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R. v. Butler: Recognizing the Expressive Value and the Harm in Pornography

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R. v. BUTLER: RECOGNIZING THE EXPRESSIVE VALUE AND THE HARM IN PORNOGRAPHY

> The subject matter of the material under review . . . is sexual activity. Such activity is part of the human experience . . . . The depiction of such activity has the potential of titillating some and of informing others. How can images which have such effect be meaningless?[1]

I. INTRODUCTION

American courts have traditionally regulated pornography when it falls within the United States Supreme Court's definition of obscenity.[2] Pornography[3] falls within this definition when courts find the sexual explicitness in pornographic material offensive and corrupting to the moral fiber of the community.[4] Another view has developed, however, which recognizes that pornography inflicts harm on society through its debasing

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1. R. v. Butler, 1 W.W.R. 97 (Man. 1990) (Twaddle, J., dissenting), *cited with approval in* R. v. Butler, [1992] 1 S.C.R. 452, 487 (Can.).

2. *See* Miller v. California, 413 U.S. 15, 24 (1973). The definition of obscenity as the authors of this comment will use it is set forth in *Miller*. The *Miller* definition deems pornographic material obscene when the average person, applying contemporary standards, finds that the material as a whole appeals to the prurient interest, is patently offensive, and lacks any serious literary or artistic value. *See* discussion *infra* notes 24-25 and accompanying text.

3. The authors of this comment are conscious that the term "pornography" is elusive and takes on different meanings depending on who is using it. *See infra* notes 33-36 and accompanying text for discussion of the anti-pornography feminists' view that pornography is a civil rights violation. *See also infra* part II.A for a discussion of the current Supreme Court's view of pornography. "Pornography" as used in this comment, means graphic depictions of sex between individuals conveyed through the medium of videos, films, books, or magazines. Pornography's function is to sexually arouse its viewers. The authors purposely give the term a neutral meaning, and except where specific adjectives such as "violent" or "degrading" are added in the text, the reader should take this term as it has been defined here.

4. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 908-17 (2d ed. 1988) (discussing the roots of the *Miller* test).

depictions of women and children.[5]

The recent Canadian Supreme Court decision of *R. v. Butler*[6] recognizes and addresses the harmful anti-social attitudes and behaviors towards women which are perpetuated by misogynistic, violent pornography.[7] Meanwhile, American courts continue to grapple with their traditional obscenity standard.[8]

This comment presents an overview of the American approach to regulating and categorizing pornography, and explores the obstacles this approach creates for addressing the issues of harm to women. The pivotal elements of the *Butler* court's analysis will be discussed in light of American decisions. The authors propose that a *Butler* analysis offers a more honest and balanced approach to the pornography issue, and that such an approach would be feasible within the parameters of the First Amendment in the United States.

II. THE AMERICAN APPROACH

The controversy surrounding pornography stems from the clash between the First Amendment[9] and forms of pornographic expression which denigrate large sections of society, yet do not fall within the American obscenity definition.[10] The obscenity definition categorizes explicit depictions of sex "obscene" when they are deviant from, and offensive to, societal mores.[11] Porno-

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5. *See* CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 197 (1989) (discussing abuse and sex discrimination caused by debasing pornographic depictions). *See also* New York v. Ferber, 458 U.S. 747 (1982) (recognizing that child pornography causes serious physical and emotional harm to children).

6. [1992] 1 S.C.R. at 452 (Can.) (creating a new definition for obscene materials and pornography based on harm).

7. *Id.* at 510-11.

8. *See Miller*, 413 U.S. at 24 (setting forth the guidelines for determining whether pornographic materials are obscene).

9. The relevant language of the first amendment is: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

10. For a selection of varying perspectives surrounding the pornography debate, see generally ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986); Martin Karo and Marcia McBrian, *The Lessons of Miller and Hudnut: On Proposing A Pornography Ordinance That Passes Constitutional Muster*, 23 J. OF L. REF. 179, 184 (1989); Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1984).

11. *See* MACKINNON, *supra* note 5, at 199. Professor MacKinnon stresses that ob-

graphic material falls within this obscenity definition when a court deems its sexual explicitness "patently offensive."[12]

In determining whether a restriction on speech can be justified, the Supreme Court requires courts to balance the value of speech against other compelling interests.[13] With obscenity, the Court deems preserving the morals of society a compelling interest which outweighs the minimal expressive value in certain sexually explicit materials.[14] The rationale behind the Court's treatment of obscenity as minimally expressive, however, has never been clearly articulated.[15]

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scenity is more concerned with whether men blush than with the harm it causes to women. The American definition of obscenity stems from what is seen as sexual impurity: "[T]he modern rule is that obscenity is measured by the erotic allurement upon the average modern reader; that the erotic allurement of a book is measured by whether it is sexually impure — i.e., pornographic, 'dirt for dirt's sake,' a calculated incitement to sexual desire . . . ." WALTER KENDRICK, THE SECRET MUSEUM 199 (*quoting* Roth v. Goldman, 172 F.2d 788, 790 (2d Cir. 1948)). One of the major problems with the obscenity definition is its failure to provide a clear workable set of guidelines for clarifying what materials fall within the "obscene" category. The famous utterance of Justice Stewart, "I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), testifies to this. *See also* KENDRICK at 194-200 for different definitions of obscenity in the U.S., which generally target the "lewd offensiveness" of sexually explicit material. Several definitions make a distinction between normal and deviant sexual desires.

12. *See Miller*, 413 U.S. at 19.

13. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-29 (7th Cir. 1985) (finding that first amendment concerns outweighed any articulated interest of a proposed anti-pornography ordinance). *Cf.* Kathleen Mahoney, *Canadian Constitutional Approach To Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992) (discussing the Canadian Charter, which, unlike the United States Constitution, expressly requires a balancing of freedom of speech against equality concerns).

14. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2457 (1991); *Hudnut*, 771 F.2d at 331 (finding that pornography which does not fall within the obscenity definition is expression and thus merits first amendment protection); TRIBE, *supra* note 4, § 12-16; Sunstein, *supra* note 10, at 602-04 (discussing speech regulation on the basis of the speech's value and the harm it produces).

15. It is unclear why the United States has placed obscenity outside first amendment protection. The Court in *Miller* assumed that obscenity was unprotected speech: "This much has been categorically settled by the Court, that obscene material is unprotected by the first amendment." *Miller*, 413 U.S. at 23. *See also* Roth v. United States, 354 U.S. 476, 484-85 (1951) (relying on tradition and the historical treatment of obscenity as a rationale for placing it outside the protection of the first amendment); TRIBE, *supra* note 4, § 12-16. (discussing some of the reasons offered by courts for why obscenity could justify suppression of speech); Louis Henkin, *Morals and The Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 391-92 (1963) (discussing the fact that obscenity laws are motivated by traditional notions of religion and morals).

