Sounding the Death Knell for Butler*? A Review of B. Cossman, S. Bell, L. Gotell & B.L. Ross,* Bad Attitude/s on Trial: Pornography, Feminism, and the *Butler* Decision

Brenda Cossman, Shannon Bell, Lise Gotell & Becki L. Ross, *Bad Attitude/s on Trial: Pornography, Feminism, and the* Butler *Decision.* Toronto: University of Toronto Press, 1997. Pp. 273. [Cloth $55.00; paper $18.95].

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Introduction

That the Supreme Court's decision in *R.* v. *Butler*[1] has been widely interpreted as a feminist victory is undoubtedly linked to the prominent role played by the Women's Legal Education and Action Fund (LEAF), a key intervener in the case.[2] Writing for the majority, Sopinka J. relied heavily upon the anti-pornography feminist discourse of theorists like Catherine MacKinnon and Kathleen Mahoney, who along with Linda Taylor wrote the LEAF factum in *Butler*.[3] The landmark ruling would redefine the legal test for obscenity under section 163 of the *Criminal Code*;[4] henceforth, pornography would not be deemed obscene simply because it breached public notions of mo-

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[1] [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [hereinafter *Butler* cited to S.C.R.].

[2] The other interveners were the Attorneys General of Canada, Ontario, Quebec, British Columbia, and Alberta, the Canadian Civil Liberties Association, the Manitoba Association for Rights and Liberties, the British Columbia Civil Liberties Association and the Group Against Pornography (GAP).

[3] Sopinka J. wrote the majority decision for Lamer C.J., Cory, Iacobucci, La Forest, McLachlin, and Stevenson JJ. L'Heureux-Dubé J. concurred with a minority decision written by Gonthier J. which affirmed Sopinka J.'s ruling but offered different reasons. MacKinnon's argument against pornography stresses the notion of harm to women over morality. Sopinka J's rejection of a morality-based rationale against obscenity is cited as proof that LEAF's claims before the Court informed his decision.

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

rality.[5] The new legal approach would subject material to a test that considered whether the material in question involved the undue exploitation of sex coupled with crime, cruelty, horror or violence. And so the Supreme Court had spoken on the constitutionality of Canada's obscenity laws and the story ended happily for those concerned with equality rights ... or did it?

Four years before the *Butler* decision was rendered, Revenue Canada quietly issued Memorandum D9-1-1 to assist Customs Inspectors in identifying obscene material at border entry points.[6] The guidelines led to a series of highly publicized seizures of books and magazines headed to the Toronto Women's Bookstore and the Little Sisters Art and Book Emporium in Vancouver.[7] The *Butler* decision only seemed to lend more credibility to police and customs officials' scrutiny of stores which specialized in women's books and gay and lesbian literature. Just six weeks after the *Butler* decision was handed down, Toronto police charged the Glad Day Bookshop under section 163 for selling *Bad Attitude*, a lesbian erotic fiction magazine.[8] In February 1994, Toronto police raided the Mercer Union Art Gallery and seized an exhibition by artist Eli Langer.[9] Langer's paintings and drawings were meant to draw attention to the problem of child sexual abuse, but police and Crown prosecutors felt otherwise and proceeded with a case under the then newly-enacted section 163.1 child pornography provisions of the *Criminal Code*. The early enthusiasm which greeted *Butler* was quickly turning sour.

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[5] *Supra* note 1 at 455: "The overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society."

[6] B. Cossman *et al.*, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 33 [hereinafter *Bad Attitude/s on Trial*].

[7] *Little Sisters Book & Art Emporium* v. *Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (B.C. S.C.) [hereinafter *Little Sisters* (S.C.)], aff'd (1998), 160 D.L.R. (4th) 385 (B.C. C.A.) [hereinafter *Little Sisters* (C.A.)]. Although Memorandum D9-1-1 was not law, it was heavily relied upon by customs officers in determining what constituted prohibited material under section 163 of the *Criminal Code*, *supra* note 4. The possibility that officers needed to use the memorandum to provide an "intelligible standard" for understanding the law casts some doubt on the premise that the legislation was sufficiently precise to meet the constitutionally-mandated "prescribed by law" test. Speaking to the issue of whether the *Criminal Code* obscenity definition is sufficiently precise so as to be intelligible for Canada Customs officers to use for non-criminal purposes in detaining material at the border, Finch J.A. noted in *Little Sisters* (C.A.), *ibid.* at paras. 216-217:

> The learned trial judge appears to have concluded that the legislative standard was sufficiently precise because, in his view, Customs officials could be trained to apply it ... It seems to me, with respect, that if the law is not intelligible without an interpretive aide, such as Memorandum D9-1-1, or without "appropriate and consistent training" it cannot be said to meet the constitutionally-mandated standard of precision.

