THE FIRST AMENDMENT: FREE SPEECH OR TICKET TO ABUSE?

A Comparison of American and Canadian Approaches to Regulating Pornography

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I. INTRODUCTION

The word pornography is derived from the Greek word "pornographos" meaning, "writing about prostitutes."[1] Although pornography is a social phenomenon which has been extant in various forms for centuries,[2] a single precise definition has been difficult to perfect.[3] Sexual references are found

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[1]WEBSTER'S NEW WORLD DICTIONARY 1109 (2d ed. 1986).

[2]*See generally* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 233-40 (1986) [hereinafter FINAL REPORT]. The Commission dates pornography back to the beginning of recorded history. *Id.* Sexually explicit references utilized for entertainment or arousal purposes can be found in Greek and Roman drama and poetry as well as the works of Aristophanes, Catullus, and Horace. *Id.* The Commission observed similar sexual references in later historical periods and different cultures. *Id.* The Commission cited *The Thousand and One Nights* and the *Kamasutra* as examples in the eastern cultures and cited the "medieval bawdy ballads and poems of Chaucer, Dunbar, and others" as reflective of western cultures. *Id.*

[3]Webster's dictionary defines pornography as: "writings, pictures, etc. intended primarily to arouse sexual desire." WEBSTER'S NEW WORLD DICTIONARY at 1109. Other definitions include material which is: "(a) sexually explicit; (b) depicting women as enjoying or deserving some form of physical abuse; and (c) having the purpose and effect of producing sexual arousal." Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 592 (1986). Andrea Dworkin and Catharine A. MacKinnon, two well known feminists, define pornography as:

> 1. [T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts — including but not limited to vaginas, breasts, or buttocks — are exhibited such

in much of the early Roman and Greek drama. However, such references were limited to inhibited sexual activity and did not extend to displays of actual sexual conduct.[4] The use of inhibited, rather than explicit, sexual activity in these early works is indicative of society's reluctance to publicly discuss sexuality.[5] Modern American society, however, has become increasingly tolerant of public displays of sexuality. To obtain exposure to the vast array of pornographic material available to society today, one need only purchase a magazine, rent a video from a local video store, turn on a television, or walk down a city street. Consequently, pornography in the United States has become a billion dollar industry.[6]

It would be erroneous to conclude that this commercially profitable industry which encompasses the facets of our everyday lives does not affect society. To the contrary, its effects are as real as the portrayals themselves.

The First Amendment of the United States Constitution guarantees all people the fundamental right of freedom of speech.[7] This protection, however, does not encompass all acts of writing or speaking. The United States Supreme Court has held that since certain forms of speech, including libel, "fighting words," and obscenity are not essential to the explication of ideas and have little social value, they are not speech protected by the First

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> that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
> 2. The use of men, children, or transsexuals in the place of women in (1) above is pornography . . . .

Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 25 (1985).

[4]FINAL REPORT, *supra* note 2, at 233-40.

[5]*Id.*

[6]Dworkin, *supra* note 3, at 10.

[7]The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Amendment.[8] While recognizing that obscenity is an unprotected category of speech, the Court struggled for over a century before agreeing on a definition of obscenity.[9]

In *Miller v. California*,[10] the Supreme Court adopted a tripartite test which judged obscenity based upon whether an average person applying community standards would find that the work appeals to the prurient interest.[11] The *Miller* test, which is still employed by courts today, is ineffective when applied to pornographic materials.[12] Attempts to overcome the shortcomings of the *Miller* test as applied to pornography have been struck down by United States courts. In *American Booksellers Ass'n, Inc. v. Hudnut*, the Seventh Circuit struck down an anti-pornography law which focused on harms to women resulting from exposure to pornography.[13] In reaching its holding, the court failed to consider the issue of harm to women, but rather, based its analysis on abstract First Amendment principles.[14] The *Hudnut* holding represents a major obstacle in the effort to combat the ever increasing market for pornographic material,[15] an increasingly large portion of which is violent, degrading, and explicit.[16] Furthermore, the holding gives little credence to the immense body of evidence compiled by researchers which indicates that pornography directly and indirectly causes serious harm to women.[17]

Unlike courts in the United States, Canadian courts have recognized harm to women as a legitimate basis for upholding anti-pornography

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[8]*See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[9]*See infra* Part III.

[10]413 U.S. 15, 24 (1973).

[11]The *Miller* test is set forth in full at *infra* note 72.

[12]*See infra* notes 88-92.

[13]771 F.2d 323, 334 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[14]*See infra* notes 93-123.

[15]*See* FINAL REPORT, *supra* note 2, at 284.

[16]*Id.* at 323-24.

[17]*Id.* at 322-47. *See also* Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut*: On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REF. 179 n.4 (1989).

legislation.[18] In *Regina v. Butler*,[19] the Canadian Supreme Court upheld an antipornography law premised on the finding that pornography works to harm women, particularly by asserting that they are inferior to men.[20] Therefore, although both the United States and Canada stress commitment to freedom and equality, they differ dramatically in their treatment and interpretation of laws that were intended to promote the freedom and equality of groups that are victimized by pornography.

Part II of this essay explores the direct and indirect effects of pornography on society, focusing primarily on its harm to women. Part III examines the evolution of the obscenity doctrine in the United States. Part IV illustrates the United States's approach to regulating pornography. Part V addresses Canada's attempt at controlling pornography. Finally, after noting the distinctions between Canadian and United States constitutional principles, Part VI argues that the United States Supreme Court should follow the analysis utilized by the Canadian Supreme Court to uphold anti-pornography legislation, focusing, as the Canadian Supreme Court did, on resultant harms, rather than on abstract First Amendment principles.

II. PORNOGRAPHY'S HARMFUL EFFECTS

The harms emanating from pornography reach not only the persons portrayed in the pornographic material, but society in general. Such harms are often difficult to correlate with pornography, since it is not necessarily the pornographic materials themselves which are harmful, but rather, their causal link.[21] The Attorney General's Commission has recognized this fact by differentiating between primary and secondary harms.[22] The former consists of harms which are intrinsically harmful, including murder, rape,

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[18]*See infra* notes 133-214.

[19]70 C.C.C. (3d) 129 (1992).

[20]*See infra* notes 194-97.

[21]FINAL REPORT, *supra* note 2, at 304-05.

[22]*Id.* at 304. The Commission reached the conclusion that pornography "systematically violates human rights with apparent impunity." *Id.* at 755. The Commission based its findings on a wide range of evidence. *Id.* at 312-13. This evidence consisted of personal experiences of witnesses including pornography participants, clinical professionals, and experimental social scientists. *Id.* The Commission also conducted its own review of empirical evidence. *Id.*

assault, and discrimination on the basis of race and gender.[23] By contrast, secondary harms are not in and of themselves harmful, but rather lead to some evil or wrongdoing.[24] Although such harms are termed "secondary" this is not to suggest that the harms are in any way less important.[25] Regardless of whether the harm is primary or secondary, if sexually explicit material can be found to cause behavior which is injurious, then such material is harmful.[26]

There are generally three types of harm resulting from pornography: harm to the participants in the production of pornography, harm to the victims of sex crimes related to the perpetrators' exposure to pornography, and harm to society in general caused by social conditioning which enhances sexual discrimination, subordination, and degradation of women.[27]

The primary victims of pornography are those who are forced to2 participate in it.[28] Evidence shows that a substantial majority of pornography models are expressly coerced into performing.[29] In one

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[23]*Id.* at 304.

[24]*Id.* The Commission stated:

> Thus, when it is urged that pornography is harmful because it causes some people to commit acts of sexual violence, because it causes promiscuity, because it encourages sexual relations outside of marriage, because it promotes so-called "unnatural" sexual practices, or because it leads men to treat women as existing solely for the sexual satisfaction of men, the alleged harms are secondary, again not in any sense suggesting that the harms are less important. The harms are secondary here because the allegation of harm presupposes a causal link that is superfluous if, as in the case of primary harms, the act quite simply *is* the harm.

Id. at 304-05 (emphasis added).

[25]*Id.*

[26]*Id.*

[27]*See* Sunstein, *supra* note 3, at 595. *See also* Catharine A. MacKinnon, *Pornography Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 11-20 (1985) [hereinafter MacKinnon]; Dworkin, *supra* note 3, at 10-11.

[28]MacKinnon, *supra* note 27, at 32.

