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CENSORSHIP IN CANADA

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In Canada, they say that every time Washington sneezes, Ottawa blows its nose. Unfortunately, there is more truth to that observation than I wish were the case. Having become a Canadian, I would like to feel that we are something more than a branch-plant economy. Economic dependency, however, is a reality, and much of the constitutional debate going on in Canada is designed to create a government that would be more sympathetic to economic globalization and North American economic integration. However, to understand the Canadian story on censorship, you need to understand that despite all the geographic and demographic similarities between Canada and the United States, Canada has a very different political culture. In particular, there are vast differences in the relationships of both individuals and provinces to the state. For example, Canadians expect services from the state and turn to it for distributive justice far more often than do Americans.[1] Another difference lies in the two countries' post-secondary educational system; universities and community colleges are far more accessible in Canada than in America.[2]

Canada's socialist parties attract a wide base of support, unlike their American counterparts. Although Canada's socialist New Democratic Party (NDP) has never been in control federally, it has held power provincially.[3] The NDP is the social conscience of Canada and is

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1. *See, e.g.*, ROBERT CHODOS ET AL., SELLING OUT: FOUR YEARS OF THE MULRONEY GOVERNMENT 65 (1988) (stating that Canadians have come to rely on a comprehensive system of public support for health care, child rearing, higher education, and old age security).

2. *See* Victor Dwyer, *Eyes on the Prize: In a World Where There Are No Guarantees, University Remains a Cherished Opportunity*, MACLEAN'S, Nov. 15, 1993, at 42, 43 (discussing Canadian universities' "tradition of accessibility" and noting that government price caps of various kinds have kept the average tuition at Canada's universities $800 lower than the figure for comparable (public) universities in the United States).

3. *See* Clyde H. Farnsworth, *Leftist Party in Canada Wins Power in 2 Provincial Governments*, N.Y. TIMES, Oct. 23, 1991, at A3 (reporting that after the 1991 provincial elections, three Canadian provinces were governed by members of the NDP: Ontario, Saskatchewan, and British Columbia).

responsible for much progressive social legislation.[4] A popular example of this is the health care program; lesser-known examples include federal subsidies for the arts, such as the Canadian Broadcasting Corporation and the National Film Board.[5]

In addition, many legal differences exist between Canada and the United States. Canada's equivalent of *Roe v. Wade*,[6] for example, was based on health rights, not on privacy rights.[7] Canada also has anti-hate-literature legislation that would probably shock the American Civil Liberties Union.[8] I am not sure how that happened, but perhaps there may have been some guilt over Canada's despicable record of not taking in Jewish refugees from Europe in the 1940s.[9] The anti-hate legislation,

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4. "[T]he social, economic and political progress of Canada can be assured only by the application of democratic socialist principles to government and the administration of public affairs." K.D. EWING, MONEY, POLITICS, AND LAW: A STUDY OF ELECTORAL CAMPAIGN FINANCE REFORM IN CANADA 232-33 (1992) (quoting statements of the purposes, aims and principles of the NDP as embodied in the NDP's constitution) (citation omitted).

5. *See, e.g.*, Appropriation Act No. 2, ch.11, 1991 S.C. 117 (Can.) (sched. A) (authorizing the payment of $903,762,000 toward the operating costs of the Canadian Broadcasting Corporation, and $79,128,000 for the National Film Board). The Government has subsidized other arts services, including the National Gallery of Canada and the National Arts Centre Corporation. *Id.*

6. 410 U.S. 113 (1973).

7. *See* Morgentaler v. R., [1988] 1 S.C.R. 30, 81 (Can.) (ruling that the "security of the person" protected by § 7 of the Canadian Charter of Rights and Freedoms "must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction").

8. *See, e.g.*, Canadian Hate Propaganda Act, R.S.C., ch. C-46, § 319(2) (1985) (Can.) (making persons who wilfully promote hatred against identifiable groups liable for criminal offense).

9. *See* Howard Adelman, *Canadian Refugee Policy in the Postwar Period: An Analysis*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 172, 188 (Howard Adelman ed., 1991):

> Before, during and after [World War II], Canada continued to have the worst record, a record which . . . had its roots directly in the antisemitism of bureaucrats, such as Frederick Blair, and politicians, such as Prime Minister Mackenzie King . . . .
>
> Initially, then, Canada's refugee policy was motivated by discrimination and implemented by political leaders and mandarins with broad general public support and only the opposition of leading religious leaders and some newspaper editorials.