Future challenges to *Butler* might benefit from this weakness. See D. Crerar, "'The Darker Corners': The Incoherence of 2(B) Obseenity Jurisprudence after *Butler*" (1996) 28 Ottawa L. Rev. 377.

[8] *R.* v. *Scythes*, [1993] O.J. No. 537 (Ont. Prov. Div.), online: QL (OJ) [hereinafter *Scythes*].

[9] *R.* v. *Paintings, Drawings & Photographic Slides of Paintings* (1995), 123 D.L.R. (4th) 289, 40 C.R. (4th) 204 (Ont. Gen. Div.) [hereinafter *Langer* cited to D.L.R.].

Bad Attitude/s on Trial contends that if the *Butler* ruling was seen as a legal victory by women in progressive circles, it was hollow. The authors challenge the "hegemonic" feminist optimism that followed the decision by documenting how police and Crown prosecutors have taken *Butler* as a green light to declare open season on marginalized communities and depictions of sexuality which fall outside the mainstream.[10] Ironically, as the net of criminal regulation has tightened over some sexual images, the authors point out that straight, mainstream pornography has continued to flourish.[11] Co-written by four women with varied backgrounds in law, sociology, political science, and women's studies, *Bad Attitude/s on Trial* successfully uses an inter-disciplinary approach to challenge the very notion that there exists a universal monolithic "feminist position" on pornography, as articulated by LEAF in *Butler*.[12] The authors convincingly present a strong feminist case *against* censorship by arguing that the ambiguity and complexity of sexual expression and desires precludes the possibility of objectively regulating pornography in the criminal justice sphere.

The book is organized into four chapters, each written by one of the authors. In her chapter, political scientist Lise Gotell sets the stage for the debate over *Butler* by outlining the political landscape against which the case was litigated. Osgoode Hall law professor Brenda Cossman delves into the specifics of the court ruling by deconstructing the legal test for obscenity created by *Butler*. Sociologist and women's studies professor Becki Ross relies on her experience as an expert witness for the defence in *Scythes* to introduce the complex legal and political issues raised by lesbian erotica. In the final chapter, York University political scientist Shannon Bell combines poetry, prose, newspaper accounts and interviews with individuals charged under obscenity provisions to highlight the contradictions of criminal regulation of sexual representation.

This review is divided into four sections which provide an overview of each author's argument. The book's assault on *Butler* will be considered in the broader context of a growing anti-*Butler* backlash, spurred on by a number of recent court rulings.

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[10] Feminist feeling towards *Butler* was by no means hegemonic. Although the question of obscenity has proved divisive and highly complex among Canadian feminists, the authors take issue with the fact that media and popular legal analyses have presented *Butler* as an unequivocal feminist victory. See *Bad Attitude/s on Trial*, *supra* note 6 at 7. A Parliamentary Background Paper unequivocally stated that, "feminist women's groups, and others have applauded the court's decision" (J.R. Robertson, "*Obscenity: The Decision of the Supreme Court of Canada in* R. *v.* Butler" (Ottawa: Library of Parliament, Research Branch, 1992) at 12.

[11] See *ibid.* at 4.

[12] The authors of *Bad Attitude/s on Trial* suggest that claims to speak on behalf of all women are impossible. By their estimation, LEAF's failure to acknowledge a multiplicity of feminist opinions on sexual representation in their factum to the court in *Butler*, implied a non-existent consensus for their position by all Canadian women.

