of images. The theme of the class is the embracing of the ambiguity and fluidity of both “conventional” and “deviant” sexual behaviour. During one class, Durbin spoke in favour of erotica while acknowledging the challenges of defining terms. A student in Durbin’s class supplied the following definition: “ ‘Erotica is anything you like and pornography is anything I like.’ ” (Durbin, 1996: 56) Durbin writes that “...from that day forward I dropped the elitist euphemism for the sexually explicit material I read and write” (Durbin, 1996: 56). Durbin’s point is well made: for many people, pornography is a disgraceful aid used by perverts; but erotica is what one uses oneself. This discomfort once again clouds the debate by labelling pornography as inherently bad, set against “virtuous” erotica.

WHAT’S PORNOGRAPHY, AGAIN?

Many anti-pornography feminists use the erotica-pornography continuum as a method of acknowledging that some sexually explicit material may have merit. Jillian Ridington’s definition, for example, allows for the presence of

arousing material intended to empower women and focuses on material which may cause harm:

Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced, overtly or *implicitly* into participation... (Ridington, 1983 in Kostash, 1985: 34)

Ridington's definition is helpful in that it narrows the range of contentious material —like Cortese, Ridington sees pornography as bad, while other material (presumably erotica) is good. It also creates a number of problems. First and foremost, Ridington presupposes that coercion, particularly implicit coercion, can be identified. Furthermore, Ridington considers simulated coercion problematic, an opinion that is, itself, contentious.

More importantly, however, definitions that restrict "pornographic" material to that which is by definition negative have a major impact on the argument. When Jillian Ridington writes about the deeply harmful effects of pornography, she is referring to only a portion of the material that pro-pornography feminists like Nadine Strossen and Wendy McElroy are defending. While no one can confirm that Wendy McElroy would be concerned by material made under coercion, a specific discussion of the material in question seems a necessity for a productive dialogue. If Andrea Dworkin, Janis Cortese, Jillian Ridington and Wendy McElroy were to view a number of images, each would almost certainly classify the images differently. Were the discussion occurring on an image-by-image basis, confusion could be avoided, but since a lack of consensus on *what* constitutes pornography is inherent to the debate, sweeping statements regarding both pornography's merits or dangers must be viewed with concern.

The debate is most functional between players with at least similar definitions of material. Ironically, then, an argument between a staunch moral conservative, arguing against all material with the intent to arouse, and an equally passionate pro-pornography advocate, arguing for the presence of all such material, would be one of the only instances when definitional quandaries would not arise.

Even the most ardent of anti-pornography feminists are not advocating for the removal of all sexually explicit material. Safe sex guides or graphic accounts of abuse, for example, would include sexually explicit images, and would be seen as meritorious by anti-pornography feminists. Unfortunately, even if the intent of anti-pornography feminists is exclusively directed at selected material (for example, material with the intent to arouse or material with the potential to cause harm), the application of perceived anti-pornography feminist definitions has seen a wide variety of meritorious material classified as obscene in Canada and either detained or destroyed. The lines between material deemed "harmful" or "pornographic" or, on the other hand, "profound" or "empowering" by feminists intervening in Supreme Court cases differs from the delineations put forward by the Supreme Court judges and varies significantly from the interpretations taken by law enforcement and Customs officers. For example, in the case of *R. v. Butler* (1992), feminist interveners successfully argued that some pornography can cause harm to society. As a result of this decision, prohibited material was that which either included both sex and violence or included sex with "degrading and dehumanizing" behaviour. In the first criminal obscenity case to follow

Butler, a lower court judge declared that since anal sex was "sub-human", the item was illegal (Fuller and Blackley, 1996: 45). Obviously, the inability to adequately define such broad terms can result in the application of legislation entirely differing from its initial motivation.

LEGAL DEFINITIONS OF OBSCENE

In Canada, sexually explicit material that is problematic is considered legally "obscene". Initially, all material with the intent to arouse was viewed as obscene in Canada (though only a tiny amount of material was ever prosecuted) (Johnson, 1995: 43). The current definition of obscenity was codified in 1959 as "any publication a dominant characteristic of which is the undue exploitation of sex" (Gotell, 1996:294).

Lawmakers have long been criticized for the vagueness of Canadian obscenity law, both by Canadians who see the law as overly stringent and those who view the law as not rigorous enough (Gotell, 1996: 286). As a result, politicians have attempted to replace the "undue exploitation of sex" definition with a new, codified definition of the law. Thus far, however, all attempts have failed.

Concerned with the degree to which obscenity legislation was open to interpretation, in 1987 the federal Conservative government attempted to come up with a rigorous definition of obscenity. Bills C-144 and C-54 prohibited as obscene any material including "masturbation... vaginal, anal or oral intercourse... any matter or commercial communication that incites, promotes,

encourages, or advocates any conduct referred to in any subparagraphs..." (Johnson, 1995: 46). Bill C-54 also prohibited the depiction of lactation, menstruation and ejaculation (Gotell, 1996: 297). When critics argued that taking a "laundry list" approach ensured that virtually all Canadians were in possession of obscene material, they were assured that law enforcement officers would obviously use their judgment—rendering the bills spectacularly ineffective. Both bills died on the parliamentary order paper.

In lieu of a new law, since 1959 Canadian courts have struggled to clarify what constitutes "undue exploitation of sex". Our current interpretation comes from the Supreme Court judgment in the 1992 case of *R. v. Butler*, stating that:

The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. 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 (*R. v. Butler*, 1992: 4).

OUR HANDS ARE TIED (NOTE TO SELF: IS THIS HEADING PORNOGRAPHIC?)

Without minimizing the vast gaps between feminist positions, the inability to define terms must nonetheless maintain some culpability in the divisiveness of the debate. In the absence of consistent terminology, feminists, policy-makers and Canadians at large are often simply arguing without engaging with one another's positions. With such vastly differing versions of what material is included in the definitions of "obscene" and "pornography", some of the very real differences in opinion are masked by vague terminology.

The struggle with definition has major implications for the application of law. Laws must necessarily include descriptions of contentious behaviour. If

many of the words in Canadian obscenity legislation are open to contradictory definitions, then obscenity is in the eye of the beholder. A chief aim of this thesis is to discuss the particular challenges of legislating obscenity given the great range of definitions given to all terms involved, a component of the debate that has largely been neglected in the literature.

Feminists who theorize about pornography acknowledge the challenges of consistently defining terms, but often fail to problematize the issue of differing terminology sufficiently. Each feminist fashions a working definition and plunges into the debate. As a result, the debate may be strangled by semantic contradictions. Unfortunately, in the absence of consistent definitions, working definitions must be used. For the purposes of this paper, "pornography" will simply refer to sexually explicit material, while "obscenity" will refer to the current Canadian legal interpretation from *R. v. Butler*. Nonetheless, in this thesis, I aim to remain conscious of the wide array of material variously considered as "pornography", "erotica", "smut", etc. As different feminist positions are considered, the variety of definitions will be acknowledged and made relevant to the debate.

If inconsistent definitions applied by theorists and legislators pose problems, then a whole new range of problems are introduced by the use of computer filtering technology designed to regulate access to obscene material on the Internet. A discussion of new technologies will show the similarities between current challenges in regulating obscenity and those that will occur as a result of new technologies.

IS THE OBSCENITY DEBATE IRRELEVANT IN THE FACE OF NEW TECHNOLOGIES?

Both advocates and opponents of pornography have hypothesized that the presence of new technologies, and in particular, the World Wide Web, will considerably alter the nature of the pornography debate, perhaps even rendering it irrelevant. Since sexually explicit images are so easily available on the Internet, the argument goes, and since furthermore, users need not even go to the embarrassing trouble of purchasing their pornography from a person, use of pornography will dramatically increase. Since many sites offer free pornography, children may either unwittingly or intentionally initiate their exposure to sexually explicit material at a far younger age than the children of a generation ago. Finally, theorists argue that the nature of the Internet is such that material is entirely immune to regulation, a cause for concern among anti-pornography activists and celebration for anti-censorship proponents. While some of the concerns above have merit, all require a deeper examination when considered in light of the pornography debate more broadly.

The claim that the Internet has increased consumption of pornography is so widespread, it has effectively been accepted as the truth. Much of the "evidence" of this outcome is anecdotal, like this claim related by Dale Spender:

Countless examples could be quoted of schoolboys who are experimenting with transmitting obscene and offensive images. Teachers acknowledge that these same students would not bring *Penthouse* into the classroom, they would not put pin-ups on the wall... Many adults who are not computer-proficient, who don't do on-line communication, have no idea about the extent of the pornographic material available and how easy it is to get (Spender, 1996 213-14).

Many claims, like Spender's, are predicated on the notion that because consumption of pornography is more visible, it is therefore more common.

Perhaps, instead of evidence of increased consumption, the “examples” Spender cites are rather evidence of less embarrassment around the practice of consuming pornography. Pornography is a multi-billion dollar industry (Cowan, 2000). Presumably, then, many people were consuming pornography in rather large quantities before the advent of the Internet. Arguably, however, consumption of pornography has generally been a fairly private activity. Leaving aside for a moment the problem of minors gaining access to pornography, perhaps the abundance and relatively easy access to pornography on the Internet have simply normalized the practice of consuming pornography, rather than actually increased its consumption. While it is obvious that the normalizing of harmful aspects of pornography is a concern, it is not clear that consumption has actually increased.

While easier access to sexually explicit materials may reinforce negative and/or harmful ideas arising from pornography, it may likewise have a democratizing effect that could enhance the liberating potential of sexually explicit material. One can argue that the Internet, as an alternative to extremely expensive magazines, broadens the scope of available images by allowing access to a wider audience. Alternately, however, one can argue that the Web simply reinforces the class discrimination associated with different types of pornographic images: users who can only access the Internet at the public library may not have access to the full range of possibilities available to those who can connect from the privacy of home.

From the perspective of gender, the Internet may have potential for harm as well as tremendous liberating potential. For many women, access to sexually explicit material has generally been off limits. For women interested in pornography, the Internet allows access in a way that dramatically minimizes the inhibition and potential abuse associated with accessing traditional locations for procuring pornography, often areas that are considered exclusively within the male realm. By allowing more women access to this aspect of sexuality, it is possible that the traditional, formulaic images within much mainstream pornography will be more rapidly replaced with images that include the input of female consumers.

FILTERING PORNOGRAPHY: THE TECHNOLOGICAL CHALLENGES

Much sexually explicit material is photographic in origin. Filters which exclusively limit text do nothing to limit access to such material. A report commissioned by the federal government in 1999 and entitled *Regulation of the Internet: A technological perspective* notes that, "Schemes suggested, such as blocking images based on the percentage of 'flesh-tones' contained in the image, hint at the problems with this approach. What are 'flesh-tones'? Are classical paintings containing nudes blocked? What about close-up pictures of faces (mostly flesh, after all)? Baby pictures? Medical images?" (Canada, 1999: 35)

While these concerns are initially considered in relation to consumer-acquired filters rather than nation-wide standards, the same problems exist at the national level. Furthermore, even if Canadian web sites can be regulated, the

authors of this study note that "eighty to ninety per cent of Internet traffic... in Canada accesses servers outside the country, creating a situation in which authorities in Canada have no jurisdiction over the originating server" (Canada, 1999: 31). The Canadian government, however, assures Canadians that, as the title of a 1997 booklet relays, "The cyberspace is not a no-law land" (Canada, 1999: 4). A 2000 report entitled "Illegal and offensive content on the Internet" earnestly assures Canadians that material that is currently designated illegal in Canada (i.e. sex with violence) will continue to face criminal penalties regardless of the form in which it is sold or consumed. The booklet skims the technological issues inherent in actually controlling Internet access and concludes that more education is the key to ensure that all Canadians use the Internet for only "meritorious" purposes.

Other countries have more successfully regulated Internet access, but often with a total negation of civil liberties. For example, Singapore has had relative success in controlling access to the Internet by using a variety of tactics:

Singapore... has used a combination of proxy serving, blocking of identified "bad" sites, licensing of modems, logging of client activity, and random checks of which sites individuals access, along with the threat of serious penalties (jail time and whippings) for people caught accessing unacceptable sites (Canada, 1999: 48).

Clearly, to attempt such a strategy in Canada would meet with a strong reaction. In any case, the authors warn, Internet access is so widespread and common in Canada, it could not be controlled through the existing methods of regulation without inordinate expenditures of both time and money.

Reviewing the analysis above, it is tempting to believe that, given the challenges of regulating cyberspace, the current debate over access to obscenity

is, indeed, irrelevant. Even Canadians who continue to prefer books and magazines to web sites can now buy them from massive on-line bookstores and can guarantee their safe arrival over the border³. However, the political will in Canada seems to be geared toward the discovery of more rigorous methods of controlling and regulating the Internet, and in the face of this support, it is unlikely that the renegade status of the World Wide Web will continue indefinitely. Rather, the difficulties in determining obscenity or non-obscenity will be yet again subject to rigid criteria that may limit access by Canadians to harmful material, but will undoubtedly have other negative effects also. Furthermore, this control will continue to be applied against those who challenge Canada's *status quo*: Already, many filtering technologies distinguish between heterosexual and homosexual content—one such filter allows parents to limit access to homosexual material that “actively promotes [it] or attempts to recruit the viewer”. The regulation of the Internet will do little to allow freedom of access to materials that are currently discriminated against in Canada.

The Internet also has a capacity for control as on-line communities can be “eavesdropped” on by law enforcement officials. For example, Laura Kipnis details the case of Daniel DePew, a young gay man who was part of the American sadomasochist community and often “chatted” with other s/m enthusiasts online (Kipnis, 1996: 3). DePew, online with two police officers, was encouraged by the officers to spin out a fantasy including the kidnapping of a

³ Personal mail is not subject to the scrutiny of Canada Customs unless it is suspected of containing anything that threatens national security.

young boy⁴. After weeks of communication, DePew was arrested for intention to commit kidnapping and murder. He was eventually sentenced to thirty-three years in prison, more than many actual child abusers, despite his strenuous and obvious (by Kipnis' account) claim that his fantasies were just that. Whether one agrees that DePew's crime was worthy of prosecution or not, his case nonetheless exhibits some of the repressive potential of the Internet. Kipnis plaintively writes that, "These days, any small-town cop with a modem and a nose for sin can log on to the Internet and set about electronically policing the sexual proclivities of the nation. It's inevitable that the Internet will increasingly be used for entrapment purposes..." (Kipnis, 1996: 4-5)

There is no question that new technologies have changed and will continue to change the nature of the debate, perhaps in the same way that the development of the art of photography likewise changed the nature of sexually explicit material. Claims, however, that the presence of the Internet will result in a cyber sexual free-trade zone are misguided and unrealistic. As technology develops, many of the same concerns and mores will be maintained and controlled.

This brief explanation of the major opinions surrounding the obscenity debate, the challenges of definition and new difficulties in regulating pornography as a result of technological advances begins to hint at the intricacies of this topic. It is this complexity that necessitates a similarly complex approach to the governance of obscenity. Such an approach must begin with an examination of

⁴ No child was ever targeted or approached; furthermore, DePew maintains that for him, the term "boy" in this context refers to a role rather than a chronological age.

attempts already made to regulate obscene material in order to determine their strengths and their failings. Having exposed some of the challenges that plague the task of regulating obscenity, I will now look at the historical roots of this law and the variety of means by which this task has been undertaken.

CHAPTER THREE: THEN AND NOW

The history of obscenity regulation has its roots in precedent-setting trials of British common law. Unlike many other areas of law, obscenity still tends to be clarified and interpreted within the courtroom rather than within the legislature. A brief look at historical trials and early obscenity laws in Canada will therefore set the stage for a closer examination for the important obscenity trials of recent history: *R. v. Butler* (1992) and *Little Sister's v. Canada* (2000).

HISTORICAL REVIEW: EVENTS IN CANADIAN OBSCENITY LEGISLATION

While material with the intent to arouse has arguably existed forever, pornography, both as a distinct genre and a social problem, has a more recent history. In her book *The Invention of pornography: Obscenity and the origins of modernity, 1500-1800*, Lynn Hunt argues that pornography only really became a "category of understanding" with the emergence of Western modernity. Pornography must be understood as a recent phenomenon, "linked to free-thinking and heresy" (Hunt, 1996: 11) in order to best comprehend the fairly recent tension between material whose chief aim is to arouse and the prohibition of such material.

Pornography is in no small part defined by its very prohibition. Hunt writes that, "Pornography was not a given; it was defined over time and by the conflicts between writers, artists and engravers on the one side and spies, policemen, clergymen and state officials on the other. Its political and cultural meanings cannot be separated from its emergence as a category of thinking,

representation and regulation" (Hunt, 1996: 11). Hunt further highlights this link in her observation that the 1986 British Meese Commission report on pornography included only sixteen pages on the history of pornography, but forty-nine pages on the history of its regulation (Hunt, 1996: 11). Clearly, the consumption of pornography and its governance are inextricably linked. This may in part be due to the role played by early pornography. In its earliest form, between 1500 and 1800, much sexually explicit writing was used as a vehicle for the mockery of religious or political authorities, rather than with the explicit intent to arouse (Hunt, 1996: 10). Thus, while it is not surprising that the push for the regulation of such material by both criminal and ecclesiastical courts was quick to follow, its early regulation was not for the reasons (concerns about immorality) that followed in the modern era.

