Abstract Priuciple v. Contextual Conceptions of Harm: A Comment on *R.* v. *Butler*

Jamie Cameron*

This Comment provides a critique of the Supreme Court of Canada's decision in *R.* v. *Butler*, which held that section 163(8) of the *Criminal Code*, defining obscenity, is a reasonable limit on freedom of expression under section 1 of the *Canadian Charter of Rights and Freedoms*. Before discussing the *Charter*, the Court expanded the scope of section 163(8) to include a prohibition against sexually explicit material that is degrading or dehumanizing. Initially, the author is critical of the Court's methodology, which enlarged section 163(8) at the expense of expressive freedom, without even mentioning the *Charter*.

Once the Court had interpreted the statute expansively, its *Charter* analysis became little more than an afterthought. By articulating the government's objective in broad, generalized terms and then applying a diluted proportionality test, the Court had little difficulty justifying the infringement on expressive freedom under section 1. The author takes issue with *Butler*'s constitutional analysis before commenting more generally on the Court's failure to acknowledge the censorial implications of this decision.

Ce commentaire traite de l'arrêt *R.* c. *Butler* de la Cour suprême du Canada, qui a déclaré que l'article 163(8) du *Code criminel* définissant l'obscénité, est une limite raisonnable à la liberté d'expression selon la *Charte canadienne des droits et libertés*. Avant même d'aborder la *Charte*, la Cour élargit la portée de l'article 163(8) pour le rendre applicable à la prohibition de produits sexuellement explicites qui sont dégradants ou déshumanisants. L'auteure trouve mal avisée cette méthodologie de la Cour suprême, qui consiste à étendre la portée de l'article 163(8) au détriment de la liberté d'expression, et ce sans avoir même fait mention de la *Charte*.

Suite à son interprétation large de la disposition législative, l'analyse que fait la Cour en vertu de la *Charte* se présente presque comme une arrière-pensée. Articulant la finalité législative de cette disposition en termes généraux, puis diluant le test de proportionnalité, la Cour éprouve peu de difficultés à trouver justifiée qu'elle porte selon les paramètres de l'article premier l'atteinte à la liberté d'expression. L'auteure critique l'analyse constitutionnelle contenue dans l'arrêt *Butler* pour enfin nous livrer ses commentaires plus généraux sur le défaut de la Cour suprême de reconnaître les implications censoriales de sa décision.

* Associate Professor, Osgoode Hall Law School.

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Introduction

Without a murmur of dissent, the Supreme Court of Canada recently upheld *Criminal Code*[1] restrictions on obscenity in *R.* v. *Butler*.[2] And, with little more than a murmur of dissent,[3] its decision was greeted with praise. While opponents of pornography claimed a legal victory for women "of world historic importance,"[4] the *Globe and Mail* placed the Supreme Court of Canada in "the vanguard of legal thinking" for not permitting the right of freedom of expression to be used as an "excuse" for the circulation of debasing sexual materials.[5]

Ten years after the *Charter*'s[6] enactment, it is doubtful that section 2(b)[7] has enhanced the status of expressive freedom in Canada. Although resistance to the guarantee can be found in the lower court jurisprudence, it is the Supreme Court of Canada's interpretation of section 2(b) that is most troubling. In more than fifteen decisions to date, the claim has succeeded no more than five times.[8]

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[1]R.S.C. 1985, c. C-46.

[2]*R.* v. *Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129 [hereinafter *Butler* cited to S.C.R.]. Compare *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 [hereinafter *Keegstra* cited to S.C.R.] (upholding a ban on hate expression, by a four to three margin) and *R.* v. *Seaboyer*, [1991], 2 S.C.R. 577, 83 D.L.R. (4th) 193 [hereinafter *Seaboyer* cited to S.C.R.] (invalidating a ban on examination of past sexual experience in sexual assault cases, by a seven to two margin).

[3]For less receptive views, see A. Borovoy, "Beware the Bible, or the 11 O'clock News" *Globe and Mail* (10 March 1992) A19; P. Bryden, "*The Queen* v. *Butler*: The Triumph of Pragmatism in Free Speech Adjudication" (1992) 3 Med. & Comm. L. Rev. [forthcoming].

[4]Jeff Sallot, "Legal Victory Bittersweet" *The Globe and Mail* (29 February 1992) A6 (quoting Catharine MacKinnon).

[5]"Pornography and Violence" *The Globe and Mail* (29 February 1992) D6 (editorial).

[6]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[7]Section 2(b) of the *Charter* reads as follows:

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[8]The claim also failed in the following cases: *R.W.D.S.U.* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 (upholding limitations on secondary picketing); *Canadian Newspapers Co.* v. *A.G. Canada*, [1988] 2 S.C.R. 122, 52 D.L.R. (4th) 690 (upholding a mandatory publication ban of complainant's identity in sexual offence cases); *B.C.G.E.U.* v. *A.G. British Columbia*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 (upholding an injunction restraining courthouse picketing); *Irwin Toy Ltd* v. *A.G. Quebec*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.] (upholding a prohibition on advertising directed at children under age 13); *Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 (upholding an order for compelled expression); *R.* v. *Stagnitta*, [1990] 1 S.C.R. 1226, 56 C.C.C. (3d) 17; *R.* v. *Skinner*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1; *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1226, 4 W.W.R. 481 [hereinafter *The Prostitution Reference* cited to S.C.R.] (upholding the *Criminal Code*'s prohibition on the public solicitation of sexual services); *Keegstra*, *supra*, note 2; *R.* v. *Andrews and Smith*, [1990] 3 S.C.R. 870, 61 C.C.C. (3d) 490 (upholding a *Criminal Code* provision prohibiting hate propaganda); *Canada Human Rights Commission* v. *Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 (upholding a prohibition against racist telephone messages); *Lavigne* v. *O.P.S.E.U.*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545 (upholding compelled financial support of political and ideological messages); *C.B.C.* v. *Lessard*, [1991] 3 S.C.R. 421, 67 C.C.C. (3d) 517; *C.B.C.* v. *A.G. New Brunswick*, [1991] 3 S.C.R. 459, 85 D.L.R. (4th) 57 (upholding the search and seizure of press news videotapes).

Concerns about the implications of that record can only deepen following the Court's unanimous decision in *Butler*.

Ultimately, the Court held that section 163(8) of the *Criminal Code*, which defines obscenity, is a justifiable limitation on freedom of expression. The analytical approach Sopinka J. adopted in arriving at that conclusion was somewhat unusual.[9] Initially, and without reference to the *Charter*, he read section 163(8) "up" to enhance the scope of the prohibition. Through a doctrinal interpretation that purported to fill "lacunae" in the legislation, the definition of obscenity expanded to include sexually explicit material that is degrading or dehumanizing.[10] Under that standard, material which might create a predisposition to behave in an anti-social manner can be prohibited; anti-social behaviour is in turn defined as any conduct that "society formally recognizes as incompatible with its proper functioning."[11] Even before the *Charter* was considered, a new category of prohibited expression had been added to section 163(8).

At that point it was inconceivable that the Court would then invalidate section 163(8) under the *Charter*. In such circumstances, Mr. Justice Sopinka's constitutional analysis was little more than an afterthought. With one exception, every issue was resolved against the interest in protecting expressive freedom. Precedent dictated a generous and egalitarian interpretation of section 2(b), and a *prima facie* finding of breach was accordingly unavoidable. Once the analysis shifted to section 1, the egalitarianism of section 2(b) was quickly displaced; there, the analysis was driven by an assumption that, as low value expression, obscenity should effectively receive no protection under the *Charter*.

