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Consuming Ghost Stories: The Spectre of Snuff Films is Haunting Canadian Obscenity

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Abstract

Using a Derridean theory of hauntology and textual analysis, I argue that the spectre of the snuff film and its mythology is haunting Canadian obscenity law and that this is manifested in three interconnected anxieties: 1) that viewers, including police and other government officials, are unable to distinguish fictional representation and authentic recordings; 2) that regardless of whether material is real or fake, the influence of such materials is the same and thus relies upon and reproduces the media-effects narrative; 3) again reproducing anti-porn logics associated with the snuff film, that obscene content — whether real or fictional — that content is becoming increasingly sexually violent and thus must necessitate a natural progression to making snuff films real. Building on research on obscenity and snuff in the UK and US (Smith 2016; Olsen 2016), this article contributes an analysis of the influence of the snuff film mythos on obscenity law in the Canadian context. Further, this research also contributes to the current "spectral turn" in criminology (Fiddler et al., 2022, p. 4) by using hauntology to bring into focus an overlooked *presence* that is the *absence* of these crimes in Canadian discourses on obscenity.

Keywords: obscenity, hauntology, cultural criminology, snuff mythology, governance

"Now I know what a ghost is. Unfinished business, that's what."

— Salman Rushdie, *The Satanic Verses* (1989).

Ghosts are consumed by their quests for justice; the very presence of spectres denotes that something has gone wrong and has yet to be righted. Canadian obscenity law is haunted by the same unresolved

issues that have existed since the first obscenity laws were introduced in Victorian England; haunted by the crime legend of the snuff film and its mythos; and haunted by the cultural traumas of two of Canada's most infamous violent crimes, both of which involve recordings of those crimes. In keeping with this issue's theme of "consuming justice," this article explores how obscenity law in Canada is haunted and based on consuming ghost stories; that is, the obscenity provisions continue to exist because of the reappearance of cultural anxieties and ghosts of past traumas, rather than empirical proof that these laws are effective at protecting against harm.

Using a Derridean hauntological framework and textual analysis, I argue that the spectres haunting obscenity are manifested in three interconnected anxieties and are reanimated by persistence of the snuff film mythos. These manifested anxieties are: 1) that viewers, including police and other government officials, are unable to distinguish fictional representation and authentic recordings; 2) that regardless of whether material is real or fake, the influence of such materials is the same and thus relies upon and reproduces the media-effects narrative; 3) again reproducing anti-porn logics associated with the snuff film, that obscene content — whether real or fictional — is becoming increasingly sexually violent and thus must necessitate a natural progression to making snuff films real.

The snuff film mythos operates as both a ghost story and a crime legend. While ghost stories have always functioned as articulations of feelings of alienation, estrangement, and other cultural anxieties (Smith, 2010), Pamela Donovan (2004) conceptualizes "crime legends" as a specific form of folk tale that reveals cultural anxieties about crime and victimization and argues crime legends are both social practices and texts. The function of both ghost stories and crime legends are based on social belief and evolve to maintain cultural relevance, often mutating to reflect significant changes such as social norms and technologies. Further, hauntology within the social sciences operates as a "folk theory," an interdisciplinary means of accounting for and making visible disappeared, forgotten, and otherwise marginalized histories and stories (Gordon, 2008). Charlie Gere (2016) argues hauntology has always been closely related to both death and technologies, as well as pornographic representations. The

four cases that ground my analysis bring into *apparent* presence eroticized violence and death, with the four texts involved all approximating the visual qualities of snuff films (to at least some spectators). By using these four cases — Paul Bernardo and Karla Homolka's infamous tapes, Donald Smith's website Perfectshotsvideo.com, Remy Couture's film *Inner Depravity,* and Luka Magnotta's *1Lunatic, 1Icepick* — in tandem with government documents and the broader context of obscenity prosecutions of the last 30 years, I demonstrate how Canadian obscenity law can be understood to be haunted by the snuff film mythos and will continue to be until the inceptive problems are addressed and the ghost story of snuff exorcized from obscenity discourse.

Obscenity

In the first section I outline a brief history of Canadian obscenity law, from its conception in British parliament in the Victorian period (when Canada was still a British colony), through to the Supreme Court precedent in *R. v. Butler* in 1992.

Obscenity law has been flawed from its inception. In 1857 Great Britain, when the *Obscene Publications Act* was introduced, members questioned whether a new law specific to obscene materials was needed, arguing the common law and *Vagrancy Act* of 1824 were sufficient to deal with offending materials (Manchester, 2007). Despite reservations about the lack of clear definition and how the law would be enforced, the *Obscene Publications Act* was passed as a common-law offense, meaning parliament did not need to define obscenity, and instead left it to judges to define via juris prudence (Hillard, 2021).

A decade after the *Obscene Publications Act* was passed, the lack of a clear definition for obscene materials would be put to the test with *Hicklin*. Justice Cockburn provided the first legal test definition of obscenity as: "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (in Lacombe, 1994, p. 4). Brenda Cossman and her colleagues highlight how such concerns were moralistic and understood vulnerable minds to include children, women, and working-class men

(Cossman et al., 1997). Hillard (2021) notes that despite this, the legal understanding of obscenity remained unchanged from material *tending to deprave and corrupt* from 1867 to 1959, and that "its longevity can seem surprising, for this is a definition that does not do much defining" (p. 18).