A. Pornography as Unprotected Expression

In *United States v. Roth*,[16] the Court upheld a conviction under a federal statute prohibiting the mailing of "obscene, lewd, lascivious or filthy" materials.[17] The Court ruled the material "obscene" and thus outside First Amendment protection since it was "utterly without socially redeeming value."[18] The Court distinguished between material which expresses ideas, no matter how controversial or unpopular, and obscenity, which, according to the Court, merely arouses the senses.[19]

Twenty-two years later, in *Miller v. California*,[20] the Supreme Court rejected the constitutional standard set forth in *Roth*.[21] While agreeing with *Roth's* holding that obscene material is unprotected by the First Amendment,[22] the Court set forth a new American obscenity standard.[23] The *Miller* test focuses on whether an average person, applying contemporary standards, would find that the subject as a whole: a) appeals to a prurient[24] interest, b) depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law, and c) lacks serious literary, artistic, political, or scientific

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16. 354 U.S. 476 (1957) (upholding a federal statute prohibiting mailing of obscene materials).

17. *Id.* at 491.

18. *Id.* at 484. *See also* JoEllen Lane, Note, *Osborne v. Ohio*, 68 U. Det. L. Rev. 427, 428-30 (1991) (discussing the *Roth* decision).

19. *See Roth*, 354 U.S. at 484 (discussing the function that pornography serves).

20. 413 U.S. 15 (1973) (upholding a California criminal obscenity statute which prohibited thrusting aggressive sales of obscene materials upon unwilling recipients).

21. *Id.* at 22-23.

22. The key to the *Roth* decision and the later *Miller* holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . .

Roth, 354 U.S. at 484, *cited with approval in Miller*, 413 U.S. at 20.

23. *Miller*, 413 U.S. at 24.

24. "Prurient," as defined by the *Miller* Court, means "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor . . . ." *Id.* at 17 n.1.

value.[25] The *Miller* test is narrowly construed to comport with First Amendment concerns.[26]

The *Miller* Court held that obscene speech embodies none of the traditional political and ideological values which the First Amendment was primarily designed to protect:[27]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[28]

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25. *Id.* at 25. The underlying concern of the *Miller* Court was that courts remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.

26. *Id.* at 23-24 (discussing the dangers of regulating any form of expression with respect to the first amendment). The Court in *Miller* required that sexual acts be depicted in a patently offensive way. This includes sexual acts which are actual or simulated. In theory this can include medium-core or soft-core pornography. The reality of the *Miller* test, however, is that the standard set is so rigorous that pornography flourishes in violation of existing laws. *See* Bruce A. Taylor, *Hard Core Pornography: A Proposal for a Per Se Rule*, 21 J. OF L. REF. 255, 275-76 (1988). *See generally* 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUST., FINAL REPORT 367 (1986) [hereinafter COMM'N ON PORNOGRAPHY].

27. *Miller*, 413 U.S. at 34. In answering the dissenting justices' concern about the suppression of speech, the majority in *Miller* held that, "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Id. See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976):

> [I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate . . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

28. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

This "expression versus non-expression" dichotomy stems from the traditional moral perspective the United States has adopted towards explicit sex:[29] "[I]t [has been] common to dismiss the case against pornography as the product of prudishness or inhibition, a kind of aesthetic distaste not grounded in concrete showings of harm. Regulation of sexually explicit material has thus been based on its offensiveness."[30]

In *Miller*, the Court held that states had a legitimate interest in avoiding "the significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[31] The justification for regulating obscenity was to maintain the moral decency of the community.[32]

The moral foundation of the American obscenity doctrine has been vigorously attacked in recent years by anti-pornography feminists and theorists.[33] According to anti-pornography feminists, a gender-neutral view of what is "patently offensive" turns obscenity into a question of what the patriarchial majority at any given time sees as good taste.[34]

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29. *See Barnes*, 111 S. Ct. at 2457 (holding that state's police power to provide for the public health, safety and morals justified regulation of public nudity and nude dancing); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (holding that states have the power to make a "morally neutral judgment" to maintain a decent society); Henkin, *supra* note 15, at 393 (discussing the country's religious antecedents of governmental responsibility for communal and individual decency and morality); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 291, 322 ("Obscenity law is concerned with morality, specifically morals from the male point of view . . . .").

30. Sunstein, *supra* note 10, at 594.

31. *Miller*, 413 U.S. at 18.

32. TRIBE, *supra* note 4, § 12-16. *See also* MacKinnon, *supra* note 29, at 329 (asserting that the Supreme Court's view of obscenity is that, "Obscenity at bottom is not a crime. Obscenity is a sin.").

33. For a comprehensive examination of the feminist movement against pornography starting in 1970, focusing on MacKinnon and Dworkin's accomplishments in the anti-pornography struggle, see generally Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

34. *See* MacKinnon, *supra* note 29, at 331-32:

> The outcome, descriptively analyzed, is that obscenity law prohibits what it sees as immoral, which from a feminist standpoint tends to be relatively harmless, while protecting what it sees as moral, which from a feminist standpoint is often that which is damaging to women . . . . What male morality finds evil, meaning threatening to its power, feminist politics tends to find comparatively harmless. What feminist politics identifies as central in our subordination — i.e. the

The obscenity label created by the Supreme Court fails to consider the reality of pornographic material which falls within the obscenity definition.[35] The American obscenity doctrine's rigid framework ignores pornography's capacity to communicate ideas.[36]

Pornography is more than "dirt for dirt's sake;"[37] it is a form of expression which conveys ideas and attitudes through its depictions of sex.[38] What are depictions of sex if they are not expression?[39] Books, magazines, and movies, by their very nature, are forms of expression.[40] Pornography can express the celebration of consensual and liberating sexuality.[41] Pornography can also dehumanize and objectify its participants, resulting in deleterious effects on behavior and attitudes.[42]

The United States Supreme Court has consistently recognized the avoidance of certain societal harms as justifying regu-

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> erotization of dominance and submission — male morality will tend to find comparatively harmless or defend as affirmatively valuable, hence protected speech.

35. *See* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 20-21 (1985) (discussing how the United States courts ignore the complex issues surrounding pornography and the insidious effects pornography has on societal beliefs).

36. *See* Karo & McBrian, *supra* note 10, at 183 ("The Court assumed a dichotomy between material that presented ideas, no matter how controversial or hateful, and material intended purely to titillate or excite.").

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

38. *Hudnut*, 771 F.2d at 329 (recognizing the power of pornography as speech).

39. *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting):

> Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community, welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours . . . that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Id. at 205 (citations omitted).

40. *Butler*, [1992] 1 S.C.R. at 488.

41. *Id.* at 500 (discussing "good" pornography which validates women's will to pleasure). *See generally* LONNIE BARBACH, PLEASURES: WOMEN WRITE EROTICA (1984).