[29]*Id.* In its report, the Commission stated: "It is an unpleasant, controversial, but in our view well established fact, that at least some performers have been physically coerced into appearing in sexually-explicit material, while others have been forced to engage in

example, Linda Marciano, who played "Linda Lovelace" in the financially-profitable film "Deep Throat," notes that the tactics used to coerce her into performing were "abduction, systematic beating, being kept prisoner, watched every minute, threatened with her life and the lives of her family if she left, tortured, and being kept under constant psychological intimidation and duress."[30] Evidence of such abuse has only come to light within the past decade.[31] Coercion and brutal mistreatment are often found in cases involving young women who were sexually abused as children.[32]

The second category of harm resulting from pornography concerns the escalation of violence aimed at women.[33] Although pornography is not the sole cause of violent crimes committed against women, clinical and experimental evidence evinces a causal relationship between exposure to sexually explicit material and an increase in aggressive behavior by men towards women.[34] Such findings have been based upon laboratory

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sexual activity during performances that they had not agreed to beforehand." FINAL REPORT, *supra* note 2, at 865-66. The Commission reached its conclusion after hearing direct testimony from three different women who each described the brutal force used against them to force them into pornography. *Id.* at 866. Such evidence was corroborated by the testimony of representatives of "sex workers," a victim counseling agency, and extrinsic evidence. *Id.* at 866-67. The Commission also considered the statements of law enforcement officers, one of whom stated:

> I have talked to models and I have seen films where it's quite obvious that the models had no idea as to what they were getting into. Part of an S&M film, when they start torturing the victim, tying them, whipping them and putting cigarettes out on their body, is the showing of pain. This is what sexually excites some people.
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> Obviously we are not dealing with people that can act, so they can't act the pain. Therefore the pain is very real. It's quite apparent these people do not realize what they have gotten into once they start the filming.

Id. at 868.

[30]*Id.* (citing L. LOVELACE & M. MCGRADY, ORDEAL (1980)).

[31]Sunstein, *supra* note 3, at 595.

[32]*Id.*

[33]*Id.* at 597.

[34]FINAL REPORT, *supra* note 2, at 325-26. In reaching its conclusions, the Commission grouped pornography into different categories which included sexually violent material; non-violent materials depicting degradation, domination, subordination, or humiliation; and non-violent, non-degrading materials. *See generally id.* at 322-47. A causal connection

studies,[35] victim accounts,[36] and comparative statistics between countries that have enforced limitations on pornography and those that have not.[37]

The final and most latent effect of pornography is its effect on the role of women in society.[38] Pornography depicts women in degrading and humiliating positions and helps advance the view that women should "subordinate their own desires and beings to the sexual satisfaction of men."[39] Viewers of such pictorials are ultimately conditioned into believing

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was found most strongly in cases involving material which combined sex and violence, including sado-masochistic themes, whips, chains, devices of torture, and material depicting rape scenes. *Id.* In its evaluation of the latter two categories, the causal link between pornography and sexual violence decreased slightly, but harms other than sexual violence were determined to exist as a result. *Id.* Such harms included the misconceptions that women often desire sexual violence or coercion and that sex offenders are less responsible for their acts. *Id.* A society holding such beliefs would not only be more tolerant of such crimes, but also would be more likely to commit such acts. *Id.* At the very least, non- violent, non-degrading material can cause harm to a society's morals, since such presentations suggest that the episodes are taking place beyond the context of marriage, love, commitment, or even affection. *Id.*

[35]Males exposed to pornographic materials in a laboratory setting and questioned thereafter admitted having aggressive sexual fantasies. *Id.* at 979. Furthermore, they were more prepared to view rape and other violence against women as acceptable and also reported that they themselves would be more likely to commit rape. *Id.* at 1005.

[36]Victim accounts include testimony by victims and police reports which show that many perpetrators utilize pornography as "how to" manuals while carrying out their acts. Sunstein, *supra* note 3, at 600.

[37]FINAL REPORT, *supra* note 2, at 325-26. Countries with liberalized pornography laws such as the United States, Britain, Australia, and Scandinavian countries have experienced an increase in reported rapes. Sunstein, *supra* note 2, at 599 (citing SEX AND VIOLENCE: A RIPPLE EFFECT, PORNOGRAPHY AND SEXUAL AGGRESSION 157-67 (N. Malamuth & E. Donnerstein eds., 1984)). In contrast, reported rapes have decreased in countries which have adopted restrictions. *Id.*

[38]FINAL REPORT, *supra* note 2, at 331.

[39]*Id.* The Commission explained:

> The degradation we refer to is degradation of people, most often women, and here we are referring to material that, although not violent, depicts people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating.

that the woman's role is one of subservience to men. This belief disintegrates the status of equality women have fought so arduously to achieve in the workplace, educational institutions, and society in general.[40]

Thus, the overall harm emanating from the pornography trade warrants concern.[41] In seeking a remedy, the current law is designed to regulate the resultant conduct by enforcing civil and criminal remedies against assault, kidnapping and sexual abuse, rather than against the pornographic materials themselves.[42] Utilizing the law to penalize the conduct is insufficient to prevent its occurrence.[43] Due to the immense profitability of the pornography industry, as well as the inherent difficulty and costs in ferreting out and punishing individualized abuses, a method of eliminating the financial

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Id. The Commission determined that a causal link could be demonstrated between such degrading material and an increased acceptance of the proposition that women enjoy being forced into sexual relations. *Id.* at 332. Furthermore, substantial exposure to such pornography leads to increases in non-violent forms of discrimination and subordination of women. *Id.* at 334.

[40]Dworkin, *supra* note 3, at 20.

> To get that word, male, out of the Constitution, cost the women of this country fifty-two years of pauseless campaign; 56 state referendum campaigns; 480 legislative campaigns to get state suffrage amendments submitted; 47 state constitutional convention campaigns; 277 state party convention campaigns; 30 national party convention campaigns to get suffrage planks in the party platforms; 19 campaigns with 19 successive Congresses to get the federal amendment submitted, and the final ratification campaign.
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> Millions of dollars were raised, mostly in small sums, and spent with economic care. Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest and such aid as they could. It was a continuous and seemingly endless chain of activity. Young suffragists who helped forge the last links of that chain were not born when it began. Old suffragists who helped forge the first links were dead when it ended.

Id. (quoting Carrie Chapman Catt).

[41]*See generally* FINAL REPORT, *supra* note 2, at 323-47. The possibility that social factors other than pornography, such as ethical and demographic trends, may be attributed to the correlative increases in pornography and violence does not disprove a connection, but rather, may only suggest that the empirical data is not perfect. Sunstein, *supra* note 3, at 600.

[42]Sunstein, *supra* note 3, at 596.

[43]*Id.*

incentives of pornography is necessary to deter the harms resulting from pornographic materials.[44]

III. A BRIEF LOOK AT THE EVOLUTION OF THE OBSCENITY DOCTRINE IN THE UNITED STATES

The First Amendment of the United States Constitution guarantees all persons the fundamental right to freedom of speech.[45] Although courts cannot impose punishment merely because one's opinion or expression is contradictory to that of the sovereign, First Amendment protection cannot plausibly extend to all acts of writing or speaking.[46] In *Chaplinsky v. New Hampshire*,[47] the Supreme Court reasoned that certain types of speech, including libel, "fighting words," and obscenity are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth" that they are not protected by the First Amendment.[48] The Court did not attempt to define obscenity, but only confirmed that the First Amendment protections are not absolute.[49]

As early as 1868, English courts struggled to define obscenity. In *Regina v. Hicklin*,[50] the court posited that the appropriate test for obscenity was "whether the tendency of the matter charged . . . is to deprive and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[51] This broad definition allowed the courts to label a work obscene based not upon its literary or

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[44]*Id.* This view was endorsed by the Supreme Court in the context of child pornography in New York v. Ferber, 458 U.S. 747, 761-62 (1982).

[45]U.S. CONST. amend. I.

[46]FINAL REPORT, *supra* note 2, at 251.

[47]315 U.S. 568 (1942).

[48]*Id.* at 572.

[49]*Id.* at 571.

[50]3 L.R. - Q.B. 360 (1868).