In 1959, as the result of growing public backlash to the inconsistency of how the test was being applied across Canada, the Conservative government enacted the first statutory definition of obscenity under section 159 of the *Criminal Code of Canada* (Cole, 1989). This remains the legal definition for obscenity to this day, now under section 163(8) of the Code: "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene." Under section 163(1), it is a crime "to make, print, publish, distribute, circulate, or have in one's possession for the purpose of doing so, any obscene written matter, picture, model, phonograph record, or any other obscene thing." In 1962 the Supreme Court decision in *R. v. Brodie* would incorporate the community standard of tolerance, degradation, and internal necessities tests to help clarify the meaning of the "the undue exploitation of sex" component of obscenity (Walsh, 1994, p. 1022).

The *Canadian Charter of Rights and Freedoms* was enacted with the *Constitution Act* in 1982. Section 2(b), the right to free expression, was first tested on the matter of obscenity with the Supreme Court case of *R. v. Butler* in 1992. In *Butler*, the Court upheld the constitutionality of the obscenity provisions — despite acknowledging their violation of the right to free expression — on the basis that they could be 'saved' by section 1, which guarantees the rights and freedoms set out in the Charter "subject only to such reasonable limits prescribed by law as can be *demonstrably justified in a free and democratic society*" (Part I of the *Constitution Act*, 1982, emphasis mine). Elsewhere scholars have discussed whether obscenity's risks and potential harms are (or should be) understood as reasonable limits to free expression (see Sumner, 2004; Valverde, 1999).

A significant amount of research has been conducted on the *Butler* decision (see Busby, 1994; Cossman, 2003; Kramer, 1992; Ryder,

2001; Walsh, 1993). However, apart from Janine Benedet's (2015), there is a dearth of research on how criminal obscenity law has been applied in Canada since then.

With the benefit of yet another decade of time and obscenity cases to examine, this research contributes to ongoing conversations about obscenity law, particularly its relationship to the snuff film mythos in the US and the UK but focuses on the often-overlooked Canadian context (Olsen, 2016). Most significantly, and as part of the current "spectral turn" in criminology (Fiddler et al., 2022, p. 4), I apply a Derridean hauntological theoretical framework to understand the spectre of the snuff film haunting obscenity law and how it manifests in three key interconnected anxieties.

As Alison Young (2019) argues, to "think hauntologically" (p. 4) is to attend to the obscured and repressed presences that intrude on our world and thinking but are not easily compatible with other available frameworks. Through a combination of textual analysis and hauntology, I demonstrate that obscenity remains poorly understood, unevenly applied, and continues to exist not because it addresses or prevents harm, but rather because of cultural fears — specifically the snuff film mythos — and its shades in key cases explored in the sections below. It is appropriate to apply a hauntological frame to thinking through how the snuff mythos *haunts* obscenity law, given its relationship to erotic/pornographic images, cultural anxieties, and persistence of both fear and belief about sexual representations and harm despite significant changes in media technology.

Snuff Films

A snuff film is, by traditional definition, an authentic recording of a murder of a human being for the (sexual) pleasure of the audience or viewer and for the profit of the producer (Jones, 2011). The myth of snuff films is generally traced to the American release of the fictional horror movie *Snuff* in 1976 (Donovan, 2004, p. 27). The marketing for the film antagonistically engaged with anti-pornography feminists and moral campaigns at the time that argued that snuff films were (or would soon be) a natural progression of the adult film industry (Herron, 2020; Lonergan, 2022).

The snuff film mythos became associated with pornography because of the temporality of these events coinciding with rise in anti-porn campaigns by feminists, right-wing politicians, and religious groups (Johnson & Schaefer, 1993; Jackson, 2016). Snuff films are the natural progression when pornography is understood as becoming increasingly violent towards women and that audiences who are exposed to pornography will seek out or even need 'harder' or more violent pornography, thus culminating in snuff films as a pornographic genre (Labelle, 1992; Jackson, 2016). More ambiguous and troubling, however, is the unconcise usage mobilized from the birth of the mythos in the 1970s, to use "snuff" to refer to hardcore pornography where no death — neither real nor simulated — is featured (Downing, 2014).

Canadian obscenity law makes no distinction in the codified letter of the law regarding obscenity or in case law between obscene fictional representations and obscene recordings of the commission of other crimes. I assert that one reason for this lack of distinction between reality and fiction is because obscenity law is haunted by the spectre of the snuff film and the cultural (and perhaps institutional) anxieties about being able to differentiate authentic and fictional recordings of sexual violence, and so attempts to ignore this complexity by ignoring the different harms associated with these distinct categories. Even if one suggests that watching violent content, whether real or fictional, has the same effect on the viewer (and thus carries the same risk of harm for the audience regardless), the difference regarding *production* as opposed to a focus on the *consumption* of the materials highlights that the harms of real victims in authentic recordings of criminal activity are substantially different than acting in a fictional recording.