A major impetus for the emergence of pornography as a genre was the invention of the printing press which, coupled with increased literacy among the working class, allowed for pornography's mass distribution in an unprecedented way (Johnson, 1995). Bernard Arcand explains that, "In other eras, most erotic productions were either very rare and reserved for the upper classes, or else appeared as parts of religious ceremonies, victory celebrations, or at carnivals, which gave them quite a different meaning" (Arcand, 1993: 126).

If modernity "created" pornography and the printing press resulted in its mass production, it was the invention of photography, and later film, that resulted in pornography's development into a multi-billion dollar industry in North America (Cowan: 2000). Graphic depictions of sexual acts could now be produced

cheaply and were easily copied. The Sexual Revolution of the 1960s rid pornography of some of its shameful reputation with the mass marketing of magazines such as *Playboy* and *Penthouse*, which strove to present pornography as an obvious hobby for the sophisticated man (Cowan, 2000). Nonetheless, it is surprising to note that criminalization of obscenity in Canada only occurred in 1892 and that between 1900 and 1944, only five cases were tried (Johnson, 1995: 43).

If the regulation of pornography is intimately tied to its consumption, its approach is further bound to earlier attempts to regulate sexuality and morality. Attempts to control pornography betray motivations similar to laws concerned with controlling prostitution, affirming heterosexual marriage as the only appropriate expression of sexuality, and generally prescribing a conservative attitude toward sexuality (Gotell, 1996: 282). An examination of the origins of Canadian obscenity law reveals a range of both tactics and motivations for the control of obscene material.

In Britain, prior to the criminalization of obscenity, obscene material was viewed as an "offense to the spirit" and could only be governed by an Ecclesiastical Court of the Church of England (Hall, 2001: 2). Beginning in the mid-eighteenth century, however, obscenity was beginning to be tried criminally under laws governing libel, sedition, blasphemy and a number of other provisions (Johnson, 1995: 40). This occurred with the first case of obscene libel in England. In 1727, Edmund Curl was prosecuted for publishing his translation of the French novel *Venus in the Cloister or Nun in Her Smock* (Johnson, 1995: 40,

Cole, 1989: 69), a book that depicted lesbian nuns as well as sex between priests and nuns. The ruling specifically noted that obscene material could be harmful, as Cole notes: "The judge ruled that the peace of society could be disrupted by something other than force—specifically, by an attack against society's morality" (Cole, 1989: 69). This ruling laid the groundwork for an attitude toward governance of obscenity specifically concerned with morality and with moral degradation as a vice with massive consequences. Bernard Arcand writes of the many organizations concerned with public morality in Europe and North America: "Many of them registered... the conservative perspective: sex being a major symbol of social order, it was the entire world order that was at stake, and so critics were unanimous in their conviction that they were in fact trying to save civilization" (Arcand, 1993: 143).

Canadian obscenity law began, then, with the premise that obscene material could bring about the corruption of civilization. Clearly, such material needed to be controlled. Even prior to criminalization of obscenity, however, Canadian judges and politicians realized that obscenity needed to be more easily identified in order to be stamped out. In Canada, identification of obscene material between 1868 and 1944 was based on what became known as the *Hicklin* test.

In 1868, the case of *R. v. Hicklin* was brought before the British courts. The case concerned a man named Scott who had written and distributed an erotic pamphlet called "The Confessional Unmasked", "revealing" the methods priests were allegedly using to urge women to make erotic confessions (Johnson,

1995: 42). Remarkably little is known about this case, given the significance of the judicial decision. In giving his judgment, Lord Cockburn formalized a definition of obscenity that would be used in Canada for over sixty years:

...the test of obscenity is this... the tendency... to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall... it would suggest into the minds... thoughts of an impure and libidinous character (*R. v. Hicklin*, 1868 in Gotell, 1996: 283).

Thus, the initial hallmark of obscene material was that which tended to deprave and corrupt, further enshrining an attitude toward regulation concerned with the building of a morally pure society. The five cases tried between 1900 and 1944 were faithful to this definition of obscenity. All five cases were about the corruption of morals as a result of exposure to obscene material, and none took into account the author's intention (Johnson, 1995: 43). Between 1944 and 1959, however, Canadian obscenity law began to change, and important additions were made to the *Hicklin* test. The intent of the author was to be taken into account; works had to be considered in their entirety; and works were to be considered in relation to "contemporary standards" (Gotell, 1996: 282, Johnson, 1995: 43).

At the same time as these changes were taking place, Canadian politicians were beginning to look for a tougher law than the *Hicklin* test. Stricter regulations were viewed as necessary for dealing with "a perceived explosion of 'filthy' literature" (Gotell, 1996: 284). In particular, many Members of Parliament viewed the *Hicklin* test as over-subjective, and therefore insufficiently rigorous in controlling "trashy" publications. In 1952, a Special Committee of the Senate

was created under the direction of E.D. Fulton. The Fulton Committee presented recommendations to the House of Commons in 1957, meant to expand and clarify the *Hicklin* test (Johnson, 1995: 43). Bill C-58, based upon the recommendation of the Fulton Committee, gives us our current definition of obscenity under Canadian law, section 163 (8) of the *Criminal Code*:

...any publication a dominant characteristic of which is the undue exploitation of sex, and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene (in Johnson, 1995: 43).

This definition is often simply taken as "the undue exploitation of sex", and the linkages to other problematic behaviours have generally been ignored. The recent focus linking violence and sex is more respectful of the original legal definition of obscenity.

While the 1959 definition is the legal definition of obscenity in Canada to this day, many attempts have been made to change this law and court decisions have dramatically changed the interpretation of this section of the *Criminal Code* since 1959. The first case to be tried before the Supreme Court of Canada introduced a critical component to the new law. While the definition of obscenity had changed from "the intent to deprave and corrupt" to "the undue exploitation of sex" (sometimes linked with other problematic behaviours), it had nonetheless been in the exclusive domain of the judge to decide whether a work fit either definition. Under either definition, the law was seen as subjective and difficult to enforce consistently (Gotell, 1996: 284). *R. v. Brodie*, heard in 1962, introduced the notion of a "community standard" to which material (whether written or photographic) could be held.

Between 1977 and 1987, no fewer than six attempts were made, by both Liberal and Conservative federal governments, to amend Canadian obscenity law. Definitions of criminal obscenity ranged from "explicit representation of a sexual act" (Private Members Bill, Conservative, 1977) to (in Conservative Bill C-54, 1987) an exhaustive list of prohibited items including depictions of penetration, defecation, urination, ejaculation, lactation and menstruation. No bill was passed (Gotell, 1996: 295-297). A variety of reasons have been suggested to explain the political interest in the regulation of pornography. One rationale is the variety of support afforded anti-pornography legislation across the political spectrum; while the topic generates considerable debate, anti-pornography legislation is supported by interest groups as disparate as radical feminists and the New Right. As Gotell writes, "...in this drawing together of competing interests, pornography law reform appears to offer the promise of electoral gains" (Gotell, 1996: 302). A second rationale put forward by Gotell is the renewed discourse on the need for tough "law and order" measures, fitting pornography into the context of a neoconservative approach that opposes civil libertarian views and focuses on community control (Gotell, 1996: 303).

As different governments were scrambling to amend the *Criminal Code*, a Special Committee on Pornography and Prostitution was struck. Commonly known as the Fraser Committee, its 1985 Report was the first legal discussion of pornography to take feminist arguments into account. The Report recommended an obscenity law premised on the notion that some material may cause harm, and attempted to locate pornography within a framework which noted the

unequal status of women and children in society (Gotell, 1996: 296). Nevertheless, the proposals of the Fraser Commission regarding pornography failed to become law.

Prior to the report of the Fraser Commission, the *Charter of Rights and Freedoms* was enacted in 1982. The *Charter* allowed for a new framing of the pornography debate. Proponents of pornography could argue that obscenity legislation denied the *Charter*-protected right to freedom of expression under section 2. While much of the regulation of obscenity was based on court decisions and precedents, the courts were now endowed with yet more power to order Parliament to strike down laws which unduly limited *Charter* rights. It seemed only a matter of time before a *Charter* challenge was mounted arguing that Canadian obscenity legislation countered the right to freedom of expression. Anti-pornography advocates waited and worried; anti-censorship supporters waited and hoped.

In August 1987, Winnipeg police entered a video store and, while taking away every videotape in the store, arrested an employee and the owner of the store, a man named Donald Victor Butler.

BUTLER DID IT: THE CASE OF R. v. BUTLER

The case of *R. v. Butler* is widely hailed as a turning point in the history of Canadian obscenity legislation (Busby, 1994: 172; Gotell, 1996: 304; Johnson, 1995: 58). What, in particular, makes this case so significant?

An examination of the bare facts of the *Butler* case yields little insight into the importance it has since assumed. Donald Butler was the owner and operator of a Winnipeg store specializing in pornographic videotapes and magazines. The store also sold other sexual paraphernalia. In 1987, Winnipeg police executed two search warrants resulting in a total of 250 counts of obscenity being laid against Butler. The trial judge, Wright J., acquitted Butler of 242 counts and convicted him of the remaining eight charges (*R. v. Butler*, 1992: 13-14). It was the rationale of the trial judge, given in both the convictions and the acquittals, that began to give this case extraordinary significance.

To begin with, Wright J. expressed grave concerns regarding his ability to apply the "community standards test". He noted that Canadian courts have traditionally understood this test as implying that judges or justices should interpret the level of tolerance of the Canadian community without bias, "based on his or her 'experience' " (*R. v. Butler*, 1992: 13-14). Not only did Wright J. doubt his ability to draw upon his own experience, he stated that "it is incongruous and inconsistent with basic judicial legal principles to do so" (*R. v. Butler*, 1992: 14).

Noting that case law provides precedents for the identification of obscene material, Wright J. chose this method of ascertaining the validity of the charges. Based on such precedents, he held that all the materials seized were obscene. However, Wright J. found that obscene material is protected under section 2(b) of the *Charter of Rights and Freedoms*, the right to freedom of expression. While

all rights protected by the *Charter* are subject to “reasonable limits” under section 1, Wright J. held that the application of section 1 must be limited to cases where:

[t]he aim must be directed more specifically to objectives such as equality concerns, or other *Charter* rights, or particular human rights; otherwise, the basic freedoms in the *Charter* will be subject to restrictions that arise from very personal and subjective opinions of right and wrong that will be impossible to identify (*R. v. Butler*, 1992: 16).

Based on this interpretation, he held that only eight videotapes, specifically those combining sex with violence, cruelty or non-consent, could be legitimately limited under section 1 of the *Charter* (*R. v. Butler*, 1992: 17). Wright J. did not find that the obscenity section of the *Criminal Code* unduly limited *Charter* rights, per se; rather he advised caution in ensuring that freedom of expression remained paramount and that only cases with the potential for extreme harm (violent or degrading/dehumanizing pornography) be prohibited (*R. v. Butler*, 1992: 17).

The Crown appealed the acquittals and Butler appealed the convictions (*R. v. Butler*, 1992: 13-14). In 1989, the case reached the Manitoba Court of Appeal, where Huband J., writing for the majority, held for the Crown and convicted Butler of all 250 charges. Huband J. argued that the law in question did not warrant protection under section 2(b) of the *Charter*, because such material did not impart or attempt to impart anything of substance; therefore the section of the *Criminal Code* had not “thwarted or subverted anyone in conveying or attempting to convey a meaningful message” (*R. v. Butler*, 1992: 19).

Butler appealed the convictions and the case was taken to the Supreme Court of Canada. The trial judge and the Manitoba Court of Appeal held opposing opinions not only on the legitimacy of *Charter* protection for obscene

materials, but also on the validity of the community standards test. Even before *R. v. Butler* was heard by the Supreme Court in 1991, it was obvious that this case had the potential to radically change obscenity legislation in Canada. An outcome that would result in section 163 of the *Criminal Code* being declared unconstitutional in light of the *Charter* seemed to be a real possibility and one that was increasingly causing a great deal of concern to both moral conservatives and anti-pornography feminists. On the other hand, the notion that the landmark case could completely de-legitimize pornography as a form of expression, thus rendering the *Charter* irrelevant, concerned civil libertarians⁵.

LEAF TAKES THE LEAD

As the court date approached, anti-pornography feminists became particularly concerned by the potential for societal harm implicit in pornography's protection by the *Charter's* guarantee of freedom of expression. As a result, the Women's Legal Education and Action Fund (LEAF), a feminist organization, chose to intervene. In line with the writings of Catherine McKinnon and Andrea Dworkin, LEAF argued that pornography had a sexist and detrimental effect on the quality of all women's lives. Working from the premise that "the existing obscenity law could be interpreted to promote equality" (Busby, 1994: 175), LEAF sought to convince the Court that obscenity needed to be controlled not on

⁵ This multiplicity of conflicting interests was clearly evident in the list of interveners for the case. The Canadian Civil Liberties Association, the Manitoba Association for Rights and Liberties and the British Columbia Civil Liberties Association intervened on *Butler's* behalf; Group Against Pornography (GAP) intervened for the Crown, as did the Women's Legal Education and Action Fund (LEAF), the only feminist interveners in the case.

the basis of its potential for immorality, but because of its potential ability to support gender inequality and cause harm.

While feminist and harms-based approaches were not entirely absent in obscenity cases before *Butler*, the approach taken by LEAF in this case represented a dramatically new approach to the governance of obscenity. In seeking to demonstrate the potential for harm (to women and children in particular) brought about by obscene material, LEAF attempted to set pornography into the context of women's historic oppression.

In *Butler*, LEAF challenged judicial practices by encouraging the Court to look at the effects of pornography based on its potential harm to women rather than its effect on community values. The judgement of the Supreme Court of Canada in *Butler* specifically refers to the analysis encouraged by LEAF.

AND THE VERDICT IS...

The Supreme Court of Canada found that while section 163 of the *Criminal Code* does infringe upon the right to freedom of expression under section 2(b) of the *Charter*, the infringement is justified under section 1 of the *Charter*. In other words, Canadian obscenity law limits freedom of expression, but does so justly given the potential for harm from obscene material.

The Court further clarified the "community standard" test, stating that the test can be used effectively to limit harmful material without a moral judgment being made. Writing for the Court, Sopinka J. stated that,

There has been a growing recognition in recent cases that material which may be said to exploit sex in a "degrading or dehumanizing" manner will necessarily fail the community standards test, not because it

offends against morals but because it is perceived by public opinion to be harmful to society, particularly women (*R. v. Butler*, 1992: 3).

The Court provided a new interpretation of section 163 of the *Criminal Code*, dividing obscenity into three types: 1) explicit sex with violence; 2) explicit sex without violence but that is "degrading or dehumanizing"; and 3) explicit sex that incorporates neither violence nor "degrading or dehumanizing" behaviour. While the first two types of material will be found to be obscene, materials that fall into the third category will rarely be deemed obscene unless they include the presence of juveniles (Johnson, 1995: 68).

Finally, the Court noted that materials which might otherwise be considered obscene, including those with violent and explicit sex, might be permissible if the inclusion of obscenity were "essential to a wider artistic, literary or other similar purpose," known as the "internal necessities" test (*R. v. Butler*, 1992: 4). To this end, the Court reaffirmed earlier judgments confirming the need for materials to be examined in their entirety before being deemed obscene.

A VERDICT, BUT THE JURY'S STILL OUT

LEAF's intervention in *Butler* came at a time when the feminist divide over pornography was growing ever wider. Prior to LEAF's intervention in this case, feminist groups had rarely been as overtly involved in affecting legislative or judicial outcomes with regard to obscenity law. While the National Action Committee on the Status of Women had endorsed Bill C-54, it had not contributed significantly to its construction. Likewise, while many feminist

organizations submitted information to the Fraser Commission, its final report did not affect obscenity law.

While the decision in *Butler* clearly employs feminist language, feminists remain divided about the degree to which Canadian obscenity legislation has actually been changed for the better. Furthermore, feminists across Canada engaged in arguments regarding the appropriateness of LEAF's involvement in light of the fierce debate. While some feminists felt that a great victory had been achieved by LEAF, "[s]ome feminists concluded that if feminists themselves can't agree about this, it's a little foolish to be handing this [power] over to a state, which is usually not feminist-controlled" (Vance, in Fuller and Blackley, 1996: 39).

A chief concern of those who were opposed to LEAF's involvement was the potential for the targeting of sexual minorities. Indeed, despite the acrimonious debate, most feminists (regardless of their stance) admit that gay and lesbian pornography has tended to be particularly targeted by Customs agents and law enforcement officers. The great fear of many anti-censorship advocates was that the *Butler* decision would step up the incidents of homophobic censorship. In particular, there was concern that the new harms-based analysis would be misappropriated by ill-informed law enforcement or Customs officials who could find the behaviour of gays and lesbians "degrading and dehumanizing" while ignoring normative (yet nonetheless problematic) heterosexual pornography. Unfortunately, this fear seems to have been borne out (Fuller and Blackley, 1996: 44).

LEAF, however, maintains that focusing on equality implications has paved the way for further political arguments extending to equality based on sexuality. LEAF believes that if a substantive equality approach to pornography were taken, gays and lesbians would be positively rather than negatively affected. Writing in 1994, LEAF's Karen Busby stated that "*Butler...* makes possible a political argument, one that has been articulated within lesbian and gay communities and that may advance lesbian and gay equality rights without undercutting the substantive equality case law" (Busby, 1994: 182).