I. The Politics of Censorship

If at first glance LEAF's alignment with other interveners who espoused morally conservative claims against pornography made for strange bedfellows, Lise Gotell suggests an underlying commonality between right-wing moral condemnation of obscenity and feminist attacks on obscenity.[13] Gotell uses the term "foundational discourse" to describe political visions which assert universal claims to "truth".[14] Thus, right-wing conservative dialogue which stresses an objective morality, based on traditional Judeo-Christian values as the undisputed truth, shares much in common with the dominant feminist discourse of Catherine MacKinnon which maintains its own "truth" premised on a belief that pornography is universally a cause of women's oppression and subordination.[15] Gotell explains that sexuality and erotic expression are informed by complex human desires, yet LEAF's intervention demonstrated a preference for portraying sexuality in simplistic, black and white terms. Shannon Bell states it bluntly: "MacKinnon's position is one of certainty: this is what pornography is, this is what it does; women who disagree or partially agree are either collaborators or suffering false consciousness."[16] According to Gotell, MacKinnon's argument seeks to "recast the moral foundations of law to incorporate a normative concern for sexual harm," thus endorsing the moral-regulatory function of law and entering a "rhetorical and political alliance with the moral right."[17]

Bad Attitude/s on Trial suggests that LEAF's success before the Supreme Court in *Butler* was the product of its willingness to assert incontestable claims of legal truth and certainty.[18] If indeed law's own power rests in its claim to truth, the foundational discourse of anti-pornography feminists found a willing accomplice in a Supreme Court eager to accept universalist claims rather than have to wrestle with the complexities of sexual representation.[19] A good example of the ruling's inability to posit unconventional expressions of sexuality is found in the discussion on degrading and dehumanizing sex. Referring to depictions that involve subordination and humiliation,

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[13] Gotell argues that even though GAP was the only *de facto* "morally conservative" intervener, the arguments of the Attorney General of Canada and the Attorney General of Manitoba were "remarkably similar" to the GAP factum.

[14] See *supra* note 6 at 60.

[15] See *ibid.*

[16] *Ibid.* at 201.

[17] *Ibid.* at 64.

[18] See *ibid.* at 72.

[19] *Ibid.* U.S. courts had already rejected MacKinnon's attempts to enact local anti-pornography ordinances. See *American Booksellers Association* v. *Hudnut*, 771 F.2d 323 (7th Cir. 1985), summarily aff'd 475 U.S. 1001 (1986) which struck down s. 16.3 of the Indianapolis Municipal Code. MacKinnon's arguments would eventually succeed before the Supreme Court of Canada. For a recent comparison of U.S. and Canadian constitutional approaches to obscenity law, see P. Horwitz, "Citizenship and Speech" Book Review of *The Irony of Free Speech* and *Liberalism Divided* by O.M. Fiss (1998) 43 McGill L.J. 445.

Sopinka J. finds that such material, even if genuinely consensual, can never be saved.[20] The authors of *Bad Attitude/s on Trial* argue that subordination and humiliation form a valid part of some people's sexual fantasies and identities. Sopinka J.'s decision is criticized for not recognizing that some material which depicts submission or the infliction of pain may not be harmful, and that some people might actually willingly consent to such behaviour. If the Supreme Court was unwilling to consider ambiguity over certainty, surely it was unreasonable to expect nuanced readings of sexual expression by police, Customs Inspectors and Crown prosecutors. The authors assert that there are multiple ways of interpreting imagery involving domination and subordination, pointing out the existence of a distinct sub-culture of consenting adults who choose to engage in sado-masochistic ("s/m") role-play.

II. Sex Panic: The Good Sex/Bad Sex Divide

Author Eric Rofes elaborates on Allan Bérubé's definition of sex panic ("a moral crusade that leads to crackdowns on sexual outsiders"), by describing the particular characteristics of the phenomenon.[21]

> During a sex panic, a stampede mentality takes hold and alternative viewpoints are silenced. A wide array of free floating cultural fears are mapped onto specific populations who are then ostracized, victimized, and punished. In recent years we have seen sexual terrors marshal[l]ed to trample upon prostitutes and other sex workers, African-American men, welfare mothers, sex offenders as a class, and men who engage in consensual sex with male teenagers.[22]

Gotell and Cossman situate the contemporary debate over pornography in the context of a larger moral and sexual panic brought on by the AIDS crisis. Because subjective determinations of good sex/bad sex are intimately linked to the perceived risk of seropositivity associated with particular sexual practices, gay and lesbian representations attract more scrutiny than heterosexual depictions.[23] In the same way that efforts in the 1970s to educate society about the threat of sexual assault unwittingly lead to "rape panics" in which fears of violation were unfairly projected onto Black men, efforts in the 1990s to reduce the harms associated with exploitive pornography have resulted in the inadvertent projection of these fears onto another marginalized community: gays and lesbians.[24]

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[20] See *Butler*, *supra* note 1 at 479.