To reiterate the earlier definition, a snuff film must meet all three criteria: be a recording of the real murder of a human being; be produced for the arousal/entertainment of the viewer; and be created for the profit of the producer. There is much confusion around the term, since the concept has been expanded and used to refer to both fictional horror movies that make use of the mythos as a plot device or as part of a 'found footage' aesthetic (Jones, 2011; Jackson, 2016). The confusion, conflation, and political connection of fictional representa-

tions of horror and violence and their relationship to real-world horror and crimes is central to understanding both the snuff film mythology and obscenity laws.

Hauntology

In *Spectres of Marx*, Jacques Derrida ([1994] 2006) writes, "A traditional scholar does not believe in ghosts — nor in all that could be called the virtual space of spectrality" (p. 12). This research does not purport to prove or disprove the existence of paranormal or spectral phenomenon, but rather adopts a hauntological frame to address how obscenity law been affected by influences that have been overlooked but make their presence known. Avery Gordon builds upon Derrida's ([1994] 2006) concept of spectres and hauntology as developed in *Specters of Marx*, bringing it into the sociological toolbox in a critical form of grounded theory, disrupting disciplinary boundaries and how we understand knowledge production in the social sciences (Gordon, 2008). It is an appropriate approach for my work here, as hauntology provides a means of accounting for phenomena whose temporality is disrupted, for the presences in absences, in short, accounting for ghosts. Gordon (2008) defines ghosts and haunting thusly:

If haunting describes how that which appears to be not there is often a seething presence, acting on and often meddling with taken-for-granted realities, the ghost is just the sign, or the empirical evidence if you like, that tells you a haunting is taking place. The ghost is not simply a dead or missing person, but a social figure ... The way of the ghost is haunting, and haunting is a very particular way of knowing what happened or is happening. Being haunted draws us affectively, sometimes against our will and always a bit magically, into the structure of feeling of a reality we come to experience, not as cold knowledge, but as a transformative recognition (p. 8).

Hauntology works well thematically speaking with obscenity, given their associations with death, violence, and disturbing experiences. I argue that the obscenity provisions persist in the Canadian Criminal Code because they are haunted by unresolved cultural traumas and the intimate connection between these traumas and the crime legend of the snuff film.

There is a spectral turn currently happening in criminology, particularly amongst scholars already well-established within cultural criminology (Linnemann, 2022; Fiddler et al., 2022). In *Ghost Criminology: The Afterlife of Crime and Punishment*, Fiddler et al. (2022) explicitly unite hauntology and cultural criminology, writing: "There are spectres haunting criminology ... The spectres that we are describing here leave (in)visible traces in texts, images, and spaces. They radiate out from sources of trauma" (p. 1). Cultural traumas from the crimes of Bernardo, Homolka, and Magnotta fuel the believability of the snuff film mythos by haunting the national imaginary, but in turn this trauma fuels anxieties and (mis)understandings about obscenity and recordings of crimes.

Method

To reiterate, Donovan (2004) uses "crime legend" to describe the snuff film mythology as a cultural text representative of anxieties and fears about crime and victimization. A ghost story, in the Victorian tradition, is a text wherein fact and fiction are confused and produce an uneasy, haunting affect (Lehmann Imfeld, 2016); ghost stories remain a fundamental way we understand the world that we inhabit (Goldstein et al., 2007). In his chapter "Ghost Method," Jeff Ferrell (2022) notes, "Ghostly times will require ghostly method" (p. 70). He argues that to study ghosts requires we attend absence and presence, attend to residues, and develop new ways of seeing.

To attend to the ghosts haunting Canadian obscenity, I use a mixed-methods qualitative approach, focused primarily on ethnographic content analysis of several kinds of texts, primarily: obscenity case law, media coverage of the cases discussed, government documents obtained via *Access to Information Act* requests, and lastly, broadly understanding the snuff film mythos as a cultural text in the form of a crime legend and ghost story. Each analytical site provides a different perspective into how obscenity is used and understood, while simultaneously revealing critical absences and residue of past and future crimes and fears.

Obscenity Cases

A systematic review of available obscenity cases from 1992 to 2020 was conducted using the three major Canadian legal databases: Cana-

dian Legal Information Institute (CanLii), WestlawNext Canada (Westlaw), and LexisNexis Advance Quicklaw (LexisNexis). Including *Butler*, this process yielded 17 criminal prosecutions for obscenity in this timeframe. These cases were then coded for: charges laid; whether the materials were obscenity, or child porn, or both; any description of what the materials were; the province or territory and court level; and trial outcome and sentencing.

Most of the cases in the remainder of the 1990s were almost exclusively cases like *Butler* that involved police raids of adult video stores for pornography that may be interpreted as being obscene under the broad definition (seven cases); one was the *Little Sisters* challenge of Canadian Border Services interpretation of obscenity to target LGBTQ+ materials; three involved suspected child pornography, of which one had the obscenity charges dropped and the other being the Art Show at Mercer Union Gallery, wherein the charges were dropped, with the third being convicted of child pornography and obscene materials.[1] One was homemade sadomasochistic pornographic photos made with a disposable camera that led to conviction for obscenity; and one was a man who was masturbating to a pornographic magazine on a city bus, who was acquitted of obscenity but convicted on other charges. The remaining four cases, which represent most of the cases post-2000, all focus on violent content rather than sexual content. Further, two of these cases deal with fictional horror while the other two deal with the recording and distribution of recorded violence against and death of a human being.