Anti-censorship feminists argue that censorship is never equitably enforced, and that the increase in the suppression of gay and lesbian material was inevitable. Furthermore, LEAF's critics argue that the incorporation of feminist intervention began and ended on the level of language: "The *Butler* decision [showed]", writes Lise Gotell, "old morality [and a] new feminist justification" (Gotell, 1996: 301). Feminists, even anti-pornography feminists, have criticized LEAF for expecting the bureaucratic mechanisms of Canada Customs and law enforcement to realistically incorporate equality-based approaches (McCormack, in Busby, 1994: 175). In response, Busby writes that "LEAF is simply attempting to force the State to extend its protection in order to fulfil its promise of security of the person for all women" (Busby, 1994: 175).

THE BATTLE CONTINUES...

While anti-pornography feminists were celebrating what they perceived as a victory by LEAF, anti-censorship feminists as well as gays and lesbians were

preparing for the worst. Long accustomed to discriminatory application of Canadian obscenity law, many gays and lesbians were quite cynical about the *Butler* decision's capacity to encourage equality. Their fears did not seem to be unfounded when the first two cases following the *Butler* decision were both aimed at the Glad Day Bookshop, a Toronto bookstore specializing in literature, self-help manuals, philosophy and erotica for gays and lesbians (Fuller and Blackley, 1996: 44). These two cases, however, were not unprecedented. In fact, gay and lesbian bookstores across the country had been running up against the obscenity law for years. In particular, bookstores like The Little Sister's Bookstore and Art Emporium were finding themselves "reluctant participant[s] in a running battle with Canada Customs" (*Little Sister's v. Canada*: 11).

Tired of waiting for the state to extend its protection to gays and lesbians, the Little Sister's Bookstore and Art Emporium decided the frequent detention of its wares at the American border had to stop. After innumerable stints in court defending the non-obscenity of books intended for Little Sister's, the bookstore's owners went on the offensive (Fuller and Blackley, 1996: 15). In 1990, Little Sister's filed a Statement of Claim against the Minister of Justice, the Attorney General of Canada and the Minister of National Revenue (collectively responsible for Canada Customs) (Fuller and Blackley, 1996: 208). Little Sister's was arguing the same point as Donald Butler—that obscenity legislation infringed upon their right to free expression—and hoping for a wholly different outcome.

QUEER CUSTOMS

It is impossible to appreciate the magnitude of the issues presented in the case of *Little Sister's v. Canada* without a much closer look at Canada Customs. Canada Customs plays a critical role in implementing Canadian obscenity law. While incidents of material being detained by police officers are still quite rare, an enormous amount of material is stopped at the US-Canada border (Fuller and Blackley: 165). Since Customs plays such a large role in the determination and detention of obscene material, a comprehension of the mechanisms which govern Canada Customs is necessary to understand the challenges of Canadian obscenity law.

One side effect of Canada's proximity to a country with ten times its population is the extent to which imported materials line the walls of the average Canadian bookstore. With regard to pornography, the amount of material is yet higher; with regard to gay and lesbian material generally, and gay and lesbian erotica specifically, the vast majority is created in the United States (LEAF, 1999: 1; Fuller and Blackley, 1996: 23). Even material produced by Canadians is often released by American publishers, resulting in the necessity of importing such material (Fuller and Blackley, 1996: 23).

The amount of material imported into Canada necessarily results in Canada Customs playing a critical role in the enforcement of obscenity law. While *Butler* dealt with a criminal charge of obscenity by law enforcement officers, it represents the minority as far as most obscenity charges are concerned. In fact, the vast majority of potentially obscene material is never

subject to criminal charges—it is simply prohibited at the border. The specific Tariff Code used by Canada Customs is Code 9956, which prohibits any “books, printed paper, drawings, paintings, prints, photographs or representations of any kind that (a) are deemed to be obscene under subsection 163(8) of the *Criminal Code*” (*Little Sister's v. Canada*, 2000: 15). In theory, then, the obscenity of any material, whether detained by Customs officials or seized by law enforcement officers, should be determined by the same definition of “obscene” from the *Criminal Code*, subject to the legal interpretations which have affected that legislation since its inception in 1959. In practice, however, Canada Customs seems to have its own definition of what constitutes obscenity.

To illustrate, both the plaintiff and the defendant in the case of *Little Sister's v. Canada* conceded the following fact: “[I]n British Columbia, only fourteen obscenity charges were prosecuted under the *Criminal Code* between 1989 and 1992; during the same time period, Customs prohibited 34,748 shipments under Tariff Code 9956...a shipment usually included more than one item” (Fuller and Blackley, 1996: 165). Perhaps, then, Customs is responsible for “cleaning up” the country to such an extent that little obscene material remains for law enforcement officers to seize. A simple perusal of any sex shop in any major city in Canada would rapidly disprove this theory. Why the disparity between these numbers?

Even high-ranking Customs officials concede that, due to limited resources, only about eight per cent of all mail intended for Canada is inspected (*Little Sisters v. Canada*: 19). If this number is correct, by extension, one would

expect that the 34,748 shipments prohibited by Customs would constitute only eight per cent of the obscene material being shipped into Canada, and that a further ninety-two per cent of material had been successfully imported. Why, then, were only fourteen cases tried in British Columbia between 1989 and 1992? The only possible answer is that prohibition of material by Customs is undertaken more readily, with less of a burden of proof than prohibition through the courts. A closer examination of the methods of determination used by Canada Customs supports this hypothesis.

Under Tariff Code 9956, Canada Customs may detain any potentially objectionable material for thirty days in order to assess it. If the material is deemed obscene, seditious, treasonable or hate propaganda, it is then subject, at the request of the importer, to a re-determination by a specialized Customs unit. If this avenue results in the item's continued prohibition, the matter may be appealed to the Deputy Minister of Justice. In theory, at least, if the importer remains dissatisfied with the classification of the material in question, safeguards exist to contest the classification (*Little Sister's v. Canada*, 2000: 14). Unfortunately, in practice, the cost for such appeals often results in smaller importers giving up on importing selected material. Furthermore, while the classification is in question, the material is detained, which in the case of magazines, for example, renders the lengthy appeal process totally unrealistic. Finally, while waiting for classification, many books are destroyed.

Yet other problems abound. When a shipment is detained, an importer initially receives a Notice of Detention/Determination (Form K27), revealing only

the title, but no information regarding the reasons it is being held. Next, after re-determination by a Commodity Specialist, a second Form K27 is sent to the importer with one of eight boxes ticked off, indicating the reasons for the detention. The possible reasons are: a) sex with violence; b) child sex; c) incest; d) bestiality; e) necrophilia; f) hate propaganda; g) anal penetration (now removed) and h) other (Fuller and Blackley, 1996: 119). The importers must then begin the appeal process with no further indication of the case they have to meet.

In May 1987, a decision unequivocally confirming that the depiction of anal penetration was not, in and of itself, obscene was given by Ontario Provincial Court Judge Hawkins. Based on Customs' frequent detention of *The Joy of Gay Sex*, Glad Day Books took Customs to court to prove the book's merit. Hawkins evidently meant to clarify the legitimacy of anal penetration beyond all doubt—in his judgment, he noted that “to write about homosexual practices without dealing with anal intercourse would be equivalent to writing a history of music and omitting Mozart” (Fuller and Blackley, 1996: 12). Despite this decision, Canada Customs did not omit “anal penetration” from its list of criteria for detention until September 29, 1994—suspiciously, just days before Little Sister's case against Canada Customs was due to begin (Fuller and Blackley, 1996: 198).

Customs keeps no record of books that have been previously deemed acceptable, with the result that a large number of books have been successfully appealed (at considerable expense to both the government and importers) several times. The most famous example of this is Pat Califia's book *Macho*

Sluts, “detained, prohibited, reviewed and released at the deputy minister’s level on five separate occasions” (Fuller and Blackley, 1996: 121).

Finally, it is clear that importers face differential treatment. While Customs only examines approximately eight per cent of material that crosses the border, the trial judge in the *Little Sister’s* case found that “virtually all imported mail addressed to Little Sister’s is examined” (*Little Sister’s v. Canada*, 2000: 19). Other bookshops carrying gay and lesbian material have been similarly affected. The argument from Customs is that once an importer has had a significant amount of material detained, they are given a “hot indicator” as a warning that they might potentially attempt to import other obscene materials. As a result, all shipments are detained (Fuller and Blackley, 1996: 133).

Differential treatment was not restricted to targetting or to the delay in rescinding homophobic legislation. Several items have been sped through Customs due, perhaps, to their high profile. Chief among these is Madonna’s book, *Sex* and the novel *American Psycho*. Both books contain scenes that are highly contentious and quite clearly within the scope of Canadian obscenity legislation. In both cases, however, Customs “pre-screened” the books; in both, the publishers employed high profile lawyers to anticipate the concerns of Customs and to defend the works well before they were held at the border (Fuller and Blackley, 1996: 124).

SISTER'S DOING IT FOR THEMSELVES: THE CASE OF LITTLE SISTER'S V. CANADA

The Little Sister's Book and Art Emporium was opened on April 28, 1983 by friends Jim Deva and Bruce Smyth. Initially operating on a shoestring budget, the store relied on "paintings [to] artfully cover the expanse of walls" (Fuller and Blackley, 1996: 5). As the store finally began to break even, however, they found a new threat to their fledgling finances: "Every imported shipment to Little Sister's was suddenly stopped at the Canadian border in December 1986. The store, virtually overlooked by Canada Customs during their start-up years, was now in the border guards' sights" (Fuller and Blackley, 1996: 7).

Because of the Customs mechanisms, the seizure of a considerable amount of the store's stock had a significant effect. Completely apart from Deva and Smyth's inability to stock Little Sister's shelves, most of the duo's importers insisted on payment in advance. Even if shipments were merely detained for thirty days and then released, Deva and Smyth were still forced to extend their finances precariously, with such a long lag time between their payment for material and their ability to sell the material. Furthermore, the majority of material was *not* released to Little Sister's without considerable difficulty (Fuller and Blackley, 1996: 9).

After nearly a decade of court cases as defendants, Deva and Smyth had had enough. With the backing of the British Columbia Civil Liberties Association, a Statement of Claim was laid on behalf of both the bookshop and Deva and Smyth as individuals alleging that they had personally been discriminated against. A number of "solutions" were requested by the plaintiffs. First and

foremost, a request was made to declare Tariff Code 9956 null and void since it violated the *Charter* rights of both the bookshop and the men who owned it. Alternatively, the plaintiffs asked that the Tariff Code be declared null and void with regard to print literature and/or with regard to material intended for a homosexual audience, submitting that such material was obviously more likely to be misinterpreted by undertrained Customs agents (Fuller and Blackley, 1996: 211).

ONE STEP FORWARD, TWO STEPS BACK

The case was initially heard by Justice Kenneth Smith of the British Columbia Supreme Court. In many ways, the initial trial, lasting forty days with thousands of hours of testimony, became an exposé of the inefficiency of Canada Customs. Witnesses as diverse as Robin Hand (publisher of *Lezzie Smut*) and Pierre Berton spoke on behalf of Little Sister's (Fuller and Blackley, 1996: 82). Customs officials of all rankings were called by the Crown. At the end of the testimony, there was little dispute about the degree of incompetence of the Customs regime. Nonetheless, a major question remained: what would the Court chose to do to rectify the problems?

Smith denied any remedy that involved the changing or the striking down of Tariff Code 9956. Instead, he held that the discrimination at the border was due to "serious systemic problems in the administration of the Customs regime... result[ing] in the inconsistent and unwarranted prohibition of many items of homosexual art and literature" (*Little Sister's v. Canada*, 2000: 17, emphasis

added). The discrimination was not part of the law itself; rather it came about through the unfair and misguided application of the law.

At the Court of Appeal for British Columbia, Macfarlane J. A. spoke for the majority in upholding Smith's decision—that “the Customs legislation is discriminatory neither on its face, nor in its effect, because if applied correctly, it only prohibits material because it is obscene not because it is homosexual” (*Little Sister's v. Canada*, 2000: 18, emphasis added). Interestingly, however, the decision of the Court of Appeal was not unanimous: Finch J.A., dissenting, would have allowed the appeal and held that Customs legislation has no force with regard to any material directed toward a homosexual audience (*Little Sister's v. Canada*, 2000: 18).

On March 16, 2000, the case of *Little Sister's Book and Art Emporium v. The Minister of Justice and Attorney General of Canada*, more commonly known as *Little Sister's v. Canada*, was heard by the Supreme Court of Canada. As in the Court of Appeal, the judgment was not unanimous, with three of the nine justices dissenting in part. The majority opinion held that the disgraceful lapses in judgment on the part of Canada Customs were not inherently due to the legislation itself; furthermore, they held that the legislation had the capacity to be applied equitably. Binnie J., writing for the majority, noted that “A failure at the implementation level, which clearly existed here, can be addressed at the implementation level” (*Little Sister's v. Canada*, 2000: 3). The only part of the Customs regime expressly seen to infringe the appellants' *Charter* rights was the “reverse onus” provision, which put the burden of proof on the importers to prove

that their material was *not* obscene, rather than the reverse. This provision was held to be in violation of the *Charter* protected right to freedom of expression without a corresponding societal interest under section 1, and was therefore null and void.

The dissenting opinion held that the degree of discrimination facing gays and lesbians at the hands of Canada Customs put the onus on the government to introduce new provisions specifically ensuring that freedom of expression is only encroached upon when justified under section 1 of the *Charter*. Writing for the dissenting Justices, Iacobucci J. stated that,

The legislation has been administered in an unconstitutional manner, but it is the legislation itself, and not only its application, that is responsible for the constitutional violations. Given the extensive record of *Charter* violations, there must be sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights... the crucial consideration is that the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials (*Little Sister's v. Canada*, 2000: 5).

Had the dissenting view been taken by the majority, Parliament would have been charged with the responsibility of striking the existing Customs legislation and of creating new legislation that would be in keeping with the recommendations of the Court. As the minority view, however, the opinions of Iacobucci, Arbour and LeBel JJ. are simply suggestions for both Customs officials and politicians. While the removal of the "reverse onus" clause and the exposure of Customs' incompetence were, in themselves, victories for Little Sister's, no major safeguard has been created to ensure that gay and lesbian materials will not continue to be differentially affected.

The history of the regulation of obscenity has been characterized by repeated attempts at the creation of a law that is simultaneously suitable,

enforceable and (ideally) equitable. Although clear flaws exist, a discussion of the history of obscenity law to the present day reaffirms that the process of refining this area of law still continues. Legal interpretations have allowed for the determination of obscenity through three tests—the community standards test, the internal necessities test and the harm test. Having examined some of the key cases that have contributed to the law's current incarnation, an analysis may now be undertaken of the tests that currently constitute Canadian obscenity law.

CHAPTER FOUR: DETERMINING OBSCENITY IN CANADA: THE CURRENT CONTEXT

In order to arrive at pragmatic suggestions for obscenity legislation that best balance the right to free expression with the right to safety of the person, we must examine the current system by which obscenity is determined in Canada. In fact, despite the considerable differences in opinion between anti-censorship, anti-pornography and pro-pornography feminists, one point of consensus may be achieved: nearly all stakeholders involved agree that the current system is problematic.

Currently, potentially obscene material is subjected to three different "tests". The material is judged on its potential to cause harm, a key determinant of which is the presence of both sex and violence within the same item. For material which is not "obviously" either harmful or innocuous the "community standards of tolerance" test is applied to determine the extent to which the material in question would be accepted by the Canadian community. Finally, even material which is deemed to be clearly obscene may avoid prohibition if the obscenity is warranted based on artistic, literary, political or scientific merit.

All three tests have come under considerable criticism by anti-pornography, anti-censorship and pro-pornography feminists alike; other stakeholders including moral conservatives and civil libertarians have likewise expressed concerns. Obviously, variation is to be found in the solutions proposed by theorists espousing the different major positions in the debate. By critically analyzing the three major tests while taking into account the variety of

competing interests, the current failings in Canadian obscenity law can be better appreciated, and ideally, remedied.

Of course, it is only in an ideal world that potentially obscene material is actually subjected to these tests and thoroughly scrutinized, as seen by the earlier analysis of the shortfalls of Canada Customs, which is responsible for determining the majority of material prohibited to Canadians. At least some of the problems with the tests may be therefore placed squarely on inconsistencies between the *intention* of the test and the method by which it is actually applied. It is also possible, however, that given the critical role currently played by Canada Customs and the lack of resources available to assist in the carrying out of this role, obscenity law could never remain true to its intentions. In light of this, the realistic practicability of the three tests will therefore also be discussed in an effort to determine more effective methods of addressing concerns about current Canadian obscenity law.

THE COMMUNITY STANDARD OF TOLERANCE TEST

While the community standard of tolerance test was officially established in 1962 by the case of *R. v. Brodie*, the notion of judging obscenity based on a national standard had come into fairly common usage in judicial decisions beginning in the early 1950s (Gotell, 1996: 285). The test was influenced by earlier decisions in Australia and New Zealand arguing in favour of obscenity being governed by a national community standard. In *Brodie*, Judson J. noted the decision of the 1948 Australian case of *R. v. Close* in which Fullager J. wrote:

There does exist in any community at all times—however the standard may vary from time to time—a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that there is any better tribunal than a jury to draw it... There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards (in *R. v. Butler*, 1992: 29).