See also *Fraser* v. *Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122 (upholding limits prior to the *Charter* on the expressive freedom of public service employees); *Moysa* v. *Alberta Labour Relations Board*, [1989] 1 S.C.R. 1572, 60 D.L.R. (4th) 1 (declining to consider whether s. 2(b) protects the confidentiality of a journalist's source of information); *MacKay* v. *Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 (dismissing a challenge to provisions of Manitoba's *Elections Finances Act*); *Vickery* v. *Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, 64 C.C.C. (3d) 65 (dismissing an application by the press for access to a video tape court exhibit).

The claim succeeded in the following cases: *Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577; *Devine* v. *A.G. Quebec*, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641 (invalidating Quebec's unilingual sign language law); *Edmonton Journal* v. *A.G. Alberta*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to S.C.R.] (invalidating a publication ban on the disclosure of certain judicial proceedings); *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 (invalidating regulations prohibiting professional advertising); *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 485 (upholding access to public airports for expressive purposes); *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 [hereinafter *Osborne*] (invalidating legislative provisions prohibiting public servants from engaging in partisan political activities).

[9]Though the decision was nnanimous, Gonthier J. wrote concurring reasons, in which L'Heureux-Dubé J. joined. Due to space limitations this Comment focuses its attention on Sopinka J.'s majority reasons, which were supported by seven members of the Court.

[10]*Butler*, *supra*, note 2 at 483. S. 163(8) of the *Criminal Code* defines obscenity as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of crime, horror, cruelty and violence."

[11]*Ibid.* at 484.

In discussing the permissibility of the government's objective, Sopinka J. claimed that the purpose of section 163(8) is to avoid harm, and not to enforce morals.[12] In his view, sexually explicit material undercuts equality values, reinforces women's negative self-perception and may retard the achievement of gender equality.[13] By placing the emphasis on gender, Mr. Justice Sopinka attempted to distinguish the prevention of harm from the enforcement of morals.[14] Ultimately, however, what *Butler* punishes is gender inequality, and an unacceptable portrayal of female sexuality. The result is that, although the *Charter* prohibits the institutionalization of a particular conception of sexuality that is based on "morality," it permits the imposition of an alternative conception based on "equality."

Thereafter, the Court applied a diluted standard of proportionality that was essentially meaningless. The first element of that test requires the government to establish that the prohibition is rationally connected to the achievement of its objective.[15] There, because it was reasonable for Parliament to prohibit any materials which might contribute to a "desensitization of individuals," the rational connection requirement was satisfied.[16] The purpose of the second element, the minimal impairment test, is to ensure that the government does not overreach, either by prohibiting activity that is constitutionally protected, or by employing means which unduly impair the right.[17] According to Sopinka J., that requirement was satisfied as well, because less intrusive means would not prevent women from feeling victimized by sexually explicit materials.[18] However, reversing a perception of victimization is incompatible with a concept of minimal impairment: such a perception could only be negated by maximum impairment. In light of those findings, discussion of the third element of the test, which reflects a final time on the proportionality of the infringement, was perfunctory.

Whatever its consequences for the status of sexually explicit materials, *Butler* is troubling from a broader perspective. The Court's treatment of expressive freedom was both careless and peremptory. In methodological terms, the *Charter*'s separation of the right and its permissible limitations has enabled the Court to marginalize section 2(b)'s guarantee in the following way. After invoking the rhetoric of expressive freeedom to support a definition of the right which conceptualizes all expression as equal, the Court employs contextualism under section 1 to rationalize limitations on expression that offends fundamental values. Because it is disguised by the *Charter*'s bifurcation of breach and justification, the contradiction between the *prima facie* egalitarianism of section 2(b) and the nullification of that principle under section 1 is implemented without explanation.

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[12]*Ibid.* at 493.
[13]*Ibid.* at 497, 504.
[14]*Ibid.* at 479, 484.
[15]*R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 139, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].
[16]*Ibid.* at 164.
[17]*Ibid.*
[18]*Supra*, note 2 at 507.

Jurisprudentially, *Butler* confirms that, rhetoric aside, the Supreme Court of Canada lacks any vision of expressive freedom. Conceptually, the difficulty can be traced to *Edmonton Journal*, and Madame Justice Wilson's juxtaposition of "abstract" principle with "contextual" reality.[19] As this Comment suggests, in the absence of a commitment to principle, it is questionable whether freedom of expression can be protected. The decisions in *Keegstra* and *Butler* demonstrate that context can otherwise become synonymous with the suppression of unpopular expression. Historical experience proves that censorship has been as much a part of democratic reality as social inequality.

In examining these themes, this Comment begins by explaining how *Butler*'s decision to read section 163(8) up effectively constitutionalized a definition of obscenity without subjecting it to constitutional scrutiny. Following discussion of the Court's *Charter* analysis, a third and final section reflects on *Butler*'s implications for expressive freedom more generally.

I. Reading Section 163(8) "Up"

A. *Introduction*

Before addressing the *Charter*, Sopinka J. decided to elaborate on and clarify obscenity doctrine. Through doctrinal interpretation, he incorporated a prohibition against degrading or dehumanizing sexual material into section 163(8)'s definition of obscenity. In doing so, he chose to ignore precedent which explicitly considered the principle of tolerance in balancing freedom against community standards. Moreover, by expanding that definition without a single reference to the *Charter*, the Court's preliminary discussion in effect resolved the constitutional issue.

B. *Obscenity Doctrine and the* Charter

Section 163(8) of the *Criminal Code* defines obscenity as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of ... crime, horror, cruelty and violence." Prior to the *Charter*, conviction did not require proof of any of its aggravating elements; materials which offended "community standards" constituted an undue exploitation of sex under the *Criminal Code*.[20] The subjectivity of that standard, together with its undeniable roots in conventions of moral propriety, provoked concerns about its implications for expressive freedom. To reduce the scope of moral censorship, the courts began to qualify the concept of community standards by reference to the principle of tolerance.[21]

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[19]*Supra*, note 8 at 1355-56 (concurring opinion).

[20]See *Brodie* v. *R.*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507 (introducing the community standards test).

[21] It is neither helpful nor accurate to say that the standard of tolerance is synonymous with the moral standards of the community .... The question ... is not whether the content of the publication ... is right, but rather whether it goes beyond what the contemporary Canadian community is prepared to tolerate (*R.* v. *Penthouse International Ltd*

Enactment of the *Charter* posed new dilemmas about the status of obscenity. Though the constitutionality of suppressing explicit sex on purely moral grounds appeared dubious, instinct rejected the suggestion that "low value" expression could be protected by the *Charter*. In such circumstances, sustaining the *Criminal Code*'s prohibition against obscenity would require an alternative explanation. An added complication was that, in structural terms, it was unclear how pre-existing doctrine could be adapted to the *Charter*'s framework of breach and justification.[22] Doctrinal standards which evolved prior to the *Charter* were designed to facilitate enforcement of the *Criminal Code*, not test its constitutionality.[23]

To sever the connection between pre-existing doctrine and conventions of morality, the lower courts began to shift the analysis. Sexually explicit materials could be prohibited in the era of the *Charter*, not simply because they were morally wrong, but because they were "degrading" or "dehumanizing." That shift had its genesis in *R.* v. *Doug Rankine Co.*'s conclusion that the *Criminal Code* prohibits "the performance of indignities" which degrade and dehumanize its participants.[24] Although the *Charter* was not in issue, Borins Co. Ct J. stated that the community standard of tolerance must be informed by "heightened respect for freedom of expression."[25] Despite that qualification, the definition of obscenity expanded by judicial interpretation. At the same time, section 163(8) was saved under the *Charter* because it was valid on its face.[26]

Although the prohibition against degrading or dehumanizing treatment did not displace moral criteria, it found additional support in a new-found reliance on equality values. Thus in *Wagner* the Court drew a distinction between "sexually explicit erotica [which] portrays positive and affectionate human sexual

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(1979), 46 C.C.C. (2d) 111 at 114-15, 96 D.L.R. (3d) 735 (Ont. C.A.), leave to appeal refused, [1979] 1 S.C.R. xi).