42. *See* HARRY CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 242 (1969). The author defines pornography as "a certain kind of obscenity — it is sexual obscenity in which the debasement of the human element is heavily accentuated, is depicted in great physiological detail, and is carried very far toward its utmost logical conclusion." *Id.*

lation of speech.[43] The Court has not, however, considered debasing depictions of women such a harm.[44] With obscenity, the Court considers offensiveness the "harm" which justifies placing obscene speech outside First Amendment protection.[45] This leads to an inconsistent and unworkable approach which offers few guidelines for courts on the complex issue of pornography.

B. Inconsistencies of the American Non-Expression Definition

1. *Barnes v. Glen Theatre, Inc.*[46]

In order to deal with the distinction between expression and non-expression, the Supreme Court has stretched far to circumvent the *Miller* test in order to allow states to regulate pornography. To prohibit pornographic expression, the Court must either label explicit material as obscene speech and thus unprotected,[47] or deem the sexual activity "conduct" and therefore regulable because conduct is not speech and therefore any impact on the First Amendment is "incidental."[48] The Supreme Court took the latter approach in *Barnes v. Glen Theatre, Inc.*, upholding a public indecency statute used to ban nude dancing.[49]

The *Barnes* Court upheld an Indiana public nudity statute which targeted nude dancers and required them to wear pasties and G-Strings.[50] The Court held the statute constitutional because it had "other purposes" than proscribing free speech.[51]

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43. Other examples of restrictions on free speech to avoid harm which the United States has recognized include FCC v. Pacifica Found., 438 U.S. 726 (1978) (overhearing of indecent speech by children); *Miller*, 413 U.S. at 19 (exposing juveniles and unconsenting adults to obscene material); Beauharnais v. Illinois, 343 U.S. 250 (1952) (harm due to a racist leaflet containing group libel); *Chaplinsky*, 315 U.S. at 568 (harm by speech coupled with the risk of imminent breach of the peace).

44. *See* MacKinnon, *supra* note 29, at 322. *See generally* Comm'n on Pornography, *supra* note 26 (finding no direct link between harm to women and pornography).

45. *See* Sunstein, *supra* note 10, at 594 (discussing the regulation of sexually explicit material on the basis of offensiveness rather than harm).

46. 111 S. Ct. 2456 (1991) (upholding an Indiana public indecency statute as applied to nude dancing).

47. *See* discussion *supra* part II.A; *Miller*, 413 U.S. at 15.

48. *See Barnes*, 111 S. Ct. at 2456.

49. *Id.*

50. *Id.* at 2459.

51. *Id.* at 2463. The Court found that the purpose of the statute, although not articulated in the statute, was to preserve societal order and morality, not to restrict free

Since the intent of the statute was not to regulate speech, but simply to regulate the offensive conduct of public nudity for purposes of societal order and morality, the Court found any First Amendment infringements incidental.[52]

The *Barnes* Court acknowledged the expressive value of erotic dancing.[53] However, the Court held that the nudity aspect of the dance was mere conduct which was on "the outer perimeters" of the First Amendment.[54] The Court concluded that nude erotic dancing was entitled to only a small degree of First Amendment protection.[55]

The majority's separation of "non-expressive nudity" from the "expression of dancing" was strongly criticized in Justice White's dissent.[56] Justice White noted that the nudity itself was an expressive component of the erotic dancing and not simply conduct:[57]

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women.[58]

A person's nudity cannot be independent from the accompanying actions of the body which convey a message. The major-

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speech. *Id.* The Court stated that this purpose was unrelated to the suppression of freedom of expression and therefore legitimate. *Id.* at 2462.

52. *Id.* at 2456.

53. *Id.*

54. *Id.* at 2459 (Souter, J., concurring). In his concurrence, Justice Souter stated that "the interest is unrelated to the suppression of free expression, since the pernicious effects are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing." *Id.*.

55. *See* Vincent Blasi, *Six Conservatives In Search of The First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 651 (1992) (discussing Justice Souter's concession that nudity by itself can be expressive).

56. Justice White criticized the majority opinion, stating that "[t]he nudity element of nude dancing performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance." *Barnes*, 111 S. Ct. at 2474 (White, J., dissenting).

57. *Id.*

58. *Id.*

ity's treatment of "nudity" as independent from the very act of dancing highlights the contrived nature of the American obscenity doctrine, which treats all obscene material as non-expression.

2. *American Booksellers Ass'n v. Hudnut*[59]

In *American Booksellers Ass'n v. Hudnut*, the Court of Appeals for the Seventh Circuit struck down an Indianapolis statute which prohibited subordinating depictions of women in pornography as a form of sex discrimination.[60] Catharine MacKinnon, an anti-pornography feminist and a drafter of the ordinance, defines pornography as a civil rights violation.[61] According to MacKinnon, pornography, as an expression of male domination and women's servility, institutionalizes inequality and male supremacy.[62] MacKinnon faults the court for treating pornography as simple depictions of sex while ignoring the fact that pornography perpetuates the objectification of women through such depictions.[63]

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59. 771 F.2d 323 (7th Cir. 1985) (striking down an Indianapolis ordinance as content-based regulation).

60. *Hudnut*, 771 F.2d at 324. The ordinance described pornography as, "the graphic sexually explicit subordination of women, whether in pictures or in words." *Id.* The ordinance also described pornography as depicting one or more of the following:

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
> (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, IND., CITY-COUNTY GENERAL ORDINANCE ch. 16 § 16-3(q) (1984). *See also* MacKinnon, *supra* note 35, at 26 (defending her position on the ordinance).

61. MacKinnon, *supra* note 35, at 18: "What pornography *does* goes beyond its content: it eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic . . . ."

62. *Id.*

63. MacKinnon argues that pornography portrays heinous abuses of women, "[o]nly in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively.

A striking failure of the Indianapolis ordinance was its refusal to incorporate any of the safeguards encompassed in the *Miller* formulation of obscenity, such as the artistic defense.[64] The *Hudnut* court criticized the ordinance for not providing an artistic defense.[65] Unlike the *Miller* test's concern for artistic, political, or scientific expression,[66] the Indianapolis ordinance did not accomodate the view that harmful pornography could have socially redeeming value.[67]

In striking down the ordinance, the *Hudnut* court acknowleged that pornographic material expresses ideas.[68] The court emphasized that such ideas were powerful in forming attitudes and beliefs,[69] and likened it to political speech, which merits the highest protection of the First Amendment.[70] The court found

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Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse . . . [I]t eroticizes the dominance and submission that is the dynamic common to them all." *Id.* at 17.

64. When a work has socially redeeming artistic or literary value, the obscene aspects may not be banned. *Miller*, 413 U.S. at 20. Following this reasoning, the *Hudnut* court criticizes the Indianapolis ordinance for targeting particular depictions in the work, not to the work judged as a whole, which the *Miller* definition requires. *Hudnut*, 771 F.2d at 325.