[51]*Id.* Lord Chief Justice Cockburn defined obscenity under Lord Campbell's Act. *Id.*

scientific content, but rather upon isolated passages of that work, in the hands of a person most susceptible to immoral influences.[52]

The expansive *Hicklin* rule proved to be problematic to the majority of United States courts which accepted it.[53] Since the courts only evaluated isolated passages of the work and did not consider the work's literary value, prosecutions often extended not only to sexually explicit work, but to numerous works of contemporary literature that posed no threat.[54]

American courts eventually challenged the validity of the *Hicklin* rule.[55] In *Roth v. United States*,[56] Justice Brennan attempted to narrow the expansive *Hicklin* definition by articulating a new standard. Under the *Roth* test, the Justice explained, the jury's job was to decide "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[57] The Court expressly repudiated the *Hicklin* test, finding that it encompassed material which legitimately dealt with sex.[58] Consequently, the Court rejected *Hicklin* as "unconstitutionally restrictive of the freedoms of speech and press."[59]

The *Roth* test differed from *Hicklin* in that it called upon the factfinder to judge the effect of a work *taken as a whole* on the *average person* rather than analyzing the effect of isolated passages on the most susceptible persons.[60] Furthermore, the Court in *Roth* reaffirmed its holding in *Chaplinsky* that obscenity is not within the ambit of the First Amendment's

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[52]Edward A. Carr, Comment, *Feminism, Pornography, and the First Amendment: An Obscenity-Based Analysis of Proposed Anti Pornography Laws*, 34 U.C.L.A. L. REV. 1265, 1275 (1987).

[53]*Id.*

[54]*Id.*

[55]*Id.*

[56]354 U.S. 476 (1957). In *Roth*, a New York bookseller was convicted for mailing obscene materials in violation of a federal obscenity statute. *Id.* at 480.

[57]*Id.* at 489.

[58]*Id.*

[59]*Id.*

[60]*Id.*

protection.[61] Under the *Roth* test, if a work was obscene, a state had a constitutional right to proscribe its dissemination and could impose criminal sanctions upon those distributing or exhibiting it.[62] Alternatively, if a work was not obscene, it was protected under the First Amendment and thus, any restrictions on its publication or distribution were presumptively unconstitutional.[63]

The *Roth* test set the groundwork for what evolved into the obscenity standard used today. In the interim, however, the courts modified and expanded the definition. For instance, Justice Brennan, writing for the Court in *Jacobellis v. Ohio*,[64] in evaluating the application of contemporary community standards opined that the determination of whether a work is obscene should be based upon a national standard rather than a local one.[65] In rejecting a "local" definition, the plurality interpreted prior Supreme Court opinions as refusing to accept an interpretation of the Constitution that allowed First Amendment protection to vary with state lines.[66]

In 1966, in *Memoirs v. Massachusetts*,[67] utilizing the *Roth* test, a plurality held that in order for a work to be obscene, three components must be met: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[68] The requirement that the material be *utterly* without redeeming social value severely constricted the amount of material that could be labeled obscene since a work would enjoy First Amendment

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[61]*Id.* at 485.

[62]*Id.* at 492-93 ("[T]he federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, Sec. 8, cl.7.").

[63]*Id.* at 484 ("All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [sic] . . . .").

[64]378 U.S. 184 (1964) (plurality opinion).

[65]*Id.* at 195 (plurality opinion).

[66]*Id.* at 194-95 (plurality opinion) (citing Pennekamp v. Florida 328 U.S. 331, 335 (1946)).

[67]383 U.S. 413 (1966) (plurality opinion).

[68]*Id.* at 418 (plurality opinion).

protection even if it possessed only a scintilla of literary or other value.[69] The test formulated in *Memoirs* was never adopted by a majority of the Court, and throughout the next seven years, the Court was unable to definitively establish an obscenity test.[70] It was not until 1972, in *Miller v. California*,[71] that the Court agreed upon and adopted a revised version of the tripartite test offered in *Memoirs*:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[72]

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[69]William K. Layman, Note, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J., 1475, 1483 (1987).

[70]Eric Jaeger, Note, *Obscenity and the Reasonable Person: Will He "Know it when he sees it?"* 30 B.C. L. REV. 823, 839 (1989). *See, e.g.*, United States v. Reidel, 402 U.S. 351, 354 (1971) (declaring that the decision in Stanley v. Georgia, 394 U.S. 557 (1969), did not disturb *Roth*); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime"); Ginsberg v. New York, 390 U.S. 629, 638 (1968) (finding constitutional a New York statute affording minors a more stringent test in determining whether certain materials are obscene); Mishkin v. New York, 383 U.S. 502, 508-09 (1966) (adjusting the prurient-appeal requirement to apply to particular members of a group, rather than the public at large, when the obscene material is designed and disseminated primarily to a "defined deviant sexual group, rather than the public at large").

[71]413 U.S. 15 (1973). In *Miller*, the appellant sent unsolicited brochures advertising an array of "adult" books and films through the mail. *Id.* at 17-18. The brochures contained explicit pictures and drawings displaying groups of men and women engaged in sexual activity. *Id.* at 18. These brochures ended up in the hands of an unwilling recipient who had indicated no desire to receive such material. *Id.* Thereafter, appellant was convicted of violating the California Penal Code which made the dissemination of obscene material through the mail a misdemeanor. *Id.* at 16.

[72]*Id.* at 24 (citations omitted). Chief Justice Burger wrote the majority opinion and was joined by Justices Blackmun, Powell, Rehnquist, and White. *Id.* at 16. A dissenting opinion, joined by Justices Stewart and Marshall, was authored by Justice Brennan who wrote the majority opinions in *Roth* and *Memoirs*. *Id.*

Writing for the majority, Chief Justice Burger refused to adopt the "'*utterly* without redeeming social value' test" established in *Memoirs* and instead, required that such work not have "serious" value.[73] This new choice of words expanded the definition of obscenity, thus encompassing more works under its definition. Furthermore, the Chief Justice established that when addressing the first prong of the test, the trier of fact must focus on local rather than national community standards, thereby requiring factfinders to step into the shoes of "an average person in the community" rather than a "particularly sensitive person — or indeed a totally insensitive one."[74] As a guide to the second prong, the Court provided two examples of what a state statute could define as obscene:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[75]

The Court limited "obscenity" to depictions or descriptions of "patently offensive 'hard core' sexual conduct," thus assuring that nudity, alone, would not qualify as obscene.[76]

The *Miller* tripartite test was applied the following year in *Paris Adult Theatre I v. Slaton*,[77] where the Court reaffirmed *Roth*, concluding that obscene material does not fall within the ambit of the First Amendment's protections, and that the states possess a legitimate interest in regulating the dissemination and exhibition of obscene material in public places such as

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[73]*Id.* at 24. The "utterly without redeeming social value" standard was never adhered to by more than three Justices at one time. *Id.* at 25. Whether a work containing pornography or obscenity has social value, and therefore, should be afforded First Amendment protection, remains a hotly debated issue. *See generally* MacKinnon *supra* note 27, at 26.

[74]*Miller*, 413 U.S. at 31-34.

[75]*Id.* at 25.

[76]*Id.* at 27. Finding that the movie "Carnal Knowledge" was not obscene, the Supreme Court held that nudity alone is not obscene in Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

[77]413 U.S. 49 (1973).

"adult" theaters.[78] In *Paris Adult Theatre*, a local state district attorney attempted to enjoin two Atlanta, Georgia adult movie theaters from exhibiting films containing sexual conduct characterized by the Georgia Supreme Court as "hard core pornography."[79] The Supreme Court recognized that some state interests justify the government's prohibition against the use of one's property for the commercial display of obscene materials.[80] These interests include the "quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[81] In deriving these interests, the Court took notice of the "arguable correlation between obscene material and crime."[82]

In addition to its reference to sex crimes, the Court alluded to a problem of large proportion concerning the style and quality of American life.[83] While conceding that a person's right to read an obscene book in the privacy

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[78]*Id.* at 69. Four Justices dissented. Justice Brennan, who wrote for the majority in *Roth*, stated in his dissent:

> [A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meanings of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

Id. at 84 (Brennan, J. dissenting) (citations omitted).

[79]*Id.* at 50-52.

[80]*Id.* at 58-60. The Supreme Court of Georgia held that the films' exhibition should have been enjoined. *Id.* at 53. On appeal, the United States Supreme Court utilized the *Miller* test. *Id.* at 69.

[81]*Id.* at 58.

[82]*Id.* (citing THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 390-412 (1970)).

