

Dangerous Customs: Censorship in Risk Society¹

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The term 'risk' acts rather to reintroduce judicial discretion into the adjudication of harm. While actual harm requires empirical proof, virtually anything can be considered under the category of 'risk'.....'Risk of harm', then, is wonderfully useful phrase not so much because it uses actuarial language to conceal moralism-as a certain school of Critical Legal Studies would argue-but precisely because it is so capacious -Mariana Valverde, (1999).

Over the last century, those wielding the power to censor in Canada have been shrouded in a cloud of secrecy (Ryder, 1999). The single largest bureaucratic entity behind censorship was, and continues to be, the Canada Customs and Revenue Agency (Customs). Currently, Customs is authorized under Customs Tariff code 9956 (a) to detain, open, and prohibit any shipment of publications or portion thereof that they deem 'obscene' under s. 163 (8) of the *Canadian Criminal Code*. It is no small matter that in the course of conducting this researching I was unable to find any documents detailing Customs' policy and procedure on censorship, nor any systematic research on Customs as a bureaucracy either internal or external.² In short, very little is known about Canada Customs outside of those in the institution itself.

In 1994, parts of this cloud were lifted by the lawsuit brought against Canada Customs by Little Sister's Art and Book Emporium heard by Justice Smith in the BC Supreme Court. Little Sister's, Vancouver's only gay and lesbian bookstore, has been under constant scrutiny by Customs since their opening ten years earlier and in that period, had 261 titles detained at the border, many more than once.³ For a small, independent bookstore this process of constant detainment and censorship would amount in certain bankruptcy. It can cost an importer up to \$20,000 to have a single shipment released by Customs (Fuller and Blackley, 1995: 5). Despite these obstacles and others,⁴ the Little Sis-

ter's legal team and staff made Customs' accountable for their discriminatory policies and procedures through a two month legal battle.

In this article, I use Canada's contemporary obscenity law and Customs' practices as a frame through which to analyze the recent ascendancy of 'risk' discourse in crime and 'harm' prevention strategies focusing specifically on censorship. I argue that censorship, as a method of social control, has increasingly become governed by a discourse of risk in language (law) and application (Customs). The article is comprised of three sections: the first will address the major theoretical components of 'risk' society (Beck, 1992) and 'policing the risk society' (Ericson and Haggerty, 1996). The second section is an overview of Canada Customs procedures, those which were brought to light in *Little Sister's* and the emergence of the 'risk of harm' discourse as embedded in Canadian obscenity law. The third section is a discussion of the effects of this emergence of a 'risk' discourse on censorship with specific focus on the case of *R. v. Scythes and Little Sister's Book and Art Emporium*; further I outline the central importance of 'expertise' in adjudicating 'risk'. My central argument is that 'risk of harm' discourse serves to obfuscate the moral and legal construction of 'dangerousness' with respect to 'homosexuality' and the ideological consequences of censorship-as-risk management within neo-liberalism.

'Post-Criminal'?: The Proliferation of Theoretical and Practical 'Risks'

Heavily influenced by the work of Michel Foucault, the ascendancy of risk discourses has been marked in both socio-legal and criminological literatures. Previously, risk calculations were used primarily for insurance purposes (see Burchell et al., 1991). We protect ourselves with life insurance, our property with fire and flood insurance, and our cars with auto insurance. Furthermore, not only do we protect ourselves from unforeseen natural accidents, we are also protected from the dangers others pose to us. Jonathan Simon argues that with the increase in risk management strategies such as insurance, we enter into many different types of relationships with others, many we are not even aware of. He provides the example of driving on a freeway. Sitting in your car, you have your own thoughts, listen to a certain, genre of music and yet you are connected to everyone else on that freeway because of the potential danger you pose to one another (Simon, 1987: 87).

His is an excellent example of more 'traditional' analyses of risk management or 'harm' prevention. Indeed, Ulrich Beck's foundational work, *Risk Society* has prompted a veritable explosion of literature on risk discourse from 'mad-cow disease' (Smart, 1999) to policing work and information systems (Ericson & Haggerty, 1996). 'Risk', Beck argues, is the most pronounced mark of modernity, one which is pivotal to our understanding of the 'post-industrial' society. Risk is generally understood as an external danger or threat of harm from another person (Ericson & Haggerty, 1996) as well as 'manufactured' (Giddens, 1994) by the same techno-scientific apparatus designed to reduce our 'risk of harm'. Indeed, the foundational components of risk theory rest on the argument that human intervention by scientific communities, particularly in the Western World, has exponentially increased the risks and dangers we may encounter on a daily basis.

There has also been an increase in risk analyses in the discussion of crime, power, actuarial justice, and the state (see Castel, 1991; Doyle and Lacombe, 2000; Ericson & Haggerty, 1996; O'Malley, 1992; Simon, 1987 & 1999; Valverde, 1999). The prominence of risk theories within criminology and socio-legal studies is in great part due to the importance and influence of French social theorist, Michel Foucault. In both *Discipline and Punish* and *History of Sexuality: An Introduction*, Foucault maps out both the 'objectivizing' and 'subjectivizing' elements of regulation vis-à-vis the body (Lacombe, 1996). In *Discipline and Punish*, Foucault traces the development of the modern prison and the techniques of surveillance used to control the inmate population. His description of Jeremy Bentham's panopticon is perhaps most widely associated with this work and operates as a metaphor through which Foucault demonstrates how discipline is a modern form of wielding power in the forms of punishment, regulation, and normalization. The techniques of power which Foucault outlines are instrumentally used to regulate and survey various bodies: prisoners, school children, and factory workers. Foucault also demonstrates, through an analysis of the evolution of the modern prison, the connection of penality with the rise of 'the disciplines'. In this sense power, as viewed by Foucault as a series of practices and techniques, is productive as well as repressive. Much of his lens focuses on the interconnections between power and knowledge, thus the opportunity to label, categorize, and analyze those incarcerated lead to the strengthening of penological discourses. As

Foucault writes, "in fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production" (1977: 194). Similarly, Doyle and Lacombe argue that, "according to risk society theorists, risk rationality and the emergent regimes of social protection it assumes, are predicated on identifying 'future' criminals and penalizing them for 'who they are' not for 'what' they have done" (2000: 188).