65. *See supra* note 25 and accompanying text for an explanation of *Miller*'s artistic defense for works with redeeming scientific, political or literary value.

66. *Miller*, 413 U.S. at 23-24.

67. *See* INDIANAPOLIS, IND., CITY-COUNTY GENERAL ORDINANCE ch. 16, § 16-3(q)(1984).

68. *Hudnut*, 771 F.2d at 329 (explaining that pornography expresses powerful ideas, the court stated, "Pornography affects how people see the world, their fellows, and social relations."). In contrast to *Barnes*, the *Hudnut* court concluded that the ordinance regulated speech rather than the conduct involved in making pornography. The court intimated that the regulation of speech could be justified only by a compelling interest in reducing sex discrimination, which the court found that Indianapolis had not established. *Id.* at 326. *Compare Hudnut with Barnes*, 111 S. Ct. at 2458, where the Court held the state had established a compelling interest in avoiding secondary harms from nude dancing establishments from the legislative history, although the statute did not explicitly set forth such an interest.

69. In answering the anti-pornographers' position that pornography perpetuates harm to women, the court reasoned that this was evidence of the pornographic materials' power as speech. *Hudnut*, 771 F.2d at 329.

70. The *Hudnut* court likened pornographic speech to other highly controversial ideological and political speech, such as Communism and Marxism, pointing out that when speech is controversial, it merits even higher protection:

> If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government . . . . Yet all is protected

that the drafters of the ordinance were trying to regulate speech on the basis of content.[71] This rendered the ordinance viewpoint-based legislation which the court held unconstitutional under the First Amendment.[72]

C. *American Booksellers Ass'n v. Hudnut*: The American Obscenity Definition's Inability to Accommodate the Harm From Pornography

The extreme differences in the results of *Barnes* and *Hudnut* illustrate the inconsistent application of the American obscenity definition. The *Hudnut* decision exemplifies the difficulties the rigid constraints the obscenity doctrine presents to courts in trying to deal with pornography's harmful effects.[73] The anti-pornography feminists describe three categories of harms generated by the pornography industry: 1) exploitation of those participating in the production of pornography,[74] 2) encouragement of sex crimes which would not have otherwise been committed by the audiences of pornography,[75] and 3) discrimination fostered by pornography's social conditioning.[76]

In *Hudnut*, the Seventh Circuit was confronted with extensive empirical evidence by proponents of the anti-pornography ordinance of pervasive physical, mental, and behavioral harms.[77]

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speech, however insidious.

Id. at 329-30.

71. *Id.* at 325.

72. *Id.* at 330. The court found that the material presented an idea, no matter how controversial, and as such, should be afforded constitutional protection.

73. For further discussion on the constraints of the American obscenity doctrine, see *Hudnut*, 771 F.2d at 329; Tribe, *supra* note 4, § 12-16; Karo & McBrian, *supra* note 10, at 181; MacKinnon, *supra* note 29, at 329-40.

74. Sunstein, *supra* note 10, at 595.

75. *Id.*

76. *Id.* For a comprehensive list of various psychological reports and recent statistical studies regarding the harms generated by pornography, see generally MacKinnon, *supra* note 5, at 304 n.6.

77. *See* Andrea Dworkin, *Pornography is a Civil Rights Issue For Women*, 21 U. Mich. J. L. Ref. 55 (1986). The article is a transcript of Dworkin's testimony before the Attorney General's Commission on Pornography, during its hearings at the United States Court of International Trade in New York City, Jan. 22, 1986. Dworkin presents an in-depth and highly emotional discussion of the harms the Indianapolis ordinance was trying to target. She first speaks about the exploitation of women in the industry, how most come from poor backgrounds where they have not had opportunities in society. *Id.* at 56. They are raped, maimed, abused, and tortured in pornography. *Id.* at 55-57. Por-

The proposed ordinance did not aim to prohibit pornography because of its sexual explicitness. Rather, the ordinance targeted the degrading and subordinate depictions of women in pornography and the injury women suffer from these portrayals.[78]

The *Hudnut* court acknowledged that pornography harms women, stating: "Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets."[79] Such acknowledgement was the furthest limit of the *Hudnut* court's ability to address such harm, however.[80] The court immediately went on to hold that these "unhappy effects . . . simply demonstrate[] the power of pornography as speech."[81] The court stated that the power of expression in pornography is what requires the protection of the First Amendment.[82] Thus, the *Hudnut* holding demonstrates how degrading pornography which falls outside the obscenity definition will not be recognized as harmful under the American approach.

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nography also creates the atmosphere for sexual harassment in jobs, in education and on the streets. *Id.* at 57. It encourages men to sexually assault women, to treat them as objects and to humiliate them. *Id.* at 56. She further explains that the harm to women by pornography is invisible because most sexual abuse still occurs in private, even though there is photographic documentation of it, called the pornography industry. *Id.* at 60.

78. *See* INDIANAPOLIS, IND. CITY-COUNTY GENERAL ORDINANCE ch. 16, § 16-3(q) (1984).

79. *Hudnut*, 771 F.2d at 329.

80. *Id.* at 326. The court appears to have ignored the legislative history of the ordinance, which addresses the lowered social status and abuse women face from the degrading pornographic depictions in certain materials, holding that "[t]he regulation of speech could be justified, the [trial] court thought, only by a compelling interest in reducing sex discrimination, an interest that Indianapolis had not established." *Id. See also* MacKinnon, *supra* note 35, at 20. Professor MacKinnon argues that the evidence of harm before the legislature is given no weight at all. Professor MacKinnon also scathingly indicts the court for taking the "blame-the-victim-misogyny" view that, "[a]dult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography." *Id.* (quoting American Booksellers Ass'n v. Hudnut, 11 Media L. Rep. 1105, 1119 (S.D. Ind. 1984)). *Compare Hudnut*, 771 F.2d at 3326, *with Barnes*, 111 S. Ct. at 2461, where the Supreme Court inferred a compelling interest in preserving the morals of a community absent any legislative history on the fact: "It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute. . . . Nonetheless, the statute's purpose of protecting societal order and morality is clear . . . . " *Barnes* at 2461.

81. *Hudnut*, 771 F.2d at 329. *Compare id.* at 329 *with Barnes*, 111 S. Ct. at 2458 (allowing regulation of the harmful secondary effects of nudity in dancing).

82. *Hudnut*, 771 F.2d at 329.

D. The Supreme Court's Recognition of Other Harms as a Basis For Regulating Speech

Unlike obscenity, where offensiveness is the only "harm" recognized, other categories of speech are regulated on the basis of avoiding antisocial behavior and attitudinal harms.[83] Child pornography, group libel, fighting words, and the location of adult theaters are all regulated on the basis of the potential harms they may cause.