See also *Dominion News and Gifts (1962) Ltd* v. *R.*, [1964] S.C.R. 251, 3 C.C.C. 1 [hereinafter *Dominion News* cited to C.C.C.] affirming (1963), 2 C.C.C. 103, 40 C.R. 109 (Man. C.A.); *R.* v. *Odeon Morton Theatres Ltd* (1974), 16 C.C.C. (2d) 185, 45 D.L.R. (3d) 244 (Man. C.A.); *R.* v. *Prairie Schooner News Ltd et al.* (1970), 1 C.C.C. (2d) 251, 75 W.W.R 585 (Man. C.A.); *Towne Cinema Theatres Ltd* v. *R.*, [1985] 1 S.C.R. 494, 18 D.L.R. (4th) 1 [hereinafter *Towne Cinema* cited to S.C.R.].

[22]Some s. 2(b) activities raised issues of first impression; for example, does legislation which limits commercial expression violate the *Charter*? Obscenity, by contrast, raised questions about the constitutional status of a ready-made doctrinal framework that predated the *Charter*.

[23]Thus it was awkward to define the s. 2(b) right by reference to concepts such as the "undue exploitation of sex" and community standards test, which are aimed at limiting expressive freedom. Nor was it self-evident that the pre-existing doctrine would fit into the s. 1 analysis. Prior to *Oakes* that doctrinal framework might have been regarded as an issue-specific proxy for "reasonable limits." Once *Oakes* was decided the difficulty was that obscenity doctrine lacked analogues in a standard that was designed to test the constitutionality of legislation.

[24](1983), 9 C.C.C. (3d) 53 at 70, 36 C.R. (3d) 154 (Ont. Co. Ct) [hereinafter cited to C.C.C.).

[25]*Ibid.* at 65.

[26]See, for example, *R.* v. *Red Hot Video* (1985), 45 C.R. (3d) 36, 18 C.C.C. (3d) 1 (B.C.C.A.), leave to appeal to S.C.C. refused (1985), 46 C.R. (3d) xxvn [hereinafter *Red Hot Video* cited to C.R.]; *R.* v. *Wagner* (1985), 43 C.R. (3d) 318, 36 Alta. L.R. (2d) 301 (Q.B.) [hereinafter *Wagner* cited to C.R.], aff'd 50 C.R. (3d) 175, 43 Alta. L.R. (2d) 204 (C.A.), leave to appeal to S.C.C. refused (1986), 50 C.R. (3d) 175n, 26 C.C.C. (3d) 242n; *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230, 29 Man. R. (2d) 110 (Q.B.) [hereinafter *Ramsingh* cited to C.C.C.].

interaction, between consenting individuals participating on a basis of equality," and pornography that is "degrading or dehumanizing."[27] In rejecting a challenge under section 2(b) of the *Charter*, *Ramsingh* confirmed that community standards are exceeded "where there are people, particularly women, who are subjected to anything which degrades or dehumanizes them."[28] The B.C. Court of Appeal provided the most explicit endorsement of the new-found rationale in *Red Hot Video*; there Anderson J.A. declared that exposure to violent and degrading material constitutes a "threat to equality" which tends to make men more tolerant of violence to women and creates a "social climate encouraging men to act in a callous and discriminatory way towards women."[29]

In the years prior to *Butler* the definition of obscenity expanded at the expense of expressive freedom. Not only did gender equality suggest a rationale that was distinct from traditional moral grounds, it could also claim the textual sanction of the *Charter*.[30] Morever, though the *Criminal Code* neither mentions nor prohibits sexual materials that are degrading or dehumanizing, the courts failed to consider the possibility that section 163(8) could be given an unconstitutional interpretation. It appeared that, as long as the statutory provision was valid on its face, the definition of obscenity could expand with impunity. The decision in *Butler* both legitimized and extended a trend that began with *Doug Rankine Co.*

C. Butler*'s Definition of Obscenity*

In *R.* v. *Butler*, Sopinka J. filled "lacunae" in the legislation by proposing a definition which divides "pornography" into three categories: explicit sex with violence; explicit sex without violence which is degrading or dehumanizing; and explicit sex without violence that is neither degrading nor dehumanizing.[31] *Butler*'s scheme would include all explicit sex with violence in the scope of the prohibition, and exclude all explicit sex that lacks elements of violence, degradation or dehumanization, except where children are involved.[32] *Butler* would also prohibit explicit sex that is degrading or dehumanizing, if it presents a substantial risk of harm.

Unlike sex with violence, sex that is degrading or dehumanizing is not explicitly prohibited by section 163(8).[33] Although Sopinka J.'s definition would include sex in combination with crime, horror or cruelty, his conception of what is degrading or dehumanizing was not limited to the criteria specifically identified by section 163(8). He extended the prohibition, additionally, to material which "predisposes persons to act in an anti-social manner."[34] Such a pre-

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[27]*Ibid.* at 331.

[28]*Supra*, note 26 at 240.

[29]*Supra*, note 26 at 59 (concurring opinion).

[30]Ss 15 and 28 (guaranteeing, respectively, equality and gender equality).

[31]*Supra*, note 2 at 484. Note that although much of the literature draws a distinction between obscenity and pornography, Sopinka J. used the terms interchangeably.

[32]*Ibid.* at 485.

[33]Such materials would fall within the prohibition, through judicial interpretation, as an "undue exploitation of sex."

[34]*Ibid.* at 485.

disposition can be manifested in the form of "physical or mental mistreatment of women by men;"[35] more generally, it encompasses any conduct which "society formally recognizes as incompatible with its proper functioning."[36] An inference that materials create a risk of promoting a predisposition to behave in an anti-social manner can be drawn from the material itself.

Butler's indeterminate and open-ended definition of obscenity unarguably undercut expressive freedom. However, for reasons that are not explained, Sopinka J. assumed that his doctrinal interpretation of section 163(8) was immune from *Charter* review. Thus he initially stated that it would be helpful to review obscenity doctrine "*[b]efore* proceeding to consider the constitutional issues," [emphasis added][37] and later reiterated that it was necessary to fill lacunae in the legislation "*before* subjecting [it] to *Charter* scrutiny." [emphasis added][38] By enhancing the statutory definition through judicial interpretation, Sopinka J. finessed the central question: does the *Charter* permit sexually explicit materials to be suppressed because they are considered degrading or dehumanizing?

Quite apart from the *Charter*, Mr. Justice Sopinka's discussion of obscenity doctrine reveals a startling disregard for precedent and more specifically, for the principle of tolerance. As early as 1964, Freedman J.A. stated that "in cases close to the border line, tolerance is to be preferred to proscription," because otherwise, "suppression may tend to inhibit those creative impulses and endeavours which ought to be encouraged in a free society."[39] That principle was consistently confirmed in the jurisprudence leading up to the Supreme Court of Canada's decision in *Towne Cinema Theatres*.[40]

Although *Towne Cinema* included degrading and dehumanizing treatment in its definition of obscenity, the charges in that case predated the *Charter* and accordingly were not challenged on constitutional grounds. Moreover, whereas *Butler* defined degradation and dehumanization in abstract, speculative terms, *Towne Cinema* linked those concepts more closely to the text of section 163(8), and to the aggravating elements, such as violence and cruelty, which it specifically prohibits.[41] Finally, while accepting that the community might tolerate harmful behaviour, former Chief Justice Dickson confirmed that obscenity doctrine is based on a principle of tolerance.[42]

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[35]"Or, *what is perhaps debatable*, the reverse" [emphasis added] (*ibid.*).

