R. v. *BUTLER* : THE LIMITS OF THE SUPREME COURT'S FEMINIST RE-INTERPRETATION OF SECTION 163

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In R. *v.* Butler *the Supreme Court relies on feminist arguments about the harm of pornography to justify the* Criminal Code *prohibition on obscene publications as a reasonable restriction on freedom of expression. However, the use of feminist arguments in* Butler *may confirm the view of those feminists who oppose the legal restriction of pornography because of the risk that it will be co-opted by conservative interests and used to suppress sexual expression that is not of the mainstream. The space for a conservative reading of the* Butler *decision arises first from the conservative language and structure of the existing* Criminal Code *restriction to which the Court has simply given a feminist gloss and secondly from the attempt to fit feminist arguments into the existing framework of freedom of expression adjudication which is built on classical liberal assumptions about language, agency and harm.*

Dans l'arrêt R. *c.* Butler, *la Cour suprême invoque des arguments féministes portant sur le préjudice causé par la pornographie pour démontrer que l'interdiction de publier du matériel obscène prévue par le* Code criminel *est une restriction raisonnable de la liberté d'expression. Cependant, le fait qu'on s'appuie sur des arguments féministes dans l'arrêt* Butler *pourrait bien justifier* l'opinion des féministes qui s'opposent *à la restriction légale portant sur la pornographie parce que cette restriction risque d'être récupérée par des intérêts conservateurs et d'être utilisée pour supprimer l'expression sexuelle qui n'est pas celle de la majorité. Deux raisons permettent de faire une lecture conservatrice de la décision rendue dans l'arrêt* Butler *: le caractère conservateur de la langue et de la structure de la restriction prévue actuellement par le* Code criminel, *restriction à laquelle la Cour a simplement donné un vernis féministe, et le fait qu'on a tenté d'intégrer les arguments féministes dans le cadre actuel des décisions sur la liberté d'expression qui sont fondées sur des présomptions classiques et libérales à propos de la langue, de l'action humaine et du préjudice.*

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I. INTRODUCTION

In deciding that the *Criminal Code*[1] restriction on the publication of obscene materials does not violate the *Canadian Charter of Rights and Freedoms*,[2] the Supreme Court of Canada in *R.* v. *Butler*[3] relies on feminist arguments about the harms of pornography. While these arguments represent a strong case for the censorship of pornographic materials, their use in the *Butler* decision may confirm the view of those feminists who oppose the legal restriction of pornography because of the risk that it will be co-opted by conservative interests and used to suppress sexual expression that is not of the mainstream.[4] The space for a conservative reading of the *Butler* decision arises first from the conservative language and structure of the existing *Code* restriction to which the Court has simply given a feminist gloss and secondly from the attempt to fit feminist arguments into the existing framework of freedom of expression adjudication which is built on classical liberal assumptions about language, agency and harm.

II. A FEMINIST READING OF A CONSERVATIVE PROVISION

A. *The Re-interpretation of Section 163*

Before considering the constitutionality of section 163 of the *Code*, Justice Sopinka, writing for the majority of the Court,[5] reviews "the legislative history of the provision as well as the extensive judicial interpretation and analysis which have infused meaning into the bare words of the statute."[6] In his review of the provision, Sopinka J. continues the judicial re-interpretation of section 163 from a conventional restriction of obscene material that offends the community's sense of decency to a restriction of pornographic material that is degrading and harmful to women.

Section 163 of the *Code* provides:

> (1) Every one commits an offence who
> (a) makes, prints, publishes, distributes, circulates ... any obscene written matter, picture, model, phonograph record or other thing whatever, ...
> (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.
> (4) For the purposes of this section, it is a question of law whether an act served the public

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

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3] [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [hereinafter *Butler* cited to S.C.R.].

[4] *See, e.g.*, the recent prosecution of Glad Day Bookshop in Toronto: *Glad Day Bookshop Inc.* v. *Deputy Minister of National Revenue (Customs and Excise)* (1992), 90 D.L.R. (4th) 527 (Ont. Gen. Div.).