1. *Child Pornography — New York v. Ferber*[84]

The Supreme Court has consistently recognized a strong state interest in avoiding harm to children.[85] In *New York v. Ferber*, the Court examined the constitutionality of a New York criminal statute which prohibited knowing distribution and promotion of sexual performances by children under the age of 16.[86] The *Ferber* court departed from the strict *Miller* test and allowed states greater latitude in regulation of pornography where the well-being of children was involved.[87] The Court reasoned that, "the use of children as . . . subject[s] of pornographic materials is very harmful to both the children and the society as a whole."[88] The Court permitted states to enact legislation which did not incorporate an artistic defense, reasoning that the state

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83. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding zoning laws which disperse adult theaters because of harmful secondary effects); *Young*, 427 U.S. at 50 (upholding zoning of adult theatres because of harmful effects).

84. 458 U.S. 747 (1982) (upholding a New York criminal statute prohibiting the distribution of child pornography).

85. *Ferber*, 458 U.S. at 747. For other cases which involve children and obscene or indecent materials, see *Pacifica Found.*, 438 U.S. at 739-41 (permitting government to restrict the broadcasting of non-obscene offensive language, in part because of danger to children); Kaplan v. California, 413 U.S. 115, 120 (1973) (stressing the special problems of keeping obscene printed material from being distributed to children); *Paris Adult Theatre I*, 413 U.S. at 58 n.7 (1973) (noting that because books are portable and durable, simply banning children from adult movie houses does not adequately protect juveniles). *See also Miller*, 413 U.S. at 27 (permitting government to restrict dissemination of obscene materials because of the danger of exposure to juveniles).

86. *Ferber*, 458 U.S. at 747.

87. *See id.* at 753.

88. S. Rep. No. 95-438, at 5 (1977), *quoted in Ferber*, 458 U.S. at 758 n.9. These words echo the analysis in *Miller*, which recognized that states have a legitimate interest in prohibiting dissemination of obscene material when the dissemination has a significant danger of offending the sensibilities of unwilling recipients or of exposure to minors. *Ferber*, 458 U.S. at 775.

had a compelling interest in forbidding sexual acts involving minors.[89] *Ferber* shows the Court's willingness to restrict speech in order to safeguard children's emotional and physical well-being.

2. *Clear and Present Danger — Chaplinsky v. New Hampshire*[90]

The Supreme Court is also willing to restrict speech, regardless of its political or ideological value, when the speech presents danger of an "imminent breach of the peace."[91] In *Chaplinsky v. New Hampshire*, the Supreme Court upheld a law prohibiting words "tending to excite the addressee to a breach of the peace . . . ."[92] The Court reiterated "that Freedom of Speech . . . [is] among the fundamental personal rights and liberties which are protected . . . [against] state action."[93] The Court held, however, that prohibition of certain classes of speech presents no constitutional problem because their very utterance inflicts injury.[94]

3. *Group Libel — Beauharnais v. Illinois*[95]

Group libel is a category where the American courts have restricted speech on the basis of harm without a showing of clear and present danger.[96] In *Beauharnais v. Illinois*, the Supreme Court upheld a statute prohibiting the sale or advertising of materials which "portray[] depravity, criminality, unchastity, or lack of virtue, of a class of citizens, of any race, color, creed or religion."[97] The Court recognized that the State of Illinois could

89. *Id.* at 761. The Court asserted that "the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest [in protecting children] . . . ." *Id.*

90. 315 U.S. 572 (1942) (upholding a statute prohibiting speech which tends to incite a breach of the peace).

91. *Id.* at 572.

92. *Id.* at 573.

93. *Id.* at 570-71.

94. *Id.* at 571-72.

95. 343 U.S. 250 (1952) (upholding a statute prohibiting the sale of materials which denigrate a certain class of citizens).

96. *Id.* at 250. Although the vitality of *Beauharnais* has been brought into question, the United States Supreme Court continues to rely on it. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (striking down a St. Paul ordinance prohibiting the display of a burning cross); *Ferber*, 458 U.S. at 763.

97. *Beauharnais*, 343 U.S. at 251.

legitimately address the harm in group libel without a showing of clear and present danger.[98]

The Illinois statute sought to address tensions between races which often escalated into violence and destruction.[99] As a result, the *Beauharnais* Court held that the state could rationally infer that the racist utterances in question played a significant part in such violence.[100] Even though there was less than conclusive empirical evidence that racist utterances incited violence,[101] the Court allowed restriction of such utterances in the interest of avoiding societal harm.[102]

4. *Zoning*

The Supreme Court frequently employs "reasonable time, place, and manner" restrictions to regulate the harmful effects of pornography.[103] Here, the Court recognizes that pornographic theaters cause substantial harm to property values because of their tendency to attract criminal elements into neighborhoods. The adult theaters may thus be regulated in order to minimize that damage.[104] The "harmful" secondary effects of permitting pornography to flourish in neighborhoods give state legislatures ample justification to enact stringent zoning laws to restrict such activity.[105]

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98. *Id.* at 266.

99. *Id.* at 259.

100. *Id.*

101. The *Beauharnais* Court relied on various commission reports and instances within their own community to support the notion of harm caused by the racist utterances. *Id.*

102. *See R.A.V.*, 112 S. Ct. at 2541-46. The Court's decision again brings into question the vitality of *Beauharnais*. The Court seems to be moving away from allowing regulation of speech on the basis of non-imminent harm to a group. Justice Scalia's opinion appears to be retreating back into the categorical approach which only allows regulation in certain narrow classes of speech which do not have "traditional First Amendment values" and therefore no expressive value. Note, however, that Justice Stevens' concurrence reminds the Court that the focus of speech regulation should be on the harm speech causes. *Id.* at 2569-70 (Stevens, J., concurring).

103. *See Renton*, 475 U.S. at 41; *Young*, 427 U.S. at 50.

104. *See Renton*, 475 U.S. at 48 ("The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values . . . not to suppress the expression of unpopular views.").

105. *See Young*, 427 U.S. at 71 n.34 ("[A] concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these

In *Renton v. Playtime Theatres, Inc.*,[106] the Supreme Court upheld an ordinance which intended to prevent harmful secondary effects of pornography by geographically dispersing adult theaters.[107] The Court concluded that the *Renton* ordinance was content-neutral because it was not aimed at the substantive message of the obscene movies, but at the secondary effects these movies had on crime rates, neighborhood quality and property value.[108] Ostensibly, the Court did not advocate a complete ban on adult establishments.[109]

The Court's willingness to uphold zoning ordinances which greatly restrict access to pornographic establishments highlights the Court's awareness of some of the harms the pornography industry generates.[110] The Court's remedy for pornographic harms, however, is to place the pornography out of sight or disperse it

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zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech."); *Barnes*, 111 S. Ct. at 2458 (Souter, J., concurring) ("[T]he State's interest in preventing the secondary effects of adult entertainment establishments — prostitution, sexual assaults, and other criminal activity — is sufficient . . . to justify the law's enforcement against nude dancing."). *Compare Barnes*, 111 S. Ct. at 2458, *with Butler*, [1992] 1 S.C.R. at 507. The *Butler* court rejects the use of reasonable time, place and manner restrictions since the harm remains the same and is simply shifted to other areas under such restrictions:

> Once it has been established that the objective is the avoidance of harm . . . it is untenable to argue that these harms could be avoided by placing restrictions on access to such material. Making the materials more difficult to obtain by increasing their cost and reducing their availability does not achieve [the avoidance of harm]. Once Parliament has reasonably concluded that certain acts are harmful to certain groups in society and to society in general, it would be inconsistent, if not hypocritical, to argue that such acts could be committed in more restrictive conditions. The harm sought to be avoided would remain the same in either case.