[21] E. Rofes, *Dry Bones Breathe: Gay Men Creating Post-AIDS Identities and Cultures* (New York: Harrington Park Press, 1998) at 169 citing A. Bérubé, "A Century of Sex Panics" in *Sex Panic!* (New York: Sex Panic!, 1997) at 4-8.

[22] Rofes, *ibid.*

[23] The authors describe this phenomenon as a "logic of contagion". Participation in perceived "high risk" activities for HIV infection is positively correlated with regulatory disapproval.

[24] MacKinnon is keenly aware of the currency yielded by the stereotypical commodification of Black men as rapists, observing that, "[r]ape comes to mean a strange (read Black) man knowing a woman does not want sex and going ahead anyway." C. MacKinnon, "Feminism, Marxism, Method,

Herein lies the core message of *Bad Attitude/s on Trial*: the *Butler* decision was concerned with the harms which may arise from violent and degrading *heterosexual* pornography, yet as University of Manitoba law professor and LEAF member Karen Busby concedes, the post-*Butler* pornography dragnet has instead focused on gay and lesbian depictions.[25] In 1994, Busby wrote "since *Butler* was released, very few Criminal Code charges have been laid regarding heterosexual materials."[26] Brenda Cossman sees this as no accident. Although the official reading of *Butler* holds that the Supreme Court redefined the test for obscenity under section 163 of the *Criminal Code* by replacing the law's concern for protecting morals with a concern for reducing harm towards women, Cossman attempts to map out a different reading of *Butler*, focusing instead on the decision's assumption of "sexual negativity".[27]

The Court classified pornography into three categories: i) explicit sex with violence, ii) explicit sex that is degrading or dehumanizing, and iii) explicit sex that is neither violent nor degrading.[28] We are told that the first category will always break the law, the second category may break the law if the risk of harm is substantial, while the third category will generally be tolerated unless it involves children. According to Cossman, "[t]his categorization further underscores the absence of a positive theory of sex and sexual expression in Butler. The very definition of good sex — the third category — is framed in purely negative terms."[29] Cossman stresses the fact that we are never told what makes sex good, only what makes it bad. It is this very silence which the authors of *Bad Attitude/s on Trial* deplore. As *Scythes*,[30] *Little Sisters*[31] and *Langer*[32] demonstrate, when police, Customs Inspectors and Crown prosecutors are not given detailed instructions regarding what is *permitted*, they will all too often draw the line at depictions of the sexual "other".

Cossman explains that aspects of the good sex/bad sex dichotomy appear throughout the text of *Butler*, and underscore a rudimentary moral hierarchy:

> "[T]he public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension ... must be

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and the State: Towards Feminists Jurisprudence" in S. Harding, ed., *Feminism and Methodology* (Bloomington: Indiana University Press, 1987) 135 at 146. Unfortunately MacKinnon is unable to see how, for the state institutions she has politically aligned herself with, obscenity has come to mean gay and lesbian sexuality.

[25] See K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" 9 Can. J. L. & Soc. 165 at 184. Busby is not alone in feeling the need to justify LEAF's position. See also "Statement by Catherine A. MacKinnon and Andrea Dworkin Regarding Canadian Customs and Legal approaches to Pornography" (26 August 1994), online: <http://www.igc.apc.org/womensnet/dworkin/OrdinanceCanada.html> (Date accessed: 9 August 1998).

[26] Busby, *ibid.*

[27] See *supra* note 6 at 107.

[28] See *Butler*, *supra* note 1 at 454.

[29] *Supra* note 6 at 115.

[30] See *supra* note 8.

[31] See *supra* note 7.

[32] See *supra* note 9.

> harmful in some way." We see in this passage from Wilson, J., as affirmed by Sopinka J., a particular vision of sex and sexual representation. The merely physical dimension of sex is subhuman. The opposition of good and bad sex reappears in a somewhat different guise. Bad sex is subhuman sex. Bad sex is sex that emphasizes the merely physical dimension of sex.
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> We begin to see here the underlying binary opposition. It is the distinction between mind and body, between intellectual and physical, between the emotional and sensual, that has long informed Western thought.[33]