[1] Under *Criminal Code* section 163.1 (1) child pornography is defined as:

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Media Coverage

While 17 criminal prosecutions for obscenity offences is a small sample size of cases, it has the benefit of allowing deep engagement with the details of the cases and related documents. Searches of archival databases for media coverage for all the obscenity cases were conducted. I was particularly interested in the four cases mentioned above, which were both some of the most recent obscenity prosecutions but also marked a departure from targeting adult-video suppliers to horror producers.

The first case of the obscenity provisions being used against a website in Canada was the case involving horror director and special effects artist Donald "Dr. Don" Smith. In October 2000, Don Smith and his brother were charged with obscenity for their website Perfectshotsvideo.com, which contained clearly marked adult fictional entertainment. *CBC* ran the headline "'Snuff' porn business busted," and while they define snuff videos in the article writing, "They feature explicit images of women engaged in rough sex who then appear to be killed in graphic fashion," they follow up with a quote from Sgt. Harrison of the Winnipeg Police Service, noting "There were no women to our knowledge who were hurt, forced, coerced or ultimately killed in the making of these videos" (CBC, October 13, 2000). Further, they note the actresses that appeared in the films were paid but choose to encase the word "actress" in quotation marks, suggesting that perhaps they understand them more akin to adult film performers than actresses, and revealing an understanding of pornography as a less-than genre of film.

In 2006, Interpol contacted the RCMP, who in turn contacted the Montreal police. Despite Montreal police claiming they doubted that Couture had documented and uploaded evidence of criminal acts rather than fictional content, they still enacted "an elaborate sting operation with police posing as clients looking to do a gory photo shoot around Halloween" (The Canadian Press, 2012). *The Canadian Press* (2012) notes that Genevieve Dagnais, the Crown prosecutor in the case, said that "Couture was not targeted by police and admitted the case is particular [sic] because there is no victim." However, this case is seemingly not peculiar because Smith had been convicted of the

same charges for similar content without a victim who had been harmed in the production of the videos.

The *National Post* (2012) ran the headline "Jury in trial of Quebec gore artist views hundreds of explicit photos depicting murder, torture," but without noting that these were not *real* photos of either murder or torture. Further in the body of the article, artistic expression and the "violent, sexually explicit, *horror-inspired* works were based on a *serial-killer character Couture created and played*" (2012, emphasis mine), provides the most explicit clarification that the content he was being prosecuted for was fictional.

While coverage of Smith's trial explicitly linked him to the snuff film mythos, coverage of Couture's trial a decade later still suggests concerns that fictional horror videos — and especially those with female victims and male perpetrators — have harmed, do harm, and/or will result in harm to women. This is assumed to either happen at the point of producing the materials or at consumption of the materials, echoing the snuff film mythos.

Access to Information Requests

In 2021, requests for information under the *Access to Information Act* were filed with the three key relevant government departments: public safety, justice, and the RCMP. All documents, memos, policies, training materials, and other documents related to Criminal Code section 163(1) obscene materials and obscenity were requested for the temporal scope of 1992–2020 (excluding cabinet confidences and public correspondence).

Public Safety Canada responded and informed me they had no relevant documents within less than a week of the request for documents.

After five months of correspondence with the Department of Justice, I received 22 pages of the 13,856 relevant pages, with the other pages being exempt due to being personal information, protected advice or recommendations, or solicitor-client privilege. This seems to suggest that I received about 0.16% of relevant government documents related to obscenity under the purview of the Department of Justice from 1992 to 2020.

After 15 months, much correspondence, and a successful complaint against the RCMP for failure to comply with the Act, I received 35 pages from the RCMP and a two-page letter explaining that based on the information provided, these pages were all the information to which I was entitled and that some information was exempted pursuant to subsection 18(b) of the Act (presumably referring to the heavy redaction) and my right to file another complaint with the Information Commissioner. Despite repeated correspondence clarifying with the RCMP and the investigator from the Office of the Information Commissioner of Canada that I was not and did not want any documents that were strictly regarding child pornography offences under section 163.1,[2] only information and documents pertaining to obscenity, most of the pages I received were from the Canadian Police College's Canadian Internet Child Exploitation Course (the 2006 version). Interestingly, no mention of Courture's or Magnotta's cases — nor any other obscenity case except *Butler* — was amongst the scant documents supplied by the RCMP in response to my request.

Katherine Biber (2022), writing about ghost criminology and the destruction of documents, argues that: "Whether arriving or returning, the ghost issues a demand that we pay attention to something that is difficult to visualize, or in danger of being forgotten" (p. 160). I received only 57 pages, nearly all of which were redacted, irrelevant to obscenity, or publicly available, for all documents related to a Criminal Code offence for a 28-year period. Not only was *Butler* a significant presence on freedom of expression, but at least three other obscenity cases were heard by the Supreme Court during this timeframe; significant technological and cultural shifts in how people access pornographic content (the increased accessibility of home Internet access); and two obscenity cases with international cooperation (Couture and Magnotta) occurred — all of which would

[2] The conflation and confusion between section 163(1) obscene materials and section 163.1 is a serious impediment to research on obscenity cases and law in Canada, as my research experience has shown, and is similarly a problem in the U.K. (see Rowbottom, 2018).