Id. (citation omitted).

however, does not seem to have done much good,[10] and, besides, even Weimar Germany had anti-hate literature legislation.[11]

What has been particularly fascinating for those of us who follow politics is Canada's new constitution.[12] In the early part of Canadian history, final decisions were made by the Privy Council in Britain and based on the common law.[13] It was Pierre Elliot Trudeau who "patriated" the constitution.[14] Trudeau, a rebel and a free spirit who had grown up in Quebec during the Duplessis regime,[15] had every reason to ensure that our new constitution was akin to the American Constitution in the latter's First Amendment protections.[16] Section 2 of the Charter of Rights and Freedoms, therefore, specifies that "Everyone has the following freedoms: . . . Freedom of thought, belief, and opinion and

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10. The provision rarely results in conviction. *See Canadian Convicted in Anti-Semitism Case*, N.Y. TIMES, July 11, 1992, at 3 (reporting the successful second prosecution of Alberta schoolteacher James Keegstra for promoting anti-Semitism after his first conviction, in 1985, had been overturned, and noting that the earlier conviction was "the first time Canada's anti-hate law had been successfully prosecuted"). *See generally* Bruce P. Elman, Her Majesty the Queen v. James Keegstra: *The Control of Racism in Canada, A Case Study*, *in* UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 149-76 (Louis Greenspan & Cyril Levitt eds., 1993) [hereinafter UNDER THE SHADOW OF WEIMAR] (discussing the case and the legal and constitutional obstacles—including § 2(b) of the Charter of Rights and Freedoms—to successful prosecution of hate crimes in Canada).

11. For a thorough discussion of the anti-hate speech laws of the Weimar Republic and an analysis of how even those laws were exploited by the Nazis in their rise to power, see Cyril Levitt, *Under the Shadow of Weimar: What Are the Lessons for the Modern Democracies?*, *in* UNDER THE SHADOW OF WEIMAR, *supra* note 10, at 15-37.

12. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA §§ 1.2-1.3, at 7-8 (3d ed. 1992) (describing the enactment of the Canada Act of 1982 and the Constitution Act of 1982, which terminated British Authority over Canada, adopted a charter of rights, and established a formula for constitutional amendment).

13. *See id.* § 1.2, at 6.

14. *See id.* § 4.1(a), at 63 (describing Trudeau's initiation of legislation which resulted in the enactment of the Canada and Constitution Acts).

15. *See* THOMAS BUTSON, PIERRE ELLIOTT TRUDEAU 25 (1986) (describing Trudeau as a "restless young man" who criticized the ultraconservative Duplessis provincial government which he claimed was "suffocating the people").

16. In his push to initiate constitutional reform, Trudeau insisted that a "charter of fundamental rights and freedoms be entrenched in the new constitution and that it extend to . . . language rights." For Trudeau, this provision was non-negotiable. *See id.* at 102 (describing Trudeau's proposal that "the new Canadian Constitution include a Canadian version of the United States Bill of Rights . . . incorporated into the new Constitution and therefore outside the authority of Parliament").

expression, including freedom of the press and other media of communication."[17] That last would include videotapes.[18]

Much of Trudeau's passion for civil liberties grew out of a very famous case in Quebec in which a Jehovah's Witness was denied a liquor license for his restaurant because he had offended Duplessis.[19] But the same Trudeau, as Prime Minister during the Front for the Liberation of Quebec (FLQ) crisis, invoked the War Measures Act, depriving the entire country of basic rights and resulting in the arrest of hundreds of Québecois.[20] Trudeau's inconsistency in these matters is typical of the country, and his championing of freedom of expression was to some extent simply a reflection of the liberalism of the postwar period. In any case, we have Trudeau to thank for the codification of rights in the Charter of Rights and Freedoms.

Of particular interest in the Charter is Section 15, which reads: "Every individual is equal before and under the law and has the right to the 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."[21] Section 15 specifically does not preclude programs that seek to improve

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17. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

18. *See* R. v. Butler, [1992] 1 S.C.R. 452 (Can.). In *Butler*, the Canadian Supreme Court ruled that although laws criminalizing pornographic videotapes are ultimately justifiable under § 1 of the Canadian Charter of Rights and Freedoms, such laws infringe § 2(b) of the Charter. *See id.* at 489.

19. *See* Roncarelli v. Duplessis, [1959] S.C.R. 121 (Can.) (holding that Duplessis, the Premier of Quebec, improperly ordered the cancellation of Roncarelli's license because his exercise of discretion in doing so was not related to the objects and purposes of the licensing act and was made in attempt to "punish" Roncarelli). *Roncarelli* has been described as "represent[ing] a landmark in the interpretation and application of the rule of law in Canada." CANADIAN CONSTITUTIONAL LAW IN A MODERN PERSPECTIVE 13 (J. Noel Lyon & Ronald G. Atkey eds., 1970).

20. *See* Kevin Sneesby, Note, *National Separation: Canada in Context—A Legal Perspective*, 53 LA. L. REV. 1357, 1363 (1993) (explaining that Prime Minister Trudeau, with the support of the House of Commons, invoked the War Measures Act to quell the FLQ Crisis). The War Measures Act empowered the government to do "almost anything it deemed necessary to meet a given emergency, including setting aside civil rights." Jay Walz, *Canada Invokes Wartime Powers in Quebec Terror*, N.Y. TIMES, Oct. 17, 1970, at 1, 12. The crisis resulted from the kidnapping of a British diplomat and the kidnapping and murder of the Quebec Labor Minister by the FLQ, a left-wing terrorist organization. *Id.* Invocation of the War Measures Act enabled the government to make searches and arrests without warrants. *See id.*

21. CAN. CONST. (Constitution Act, 1982), pt. I, § 15(1).

the conditions of disadvantaged individuals or groups,[22] thus, it permits affirmative action.[23] The women's movement in Canada fought very hard for the inclusion of that clause,[24] which is neither branch-plant nor derivative, and that achievement may have been the movement's greatest moment.