In his discussion of 'bio-power' in *The History of Sexuality*, Foucault describes the gathering of statistics by governments to manage and control populations. Foucault argues that these mechanisms of social control were not established to directly repress individuals, as largely described by the techniques outlined in *Discipline and Punish*. Instead, the deployment of 'bio-politics' was a productive use of power, a way through which the bourgeoisie could maximize life. Foucault writes,

The old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and that calculated management of life. During the classical period, there was a rapid development of various disciplines.....there was also the emergence, in the field of political practices, and economic observation, of the problems of birthrate, longevity, public health, housing, and migration. Hence there was an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations, marking the beginning of an era of "bio-power"(1978: 139).

Thus, the collection of great quantities of numbers on a given population, from births to marriage, what is commonly thought of as 'vital statistics', became intimately tied to the regulation of bodies, vis-à-vis sexuality and penalty. We see the modern-day incarnation of these statistics used for both insurance purposes, within the Canadian criminal justice system and, virtually every other social institution from health care to state welfare agencies. With the advent of computerized statistical profiling, the ability to track, monitor, and analyze data sets on highly-specific sub-populations has become routine. Pat O'Malley writes,

Although developed earlier (insurance strategies go back to the emergence of modern capitalism) they have been employed predominantly in the twentieth century, in which the population has been extensively pacified by the operation of the disciplines and by the improvement in living and working conditions associated with the development of industrial capitalism....Under such conditions, risk-based technology - which is more tolerant of individual deviance and less overt and coercive in its interventions - may operate effectively (1992: 254).

Perhaps the most striking shift in the use of 'actuarial' or risk-based technologies is the lack of focus on the criminal as subject. Previously, the major focus of criminological literatures and the criminal justice system had been general and specific deterrence and the rehabilitation of the offender. With the rising cost of police forces and prisons, and faced with an overburdened judicial system, the criminological emphasis is increasingly placed on risk management strategies such as 'target-hardening', harm prevention, and risk profiling of suspects. As Stanley Cohen comments, "no one is interested in inner thoughts... 'the game is up' for all policies directed to the criminal as an individual, either in terms of detection or causation" (cited in O'Malley, 1992: 253). Thus, in the name of 'efficiency', general crime deterrence is replaced with risk management. O'Malley and others (see Simon, 1987 & 1988) have traced this marked shift towards a discourse of efficiency and cost cutting to emergent neo-liberal economics and political strategies in the Western world. This type of cost-benefit analysis is intimately tied to the modern rationality of 'risk society' and can also be connected to the bureaucratization of everyday life. Jonathan Simon writes,

While the disciplinary regime attempts to alter individual behaviour and motivation, the actuarial regime alters the physical and social structures within which individuals behave. The movement from normalization (closing the gap between distribution and norm) to accommodation (responding to variations in distributions) increases the effectiveness of power because changing people is *difficult and expensive* (emphasis added, 1988: 773).

Not only is changing individuals expensive, it has proven to be time-consuming and relatively ineffective. Many criminology and socio-legal theorists agree that changing crime prevention strategies more often than not adds further layers of social control (Cohen, 1985; Snider, 1994). Thus, actuarial strategies have greater predictive value as they calculate uncertainty at the level of aggregates and not individual offenders. The more data that is collected on a population, the greater the ability to calculate, based on various 'risk factors', what areas of crime control need strengthening.

As Jonathan Simon notes, this collection of information is not intended to create a picture of one's 'identity' (1987: 63). In fact, within a risk regime, the exact opposite occurs; an individual's identity is fragmented within risk categories, from race to gender to bank balance. As innocuously as this often occurs, risk profiling and risk management strategies are increasingly used as the *modus operandi* of postmodern social control. In his article, "The Emergence of Risk Society: Insurance, Law and The State", Simon argues that the mechanisms of risk as social control operate in two distinct ways. First, actuarial practices ensure that a person's access to certain opportunities and commodities is controlled. Secondly, people will change their behaviour accordingly in order to gain access (1987: 76). Just as with Bentham's panopticon, we often internalize these mechanisms of social control and thus become self-controlling and self-monitoring. Individuals monitor their driving habits, credit card spending, loan re-payments, and area in which they live in order to appear as a 'good credit risk'. Moreover, these risk classification are stratified along race, class, and gender lines although they are presented as neutral, benign calculations of chance and probability. "Social relations that are constituted by *risk* practices bring people together on the basis of "objective" social markers. Think about how we 'belong' to our insurance companies, our credit-card companies, and increasingly our jobs as well" (Ibid: 78).

In "Risk, power and crime prevention", O'Malley makes a similar argument with respect to the development of risk management strategies and crime prevention. His primary focus is on "situational crime prevention" or "target hardening" which can be viewed as "quintessentially actuarial" (1992: 262). This type of crime control strategy relies on the basics of risk management strategies. Primarily, it is interested in the

spatial and temporal, not the individual offender. Determining causation is not a priority, nor is the reform of offenders (Ibid: 262). He argues that despite claims that more traditional criminological approaches have 'failed' to stem the tide of rising crime rates,⁵ risk management strategies such as situational crime prevention are politically and ideologically expedient for the neo-liberal economic policies of right-wing conservatives. O'Malley writes,

I believe that the broader political and ideological effects of situational crime prevention reveal that its attractions to economic rationalists, neo-conservative and New Right programs provide such an answer (although not unrelated attractions to police forces are also significant). The primary attractions, I will argue, link directly with core ideological assumptions of the New Right, and through these with the two directions of population management - increasing punitiveness with respect to offenders, and with respect to victims, the displacement of socialized risk management with privatized prudentialism (1992: 263).