[83]*Id.* at 59 (quoting 22 THE PUBLIC INTEREST 25-26 (Winter 1971)).

of one's own home should be protected, the Court added that granting that person a right to obtain those books and pictures in the marketplace "'*is to affect the world about the rest of us, and to impinge on other privacies.*'"[84] The fact that it is possible to "'avert the eye and stop the ear,'" the Court continued, is unimportant since "'what is commonly read and seen and heard and done intrudes upon us all, want it or not.'"[85] The Court further determined that the absence of conclusive empirical data evincing a connection between obscene material and an adverse effect on society was also irrelevant in determining whether legislation was constitutional.[86] Rather, the Court opined, it was sufficient for the legislature to reasonably determine that a connection *might* exist.[87]

IV. APPLYING THE OBSCENITY TEST TO PORNOGRAPHY

The United States Supreme Court has held that since obscene material does not fall within the underlying objectives of the First Amendment, it is not the type of "speech" which is deserving of First Amendment protection.[88] Application of the *Miller* obscenity doctrine to pornography, however, produces unwarranted results. "Obscenity" is a vague, gender neutral term referring to "indecency and filth;"[89] conversely, the term "pornography" — derived from the Greek word for "writing about whores" — refers to materials that treat women as prostitutes, their sole role being to

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[84]*Id.* (emphasis added)

[85]*Id.*

[86]*Id.* at 60 ("[i]t is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.").

[87]*Id.* at 61 (emphasis added).

[88]*See, e.g., id.* at 69 (holding that "obscene" material is not protected by the First Amendment); Miller v. California, 413 U.S. 15, 36-37 (1973) (same); Roth v. United States, 354 U.S. 476, 492-93 (1957) (ruling that federal statute which criminalized "obscenity" did not violate the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that certain classes of speech such as the "lewd and obscene" are not accorded First Amendment protection).

[89]BLACK'S LAW DICTIONARY 1077 (6th ed. 1990) defines obscenity as: "[t]he character or quality of being obscene; conduct tending to corrupt the public morals by its indecency or lewdness."

provide sexual satisfaction to men.[90] Contrary to the nebulous basis of the obscenity doctrine, which focuses on indecency and filth, the focus of antipornography laws is the prevention of *concrete* gender-related harms; namely harm to victims of sex crimes committed because of pornography, and harms to society created through social conditioning that cultivates discrimination and other unlawful actions.[91] However, neither the district court nor the court of appeals considered this issue in determining the constitutionality of an Indianapolis anti-pornography law in *American Booksellers Ass'n, Inc. v. Hudnut*.[92]

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[90]*See generally* Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

[91]*See generally supra* Part II. This focus on harm to women was derived from the feminist attack on violent pornography. Feminists have asserted that pornography creates and maintains sexual inequality. *See generally* MacKinnon, *supra* note 27. The Supreme Court, utilizing current First Amendment analysis, has prohibited only a few narrowly defined classes of "unprotected" speech. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Miller v. California, 413 U.S. 15 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement of illegal acts); Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words). In each of these cases, the Court found the disputed speech to be of low value since it was far removed from the underlying purposes of the First Amendment. Speech which does not fall within one of the unprotected classes will be permitted unless the government can demonstrate a compelling interest. The futility of this test, however, has been demonstrated by the Court's invalidation of almost every attempted governmental regulation of speech in the past thirty years. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). Since pornography does not fall within any enumerated category of unprotected speech, a court could find an antipornography law constitutional only if it found that pornography constituted a new class of "unprotected speech." Consequently, feminists have argued that pornography does not fulfill any underlying objective of the First Amendment — they contend that pornography operates to silence women, preventing them from participating in the political process and denying women the possibility of individual fulfillment. MacKinnon, *supra* note 27, at 63-64. As MacKinnon has succinctly stated: "Any system of freedom of expression that does not address a problem where the free speech of men silences the free speech of women, a real conflict between speech interests as well as between people, is not serious about securing freedom of expression in this country." *Id.* at 64.

[92]771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

THE COURTS' INITIAL ENCOUNTER WITH ANTI-PORNOGRAPHY LAWS: *AMERICAN BOOKSELLER'S V. HUDNUT*

Hudnut represents the federal courts' initial encounter with a radical feminist legal attack on pornography.[93] In *Hudnut*, the Indianapolis City Counsel adopted an ordinance premised on a model anti-pornography law which defined pornography in terms of its harm to women, and outlawed it as a form of sex discrimination.[94]

Plaintiffs, composed primarily of trade associations, distributors, and sellers of literary materials, sued the Indianapolis mayor and city council members, contending that the ordinance violated their constitutional rights by restricting the distribution of constitutionally protected, non-obscene

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[93]Rebecca Benson, *Pornography and the First Amendment:* American Booksellers v. Hudnut, 9 HARV. WOMEN'S L.J. 153 (1986).

[94]The ordinance was premised on the model anti-pornography law formulated by Andrea Dworkin and Catharine A. MacKinnon, *supra* note 3. The Indianapolis City Council adopted this Model Law in slightly modified form, to define pornography as:

> [T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
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> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
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> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual; or
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display.

INDIANAPOLIS CODE § 16-3(q), *reprinted in* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 324 (1985), *aff'd*, 475 U.S. 1001 (1986). The statute also extends to the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6)." *Id.* The Indianapolis ordinance eliminated subsections (i), (v), (vi) and (vii) of the Model Antipornography Law definition and added subsection (vi). For an extensive analysis of Dworkin and MacKinnon's theoretical foundations for their model law, see MacKinnon, *supra* note 3; Dworkin, *supra* note 3.

materials.[95] Plaintiffs contended that the ordinance was vague and regulated speech based on content.[96]

The district court invalidated the ordinance, holding that the State's interest in prohibiting sex discrimination was insufficient to outweigh the constitutionally protected interest of free speech.[97] The court did not attempt to address the constitutional theory behind the ordinance — that due to findings that pornography harms women, the underlying objectives of the First Amendment warranted the creation of a new class of "unprotected" speech.[98] Instead, the court based its analysis on three issues: (1) whether the ordinance imposed restraints on speech or behavior; (2) if the ordinance regulated speech, whether this speech was within the ambit of the First Amendment; and (3) if the speech was protected under the First Amendment, whether there was a compelling state interest justifying the prohibition.[99]

In addressing whether the ordinance imposed restraints on speech or behavior, the district court rejected defendant's argument that in regulating pornography the City was trying to regulate harmful conduct.[100] Conversely, the court found that the ordinance was "clearly aimed at controlling the content of the speech and ideas which the City-County Council has found harmful," and was, therefore, a content-based regulation.[101]

After finding the law to be content-based, the court examined whether the speech regulated under the ordinance fell within an "unprotected"

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[95]American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1318-19 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[96]*Id.* at 1327-28. Plaintiffs further contended that the ordinance's provision for "cease and desist orders" constituted an illegal prior restraint. *Id.*

[97]*Id.* at 1342.

[98]*Id.* at 1329-30.

[99]*Id.*

[100]*Id.* at 1330-31. The city council argued that since the "production, dissemination, and use of sexually explicit words and pictures *is* the actual subordination of women and not an expression of ideas" they were attempting to regulate conduct. *Id.* at 1330 (emphasis added).

[101]*Id.* at 1330-31.

category of speech under the First Amendment.[102] Plaintiffs argued that because obscenity closely resembles pornography, the *Miller* obscenity test should apply.[103] Defendants, however, contended that pornography, as defined in the Indianapolis ordinance,[104] was a broader category of speech than obscenity and argued that the court should recognize pornography as a newly defined category of unprotected speech.[105] The court agreed that pornography as defined in the ordinance was broader than obscenity and thus fell outside the rubric of *Miller*.[106] Consequently, the court was called upon to decide whether pornography constituted a new unprotected category of speech.

The district court compared pornography with three obscenity cases to determine whether a new exception should be created for pornography. The court distinguished the instant case from *FCC v. Pacifica Foundation*, where content-based restrictions on obscenity in broadcasting were permitted.[107] The court in *Hudnut* opined that *Pacifica* dealt with a medium that "invaded" the privacy of the home as distinguished from the materials covered by the ordinance.[108] The court stated: "if an individual is offended by 'pornography,' as defined in the ordinance, the logical thing to do is avoid it, an option frequently not available to the public with material disseminated through broadcasting."[109]

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[102]*Id.* at 1331. For examples of the types of speech which the courts have found to be "unprotected," see *supra* note 91.

[103]American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1318-19 (S.D. Ind. 1984). *See supra* Part III.

[104]*See supra note* 94.

[105]*Hudnut*, 475 U.S. at 1332.