The liberal era of Trudeau saw the recommendation of Canada's Federal Law Reform Commission that obscenity be removed from the criminal code.[25] At that time, Section 163(8) of the criminal code defined obscenity as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of . . . crime, horror, cruelty and violence . . . ."[26] The commission, in recommending Section 163(8)'s excision, was not convinced that pornography was harmless; but the mood of the time was to decriminalize social problems.[27] The commission's advice, however, was not taken,

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22. *Id.* § 15(2):

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Id.

23. *See id. See also* M. David Lepofsky, *The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?*, 55 LAW & CONTEMP. PROBS. 167, 174 (1992) (discussing § 15(2) in the context of affirmative action).

24. CANADIAN HUMAN RIGHTS FOUNDATION, MULTICULTURALISM AND THE CHARTER 6-7 (1987) (stating that women's groups that participated in the discussions before the 1981 Joint Parliamentary Committee supported the adoption of § 15). "[S]ection 15(2) may be able to be used to give employment preferences to minorities, aboriginals and women." *Id.* at 13.

25. *See* LAW REFORM COMMISSION OF CANADA, WORKING PAPER 10: LIMITS OF CRIMINAL LAW 48 (1975) (recommending that both "public obscenity," e.g., posters, advertisements, magazines, and broadcasts, and "obscenity" that might become available to children, continue to be criminalized, but that "private obscenity" be decriminalized):

> [T]he criminal law can't properly be used either to save the individual or the society from itself. Individuals should be free to choose their own life-style and society should be free to change. In practical terms this would mean considerable change. It would mean decriminalizing much obscenity. In detail it would mean that pornography stores, pictures and so on carefully restricted to "adults only" would be allowed.

Id.

26. Criminal Code, R.S.C., ch. C-34, § 159(8) (1970) (Can.). The section number of the statute was changed to 163 in 1985.

27. *See* LAW REFORM COMMISSION OF CANADA, *supra* note 25, at 48 ("In this context the criminal law can't properly be used either to save the individual or the society from itself.").

and the matter was dropped as Canada began to share in the conservatism of the Reagan–Bush era.

Notwithstanding the experience of the Federal Law Reform Commission, there was a period of liberal decisions in Canadian politics and arts that one can look back on now with some astonishment. For a while, Canada had liberal judges who defined community standards broadly. For example, the first case in which I ever testified concerned a gay newspaper called *The Body Politic*, which carried an article on sexual relations with young boys.[28] At one point, the judge turned to me, and said "It's like oral history, right?" I said, "Right!," and the case was won. That would never happen today.

In the meantime, it has become clear that the problem in Canada is not the bench but the bureaucracies, and in particular customs officials, who look at books and magazines as commodities and who have become increasingly hostile to the importation of gay and lesbian materials.[29] Efforts to limit the power of customs officials have largely failed.[30] These officials seem to be a law unto themselves; they can keep small bookstore owners impoverished by legal costs. Most recently, and still unresolved, two women in Toronto brought charges to the Ontario Human Rights Commission concerning pornographic magazines found in convenience stores.[31] In addition, we have local film censor boards, which means that there are films that you can see in Quebec that you cannot see in Nova Scotia and that you might or might not be able to see

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28. R. v. Pink Triangle Press, 51 C.C.C. (2d) 485 (Cty. Ct., Judicial Dist. of York, Ont. 1980) (Can.) ("The case involved an issue of 'The Body Politic' journal which was mailed to subscribers and which contained an article entitled 'Men Loving Boys Loving Men' which dealt with the experiences of several homosexual pedophiles.").

29. *See, e.g.*, Mark Abley, *Gay Literature Prey to Strange Customs*, MONTREAL GAZETTE, Oct. 3, 1993, at A1 (reporting that Canadian customs officials seized more than 8100 publications in 1992 and that in many instances the officials use their authority to discriminate against gays and lesbians).

30. *See* Don Gillmor, *Strange Customs*, SATURDAY NIGHT, Mar. 1993, at 31, 67 (noting that although customs officials' determinations can be appealed and overruled, they consider such rulings as "opinions" only and will continue to make similar determinations in the future).

31. *See* Donna LaFramboise, *Anti-Porn Crusade Victimizes Three Stores*, TORONTO STAR, July 5, 1993, at A17.

in Ontario.[32] In Toronto we also have "Project P," which acts as a watchdog and lays charges against vendors.[33]

The feminist campaign against pornography in Canada mimicked the campaign in the United States—sometimes, it seems, we have branch-plant feminism, too. Women were "taking back the night," picketing video stores,[34] and, in the extreme, engaging in arson.[35] In one of the arson cases, the British Columbia Court of Appeal upheld the criminal code on obscenity and referred to the extent to which pornography, while not legitimating inequality, could interfere with its achievement.[36] In

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32. *See, e.g.*, John Barber, *Sex and Censorship*, MACLEAN'S, Sept. 1, 1986, at 37 (discussing inconsistent standards among the regions and noting that in Winnipeg a retailer was fined for renting out an adult video while in Toronto the same video was shown legally in adult cinemas).