Thus O'Malley makes a critical argument not only about the privatization of security provision but also, the diminishing focus on structural explanations of crime which typically identify race, class, and gender as key factors. Once the socio-structural elements of criminality such as poverty, racism, and hegemonic masculinity are constructed as no longer 'effective' or worthwhile explanations of crime control or prevention, the responsibility for crime is shifted solely onto the individual criminal as a rational, calculating actor within risk discourse (O'Malley, 1992). These structural factors are increasingly viewed as simply part of one's 'risk profile' and not determinative of behaviour or circumstance.

Furthermore, a key component of this trend towards risk management strategies as crime control is evidenced in the shifting role of police forces and the emergence of privatized security costs. Alarms for homes and cars, security teams for office buildings, and the rise in the discourse of 'personal safety' measures have all combined to reduce some of the financial burden placed on the state for crime control. As O'Malley notes,

In the privatization of the actuarial techniques are the same notions of individual responsibility and rational choice that are present in the justification for expanding punitiveness. Reliance on the state, even for protection against crime, is not to be encouraged. Quite literally therefore it represents the expression in one field of the New Right ideal of the Strong State and the Free Market, combining to provide crime control in a period when the threat of crime generated by the Right's own market oriented practices can be expected to increase (1992: 269).⁶

The work of Richard Ericson and Kevin Haggerty, *Policing the Risk Society*, is perhaps the most comprehensive analysis of the shifting role of police in Canada. Through research on police forces in Vancouver, they argue that police work is determined by the requirements for knowledge in our risk society, and is driven less and less by the traditional notions of crime fighting. Security, surveillance, and risk management are the police's new mandates according to Ericson and Haggerty as they write, "we contend further that the role of the police as risk communicators in the service of external institutions changes the way in which the police provide security to individuals, organization, and institutions" (1996: 18).

As risk communicators, the police not only must fulfill the requirements of their own internal risk management strategies, but the requirements of other outside bureaucratic institutions as well. Ericson and Haggerty claim that it is through the structuring of risk communication that police work is defined and circumscribed. Therefore, format becomes crucial within risk policing as formatting dictates the ways in which knowledge and experience will become 'reality'. With the advent of increasingly sophisticated computerized technology, this type of information management and dissemination becomes routinized. Furthermore, these authors claim that such computerization and mechanization decreases the autonomy and discretion of front-line police officers, turning them into little more than paper-pushers largely controlled by upper management in a large bureaucratic organization. Ericson and Haggerty write,

Policing, like the knowledge-based occupations it intersects with in other risk institutions, is subject to intensive 'informating' (translating events and objectives into visible information via formats) and 'automating' or 'fordization' (machine appropriation of human skills and labour). Again, the goal is the simplification of choices in the face of a kaleidoscope of possible interpretations and courses of action - 'taylorization' (1996: 36).

Indeed, it is this 'taylorization' or 'panoptic sorting' that is the hallmark of policing in the risk society (Ibid: 40). These authors argue that the processes of organizing, classifying, and surveying populations are for the purposes of their more efficient management and are not predicated on a certain political or moral agenda. They argue that questions of fault and blame are subsumed under the desire to 'tame chance' thus, risk bears a 'utilitarian morality' (Ibid: 39).

One of the most recent developments in this area has been the expansion of risk management discourse and practices into both civil and criminal law (Ericson and Haggerty, 1996: 51). These authors argue that in terms of criminal law, often police work is most effective in collecting risk data for outside agencies such as insurance companies. They write, "the police are part of this compliance-law enforcement order. The police not only broker risk knowledge to insurance companies but also function as co-promoters of insurance coverage schemes. They are an integral component of crime risk management strategies" (Ibid: 51). What is perhaps of greater significance to this analysis however is the utilization of risk management strategies within civil law processes. These authors claim that the adjudication of justice has become far more about the distribution of various risks (Ibid: 51). Ericson and Haggerty argue,

In all areas of civil law, risk distribution and indemnification are matters of right, and risk is further legalized.....Judges are the engineers of actuarial justice, fitting the parties into generic categories of actors and deciding which party is in a better position to maintain loss prevention and bear the cost of any losses or harms suffered (1996: 51).

Indeed, they claim that higher levels of surveillance and intrusive police tactics evident in our risk society are increasingly legitimized by the legal system through a risk logic. They claim that due process is slowly being eroded and that, "in Canada the law of search and seizure strongly favours the police, to the point where it is only the incompetent police officer who cannot prove the legality of a search (Ibid: 64). Thus, as O'Malley argues, the necessity for crime control measures is increasingly dislocated from the issues of constitutionally protected individual rights and basic notions of social justice (1992: 265). The internal surveillance needs of the police force and criminal justice system are made grounds for decreased civil liberties in the interests of risk management.

'Queer' Customs: Or, Risky Business

The purpose of the foregoing discussion of risk management and risk policing is to establish a theoretical lens through which to analyze the contemporary policies and practices of Canada Customs as dictated by the *Canadian Criminal Code* and related jurisprudence regarding 'obscenity'. The vast majority of the literature regarding Custom's censorship practices has been concerned with the underlying or 'hidden' moral regulation agenda of state censorship (see Cossman et al., 1997; Ryder, 1999). For example, Brenda Cossman argues that the objectives of existing obscenity law, as enshrined in the precedent-setting 1992 *Butler* decision, are the same as before only couched in different language. These objectives take as their aim the legal regulation of sexual morality and sexual representations particularly those targeted at sexual minorities (Cossman, 1997: 107). These authors see state censorship practices as intimately connected to the power of knowledge legitimization and delegitimization, particularly regarding the representations of gays and lesbians. The purpose of this section is to provide an overview of the jurisprudence of obscenity law and discuss how the new 'risk of harm' test as established in the 1992 Supreme Court *Butler* decision has effected a shift at the level of Customs policies in the form of censorship-as-risk management. As I hope will become apparent, the moral and legal regulation of sexual 'Others' has not ceased, it has merely moved towards a risk logic in form (law) and function (Customs).