[106]*Id.*

[107]*Id.* (citing FCC v. Pacifica, 438 U.S. 726 (1978)). *Pacifica* involved a radio broadcast of "dirty words." FCC v. Pacifica, 438 U.S. 726, 729-30 (1978). The Supreme Court held that offensive language was not entitled to constitutional protection in the context of broadcasting; it did not utilize the traditional obscenity test in reaching this decision. *Id.* at 748-50.

[108]American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 1334 (S.D. Ind. 1984).

[109]*Id.*

The court next compared the instant case to *Young v. American Mini Theaters*.[110] In *Young*, the court upheld a zoning ordinance which regulated the location of commercial pornography distribution as a valid time, place, and manner restriction.[111] The court in *Hudnut* found that this case was also inapplicable, since the city council in *Hudnut* was not restricting the time, place, and manner of the distribution of pornography, but rather prohibiting it completely.[112]

Finally, the court compared the instant case to *New York v. Ferber*, which upheld a ban on child pornography because of a state's compelling interest in protecting children from exploitation.[113] Defendants argued that the court in *Hudnut* should apply the same reasoning found in *Ferber* since the states' interests in protecting women are "every bit as compelling and fundamental."[114] Disagreeing, the court stated that although Indiana has a "well recognized interest in preventing sex discrimination," adult women as a class are not in need of the same type of protection afforded to children.[115] The court opined that this is true even when women are subjected to the "inhuman treatment defendants have described and documented to the Court in support of this Ordinance."[116] The court went on to state that since adult women have the capacity to protect themselves, the states' interests are "not so compelling as to sacrifice the guarantees of the First Amendment."[117]

The court found the city council's interest in sexual equality important and valid[118] but nevertheless declared the ordinance invalid, refusing to

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[110]*Id.* (citing Young v. American Mini Theaters, 427 U.S. 50 (1976)).

[111]*Id.* In *Young*, a zoning ordinance for adult movie theaters was upheld on the ground that the state "may legitimately use the content of [sexually explicit] materials as the basis for placing them in a different classification from other motion pictures." Young v. American Mini Theaters, 427 U.S. 50, 70-71 (1976).

[112]*Hudnut*, 598 F. Supp. at 1318-19.

[113]*Id.* at 1333 (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).

[114]*Id.*

[115]*Id.*

[116]*Id.*

[117]*Id.* at 1334.

[118]*Id.* at 1336.

carve out a new exception to the First Amendment, "even when there may be many good reasons to support legislative action."[119] The court reasoned that permitting every interest group to carve out exceptions to the First Amendment by obtaining a majority of legislative votes in their favor "demonstrates the potentially predatory nature of what defendants seek through this Ordinance."[120]

The Court of Appeals for the Seventh Circuit affirmed the district court's decision.[121] Unlike the district court, however, the court of appeals held that the ordinance was unconstitutional as an unacceptable form of content regulation.[122] The court found that the ordinance discriminated on the basis of the content of speech — speech treating women in an approved manner was lawful, whereas speech treating women in an unapproved manner was unlawful, regardless of its literary value.[123] The court held that this was "thought control" which advanced an "approved" view of how women ought to behave.[124] In rendering its decision, the court purported to accept the premise of the ordinance, finding that "depictions of subordination tend to perpetuate subordination"[125] but nevertheless held that

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[119]*Id.* at 1337.

[120]*Id.* The court further found the ordinance to be unconstitutionally vague, both in its use of particular terms and in its more general prohibitions. *Id.* at 1339. The court was particularly disturbed by the vagueness of the term "subordination of women," stating:

> [It would be] almost impossible to settle in ones own mind or experience upon a single meaning or understanding of that term . . . . Nothing in the Ordinance . . . suggests whether the forbidden "subordination of women" relates to a physical, social, psychological, religious, or emotional subordination or some other form or combination of these.

Id. at 1338.

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

[122]*Id.* at 325.

[123]*Id.*

[124]*Id.* at 328.

[125]*Id.* at 329. In accepting the rationale of the ordinance, the court quoted the council's finding that:

suppression of speech based on viewpoint constituted an impermissible method of correcting such harms.[126] Labeling the council's premise as a constitutionally insufficient basis for the legislation, the court determined that it is impermissible to invoke government regulation simply because speech plays a role in social conditioning.[127]

The court of appeals also rejected the defendant's argument that pornography is low value speech and therefore falls within one of the exceptions to First Amendment protection.[128] While acknowledging that some government regulation of speech is permissible,[129] the court noted once again that unlike regulation permitted in earlier cases, the ordinance at issue in *Hudnut* was invalid because it selected among viewpoints.[130]

The circuit court's decision is much less analytical than that of the district court, essentially finding that the Indianapolis ordinance was impermissibly based on viewpoint and therefore constituted a form of "thought control."[131] Although the court of appeals purported to accept the premise of the anti-pornography ordinance in its evaluation, it failed to

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> Pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].

Id. (quoting INDIANAPOLIS CODE § 16-1(a)(2)).

[126]*Id.*

[127]*Id.* at 330. Espousing the view that the First Amendment is intended to protect all points of view, even those that the "government finds wrong or hateful," the court cited cases which upheld the rights of political groups to express their ideas. *Id.* at 328 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding right of Klan members to speak); DeJonge v. Oregon, 299 U.S. 353 (1937) (allowing Communists the right to speak and run for office); Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984) (holding that people have the right to criticize the president); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (giving Nazis the right to demonstrate)).

[128]*Id.* at 331.

[129]*Id.* The government will regulate speech that is "far removed from politics and other subjects at the core of the Framers' concerns." *Id.*

[130]*Id.*

[131]*Id.* at 332.

recognize that the definition of pornography in the ordinance focused on harm rather than viewpoint — the objective of which was the prevention of sexual violence and discrimination, not the imposition of an approved point of view. The ordinance sought to outlaw pornography, not sexist material in general. The existence of empirical evidence to support the basis of the ordinance lends credence to the conclusion that the ordinance was not a method of "thought control." Nonetheless, the United States Supreme Court affirmed the Seventh Circuit's decision in *Hudnut* holding that the anti-pornography ordinance violated the First Amendment.[132]

V. THE CANADIAN APPROACH TO PORNOGRAPHY

The validity of anti-pornography legislation which was addressed in *Hudnut* is not unique to American society, as the conflicts emanating from pornography and the right to freedom of expression have caused judicial uncertainty in other societies as well. Like American courts, Canadian courts have long struggled to construct a test that would place limits on pornography.[133] Unlike the United States, however, Canada has upheld anti-pornography legislation premised on harmful effects caused by society's exposure to pornography. In order to make a legitimate comparison between Canadian and United States law, a brief overview of Canadian constitutional law is necessary.

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[132]475 U.S. 1001 (1986). The Supreme Court rendered its decision without an opinion on February 24, 1986. *See id.*

[133]For discussion on some proposals, see Stefan Braun, *Freedom of Expression v. Obscenity Censorship: The Developing Canadian Jurisprudence*, 50 SASKATCHEWAN L. REV. 39 (1985-86); Michael MacDonald, Comment, *Obscenity, Censorship, and Freedom of Expression: Does the Charter Protect Pornography?*, 43 U. TORONTO FAC. L. REV. 130 (1985); Kathleen E. Mahoney, Comment, *Obscenity and Public Policy: Conflicting Values — Conflicting Statutes*, 50 SASKATCHEWAN L. REV. 75 (1985-86); Ronald Sklar, Comment, *Pornography*, 16 OTTAWA L. REV. 387 (1984).

A. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

1. Limitation Clause — § 1

The Canadian Charter of Rights and Freedoms was incorporated into Canada's Constitution in 1982.[134] The Charter was modeled after the American Bill of Rights[135] and guarantees its citizens a set of civil liberties analogous to those found in the Charter's American counterpart.[136] The

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[134]PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 650 (2d ed. 1985). A Canadian Bill of Rights was enacted in 1960. *Id.* However, many felt it was ineffective since it was merely a creature of statute and therefore did not apply to the Canadian provinces. *Id.* Advocates of a Bill of Rights, including Pierre Elliott Trudeau who served as Prime Minister from 1968 to 1984, sought to adopt a more effective bill of rights through an amendment to the Constitution. *Id.* These efforts led to an agreement in 1981 which was succeeded by the enactment of the Constitution Act, 1982, including as Part I, the Canadian Charter of Rights and Freedoms. *Id.* The Charter is believed to be a more effective mechanism than the old Bill of Rights since it can only be altered by constitutional amendment. *Id.* at 650-51. For a detailed discussion of the comparison between the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights see, Peter W. Hogg, *A Comparison of the Canadian Charter of Rights and Freedom with the Canadian Bill of Rights*, *in* CANADIAN CHARTER OF RIGHTS AND FREEDOMS, COMMENTARY 1 (Walter S. Tarnopolsky & Gerald-A Beaudoin eds., 1982).