While both offences are in Part V of the *Criminal Code*, dealing with offences tending to corrupt morals, child pornography under section 163.1 deals with the sexual exploitation of children (or depictions of children), whereas obscenity under section 161(1) deals with the undue exploitation of sex, and or sex and violence, crime, horror, or cruelty.

suggest more documentation would be available on obscenity from government institutions.

The absence of any substantive policy documents, training materials, or other information on how the government and police agencies understand obscenity is both frightening and revealing by virtue of its absence. Biber (2022) notes that:

> Redaction is a tool of both secrecy and transparency; it is visible evidence of something unseen. It demands a destructive act the wilful withholding, concealing, obfuscating, and deleting of part of the official record, it appears before us as a spectre looming over an unreadable document. (p. 169)

Redacted documents and documents destroyed — whether by exceeding retention policies, mishap, or on purpose — are spectres of both old and new crimes and fears (Biber, 2022). While the Department of Justice was clear in the number of documents being withheld, it remains unclear what documentation the RCMP may have on obscenity that were not provided.

A significant hinderance was the conflation by these departments of two related but distinct criminal offences: section 163(1) obscene materials and section 163.1 child pornography. Despite repeated clarification via email and phone conversations, much of the documentation provided was both out of date and in reference to child pornography. The issues of accessing information, particularly where it is related to policing, is well documented (Duncan et al., 2023; Luscombe & Walby, 2015; Walby & Larsen, 2011). These issues unfortunately are not unique to the Canadian context, as Jacob Rowbottom (2018) has encountered similar issues studying obscenity in the UK context.

Engaging with obscenity as a research subject is to seemingly spend a lot of time with ghosts.

Obscene Case Studies

Recordings of Real Crimes

Despite that Paul Bernardo, known as the Scarborough Rapist and the Schoolgirl Killer, was committing his crimes during the late 1980s

until his arrest in 1993, coinciding with the timeline of Donald Butler being charged with obscenity in 1987 and the case proceeding through the criminal justice system to the Supreme Court ruling in 1992, I could find no existing literature that discusses any influence or relationship that may exist between these significant Canadian criminal cases. Morrissey (2006) describes Bernardo's trial as being partially *about* pornography, especially when discourses surrounding the trial emphasized pornographic tropes including bondage, sado-masochism, schoolgirls, and threesomes, but does not connect the case to *Butler*. The influence of anti-porn feminists on the *Butler* decision is well established (Acorn, 1997; Cossman et al., 1997; Khan, 2014). The absence of scholarly analysis of Bernardo's case in conversation with *Butler* may be in part because "true crime" stories (Jewkes, 2009; Linnemann, 2015), folklore and legends (Donovan, 2004), and other popular texts have only slowly become accepted within criminological research, often under the subdisciplines of cultural or popular criminology (Ferrell et al., 2008; Kohm & Greenhill, 2011; Rafter & Brown, 2011).

Butler marked a significant criminological moment in Canadian history, especially for obscenity. The Supreme Court upheld the obscenity provisions on the premise that they were proportional to their purpose of addressing harm rather than enforcing morality. The harms being addressed, however, were to women's equality and that obscene materials might contribute to desensitizing individuals (Cameron, 1992). Pornography (or other materials) that contained *the undue exploitation of sex and/or sex and violence, horror, cruelty, or crime* is understood as desensitizing (men) and harming women and yet is not put into conversation with the most notorious case of a criminal couple in Canadian history. Butler was convicted of 8 of the 77 combined counts of possessing, selling, and distributing obscene materials and fined $1000 per offence. Neither Bernardo nor Homolka were charged with obscenity offences.

Bernardo's lawyer Ken Murphy was later charged with obscenity and child pornography for making copies of the tapes, but these charges were later dropped, and he became the centre of conversation about the responsibilities of lawyers to their clients and to the court (Clemmer, 2008). Rather than providing clarity on obscenity here, it further

confuses the obscenity provisions and their purpose. Section 163(1) specifies making obscene materials is an offence under the law; thus, whether he ever intended to publish or circulate the tapes is irrelevant. Secondly, he did distribute the tapes to his lawyer for safekeeping.

If Bernardo was not charged with obscenity because his authentic recordings of violence were beyond the intended scope of the obscenity provisions — after all, the provisions were originally enacted to address fictional stories — then this would make sense (again, we would have to set aside that Murphy was charged). However, in May 2012 Luka Magnotta recorded himself committing several serious and sexually violent crimes with his digital camera and uploaded the video to the Internet. The video is nearly 11 minutes in length and is easily recoverable online, despite having been convicted as being obscene. The video is edited with the song "True Faith" by New Order, a song from the *American Psycho* soundtrack, and is titled *1Lunatic, 1Icepick* seemingly as an homage to the viral scatological porn trailer *2Girls, 1Cup* (see Jones, 2017). After his escape from the country, being found, arrested, and extradited from Germany, Magnotta was charged with first-degree murder, committing an indignity to a corpse, criminally harassing then-Prime Minister Stephen Harper and other members of parliament, mailing obscene materials, and publishing obscene materials (Davidson, 2018). In December 2014, he was subsequently found guilty by a jury and sentenced to the maximum for all charges and is currently serving a life sentence in prison (Minksy, 2014).