Id. at 507-08.

106. 475 U.S. 41 (1986) (upholding an ordinance which dispersed adult theaters because of harmful secondary effects on neighborhoods around the theaters).

107. *Renton*, 475 U.S. at 51. The *Renton* Court recognized that adult theaters and the movies shown in them increase crime in neighborhoods. The ordinance mandated that adult establishments be more than one thousand feet away from the nearest residential neighborhoods.

108. Sunstein, *supra* note 10, at 612.

109. *Renton*, 475 U.S. at 46. The Court reasoned that as long as there are alternative avenues of communication, free speech has not been abrogated. The ordinance does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1000 feet of any residential zone.

110. *See* Sunstein, *supra* note 10, at 612-13.

in "non-residential" neighborhoods.[111] This fails to recognize that the fundamental harm from pornography remains the same, whether in wealthy or poor neighborhoods, whether there is one or a dozen adult theaters.[112]

III. RECOGNIZING HARM TO WOMEN FROM PORNOGRAPHY AS A BASIS FOR REGULATION

The United States Supreme Court recognizes harm in its decisions dealing with child pornography, fighting words, group libel and zoning ordinances. In all of these areas, the Supreme Court balances the value of the speech with the compelling interest of avoiding harm.[113] This is not the case with pornography, however. The Supreme Court's resistance to extending such an approach to pornography, and insistence on using the obscenity definition as a standard, is symptomatic of the Court's refusal to recognize pornography for what it clearly is — expression.[114] The effect of the Supreme Court's categorical approach is to make the laws dealing with pornography, as the *Miller* Court recognized, "a hodge-podge."[115]

The Supreme Court never recognizes the expressive value of depictions of sex. As a result, courts cannot legitimize concerns of women harmed by pornography.[116] In contrast to the American approach, the recent Canadian Supreme Court decision of R. v. Butler applies a harms-based analysis to pornography while recognizing the expressive value of all forms of sex.

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111. *See* Dworkin, *supra* note 77, at 59. The author criticizes zoning ordinances as ineffective for dealing with the harmful effects of pornographic establishments:

> Zoning laws impose pornography on poor neighborhoods, on working-class neighborhoods, on neighborhoods where people of color live, and all of those people have to deal with the increase of crime, the terrible harassment, the degradation of the quality of life in their neighborhoods, and the politicians get to protect the property values of the rich.

112. *See Butler*, [1992] 1 S.C.R. at 507 (discussing the hypocritical nature of zoning which merely relocates the problem, yet leaves the harms intact).

113. *See* Sunstein, *supra* note 10, at 602-03.

114. *See* TRIBE, *supra* note 4, § 12-16; Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 18 (1992) ("Obscenity does not count as speech; the Supreme Court treats it as sex rather than expression.").

115. *Miller*, 413 U.S. at 43.

116. *See* discussion *supra* note 77 on the harms the *Hudnut* court failed to recognize.

A. THE CANADIAN APPROACH: R. v. BUTLER

On February 27, 1992, the Canadian Supreme Court unanimously upheld a criminal obscenity statute prohibiting "undue exploitation of sex" in pornographic materials.[117] The Canadian criminal obscenity statute defines obscenity as: "[A]ny 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 or violence, shall be deemed to be obscene."[118]

The *Butler* analysis employs a "community standards" test to determine what material falls in this category.[119] While the American *Miller* community standards test targets what is "offensive" to the community, the *Butler* analysis targets "harm" which the community is not willing to tolerate.[120] The court held that "the community standards test is concerned not with what Canadians would not tolerate themselves being exposed to, but what they would not tolerate *other* Canadians being exposed to."[121]

The *Butler* court held that the statute in question violated Canada's freedom of expression clause.[122] However, the limitations the statute imposed on pornography were reasonably justified under Section 1 of the Canadian Charter, which guarantees "the rights and freedoms set out in [the Canadian freedom of expression clause] subject only to such reasonable limits prescribed by law as can be demonstratively justified in a free and

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117. Criminal Code, R.S.C. ch. C-46 § 163(8) (1985) (Can.). *See also* Mahoney, *supra* note 13, at 78.

118. R.S.C. ch. C-46 § 163(8) (1985) (Can.) (emphasis added).

119. *Butler*, [1992] 1 S.C.R. at 485. Harm in this context means that "it predisposes persons to act in an anti-social manner. . . . Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning." *Id.*

120. Basing a community standards test on "harm" leads to a more uniform approach to what society will consider intolerable. Offensiveness is a more subjective and abstract concept which will fluctuate depending on different contexts. Notions of harm are far more concrete and less susceptible to individual interpretations.

121. *Butler*, [1992] 1 S.C.R. at 478.

122. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b): "Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." This provision is substantially similar to the first amendment in the United States.

democratic society."[123] The *Butler* court held that the statute's regulation of certain pornographic materials was constitutionally permissible under Canadian law in the interest of avoiding harm and promoting equality.[124]

1. *Facts and Procedural History*

In *Butler*, the government seized pornographic materials from a video, magazine and sexual paraphernalia shop.[125] The owner was charged with several counts of selling obscene material, possessing obscene material for distribution or sale, and exposing obscene material to public view in contravention of Section 163 of the Criminal Code.[126]

The trial court acquitted the owner of most of the charges, on the grounds that the freedom of expression clause in Section 2(b) of the Canadian Charter protected the seized materials.[127] The Court of Appeals reversed the trial court's decision and entered convictions on all counts, holding that the seized materials fell outside the protection of the Charter.[128] The defendant then appealed to the Canadian Supreme Court.[129]

2. *Butler's Recognition of Pornography as Expression*

First, *Butler* determined that pornographic material is ex-

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123. CAN. CONST. pt. 1, § 1. In contrast to the United States Constitution, Section 1 specifically allows for limitations on freedom of expression in the interest of furthering a free and democratic society, such as equality.

124. *Butler*, [1992] 1 S.C.R. at 509. *See also* Mahoney, *supra* note 13, at 103.

125. *Butler*, [1992] 1 S.C.R. at 461.

126. *Id.* Section 163 reads:

> (1) 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, model, phonograph record or other thing whatever . . . .
> (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. at 469.