[135]HOGG, *supra* note 134, at 661. In fact, much of the language in the Charter directly parallels that found in the American Bill of Rights. *Id.* Consequently, Canadian courts often rely upon decisions of the United States Supreme Court as precedent in interpreting the language of the Charter. *Id.* Even where the language in the Charter and the American Bill of Rights differs, Canadian courts look to American cases as "a useful source of ideas and parallels." *Id.*

[136]*Id.* at 651. Hogg continued:

> [However, the] Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no substitute for any of these things and would be ineffective if any of these things disappeared. This is demonstrated by the fact that most countries in Africa and Eastern Europe have bills of rights in their constitutions, and yet in many of these countries the civil liberties which are purportedly guaranteed do not exist in practice.

Id.

Charter provides a uniform national standard for protecting civil liberties which, prior to 1982, was unavailable to Canadians.[137]

Although the Charter substantially parallels the American Bill of Rights, it deviates somewhat in its language.[138] The most notable distinction for purposes of this commentary is the drafters' inclusion of a limitation clause in the Charter, which maintains that the rights and freedoms set forth in the Charter are not absolute.[139] The Limitation Clause requires the judiciary to conduct a dual analysis when reviewing legislation under the Charter.[140] First, the court will determine whether the law being challenged has a limiting effect on one of the guaranteed rights.[141] If this finding is in the affirmative, the court must next decide "whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society."[142] The burden of persuading that a law is justified under section one rests upon the government.[143]

Thus, although the Limitation Clause guarantees all of the rights and freedoms provided in the Charter, it also mandates that such rights are not absolute. Where a Canadian court determines that a particular law infringes on a guaranteed right, that law may still remain valid if it "is a reasonable limit" that "can be demonstrably justified in a free and democratic society."[144]

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[137]*Id.* at 652.

[138]*Id.* at 661.

[139]*Id.* at 679. This clause is embodied in section one of the Charter and provides:

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

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

[140]HOGG, *supra* note 137, at 679.

[141]*Id.*

[142]*Id.*

[143]*Id.* at 681.

[144]*Id.* Section one and the mandated two-stage review process reflects the influence of international human rights instruments including the European Convention on Human Rights and the International Covenant on Civil and Political Rights. *Id.* at 680.

2. Freedom of Expression — § 2(b)

The rights guaranteed under the First Amendment of the United States Constitution[145] are embodied in the Canadian Charter of Rights.[146] These rights include the fundamental freedoms of religion, expression, assembly, and association. The guarantee of freedom of expression[147] has always been afforded great weight by Canadian judges.[148] Like United States constitutional policy, Canadian law values freedom of expression as an instrument of democratic government,[149] truth,[150] and personal

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[145]The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. I.

[146]Section two of the Charter of Rights provides:

> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

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

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

[148]HOGG, *supra* note 137, at 713.

[149]*Id.* (citing Switzman v. Elbling, S.C.R. 285, 358 (1957) (opinion of Rand, J.) ("[P]arliamentary government was 'ultimately government by the free public opinion of an open society,' and that it demanded 'the condition of a virtually unobstructed access to and diffusion of ideas.'").

[150]*Id.* (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Hogg explained that Justice Holmes believed the rationale underlying the First Amendment was that "the truth was to be found in a 'free trade in ideas,' in 'the power of thought to get itself accepted in the competition of the market.'" *Id.*

fulfillment.[151] Despite the importance placed upon this fundamental right, however, freedom of expression, like all other Charter provisions, is still subject to the limitation clause.[152]

B. CANADA'S SOLUTION TO PORNOGRAPHY — *REGINA V. BUTLER*

As early as 1892, Canada enacted criminal laws to prohibit certain forms of sexual expression.[153] While Canada's *Criminal Code* made it a

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[151]*Id.* at 714. "[E]xpression is protected not just to create a more perfect polity, and not just to discover the truth, but to 'enlarge the prospects for individual self fulfillment,' or to allow 'personal growth and self realization.'" *Id.* at 714 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 578 (1978)).

[152]*Id.* at 709. A law limiting a section two right will be upheld under section one if it is determined to be a "reasonable limit" which can be "demonstrably justified in a free and democratic society." *Id.* at 709-10.

[153]*See* Mahoney, *supra* note 133, at 87. Parliament's initial attempt at regulating pornography was in § 179 of the *Criminal Code*; which provided in part:

> 179. Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse
>
> (a) publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals; or
>
> (b) publicly exhibits any disgusting object or indecent show;
>
> (c) offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.

Criminal Code, S.C., ch. 29, § 179 (1892) (Can.), *reprinted in* Regina v. Butler, 70 C.C.C. (3d) 129, 141 (Can. 1992).

Section 179 was repealed in 1949 and replaced with the following:

> 207. (1) Every one is guilty of an indictable offence and liable to two years' imprisonment who
>
> (a) makes, prints, publishes, distributes, circulates, or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever; or
>
> (b) prints, publishes, distributes, sells or has in possession for any such purpose, any crime comic.
>
> (2) Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse
>
> (a) sells, exposes to public view or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever;

crime to "knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view," the *Code* initially failed to define obscenity.[154]

It was not until 1957 that the Canadian Parliament amended the *Criminal Code* to include a precise definition of obscenity.[155] This definition provides:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[156]

(b) publicly exhibits any disgusting object or any indecent show; or

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a means of preventing conception or causing abortion or miscarriage or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

Id. § 207, *reprinted in Butler*, 70 C.C.C. (3d) at 141-42.

[154]Mahoney, *supra* note 133, at 87. The courts, possessing no statutory definition upon which to base their analysis, adopted the definition set forth in Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868), which deemed a publication obscene when:

> [T]he tendency of the matter charged is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.

Id. Henceforth, the law protected only those individuals who viewed or read the obscene materials. *Id.* at 88. No protection was afforded to participants or to society in general. *Id.*

[155]*Id.*

[156]Criminal Code, S.C. 1959, ch., 41 § 159(8). This definition exists today and is embodied in § 163, the current provision in the *Criminal Code* pertaining to pornography. Section 163(1) provides:

> Every one commits an offence who,
>
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, phonograph record or other thing whatever; or
>
> (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

The Canadian Supreme Court was called upon to assess the constitutional validity of this provision in *Regina v. Butler*.[157]

In *Butler*, the owner of a pornography store in Winnipeg, Manitoba, was charged with two hundred fifty counts pursuant to section 163 of the

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

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

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

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence 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 an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, phonograph record, crime comic or other thing by means of or in relation to which the offense was committed is not a defence to the charge.

(7) In this section "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

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

Id. § 631(1).

[157]70 C.C.C. (3d) 129 (1992).

Criminal Code.[158] These counts included possession of obscene material for the purposes of distribution and sale, and selling and exposing obscene material to the public.[159] The trial court convicted the defendant on eight counts and acquitted him of the remaining two hundred forty-two counts, on the grounds that the materials were protected as a valid exercise of freedom of expression under the Charter.[160]

On appeal, the Manitoba Court of Appeals entered convictions for defendant on all counts, concluding that the seized materials were not within the protection of the Canadian *Charter*.[161] The defendant appealed to the Supreme Court of Canada, contending that section 163 of the *Criminal Code*, which prohibited the sale or exposition of obscene material, violated his freedom of expression under the *Charter*.[162] The Court agreed with the defendant and held that section 163 violated section 2(b) of the Canadian *Charter* by prohibiting certain expressive activity based on its content.[163]

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[158]*Id.* at 133-34. Butler's entire inventory was seized as well. *Id.* The seized material consisted of visuals in which:

> [W]omen were presented as used, hurt or abused for sex for men. In the subject materials, women were presented as raped, sometimes acting as if they were enjoying it, sometimes screaming, resisting and trying to run away. Sex acts were presented as being performed on subordinates by superiors or caretakers . . . . Adult women were presented as children and some participants appeared to be children. Women were penetrated with objects, bound with rings through their nipples and hung handcuffed and nude from the ceiling. Men ejaculated on women's faces and into their mouths. A small amount of the subject material presented sexual aggression against men including bondage, penetration with objects, rape and beatings.