[36]*Ibid.*

[37]*Ibid.* at 471.

[38]*Ibid.* at 483.

[39]*Dominion News, supra*, note 21 at 117.

[40]*Towne Cinema, supra*, note 21.

[41]Although he did not preclude other forms of dehumanizing or degrading treatment, Dickson C.J. (as he then was) clearly associated those concepts with violence and cruelty. He stated that "publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment, may be 'undue,'" and that "[n]o one should be subject to the degradation and humiliation which link sex with violence, cruelty and other forms of dehumanizing treatment" (*ibid.* at 505). On this point, compare Wilson J. who linked degradation, in more abstract terms, to a "process of moral desensitization" (*ibid.* at 524).

[42]Thus he acknowledged that "the community may tolerate publications that cause harm to members of society" and that a legal definition of 'undue' must also encompass publications harm-

In doctrinal terms alone, *Butler* represents a departure from precedent. Prior to the *Charter*, tolerance and respect for expressive freedom formed part of the analysis in obscenity cases. With one exception, references to those principles were selectively excluded from Sopinka J.'s discussion of the jurisprudence.[43]

Furthermore, by purporting merely to fill lacunae in the legislation, Sopinka J. considered himself free to enhance section 163(8) without regard to the *Charter*. In reading section 163(8) expansively, he invented a new doctrinal technique: reading up.

Under the *Charter*, legislation must not only be valid on its face but must also be interpreted in a manner that is consistent with its guarantees. As a matter of general principle, statutory provisions found inconsistent with one of the *Charter*'s guarantees are invalid.[44] In the absence of legislation the courts will occasionally articulate judge-made rules or guidelines to ensure that doctrine complies with the *Charter*.[45] In other cases, where a statutory provision can be read narrowly, it may be unnecessary to invalidate the legislation. "Reading down" is a doctrinal technique that enables the courts to save legislation by rendering an interpretation that is consistent with the *Charter*.[46]

Whereas reading down narrows the scope of a statutory provision to make it consistent with the *Charter*, *Butler*'s technique of reading the definition of obscenity up yielded an interpretation that was more intrusive of expressive freedom than that necessitated by the statute. On this point, a comparison with *Keegstra*[47] is telling. Before upholding section 319(2)'s prohibition of hate propaganda, former Chief Justice Dickson applied a full-scale justificatory analysis. He specifically considered whether it was permissible under the *Charter* to suppress "hate," and read the statutory prohibition narrowly, to limit the interference with expressive freedom.[48]

In principle, it should not matter that section 319(2) explicitly prohibits hate, and that section 163(8), by contrast, does not mention degrading or dehumanizing treatment. Once *Butler* incorporated those criteria into section 163(8),

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ful to ... society as a whole" (*ibid.* at 505). Subsequently, however, he reiterated that, as a matter of general principle, "it is a standard of *tolerance*, not taste, that is relevant," and that "[w]hat matters is what Canadians will not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it" (*ibid.* at 508).

[43]*Supra*, note 2 at 477, citing *Towne Cinema*, *ibid.*

[44]See *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 (holding that legislative provisions which violate the *Charter* are *per se* invalid).

[45]*Seaboyer*, *supra*, note 2 at 598 (defining a "middle way" at common law, following the invalidation of legislation, that offers complainants in sexual offence trials maximum protection, "compatible with the maintenance of the accused's fundamental right to a fair trial").

[46]See, generally, C. Rogerson, "The Judicial Search for Appropriate Remedies Under the *Charter*: The Examples of Overbreadth and Vagueness" in R. Sharpe, ed., *Constitutional Litigation* (Toronto: Carswell, 1985) 233.

[47]*Supra*, note 2.

[48]Thus he carefully defined hate as "expression intended or likely to create or circulate extreme feelings of opprobrium and enmity" (*ibid.* at 722), confirmed the requirement of *mens rea*, and emphasized the scope and availability of defences to a charge.

discussion of their constitutionality became imperative. A constitutional issue that arose in both cases was addressed in *Keegstra*, but not in *Butler*.

D. Conclusion

Butler's interpretation of section 163(8) maximized the interference with section 2(b) of the *Charter*. In addition, the separation of "doctrine" and constitutional analysis enabled Sopinka J. to marginalize the values of tolerance and expressive freedom. Because section 2(b) would eventually be discussed, the principle of tolerance could be discounted in the discussion of doctrine. At the same time, the Court's preliminary discussion of doctrine eclipsed its subsequent consideration of expressive freedom. Once the statutory definition was read up, it was inevitable that the *Charter*'s requirements would be read down.

II. Reading the *Charter* "Down"

A. Introduction

Neither in its discussion of doctrine nor in its *Charter* analysis did *Butler* directly address the constitutionality of suppressing expressive activity that is degrading or dehumanizing. Moreover, free expression values were as peripheral under the *Charter* as they had been in the Court's discussion of doctrine. With one exception, which was dictated by precedent, every issue was resolved against the interest in protecting expressive freedom.

B. The Charter*'s Constitutional Equation*

The *Charter*'s separation of breach and justification recognizes that, in any contest between individual liberty and democratic values, the two sides of the "constitutional equation" must be balanced. Though formally separated by the text, breach and justification cannot be treated as discrete, analytical concepts. Limits on the guarantees can only be defined by justificatory criteria and, by the same token, the reasonableness of limitations under section 1 cannot be determined exclusively by reference to democratic values. There, the countervailing interests in protecting the *Charter*'s rights and freedoms must also be taken into account.

Under section 2(b), the Supreme Court of Canada chose not to restrict the scope of the guarantee. In *Irwin Toy* it held instead that all activity that attempts to convey meaning is *prima facie* protected by section 2(b).[49] That rule of interpretation was reinforced in subsequent decisions which refused to exclude offensive expressive activity from the scope of section 2(b).[50]

Irwin Toy's definition of freedom of expression is based on a conception of expressive freedom which is fundamentally egalitarian. Rather than distinguish between valuable and valueless expression, the Court held in *Irwin Toy*

[49]*Supra*, note 8 at 968.

[50]See *The Prostitution Reference*, *supra*, note 8 (holding that s. 2(b) protects the right to solicit an act of prostitution); *R.* v. *Keegstra*, *supra*, note 2 (holding that s. 2(b) protects hate propaganda).

that section 2(b)'s guarantee of freedom must protect all expressive activity equally, and without regard to its content.[51] In principle, therefore, offensive and scurrilous thoughts stand on the same footing as the ideas we prize. In reaching that conclusion, the Supreme Court of Canada recognized that an egalitarian interpretation of section 2(b) advances democratic values and protects those who would challenge orthodoxy from being silenced.[52]

In doctrinal terms, an egalitarian conception of expressive freedom is implemented through the principle of content neutrality. That principle provides a standard of breach under section 2(b) which acknowledges the infringement whenever the government prohibits expression on the basis of its content.[53] In such circumstances, a justificatory analysis under section 1 is imperative. In cases like *Butler*, where a statutory prohibition is content-based, a rule against purposeful interference renders further discussion of section 2(b)'s underlying values unnecessary. However, the difficulty is that, unless they infuse the analysis under section 1, those values will be lost and the equilibrium of the *Charter*'s equation thereby upset.