Luka Magnotta, more than any other obscenity case in Canada, bears an uncanny resemblance to the snuff film and its mythology, in part because Magnotta was involved in adult film (Benedicto, 2019). However, what really disrupts its approximation of snuff is that Magnotta recorded his sexual assault and murder of another *man*. The snuff film mythos almost exclusively focuses on men killing women and, less commonly, on men killing children for pedophilic snuff (Kipnis, 2003). The Supreme Court upheld the obscenity provisions in *Butler* largely on gendered understandings of the *potential harms against women* with an assumption those harms would be perpetrated by men. Scholars note that the *Butler* decision essentially married

anti-porn feminism and traditional morally conservative understandings of harm in their decision (Cossman, 1997; Jochelson & Kramar, 2011). While the act of killing another person in a sexualized manner, recording the criminal acts, editing in background music, and uploading it to the Internet to be watched by people all over the world (to say nothing of potential ad revenue for websites hosting the video) closely approximates the snuff mythos, Magnotta's identity as a bisexual man and the gender of the victim disrupt the normative understanding within the snuff mythos of porn inducing men to have harmful attitudes about women or even commit harmful acts against them, and thus the need for obscenity provisions to prevent harm to women's equality and physical integrity. I suspect his queer sexuality is a significant factor in why there has not been more discourse linking Magnotta and the obscenity provisions, and indeed the snuff film mythos, precisely because of the lack of female victimization in this case.

Fictional Content

Still and motion pictures have been described as "new obscenity," insofar as the technical innovation of film signaled a radical departure from obscenity in written or visual artistic representations by seemingly scientifically capturing excessive realism (Williams, 1995, pp. 3–4). Perhaps then it is not surprising that not only authentic recordings of sexual violence be scoped into obscene materials, but fictional content as well, particularly where it seems real. As Tom Gunning (1995) notes, these technologies produce an uncanny phenomenon, "creating a parallel world of phantasmic doubles alongside the concrete world of the senses verified by positivism" (pp. 42–43). This uncanny sense that videos may look and sound real, even when fictional, creates anxieties and in turn makes fictional horror creators vulnerable to prosecution.

Because section 163(8) of the Criminal Code, which defines obscene materials, makes no mention of a distinction between fictional and authentic depictions, it is not only real recordings of sexual abuse and murder that have been charged with obscenity since the Supreme Court ruled in *Butler* in 1992. While *Butler* did come to mark one of the last vice raids to use the obscenity provisions to target adult por-

nography, usually being rented or sold at video stores, the technological shift in the 1990s and into the 2000s saw the death of video and the rise of digital videos and online streaming. With this technological shift, we also see a shift in the mediums charged with obscenity. Whereas the 1980s and 1990s involved mostly videotapes, the 2000s are marked with online content. The shift of videos from public theatres into private homes *en masse* with the affordability of VCRs likely contributed to rising anxieties about pornography. This anxiety was deeply intensified by the Internet, which only further increased the privacy afforded to viewers while radically expanding access to producing and consuming content.

In November 2002, Smith was convicted of making and distributing obscene material and sentenced to probation, a fine of $100,000, and surrender ownership of the websites to the Crown, and prohibited from accessing the Internet. This is a seemingly unenforceable provision, especially given there is no mechanism for checking up on this condition without probation or another custodial or oversight condition. Internet bans are common for repeat child-pornography offenders (who are also subject to community supervision in addition to orders of Internet prohibition) but based on my review of cases this is the only time it has been used in an obscenity case.

The Ontario Court of Appeal in Thunder Bay ordered a new trial, resulting in the fine being reduced to $2,000 and the ruling that the court did not have the authority to sentence probation for those offences, leaving the rest of the conditions in place (Law Times, 2005). Despite that exceptions are sometimes made for content that contributes to education, science, or art, and that a film scholar testified that a slow-motion technique developed by Smith was a contribution to the arts and sciences of filmmaking, the conviction was upheld. This is generally understood to be the meaning of the section 163(3) defense of public good: "no person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good." Both the Crown and defence applied for leave to appeal to the Supreme Court in 2007, but the Court declined to hear the case (Fort Frances Times, 2008).

Smith's case is the only one of these cases examined here in which the media linked the videos with the snuff film mythos and that represents a punitive overreach in sentencing. While upon appeal the fine was lowered from $100,000 to $2,000, the forfeiture of intellectual and commercial property to the Crown — and especially the Internet ban — is significant. Smith's videos were no more violent or sexual than films screened at movie theatres across Canada, and they constituted nudity and violence more so than *sexualized* violence. It is unclear what led to the initial police investigation that began this whole process, but as Hilliard (2021) notes in the Victorian context, one complaint could be enough to set off a police investigation, and nothing suggests that there is more clarity or a higher threshold in the contemporary context, as demonstrated by the last case study.

Defence experts testified that Couture's work, such as *Inner Depravity*, is not uniquely abhorrent among other horror movies (The Canadian Press, 2012). Indeed, having watched *Inner Depravity*, while it does portray a monstrous killer who murders women, it is par for the horror genre to have such a plotline. The film contains atmospheric music that does not align with found-footage fictional snuff films like the *August Underground* trilogy (see Jones, 2013; Lonergan, 2022) and does not present the killer in a sympathetic or likeable framing.