33. *See* Gillmor, *supra* note 30, at 66 (identifying Project P as "an anti-pornographic squad in Toronto").

34. *See* Juanita Sauve, *Art or Obscenity?; Change Attitudes: Limit Access to Sexist Materials*, OTTAWA CITIZEN, July 31, 1991, at A11 (encouraging readers to boycott establishments that carry X-rated videos and magazines, and engage in "peaceful demonstrations and picketing of strip clubs and adult video stores").

35. *See* Liss Jeffrey, *Hard-Core Capitalists*, CANADIAN BU$INESS, Nov. 1984, at 44, 47-48. In 1982, a group called the Wimmins Fire Brigade claimed credit for firebombings of two Red Hot Video stores, part of a British Columbia chain that sold and shipped adult videos in unmarked boxes by courier service. *See id.* Red Hot Video was later charged with obscenity and tried in British Columbia. *See id.*

36. *See* R. v. Red Hot Video Ltd., 45 C.R. (3d) 36 (B.C.C.A. 1985) (Can.). In this case, the British Columbia Court of Appeal upheld an obscenity conviction of the Red Hot Video chain against a claim that § 163 of the Canadian Criminal Code (deeming obscene "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any [of] crime, horror, cruelty and violence") was both vague and overbroad, in violation of § 7 of the Charter of Rights and Freedoms, and was not a "reasonable limit" upon freedom of expression within the meaning of § 1 of the Charter. *See id.* at 43-44. The court opined that any restriction on freedom of expression from banning obscenity could be "'demonstrably justified'. . . only if it can be shown that the material sought to be banned from publication causes or threatens to cause real and substantial harm to the community." *Id.* at 59 (separate opinion of Anderson, J.A.) (quoting § 1 of the Charter).

In making its finding of harm, the court made note of § 28 of the Charter (stating that "[N]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons"), concluding that:

> If true equality between male and female persons is to be achieved it would be quite wrong . . . to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material [in the case at bar]. . . . [S]uch material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.

response to considerable pressure from the women's movement, in 1984 the government set up the Fraser Commission to investigate pornography, sexual assault and prostitution.[37] At the time, nobody questioned the linkage. In any case, we now had this great commission on our hands, and this resulted in a series of draconian recommendations that seemed utterly unrelated to the findings of the commission itself. The commission found that there was no evidence of any causal link between pornography and sexual assault against women. What the commission did say, however, was that equality was the relevant issue and that if we had to choose between Section 2(b) of the Charter (freedom of expression) and Section 15 (equality), the latter must prevail.[38]

The Fraser Commission did not develop this idea, it merely asserted it—leaving some of us to wonder whether, if ever we did achieve gender equality, we could return to greater freedom of expression. Feminists against pornography regarded this report as a great triumph, but the splitting of equality and freedom of expression is as regressive as anything feminists could imagine. A feminist concept of equality is transformative, and one cannot separate structural equality from liberation. Nevertheless, the report is often cited as an important step in the pornography-freedom of expression discourse.[39]

In Canadian political tradition, the doctrine of the supremacy of Parliament is critical.[40] What concerns many intellectuals on the left in Canada is the drift toward locating final authority in an appointed supreme court rather than in an elected parliament. That is why legal scholars, journalists, lawyers, and concerned members of the public have become

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Id. (separate opinion of Anderson, J.A.).

37. *See* Michael Kanter, *Prohibit or Regulate?: The Fraser Report and New Approaches to Pornography and Prostitution*, 23 OSGOODE HALL L.J. 171, 172-74 (1985) (tracing the establishment of the commission to both feminist concerns about the prevalence of degrading images of women and to provincial and municipal agitation for tough federal anti-prostitution legislation); Thelma McCormack, *Pornography and Prostitution in Canada: The Fraser Report*, 1 ATLANTIS 13 (1987).

38. *See* Kanter, *supra* note 37, at 177-78 (explaining that "the Report is quite well informed by feminist insights . . . not[ing] that the right to freedom of expression conflicts with the right of women to equal treatment").

39. *See generally id.*

40. *See* HOGG, *supra* note 12, §§ 12.1-12.2, at 301-07 (explaining that in the Canadian constitutional order, much as in the British system from which it evolved, there is no judicial review of legislation; courts have no power to deny the force of law to any statute enacted by Parliament). As Hogg notes, even the recently-promulgated Canadian Charter of Rights and Freedoms does not cabin parliamentary sovereignty, inasmuch as § 33 of the Charter enables Parliament to override many provisions of the Charter merely by expressly declaring that a statute will operate notwithstanding the Charter. *Id.* § 12.2(b), at 304-05.

avid court watchers, and why the recent *Butler* decision on obscenity[41] takes on special meaning.