By "contextualizing" its section 1 analysis, the Supreme Court of Canada acknowledged that there must be a "synergetic relation" between "the values underlying the *Charter* and the circumstances of a particular case."[54] The contextual perspective assesses the justifiability of an infringement, not only in terms of the objectives which may support the breach, but as well, in terms of the countervailing values which may vindicate the liberty interest at stake. As described by Madam Justice Wilson in *Edmonton Journal*, the contextual approach "attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake," as well as "the relevant aspects of any values in competition with it."[55]

Though it acknowledges the need to address both sides of the equation under section 1, Wilson J.'s contextual approach proposed a dichotomy between section 2(b)'s guarantee, which was characterized, somewhat negatively, as "abstract" or formalistic, and the analysis under section 1, which was portrayed as "contextual" and, by implication, more realistic.[56] Unfortunately, that juxtaposition has enabled the Court to discard section 2(b)'s egalitarian conception

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[51]*Supra*, note 8 at 970 (stating that the guarantee of free expression protects all content of expression).

[52]See, for example, *Dolphin Delivery*, *supra*, note 8 at 584-85 (citing *Boucher* v. *R.*, [1951] S.C.R. 265 at 288, 2 D.L.R. 369).

[53]*Irwin Toy*, *supra*, note 8 at 974 (stating that s. 2(b) is infringed if "the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed"). A breach can also occur when government action has an unconstitutional "effect" on expressive freedom.

[54]*Keegstra*, *supra*, note 2 at 737.

[55]*Supra*, note 8 at 1355-56 (concurring opinion).

[56] [O]ne should not balance one value [s. 2(b)'s guarantee] at large and the conflicting value [under s. 1] in its context. To do so would prejudge the issue by placing more weight on the value developed at large than is appropriate in the context of the case (*ibid.* at 1353-54).

of expression under section 1, and to label certain expressive activity valueless.[57] By separating freedom of expression from its reasonable limits, the text of the *Charter* enabled the following contradiction to evolve: though content is irrelevant in defining the scope of the guarantee under section 2(b), it then becomes "destructive of free expression values"[58] to treat all expression as equal under section 1.

In accordance with that methodology, Sopinka J. effectively negated one side of the constitutional equation. Despite the Manitoba Court of Appeal's willingness to exclude obscenity from section 2(b), precedent required a finding that section 163(8) violates the *Charter*.[59] Because the statutory prohibition is content-based, a finding of purposeful interference did not require reference to section 2(b)'s underlying values. To balance the equation, discussion of those values was therefore necessary under section 1. However, without explaining how the shift to section 1 nullified the egalitarian conception of expressive freedom that prevailed under section 2(b), Sopinka J. simply declared that obscenity "does not stand on equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values."[60]

Once that characterization has been made, the permissibility of limits is essentially self-evident. As McLachlin J. observed in *Keegstra*, "[i]f one starts from the premise that the speech [in question] is dangerous and without value, then it is simple to conclude that none of the commonly-offered justifications for protecting freedom of expression are served by it."[61] In the "context" of hate propaganda, Mr. Justice Sopinka expressed agreement with that view by concurring with her dissent.[62]

C. *Standards of Justification*

The standard of justification applied in *Butler* bears little resemblance to the *Oakes* test, as originally promulgated and as implemented in the criminal justice jurisprudence. Though *Oakes* continues to serve as a monolithic standard of justification, the Supreme Court of Canada has institutionalized a series of retreats. First it held in *R.* v. *Edwards Books and Art Ltd*[63] that the section 1 analysis can vary with the circumstances of the case. Then, as discussed above, Wilson J. suggested in *Edmonton Journal* that the application of *Oakes* should be informed by "context."[64]

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[57]See, for example, *Keegstra*, *supra*, note 2 at 760 (stating that content is irrelevant to s. 2(b), which places a high value on freedom of expression "in the abstract," but that the nature of the expressive activity is central to the s. 1 analysis).

[58]*Ibid.* at 760.

[59]*Butler*, *supra*, note 2 at 486-90.

[60]*Ibid.* at 500. Although the Supreme Court of Canada considers the relative value of expression for the limited purpose of determining which version of proportionality to apply, that assessment influences the entire s. 1 analysis, including the permissibility of the government's objective.

[61]*Supra*, note 2 at 841 (dissenting opinion).

[62]LaForest J. also joined the dissent in *Keegstra*, but found it unnecessary to address the presumption of innocence.

[63][1986] 2 S.C.R. 713 at 722, 35 D.L.R. (4th) 1.

[64]*Supra*, note 8 at 1355-56.

Irwin Toy not only established section 2(b)'s standard of breach, it introduced the most significant modification of the *Oakes* test thus far. There, the Court suggested that a strict standard of proportionality should apply when the government acts as the "singular antagonist," as it does in the criminal justice context. Otherwise, when the government invokes its prerogative to regulate, and to implement socio-economic policy, a more deferential standard should apply.[65] The distinction assumes that government authority is presumptively less insidious when it is invoked to protect a vulnerable group or otherwise allocate scarce resources, than when it is exercised to prosecute and punish individuals under the criminal law.

Irwin Toy's distinction between the government as antagonist and the government as policy-maker recognized the implausibility of a universal standard of justification. *Charter* adjudication is too complex and diverse to be managed by a single test under section 1. Unfortunately, however, the distinction is unsound. Whenever the government exercises its coercive authority in breach of the *Charter*, it acts as the antagonist of those whose liberty interests have been infringed. Accordingly, it is difficult to understand how a strict standard of justification can be restricted in application to the criminal justice system.[66] Moreover, the government undeniably protects "the vulnerable" when it exercises its criminal law authority.[67] From that perspective, it is also difficult to understand why the deferential standard cannot apply in criminal cases. These flaws have enabled the Court to engage in a case-by-case manipulation of *Oakes*; and, as *Butler* demonstrates, it chooses between strict and deferential standards of justification on purely subjective grounds.[68]

Irwin Toy upheld a regulation aimed at protecting children under the age of 13 from manipulative advertising. In such circumstances, the Court's choice of a relaxed standard of justification was less controversial. In *Butler*, the constitutionality of more than 250 charges under the *Criminal Code* was at stake. Though legal rights were not implicated, the scope and severity of the infringement indicated that a strict standard should apply under section 1. As Charron Dist. Ct J. stated in *R.* v. *Fringe Product Ltd*, "[w]here the legislative action pertains to a more abstract notion of harm, the court must be mindful of the danger of excessive state intrusion and carefully consider the criteria set out in our *Charter*."[69] Without explanation, Sopinka J, invoked *Irwin*

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[65]*Supra*, note 8 at 993-94.

[66]See, for example, *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 397-405, 76 D.L.R. (4th) 545 (per Wilson J., dissenting, where equality rights were violated, from the application of *Irwin Toy*'s relaxed standard of justification).

[67]Presumably, the purpose of the criminal law is to protect society, which is vulnerable both as a collective entity and in individual terms, from the commission of offences.

[68]See also *Seaboyer*, *supra*, note 2 at 626-27 (assuming, per McLachlin J., that the singular antagonist model can be displaced in a contest between the state and the accused, if the legislature is attempting to "fix a balance between competing groups in society"); *R.* v. *Downey*, [1992] 2 S.C.R. 10 (stating, per Cory J., in a decision upholding a *Criminal Code* prohibition against pimping, that the *Charter* should not be used to deprive a vulnerable segment of society of a measure of protection).

[69](1990), 53 C.C.C. (3d) 422 at 440, 46 C.R.R. 154 (Ont. Dist. Ct).