III. Regulating Women's Sexuality

Becki Ross begins her chapter on the wrong foot with an apology of sorts for her "futile and failed efforts" as an expert witness for the defence in *Scythes*,[34] the case against Glad Day Bookshop owner John Scythes.[35] Ross explains that in retrospect her efforts to defend Scythes' sale of the publication *Bad Attitude*, a lesbian erotic fiction magazine with sado-masochistic leanings, was doomed from the start in the context of a post-*Butler* anti-pornography landscape. At trial, U.C.L.A. psychologist Neil Malamuth was called to testify for the Crown about his research on the link between pornography and violence against women.[36] Provincial court judge Claude Paris had Malamuth sworn in as an expert witness in communications, psychology and research on the effects of viewing pornography.[37] Although it was acknowledged by everyone that Malamuth had never studied gay and lesbian pornography *per se*, counsel for the defence was unsuccessful at disqualifying his testimony. The Crown persuaded the Court that lesbian erotic imagery which included depictions of bondage and submission was identical in meaning to violent heterosexual pornography. Defining causal relationships in the social sciences can be exceedingly difficult, yet Malamuth had no problem concluding that the publication *Bad Attitude* would likely lead to harm against women, even though he was completely unfamiliar with the codes and conventions of the lesbian sado-masochism sub-culture, and had never actually conducted research on the effects of this material.[38] The court's unwillingness to acknowl-

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[33] *Supra* note 6 at 111-12 quoting Wilson J. in *Towne Cinema*, [1985] 1 S.C.R. 494 at 524, 18 D.L.R. (4th) 1, affirmed by Sopinka J. in *Butler*, *supra* note 1 at 480.

[34] See *supra* note 8.

[35] See *supra* note 6 at 153.

[36] At the time of the trial, Malamuth was at the University of Michigan.

[37] See *supra* note 6 at 154.

[38] Sopinka J. wrestled with the issue of proof throughout *Butler*, *supra* note 1, ultimately concluding that a causal link may be impossible to establish and that harm may be presumed. Sopinka J.'s lingering doubts about the subjective question of proof raises the troubling prospect that *Butler* might not have satisfied the section1 requirement to establish a "reasoned apprehension of harm to society" resulting from *any* type of obscenity. Restrictions on *Charter* rights to free expression are subject to rigorous tests and future constitutional challenges to obscenity law may focus more critical attention on the obligation to justify those infringements. In arriving at his "national community standards" test for tolerance, Sopinka J. wrote, "Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a

edge the possibility that lesbian erotic representation involves different power dynamics than heterosexual pornography is cited as an instrumental factor in its acceptance of Malamuth's testimony.[39]

The Supreme Court's decision in *Butler* made no distinction between heterosexual and homosexual material, and consequently lower courts have been reluctant to recognize any differences. Recently, in *Little Sisters*, the appellants unsuccessfully tried to challenge the applicability of the *Butler* obscenity test to gay and lesbian erotica.[40] The appellants had endured repeated seizures by Canada Customs of printed material headed to their bookstore, and argued that Canada Customs legislation allowing arbitrary detention of contested publications[41] was a violation of their right to free expression under section 2(b) and of their equality rights under section 15(1) of the *Charter*.[42] Citing the absence of social science evidence at trial that homosexual pornography was analogous to heterosexual pornography in its potential for harm to society, the appellants contended that *Butler* only applied to heterosexual pornography.[43] The British Columbia Court of Appeal rejected the claim in a two to one decision, and leave for appeal has been requested to the Supreme Court.[44]

One of the most revealing moments from the *Scythes* trial occurred when defence counsel tried to draw an analogy between the contested publication *Bad Attitude*, and

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norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole" (*Butler*, *ibid.* at 484). See generally *infra* note 66.

[39] See *supra* note 6 at 154.

[40] *Little Sisters Book* (C.A.), *supra* note 7.

[41] The legislation in question was Tariff Code 9956(a) of the *Customs Tariff*, S.C. 1987 (3d Supp.), c. 49, Sch. VII pursuant to s. 114 and ss. 58 and 71 of the *Customs Act*, S.C. 1986 (2d Supp.), c. 1. These provisions were simplified and replaced by the *Customs Tariff Act*, S.C. 1997, c. 36 on 1 January 1998, however the parties agreed to proceed on the basis of the old legislation because of the substantial similarities between both laws which rely on the *Criminal Code* definition of obscenity. Referenee to the *Criminal Code* definition dates back to unsuccessful predecessor provisions which banned material "of an immoral or indecent character." This language was struck down for vagueness. See *Re Luscher*, [1985] 1 F.C. 85, 17 D.L.R. (4th) 503 (C.A.).