Kathleen Mahoney, Comment, R. v. Keegstra*: A Rationale for Regulating Pornography?* 37 MCGILL L.J. 242, 256 (1992) (citing exhibits from *Butler*).

[159]*Butler*, 70 C.C.C. (3d) at 133-34.

[160]*Id.* at 134. The Crown appealed the acquittals and defendant cross-appealed the convictions. *Id.*

[161]*Id.*

[162]*Id.*

[163]*Id.* at 153.

> Meaning sought to be expressed need not be "redeeming" in the eyes of the court to merit the protection of § 2(b) whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear

The Supreme Court first interpreted the judicial meaning of the definition of obscenity set forth in section 163(8).[164] The Court examined the legislative history of section 163, focusing particularly on its definition of obscenity.[165] The Court noted that the definition of obscenity introduced in section 163(8) in 1959, acted to replace the *Hicklin* test,[166] which was formerly used by the Court to evaluate obscenity.[167] This new definition of obscenity caused the courts to develop a series of tests to govern the determination of what constitutes obscenity for purposes of criminal prosecution.[168]

Before setting forth these tests, the *Butler* Court first confirmed that the objective standard of obscenity in section 163(8) was the exclusive test to be used for evaluating whether material is obscene for purposes of criminal prosecution.[169] The Court set forth the three tests for defining obscenity under section 163(8): (1) "community standard of tolerance" test; (2) "degradation or dehumanization" test; and (3) "internal necessities" test or "artistic defense."[170]

The Court explained that the "community standard of tolerance" test focused on the community's standards of decency rather than the standards of any particular segment of society.[171] Under the "degradation or

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of censure.

In this case, both the purpose and effect of § 163 is specifically to restrict the communication of certain types of materials based on their content. In my view there is no doubt that § 163 seeks to prohibit certain types of expressive activity and thereby infringes § 2(b) of the Charter.

Id.

[164]*Id.* at 143.

[165]*Id.* at 141-44.

[166]The *Hicklin* test is set forth in Section III, *supra* notes 50-55.

[167]Regina v. Butler, 70 C.C.C. (3d) 129, 143 (1992).

[168]*Id.* The Court cited the case of Regina v. Brodie, 132 C.C.C. 161 (1962), which set forth the principal tests to aid in the interpretation of section 163(8). *Butler*, 70 C.C.C. (3d) at 143.

[169]*Id.*

[170]*Id.* at 144-49.

[171]*Id.* at 144.

dehumanization" test, the Court noted that material which exploits sex in a degrading or dehumanizing manner will necessarily fail the community standards test.[172] The "internal necessities" test, or "artistic defense," is the last phase in analyzing whether exploitation is undue.[173] The Court posited that this test is utilized to assess whether the exploitation of sex in a particular work has a justifiable role in advancing the plot or theme when measured by the internal necessities of the work itself.[174]

In applying these tests to the impugned materials in *Butler*, the Court divided pornography into three categories: "(1) explicit sex with violence; (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing."[175] Next, the Court pronounced that the degree of harm emanating from exposure to pornography should be considered when assessing community tolerance to determine if the pornographic materials are "undue" pursuant to section 163(8).[176] The Court defined harmful materials as those which predispose a person to act in an anti-social manner, including by example, "the physical or mental mistreatment of women by men . . . or the reverse."[177] The Court recognized anti-social conduct as conduct which "society formally recognizes as incompatible with its proper functioning."[178] The stronger the inference of harm, the Court postulated, the lesser the likelihood of community tolerance.[179] Applying this analysis to the Court's classifications of pornography, the Court held that materials falling within the first category, explicit sex with violence, will almost always amount to the undue

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[172]*Id.* at 146-48.

[173]*Id.* at 148.

[174]*Id.* at 149. Following its analysis, the Court noted the lack of an interrelationship among these formulated tests leaving the "legislation open to attack on grounds of vagueness and uncertainty." *Id.*

[175]*Id.* at 150.

[176]*Id.*

[177]*Id.*

[178]*Id.* at 151.

[179]*Id.*

exploitation of sex.[180] Materials falling within the second category, explicit sex which is degrading or dehumanizing, the Court stated, should be deemed undue if the "risk of harm is substantial."[181] Conversely, the Court found that explicit non-violent, non-dehumanizing sex will be tolerated unless it involves children in its production.[182] Based on the foregoing logic, the Supreme Court remanded the case to the lower court to determine whether defendant's materials were "undue" under the "community tolerance test" thereby causing them to fall within the prohibitions of section 163.[183]

In determining whether section 163 should remain in effect, the Supreme Court conducted a two-part analysis.[184] The two constitutional questions the Court was called upon to decide were: (1) whether section 163 violated section 2(b) of the *Charter*; and (2) if section 163 did violate section 2(b), whether it was justified as a "reasonable limit prescribed by law" under section one of the *Charter*.[185]

First, the Court addressed whether the anti-pornography legislation embodied in section 163 violated the freedom of expression provided for in section 2(b) of the Canadian *Charter*.[186] The Supreme Court rejected the lower court's holding that the freedom of expression did not apply, since the materials involved were purely physical and lacking in any meaning.[187] Rather, the Court found that while the materials were physical, they also conveyed ideas, feelings, or opinions and thus, were not without expressive content.[188]

Next, the Court addressed the second issue: whether the anti-pornography legislation was a "reasonable limit which could be demonstrably

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[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 168-69.

[184] *Id.* at 141.

[185] *Id.*

[186] *Id.* at 152.

[187] *Id.*

[188] *Id.*

justified in a free and democratic society."[189] In its analysis of this issue, the Court considered whether there were sufficient objectives to warrant overriding the freedom of expression.[190] While acknowledging that the purpose of Parliament is not to impose moral attitudes and beliefs upon the citizenry, the Court recognized Parliament's right to legislate on the basis of a fundamental concept of morality which safeguards the values that are essential to a free, democratic society.[191] The Court did not base its analysis on moral disapprobation but rather on the harms caused to society.[192] The Court specifically held that the overriding objective of section 163 was to prevent harm to society and that such objective was sufficiently pressing to justify a restriction on the freedom of expression.[193]

In so holding, the Court reasoned that the exposure of pornography to society posed implicit dangers to society by reinforcing gender-based

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[189]*Id.* at 154. The Court rejected Butler's contention that section 163(8) was "void for vagueness" as it was not "so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.'" *Id.* at 155. Although no definition of the term "undue" exists in the statute, the Court found this lack of an express definition insufficient to render the statute void. *Id.* The Court instead recognized the impossible task of precisely defining every word when drafting legislation and concluded that defining "undue" was the duty of the judiciary. *Id.* Therefore, rather than examining the provision on its face, the Court looked to judicial decisions which interpreted and applied the provision. *Id.* After reviewing prior judgments which interpreted section 163(8), the Court held that such interpretations provided an intelligible standard for evaluating the meaning of the provision. *Id.* Consequently, the Court dismissed the "void for vagueness" argument. *Id.*

[190]*Id.* The respondent argued these objectives to be "the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes, and the public interest in maintaining a 'decent society'." *Id.* Conversely, the appellant argued that allowing such legislation would grant the states permission to act "as a 'moral custodian' in sexual matters and to impose subjective standards of morality." *Id.* The Court apparently rejected appellant's position and based its analysis upon the harms emanating from pornography. *See id.*

[191]*Id.* at 156. The Court noted that criminal law is most often based on moral conceptions of right and wrong. *Id.*

[192]*Id.* at 157. The Court noted that although moral corruption and harm to society are inextricably intertwined, Parliament moved beyond its concern for moral decency in section 163, shifting its emphasis instead to the harm to society that results from dissemination of such exploitative materials. *Id.*

[193]*Id.* at 159.

stereotypes to the disadvantage of both sexes.[194] The Court further found that pornography makes "degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable."[195] The Court further recognized that true equality between males and females could not be achieved so long as society was exposed to violent and degrading materials.[196] Additionally, the Court realized that the portrayal of women, as a class, as "objects for sexual exploitation and abuse" will negatively impact an individual's sense of self-worth and acceptance.[197]

As additional support for its conclusion, the Court noted that legislation limiting one's freedom of expression exists in most free and democratic societies.[198] Furthermore, the Court found section 163(8)'s definition of obscenity consistent with Canada's international obligations under the *Agreement for the Suppression of the Circulation of Obscene Publications and the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*.[199] Finally, the Court posited that because of the proliferation of the pornography industry, Parliament's current concern in

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[194]*Id.* at 157.