Toy's vulnerable group rationale to support a diluted proportionality analysis.[70]

D. The Government's Objective: Harm v. Morality

The first part of the *Oakes* test requires the government to advance an objective of sufficient importance to warrant the violation of a right.[71] The question in *Butler*, therefore, was whether the government's objective in suppressing sexually explicit materials outweighed the interest in protecting freedom of expression. Although rarely invalidated, the government's objective is of crucial importance nonetheless, because it conditions the proportionality analysis. When the objective is conceptualized in broad, abstract terms, the requirements of proportionality are easier to satisfy; a narrow objective, by contrast, requires more carefully tailored means. In addition, an analysis that looks exclusively at the government's interest in violating the *Charter* distorts the balancing exercise. In concluding that section 163(8)'s objectives are important enough to override the *Charter*, Sopinka J. did not feel obliged to discuss section 2(b)'s underlying values. Those values are considered under section 1 — not to strengthen protection of the guarantees, but to dilute the proportionality analysis.[72]

Mr. Justice Sopinka initially conceded that the *Charter* prohibits the government from preventing "dirt for dirt's sake."[73] Because the *Charter* precludes Parliament from coercing a particular conception of morality, it became necessary to reformulate the objective of obscenity law.[74] Thus transformed, the avoidance of harm, and not moral disapprobation, became section 163(8)'s overriding objective.[75] Whatever may once have been true, Sopinka J. declared, obscenity can be prohibited today because "[o]ur understanding of the harms caused by these materials has developed considerably since [1959]."[76] Those harms, which exist independent of conventions of propriety, consist of a threat to equality values, reinforcement of a negative self-perception on the part of women, and an impediment to the promotion of gender equality.[77]

Butler conceptualized obscenity's harm in generalized, rather than particularized, terms. Protecting the victims of sexual assault was, accordingly, not

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[70]*Butler*, *supra*, note 2 at 505. As suggested above (*supra*, note 60) the relative value of expressive activity determines which version of proportionality will apply; the ensuing discussion demonstrates how the failure to acknowledge or respect expressive freedom influences the first part of the *Oakes* test, which requires a substantial and pressing objective.

[71]This Comment does not discuss the Court's conclusion that s. 163(8) constitutes a limit that is prescribed by law (*ibid.* at 490-91).

[72]Those values are further undermined by a methodology that restricts their relevance to the proportionality analysis. See *supra*, notes 66, 67.

[73]*Supra*, note 2 at 492.

[74]*Ibid.* at 493.

[75]*Ibid.*

[76]*Ibid.* at 494-95. Although *Big M Drug Mart*, *supra*, note 44 rejected the concept of "shifting purposes," as a way of re-rationalizing unconstitutional government objectives, this Comment does not discuss that aspect of Sopinka J.'s reasons.

[77]*Ibid.* at 497.

one of section 163(8)'s objectives. Nor, with the exception of child participants, did the Court consider it necessary to prevent the exploitation of those who participate in the creation of obscene materials. Because the Court's objective was advanced at the broadest level of generalization, what section 163(8) fundamentally prohibits is an unacceptable conception of equality and of female sexuality.[78] However, if it is not permissible for Parliament to suppress dirt for dirt's sake, because that would constitute the coercive imposition of a standard of morality, it is difficult to see how it is permissible for Parliament to impose a particular conception of equality.

In addition, by separating its definition of obscenity from the constitutional analysis, *Butler* created problems of interpretation. Thus Sopinka J. left unclear which standard governs: should degradation and dehumanization be defined by the *Charter* discussion's protection of equality values, or does the doctrinal criterion of a substantial risk of harm have to be satisfied? On the assumption that sexually explicit material may predispose men to mistreat women, *Butler*'s definition of obscenity required proof of a substantial risk of harm. Under section 1 of the *Charter*, however, the Court held that the government can ban materials which threaten gender equality or have negative implications for women's self-worth. Though *Butler*'s doctrinal theory of harm implied the existence of a causal relationship between exposure to obscenity and anti-social conduct, its *Charter* counterpart did not.

By stating the government's objective in broad, abstract terms, and endorsing equality values without any countervailing reference to freedom of expression, Sopinka J. made it difficult, if not impossible, for section 163(8) to fail the proportionality test.

E. The Proportionality Analysis

To satisfy section 1, the government must prove, not only that its objective is justifiable but as well, that its implementation does not unduly compromise constitutional values. The proportionality test ensures minimal interference with rights protected by the *Charter*; it requires the government to establish that the infringement is rational in relation to its objective, that the infringement does not violate the *Charter* more than is necessary, and, despite its permissibility, that the government's objective has not been pursued at disproportionate expense to constitutional guarantees.[79] Though intended by *Oakes* to be strict, the Court's proportionality analysis in *Butler* was *pro forma*, at best.

The first element of the proportionality test examines the relation between the infringement and the legislative objective. The rational connection test has at times been interpreted as a requirement that the government demonstrate the efficacy of its measure; an infringement that does not advance the government's objective may be found irrational. Significantly, the Court divided on that issue

[78]Though Sopinka J.'s doctrinal discussion did not completely preclude the possibility that sexually explicit materials might degrade or dehumanize males, his *Charter* analysis focused exclusive attention on obscenity as "gender-based harm."

[79]*Oakes*, *supra*, note 15.

in *Keegstra*: there, McLachlin J. rejected the majority opinion's assertion that the *Criminal Code*'s prohibition of hate propaganda is rationally connected to the elimination of race prejudice. She concluded, instead, because suppressing expression might undermine that objective, that the government failed to establish a "strong and evident" connection between the criminal prohibition and achievement of its objective.[80]

Despite joining her dissenting opinion in *Keegstra*, Sopinka J. did not consider it essential in *Butler* to articulate a concrete connection between the suppression of sexually explicit materials and the promotion of gender equality. In *Keegstra* he had agreed that suppressing hate expression might compromise the elimination of race prejudice. In his view, the difference is that though hatemongers may become martyrs through the state's attempt to silence their views, pornographers do not: the suppression of obscene materials does "nothing" to promote the pornographer's cause.[81]

In principle, section 1 of the *Charter* is indifferent to the efficacy of the government's legislation: so long as its measures are consistent with the *Constitution*, it is irrelevant that they may be ineffective.[82] What the *Charter* does require is proof that the government has not unduly infringed rights by creating a prohibition that is unrelated to its objective. Although a classification that is irrational in that sense will also be ineffective, it is not unconstitutional for that reason.[83] By the same token, a classification may address the government's purpose, but be found unconstitutional nonetheless.[84]

The question in *Butler* was whether section 163(8) defines the prohibition with sufficient precision to avoid unduly infringing expressive freedom. By adopting a generalized conception of harm, Sopinka J. made it virtually impossible for the statutory definition of obscenity to fail the rational connection test. Thus he stated that Parliament could reasonably have thought that exposure to obscene materials might contribute to the "desensitization of individuals."[85] The use of the criminal sanction was accordingly linked to the objectives of expressing "our community's disapproval" of materials which "potentially victimize women," and restricting "the negative impact such materials have on changes in attitude and behaviour."[86]

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[80]*Keegstra*, *supra*, note 2 at 854 (La Forest & Sopinka JJ., concurring).

[81]*Butler*, *supra*, note 2 at 504. The unarticulated point was that, although suppressing hate propaganda may be seen as censorship, the suppression of pornography is self-evident and therefore unobjectionable.

[82]As the courts have stated on innumerable occasions, the constitutionality of legislation does not depend on the judiciary's perception of the reasonableness or wisdom of legislative policy.

[83]Irrational classifications may not be unconstitutional; *i.e.*, an income tax provision that determines marginal rates of taxation according to hair colour is surely irrational, but not necessarily unconstitutional.

[84]See, for example, *Osborne*, *supra*, note 8 (invalidating a prohibition against partisan public service activity, despite the legitimacy of the government's objective of preserving a neutral public service).

[85]*Supra*, note 2 at 504.