127. *Id.* at 461. *See also* Mahoney, *supra* note 13, at 79.

128. *Butler*, [1992] 1 S.C.R. at 462.

129. *Id.*

pressive and thus merits protection under the Canadian Constitution's freedom of expression clause.[130] The Canadian Supreme Court rejected the appellate court's holding that the depiction of purely physical activity had no expressive content.[131] The Supreme Court asserted:

> [I]n creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which in some cases, may amount to no more than physical arousal or shock.[132]

Butler concluded that videos, magazines, and other sexual gadgets convey meaning and fall within the ambit of expression.[133] Because Section 163 of the Criminal Code specifically sought to restrict certain types of expressive activity, the Canadian Supreme Court held that the Code infringed upon freedom of expression.[134]

The Canadian Charter's equality clause specifically permits a certain amount of restriction on freedom of speech.[135] Such restriction is permissible because Section 15 of the Canadian Charter firmly recognizes everyone's right to equality as a paramount constitutional provision.[136] Specifically, Section 15 provides that: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimi-

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130. *Id.* at 489. Because Section 163(8) of the Criminal Code sought to restrict material which communicates "undue exploitation of sex," the Section clearly infringed the freedom of expression clause of the Canadian Charter.

131. *Id.*

132. *Id.* at 489-90.

133. *Id.* at 488.

134. *Id.* at 489.

135. CAN. CONST. pt. I, § 15(1).

136. *See* Kathleen Mahoney, *R. v. Keegstra*, 37 MCGILL L.J. 242, 243 (1992). *Compare* CAN. CONST. pt. I, § 15(1) *with* U.S. CONST. amend. XIV, which states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

nation based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[137]

This Section allows the Canadian courts to freely address the harms perpetuated by pornography while acknowledging its expressive value.[138] Because of this, *Butler* balances the expressive value of explicit material against other interests.[139]

3. *Butler's Recognition of the Harms Implicit in Pornography*

Butler next considered whether the objectives of Section 163 justified restricting the expression in pornographic material on the basis of its harm.[140] Here, the court held that the aim of Section 163 was the avoidance of harm to society posed by undue exploitation of sex.[141] Unlike the American view, *Butler* widened the focus from simply viewing pornographic material as corrupting public morals.[142] *Butler* also focused on the sociological, political, and psychological effects from pornography in its analysis.[143]

Butler defined harm in this context as "predispos[ing] persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men."[144] Specifically, the degrading depiction of women in pornography and the negative perceptions and attitudes resulting from such depictions falls within the *Butler* definition of harm.[145] This directly contrasts the United States Supreme Court's view that pornography's

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137. CAN. CONST. pt. I, § 15(1).

138. *See* Mahoney, *supra* note 13, at 79.

139. *Butler*, [1992] 1 S.C.R. at 511.

140. *Id.* at 489.

141. *Id.* at 492. The court found that the statute's objectives were not aimed at restricting public and sexual morality solely because it reflected the conventions of a given community.

142. *Id.* at 492-93. *Butler* rejects a notion of legal moralism, noting that "[t]he prevention of 'dirt for dirt's sake' is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter." *Id.*

143. *Butler* uses Section 1 of the Canadian Charter, which guarantees equality, to alleviate some of the harms of sexual discrimination by regulating pornography. *Id.* at 511. *See also* MACKINNON, *supra* note 5, at 195-214 (also following the view that regulation of pornography is valid to redress the inequality women face); Mahoney, *supra* note 136, at 268.

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

145. *Id.* at 504.

harm is its offensiveness.[146]

Butler examines pornography's tendency to incite violence such as rape and battery towards women.[147] The court also explored the more insidious types of harm pornography generates, including changing attitudinal beliefs regarding acceptable levels of violence against women in society.[148] *Butler*'s approach is in accord with the position set forth by Catharine MacKinnon, Andrea Dworkin and other anti-pornography feminists in the United States.[149]

The *Butler* court articulates several of the well-established United States anti-pornographers' arguments in its balancing test of harms versus free speech considerations.[150] *Butler's* analysis implicitly adopts the three categories of gender-related harms articulated by the anti-pornography feminists.[151]

Butler cited with approval the specific harms articulated by the Report on Pornography by the Standing Committee on Justice and Legal Affairs.[152] The Report provides:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It at-

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146. *See* discussion *supra* notes 29-30 and accompanying text on the morality-based American obscenity doctrine.

147. *Butler*, [1992] 1 S.C.R. at 507-08.

148. *Id.* at 496-97. It is unclear whether *Butler*'s willingness to recognize harms would extend as far as the types of harms recognized by radical feminists in the United States. Note Professor MacKinnon's very liberal view of what constitutes sexual assault:

> The figure [of sexual assault] includes all the forms of rape or other sexual abuse or harassment surveyed, non-contact as well as contact, from gang-rape by strangers to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to 'Peeping Toms' and sexual exhibitionists.

MacKinnon, *supra* note 35, at 16 n.31.

149. *See* MacKinnon, *supra* note 5, at 56-60 (discussing the silencing of women through subordinate depictions in pornography); Mahoney, *supra* note 13, at 84-89 (describing various views on harm from types of speech); Sunstein, *supra* note 10, at 594-602 (discussing harm in pornography as a basis of regulation).

150. *Butler*, [1992] 1 S.C.R. at 493-94.

151. *Butler*, [1992] 1 S.C.R. at 508. *See also* Sunstein, *supra* note 10, at 595; *supra* notes 74-76 and accompanying text.

152. *Butler*, [1992] 1 S.C.R. at 493-94.

> tempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. 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.[153]

Following the Report's findings, the court found that certain themes in pornographic material were harmful because they had a detrimental impact on individuals exposed to them and consequently on society as a whole.[154]

The *Butler* court concluded that avoidance of harm against women and children constituted a legitimate objective of the statute.[155] The court held that such harm was sufficiently pressing and substantial to restrict freedom of expression.[156]

IV. *BUTLER'S* BALANCE OF HARMS: PORNOGRAPHY vs. FREEDOM OF EXPRESSION

Finally, *Butler* balanced the interest in avoiding harm to women against freedom of expression.[157] The court found that the anti-pornography statute provided a rational and proportional means to further the interest of avoiding societal harm

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153. CAN. HOUSE COMM. STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, REPORT ON PORNOGRAPHY, Issue No. 18, (1978), *cited with approval in Butler*, [1992] 1 S.C.R. at 493-94.

154. *Butler*, [1992] 1 S.C.R. at 500. The court made the distinction between harmful pornography and "good" pornography. The objective of the criminal statute was not to inhibit the celebration of human sexuality. Such "good" pornography has value because it "validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography when it is good celebrates both female pleasure and male rationality." *Id. (citing* Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 4 AM. B. FOUND. RES. J. 681, 696 (1987)).