[42] *Canadian Charter of Rights and Freedoms*, ss. 2(b), 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[43] The appellants also sought to distinguish their case from *Butler* on the grounds that their claim involved: i) printed literature, ii) a section 15 equality claim, and iii) a situation not consisting of subsequent criminal punishment, but one involving a *prior restraint* on expression. In his dissenting opinion in *Little Sisters* (C.A.), Finch J.A. spoke of the historical common law notion of press immunity to prior restraints as described by U.S. Supreme Court Chief Justice Hughes in *Near* v. *Minnesota*, 283 U.S. 697 (1931) who referred to the English struggle, quoting Blackstone,

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity (*Little Sisters* (C.A.), *supra* note 7 at para. 175).

[44] The appellants applied for leave on September 16, 1998.

pop singer Madonna's controversial best-selling coffee-table book, *Sex*.[45] Published in 1992, Madonna's book contained graphic images of sado-masochistic bondage and sex, and was quickly dismissed by critics as a cheap marketing ploy calculated to generate controversy (and sales) among her fans. Although Madonna's imagery was similar to that found in the publication *Bad Attitude*, Ross documents how the pop diva's publisher Time-Warner was able to obtain pre-clearance from Canada Customs, with the help of high-priced legal talent. With sales of only 200 copies per issue, the publisher of *Bad Attitude*, unlike Time-Warner, could not afford to hire lawyers to help police and customs officials "interpret" their material.[46] Ross sums up the situation: "[T]he safe passage of *Sex* across the U.S./Canada border was eased by the twin lubricants of money and power; the publishers of *Bad Attitude* had no such 'luck.'"[47]

Ross stresses the pitfalls of decontextualizing publications like *Bad Attitude* which employ violent imagery and ritual re-enactment to mock poignantly societal stereotypes about gender roles and sexuality, in the spirit of the gay cultural traditions of *camp* and *drag*.[48] The use of such rhetorical devices is not without controversy. Ross suggests that feminist opinion varies greatly over the meaning and appropriateness of these types of depictions, and expresses discomfort with being cast into the role of defender and spokesperson for the entire lesbian sado-masochism movement at the *Scythes* trial. "[A]s the *Bad Attitude* trial progressed, I felt acutely uneasy about my role as speaker *for* members of lesbian s/m communities. I am connected to these communities, but I am not an active member of them."[49]

It is here that *Bad Attitude/s on Trial* is most vulnerable to criticism. Ross elaborates that her reluctance to assert positivist claims on the witness-stand played a decisive role in the court's rejection of her testimony.[50] "The Crown and judge wanted me to solidify the lesbian s/m subculture as a constitutive group that was mathematically measurable ... I argued that s/m cannot be easily and neatly packaged ... I was committed to defending *Bad Attitude* as *one* product of lesbian sexual dissent."[51] Ross refused to counter Malamuth's testimony on pornography, insisting on arguing that explicit material was open to multiple interpretations, a strategy which she readily concedes was doomed to fail. In an ideal world, the court would embrace Ross's ambiguity as sufficient to establish a reasonable doubt. Unfortunately, as an expert witness in

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[45] Madonna *et al.*, *Sex* (New York: Warner Books, 1992).

[46] See *Bad Attitude/s on Trial*, *supra* note 6 at 172. Ross's allegation of a double-standard is reinforced by the recent B.C. Court of Appeal decision in *Little Sisters* (C.A.), *supra* note 7 at para. 130, where ironically, Hall J.A. noted, "We were referred to various pictorial representations from a publication termed the 'Madonna Book'. It was apparently found to fall into the non-obscene category but it must have been a close call. The relationship between the depictions in that publication and what is sometimes termed 'the marketplace of ideas' in discourses on free speech is not readily apparent."

[47] *Bad Attitude/s on Trial*, *ibid.* at 171.

[48] See *ibid.* at 159.

[49] *Ibid.* at 157.

[50] See *ibid.* at 173.

[51] *Ibid.* at 173-74 [emphasis added].

an adversarial trial where the accused stood charged with a very serious *Criminal Code* offence, Ross's unwillingness to champion John Scythes's cause on the court's terms proved fatal for the defence case, and ultimately has the effect of alienating readers of *Bad Attitude/s on Trial*. Ross displays a certain naivety in treating her testimony as though it were part of some friendly academic exchange among colleagues. Her discomfort with having to make positive claims about erotic depictions of women engaging in consensual sex involving acts of bondage and submission is symptomatic of a larger problem in *Bad Attitude/s on Trial*.