[86]*Ibid.*

The second element of the proportionality test requires the government to prove that its prohibition constitutes a minimal impairment of the constitutionally protected right. To satisfy that criterion, the scope of the prohibition must be defined with certainty and precision. Failure to do so compromises the constitutional rights of those who are unjustly caught by an over-reaching provision. However, despite earlier acknowledging lacunae in the legislation, which left its scope unclear, Sopinka J. found no breach of minimal impairment.[87]

In addition, after having stated that section 163(8)'s objective was the avoidance of harm, Sopinka J. explicitly rejected the suggestion that proportionality required proof of any harm. Citing *Irwin Toy*'s vulnerable group rationale, he stated that Parliament was entitled to suppress expressive activity without proof of harm.[88] He also held that greater precision in defining the scope of the prohibition was unnecessary because "[t]he intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote."[89]

A prohibition against an open-ended and indeterminate category of degrading or dehumanizing depictions of female sexuality could hardly be less precise. Despite the claim that greater precision is "remote," other jurisdictions have found ways to specify the harm that is prohibited.[90] More troubling yet is Mr. Justice Sopinka's assumption that the requirements of the *Charter* should be waived whenever it is difficult, awkward or inconvenient for Parliament to comply. If obscenity cannot be defined with sufficient precision to avoid undue interference with expressive freedom, then perhaps the *Charter* should protect it from being criminalized.

It became clear, in the course of *Butler*'s proportionality analysis, that obscenity can be prohibited because its content is offensive and therefore *per se* harmful. As long as it is possible to speculate that sexually explicit materials create some negative implications for gender equality, Mr. Justice Sopinka's standard of proportionality will be satisfied.

F. Conclusion

Principles of tolerance and expressive freedom receive little or no recognition in the Supreme Court of Canada's decision in *Butler*. Not only did the Court maximize the definition of obscenity and then dilute the *Charter*'s requirements, it endorsed the suppression of offensive expressive activity without once acknowledging the consequences for section 2(b)'s guarantee of expressive freedom.

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[87]*Supra*, notes 10, 31 and accompanying text.

[88]*Supra*, note 2 at 505.

[89]*Ibid.* at 506.

[90]See, for example, N.Y. Penal Law §263.00(3) (Mckinney 1980) (defining specific types of sexual conduct for purposes of a prohibition against child pornography; discussed in *New York* v. *Ferber*, 458 U.S. 747 (1982), and Fla. Stat. Ann. §847 (cited and discussed in *Skywalker Records Inc.* v. *Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990))).

III. Orthodoxy and Expressive Freedom

A. *Introduction*

The Supreme Court of Canada has been praised for institutionalizing the supremacy of equality values.[91] Especially when matched against those values, expressive freedom fares poorly; whereas equality values are portrayed as real and fundamental, freedom of expression is discounted as a concept that is abstract and formalistic. Ironically, as *Keegstra* and *Butler* demonstrate, a particular conception of equality can only be enforced by suppressing "unequal" thoughts, ideas, and attitudes.[92]

B. *Conceptions of Harm*

Expressive freedom can be suppressed where the government advances an objective that outweighs the interest in protecting a constitutional guarantee. The scope of the prohibition is accordingly determined by the way in which the harm to be prevented is conceptualized. The more precisely the harm is particularized, the narrower the scope of the prohibition. Generalized conceptions of harm, by contrast, permit the government substantial latitude. Ultimately the nature and severity of the interference with expressive freedom depends on the way the harm is conceptualized.

Obscenity threatens to create a variety of harms which can be plotted along a spectrum. Particularized theories of harm, which require a direct connection between obscenity and manifest acts of illegality, define one end of the spectrum. At the other end, a cluster of generalized conceptions of harm will be found. On the assumption that sexually explicit materials are *per se* harmful, those theories would suppress such materials without proof of direct consequences. Prior to the *Charter*, particularized theories of harm were rejected in favour of a generalized conception of obscenity as offensive to conventional standards of morality.[93] *Butler*'s dilemma was that, although the suppression of sexually explicit material is no longer permissible on purely moral grounds, a particularized conception of harm would not permit the Court to suppress materials simply because they are offensive.

In an attempt to avoid either extreme and plot a point along the spectrum, the Court essentially invoked a gender-based theory of harm. Unfortunately, conceptualizing the issue in such terms does little to resolve the dilemma; a choice between particularized and generalized conceptions of harm must still be made. For example, a gender-based theory of harm that focuses on the problem of violence against women would result in a prohibition against sexually explicit materials which involve violence or the commission of a crime. The same

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[91]*Supra*, notes 4, 5.

[92]In neither case did the Court consider the possibility that equality can protect expressive freedom by providing an anti-censorship rationale.

[93]*Butler*, *supra*, note 2 at 492.

focus could also support a prohibition that suppresses material which is connected to the commission of sexual assault offences.[94] In either case the prohibition rests on a particularized theory of harm.

As the focus shifts away from the prevention of consequences that can be traced to expressive activity, the harm associated with sexually explicit materials can only be articulated in abstract, generalized terms. Under that conception, deviation from a standard of morality, in the past, or of gender equality, today, is the harm to be prevented. Gender-based theories of harm would prohibit sexually explicit materials for a variety of reasons: because they reinforce an ideology of gender domination,[95] portray female sexuality in a false and degrading manner,[96] or "harm" women in their social context.[97] The difficulty is that gender-based responses frequently collapse the distinction between particularized and generalized conceptions of harm.[98]

Likewise, the decision in *Butler* shifted uncomfortably between particularized and generalized conceptions of harm. As discussed above, the Court created a fundamental ambiguity between two theories of harm, which will unavoidably cause problems of enforcement. In addition, it defined degradation and dehumanization in terms which are inchoate and inescapably abstract. A comparison with *Keegstra* is once again instructive. There, though unable to alleviate the concerns of McLachlin, LaForest and Sopinka JJ., former Chief Justice Dickson addressed concerns about the inherent subjectivity of suppressing hate expression by defining the offence narrowly to minimize the interference with expressive freedom.[99] In *Butler*, no member of the Court challenged a definition of obscenity that imposes criminal punishment on those whose expressive activity violates an elusive standard of gender equality.

Mr. Justice Sopinka claimed that the enforcement of gender equality is fundamentally distinct from the imposition of moral values. However, had the Court defined obscenity as sexually explicit material that degrades or dehumanizes *human* sexuality, its conception of harm would unarguably have collapsed into morality. A theory of harm that prohibits depictions of female sexuality because they conflict with a standard of gender equality surely cannot stand on

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[94]There the permissibility and scope of the prohibition would depend on the relevance and reliability of empirical data.

[95]See, generally, C. MacKinnon, "Not a Moral Issue" (1984) 2 Yale L. & Pol. Rev. 321 at 322-23 (claiming that pornography is a "political practice").

[96]See, for example, S. Noonan, Annotation of *R.* v. *Wagner* (1985) 43 C.R. (3d) 319 at 319-20.

[97]See, for example, K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1984) 17 Ottawa L. Rev. 33 at 51 (claiming that pornography causes public harm which makes many women's goals, "such as greater participation in public life, equal pay for work of equal value and daycare ... that much more difficult to achieve").

[98]See, for example, S. Noonan, "Pornography: Preferring the Feminist Approach of the B.C. Court of Appeal to that of the Fraser Committee" (1985), 45 C.R. (3d) 61 at 62 (stating that feminist definitions of pornography "stress the presence of violence, inequality, and objectification" and focus concern not only on pornography as it endorses violence against women and "creates false representations of female sexuality," but also on the manner in which it "reduces women as a group to mere objects of sexual access... .").