In contrast to the few minutes that it took to find *1Lunatic, 1Icepick* online, accessing a copy of *Inner Depravity* proved to be quite precarious. While the video used to exist on YouTube, changes to their policies regarding violence led to it being taken down. I managed to find a rare-film dealer based in the southern US and ordered a collector's edition VHS tape and paid an exuberant amount of money for priority postage in hopes of having a better chance of importing the film (despite that it was acquitted of being obscene). My order was then mysteriously rerouted to Thailand, where it was held by Thai customs for nearly a month. Eventually the seller was able to open an investigation and a few weeks later the video was sent back to the US and then onward to my home in Canada. While Magnotta's video is closer to constituting an authentic snuff film and had been convicted of obscenity, it was significantly easier (and free) to obtain in contrast to independently produced Canadian horror content.

The Canadian Press (2012) notes, "Experts for the Crown testified that the material could push vulnerable members of society to act out what they see. They also took issue with the fact that the victims were all women." And so, just as with the historic understandings of obscenity, despite the Supreme Court's decision in *Butler*, there remains an understanding that obscenity is supposed to be used to prevent moral corruption and depravity of vulnerable minds. As was previously mentioned, there remains a specific focus on depictions of women being killed by men — whether real or fictional — within obscenity. A jury acquitted Couture in December 2012. At the time of writing, no fictional content has been charged under the obscenity provisions since this case.

To reiterate, Smith and Couture were both charged (and Smith was convicted) of obscenity for creating fictional horror movies; they were charged with the same offence that Luka Magnotta was tried and convicted for based on his committing and recording first-degree murder. In contrast, Paul Bernardo was never even charged with obscenity for recording his brutal sexual abuse of several teenage girls. Consequently, how can we understand the purpose of these provisions when they are so seldom used and inconsistently applied to the same type of materials, let alone when also applied to material produced in vastly different circumstances? It is my argument that through a hauntological approach these seeming inconsistencies and anxieties reflect the presence of snuff film mythology's spectre.

Discussion

In this section, I unpack the three key anxieties that demonstrate the haunting of obscenity by the spectre of the snuff film mythos. If, as Merlin Coverley (2020) writes, "hauntology's desire [is] to unearth those points in time at which lost futures may be reanimated" (p. 16), then my purpose here is to create a narrative that highlights the issues in conflating fictional and authentic depictions, as these are conflated in the snuff mythology, in order to interrupt this unjust application of the law and prevent future prosecutions of fictional horror content from taking place.

Gordon (2008) explains haunting as a way in which abusive systems of power make themselves known and felt, perhaps especially when

they are supposedly over and done with, or their oppressive nature is denied. While some Canadian legal scholars may think that all there is to be said about obscenity in Canada has indeed already been said or argue that the acquittal of Remy Couture for his fictional horror films in 2012 demonstrates that the system is working, the continued confusion (or at least lack of transparency) about the obscenity provisions is a ghostly presence. By using hauntology I bring into focus an overlooked *presence* that is the *absence* of Bernardo and Magnotta's recorded crimes and the snuff film mythos in Canadian discourses on obscenity.

Anxiety One: The Inability to Distinguish Fiction from Reality

Mass literacy and increasing availability of paperback novels sparked the passing of the *Obscene Publications Act* in 1857, because it was thought that this would open the door to mass moral corruption (Hilliard, 2021); now we can see how changes in mass-media technologies and the democratization of access to both producing and consuming cultural texts causes intense sociopolitical anxiety. The cultural impact of Bernardo and Homolka's tapes — at a time when home video recording was becoming more financially feasible for ordinary middle-class Canadians — was the recognition that this technology could be incorporated into criminal activity. For Canadians following the *Butler* trial, or simply consuming mass media, the debates regarding pornography, violence, and women's rights were known. While vice raids, like the one involved in *Butler*, were bringing pornography to the attention of the police, Canadians were now aware that there could be concern for the private hidden tapes that the police would not uncover, as demonstrated in the Bernardo investigation.

This may also play into anxieties that one could accidentally rent and watch a snuff film and not be able to distinguish it from a particularly gory fictional horror film. Indeed, despite *1Lunatic, 1Icepick* on BestGore.com being reported to both the US Federal Bureau of Investigations and to the RCMP, both organizations claimed it was a hoax (Kerekes & Slater, 2016). If the police are unable to either locate or correctly ascertain the authenticity of potential snuff films,

then this is undoubtedly concerning for both the police but also the wider community.

None of the documents turned over from the *Access to Information Act* requests referenced or explained any training or process for determining the authenticity of a recording, nor seemed to suggest that differentiating between fictional and authentic texts might be an issue to consider in investigations into potentially obscene materials. And while the definition of obscenity makes no distinction between these, this is surely important for the investigation of potentially related crimes, at least so far as authentic recordings would be evidence of further sexually violent crimes, and even murder. Instead of engaging in this distinction and the issues that it raises, police instead leave it to the Crown, judges, and juries to make determinations as to authenticity, and rest on the broad definition of obscene materials in the Criminal Code. This is an echo of the *Obscene Publications Act* of 1857, wherein British Parliament did not define obscenity and instead left it to judges to determine (Hilliard, 2021). The vague definition of obscenity resting on the *undue exploitation of sex* and the ambiguity in definition and process feels eerily like the legal context of nearly a century and a half ago. If these issues are not addressed, they continue to linger in spectral form, neither dead nor fully alive in the years that pass between a single obscenity prosecution.