Before discussing the policies and practices of Canada Customs, it is important to outline the *Criminal Code* provisions and related statutes

regarding 'obscenity' as these decisions provide the official legal framework for Customs' policies and procedures. In 1992, the case of Donald Butler, the manager of an adult video store in Winnipeg, was heard before the Supreme Court of Canada. *R. v. Butler* was the first case to challenge the constitutionality of the obscenity provisions in the *Criminal Code*, section 163 (8). Butler, convicted of possessing and selling "obscenity", appealed the lower court decision under the *Charter* section 2 (b), the freedom of expression clause. Butler lost his appeal in the Supreme Court as after hearing all the evidence, the justices felt that the existing obscenity law was "demonstrably justified in a free and democratic society". The right to censor such pornographic material deemed "obscene" therefore did not infringe on his constitutionally protected right of freedom of expression.

The decision in *Butler* is unique for several reasons⁷ not the least of which is the 'feminist' claims that were heard through the intervention of the Women's Legal Education and Action Fund (LEAF). LEAF argued that pornography was a real danger to women as it degrades and portrays women as sexually subservient to men. Moreover they argued that as such, the distribution of pornography must be stopped as it posed a threat to women's full equality under section 15 of the *Charter*. In an apparent move to incorporate these claims, the Supreme Court justices included another test for determining if material is obscene. The 'risk of harm' test, first introduced in the 1992 decision, is the final adjudication of obscenity after the 'artistic merit' test⁸ and the 'community standards' test.⁹ Justice Sopinka, writing for all nine justices, outlines the test as follows,

The court must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an antisocial manner, in other words, a manner which society formerly recognizes as incompatible with its proper functioning. The stronger the inference of the risk of harm, the lesser the likelihood of tolerance. The portrayal of sex with violence will almost always constitute the undue exploitation of sex. *Explicit sex which is degrading or*

dehumanizing may be undue if the risk of harm is substantial (emphasis added).¹⁰

Thus, it is the job of the Canadian judiciary not only to determine what is “degrading and dehumanizing” to the point of posing a “substantial risk of harm”, but they must also determine which materials have literary or artistic merit. By purportedly shifting away from overt moralism and towards a risk-based ‘harm’ argument, the Supreme Court in effect appears to be incorporating the language of anti-pornography feminism as represented by LEAF.

Mariana Valverde argues, through an analysis of obscenity and indecency law, that although the ‘risk of harm’ test has shifted the justification for obscenity law, its application at the lower court and bureaucratic levels is very much open to conflicting and myriad interpretations. She writes, “it has been largely forgotten that ‘harm’ can mean many things and that harm-based governance can have very different rationales and produce different effects....Harm reduction sometimes amounts to nothing but a new regime for forms of moral authoritarianism, insofar as the authorities retain both the right to define what is harmful and the right to prioritize risks” (1999: 187). Indeed, religious conservatives have argued for decades that pornography is harmful because it promotes the moral degeneracy of the nation. Anti-pornography feminists on both sides of the border argued that pornography is harmful to women because it promotes misogyny, discrimination, and violence against women. Recently in the case of child pornographer Robin Sharpe, the ‘risk of harm’ argument was used to censor depictions/descriptions of youth sexuality and intergenerational sex on the grounds that it contributes to pedophilia and the sexual abuse of children (Doyle and Lacombe, 2000).¹¹ Thus, the adjudication of ‘harm’ is particularly subjective and open to contesting views depending on the materials in question.

What Little Sister’s counsel did so effectively throughout the two month trial in 1994 was demonstrate the high level of Customs surveillance the store was under.¹² Fuller and Blackley write, “the vast majority of Customs detentions are for suspected obscenity. The bureaucracy estimates that 90 percent of Ottawa-level appeals involve obscenity; the other 10 percent involve suspected hate literature” (1995: 119). As such,

Customs officials are bound by not only the *Criminal Code* provisions but the *Butler* decision as well. Their determinations are made on a purportedly systematic basis with the help of what is known as Memorandum D9-1-1. This document was created after the *Butler* decision in order to translate the Supreme Court's 'tests' for obscenity into operational Customs procedures. The following is the in brief statement of Memo D9-1-1:

The importation of material that depicts or describes anal penetration or anal intercourse in and of itself is not a ground for prohibition. However, such material will be prohibited if it includes other areas prohibited in Memorandum D9-1-1 such as violence, degradation, or dehumanization. Descriptions or depictions of violent, degrading or dehumanizing sexual acts, whether or not they involve anal penetration will continue to be prohibited. The key factor to be taken into account is whether the nature of the sexual act described or depicted is violent, degrading or dehumanizing (cited in Fuller and Blackley, 1995, p. 187).

Therefore, it is the job of Customs officers to determine whether or not a piece of work falls into any of the classifications listed in Memo D9-1-1. If an importer such as Little Sister's has an item detained at a point of entry they are sent a "K27 form" detailing the reasons for the detainment. A Customs officer's determination must fall within a certain set of proscribed categories including: a) Sex with violence b) Sex with degradation c) Sexual assault d) Sex with bondage/external control e) Sex with juveniles f) Incest g) Bestiality h) Necrophilia I) Hate propaganda/ treason or sedition.