In February 1992, the Supreme Court of Canada, in the unanimous (and now infamous) *Butler* decision, ruled that Section 2(b) of the Charter ultimately offered no protection to several pornographic videos that a Manitoba court had held to be protected.[42] Seven months later, the Court reversed an Alberta decision on hate literature and struck down Section 181 of the criminal code, on this occasion *deferring* to Section 2(b) of the Charter.[43] In other words, the Court discriminated against the arts and entertainment community in February but protected the lunatic fringe in August.

Feminist lawyers took credit for the *Butler* decision. The Legal Education and Action Foundation (LEAF)[44] submitted a brief in the

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41. R. v. Butler, [1992] 1 S.C.R. 452 (Can.).

42. *See id.* at 509. Donald Victor Butler opened an adult video store in Winnipeg, Manitoba, in August, 1987. Soon, law enforcement authorities executed search warrants on the store, resulting in Butler's arrest and indictment on 250 counts of selling, exhibiting, and possessing with intent to sell obscene material, in violation of § 163 of the Criminal Code. *See id.* at 460-61. The trial court convicted Butler on eight counts relating to eight films. *See id.* at 462. On appeal, a majority of the Manitoba Court of Appeal reversed the trial judge with respect to the remaining counts, and Butler appealed. *See id.*

The Supreme Court ruled that although § 163 of the Criminal Code, in seeking to restrict the communication of certain types of materials based on their content, infringed § 2(b) of the Charter, *see id.* at 489, the infringement was nonetheless justified as a "reasonable limit" under § 1 of the Charter, *see id.* at 509-10. The Court ordered a new trial on all charges in light of its reasoning. *See id.* at 510.

43. *See* R. v. Zundel, 95 D.L.R. (4th) 202 (1992) (Can.). Ernst Zundel was convicted on one count of violating § 181 of the Canadian Criminal Code, which penalizes the willful publication of a "statement, tale or news that [the publisher] knows is false and that causes or is likely to cause injury or mischief to a public interest," because he distributed a 32-page booklet entitled *Did Six Million Really Die?* denying the existence of the Holocaust. *See id.* at 254.

On direct appeal, the Supreme Court ruled that § 181 infringed the right of free expression guaranteed by § 2(b) of the Charter and that the infringement was not saved by § 1 of the Charter. On the free expression issue, the Court held that § 181 violated § 2(b) on its face, inasmuch as § 2(b) "serves to protect the right of the minority to express its view, however unpopular it may be; . . . it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception." *Id.* at 260-61. Moreover, § 181 was not saved by § 1, because even if § 181 could be construed to promote a pressing and substantial concern such as racial tolerance, it would still make convictions possible "for virtually any statement which does not accord with currently accepted 'truths' [thus leading] essentially to . . . the prosecution of unpopular ideas." *Id.* at 272. Accordingly, an acquittal was ordered. *See id.* at 279.

44. A non-profit women's advocacy group based in Toronto.

Butler case that gave prominent place to the ideas of Catharine MacKinnon and Andrea Dworkin.[45] MacKinnon had taught in Canada, and has remained in close contact with LEAF. Indeed, according to the *New York Times*, she assisted in writing the brief.[46] But the *Butler* decision is a very reactionary one; it does not reaffirm Section 15 of the Charter, i.e., equality, but rather the Criminal Code, i.e., law and order.[47] If Canadians were under any illusion that Section 2(b) meant that we could read what we choose to read and that the invisible hand of the marketplace would determine what booksellers could sell, that we were entering into an era of unprecedented freedom, the *Butler* decision showed them they were wrong. As far as the Supreme Court was concerned, Section 163(8) (Criminal Obscenity) trumped Section 2(b).[48] Indeed, according to the Court, Section 163(8) went further than its literal language; under "obscenity," it embraced materials that were "degrading and dehumanizing"[49]—which materials, the Court intoned, "run against the principles of equality and dignity."[50] In other words, the Court gave Section 163(8) a cosmetic facelift.[51]

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45. *See* Michele Landsberg, *Canada: Antipornography Breakthrough in the Law*, MS., May/June 1992 at 14 (describing how Kathleen E. Mahoney, a professor of law at the University of Calgary, successfully represented LEAF in court, and stating that Catharine A. MacKinnon, a professor of law at the University of Michigan, assisted in the victory); Tamar Lewin, *Canada Court Says Pornography Harms Women*, N.Y. TIMES, Feb. 28, 1992, at B7.

46. *See* Lewin, *supra* note 45.

47. *See Butler*, 1 S.C.R. at 509.

48. For the text of the definition of "obscenity" given in § 163(8) of the Criminal Code, see *supra* note 36; for the Court's view of the relationship of § 163(8) to §§ 1 and 2(b) of the Charter of Rights and Freedoms, see *infra* note 51.

49. *See Butler*, 1 S.C.R. at 478.

50. *Id.* at 479.

51. Under the guise of determining what exploitation of sex would be considered "undue" under the statute, the Court made two quantum leaps. First, after noting various tests that had been applied in prior decisions, the Court announced, in no apparent context, that "[p]ornography can be usefully divided into three categories." *Id.* at 484. These three categories were "explicit sex with violence"; "explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing"; and "explicit sex without violence that is neither degrading nor dehumanizing." *Id.* Second, the Court announced that henceforth the "arbiter" of what would constitute undue exploitation of sex would be "the community as a whole." *Id.* Specifically, said the Court, "[t]he courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure." *Id.* at 485.