The community standard of tolerance test has always been applied in consultation with other tests and has depended on the definition of obscenity at any given time. Initially, since the legal definition of obscenity was that which had the ability to deprave and corrupt, it was the Canadian community that was meant to judge whether an item had such a tendency. Through the years, the test has been considerably refined. Further judicial decisions clarified that the test did not refer to selected smaller communities, but rather to the Canadian community as a whole; an argument for local standards judged individually by smaller communities was refuted. Specifically, in the case of *Towne Cinema Theatres Ltd. v. The Queen*, Wilson J. wrote that, "It is not open to the courts under s. 159 (8) of the *Criminal Code* to characterize a movie as obscene if shown to one constituency but not if shown to another... In my view, a movie is either obscene under the *Code* under a national community standard of tolerance or it is not" (in *R. v. Butler*, 1992: 31). This ruling is in stark opposition to the U.S. Supreme Court ruling in *Pope v. Illinois* in which the Court determined that the value of any given piece of work could vary in any community based on its degree of acceptance. Thus the community standards test, once similarly entrenched in American law, was radically changed in the US in 1987 (Gubar and Hoff, 1989: 42).

In Canada, the test has recently undergone a major change with regard to what the Canadian community is meant to be tolerating. Initially, the test reflected Fullager J.'s notion that the community can determine "what is clean and what is dirty" and was applied with regard to a national standard of morality. As a result, any sexually explicit imagery was often deemed to be immoral in the eyes of the Canadian community (Busby, 1994: 167). With the decision in *R. v. Butler*, however, the test underwent a major shift. Rather than the community standard of tolerance measuring decency, the test was now meant to gauge the potential for harm as defined by the Canadian national community. In an effort to clarify the test, the *Butler* decision isolated particular material that was perceived as lying outside the Canadian community's level of tolerance, namely that which combined sex with either violence or degrading and dehumanizing behaviour. "Degrading" and "dehumanizing" were qualities meant to be measured based on the community's level of tolerance.

Ultimately, however, irrespective of what the test is meant to determine, is it realistically practicable? Can a national Canadian community standard truly be thought to exist? Even so, can a judge or jury, without benefit of expert evidence or empirical evidence accurately assess that standard? These questions may represent one of the few points of consensus within this debate. Anti-censorship and pro-pornography feminists are afraid of what the community standard will prohibit, while anti-pornography feminists fear that, despite the *Butler* decision, the national standard will become so lax as to admit potentially harmful material (MacKinnon, 1987; Cole, 1989). By looking at some of the concerns expressed

by different stakeholders in this debate, the major flaws in the community standard of tolerance test will be exposed.

MORALITY IN DISGUISE

Critics of the test argue that, even in its post-Butler incarnation, the test is simply an ill-disguised form of moral regulation. Leaving aside what is being measured (morality or harm), the test finally simply judges public opinion, and, as a result, morality. F.M. Christensen writes that, given the difficulty of clearly establishing harm,

...the "community standards" criterion of U.S. and Canadian obscenity law is a miscarriage of justice. A plainer admission that nothing but popular prejudice underlies the statutes could hardly be asked for. It tacitly acknowledges what was true all along, that those particular standards have no objective moral basis that can be stated but are subject solely to the arbitrary and variable forces of socialization (Christensen, 1990: 156).

Christensen's argument may be reduced *ad absurdum*: are all other Canadian laws simply moral regulation in disguise? Christensen argues, however, that in cases where harm is *unquestionably* present and "publicly verifiable", a national standard may not be misapplied. By contrast, laws where society is simply subjectively *perceived* to be at risk of harm have the potential for great danger when simply reduced to majority rule. Simply put, where harm is unverifiable, there is a potentially greater threat of other harms in the over-controlling hands of a misinformed majority. Christensen notes that, "This criterion [the community standards test] has not been used to carve out exceptions to other basic rights, for example, to support laws against other things many have found obscene, such as interracial marriage" (Christensen, 1990:

156). In essence, the community standard of tolerance test simply measures public shock, and therefore can only be governed by norms.

MAJOR, MAJOR PROBLEMS

A second key argument against the community standard of tolerance test is its majoritarian stance. Simply put, the test, by virtue of relying on one single national standard, must deny minorities access to material. Furthermore, since the community standard of tolerance is often reliant on “established truths” minority material will never be tolerated within the Canadian national community (LEAF, 1999: 13). Film, literature and other media are of the utmost importance in challenging the community standard of tolerance—but minority media will continue to be targetted, thus rendering minorities powerless to challenge the *status quo*. Considering once again Christensen’s example of interracial marriage: if all depictions of such marriages were deemed obscene, how many couples would have hidden their relationships out of fear? Yet at one time, interracial relationships offended the national community in much the same way that the coupling of sex and violence do today. Quite recently, anal sex was considered “obviously” counter to the Canadian national standard of tolerance. How do standards change if minorities cannot see themselves reflected within different media? More importantly, how do minorities, by their very definition lacking equal power with the majority, begin to challenge majoritarian ideas of appropriate and inappropriate behaviour and material?

Even if such ideas can be changed at the Supreme Court level, where current judgments around obscenity emphasize feminist and equality arguments, how does the average Customs officer, determining obscenity based on his or her perception of the Canadian national standard of tolerance, adequately assess the worth of any given item? Ironically, it is this very concern that led to the community standard of tolerance test in the first place. Attempting to clarify the test, Sopinka J. wrote in *R. v. Butler* that:

Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole (in *Little Sister's v. Canada*, 2000: 23).

While the test attempts to control for the individual prejudices of any given judge or Customs officer, it is that same (potentially prejudiced) judge or officer who is meant to measure the national community's level of tolerance. While well-intended, this test is deeply flawed.

The judgment in *Little Sister's v. Canada* attempted to respond to concerns regarding the majoritarian nature of the "community standard" test. Unfortunately, the judicial response seemed merely to chide gays and lesbians for expecting preferential treatment. Binnie J. wrote for the majority that,

The appellants have in mind a special standard related to their lesbian and gay target audience. The fact is, however, that they operate a bookstore in a very public place open to anyone who happens by, including potentially outraged individuals of the local community who might wish to have the bookstore closed down altogether. If "special standards" are to apply, whose "special standard" is it to be? There is some safety in numbers, and a national constituency that is made up of many different minorities is a guarantee of tolerance for minority expression (*Little Sister's v. Canada*, 2000: 23).

On the surface, the judgment in *R. v. Butler* seemed to recognize the power differential between men and women in Canadian society, and advocated

an approach to obscenity that recognized such power imbalances. It is deeply regretful that the line of argument put forth in *Butler* is limited to gender equality and is not extended to gays and lesbians in *Little Sister's v. Canada*. The fact that the majority decision in this case relied on a liberal notion of equality predicated on the fact that, by treating everyone equally, equality will be achieved, is yet more upsetting in light of the potential for more enlightened thinking glimpsed in *Butler*.

ANYTHING GOES

Having considered the oppressive potential of the community standard test, the concerns of anti-pornography feminists must be taken into account. While the community standards test is currently considered as a measure of harm, it is nonetheless dependent on the notion of what the Canadian national community considers harmful, degrading or dehumanizing. Unfortunately, material which may have a strong potential for harm may nonetheless be tolerated. This is evident by our current legal definition of harm: sex with violence or with degrading and dehumanizing behaviour. Under our current definition, however, a smiling naked woman alone will rarely be considered harmful, though many women may be offended by such an image, and though such images may contribute to women's objectification. Certain aspects of sexuality have become normalized though they may well cause harm, depending on their context. Susan Cole writes that:

Playboy and the rest of the girlie mags, after all, do not violate Canadian contemporary community standards, the very standards used to determine whether materials are obscene. Indeed, anyone with eyes

and ears in this media-laden culture might conclude that *Playboy* is our community standard. In a sexist society, community standards are bound to be sexist and hence obscenity legislation is not likely to have a great deal of practical value (Cole, 1995: 80).

Cole identifies an inconsistency in our current legislative approach—the notion that sex with violence or degrading or dehumanizing behaviour is always harmful, either to individuals and society, while sex alone is acceptable. Once again, it appears that the *Butler* decision, despite its use of feminist language, fails to acknowledge the true complexity of a harms-based approach. Cole further points to the degree to which the Canadian standard has relaxed in modern times, in ways that emphasize women's subjugation. In light of this, what is to prevent a national standard of tolerance of behaviour that is yet more oppressive? As Cole writes:

What would happen if a judge decided that a meathook in a woman's vagina does not violate community standards? Would that make the woman any less real? The business of "community standards" makes it seem that the pornographer's crime is having the bad manners to have chosen the wrong audience and that if only he could find an audience that would tolerate his battery of women, then he will have been a good citizen of our society (Cole, 1995: 81).

The likelihood is that the Canadian community will continue to maintain standards that support the *status quo*: namely, standards that are profoundly patriarchal, misogynistic and homophobic. The community standard of tolerance test therefore results in "standards" that are simultaneously strikingly oppressive and exceedingly lax.

CAN WE PRACTICE WHAT WE PREACH?

Since its inception, no empirical proof nor expert evidence has ever been required to prove that the community standard of tolerance is being respected. It is solely the opinion of the judge or jury as to whether the material would offend the Canadian community or not. As a result, the “standard” has varied wildly from judgment to judgment (Gotell, 1996: 285). Even if, despite the considerable evidence to the contrary discussed above, it were determined that a national community standard were an appropriate arbiter, how would such an opinion ever be accurately determined? In particular, since such material is not consistently assessed in courtrooms where considerable evidence can be introduced over a long period of time, what chance does the community standard of tolerance have of being appropriately reckoned at the border, as it is the vast majority of the time?

While on the surface, the test would appear to respect the need for flexibility and a wide range of opinions around the contentious topic of obscenity, it instead renders the judging process inconsistent and obscured. Judges, juries and Customs guards can gauge the worth of an item based largely on personal prejudice, and can then point easily to the mythical monolith of the Canadian “community”. With no guiding principles, little training, and no acknowledgement of the overwhelming presence of patriarchal and homophobic opinions in the Canadian community, how can Canadian obscenity law *ever* be applied equitably?

THE INTERNAL NECESSITIES TEST

One of the key aspects of the determination of obscenity is the internal necessities test. This test is meant to examine whether material which might otherwise be considered obscene is justified based on the literary, artistic, political or other context of the work under consideration. In this way, even sexually explicit material which is extremely graphic or violent may be considered non-obscene, based on either its merit or the necessity of its inclusion.

The internal necessities test only became a component of Canadian obscenity law relatively recently: a number of legal decisions in the 1940s and 1950s began to include the provision that potentially obscene material needed to be viewed in context. As Gotell notes, "implicit in the requirement that an entire work must be considered... was the notion that depictions of sex could be redeemed if associated with some higher purpose" (Gotell, 1996: 282). Of course, the measure of internal necessity is that which the Canadian community will tolerate.

The internal necessities test is what best allows judges, law enforcement officials and Customs officers to be selective when deciding what material is obscene. It is the measure by which safe sex guides, award-winning novels and incest survivor's accounts are not, in theory, considered obscenity based only on the explicit or graphic depictions within.

Works may escape prohibition based on internal necessity for two main reasons: artistic merit or the absence of the intent to arouse, based on context. Both rationales rely heavily on the intent of the creator of the work to justify the

necessity of material which might otherwise be considered obscene. Both are also problematic in a number of ways.

On the face of it, the absence of intent to arouse is perhaps the more clear-cut of the two reasons for the justified presence of otherwise obscene material: Diana Russell's book *Against Harm*, which includes a large number of photographic depictions of violent sex or *Don't*, Elly Danica's disturbingly graphic account of childhood abuse, clearly have no intent to arouse. As a result, despite their otherwise obscene content, they are "obviously" not obscene. Furthermore, such material is "obviously" within the bounds of what the Canadian community will tolerate.

The notion of intent, however, is quite contentious. While the examples discussed above may prove to be beyond debate, there is great fear on the part of anti-pornography feminists that even well-intended images may be co-opted for the purpose of arousal when viewed in the context of a sexist society. Furthermore, many anti-pornography feminists contend that when the intent is difficult to ascertain, depictions of violent sexual behaviour may prove very traumatic to a number of readers or viewers, thus rendering such depictions harmful despite the intent of the creator (Cole, 1995: 105-106). The debate on this topic rapidly becomes exceptionally heated, as in the following debate between author Ntozake Shange and anti-pornography feminist Andrea Dworkin:

[Shange writes that] "I was on the cover of *Poets and Writers* and I wore a pretty lace top. In the next two issues, there were letters asking if *Poets and Writers* is now a flesh magazine-- why was I appearing in my underwear? Bare shoulders are exploitation now?" In response, Andrea Dworkin... confirmed that she would indeed see Shange's photograph as exploitation: "It's very hard to look at a picture of a woman's body and not see it with the perception that her body is being exploited" (Strossen, 1995: 23).

Concerns about both intent and perception are often expressed even if the creator of a given piece of work self-identifies as feminist or argues that the work takes an anti-patriarchal position. In another incident, at a 1992 conference entitled *Prostitution: From Academia to Activism*, artist Carol Jacobsen was invited to curate an exhibition on prostitution, including her own work, in order to ensure that the voices of sex trade workers were represented at the conference. Concerned that the conference was being hosted by the University of Michigan Law School, where Catherine MacKinnon was a faculty member, Jacobsen was reassured by students that the conference would maintain a pluralist focus. Mere hours after the conference opened, MacKinnon directed the student organizers to withdraw a videotape compilation of five of the seven artists' work, stating that she had received complaints that the film was pornographic. Jacobsen withdrew the entire exhibition, and the conference went on, with no sex trade workers represented at all (Strossen, 1996: 214).

Clearly, there is little consensus regarding the status of even material which has "admirable" intentions. For this reason, many anti-censorship and pro-pornography feminists condemn anti-pornography feminists for limiting women's access to means of rebellion and the embracing of liberated sexual expression. Nadine Strossen writes that,

In light of the actual record of MacDworkinites' [sic] disrespect for other female, feminist voices and choices, it should be clear that the "protection" they seek to bestow would hardly be beneficial to all women. Many of us would like to be protected against such protection (Strossen, 1995: 215).

The notion of work protected on the basis of artistic merit is just as problematic, for it implicitly presupposes a clear divide between "art", which incidentally arouses, and "pornography" which *only* arouses. Such a defense furthermore supports the idea that both art and pornography are clearly identifiable and never open to confusion. While a source of concern, the notion of a clear and explicit distinction between works of art and works of smut has a long history. Gubar and Hoff give reference to many discussions of pornography from the 1920s and 1930s which helpfully noted that "art soothes and pornography excites" (Cotham, in Gubar and Hoff, 1989: 23). No less than D.H. Lawrence, himself subjected to perhaps the most famous obscenity trials of this century⁶, condemned pornography and advocated its censorship. Lawrence's view, shared by many, was that "artistic pornography" simply did not exist, since art and pornography were in such stark opposition (Gubar and Hoff, 1989: 54).

In truth, however, art and pornography are not so easily distinguished from one another. Many theorists argue that any such distinction is entirely contrived. Others claim that the distinction is a product of cultural relativism and is solely premised on the tastes of whoever does the judging. Comical examples of this type of behaviour abound. Consider, for example, the case of a painting of the famous *Venus de Milo* removed from a Missouri shopping mall because it was deemed "too shocking". Strossen wryly notes that, "The painting of the ancient Greek sculpture, which was carved about 150 B.C., and which stands in a place of honour in Paris's Louvre museum, was replaced by a painting of a woman

⁶ D.H. Lawrence was accused of obscenity in Canada, the U.S. and England for writing *Lady Chatterley's Lover*. He was acquitted in all three countries (Hyde: 1990).

wearing a long, frilly dress" (Strossen, 1995: 22). While humorous, Strossen's example points to another potential contrivance: depictions of female nudity or sexuality that are *de facto* accepted, seemingly based only on their longevity. Would a comparably well executed contemporary sculpture of a female nude be viewed with the respect generally granted the *Venus de Milo*?

Christensen attributes a more insidious rationale to the seemingly unreasoned distinction between pornography and art. He argues that the difference between the two genres is a result of class conflict, which privileges "artistic" depictions while condemning more commonplace examples of sexually explicit material. He writes that,

...the entertainment of the lower classes is typically sweaty and boisterous, their tastes unsubtle (i.e. explicit) and "unrefined", according to the ruling classes (upper or middle). In other words, "erotica" is what the latter enjoy, while "pornography" is what the former like. If the story ended there, it would be of small concern. But the law has been used to enforce these matters of taste (Christensen, 1996: 156).

Christensen goes on to point out the ramifications of the criminalization of what he perceives as "lower-class" depictions of sexuality, while "artistic" depictions are valorized. He notes that "Whether a person is to be locked up in prison hinges on something as trivial and subjective as bad taste, as morally irrelevant as aesthetic judgment" (Christensen, 1996: 156)

The notion of "artistic merit", however, has gained such currency that even anti-censorship advocates are eager to embrace the divide between art and obscenity. Indeed, in the case of *Little Sister's v. Canada*, the bookstore routinely pointed to the award-winning literature prohibited by Customs, "proving" the inability of Customs agents to tell apart obscenity and art. At times, this

argument became a comedy of errors, as in the case of Frank Lorito, a Tariff and Customs Administrator called as a witness by Joseph Arvey, chief counsel for Little Sister's. Lorito was specifically questioned on his role in the detention and eventual release of Kathy Acker's novel *The Empire of the Senseless*. Because the media had been alerted to the suppression of this particular book, Lorito attempted to speed up its assessment by taking it home on the weekend. Despite his unremitting condemnation of the book (which included depictions of incest and sex with violence), Lorito, upon reading the last line, did an abrupt about-face and declared that the book was artistically significant. The line read: "...And then I thought that, one day, maybe, there'd be a human society in a world which is beautiful, a society which wasn't just disgust." Lorito went on to rhapsodize that, "It's almost like a disclaimer that, 'yes, this is what it is, and I don't like it'" (in Fuller and Blackley, 1996: 133). While supporting the notion that books must be read in their entirety, Lorito's assessment nonetheless gives cause for concern if a book's entire role as art or pornography can be changed by a single phrase.