If a company attempted to import materials deemed 'obscene' in the past, Customs will 'flag' them in their computerized technical reference system (TRS), a large database containing information on any and all Canadian importers. If the TRS database runs a search for a title that has already been detained or banned, the book will be detained again. The testimony of top Customs' officials such as John Shearer and Linda Murphy indicated that importers known to receive problematic (i.e. potentially obscene) materials were subjected to 'heightened surveillance'. John Shearer, Director of the Tariff Programs Division, testified

that, "It is the normal practice of our law enforcement approach, if there is an indication of an importer who has a history of...(offending) some provision of the law, indeed, those kinds of lookouts are put out at the discretion of the people involved in putting them in place...that was a local discretionary lookout" (cited in Fuller and Blackley, 1995: 135). Shearer's testimony is in reference to the fact that Customs officials in Vancouver had been specifically instructed to make Little Sister's what is known as a 'lookout'. Furthermore, those who ship to Little Sister's and other gay and lesbian bookstores such as Inland Press are also routinely flagged in the TRS as "hot indicators", meaning that shipments made from these companies are more likely to be scrutinized (Ibid: 135). Corrine Bird, a Customs inspector from Fort Erie testified that, "A lookout is normally more of a high risk....A lookout is...pretty much a mandatory examination. A 'hot indicator' is an indicator put into our computer system that triggers a message to the Customs Inspector about the importer" (cited in Fuller and Blackley, 1995: 135). Thus, within a this system of risk management, gay and lesbian bookstores such as Little Sister's are targeted as more 'dangerous', represented by Customs as having a higher likelihood of importing 'obscene' materials.

The discourse of risk was also reinscribed within both *R. v. Scythes* and *Little Sister's* through the use of expert testimony. As Doyle and Lacombe (2000) argue, "'socially-accredited experts' play a crucial role in diagnosing and finding a cure for the object of moral panic. While the work done by experts seems 'neutral' and 'objective' because it takes place within 'legitimate' institutions, it nonetheless serves to augment social anxiety and hostility" (p. 194). As the next section demonstrates however, the type of expertise presented is largely determinative of which claims are 'heard' in law and the institutional legitimacy to which Doyle and Lacombe refer is not conferred equally with respect to all expert witnesses. In both of the cases discussed, 'risk of harm' centered on the legal status of gay and lesbian S & M representations. As will be shown, this issue is inextricably tied to a much older moralistic notion of homosexuality as dangerous, sinful, and wrong. The experts who challenged such 'risk of harm' arguments were not able to successfully challenge Justice Smith's interpretation of pornography as potentially 'harmful'.

'Proof of Harm': The Role of Experts

Despite the obvious subjectivity and level of judicial discretion involved in each one of the three tests for obscenity outlined in *Butler*, as well as their use at the level of Canada Customs, the 'risk of harm' test is presented as an objective, verifiable decision-making tool. As Valverde describes, the relative efficacy of this test is that unlike in tort law, the *actual* harm flowing from pornography does not need to be determined (1999: 190). In fact, it is only the *risk* of harm that need be present, and Crown prosecutors and judges who have utilized *Butler* do not need scientifically 'proven' studies to determine even *risk*. Valverde writes, "now, in other areas of risk assessment scales have been developed to provide more or less quantified measure of 'risk, but in the case of sexual immorality it would seem that judicial intuition, backed by 'public opinion', is sufficient" (Ibid: 190).

Valverde argues that 'risk of harm' in this context does not follow a clear actuarial logic. She writes that the discursive efficacy of using *risk* rather than 'actual' harm as justification for censorship serves to maintain judicial discretion, not to "function as an actuarial category" (1999: 190). Her argument is based on the fact that although such 'scientific' studies on the purported 'effects' of pornography consumption do exist, they were not admitted into evidence in *Butler* as expert testimony. Although I agree that maintaining judicial discretion was a key component of *Butler*, I think her dismissal of the use of 'scientific' expertise is premature for three reasons. First, at no point before or after *Butler* has the loss of judicial discretion with respect to obscenity law been at stake and second, the 'scientific' studies which were not entered into evidence in that trial have been marshaled in every censorship case since to 'prove' the substantial risk of harm argument. Third, despite the contestation around such studies and the fact that little consensus exists within the literature, their constructed reliability is weighted very heavily by the courts as evidenced by their use in every subsequent censorship ruling (see Gwilliam, 2000; Ross, 1997; Segal, 1993; Valverde, 1996).

In fact, it seems as though the Canadian judiciary is rather intent on determining the risk of harm flowing from not only heterosexual pornography, as was the case in *Butler*, but more particularly, from gay and lesbian materials. Adjudicating whether or not these materials will predispose people to "act in an antisocial manner" may not need exact probability calculations; nevertheless, risk in this context is arguably

part of a justificatory scheme which targets 'homosexuality as the real bogeyman' (Giese cited in Doyle and Lacombe, 2000: 191). In two of the most prominent post-*Butler* censorship cases, *R. v. Scythes* and *Little Sister's et al. v. Minister of Justice et al.*, the same psychologist, Dr. Neil Malamuth, was called upon to give 'expert' testimony as to the deleterious attitudinal effects of exposure to pornography. In the case of *R. v. Scythes* (1993), Dr. Malamuth's experimental data and research findings, based upon heterosexual subjects, were deemed so conclusive that they could be generalized from a heterosexual context to a lesbian one. In fact, on the stand Dr. Malamuth was allowed to opine as to the potentially harmful effects of a lesbian S & M (sado-masochism) magazine, the 'obscene' *Bad Attitude, on the gay and lesbian community*. Utilizing the findings of Neil Malamuth, Judge Paris decided that not only was sexual orientation irrelevant to the case, so was gender. Paris writes,

This type of material¹³ would apparently fail the community's standards test not because it offends against morals but because it is *perceived by public opinion to be harmful to society particularly to women....*If I replaced the aggressor in this article with a man there would be very few people in the community who would not recognize the potential for harm. The fact that the aggressor is a female is irrelevant because the potential for harm remains (emphasis added).¹⁴

Thus, the lesbian subject becomes asexual and genderless, rationalized by the judiciary into almost non-existence. Malcolm Feeley and Jonathan Simon argue that within an actuarial logic, "they (individuals) remain, but increasingly they are grasped not as coherent subjects, whether understood as moral, psychological or economic agents, but as members of particular subpopulations and the intersection of various categorical indicators" (1999: 178). In *R. v. Scythes*, the Crown attempted to construct a picture of a lesbian S & M underworld which was potentially dangerous and in need of identification and management. The argument was not overtly made in moralistic language against lesbians per se instead, the purported 'violence' depicted in the 'obscene' material was thought to present a risk of harm to the entire population, regardless of sexual orientation or sexual practice.