Combining these two leaps produced the facelift that the Court evidently thought § 163 needed:

> In making this determination [of what the community as a whole would tolerate] with respect to the three categories of pornography referred to above, 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. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

Id.

Following this elucidation, the Court evaluated § 163 for compliance with § 2(b) of the Charter, deciding that because the statute seeks to restrict the communication of certain types of expressive materials based on their content, it infringes § 2(b). *See id.* at 489.

The payoff for the Court's creative reworking of § 163(8) came in the Court's § 1 analysis. In his appeal, Butler had argued that § 163(8), in its definition of obscenity, was so vague as not to qualify as a "'limit prescribed by law.'" *See id.* at 490 (citing § 1 of the Charter). The Court dismissed this argument. "Standards which escape precise technical definitions, such as 'undue,'" it stated, "are an inevitable part of the law. . . . In my opinion, the interpretation of [section] 163(8) in prior judgments which I have reviewed, *as supplemented by* [this opinion], provides an intelligible standard." *Id.* at 491 (emphasis added).

More challenging to the Court was Butler's argument that the harms § 163 protected against were not substantial or pressing enough to justify the law's strictures. *See id.* at 491-92. The Court analyzed § 163(8) on two fronts: first, whether the harm caused by the circulation of obscene materials is substantial enough to justify some restrictions on freedom of expression, *see id.* at 491-99, and second, whether the means employed by § 163(8) are proportionate to that objective, *see id.* at 499-509.

The Court answered the first of these questions in the affirmative:

> This Court has . . . recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression. . . . [T]he burgeoning pornography industry renders the concern even more pressing and substantial than when the impugned provisions were first enacted. I would therefore conclude that the objective of avoiding the harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression.

Id. at 496-98.

On the question of proportionality, the Court conceded that the determination must hinge on the showing of an "actual causal relationship between obscenity and the risk of harm to society at large." *Id.* at 501. Indeed, the Court went so far as to state that "[o]n this point, it is clear that the literature of the social sciences [with regard to this question] remains subject to controversy." *Id.* (citing, inter alia, the Fraser Report).

In the end, however, the Court was undisturbed by the inconclusiveness of that literature: "While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs." *Id.* at 502 (citing U.S. DEP'T

The *Butler* decision is not a sophisticated leftist critique of value-free modes of inquiry. It belongs to the right. Its dogmatism gives it away. There is no need, the Court said, to provide any evidence that obscenity does harm. According to the Court, the harm is self-evident: "It is apparent . . . that it is sufficient . . . for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm."[52] This is similar to the language of the Meese Commission, which also rejects the necessity of offering any evidence.[53]

Butler did not reject the concept of community standards.[54] Although there has been a great deal of criticism and debate about community standards, that concept was a way of democratizing the response to pornography. In *Butler*, however, the Court gutted what was good about the community standards test—its democratization—and kept what was bad about it—its majoritarianism—and refined it to mean the "moral" majority. For example, in the *Butler* model, I do not speak for myself; in a measure of community standards, I am asked by the court to

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OF JUSTICE, ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT 326 (1986) [hereinafter FINAL REPORT]). Predictably, the Court concluded that § 163 constitutes a reasonable limit on freedom of expression under § 1 of the Charter. *See id.* at 509-10.

52. *Id.* at 505.

53. The Meese Commission's treatment of the problem of causal relationship between obscenity and harm is a masterpiece of equivocation. *See, e.g.*, FINAL REPORT, *supra* note 51, at 307 ("We . . . reject the suggestion that a causal link must be proved 'conclusively' before we can identify a harm."); *id.* at 308 ("[W]e openly acknowledge that in many areas we have reached conclusions that satisfy us for the purposes for which we draw them, but which would not satisfy us if they were to be used for other purposes."); *id.* at 326 ("We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behavior, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior."); *id.* at 332 ("With respect to material [that depicts sexual degradation but not violence], there is less evidence causally linking the material with sexual aggression, but this may be because this is a category that has been isolated in only a few studies, albeit an increasing number. The absence of evidence should by no means be taken to deny the existence of the causal link.").

54. *See Butler*, 1 S.C.R. at 484 (holding that the norm for determining what amounts to an undue exploitation of sex is "the community as a whole"); *see also* Thelma McCormack, *Censorship and Community Standards*, *in* COMMUNICATIONS IN CANADIAN SOCIETY (B. Singer ed., Addison-Wesley 1972).

decide what I think others would tolerate.[55] The model pitches community standards at the point of least tolerance, and it requires us to police one another—a very dangerous doctrine. The Court at least was very forthright in its concept of consent. According to the Court, materials that depict women consenting to behavior that shows them in subordinate roles are not based on consent; such materials are a pathetic indictment of our culture.[56]

The fallout from *Butler* has included the harassment of gay and lesbian bookstores, which have little clout and few resources.[57] LEAF has remained silent throughout, offering no help to the gay and lesbian communities in their legal battles.[58] A Toronto bookseller was convicted of selling *Bad Attitude*, a lesbian sex magazine, while magazines like *Hustler* are sold freely throughout Canada.[59] As a result, LEAF has begun to lose credibility in various women's groups.