Anxiety Two: Whether Materials are Real or Fake Their Influence on Audiences is the Same

The reasoning behind obscenity law has shifted over time from preventing the corruption of public morals to preventing 'harm', especially harm to women's equality in Canada. As demonstrated by the Supreme Court in *R. v. Butler*, proof of harm is not required to make the obscenity provisions compliant with the *Canadian Charter of Rights and Freedoms* (Noonan, 1992). This lack of needing to prove risk of harm to justify criminal law is concerning, as it is generally understood that section 1 of the Charter that saved the obscenity provisions despite their conflict with 2(b) and the right to free expression, necessitates that the government only limit Charter rights and freedoms where can be demonstrated to be justifiable in a free and democratic society (Rishworth, 1986). The only way to understand the continued existence of the obscenity provisions and absence of

distinction between fictional and real depictions, then, is to assume that both types of obscene materials would have the same potential effects on viewers. This logically follows if people, even police officials, are unable to differentiate between real and not real, and so, not knowing would likely produce the same effects.

This is particularly concerning where sexually violent pornography is concerned, as the understanding would be that people (men) would be conditioned to be sexually aroused by violence in real life or by real-world abuse if conditioned by exposure to recordings of explicit or rough sex acts, whether consensual or evidence of abuse and assault. The spectre of the snuff film mythos is more visible here, as this narrative directly reflects arguments by anti-porn feminists in favour of censorship and obscenity laws against pornography that explicitly made use of the snuff film discourse (Dworkin, 1989; MacKinnon, 1987). Absent the haunting of snuff and its anti-porn discourses, there would be an opportunity to reflect on whether a higher standard of proof of harm or connection of harm to legislative purpose should be required of the obscenity laws in a free and democratic society.

Anxiety Three: That Whether Material is Real or Fake, It Will Progress from Fake to Real

Intimately connected to the previous anxiety, not only does it not matter if obscene materials represent real harm or a fictional staging, but also there is an assumption that it will *become* real. Again, this assumption is grounded in and reflects a media-effects understanding, whereby exposure to representations will make some people act them out in real life. This of course overlooks any sort of critical viewership that would complicate such a theory. This also assumes that real recordings of violence are visually more disturbing than fictional ones if they are the ultimate progression of consuming violent content. However, as I have argued elsewhere, the aesthetics of real-world violence can often be less spectacular and gory than the excessive special effects used in fictional horror (Lonergan, 2022). The logic that people (men) will seek out 'harder' pornography as they become desensitized and grow a tolerance for more mainstream imagery mirrors the rhetoric of 'reefer madness' and marijuana as a

'gateway drug' from the war-on-drugs propaganda (Schlosser, 2004). In both cases, the only way to avoid a progression from softcore porn or joints to snuff films and a heroin overdose is abstaining from these vices entirely. It is not coincidental that vice squads, in addition to policing morality through criminalizing gambling, liquor, drugs, homosexuality, and sex work, police obscenity in the form of pornography historically and horror in the contemporary.

Conclusion: Ghost Stories

Following the Supreme Court decision in the precedent-setting case on the issue of obscenity law, Dany Lacombe (1994) noted that there was a reluctance in the 1980s and into the 1990s leading up to *Butler* to bring obscenity charges because they were applied so unevenly across the country due to the broad definition. Rather than further precedents in the 30 years following *Butler* clarifying how the obscenity provisions should be applied, the expansion of obscenity to include both fictional materials and the real recording of violence and death without distinction should be cause for concern.

The spectre of the snuff film reveals both the unresolved trauma of the crimes of Paul Bernardo, Karla Homolka, and Luka Magnotta on the Canadian cultural memory; the unresolved issues of what the purpose of criminal obscenity law is and how it should be enforced; and anxieties about the uncanniness of representations that depict horrors — and whether those horrors are real recordings or fictional fantasies. To exorcize this ghost, the obscenity provisions must be confronted. *R v. Butler* upheld the constitutionality of the provisions on the basis that they addressed harm rather than morality, but with 30 years of hindsight, minimal prosecutions (Benedet, 2015), and significant technological changes (Jeffres, 2015; Valkenburg & Walther, 2017), it is perhaps even less clear now to both Canadians and government officials what the purpose of the provisions are, what they are meant to address, and how they should be enforced.

Without clarity either from jurisprudence or policy directions, the provisions threaten to bring the administration of justice into disrepute. There is no doubt that Canadians are haunted by the explicit violence committed by Bernardo, Homolka, and Magnotta, but criminalizing fictional horror producers and their content does not prevent

violent crimes from being committed; rather, the obscenity provisions, and their lack of distinction between fictional and real materials, harms free expression and the artists and filmmakers who are made vulnerable to complaints and prosecution in unpredictable ways. The most recent criminal prosecutions for obscene materials reflect the anxieties related to the snuff film mythos, but neither prosecute nor prove the prevention of snuff being produced in Canada. These laws are chasing ghost stories and it is past time to lay them to rest.

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