The ruling in *R. v. Scythes* has been heavily criticized in the critical legal theory and feminist anti-censorship literatures as blatantly heterosexist and homophobic, clearly showing the deleterious impact of *Butler* on gay and lesbian sexual representations (see Cossman et al., 1997). It is apparent that the targeting of gay and lesbian bookstores began long before the *Butler* decision however, my main argument is that *Butler* and the subsequent ruling in *R. v. Scythes*, altered and subsequently strengthened the rationale

utilized by Canada Customs to detain and censor shipments to Little Sister's. As Didi Herman writes, "perhaps one could argue instead that *Butler* provided customs officials, police, and judges with a new rationale to continue old practices" (1996: 158). Throughout this article I have claimed that this 'new rationale' consists of an increase in the use of 'risk management' at the discursive level. As I will show, the rhetoric of risk works to conceal the moralism contained in censorship practices.

In *Little Sister's*, social scientific experts such as Carol Vance, Gary Kinsman, and Becki Ross were not able to couch their arguments in science or statistics, and all three made counter-hegemonic claims about the production and consumption of gay and lesbian pornography, particularly in the context of S & M.¹⁵ These experts argued that despite the 'common sense' logic enshrined in *Butler*, the same 'risk of harm' was not present with gay and lesbian pornography.

This 'common sense' operates around the idea that pornography is an evil to be controlled by Canadian obscenity law and by extension, Canada Customs. This evil manifests in contemporary obscenity law through the discourse of 'risk of harm' as enshrined in *Butler*. It was in challenging the equation of 'harm' with gay and lesbian pornography, particularly with respect to S/M materials, that several key social experts for Little Sister's had difficulty. Writing about Becki Ross' testimony, Fuller and Blackley state:

After the *Bad Attitude (R. v. Scythes)* case, Ross had observed that the word lesbian had been mentioned probably no more than five times throughout the trial. She was evidently determined not to be silenced a second time. *Yet courtrooms tend to smother certain messages, such as the small matter of sexual pleasure as a value in its own right.*

For the government, the Little Sister's trial was about obscenity and control, not bodies and pleasure. Even Joe Arvey, in his effort to prove that sexually explicit materials were a form of meaningful speech, concentrated on legal arguments, steering clear of desire (1995: 100, my emphasis).

Indeed, the *legal* contest centered around the adjudication of particular social scientific 'facts': only those facts which pertained directly to a 'harm' analysis were considered useful. Those social experts who specifically rejected this discourse of harm, such as Becki Ross and Gary Kinsman, lost ground because they were not able scientifically verify that no harm flows from exposure to this type of material. As in *R. v. Scythes*, the type of social scientific evidence privileged was quasi-laboratory research done by psychologists Neil Malamuth and William Marshall.

However, to adjudicate obscenity on the basis of a 'risk of harm' test is problematic, for several reasons presented (but not heard) by several of the social experts testifying on behalf of Little Sister's. Both Gary Kinsman and Becki Ross rejected the claim that gay and lesbian S & M pornography is the representation of violence, degradation, dehumanization, and humiliation. Their socio-cultural research indicates that S & M tropes and norms are far more complicated than 'simulated violence', and that *consent* is the foundation of S & M relationships. But, as Carol Smart writes, "legal arguments...that present simple, certain and authoritative pictures of social reality are likely to be privileged within legal discourse" (1989: 71). The Crown effectively neutralized the impact of this testimony by construing their expertise as *argument/activism* and not as fact or science. As heard by Justice Smith, this failure was critical. He writes,

Considerable evidence and argument was directed to the topic of homosexual sado-masochism. The plaintiffs established that sado-masochism is a theatrical, ritualistic practice in which consent of the participants is inherent, *although they conceded that consent is not necessarily always present*. Customs officers routinely prohibit depic-

tions and descriptions of sado-masochistic practices on the grounds they involve either explicit sex with violence or sex without violence that subjects persons to degrading or dehumanizing treatment.¹⁶

Thus, unable to *prove* that no harm exists, or that consent is always present, the assumption of harm prevailed in this trial. It would be very difficult for any social scientist, however 'empirical' his or her science, to argue that no harm could ever result from homosexual *or* heterosexual pornography. Such a conclusion is simply not knowable from any knowledge perspective.

Two other components of testimony by key social experts were 'smothered' throughout *Little Sister's*. These relate to the heterosexism and homophobia enshrined in the *Butler* decision and the moralism, or 'sexual subtext', which is covered by the 'risk of harm' discourse (Cossman, 1997). The plaintiffs utilized witnesses such as Ross and Kinsman to contextualize and historicize the differences and importance of sexual representations to gays and lesbians in Canada. This was an attempt to distinguish this material from the heterosexual standards set in *Butler*. The 'risk of harm' test is predicated on an understanding of heterosexual pornography as 'degrading and dehumanizing' to women as a group, which was LEAF's position when it intervened in *Butler*. As Mariana Valverde writes, "after all, even if Canadians cannot agree on moral and cultural values, surely they can agree that whatever causes harm is bad, and that harm minimization and harm reduction are more legitimate rationales for social and legal intervention than either the will to discipline or the desire to uphold sovereignty" (1999: 187). Both Ross and Kinsman argued that this analysis, predicated on heterosexual relationships with unequal gender power relations, could not, and should not, be superimposed onto gay and lesbian relationships which are characterized by gender *equality*.¹⁷ Counsel for Little Sister's further argued that the Crown had failed to meet its burden of proof regarding the connection between obscenity and 'harm' vis-à-vis gay and lesbian pornography, as the materials in question in *Butler* only pertained to heterosexual audiences and not to gays and lesbians. Quoting the decision in *R. v. Butler*, Justice Smith rejected this argument, saying that some of the materials seized from Butler's store included 'depictions of homosexual prac-

tices'. He further notes that the plaintiffs conceded that some homosexual materials may be deemed obscene within the legal definition contained in *Butler*.¹⁸