Like the Fraser Commission, LEAF has achieved some success in linking pornography to inequality, which is the crux of the MacKinnon-Dworkin approach.[60] Sexual inequality, they say, is the prototype of all

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55. *See Butler*, 1 S.C.R. at 485 ("The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from the exposure."); *id.* at 478 ("[T]he community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate *other* Canadians being exposed to.").

56. *See id.* at 479 ("In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.").

57. *See, e.g.*, Abley, *supra* note 29; Mary W. Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6, 1993, at A1 (detailing censors' raids on Pages Books and Magazines and Glad Day bookstore in Toronto, in which various alternative-sexuality materials were seized).

58. *See* Frances Bula, *Feminists Find Victories Shallow*, VANCOUVER SUN, Feb. 22, 1993, at A3 (noting that although LEAF lawyers defend their position by arguing that gays and lesbians should be targeting law enforcement authorities and courts which abuse the *Butler* definition rather than blaming feminists, LEAF has made no efforts to help gay and lesbian bookstores with their legal battles).

59. *See* Walsh, *supra* note 57, at A17 (reporting that following an undercover purchase of *Bad Attitude*, a Canadian trial judge found the magazine legally obscene and fined Glad Day the equivalent of $160).

60. *See* Landsberg, supra note 45, at 14 (stating that MacKinnon and Dworkin worked with attorneys for LEAF to construct LEAF's argument and reporting that Kathleen E. Mahoney, attorney for LEAF, argued that "porn makes women's subordination look sexy and appealing; it doesn't threaten men's jobs, safety, rights, or credibility").

inequality.[61] That view differs from the view of someone like Carole Pateman, for whom the marriage contract is the foundation of gender inequality.[62] But for those of us who work in the political economy tradition, the foundation of inequality is class; other forms of inequality feed into maintaining it.

The evidence supports the political economy approach,[63] but the fallacy here is to confuse *degradation* with *devaluation*.[64] If you look at inequality cases, in particular the United States' *Sears Roebuck* case,[65] it is clear that the image of woman that was self-defeating was the mainstream woman who wanted to be home, whose first loyalty was to her husband and children, and who had very little commitment to other

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61. Attorneys for LEAF showed, in court, sexually violent gay movies and successfully argued that the abused men were "being treated like women." *Id.*

62. *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 154, 168-88 (1988) ("Marriage is called a contract but, feminists have argued, an institution in which one party, the husband, has exercised the power of a slave-owner over his wife and in the 1980s still retains some remnants of that power, is far removed from a contractual relationship.").

63. *See, e.g.*, Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1155 (1993):

> [T]he U.S. Commission on Civil Rights ha[s] found . . . [that] the most significant causes of . . . [sex] discrimination [are] sex-segregated labor markets; systemic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income-maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively or largely female responsibility; barriers to reproductive freedom; and discrimination and segregation in education.

Id.

64. Equality is best served by fighting against *devaluation* of women. *See id.* at 1156 (quoting Thelma McCormack, If Pornography is the Theory, Is Inequality the Practice? 12 (Nov. 1992) (unpublished paper delivered at a public forum held in York, Canada, Refusing Censorship: Feminists and Activists Fight Back)):

> Devaluation means that if, by some strange set of circumstances, we could eliminate all forms of pornography . . . [women] would still be under-represented politically, and would still be culturally marginalized. . . . [Censoring pornography] accomplishes nothing in the struggle for equality because it confuses symbolic degradation with instrumental devaluation.

Id.

65. Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (holding that women did not hold a representational proportion of better paid commission sales positions because women were not as interested in these positions as men were. The court accepted Sears' arguments that women were put off by the intense competition, pressure and risk involved in commission sales, and that they preferred the social contact and friendliness associated with noncommission sales.).

workers or to the company.[66] It is this image that is sentimentalized, idealized, and anything but degraded. But it is used to justify low wages, dead-end jobs, promotion discrimination, and a host of other evils. By any number of objective indices, the mainstream woman is devalued, but she is not degraded.

In short, even if we could get rid of all the pornography—hard-core and soft-core, literary and visual, child pornography and adult group pornography, and the X-rated films and live sex shows—women would still be working at sixty-six cents on the dollar, would still be without pay equity, without affordable daycare. It is the *domestic* woman, not the *Dionysian* woman who reinforces structural inequality. On another level, of course, the game that is played is to argue for differences where they are inapplicable, such as in the workforce, education, and in the general culture, and to deny them where they are appropriate, such as in reproduction.[67]

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66. *See* Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 937-40 (1987) (discussing *EEOC v. Sears, Roebuck & Co.*).