Brenda Cossman spares no effort in criticizing Sopinka J.'s decision in *Butler* for not providing a "positive theory of sex and sexual expression,"[52] yet for all of its deconstruction, neither does *Bad Attitude/s on Trial*. The authors hide behind the monikers of relativism and cultural specificity in their claims against censorship, but as much as they defend the rights of others to express themselves through erotic representation, the authors unquestionably hold opinions on where the line should be drawn.[53] Rather than trying to explain and rationalize erotica by highlighting its sociopolitical significance or suggesting the ambiguity of its meaning, anti-censorship feminists would be better off asserting a definitive theory of sexual expression premised on the consent of participants. While this argument may seem obvious, it is only really in passing that Cossman and Ross define the pornography issue in terms of free choice and consent. The authors refuse to pronounce themselves on what makes erotic representation *right*. This reluctance to venture their own positive theory of erotic representation ultimately diminishes the persuasiveness of their argument.

As we saw in *Butler*, the foundational claims of pro-censorship feminists are invariably privileged in legal debate because they are simple and decisive.[54] LEAF's message is clear: Pornography is degrading and exploitive of woman, and leads to harm.[55] Becki Ross acknowledges that LEAF succeeded by crafting a simple, authoritative message, quoting legal scholar Carol Smart, who suggests that "'legal arguments ... that present simple, certain and authoritative pictures of social reality are likely to be privileged within legal discourse.'"[56] Unfortunately, to the detriment of their cause, Ross *et al.* are unwilling or unable to profit from this knowledge.

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[52] *Ibid.* at 115.

[53] Ross defends publications like *Bad Attitude* by explaining that although they present images of sexualized violence, they can be distinguished from violent heterosexual pornography on the basis on their intended audience.

> The photographic camera angles, lighting, cropping, positioning, and framing, combined with the lesbian-directed narratives, are all constructed to enhance a lesbian reader/viewer's enjoyment of, and vicarious participation in, the fantasy scenes. The narratives and pictures are made sense of by skilled members of lesbian leather and s/m subeultures who are intimately familiar with the expressed codes, techniques, etiquette, cues, argot, and rule-governed practices (*ibid.* at 159).

[54] See *ibid.* at 173.

[55] See *ibid.* at 90.

[56] *Ibid.*

IV. *On ne peut pas voir l'image*

During the trial in which Toronto artist Eli Langer was eventually acquitted of child pornography charges,[57] a protest exhibit was mounted entitled *On ne peut pas voir l'image*, "the image cannot be seen."[58] The protest was designed to highlight the vulnerability of artists to criminal sanctions under the newly enacted laws. Buoyed by the success of section 163 before the Court in *Butler*, the following year section 163.1 was enacted to solve the problem of child pornography.[59] In a clever collection of poetry, prose, newspaper accounts and interviews with individuals charged under obscenity provisions, Shannon Bell weaves together a complex portrait of the contradictions surrounding the child pornography provisions of section 163.1. Drawing on the philosophical works of Kant, Nietzshe, Foucault and American beat poet Allen Ginsberg, Bell points to the oppressive nature of a *Criminal Code* which establishes a fourteen year-old minimum age of sexual consent, but an eighteen year-old minimum age for photographic representations of this activity.[60]

We are introduced to what the author terms "The London Porn Panic" — a prolonged investigation by the London, Ontario police into allegations of child pornography and sexual molestation.[61] Part of the "province-wide joint-forces child pornography task force, Operation Guardian," the probe resulted in over 400 criminal charges against fifty-two men, yet only a fraction involved charges of sexual interference with children under the age of fourteen.[62] Over ninety per cent of the charges were for paying money to have sex with teenagers *over* the age of fourteen.[63] This did not prevent London police chief Julian Fantino from announcing, with great fanfare, at a press conference surrounded by hundreds of seized videotapes, that a major "child sex ring" had been uncovered.[64] The videos were all eventually released, and many of the suspects would later be acquitted, but not before their lives would be ruined. *After the Bath*, a documentary by Canadian filmmaker John Greyson on the London investigation, uncovered disturbing evidence that police and social workers encouraged the teenagers who had willingly consented to sex to see themselves as victims.[65]

Shannon Bell's use of specific examples forces readers to challenge their own feelings and prejudices towards pornography and the role of law in regulating sexual

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[57] See *Langer*, *supra* note 9.