Understanding Censorship in 'Risk Society'

The question of harm addressed by the judiciary in both *R. v. Scythes and Little Sister's* is tied to the idea of a moralistic 'community standard,' a standard which is resoundingly heterosexual and conservative. Justice Smith ruled that the material in *Little Sister's* could not be distinguished from heterosexual pornography as that would violate the community standards test which is another part of the ruling in *Butler*. Justice Smith writes, "that test does not permit of the proposition that material that would otherwise be obscene is not obscene if it is produced for a homosexual audience."¹⁹ Thus, Joe Arvay's submission that *Butler* be distinguished in this instance was not accepted. This relates to the second element of the Ross/Kinsman analysis which was not 'heard' in law, namely the heterosexism and homophobia implicit in this argument of 'risk of harm', which manifests once again in Justice Smith's discussion of 'community standard of tolerance'. This test, re-affirmed in *Butler*, is based on the assumption that a member of the Canadian judiciary is able to determine whether certain materials violate the community standards test. This assumption, in turn, is that, "sex is bad (sex negativity), sex is biological (sex essentialism), there is one way to have sex (sex monism), and sexual hierarchy (some sex is better than others)" (Cossman, 1997: 107). Further, the fight to contextualize gay and lesbian pornography, thus distinguishing it from heterosexual materials, was not successful because the Canadian judiciary is already working from a view that says pornography is inherently *bad*. As Brenda Cossman argues,

Neither the discursive framework of the *Butler* test, nor the dominant sexual morality within which this test is applied, is neutral on the question of sexual orientation...It is a sexual morality in which some courts are willing to state that gay and lesbian sexuality is not in and of itself obscene. ...There is still a conservative sexual morality informed by the assumption of sexual hierarchy, in which some sex is

better than others....Lesbian and gay sex continues to run a much higher risk of being pushed back across the dividing line between good sex, back from its tenuous legitimacy, into its all-too-familiar condemnation as bad sex (Ibid: p. 141).

Thus, although Justice Smith's ruling does not see gay and lesbian pornography as *de facto* obscene, the assumptions which underpin his arguments, and his marginalization of certain types of expert evidence, speak to the fact that obscenity law in Canada continues to perpetuate various sexual hierarchies.

These hierarchies are at the heart of 'risk' adjudication with respect to censorship. Since *Butler* in 1992, the use of 'risk' has been leveled not at *all* materials deemed potentially 'dangerous', but those materials which represent the practices and desires of sexual 'Others'. The historical conflation of 'homosexuality' with 'sin', 'perversion', 'immorality', 'moral degeneracy' and 'social impurity' is not lost within a rationalized risk discourse. In fact, the logic of risk serves to reinforce the idea that gay and lesbian bookstores (and by extension their customers) are 'dangerous', not because they import criminal (obscene) materials, but because of *who* they are: i.e. the category 'gay' and 'lesbian' (or bisexual, transgendered, sado-masochist, man-boy lover) makes one a potential societal 'risk'. It seems as though the argument of pornography = harm to women (in Butlerian fashion) has not substantially enabled a reformulation of what materials pose a 'threat' to the normative socio-sexual order. The 'risk of harm' analysis does nothing more than target those identified as sexual minorities whose 'risk profile' (be it named this way or not) has traditionally come to the attention of institutionalized bodies of authority: medicine, science, psychiatry, police, government, religion, etc.

Justice Smith Decides

Finally, after ten years of waiting for a trial and two years of waiting for a decision, Justice Smith of the B.C. Supreme Court rendered his verdict in 1996. Justice Smith attempted to reach a compromise that would do justice to Little Sister's plight without striking down the sections of the *Customs Tariff* that Arvey had argued against. Justice Smith found that Little Sister's had indeed suffered undue discrimination and heightened

targeting at the hands of Canada Customs, but that this targeting was due to the erroneous workings of Customs. He ruled that Little Sister's constitutional rights to equality, under section 15 of the *Charter*, had not been violated. Finally, he ordered the federal government to pay Little Sister's legal costs and directed Customs to internally re-organize their policies and procedures to more adequately prepare Customs officers to make 'obscenity' determinations. To back this up he issued an injunction, "restraining Customs officials from subjecting Little Sister's to a policy of heightened scrutiny at the Vancouver Mail Centre 'until the federal Crown satisfies this Court that the discretion of customs officers in that office is guided by appropriate standards'" (Cossman & Ryder, 1996: 105).

Although thankful to have their costs covered and their struggle vindicated by a member of the Canadian judiciary, the Little Sister's team was unsatisfied with this decision and therefore decided to appeal to the Supreme Court of Canada in 1999.

Finally, on 16 March 2000, the Little Sister's case was heard in the Supreme Court. Little Sister's was supported by intervenor factums from the Women's Legal Education and Action Fund (LEAF), PEN Canada, and Equality for Gays and Lesbians Everywhere (EGALE). Their counsel Joe Arvay presented many of the same arguments as in 1994 and essentially asked the Supreme Court Justices not to 'trust' Canada Customs to fix their own problems, as the detentions and targeting of Little Sister's had continued relatively unabated since Justice Smith's ruling in 1996. The Crown's arguments were almost entirely limited to refuting the necessity for striking down the impugned legislation, stipulating that although Little Sister's s. 2(b) rights were violated, the existing system was the least restrictive means of regulating the importation of 'obscenity'. Their decision was rendered on 15 December, 2000 and Justice Binnie, writing for the majority states, "the interpretation given to s. 163 (8) of the *Criminal Code* in *Butler* does not discriminate against the gay and lesbian community. The national community standard of tolerance relates to harm, not taste, and is restricted to conduct which society formally recognizes as incompatible with its proper functioning".