155. *Butler*, [1992] 1 S.C.R. at 507 ("[T]he objective is the avoidance of harm caused by the degradation which many women feel as 'victims' of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women . . . .").

156. *Id.* at 498.

157. *Id.* at 499.

without unduly burdening freedom of expression.[158]

The Canadian Supreme Court held that prohibition of pornographic materials which cause harm minimally impairs freedom of expression.[159] Since the statute prohibited only sexually explicit pornography which was "violent or degrading," the provision was valid for two reasons.[160] First, the provision left untouched materials which had artistic or literary value.[161] Secondly, the statute targeted only public distribution rather than private possession.[162] Therefore, the restrictions on violent and degrading pornography were easier to justify.[163]

Butler also found that the Canadian legislature had no alternate and less intrusive measures to accomplish the objectives of avoiding harm to women and society.[164] The court rejected reasonable time, place, and manner restrictions as "inconsistent and hypocritical" because such restrictions did not alter the fundamental harmful effects of the pornographic material.[165] Consequently, the court held the harm sought to be avoided would remain the same.[166]

V. THE IMPLICATIONS OF *BUTLER* FOR THE UNITED STATES

Opponents of anti-pornography legislation argue that cen-

158. To be consistent with the Charter, the restrictions imposed by a statute must be rationally connected and proportional to the legislative objective. This includes an inquiry into whether there exists: 1) 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.*

159. *Id.* at 505.

160. *Id.*

161. *Id.*

162. *Id.* at 501. The *Butler* court also found pornographic material did not stand on equal footing with other speech because it was motivated by economic profit. *Id. See also* Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. Rev. 555 (1989) (presenting an overview of the different categories of high and low value speech).

163. *Butler*, [1992] 1 S.C.R. at 503.

164. *Id.* at 507-09. The court acknowledged education and other measures as means to address the problem of pornography. However, the court found these measures were responses to the harm from pornography and did not control the dissemination of the images that contribute to subordinating attitudes. Thus, the means did not control the cause of the problem, merely the effects.

165. *Id.* at 507.

166. *Id.*

sorship of pornography would start American courts down a slippery slope where critical political speech would soon be censored.[167] This concern appears unmerited, given the willingness of the Supreme Court to regulate areas of speech where "serious" harms are at stake, such as harm to children from pornography or secondary effects of zoning.[168] More importantly, this concern obfuscates the underlying trivialization of pornographic harms implicit in the American courts' refusal to depart from the traditional obscenity definition and its outdated categorical approach.

It is unclear how the American treatment of obscenity as non-expression helps keep political speech unfettered.[169] Instead, labelling obscene material as "unprotected" merely masks the true issues and disempowers American courts from directly tackling concerns about the effects of pornography.[170] Pornography labelled as "obscenity" cannot be non-expressive when it deals with one of the most intimate, emotional and highly charged of human activities.[171] The intensity surrounding the pornography debate testifies to pornography's expressive power.[172]

Using a *Butler*-type analysis in the United States would allow the courts to deal honestly with the issue of pornography and its effects while recognizing its value as expression. American courts could legitimize the harm behind pornographic expression while accommodating First Amendment concerns through a balancing test which *Butler* provides. *Butler* breaks away from the rigid categorization of obscenity versus speech and widens the judicial perspective to encompass other issues.

In *Hudnut*, a *Butler*-type analysis would not have trivialized the importance of pornography's harm to women in balancing First Amendment concerns.[173] The *Butler* analysis would

167. For an in-depth discussion on why pornography restrictions are not leading the United States down a "slippery slope," see Karo & McBrian, *supra* note 10, at 203-05.

168. *See* discussion *supra* part II.D on the United States Supreme Court's recognition of other types of harm.

169. *See* Karo & McBrian, *supra* note 10, at 203.

170. *See* MacKinnon, *supra* note 35, at 3.

171. *See Bowers*, 458 U.S. at 205 (Blackmun, J., dissenting).

172. *See Hudnut*, 771 F.2d at 329; MacKinnon, *supra* note 35, at 17.

173. *See* discussion *supra* part III.A.3 regarding *Butler*'s harm analysis.

have addressed sex discrimination and other tangible harms from pornography. Like the American approach, however, the *Butler* analysis also would have recognized that the stringent Indianapolis ordinance was an impermissible infringement on expression because of its refusal to recognize the artistic value in pornographic materials. The *Butler* analysis shows that the First Amendment concerns can be accomodated while treating serious problems perpetuated by pornography.

A *Butler* analysis would have reached the same result in *Hudnut*, but would have left the door open for other anti-pornography ordinances based on a harms-equality approach to succeed. Women's victimization due to pornography would have been validated as harms that society needs to protect against, instead of being dismissed as "unhappy effects" which are necessary to the marketplace of ideas.

Butler's willingness to recognize pornography as expression, would have rendered a very different result in *Barnes*.[174] Under the *Butler* analysis, American courts would not have to separate the nudity from erotic dancing.[175] A *Butler* approach would allow courts to acknowledge the expressive value of the dancing in its totality.[176] By acknowledging this expressive value, *Butler* can look at the effects of nude dancing on the community as a whole. *Butler* would not restrict courts to analyzing "secondary effects" in neighborhoods. *Butler* would allow courts to consider the subtle pervasive harms generated by women stripping in front of men in bars, not simply whether the nudity of the dance affronts a public sense of decency. A *Butler* analysis would provide a more complete and realistic approach to the regulation of nude dancing.

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174. *Contra Barnes*, 111 S. Ct. at 2462 (distinguishing between non-expressive nudity and expressive dancing).

175. *Id.*

176. *Butler*, [1992] 1 S.C.R. at 487 (stating that although the subject matter may depict only physical activity, the subject matter may convey or attempt to convey ideas through such activity).

VI. CONCLUSION

Butler's recognition of pornography as expression is an invigorating change from the United States Supreme Court's dogmatic decency-based *Miller* standard with its cloudy underlying rationales. The *Miller* obscenity definition does not accomodate expressive value in sexually explicit materials which are offensive, but protects violent and misogynist pornography because of the "powerful" ideology it conveys.[177]

A recognition of pornography as expression currently allows Canadian courts to consider its harmful effects. Only when pornography is considered expression can the harm such expression perpetuates be recognized.

In *Butler*, the court balanced concerns for freedom of expression against harm caused by pornographic expression.[178] The First Amendment in this country may cause the Supreme Court to weigh these interests somewhat differently than the *Butler* Court. However, a *Butler* approach still fits into the American constitutional framework, albeit different in scope.

Ostensibly, a *Butler* approach in the United States seems to render similar results as those reached through the obscenity doctrine, yet it provides courts with a clearer set of guidelines for dealing with the issue of pornography. A *Butler* approach would also render those results through an analysis which acknowledges harms instead of trying to hide them away.

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177. *See Hudnut*, 771 F.2d at 329.

178. *See* discussion *supra* part IV.

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