[58] See *supra* note 6 at 232.

[59] See *ibid.* at 228.

[60] Bell challenges the logic of broadening the ambit of "child" porn laws to include fourteen to eighteen year-olds, who are considered sexually mature for the purpose of consent.

[61] See *supra* note 6 at 207.

[62] See *ibid.* at 208.

[63] Recall that while the age of consent is set at fourteen, one must be eighteen to accept money for sex, or to be photographed sexually.

[64] Fantino's media savvy and high profile posturing carved him a reputation for being tough on crime. On 4 August 1998 he was sworn in as York Regional Police Chief. See N. Keung, "Fantino Sworn in Before 450 Supporters" *The Toronto Star* (5 August 1998) B1.

[65] (Canada, 1995) John Greyson, 45 minutes, Video.

expression. In reading the particulars of one case, one might sympathize with the accused. In another, one might feel less sympathetic. Such arbitrary judgements prove troubling in light of *Butler*'s insistence on determinable, objective tests for obscenity. In arguing for a universal "Community Standards" test for undue exploitation, Sopinka J. rejects the minority view that tolerance is subjective, "depending on the manner, time and place in which the material is presented as well as the audience to whom it is directed."[66] Strangely enough, that was *precisely* how I felt as the authors of *Bad Attitude/s on Trial* introduced defendant after defendant. As people recognize the subjectivity of their own tolerance,[67] it becomes increasingly difficult to accept the plausibility of a "national community standard of tolerance."

In what is arguably the most compelling moment of *Bad Attitude/s on Trial*, Shannon Bell recounts the story of twenty-two year old Matt McGowan, a Toronto street hustler. McGowan was charged under obscenity laws for videotaping himself engaging in consensual sex with two teenage boys.[68] The graphic video had been made as a safer-sex tool for street hustlers, and regardless of personal feelings about its intrinsic value, one is immediately struck by the powerlessness of individuals like McGowan who are being made to bear the burden of the post-*Butler* crackdown. Police have not used *Butler* to pursue wealthy distributors of violent, misogynist pornography, but have elected instead to target the most marginalized elements: independently owned gay and lesbian bookstores, and street prostitutes like Matt McGowan.

Conclusion

The *Butler* decision was heralded as a landmark ruling, a monumental shift in attitude that was supposed to change the way police, customs officials and Crown prosecutors defined "obscenity". *Bad Attitude/s on Trial* provides strong evidence that even if the rhetoric has changed, underlying attitudes have not. The London child porn investigation, and the cases against Matt McGowan, Eli Langer, John Scythes and the Little Sisters Art and Book Emporium support the authors' contention that police have taken *Butler* as their cue to pursue a witch-hunt on marginalized communities and depictions of sexuality which fall outside the mainstream. The documented failure of Canada's obscenity laws to successfully balance the interests of reducing the harms which may arise from violent, exploitive pornography, with the rights of individuals to freely express themselves through erotic representation, highlights the inappropriateness of criminal justice sanctions for obscenity. *Bad Attitude/s on Trial* is a poignant reminder of the very real context in which Supreme Court decisions exist, and the very real impact they can have on people's lives. Proponents of *Butler* have repeatedly denied responsibility for the unfair enforcement of obscenity laws, citing their inability to foresee in advance how

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[66] *Butler*, *supra* note 1 at 478.

[67] In the contrived semantics of the decision, the community standards test refers "not to what people would tolerate being exposed to *themselves*, but what they would not tolerate *other* Canadians being exposed to" (*ibid.*). This formulation originated in *Towne Cinema*, *supra* note 33.

[68] *R.* v. *McGowan* (1995), 102 C.C.C. (3d) 461 (Ont. Prov. Div.).

the ruling would ultimately be used.[69] Given that the authors of *Bad Attitude/s on Trial* profit tremendously from hindsight in their criticism of LEAF and the Supreme Court in *Butler*, some readers will invariably find the book rather harsh in its judgements. Nevertheless, *Bad Attitude/s on Trial* provides a well-conceived, articulate case against one dimensional readings of *Butler*.

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[69] See Busby, *supra* note 25; MacKinnon & Dworkin, *supra* note 25.