If any conclusion can be drawn in the midst of the confusion which surrounds the internal necessities test, it is only that concepts such as artistic merit, context and intent are as plagued with acrimony and inconsistencies as are all other components of the pornography debate. The internal necessities test relies exclusively on notions of empirically identifiable art or other contextually necessary material. Unfortunately, in many such cases, the battle lines are hardly so clearly drawn.

Consider the cases of Mike Diana and Eli Langer. Langer was charged with child pornography in 1993, a year before Mike Diana's comic books were stopped at the border.⁷ Both men use graphic and disturbing imagery that includes sex with children, incest and violence. Both, however, argue that their intent is to condemn sexual abuse and to expose its pervasiveness in North America. Diana goes farther, saying that, "My drawings are saying 'wake up and see that this is going on around you all the time.' Why does it take me for you to get scared, though? What's obscene is that this stuff really goes on" (in Fuller and Blackley, 1996: 158). While Langer's work was eventually acquitted based on its artistic merit, Diana's was routinely destroyed at the border. More important than the different outcomes, however, were the different issues raised by the work created by these men. While the *intent* of both men was to expose and condemn child sexual abuse, clearly this intent was not obvious to either law enforcement officials or Customs officers. Only a lengthy trial convinced Justice McCombs to acquit Langer's work. If the "average" viewer cannot determine the intent of this work, does it not have the same potential for harm as similar material created with malicious intent? Does it not terrorize women and inspire potential pedophilia as successfully (or unsuccessfully) as its ill-intended counterparts? Why is the work of Eli Langer considered less harmful and more worthy simply because a judge deemed it art?

⁷ In fact, the charges against Eli Langer were dropped, but, relying on rarely used laws, the *art itself* was charged in a trial where the paintings were placed in the dock throughout. Had the material been found guilty, the paintings would have been destroyed (Fuller and Blackley, 1996: 83).

If material is judged based on its intent, then it lacks an empirical reality outside of its simple visual or literary presence. Likewise, if context can affect the outcome of an obscenity decision, material is *never* simply obscene or non-obscene. Even sexually explicit material which falls into the "clear" categories of violent, degrading and dehumanizing can be spared by the internal necessities test. In light of this, how is the harm test to be realistically applied? The morality of a given piece of work can presumably be established based on the presence of sex as a dominant theme, but arguably, harmful material is harmful regardless of the author's intent or the context into which such material is set.

In writing for the court in the case of *R. v. Butler*, Sopinka J. noted that "Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression" (*R. v. Butler*, 1992: 39). While initially this ideal would seem a panacea to anti-censorship advocates, the notion of a defense of artistic expression seems to rest uneasily with a harms-based approach to the governance of obscenity.

Even if art and obscenity are distinct categories, even if the absence of the intent to arouse were easily distinguishable and if non-arousing materials could be considered absolutely non-harmful, the problem of adequately identifying different material would still exist. While the internal necessities test is implicitly reliant on the community standards test, it nonetheless falls to the same Customs guards, law enforcement officers and judges to conclude whether any given work is art or obscenity. In light of the very real challenges presented by this identification, one must question whether law enforcement officials and Customs

officers are being asked to undertake a realistic task in determining the presence of internal necessities within potentially obscene material.

THE "HARM" TEST

The notion of harm as the major indicator of whether any item exceeds the Canadian community's degree of tolerance is quite recent. Though some judgments in cases of obscenity preceding *Butler* alluded to the capacity of sexually explicit material to harm society, such decisions were inconsistently made and no overarching precedent existed to enshrine the idea of harm as being of paramount importance in the assessment of potentially obscene material.

With the enactment of the *Charter of Rights and Freedoms*, however, freedom of expression gained new status in Canada. Given the climate of inconsistent decisions and judgments generally predicated on moral concerns, the case of *R. v. Butler* cast major doubts on whether section 163 of the *Criminal Code*—the obscenity provision—would survive a *Charter* challenge. Spurred by the concern that *R. v. Butler* could protect all sexually explicit material under the *Charter's* freedom of expression guarantee, the Women's Legal and Education Fund (LEAF) chose to intervene. Kathleen Mahoney and Linda Taylor, acting for LEAF, chose to present an analysis of certain sexually explicit material as harmful to society, and particularly harmful to women and children who had historically enjoyed fewer rights than men. This point of view followed the teachings of anti-pornography feminists (in particular, Catherine MacKinnon and

Andrea Dworkin) and had been introduced into discussions of Canadian obscenity law before. For example, the Canadian Advisory Council on the Status of Women had responded to the Fraser Committee on Pornography and Prostitution and to proposed Bill C-54 with a similar harms-based analysis of pornography. Until *Butler*, however, the anti-pornography feminist position had not yet been incorporated into legal or legislative decisions in a precedent setting capacity.

In *Butler*, LEAF urged the Court to consider that, while section 163 did indeed violate the *Charter*, it could be perceived as a justifiable limit since pornography and other sexually explicit material itself violated the *Charter's* right to equality. LEAF argued that since some pornography is or can contribute to gender discrimination, it could be justifiably prohibited despite the guaranteed right to freedom of expression.

In *R. v. Butler*, the Court accepted the argument put forth by LEAF and for the first time enshrined a harms-based test of obscenity in the language of Canadian law. Sopinka J., writing for the Court, noted an explicit move away from a morals-based approach in the way Canadian obscenity law was to be administered, writing that, "The prevention of 'dirt for dirt's sake' is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*" (*R. v. Butler*, 1992: 46).

R. v. Butler further clarified the "harm" test by defining both what is meant by harm, and what types of materials may be considered to cause harm: "Harm in this context means that it [sic] predisposes persons to act in an anti-social

manner... a manner which society formally recognizes as incompatible with its proper functioning" (*R. v. Butler*, 1992: 4). In an effort to isolate which materials might promote anti-social behaviour, the Court divided pornography into the three categories which explicitly define this test: sex with violence, sex which is degrading or dehumanizing and sex with neither violence nor degrading or dehumanizing behaviour. The first two categories would almost always be considered harmful (and therefore obscene), while the third category would generally not be considered obscene unless minors were involved. Thus while the measure of the test is the capacity of material to cause harm, its application is based on an assessment of whether the content of a given item specifically combines sex with violence or degrading or dehumanizing material.

While the decision in *R. v. Butler* was meant to provide a clearer and more consistent definition of obscenity, the Court referred to the failed Conservative Bills which attempted to take a laundry-list approach, noting that, "The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail" (*R. v. Butler*, 1992: 60). As a result, the Court gave only a few examples of material which might be considered degrading or dehumanizing, including material which portrayed women as ever-eager nymphomaniacs or material which was degrading or dehumanizing but included consent. Sopinka J. wrote that "Consent cannot save materials that otherwise contain degrading and dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading" (*R. v. Butler* in *Busby*, 1994: 178). Despite these few examples, however, the definition of which materials could be defined

as degrading or dehumanizing was largely left to the discretion of individual judges. Of course, the material in question needed to be assessed on the basis of what the Canadian community would tolerate, but the specific limits of Canadian tolerance were to be assessed by judges or Customs agents with little guidance.

As the *Little Sister's* case obviously shows, a harms-based analysis has never been successfully implemented in Canada. The decision in this case, however, clearly indicates the renewed certainty of the Supreme Court that obscenity, if judged by the “harm” test, would result in the best indication of what would be tolerated by the Canadian community (*Little Sister's v. Canada*, 2000: 24). Critics of the test, however, do not exclusively point to the major flaws in its application—rather, both advocates and opponents of the test are interested in the test in both its ideal form and its current incarnation. An examination of the ideas behind the “harm” test will provide greater insight into its potential strengths and weaknesses. After the intent is assessed, the test may then be examined with regard to its ability to remain true to that intent and an analysis may be conducted around the challenges associated with the test’s current application.

MAJOR ASSUMPTIONS OF THE “HARM” TEST

The approach to obscenity taken in *Butler* rests on several key assumptions. First, the Supreme Court accepted the view put forward by LEAF: that pornography causes harm. Second, the Court agreed with the idea that pornography contributes to gender inequality in a number of ways. Third, the

Court isolated themes within sexually explicit material that were considered to be sufficiently harmful to require prohibition— the Court formed a conclusion that specifically sex with violence or degrading and dehumanizing behaviour are harmful unless salvaged by some greater literary, artistic, political or scientific purpose. Fourth, by extension, the Supreme Court of Canada therefore concluded that pornography without violence or degrading or dehumanizing behaviour would generally be tolerated by the Canadian community. Every one of the assumptions made by the Supreme Court is highly contentious and each has been the source of considerable debate.

The harms generally perceived as associated with pornography can usefully be divided into two sorts: harm expressly resulting from the *production* of pornographic material— most often, harm to the persons posing for the film or videotaped depictions of explicit sexual behaviour. The second harm is that which comes from the pornographic product itself and its subsequent effect on society. The "harm" test put forward in *Butler* is exclusively concerned with the potential harm which may befall society as a result of consumption of the obscene product. The following discussion of harm will therefore be largely restricted to the flow of harm from pornography's effect on its audience. The next section will discuss the potential for harm during the process of creating pornography and other sexually explicit material.

"HARM" AS AN EFFECT OF PORNOGRAPHY

The feminist anti-pornography movement began with the assumption that some sexually explicit material, particularly mainstream pornography, could cause harm to society. Catherine MacKinnon explicitly opined that the feminist position against pornography was *the* feminist attitude, because those who were not against pornography were not, in fact, feminists at all. She wrote that, "Pornography, in the *feminist* view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality" (MacKinnon, 1987: 148, italics mine).

Andrea Dworkin, in *Pornography: Men possessing women*, goes yet further, likening pornography's effect on women to other instances of oppression, including slavery in the United States and the treatment of European Jews, gypsies [sic], homosexuals and others during the Holocaust. Dworkin writes that, "...pornography has the weight and significance of any other historically real torture or punishment of a group of people because of a condition of birth..." (Dworkin, 1979: xxxviii). Dworkin also uses the real life stories of women affected by pornography: women whose husbands or partners have forced them to emulate the scenes they watch; women whose lives began with horrific abuse and culminated in pornographic "careers"; women whose self-esteem has plummeted as a result of pornography's presence in their lives. Dworkin quotes a twenty-two year old woman who says, "Pornography is not a fantasy, it was my life, reality" (Dworkin, 1979: xxi). Much of the evidence of the harmful potential of pornography begins with evidence like that brought forth by Dworkin: first person accounts of women who self-identify as victims of pornography. While

the pain of these women is beyond question, the precise cause of their suffering is difficult to isolate. The fact that many women are abused by men who use pornography does not necessarily prove that pornography is a *cause* of that abuse; in a sexist society, it is a fairly unrealistic notion that a direct and exclusive causal relationship exists between pornography and the objectification, discrimination and abuse most women face.

With regard to anecdotal claims of pornography's harmful potential, Christensen writes that:

...merely finding instances of A accompanied by B-- for example, women who leave school with health problems-- is not legitimate evidence that A causes B. Such thinking has been especially common in regard to the charge that pornography elicits violence. We constantly hear claims about sex criminals found to own pornography-- ignoring all those who do not, and all the noncriminals who do. Similar stories of rapists and murderers who were Bible readers can equally well be found (Christensen, 1990: 126).

If anecdotal claims of the harmful effects of pornography are therefore contentious, perhaps a closer look must be taken at statistical and experimental research regarding pornography. Unfortunately, such material is notoriously contradictory and the methodology of much of the research is often the source of considerable argument. Nonetheless, a survey of the available material from both an anti-pornography and a pro-pornography position will be examined. Interestingly, the anti-pornography position taken by Diana Russell and the pro-pornography position taken by F. M. Christensen often examine the same material, but arrive at entirely contradictory conclusions.

PORNOGRAPHY = HARM...

Diana Russell divides her book *Against pornography: The evidence of harm* into two sections. The first shows many examples of pornography with accompanying commentary on Russell's perception of the harm associated with each image. Russell notes that,

I have found that showing pornography is an effective and rapid consciousness-raiser about misogyny and male views of women. It helps to enhance women's understanding of many males' dangerous notions of what it is to be a man. It often also succeeds in arousing women viewers' anger (and some men's) at the contempt and hatred of women they see in the pictures and captions (Russell, 1993: 16)

While Russell's motivations are admirable, her analysis of the pornography she supplies is based on her personal, emotional and aesthetic concerns with the material. Since subjective and anecdotal evidence regarding pornography's potential for harm has already been seen to have problems, we may move to part two of Russell's book, "Pornography as a cause of rape". Russell notes that it would be very difficult indeed to prove that pornography is the single cause of rape. Rather than *simple causation*, then, Russell ascribes *multiple causation* to rape, and is proposing that pornography is but one possible cause. She writes that, "pornography can be a sufficient (though not *necessary*) condition for males to desire to rape" (Russell, 1993: 122).

Relying on a broad range of different studies, Russell presents four factors in pornography's capacity for causing rape:

Exposure to pornography... 1) predisposes some males to desire rape or intensifies this desire, 2) undermines some males' internal inhibitions against acting out rape desires, 3) undermines some males' social inhibitions against acting out rape desires, [and] 4) undermines some potential victims' abilities to avoid or resist rape (Russell, 1993: 121)

With regard to factor number one, "[the predisposition of] some males to desire rape or [the intensification of] this desire", Russell isolates a number of ways that pornography may cause rape. She focuses on the pairing of sexual stimulation with violence (particularly rape) noting studies where the pairing of other stimuli (for example, women's boots) resulted in the stimuli alone becoming sexually arousing (Russell, 1993: 123).

Russell's second argument, that pornography undermines the inhibitions some males may have against raping is generally supported by studies which report that pornography causes subjects to objectify women, treat them in a sexist manner and trivialize rape. Some of the evidence presented by Russell, however, is highly subjective. For example, in an effort to support the notion that pornography causes men to objectify women, Russell cites a study by McKenzie-Mohr and Zanna. The researchers first coded subjects into "masculine sex-typed males" and "androgynous males" based on earlier interactions. Their findings cite that after watching fifteen minutes of pornography, the masculine sex-typed males "treated our female experimenter who was interacting with them in a professional setting, in a manner that was both cognitively and behaviorally sexist" (in Russell, 1993: 132). Nowhere else in her analysis does Russell acknowledge the notion of differently typed males present in this research. Neither does she contend with the highly subjective results put forth by the researchers.

With regard to pornography's role in supporting rape myths⁸, Russell begins by citing the tremendous prevalence of rape myths in North American society. Russell cites a study by Diana Scully and Martha Burt in which the researchers found that 65% of subjects, convicted rapists, believed that "women cause their own rape by the way they act and the clothes they wear" (Russell, 1993: 132). Once again, however, Russell fails to acknowledge that the correlation between belief in rape myths and rape may exist outside of the influence of pornography.

Russell's third point is that pornography may cause rape by undermining the inhibitions males may have against their existing impulses to rape. Once again, Russell attempts to cite studies to prove the existing (and terrifying) norms outside the realm of pornography. Citing Neil Malamuth, Russell points to a study in which male students read an account of a violent rape: "17%... admitted that there was some likelihood that they might behave in a similar fashion in the same circumstances. However, 53% of the same male students said there was some likelihood that they might act as the rapist did *if they could be sure of getting away with it*" (Russell, 1993: 138). Russell then goes on to hypothesize that pornography must act as both cause and effect with regard to societal acceptance of rape, both minimizing fear of reprisal (since most depictions of rapes are not met with any social sanction) (Russell, 1993: 139) and therefore reinforcing existing desires to rape on the part of men by trivializing rape.

⁸ "Rape myths" refer to the idea that some women enjoy rape and that protestations against sexual intercourse are simply foreplay.

Russell's final argument is that pornography may cause rape by encouraging women to get into high rape-risk situations. Citing testimony from various panels regarding pornography as well as first person accounts from previous studies she has done, Russell concludes that many women are harmed by being coerced into "acting out" unsafe pornographic scenarios while other women are harmed by their participation in the production of pornography (Russell, 1993:141).

While Russell's analysis is extremely thoughtful, the studies she draws from refer to a huge range of different material, some of which may not even be traditionally considered pornography, as in the case of R-rated movies shown by Linz, Donnerstein and Penrod. Furthermore, the vast majority of the studies use college students as their subjects which may affect their generalizability. Many of the results she cites are either subjective or not directly relevant to the points she attempts to make. Finally, the majority of Russell's findings, despite her frequent assertions to the contrary, are presented as preliminary; nearly every section of her analysis ends with "further research is needed on this issue...". While Russell's ideas are very important in bringing together the wide variety of experimental evidence around pornography and harm, her conclusions must be approached with caution.