[99]*Supra*, note 48.

better ground.[100] Whether characterized as morality or as gender-based harm, the prohibition in either case permits expressive activity to be suppressed because it is inconsistent with a conventional standard of propriety.

C. *Expressive Freedom: Rhetoric and Reality*

While simultaneously upholding limitations on section 2(b), the Supreme Court of Canada dutifully recites the rhetoric of expressive freedom. That rhetoric acknowledges the debt democratic process owes to freedom of expression, and otherwise traces the values we prize to a commitment to expressive freedom. It acknowledges that, to be meaningful, the right of expression must not only be free, but equal as well.

Those values are reflected in a generous interpretation of section 2(b), which asserts, as a fundamental principle of the *Charter*, that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[101] Unfortunately, that vision of expressive freedom is ephemeral: the *Charter*'s egalitarian conception of the right does not survive section 2(b). Once a breach has been found, section 2(b)'s underlying values are dismissed as abstractions which must yield, under section 1, to an assessment of priorities based on context.

According to former Chief Justice Dickson, section 1 contemplates a "synergetic relation"[102] between the values underlying the *Charter* and the circumstances of a case. Thus the Court held in *Keegstra* and *Butler* that expressive activity can be suppressed, though the threat of harm is speculative, where its content is valueless. The analysis in both instances was synergetic but circular as well: when the sole purpose of a prohibition is to suppress the content of the communication, the harm may often be speculative; at the same time, when the harm is general and speculative, rather than concrete and particular, the prohibition can only be explained as an attempt to silence those whose views are unorthodox.

This same synergy can be found in the *First Amendment* jurisprudence of the Cold War era, which upheld the suppression of communist sympathizers throughout the 1950s. Although it no doubt preyed on the fears and insecurities of that era, the advocacy of socialist forms of government posed no direct threat of harm. Communist sympathizers were convicted nonetheless because the United States Supreme Court refused to apply the clear and present danger test; as Jackson J. explained, a standard of justification that required proof of a particularized harm would have forced the judiciary to "appraise imponderables."[103] To sustain the suppression of *First Amendment* values in the absence

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[100]Gonthier J.'s concurring reasons expose the fallibility of Sopinka J.'s distinction between morality and harm.

[101]*Irwin Toy, supra*, note 8 at 968.

[102]*Keegstra, supra*, note 2 at 737.

[103]*Dennis* v. *United States*, 341 U.S. 494 at 570 (1951) (concurring opinion). Though the precise nature of the harm remains speculative, *Keegstra* and *Butler* likewise permitted the suppression of expressive activity that offends democratic values.

of a clear and present danger, it was necessary for the United States Supreme Court to stigmatize the underlying expressive activity. Advocates of communism could be punished, because "[n]ot every type of speech occupies the same place on the scale of values,"[104] and, "[o]n any scale of values we have hitherto recognized, speech of this sort ranks low."[105] Dismissing political speech as valueless enabled the the American judiciary to legitimize the persecution of suspected communist sympathizers.

Today, the Cold War is remembered as an era of unforgivable suppression. It can be easily forgotten, nonetheless, that it was not political expression *per se* that was suppressed during this period, but political expression that endorsed a particular conception of government and the state. Though the comparison will be resisted, there is a parallel in Canada's section 2(b) jurisprudence under the *Charter*. In the McCarthy era, expressive freedom was suppressed to protect democracy; likewise *Keegstra* and *Butler* invoked "democratic values" to prohibit expression that advances an objectionable conception of racial and gender relations.

Ultimately, the Supreme Court of Canada's willingness to prohibit expressive activity that offends fundamental values reflects a particular conception of democracy. In the absence of particularized harm, American constitutional jurisprudence denies government the authority to enforce a particular set of values. *First Amendment* doctrine is based on an underlying assumption that, on balance, democratic process is better served by open debate and competition between values: by a marketplace of ideas.[106]

In upholding limits on hate propaganda in *Keegstra*, former Chief Justice Dickson rejected a conception of expressive freedom that would protect open debate. There he suggested that Parliament could prohibit true expression as well as falsehood.[107] In reaching that conclusion, he rejected the theory of the marketplace because it was not apparent to him that "rationality will overcome all falsehoods in the unregulated marketplace of ideas."[108] The difficulty, in his view, was not that truth cannot be separated from falsehood but rather, that there is no guarantee that "unregulated" debate will be rational. Where emotion and influence intrude into debate, a risk of irrational results is created.

It is the imperfections of the marketplace, and particularly the risk that irrational views may gain acceptance, that prompted Dickson C.J. to endorse the benevolent intervention of the state. If the marketplace is imperfect, it must be because individuals are incapable of rational decision-making. By the same token however, government authority can only be exercised by individuals who inevitably must respond to the same social and political pressures as those in the marketplace. In the circumstances, there is little reason to believe, either in the-

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[104]*Ibid.* at 544 (*per* Frankfurter J., concurring).

[105]*Ibid.* at 545.

[106]The concept originated in *Abrams* v. *United States*, 250 U.S. 616 (1919) (per Holmes J., dissenting).

[107]*Supra*, note 2 at 781.

[108]*Ibid.* at 763.

ory or practice, that government will act in a way that is presumptively more rational.

In the end, the question is whether democratic values are better served by an egalitarian conception of expressive freedom or by an alternative conception that grants government the authority to control the form and content of the debate. The answer to that question depends, in turn, on how the right to participate is valued. Under Canada's *Charter of Rights and Freedoms* that right is conditional: whereas those who support the *Charter*'s "fundamental values" are entitled to invoke section 2(b)'s protection, those who challenge its values are not.

Conclusion

It is strongly ingrained in our culture that sexually offensive material offends moral values and gender equality. We are daily reminded that while violence against women is a social reality, gender equality is not. In such circumstances, it is difficult to defend freedom of expression except on grounds of principle. However, precisely because the principle is abstract and sexually explicit material is seen as valueless, the interest in protecting expressive freedom can be easily dismissed. Addressing women's reality through the suppression of sexual expression that offends equality values appears to advance the *Charter*'s objectives without apparent cost to democratic values.

Though gender equality is an aspiration few would dispute, its attainment poses questions of broad and perplexing dimensions. Whether and to what extent expressive freedom poses an obstacle to that goal is one of many sources of controversy. Even in the absence of conclusive empirical data, it may not be unreasonable to assume that some sexually explicit material may discourage or undermine equality values. Unfortunately, however, such an assumption does not resolve the issue; instead, it raises further questions whether the costs of enforcing those values are worth the benefits that may be gained.[109]

There can be little doubt that *Butler*'s ambiguous conception of harm will create problems of enforcement. It is open to question, for example, whether materials which offend an egalitarian conception of female sexuality should be equated with those which combine explicit sex with violence. Such an equation creates the risk that a generalized theory of harm will trivialize the particular injury that occurs when acts of violence are committed against women. It is also open to question whether "values" should be imposed through the criminalization of offensive expression.

The impairment of expressive freedom that *Butler* endorses is, in any event, disproportionate to the harm that can fairly be attributed to offensive sexual materials. To avoid collapsing into the censorship of unpopular expression, a constitutional guarantee of expressive freedom must reflect a commitment to

[109]See, for example, *American Booksellers Association* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985) (acknowledging the effects of pornography, but ultimately upholding the interest in protecting expressive freedom).

principle. It is the freedom to disagree that is at risk and, in the absence of particularized harm, that is the freedom section 2(b) should protect. It is disappointing that the Supreme Court of Canada is unwilling or unable to acknowlege that censorship is as much a part of historical experience and contemporary reality as social inequality. Until the Court recognizes that censorship is real, section 2(b)'s guarantee of expressive freedom will remain an abstraction, detached from context and devoid of meaning.