> The court finds that women also do not like to accept financial risk as much as men; this is perhaps because their economic dependence and their principal responsibility for children can make monetary risk a suicidal course. Women's education makes it less likely that they will have the requisite technical background, comfort, or confidence in their ability to master technical information. For all these reasons, it was not surprising that Sears encountered difficulties in attempting to convince women to apply for positions selling machinery, home improvement devices, and automotive products.

Id. at 938 (citations omitted).

67. *See, e.g.*, BARBARA F. RESKIN & HEIDI I. HARTMANN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 45 (1986) (discussing early twentieth-century labor laws which sought to protect women but, in effect, limited them); MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICAS'S SCHOOLS CHEAT GIRLS 1 (1993) (examining pervasive sexism in educational settings and particularly how "from grade school through graduate school female students are more likely to be invisible members of classrooms").

Examples of this argument in general culture include debates about bans on women in combat positions in the military, military institutes, social and power clubs. *See* RUSH H. LIMBAUGH, III, SEE, I TOLD YOU SO 259 (1993) (maintaining that an all-male combat force is "[c]learly . . . the best fighting force we can assemble"); Judy Mann, *No Women Need Apply*, WASH. POST, Jan. 26, 1994, at D16 (stating that both the Citadel and Virginia Military Institute "argue that admitting women would destroy their military environment and educational mission . . ."); Dana Thomas, *Court Delays Yale Society Initiations: 8 Skull and Bones Members Seek to Keep Ban on Women*, WASH. POST, Sept. 7, 1991, at G1 (explaining that although the secret society for the "best and the brightest" has debated the issue of whether to admit women since 1969 when Yale became co-ed, many still worry that admission of women would result in the elimination

Finally—to return to a point I raised earlier—what does equality mean? I have suggested that in a feminist framework equality is a transforming concept; it combines material or structural equality with liberation. Without liberation, women are beholden to a patriarchal state, and their dependency becomes a self-fulfilling prophecy. That is not a humanistic model of equality, and it is certainly not a feminist one. In a feminist paradigm, the mind is as important as the body. Thinking is as important as doing. Freedom is as important as structural equality. If we look, then, at the *Butler* decision with its law-and-order mentality, its failure to provide or even suggest that any evidence of harm was needed, and its definition of community standards, we see that it has set the struggle for gender equality back at least a century.

Simply put, the Supreme Court of Canada does not give a damn about gender equality or civil liberties. It is determined to teach us about control, and it was quite pleased to have a feminist gloss put on its decision. The Court, like much of society, is frightened by the new communications technology. The increased availability of videotapes, a widely popular form of home entertainment, sent a chill through their bodies. The result was a much icier chill for the rest of us.

Paradoxically, the feminist agenda in Canada is no longer preoccupied with pornography. Pornography has been replaced by the issue of violence.[68] The government has set up a ten-million-dollar panel to go across the country and hear from women on the subject of violence.[69]

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of sacred male-bonding traditions).

In regard to reproduction, the same conservative Republican Senators who supported the Pornography Victims' Compensation Act, supposedly to attack inequality, have been against initiatives such as "the Family and Medical Leave Act, government-funded day care; . . . legislation to lift the 'gag rule,' which prohibited the provision of information about abortion at federally funded family planning clinics; and government funding for abortions for poor women, under programs that subsidize poor women's pregnancy and childbirth expenses." *See* Strossen, *supra* note 63, at 1154.

See also Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 733 (1985) (explaining that conservatives view abortion as simply wrong and therefore, regard as absurd the liberal view that unchosen attributes [the differences between men and women] should make a woman's right to an abortion constitutional).

68. *See, e.g.*, Mark Clayton, *Canada's Feminists Tighten Ranks*, CHRISTIAN SCI. MONITOR, Sept. 4, 1992, at 6 (describing that "the key issue right now for the women's movement is violence against women") (quoting Judy Rebick, president of the Toronto based National Action Committee on the Status of Women).

69. *See* Sunera Thobani, *Violence Against Women: Ottawa's $10 Million Panel Needs New Approach*, VANCOVER SUN, July 21, 1992, at A11 (noting the Conservative government's appointment of the Canadian Panel on Violence Against Women to travel from community to community gathering the views of women, but criticizing the Panel

In addition, five university centers have been funded almost $500,000 a piece to study violence against women.[70] More recently, the specific concerns of women of color have become a central issue and are likely to remain so for at least a decade.[71] In short, there are new groupings and new issues, and I think that it is in this period that those of us who are interested in the arts, in culture, and in politics have an opportunity to redefine what we mean by freedom of expression in a new feminist framework.

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for holding hearings in inaccessible buildings, sharply limiting the time allotted to each speaker, failing to provide translation or child care, and failing to provide advance notice of its meetings).

70. *See* Philip Mathias, *Playing Fast and Loose With Figures: How Statistics, Reality Clash Over Violence Against Women*, FIN. POST, Aug. 3, 1993, at 7 (reporting allocation by Ottawa government of $2.2 million for university research centers to study violence against women and criticizing the scientific methodology used by some feminist groups in studying such violence).

71. "The government doesn't want to say there is racism. But there is. And I think increasingly it will become a central issue." Clayton, *supra* note 68, at 6 (quoting Judy Rebick).