...EXCEPT WHEN PORNOGRAPHY ≠ HARM

Christensen looks at both statistical and experimental evidence regarding the link between pornography and harm in the form of violent or anti-social

behaviour. Much of the statistical evidence he examines focuses on the correlation between use of pornography and violent sex crimes. Christensen cites five studies done at the behest of the U.S. Commission on Obscenity and Pornography of which only one found a higher exposure to pornography in violent sex offenders. In fact, Christensen notes that three of the studies found "a *smaller* amount of prior exposure among violent sex criminals than in a 'control group' of persons not known to have committed sex crimes" (Christensen, 1990: 130). Noting that not all studies on the topic have repeated these results, Christensen ascribes other reasons for the correlation including "an obsessive preoccupation with sex" responsible for both higher use of pornography and violent sex crimes (Christensen, 1990: 131).

With regard to experimental evidence, Christensen is highly critical of the format of the vast majority of experiments which tend to measure the subject's propensity to punish other people (for example with supposed electric shocks). Subjects are exposed to some stimulus and are then meant to "punish" another person— if there is a significant difference between the levels of punishment imposed by those who have been exposed to the stimulus then a correlation can be drawn between the stimulus and the response. Christensen reports that "The researchers have almost uniformly gotten the same result: subjects simply exposed to pornography beforehand are not inclined to administer harsher treatment than those not so exposed" (Christensen, 1990: 135).

Other experiments that *do* note a correlation between exposure to sexually explicit material often include a third variable, for example, hostility on

the part of the female researcher toward the male subject. Such experiments tend to expose a correlation between the material, the hostility and an increasingly punitive response from the subject. Christensen dismisses these findings by arguing that the aggressiveness noted in the results is simply an organic response: "It is not a feeling of contempt for women, or a special moral nastiness, or anything of the sort; it is just a general state of heightened physiological activity" (Christensen, 1990: 136). One wonders at the simplicity of this response. While the design of the experiment makes it difficult to note the specific *causality* of the increased aggression of the subjects, the results are nonetheless statistically significant and bear a more in-depth analysis than Christensen's response which seems fearfully close to simply saying "boys will be boys". Furthermore, while critiquing many of the experiments that are similar in description to those cited by Russell, Christensen fails to mention who has done the research of which he is so critical, thus making it impossible for the reader to do further research on his findings. As with Russell, Christensen's contribution to the field is thoughtful and engaging, but his results must be critically examined and not simply taken at face value.

BACK TO ANECDOTAL EVIDENCE

While the analysis above is by no means exhaustive, it does begin to expose the dilemma of attempting to "prove" the existence of either merits or harms associated with pornography. In particular, the statistical and experimental evidence is far from convincing of either claim. Many women,

however, know that the effects of patriarchy are not always easily quantifiable in a laboratory and that anecdotal evidence, dismissed for years as "soft" research unworthy of being taken seriously, reveals a clear and true picture of the world despite the absence of statistical analyses. The debate on the *need* for compelling scientific evidence has always been at the heart of the feminist "pornography wars". Consider, for example, Catherine MacKinnon's response to an article by Alice Henry which, based on the social scientific evidence, concluded that the link between rape and pornography is inconclusive. MacKinnon wrote that,

Women have known for a long time that pornography is at the center of much discrimination against us, whether through attitudes or behavior, violent or less overt. Research is only beginning to uncover and substantiate some of these connections we experience every day. What do you call not caring to hear women when we say these things *do* happen to us, in favor of male researchers studying men predicting that such things *would* happen to us? Whatever you call it, I suspect it isn't feminism (Henry, 1988: 103).

Just because so much abuse against women is not verifiable by experimental evidence, it cannot be simply dismissed as either non-existent or not important. The Supreme Court of Canada upheld this idea in *R. v. Butler*. Despite the confusion and inconsistency in research on the link between pornography and sexual aggression, the Court held that, "While a direct link between obscenity and harm may be difficult to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs" (*R. v. Butler*, 1992: 5). Therefore, the Court's decision was that there is a clear *enough* causal relationship between obscene material and harm to criminalize some sexually explicit material. Regardless of the Court's conclusion, the notion that women's lived experiences can be sufficient evidence

of harm is a fairly radical one, and the Court must be applauded for choosing to uphold this point of view.

Unfortunately, a reliance on the anecdotal evidence of women who have potentially been victims of pornography neglects the anecdotal evidence from women whose lives have been enriched as a result of pornography. No correlative harm has been discussed with regard to the effects of prohibiting material that may be empowering. While much sexually explicit material is allowed by the *Butler* decision, it is clear in *Little Sister's v. Canada* that the prohibition of some material (arguably unjustly) harms those to whom it is denied. One wonders what resolution could be achieved if the same piece of material were viewed as both empowering and harmful by different communities.

PORNOGRAPHY AND GENDER DISCRIMINATION

One of the chief points of interest arising from *R. v. Butler* was that the decision did not merely discuss generic harms "to society". Rather, the decision specifically referred to violence against women as a harm arising from pornography. Likewise, with regard to degrading or dehumanizing material, Sopinka J. wrote that "There has been a growing recognition... that material which may be said to exploit sex in a 'degrading or dehumanizing' manner will necessarily fail the community standards test, not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women" (*R. v. Butler*, 1992: 3, emphasis added).

Not all feminists agree that pornography has a role in women's continuing oppression in Canadian society (see, for example, Strossen, 1995: 120; Kiss and Tell, 1991; Tisdale, 1994). Rather, pro-pornography feminists argue that in much pornography precisely the opposite effect is present, that pornography may act as a tool of women's empowerment. Strossen notes that, "Much commercial erotica⁹ depicts women in nonsubordinated roles, and contains images and ideas that may well be seen as positive for women and feminists" (Strossen, 1995). For pro-pornography feminists, the *Butler* decision was a debacle in every way—because pro-pornography feminists reject the premise that pornography is harmful, they find the *Butler* decision absurd. Rather, the prohibition against pornography is seen as harmful, and in particular, harmful to women.

The idea of harm arising from pornography's suppression is absent from *R. v. Butler* in part because most mainstream pornography is considered to be expressly created for a male audience. Preventing men access to material which may cause them to hold anti-social attitudes toward women is a reasonable justification for the harm of denying some men access to some pornography. This argument, however, denies the existence of many women who consume mainstream pornography. While undoubtedly much material is created before an assumed male gaze, women are beginning to consume pornography at a rate that will hopefully reverse this trend. Strossen reports that,

Women, either singly or as a part of a couple, constitute more than 40 per cent of the adult videotape rental audience... In 1987 two social scientists conducting a survey of over 26,000 female readers of *Redbook* magazine found that nearly half of the respondents said they regularly watch pornographic films (Strossen, 1995: 144).

⁹ Strossen uses the terms erotica and pornography interchangeably.

Strossen's data must be approached with the same caution as the harms-based studies previously discussed. Nonetheless, it seems that the notion of women as victims needing to be protected from the misogyny which results from pornography takes into account only half of the picture. While women might benefit from the regulation of pornography, it is likewise women who may be harmed by the suppression of sexually exciting material. In light of this information, if Canadian obscenity law is truly aimed toward the combating of gender discrimination, the law must make a much clearer effort toward balancing potential harmful outcomes.

UNFORESEEN OUTCOMES

The *Butler* decision's focus on gender discrimination and harm based on women's unequal status in Canadian society could have had beneficial implications for gay and lesbian sexually explicit material. If the chief harm outlined by the Court was based on a heterosexual model, perhaps same-sex material was therefore exempt as it could not reproduce the same oppressive models that were of concern in heterosexual materials. Unfortunately, the Court definitively rejected this idea in *Little Sister's v. Canada*, writing that, "*Butler* is directed to the prevention of harm, and is indifferent to whether such harm arises in the context of heterosexuality or homosexuality" (*Little Sister's v. Canada*, 2000: 20). Feminist theorists continue to struggle with the role of same-sex material with regard to gender discrimination, with some maintaining that oppressive structures present in heterosexual relationships may be reproduced

in depictions of same-sex relations. Susan Cole, for example, argues that, "In gay male pornographic scenarios of dominance and submission, the person doing the fucking is often called 'he,' while the fuckee is called 'she.' This is the way gay pornography, even though it is same sex material still manages to gender sexuality" (Cole, 1989: 35). Jillian Ridington, looking for a more nuanced approach to this concern, asks, "While it is true that two women may be more likely to be in an equal relationship than a woman and a man, does it mean lesbians are 'immune' to any effects of violent pornography and violent actions?" (Ridington, 1994: 22) Lesbians themselves disagree about the role of pornography and its propensity for harm when depicting same-sex relationships. The situation is further confused by the prevalence of "lesbian" pornography created for the enjoyment of heterosexual men: the internal necessities test examines the intent of the creator, but what of the intent of the audience?

While *Butler* did move further than any previous judgment in acknowledging the potential for harm based on a gender analysis, the notion that such harm could specifically be inflicted upon society's morality rather than on women as a particular group still lurks beneath the progressive attitude generally present in the judgment. Consider, for example, the comments of Gonthier J., writing for the minority in *R. v. Butler*. "Obscene materials... convey a distorted image of human sexuality, by making public and open elements of the human nature which are usually hidden behind a veil of modesty and privacy" (*R. v. Butler*, 1992: 68). The *Butler* idea of harm is therefore contentious on two levels: first, it assumes that pornography contributes to gender discrimination, an idea

about which no consensus has been reached, and second, it has the great potential to betray its feminist-guided intent and instead reinforce the moral regulation of Canada's not too distant past.

EENY, MEAN-Y, MINE-Y, MOE: *WHAT CAUSES HARM?*

Even if the assertion that pornography causes harm is accepted, breaking down sexually explicit material to isolate *which* material in particular is harmful is the subject of enormous debate. While the decision in *R. v. Butler* concluded that it is violence and/or degrading and dehumanizing behaviour that, when combined with sex, render a work obscene, these criteria seem somewhat arbitrary: feminists argue both in favour of material that is legally obscene, yet meritorious, and against material that is legally acceptable yet discriminatory or harmful.

The decree that all depictions of sex and violence simultaneously are *de facto* obscene is one of the only instances where Canadian obscenity law is extremely clear and explicit about what is prohibited. Nonetheless, even this aspect of the law is highly contentious. There exists, in Canada, a thriving community dedicated to the safe conduct of sadomasochist sex that includes both bondage and domination. Depictions of s/m sex (as I will refer to it) violate every aspect of the harm test for obscenity, yet advocates of this aspect of sexuality argue strenuously against its potential for harm as well as its potential for the radical repositioning of sex within society, perhaps resulting in the

minimizing of traditionally oppressive sexual practices. Pat Califia, for example, writes that,

The S/M subculture is affected by sexism, racism, and other fallout from the system, but the dynamic between a top and a bottom¹⁰ is quite different from the dynamic between men and women, whites and blacks, or upper- and working-class people. That system is unjust because it assigns privileges based on race, gender and social class. During an S/M encounter, roles are acquired and used in very different ways. The participants select particular roles that best express their sexual needs, how they feel about their particular partners, or which outfits are clean and ready to wear. The most significant reward for being a top or a bottom is sexual pleasure. If you don't like being a top or a bottom, you switch your keys. Try doing that with your biological sex or your race or your socioeconomic status (Califia, 1994: 169).

Even if s/m sex were seen as non-harmful and acceptable, what of all depictions of violence and sex simultaneously? For many adults, the high levels of arousal present in both sex and violence make the presence of both extremely exciting. Consider, for example, a study done in Ontario, in which 51% of female respondents said they had fantasized about rape. Eighteen per cent fantasized about gang rape, and 9% fantasized about sex with an animal (Christensen, 1990: 83). Of course, this one study must be approached with great caution; and the cause and effect of these numbers must be argued: perhaps these women fantasize about rape because they have been exposed to so many sexualized depictions of rape in pornography. Nonetheless, clearly the presence of sex and violence is relevant to some people's sex lives. Leaving aside the issues of harm toward those involved in the production of depicted rapes (pornographic actors will be discussed in the next section), what can we conclude about the high level of "prohibited" sex in people's fantasies?

¹⁰ In s/m circles, a "top" is the dominant partner, while a "bottom" is the submissive partner.

Russell would have us believe that since we live in a misogynistic society, it is obvious that we might become aroused from sexist and abusive material. She espouses that we perceive these views as akin to internalized racism and battle to end our self-hatred (Russell, 1993: 20). For many women, however, this methodology leads to shame and sexual inhibition. Califia, for example, writes that submission, dominance and pain had been a part of her sexuality from a very early age, but that, "Abstinence, consciousness-raising, and therapy had not blighted the charm of these frightful reveries. I could not tolerate any more guilt, anxiety or frustration, so I cautiously began to experiment with real sadomasochism" (Califia, 1994:165).

At the heart of this debate are ideas about the constructions of reality and fantasy and the boundaries between these realms of human sexuality. Abundant anecdotal evidence exists to support the idea that people often indulge in fantasies about behaviour that they would *not* want to have occur in "real life". Pat Califia notes quite explicitly that much of her enjoyment comes from the role-playing aspect of s/m culture; presumably she is not hoping *ever* to be tied up against her will, in a non-consensual encounter. Likewise, it seems beyond argument that the 51% of respondents in one study who fantasize about rape (Christensen, 1990: 83) do not actively hope to be raped; more likely, they dread and avoid abuse. Nonetheless, violence and/or degradation are a theme in their sexual imaginings.

Of course, the fact that violent and degrading pornography may be arousing to many women (that it is arousing to men seems to be beside the point

in view of the gender equality position of the harm test) does not prevent it from also causing harm. The major dilemma of the harm test is that the same piece of material may be simultaneously empowering to one woman and entirely debasing to another. The test was neither devised nor implemented with the notion that women might enjoy violent sexual material. *Butler* put forward the notion of male desire as counter to women's protection. The unfortunate outcome has therefore been the further suppression of women's sexuality. By effectively reducing *women's* desire, whether in heterosexual or lesbian unions, to a footnote entitled "erotica", the notion of the sexually excited and empowered woman (in whatever form she chooses to take) has once again been imbued with shame. Sallie Tisdale, author of *Talk dirty to me*, writes that:

Censors are always concerned with how men act and how women are portrayed. Women cannot make free sexual choices in the censor's world; they are too oppressed to know that only oppression could lead them to sell sex. And I, watching, am either too oppressed to know the harm that my watching has done to my sisters, or— or else I have become the Man. And it is the Man in me who watches. By insisting that no woman could honestly like porn or sex work... feminists against pornography have made women into objects. Women can *never* be the agents of sex to them (Tisdale, 1994:156).

IT'S ALL OK

By concluding that harmful pornography is restricted to that which combines sex and violence or degrading behaviour, the "harm" test also minimizes the harm that can be done by much more mainstream pornography. Images of consistently "perfect" bodies, and magazines filled with naked, pouting women, may cause harm in different ways than violent pornography. Consider, for example, *Playboy* magazine, perhaps the most prevalent form of pornography in the world. Women are objectified within this magazine, are reduced to smiling

body parts and are never seen as anything less than perfect. Consider the new trade in "men's" magazines such as *Maxim*, *FHM* and *Stuff*. Women may be scantily clad, but nipples and pubic area are never exposed— this is not pornography by most definitions. Yet the magazine is explicitly about selling sex and women's sexuality, including (in the case of *Maxim*) an Internet gallery with the "Babe of the Month".

While anti-pornography feminists have been vocal about their concerns that harm may also result from non-violent materials, unfortunately, most advocacy efforts with regard to legal solutions have focused on violent and explicitly degrading pornography as worthy of prohibition. Perhaps ironically, many pro-pornography feminists are very concerned about other aspects of women's depiction in society. Sallie Tisdale, for example, describes her concern with the categories of harm present in most legislation:

Brutality takes a lot of forms, and many of them invade us in the most mundane ways. Consider this commercial: a woman's pale, slender hand, her fingernails painted bloodred [sic], is rubbing, rubbing with a white cloth. Her strokes are languid, loving. She is cleaning the base of a white toilet, and as she strokes, she talks about the problems of 'living with men' of how difficult it is to 'keep the bathroom clean' when men and boys are so phallically [sic] present. She has debased herself as far as she can go and wants us to be pleased. *That* offends me, that is the image of women that sparks me to take my daughter aside for a little conversation about the history of sexism. How could the face of a woman in orgasm be more depraved than this? (Tisdale, 1994: 153)

Of course, the argument that pornography is but one aspect of patriarchy and misogyny is no reason not to limit it, but Tisdale's point regarding the *relative* degradation present in pornography, as compared to other, more "acceptable" images of women, is apt.

THE "IDEAL"?...

The "harm" test is built on a series of shaky assumptions. While many of the assumptions that guide the test are true to some people, some of the time, they are far from representative of the attitudes of the Canadian community. The legal criteria for harmful pornography are not the same as the criteria for *misogynist* pornography for a lot of women (Cole, 1989, 1995). To some other women, the notion of misogynist pornography is a contradiction in terms (Tisdale, 1994, McElroy, 1996). Even if the test actually accomplished what it set out to accomplish, however, there is no doubt that it would have two key failings. First, it would inhibit the sexuality of many women whose voices were never represented in LEAF's intervention or in any of the trials associated with the case. Second, it would still permit a wealth of material that, for some women, contributes to gender oppression. In light of this, the test seems fatally flawed.