Little Sister's appeal was held in part as the majority ruled that the 'reverse onus' of the system of prior restraint could not be constitutionally justified. Thus, Canada Customs is now required to prove that the

materials they detain are in fact 'obscene' under s. 163 (8) of the *Criminal Code* and *Butler* and they must now do so within thirty days or else release the materials to the importer. However, as Persky and Dixon argue, "if the court partially allowed the bookstore's appeal, it was the smallest part of the appeal. The main thrust of the bookstore's bid - to overturn the law that made censorship at the border possible - was rejected. Further (Supreme Court) Justice Ian Binnie's majority decision also rejected most of the arguments about obscenity that underpinned the Little Sister's efforts to dismantle the censorship regime" (2001: 182).

Conclusion

In this paper, I have attempted to sketch censorship practices in Canada as understood within the theoretical framework of the 'risk society'. The driving force behind such an argument lies in the fact that 'risk' determinations are not benignly made; they have both ideological bases and consequences for the populations so targeted. Understanding censorship within this framework challenges the argument continually made by many anti-pornography feminists that it is not the decision in *Butler* that is problematic, it is only the erroneous application of the law that must be rectified. Clearly the experiences of gay and lesbian bookstores across Canada attest to the fact that this is not the case. The Canadian judiciary's continual reliance on the 'risk of harm' test, as it relates to 'community standards of tolerance', merely serves to reinforce the idea that it is acceptable to use a heterosexual standard in law. It is no more apparent that in the *Little Sister's* case that in order to understand the moralism which 'risk' so neatly obfuscates, we must go back and challenge the homophobic and heterosexist bases upon which contemporary obscenity law is based.

Notes

1. I am particularly indebted to the work of Doyle and Lacombe on risk and the case of Robin Sharpe.
2. Janet is a Phd Candidate in the Department of Sociology at Simon Fraser University in British Columbia.
3. The most comprehensive work I have found to date is Bruce Ryder (1999), "Undercover Censorship: Exploring the History of the Regulation of Publications in Canada". Even this article however is not a detailed analysis of

Customs as an institution or their inner-workings but an historical analysis of the legal underpinnings of this hidden history.

4. Judgment of Smith J., *Little Sister's Book and Art Emporium v. Canada (Minister of Justice)* [1996]

B.C. J. No. 71.

5. The bookstore was bombed twice in the period between 1984 and 1990 as well.

6. It should be noted that this is the public *perception* of rising crime rates. In fact, crime rates in North America, for all types of crimes, have been steadily decreasing in the 1990s and continue to drop (Roberts, 2000, p. 6).

7. Despite increasing social, political, and economic inequalities, particularly in the United States, punitiveness is on the increase with prison expansions and higher sentencing rates however, crime rates are falling (see Roberts, 2000).

8. For a detailed analysis of these issues see Lacombe (1994) and Cossman et al. (1997).

9. This is also known as the "internal necessities" test wherein a publisher or writer/artist can petition the court to reconsider materials which are argued to have artistic or literary value. If the court decides that the predominant characteristic of the work is the "undue exploitation of sex" despite its literary or artistic context, it will be deemed obscene. Bruce Ryder (1999) writes that in the 1962 ruling in *R. v. Brodie*, the majority took the aesthetic approach in freeing *Lady Chatterley's Lover* and concluded, "the serious minded author must have freedom in the production of a work of genuine artistic and literary merit" (p. 142).

10. The "community standards test" is perhaps the most well-known form of judicial reasoning vis-à-vis purported obscenity. Sopinka J. writing for the majority states, "this test is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to" (*R. v. Butler*, [1992] S.C.R. No. 452)

11. *R. v. Butler*, [1992] S.C.R. No. 452.

12. Although I have chosen not to discuss issues of pedophilia/child pornography, the discursive construction of homosexual as child molesters and peddlers of child pornography also played a role in Little Sisters. For an excellent discussion of the Robin Sharpe case and the making of the 'kiddie porn' law, see Doyle and Lacombe (2000) and Persky and Dixon (2001).

13. Although I have only discussed the plight of Little Sister's thus far, it is important to note that there are seven major bookstores across Canada that specifically cater to queer communities. Each of them has had a comparable or higher level of targeting since their various openings and these include Glad Day Bookstore in Toronto and L'Adrongyny in Montreal.

Alternate Routes

14. The material in question is a story written by lesbian S/M fiction author Trish Thomas called "Wunna My Fantasies" published in the lesbian erotic fiction magazine *Bad Attitude* in 1992.

15. Decision of Paris Prov. Div. J., *R. v. Scythes*, [1993] O.J. No. 537.

16. The legitimacy of the expert witness in this case was inextricably linked to their ability to work within a 'scientific' discursive framework. As Beck (1992), Giddens (1994) and Smart (1999) have discussed in the context of 'risk', science is part of the modern epistemic project which sees 'truth' verified through legitimized science. For an in-depth analysis of the role of social scientific expertise in law see, Janet E. Gwilliam (2001), MA Thesis (unpublished), Queen's University. *The Truth, Whole Truth and Nothing But the Truth: Censorship, Sexuality and the Politics of Expertise*.

17. Decision of Justice Smith, para 224, my emphasis.

18. This does not, however, mean that gay and lesbian relationships are not affected by race, class, ethnicity, or ability/disability inequalities.

19. para 187

20. para 190

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