[195]*Id.* The Court propounded:

> A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

Id. (quoting REPORT ON PORNOGRAPHY BY THE STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS 18:4 (1978)).

[196]*Id.* at 159.

[197]*Id.* (citing R. v. Red Hot Video Ltd., 18 C.C.C.(3d) 1 (1985)).

[198]*Id.*

> [A]ll organized societies have sought in one manner or another to suppress obscenity. The right of the state to legislate to protect its moral fibre and well-being has long been recognized with roots deep in history. It is within this frame that the Courts and judges must work.

Id. (quoting R. v. Great West News Ltd., 4 C.C.C. 307, 309 (1970)).

[199]*Id.* at 160.

regulating pornography is even more pressing and substantial than when the impugned provisions were first enacted.[200]

Subsequent to holding that section 163 was a reasonable limit prescribed by law, the Supreme Court analyzed whether the impugned provision was rationally connected and proportional to its objective.[201] First, the Court found that the communication sought to be limited was not the type which the freedom of expression clause sought to guarantee.[202] Second, while conceding that a direct link between pornography and harm to society could not be conclusively established, the Court found that there was a sufficient rational link between the criminal sanction and the objective.[203] In support of its finding, the Court alluded to the "American approach" set forth by

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[200]*Id.*

[201]*Id.* at 161. Pursuant to Canadian law, in order to meet the proportionality requirement, three factors must be established:

> (1) the existence of a rational connection between the impugned measures and the objective;
> (2) minimal impairment of the right or freedom; and
> (3) a proper balance between the effects of the limiting measures and the legislative objective.

Id. (citation omitted).

[202]*Id.* at 162. The Court viewed the expression sought to be limited in this case merely as expression with an economic purpose. *Id.* "It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of the freedom of expression." *Id.* at 161. The Court acknowledged the BC Civil Liberties Association's interest in protecting "good pornography" which, according to the association, "has value because it validates women's will to pleasure . . . . celebrates female nature . . . . validates a range of female sexuality . . . . [and] celebrates both female pleasure and male sexuality." *Id.* The Court opined that such so-called "good pornography" would not be affected if the test of section 163 was properly applied, however, the Court gave more credence to Justice Shannon's description of pornography in *R. v. Wagner*:

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

Id. at 161-62 (quoting 43 C.R. (3d) 318 (1985), *aff'd*, 26 C.C.C. 3d 242 (1985)).

[203]*Id.* at 163.

Chief Justice Burger in *Paris Adult Theatre I v. Slaton*,[204] which supported a connection between anti-social behavior and obscene material.[205]

The Court next opined that section 163's criminal sanction was a minimal impairment of a guaranteed right or freedom, based upon several propositions.[206] First, the Court found that the provision was not so broad as to prohibit all types of pornographic materials,[207] as depictions that were non-violent, non-degrading, and non-dehumanizing would not fall within the statutory proscriptions.[208] Second, the Court commented that materials having scientific, artistic, or literary value would not be prohibited by the impugned provision since such works fall within the "artistic defense."[209] Third, the Court referred to Parliament's past unsuccessful attempts at constructing a more precise definition of "obscenity."[210] Fourth, the Court opined that the impugned provision would not apply to private viewing of

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[204]*Id.* at 163-64. For a discussion of *Paris Adult Theatre*, see *supra* notes 77-87.

[205]Regina v. Butler, 70 C.C.C. (3d) 129, 164 (1992). "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist." *Id.* (quoting 413 U.S. at 60-61 (1972)). The Court also referenced the ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT, discussed at *supra* note 2. *Id.* at 163.

[206]*Butler*, 70 C.C.C. (3d) at 164-67. The Court stated that in meeting this test it was not necessary that the legislative scheme be the "perfect" scheme; rather, it required that the legislation be "appropriately tailored in the context of the infringed right." *Id.* at 164-65 (citations omitted).

[207]*Id.* at 165.

[208]*Id.*

[209]*Id.*

[210]*Id.* The Court stated:

> [O]ur court [has] recognized that it is legitimate to take into account the fact that earlier laws and proposed alternatives were thought to be less effective than the legislation that is presently being challenged. The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (citations omitted). It seems that the only particular alternative is to strive towards a more abstract definition . . . [i]n my view, the standard of "undue exploitation" is appropriate.

Id.

obscene materials;[211] rather, its applicability would extend only to public dissemination and exhibition.[212]

Finally, the Court conducted a balancing test and determined that the legislative objective of preventing harm to society outweighed the infringement of one's freedom of expression.[213] The Court propounded that the kind of expression sought to be limited by the anti-pornography law "lies far from the core of the guarantee of freedom of expression . . . . [while] the objective of the legislation . . . is of fundamental importance in a free and democratic society . . . seek[ing] to enhance respect for all members of society, and non-violence and equality in their relations with each other."[214]

The Court in *Butler* concluded that while section 163 restricts one's freedom of expression, such restriction is justifiable because of section 163's objectives of preventing serious harm to society and promoting equality of men and women. In performing a balancing test, the Court found that the need to protect women and society from the harms caused by the free flow of pornographic materials outweighs any infringement on the freedom of expression that may occur as a result of the regulation. The underpinning of the Court's holding was its finding that the regulation promoted respect, equality, and non-violence, the essential elements of a free and democratic society.

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[211] *Id.* at 166.

[212] *Id.* The Court rejected arguments that reasonable time, manner, and place restrictions should be utilized in place of an outright proscription, concluding that such restrictions would do little or nothing to alleviate the harm to society caused by pornography. *Id.* Furthermore, the Court reasoned that alternative proposals such as counselling for rape victims, providing shelter and assistance for battered women, campaigning for laws against discrimination based on sex, and educating law enforcement agencies and other governmental authorities had been invalidated by the Court. *Id.* The Court found such alternatives to exist in the form of responses to the harms caused by negative attitudes. *Id.* The Court stated that such measures should act as complements in addressing societal problems. *Id.*

[213] *Id.* at 168.

[214] *Id.*

VI. CONCLUSION

Pornography is an age-old phenomenon which has been tolerated in the United States for centuries. The market for pornographic material is ever increasing, making it a lucrative business for all who want to cash in. There are a plethora of reasons, however, why its dissemination must now be curtailed.

First, in early times, pornography consisted primarily of nudity and perhaps descriptions of sexual acts. Pornography in modern society depicts violent, explicit, and degrading episodes of sexual activity. Second, research conducted within the past decade reveals the existence of a causal link between exposure to pornography and harm. Such harm extends not only to the individuals portrayed in the pornographic materials, but to all of society as well — whether it be in the form of harm to victims of sex crimes related to the perpetrator's exposure to pornography, or harms to society in general caused by social conditioning which promotes sexual discrimination, subordination, and degradation of women. Third, the pornography industry must be curtailed to buttress the promotion of equality of men and women. Pornography evolved at a time when women were considered inferior to men; however, women have fought arduously to annul this misconception and achieve equality in American society. Women will never be entitled to absolute equality, however, as long as these violent, degrading, and dehumanizing forms of pornography exist. The producers and distributors of pornography continue to reap their financial benefits at the expense of women's dignity. A response to limit pornography by the United States Supreme Court would be a proclamation to all that women are important in our society.

Thus far, the courts in the United States have done little to curtail the proliferation of the pornography industry. In holding that the anti-pornography ordinance at issue in *Hudnut* was unconstitutional, the court failed to place emphasis on the ordinance's objective of preventing harm to women and society and based its analysis instead on theoretical First Amendment principles. While freedom to express oneself is an important and essential right in American society, the United States Supreme Court has pronounced that this right is not absolute. Exceptions have been carved out of the First Amendment when the Court has found that such expression was not at the core of the Framers' intent in drafting the Amendment. Speech which harms women and society is surely not that which the First Amendment was intended to protect.

The courts in the United States should look to Canadian courts and their commitment to equality. Although arriving at a solution to control pornography is not a rudimentary process, the United States should give serious consideration to the Canadian Supreme Court's position that it is

legitimate to regulate pornography that is harmful to women. Both Canada and the United States are democratic societies which stress freedom and equality for all of their citizens. Canadian courts have taken the position that placing a limitation on peoples' rights and freedoms, where needed to achieve a collective goal, is essential and consistent with the ideals of a democratic society. Until American courts are ready to accept this view, our collective goal of achieving equality for all will remain at a standstill.