...AND THE REALITY

The "harm" test, as set out in *R. v. Butler* has never actually rid Canadians of violent and degrading pornography. Neither has it restricted its prohibition to works which might explicitly cause harm in the ways outlined in the judgment. In *Little Sister's v. Canada*, however, the Supreme Court held that the test was a valid measure and that its application could be sufficiently free from discrimination to render it a useful method of protecting Canadian society. Setting aside the flaws in the test's intent, can its application be realistically expected to be true to that intent?

As can be seen in the discussion above, feminists cannot begin to achieve consensus on *whether* pornography causes harm and, if so, *which* pornography does so. Even if material combining sex with violence is seen as obviously obscene, what of degrading and dehumanizing material? Whose measure is used? Catherine MacKinnon's? Sallie Tisdale's?

Of course, neither opinion has any relevance, because the actual judging is mostly done at the border. Fuller and Blackley cite a 1991 study in which 70% of Customs guards interviewed felt that "homosexual acts" were repulsive (Fuller and Blackley, 1996: 111). The first criminal case of obscenity post-*Butler* rendered a judgment of depictions of anal penetration as not "positive, affectionate or human" (Fuller and Blackley, 1996: 45). While either MacKinnon's or Tisdale's version of which material should be prohibited would be sure to anger many people, the current regime would anger both Tisdale and MacKinnon by maintaining access to magazines like *Hustler* and *Penthouse*¹¹ while limiting access to gay, lesbian and feminist materials. It would seem that if the harm test is failing, the community standards test is succeeding: Canada is a homophobic and sexist society, and our tolerance for obscene material reflects our heterosexist and misogynist values. Ironically, anti-pornography feminists are accusing Canadian society of hate while allowing access to sexually explicit material to be judged by the tool of that same society—the law. The notion that the harm test could be consistent with feminist ideals is ridiculously optimistic.

¹¹ Both magazines recently opened Canadian publishing offices to avoid censorship at the border. Of course, most small alternative presses haven't the financial luxury of this option.

THE PRODUCTION OF PORNOGRAPHY

The harms which potentially flow from pornography and other sexually explicit material can, as previously mentioned, be divided into two types: one, harms which occur as a result of exposure to such material and two, harms which come about as a direct result of pornography's production. Following the discussion of the former type of harm, above, the latter type of harm— that which may occur to actors and models who participate in the process of creating pornography— can now be undertaken in more detail.¹²

Obviously, not all sexually explicit material has the capacity for direct harm associated with production. Cartoons, textual material and other pornography that does not require the presence of a model or actor may potentially contribute to anti-social behaviour as a result of their product, but harms associated with the pornographic process can generally be restricted to discussions of photographic, video and film media.

Harms from production occur when the performers who are portrayed in pornography are injured emotionally, physically or sexually in an effort to achieve the pornographic product. The best known example of this type of harm is the urban legend of "snuff" films, films in which a woman is murdered in a sexual context.¹³

¹² The gender-neutral term "actor" will be used to describe both men and women in this industry.

¹³ While it is impossible to entirely disprove the existence of this "genre", there has been no evidence to suggest that snuff films actually exist, despite the offer of one million dollars by the editor of *Screw* magazine over twenty years ago (Strossen, 1995: 190). While other criminal activities have been captured on film— a notable example is the "home videos" of the brutal rapes committed by Paul Bernardo and Karla Homolka—rarely have such tapes been released for distribution. For more information on the status of snuff films as urban legend, please see *Killing for culture*, by David Kerekes and David Slater (1995).

Protests at the 1977 screening of a film called "Snuff", and subtitled "The film that could only be made in South America... where life is cheap!" are often thought of as the beginning of the North American feminist anti-pornography movement, despite the movie's eventual exposure as a hoax (Cole, 1989: 19). Though snuff films may not exist (Kerekes and Slater, 1995), many pornography theorists agree that at least some marketed depictions of sex and/or violence are non-consensual.

Despite the general consensus that harm may be associated with the pornographic process, this topic garners little attention. On the whole, pro-pornography and anti-censorship feminists exclusively restrict their arguments to a discussion of pornographic products and to issues around censorship. While anti-pornography feminists do, by contrast, spend some time examining harms that result from pornography's production, their analyses do not generally go far enough. Virtually no studies exist to confirm or deny the level of coercion on pornographic film sets or in pornographic studios¹⁴.

Likewise, Canadian law does not identify *any* harms associated with the pornographic process. The "harm" analysis extends exclusively to the effect of sexually explicit material on consumers and Canadian society more broadly.

¹⁴ The only study I have found that explicitly examines the pornographic process is an unpublished doctoral dissertation by Sharon Abbott (1999). Abbott's work will be examined in detail later.

This analysis is meant to expose a gap in Canadian obscenity law while moving toward potential solutions that effectively reduce harm to women in Canadian society.

ANTI-PORNOGRAPHY FEMINISTS SPEAK

Andrea Dworkin once noted that, "I was under oath when asked whether, in my opinion, pornography is a cause of violence against women. I hate that question, because pornography *is* violence against women: the women used in pornography" (Dworkin, 1988: 207). Dworkin's comment exemplifies the view of many anti-pornography feminists who argue that the women depicted in sexually explicit material are, by their very involvement, undergoing abuse. Some anti-pornography feminist theorists (Diana Russell, for example) point to visible bruises present in explicit images of women who are bound or otherwise restrained. Other images involve women who show "obvious expressions of disgust" (Russell, 1993: 54). Andrea Dworkin often describes visual pornography in detail to show the pain that must have resulted in its production. For example, Dworkin describes an aspect of one pornographic image as, "A workman dressed in overalls is squeezing one of [the woman depicted's] breasts apparently to a pulp" (Dworkin, 1979: 161).

While anti-pornography feminists (unlike other feminist theorists) do generally display concern about harms that may result from the practice of creating pornography, they have one characteristic in common with most

pornography theorists: they generally fail to actually speak with anyone involved in the making of pornography.

There are a few exceptions to this rule. Many anti-pornography feminists cite the autobiography of Linda Marchiano, star of the highly profitable film *Deep Throat*. Anti-pornography feminist Bonnie Klein sought an insider opinion in her movie *Not a Love Story* in which she interviews stripper Lindalee Tracey. A look at these two case studies reveals a great deal of information on the challenges present in obtaining true consent.

DEEP THREAT

Deep Throat, a “comical” film whose plot centred around the idea of a woman with a clitoris in her throat, is described by Catherine MacKinnon as “a turning point in legitimizing pornography in this country” (MacKinnon, 1987: 128). Initially defended as both non-obscene and sexually liberating, the film underwent a total change in perception (at least, by feminists) when Linda Marchiano, who starred in the film under the name Linda Lovelace, published her memoir. Titled *Ordeal*, Marchiano’s autobiography revealed that she had been coerced by her abusive boyfriend into making the film, and that her entire pornographic career had occurred without her consent. That the film, however, depicts Marchiano smiling and feigning sexual pleasure resulted in a total reassessment of what constitutes consent. As Susan Cole writes,

What’s on screen looks like fun, like sex, like consensual sex, like all the things many people might call erotica. But the pictures do not tell the real off-screen story... Linda (Marchiano) Lovelace describes how she was pimped, assaulted and terrorized in the making of *Deep Throat*... Marchiano has had a great deal of difficulty getting people to believe her

story. This poses an intriguing paradox. Viewers excuse sexual violence in pornography, assuming that it's staged. So why do they assume that the "just sex" materials present women really enjoying sex?... That these women may have been forced to smile for these pictures is somehow never considered" (Cole, 1989: 20).

While Marchiano may have had difficulties in convincing many people of her abuse, anti-pornography feminists immediately seized her story as evidence of precisely the types of abuse they had suspected. Furthermore, Marchiano's story was then generalized to extend to the experiences of all actors and models in the pornography industry. Virtually all the major anti-pornography theorists (Dworkin, MacKinnon, Cole and Ridington, to mention but a few) allude to Marchiano in their writing— but no other voices are represented.

That Marchiano suffered horrific violence at the hands of her pimp/boyfriend is beyond dispute. To generalize Marchiano's experience to the entire pornography industry, however, is simply shoddy research. Nonetheless, Marchiano's experience does introduce an interesting point of view to a discussion of the harms associated with pornography: the difference between true and apparent consent.

Currently, Canadian law considers something obscene if it implies non-consent. As a result, virtually all s/m material, predicated as it is on elaborate scenarios of dominance and submission, is rendered illegal. By contrast, *Deep Throat*, which was produced by deadly coercion, is legal in Canada because it *appears* consensual. Once again, the harm analysis taken in *R. v. Butler* falls far short of any honest attempt at protecting women or Canadian society and instead

simply requests optics that can protect the viewer from the implications of his or her pornographic consumption¹⁵.

NOT A TRUE STORY

When feminist filmmaker Bonnie Klein set out to make a film describing her concerns about pornography, she understood the need to allow industry insiders the ability to speak for themselves. She therefore contacted Lindalee Tracey, a stripper and performance artist then working in Montreal, and asked her to join the movie's progress through various parts of the United States "looking at strip clubs and peep shows and live sex acts, things we don't have in Canada" (Tracey, 1997: 190).

Released in 1981, *Not a love story* eventually realized prominence rarely granted movies made by the National Film Board. Even now, over twenty years after the film's release, it is shown in many university classes as representative of the anti-pornography feminist position. Central to the film's appeal is the representation of Lindalee Tracey as a thoughtful member of the sex industry who, while not entirely "converting" her ways, begins to see how pornography may be degrading.

Like Marchiano, however, Tracey's experience was very different from her depiction in the film. In her 1997 memoir, *Growing up naked*, Tracey discusses her total sense of betrayal by the filmmakers. She writes,

I can't believe what they've turned me into. There's nothing of my studio or my performance art, nothing of me outside my function. I'm reduced to a porno queen... immortalized as a cheap cliché and the 'articulate'

¹⁵ Suggested solutions to this dilemma will be proposed in chapter five.

voice of all the live sex girls... Then at the end I'm a snappy, happy born-again feminist penitent—a bad girl gone good. The film takes credit for my supposed conversion, as if I had no intellectual context before... in New York, the women ask me to pose with Linda Lovelace, another feminist darling who's written a book about her days as *Deep Throat*. There's no connection between her and me except in the minds of the press and my new feminist sisters... (Tracey, 1997: 201-203)

Tracey sadly concludes that,

I am smothering under the weight of the film's lie: that I was re-created and liberated by the filmmakers. It's so humiliating and so subtle a robbery that my mind can barely express it... This film has done what pornography does: abbreviating my details, overemphasizing certain attributes, caging my essence in a single flat dimension (Tracey, 1997: 205).

While there are obvious differences between the experiences of Marchiano and Tracey, the key element is similar: both women felt that their filmed lives were a lie: Marchiano's as a result of explicit coercion, and Tracey's as a result of creative editing. Ironically, many of the same feminists who rail against the mainstream acceptance of *Deep Throat* despite Marchiano's explanation of its production applaud *Not a love story* as an intelligent and honest assessment of the pornography industry and its attendant problems.

TALKING PORN: LOOKING INTO THE INDUSTRY

As previously mentioned, few studies have been done on the working conditions in the pornography industry. One exception to this rule is an unpublished doctoral dissertation written by Sharon Abbott at the University of Indiana. Abbott sought to counter the prevalence of outsider accounts of the industry by conducting in-depth interviews while immersing herself in the industry in order to get insider views on the production of video pornography. Abbott's research was largely restricted to video pornography aimed at a heterosexual

audience and examined the amateur, pro-amateur and professional industries. While Abbott's work must be taken cautiously as further studies are required to substantiate her findings, Abbott's work nonetheless gives some useful information about the nature of pornographic work.

Abbott traveled to Los Angeles¹⁶ in 1996 and 1998 and conducted in-depth interviews with fifty pornographic actors, of whom thirty-one were women and nineteen were men. In addition to these interviews, Abbott attended a large number of industry events including parties, awards shows and production sets. Using both interviews and participant research, Abbott estimates that she spoke with well over one hundred people involved in the industry over her two trips. Abbott explains that her respondents "suggested that there were about two hundred actresses and twenty actors working in the industry at any time. The fifty actresses and actors interviewed, therefore, comprise a large percentage of the total talent pool" (Abbott, 1999: 66).

Abbott's findings are in stark contrast to general perceptions about the pornography industry. While Abbott's study must be substantiated by further work, she generally found that "the work is desexualized, routinized and neutralized, and is more similar to other low status jobs than to deviant and/or illegal careers" (Abbott, 1999: vii). Furthermore, the majority of respondents explained that their motivations for entering the industry were money, flexible hours and "fun" (Abbott, 1999: 123). Many of the motivations for women getting into pornography, then, are the industry's ability to provide that which is least

¹⁶ The majority of pornographic videos aimed at a heterosexual audience are made in Los Angeles, while the majority of gay porn is made in San Francisco (Abbott: 29).

readily available in the larger world: flexibility and money. Given that in 1995, women still made, on average, only 73% of average male earnings,¹⁷ and given, too, the difficulty many women have in balancing the simultaneous demands of family and work (Mandell, 1998: 215), it is not at all surprising that an industry characterized by flexibility and relatively high earnings would be a realistic choice for many women.

Contrary to popular beliefs, Abbott's findings support the idea that actors *choose* pornography rather than being forced into it: "About one third of the respondents interviewed in 1998 had graduated from a four-year college, and all had graduated from high school. In addition to this, two held masters degrees... my respondents had chosen a career in pornography from a variety of other options available to them" (Abbott, 1999: 206).

As opposed to perceptions of the industry as coercive, Abbott found that "most respondents reported that they have never felt forced to do anything they did not want to do, either on-camera or off-camera" (Abbott, 1999: 193). While this result may be due in part to sampling bias (perhaps those who had experienced coercion would feel less comfortable being interviewed), Abbott's results were nonetheless telling. Far from reporting forced experiences, both male and female actors explained that generally women in the industry have a great deal of flexibility in selecting both which men they would like to work with and the productions they would or would not like to participate in. Abbott notes that, "Several actresses stated that they would not work in videos they thought were degrading to women" (Abbott, 1993: 194).

¹⁷ Canadian numbers: Statistics Canada, 1996b.

While it is possible that the pornography industry is not as coercive or explicitly abusive as is often suspected, Abbott isolates a number of sexist elements that do persist. Abbott notes that while many of the women in the industry are treated with chivalry, male actors garner more respect (Abbott, 1999: 183). This is borne out by future careers in the industry: when actors finish performing in front of the camera, many seek out jobs behind the scenes. While many male actors become directors or editors, former female actors can more often be found working as makeup artists, production assistants and set designers, following some of the gendered roles found in the mainstream film industry (Abbott, 1999: 202).

Interestingly, however, the pornography industry does have certain characteristics which challenge traditional gender roles. For example, Abbott writes that, "When asked what it takes to get ahead in the industry, respondents listed traits contrary to those characteristic of traditional femininity. For example, actresses reported that to have a successful career, an actress must have high self-esteem, be sure of herself, retain control over her earnings, be unwilling to be walked on, and be ambitious" (Abbott, 1999: 181). Other women reported entering the pornography industry to better access their own sexuality, a trait generally inconsistent with traditional female characteristics. One female actor, asked about her entry into the field, "reported that she had never had an orgasm, and thought the industry would be a good avenue for exploring her sexuality. She stated that working over the past year has positively changed her attitudes about sex, sexuality and her own body" (Abbott, 1999: 160). Finally, men

generally earn 50% less than women for any given scene, uncharacteristic of almost any other profession (Abbott, 1999: 119)¹⁸. While the different expectations of male and female actors in pornographic work have yet to be studied, these findings seem initially to contradict assumptions of female pornographic actors as weak, abused women forced into the industry.

If the pornography industry is more open to abuse, this may be due to its status as a "deviant" profession: if a woman is sexually harassed or abused while doing sex work, her support from law enforcement officials is likely to be nonexistent. Interestingly, then, Abbott found that the industry has begun to provide its own safeguards for the control of abuse, harassment and workplace injury. To begin with, in order to participate in a professional or professional-amateur project, both male and female actors must show age (in the form of two pieces of valid identification) and, through monthly HIV tests, must provide proof of their HIV-negative status. In addition, Abbott reports that "Frequently, actresses and actors will... be videotaped stating that they are freely consenting to participation and are there at their own will" (Abbott, 1999: 82). Many actors do not sign a release form until after a scene is shot, retaining the right to prevent the scene from being distributed. Finally, the industry has recently established a crisis hotline "intended to provide referral and support to participants in the adult entertainment industry" (Abbott, 1999: 37). These safeguards are clearly not foolproof: one can easily envision a situation where an actor gives her free

¹⁸ Because there are fewer men in the industry and because male actors are often not the focal point of the pornographic product, men generally do not suffer from overexposure, and as a result can work more often, resulting in a similar annual income to women in the industry. Nonetheless, for the same hour's work, women receive more money.

consent but is nonetheless subjected to uncomfortable or abusive treatment once she is in the midst of the scene. In addition, for a situation like that of Linda Marchiano, who was effectively held hostage by her "boyfriend," her consent would be worthless since her refusal to participate would simply have resulted in more abuse. Nonetheless, what is of interest is that this industry has, outside of the traditional realms of policy and law enforcement, chosen to care for the safety of its participants.

PROCESS AND PRODUCT

It is obvious that feminist pornography theorists disagree with regard to the sites of potential harm which may arise as a result of the pornographic product. It is possible, however, that a discussion of the pornographic process could be a site of some consensus: presumably, all feminists, regardless of how empowering they may find pornography, do not expect that it should be produced at the expense of someone's safety. Furthermore, abuses which occur as a result of the process of making pornography can be dealt with in the same way as other forms of violence against women, and may be dealt with less subjectively as they are examined on a case-by-case basis.

Even those who consider pornography abhorrent must acknowledge that the industry currently exists and employs a large number of women: to ignore this fact is simply to perpetuate any abuse that does occur within it. It is simply naïve to assert that feminist anti-pornography efforts will end this industry. While feminists may not agree on the *extent* to which abuse occurs in the making of

pornography, presumably we can agree that such abuse is wrong and should be stopped. Instead of arguing about what constitutes abuse, perhaps we should simply listen to the women for whom this industry is a career. As one woman who is a former pornographic actor stated:

We don't think pornography is going to go away... And what we are basically saying is, let us take care of ourselves. We're perfectly capable of doing it. We have been doing it for years... We want to be able to work and control our business and our lives by ourselves (in Bell: 179).

WHERE DO WE GO NOW?

An analysis of the tests that comprise Canadian obscenity law reveals a wide variety of failings in terms of both intention and application. This analysis furthermore clarifies the amazing complexity of this area of law. It is tempting to conclude that no obscenity law can be devised that does not fall far short of meeting the needs of Canadians. Part of the complexity of the topic, however, lies in the great power sexuality holds. As a result of this power, it is not an option to simply despair without at least an attempt to conceive of solutions that could address some of the failings exposed in the preceding analysis. Having attempted to unveil not only the shortcomings of the current law, but also the many different threads which must be accounted for in the regulation of obscenity, we may now envision some tentative new directions.

CHAPTER FIVE: NEW DIRECTIONS

Having established the litany of problems which plague Canadian obscenity law, it is important to propose alternative methods of providing a balance between the suppression of potentially harmful materials and the *Charter* guaranteed right to freedom of expression. The alternatives proposed aim neither for the total suppression of all pornography nor for the abolition of any sort of restriction on sexually explicit material. Rather, they look toward a more nuanced approach to this law to best ensure that all Canadians are minimally impaired by its application, yet are kept safe by its governance. While not all suggestions are easily undertaken, they are offered in the hopes of inspiring a range of other creative solutions to this very challenging problem.

Any system of regulation can be administered in a dogmatic and restrictive way; for these suggestions to effect real change, they must be undertaken with a constant awareness of the complexity of this debate and the multiplicity of needs that must be addressed by Canadian obscenity law. It is possible that no solutions *can* exist while the obscenity debate continues to be plagued by such polarized views and while obscenity continues to be considered in the context of a heterosexist and patriarchal society. Nonetheless, a number of the most appalling inconsistencies of the current Canadian obscenity regime may be open to suggestions that begin to move this law toward a more effective scheme. While these suggestions can go only a short way toward forging a design that best protects and empowers Canadians, they are offered in an effort to envision

future directions that begin the long road toward effective and equitably enforced laws more generally.

STEP ONE: DEFINE "OBSCENITY"

If the notion of a connection between pornography and violence against women is contentious, the specific characteristics of obscene pornography in Canada are yet more contentious and appear to be somewhat arbitrarily applied. Despite the presence of a thriving Canadian community that combines sexual excitement through sadomasochism with a focus on safe sex and careful rules to ensure consent, all s/m material is prohibited. By contrast, misogynist material in men's magazines popularly thought to be non-pornographic (*Maxim* and *Stuff*, for example) is acceptable. If the intent of Canadian obscenity law is to combat gender discrimination, different and more nuanced criteria are required to ensure this end.

Despite the Court's acknowledgement in *R. v. Butler* that, "The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail." (*R. v. Butler*, 1992: 60), current Canadian obscenity law continues to make that attempt. The definitional quandary which faced the Supreme Court is not limited to discussions of obscenity: in many instances, laws are stretched between definitions which are too rigid (and are therefore applied to far too many circumstances or are subjectively applied) and terms which have only vague definitions (resulting in an obviously subjective application). Faced with this dilemma, however, an acknowledgement that obscenity law is particularly prone

to subjective application must be a guiding factor in other decisions regarding the law's assessment; ideally, great caution must be exercised in making decisions regarding obscenity because of the potential pitfalls caused by inconsistent definition.

A potentially useful definition of legal obscenity in Canada could be "sexual material that may contribute to discrimination against those who have been historically disadvantaged, including, but not limited to women, children, gays and lesbians, people of colour and people with disabilities." Such a definition would avoid terms like harm, pain and violence altogether, recognizing that for some people and communities such terms refer to sexually gratifying behaviour. By contrast, presumably few Canadians "get off" on discrimination. This definition would have an addendum to clarify that material which may discriminate (or give the appearance of discriminating) against one disadvantaged group might be a tool of empowerment for another, and that in such cases, discretion must be used to minimally harm both sides. Because this would undoubtedly be a complicated determination, it would need to be recognized as an area that requires a complex and sophisticated approach that respects the needs of both groups.

It must be conceded that both obscenity and discrimination are subjective terms and that no empirical determination of either term can be adopted. Obscenity law in the past, however, operated as though an empirical assessment was possible. Using discrimination as the criteria for illegality moves the assessment of material from the pretense of objectivity to a realm where

subjective feelings are given weight yet are still noted as subjective: as a result, material can usefully be determined to be discriminatory and/or empowering based on the feelings of those reacting to it.

Of course, a question immediately arises regarding whose assessment of discrimination is to be taken in order to apply this definition. Obviously, were this definition given to law enforcement officials and border guards, a whole new set of confusing and inconsistent decisions would be made regarding what material is obscene. For this reason, a new system must be implemented with regard to who has control over the determination of obscene material. Ideally this system would attempt to recognize that obscenity law may always be a gray area where the truth about a given item is ambiguous and that therefore governance must be approached with caution.

STEP TWO: CABBAGES, CUCUMBERS AND... LITERATURE? ESTABLISH A TRIBUNAL

The fact that border guards are overwhelmingly responsible for the determination of obscene material in Canada has long been the subject of debate (Fuller and Blackley, 1996; Cossman, 1997; Gotell, 1996). While those who have had their material seized at the border are naturally suspicious of the ability of Customs to undertake this task, Canada Customs itself has always had an uneasy relationship with its role as censor. Consider this example of the challenge faced by Customs officials, from the *House of Commons Debates* on August 27, 1958:

Last year I had submitted to me six lithographs for inclusion in this year's calendars. They were six nudes. They had been passed on by all these officers. Three of the nudes were absolutely nude and three had some

sort of diaphanous wrapping around their bodies. One of the more senior officers said the three which had the diaphanous clothing could be admitted because they were semi-clothed. Another officer said their posture was indecent and they should not be admitted, but the nudes could be admitted because their posture was not indecent. This is an example of the judgment that has to be exercised and the kind of artistic skill that has to be passed upon by customs [sic] officers. I really think that we are much better qualified to deal with increasing the seasonal tariff on cabbages and cucumbers than to pass moral judgment on literature coming into the country (in *Little Sister's v. Canada*, 2000: 13).

Apart from concerns about taking on the role of censor, many Customs officers express concerns that the need for a thorough assessment of each item takes up so much time that an accurate reading of each item is virtually impossible (Fuller and Blackley, 1996:130). Given the sheer volume of material entering Canada—approximately 20,000-40,000 pieces of mail (usually including more than one item) *per day*, it is highly unrealistic to expect Canada Customs to assess potentially obscene material at the border. Furthermore, given the vast difference in the number of items that undergo criminal prosecution for obscenity and those prohibited at the border, it seems obvious that imported items are currently being subjected to a very different system than domestic material.

If many of the concerns about the overzealous application of Canadian obscenity law can be left at the border, perhaps the best way to ensure that the law indeed only “minimally impairs” freedom of expression is to rid Canada Customs of this mandate. Customs officials would be free to alert law enforcement officials of the destination of potentially obscene material, but would no longer be responsible for its immediate prohibition. No less an expert than Pierre Berton testified in favour of this idea at the lower court trial of *Little Sister's v. Canada*. Confirming his opinion as a devoted civil libertarian, Berton

nonetheless rejected the notion that all material should always be available for consumption in Canada. Rather, Berton stated that:

I think that books deserve to be judged the same way as a human being is, because books are just as important... as human beings and some may be more important. I think a book has to face a jury of its peers, and through cross-examination and evidence and statements, people on the jury or the judge himself [sic] make up their minds as to whether that book is breaking the law, which are the obscenity laws in this country... But it must have its day in court (in Fuller and Blackley, 1996: 82).

Berton's point is extremely important. In criminal obscenity cases, authors and importers are allowed to testify on behalf of their work; intent can be more accurately assessed and expert witnesses can be called. By contrast, at the border, Customs officials must not only act as judge and jury, but must also be experts on photography, literature and the culture of different sexual practices, among many other roles.

While a criminal trial does allow for a clearer defense of material charged with obscenity, there are nonetheless dismayingly many trials that result in extremely sexist and homophobic decisions such as that given in the case of *R. v. Glad Day Books* (Fuller and Blackley, 1996; Strossen, 1995). Clearly, simply removing the responsibility for the regulation of obscene materials from Canada Customs cannot effectively rid the system which assesses sexually explicit material of its heterosexist and patriarchal bias. Furthermore, expert testimony must be provided on a case by case basis, forcing communities who have been historically targeted by the law to acquire a stable of experts to defend each item in succession. Experts are not simply those chosen by their communities as representatives; neither are expert witnesses allowed in all cases. Rather, both the defense and the prosecution in each case must prove that expert evidence is

required, that "[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge" (Bevan, in Bruce, 1999:1). In each case it must also be made clear to the Court that the individuals called as experts are those who possess relevant knowledge. In the case of obscenity, this often includes the need for social scientists who can testify about obscenity's propensity to generate harm, or its lack thereof. This process is both expensive and onerous; for communities who frequently face criminal obscenity, the acquisition of a group of experts to consistently draw upon may prove an unreasonable challenge.

If neither Customs guards nor criminal trials are the appropriate venue for the fair determination of obscenity, perhaps an alternative must be envisioned. A specialized obscenity tribunal could be devoted to this issue. Ideally, this tribunal would have parallel steps to the criminal court procedures (in terms of stages of appeal). The tribunal would have to be representatively diverse, and would employ experts (using the current legal definition of expert witness) from historically disadvantaged communities. These experts could be retained by the tribunal, but chosen by different communities, thus both relieving historically targetted communities of the effort and cost of acquiring such experts while retaining autonomy. In this way, decisions could begin to counter the pervasive influence of white, male, Christian and middle-class values over obscenity decisions.

Such a system would effectively mark the end of the community standards test, perhaps the only aspect of Canadian obscenity law that has been

functionally applied. It is this application that has resulted in the maintenance of homophobic and sexist attitudes toward obscenity in Canada for so long. Far better than a standard that represents what some mythical, cohesive Canadian community will tolerate would be a system that accounts for those who have been consistently disenfranchised from the Canadian community and attempts to reintegrate non-mainstream points of view back into the debate. Such a system would be far more consistent with feminist teachings than Canada's current obscenity law.

STEP THREE: GOVERN THE PROCESS

Theoretically, abuses which occur as a result of the process of creating pornography are already regulated by existing criminal laws against sexual assault or other crimes. Unfortunately, in practice, most abuses which occur in the context of sex work are ignored by the police (Abbott, 1999). Alternately, victims may fear legal repercussions if attention is drawn to the circumstances under which the abuse took place, thereby choosing not to report such crimes. If a chief concern of a feminist analysis of obscenity is the need to keep women safe, then the need to ensure a safe working environment for those in the pornography industry is of paramount importance.

Currently, the majority of mainstream films that involve the use of animals require the presence of an external observer from the Society for the Prevention of Cruelty for Animals to ensure that the animals do not undergo abuse or neglect on the movie set. Nearly all such films include a disclaimer in the credits,

to the effect of "No animals were harmed in the making of this film". Perhaps the pornography industry needs to develop a similar governing body to ensure that no actors were harmed in the making of any given film or still photograph. In order to understand the particular challenges around consent in this industry, such a body would need to be staffed by insiders— present or past pornographic actors. In this way, pornographic actors reporting concerns would have a better chance of receiving non-judgmental support. Only items which met the standards for safe production would be legal for distribution.

While it is possible that such an idea is hopelessly unrealistic given the scope of the pornography industry and the sheer volume and range of material being created, it is interesting to note that professional and professional-amateur productions are beginning to self-enforce standards of safety and documented consent. Perhaps if feminists and legislators spoke with industry representatives, a realistic method could be undertaken to ensure that movies like *Deep Throat*, made under extreme duress, would be made instead in a safe and supervised fashion.

For Canadian obscenity law to truly purport to challenge violence against women, the law must acknowledge concerns about violence which may come about as a result of the pornographic process rather than simply its product. Law enforcement officials must be informed of appropriate steps to be taken and those in the industry must be assured of prompt and respectful attention if criminal acts are undertaken as a result of the pornographic process.

STEP FOUR: FEMINISTS WHO HAVE CONVERSATIONS— OPEN UP THE DISCUSSION

Perhaps instead of the vitriol which has characterized this debate thus far, feminists who theorize about pornography need to sit down and discuss points of consensus and disagreement. Ideally, a feminist think tank discussing issues around the regulation of pornography, with pornographic actors respectfully included, could work to develop a range of legislative solutions. Likewise, perhaps such an entity could undertake a critical analysis of the failings of the current obscenity law in Canada. Obviously, consensus would never be reached by such a group—feminist positions on pornography and obscenity are too polarized to realistically expect instant solutions. If it is obvious that this process would be dogged with challenges however, it is no less obvious that the time has come for such collaboration. As feminists turn to the state for legislative and legal solutions to dilemmas, it is more important than ever that major sites of disagreement be discussed in a respectful manner. To do so would be the first step in countering the profound alienation and despair of many feminists resulting from the rancor with which this controversy has been discussed. As Jillian Ridington poignantly writes:

We have debated pornography as a legal issue, as part of a panoply of violence against women, and as an issue of artistic freedom. And perhaps that is the crux of the problem—we have debated pornography, but we have not talked about it... We need to talk about why some of us fear the state, and some of us fear the power of the pornography industry and its users more. Maybe we need to adopt a modern version of the 'consciousness raising' groups of the early 70s, in the belief that a collective process may help us reach some sort of consensus. If we look at the origins of our own ideas, and learn from other women who have also thought about those things—but have come to very different conclusions—a real dialogue might start. Enough of the porn debates. Let's have conversations instead. We may never share an identical analysis, but we may at least find a small space of common ground on which we can build. It's going to be a long and difficult conversation, but isn't time we started talking? (Ridington, 1994: 33)

Perhaps Ridington's ideas are simply misplaced optimism or ill-conceived idealism. Maybe they are, however, evidence of precisely the paradigm shift that this debate so desperately requires.

CONCLUSION

During the lower court trial of *Little Sister's v. Canada*, feminist artist Persimmon Blackbridge described "Drawing the line: Lesbian sexual politics on the wall", an art installation created by the Vancouver collective Kiss and Tell. Blackbridge explained that,

The photos are arranged on the gallery walls, starting with relatively non-controversial photographs with no nudity or explicit sex, and ending with photos which are deliberately constructed to cover a range of problematic and controversial issues. Viewers are invited to express their opinion of the various photographs, to 'draw the line' as regards their personal limits. Women viewers write their reactions directly on the walls around the photographs... The gallery walls are soon scrawled over with writing. The pictures float in a sea of text, no longer functioning as separate sexual images, but set literally within the context of debates, discussions, and disagreements about sexual representation (in Fuller and Blackley, 1996: 72).

Any analysis of Canadian obscenity law must begin by questioning whether "the line" should or can be drawn; where; and how. Like viewers of the Kiss and Tell show, Canadians must continue to grapple with the challenges associated with acknowledging the potential for sexuality as a site of oppression while maintaining its liberating potential. This is definitely a risky undertaking, but as Adrienne Chambon writes, "...transformative knowledge is disturbing by nature. It disturbs commonly acceptable ways of doing and disturbs the person implementing it. It ruffles our certainties, disorganizes and reorganizes our understanding..."(Chambon et al, 1999: 53)

By attempting radical approaches to the regulation of obscenity, by challenging existing methods, and most of all by using the pornography debate as a fertile source of unconventional solutions, we may truly arrive at techniques that "disturb our common ways of doing". In doing so, we may arrive at a Canadian obscenity law that provides the greatest equality and respect to all Canadians.

APPENDIX: RELEVANT LEGISLATION AND ENACTMENTS

(From *Little Sister's v. Canada*, 2000: 14-17; *R. v. Butler*, 1992: 22-23.)

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

163 (1) Everyone 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;

...

(2) Every one commits an offense who knowingly, without lawful justification or excuse, (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever; (b) publicly exhibits a disgusting object or an indecent show;

...

(3) No person shall be convicted of an offense under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(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.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) Where the 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... or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

...

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

Canadian Charter of Rights and Freedoms

1) The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2) Everyone has the following fundamental freedoms:

...
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

24. (1) Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Constitution Act, 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Customs Tariff, R.S.C., 1985, c. 41 (3rd supplement)

114. The importation into Canada of any goods enumerated or referred to in Schedule VII is prohibited.

Customs Tariff, S.C. 1987, c. 49, Schedule VII

9956 Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that (a) are deemed to be obscene under subsection 163 (8) of the *Criminal Code*

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