[5] Justice Gonthier (L'Heureux-Dubé concurring) agreed with Justice Sopinka's "disposition of the case and with his reasons generally": *supra* note 3 at 511.

[6] *Ibid.* at 471.

> good....but it is a question of fact whether the acts did or did not extend beyond what served the public good.
> (5) For the purposes of this section, the motives of an accused are irrelevant.
> (6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model.... is not a defence to the charge....
> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[7]

According to Sopinka J., section 163(8) provides an "exhaustive test" for determining whether material is obscene and therefore prohibited.[8] Material is obscene if its dominant characteristic is the undue exploitation of sex or the combination of sex with violence, cruelty, crime or horror.

The most important test formulated by the courts for determining when the exploitation of sex is "undue" is the community standards test. The test was introduced by the Supreme Court shortly after the enactment of section 163.[9] However, the test was given its contemporary shape by the Supreme Court in *R.* v. *Towne Cinema Theatres Ltd.*[10] In *Towne Cinema*, Chief Justice Dickson said that "the task is to determine in an objective way what is tolerable in accordance with the contemporary standards of the Canadian community, and not merely to project one's own personal ideas of what is tolerable."[11] The test, he emphasized, is one of tolerance rather than taste. It is concerned not with what Canadians would tolerate being exposed to themselves, but what they would tolerate other Canadians being exposed to.[12] The standard is that of the community as a whole.[13] The judge is not required to make use of evidence about public attitudes but instead may draw on his or her own knowledge of those attitudes.

In *Towne Cinema* Chief Justice Dickson expressed the view that "community standards" is only one of the tests the courts use to determine whether the exploitation of sex is undue. According to Dickson C.J.C. the courts also consider material to be obscene if it is degrading or dehumanizing in its representation of

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[7] *Supra* note 1.

[8] This was settled in *Dechow* v. *R.* (1977), [1978] 1 S.C.R. 951, 76 D.L.R. (3d) 1. Justice Sopinka makes reference to this in his judgment: *see supra* note 3 at 475.

[9] *R.* v. *Brodie*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507.

[10] [1985] 1 S.C.R. 494, 18 D.L.R. (4th) 1 [hereinafter *Towne Cinema* cited to S.C.R.].

[11] *Ibid.* at 508.

[12] *Ibid.*

[13] Dickson C.J.C. considered that:

> Since the standard is tolerance, I think the audience to which the allegedly obscene material is targeted must be relevant. The operative standards are those of the Canadian community as a whole, but since what matters is what other people may see, it is quite conceivable that the Canadian community would tolerate varying degrees of explicitness depending upon the audience and the circumstances.

Ibid. at 509. However, the majority of the Court disagreed with him on this point and thought that the particular audience was irrelevant.

women, even though the community might be prepared to tolerate this material.[14] He says that:

> Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of "undue" must also encompass publications harmful to members of society and, therefore, to society as a whole.[15]

Justice Sopinka, however, rejects this two pronged approach and seeks instead to merge the harm test with the community standards test. Sopinka J. considers that the purpose of the obscenity provision is to prevent harm and not simply to vindicate conventional morality. He recognizes, however, that there is dispute about what sort of material causes harm. In his view the judgment that certain material is harmful should be made by the community. In all cases the arbiter for determining what amounts to the undue exploitation of sex — what creates an unacceptable risk of harm to society — should be the community as a whole.[16] Sopinka J. assumes that if the decision that material is harmful and subject to restriction does not depend on community standards then it will depend on "the individual tastes of judges".[17]

For Sopinka J. the community standards test provides a way to limit judicial subjectivity in the application of the prohibition against harmful material. The courts 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."[18] The stronger the inference of a risk of harm the lesser the likelihood of tolerance.

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[14] As Sopinka J. notes:

> In *Towne Cinema*, Dickson C.J. considered the "degradation" or "dehumanization" test to be the principal indicator of "undueness" without specifying what role the community tolerance test plays in respect of this issue. He did observe, however, that the community might tolerate some forms of exploitation that caused harm that were nevertheless undue.

Supra note 3 at 480.

[15] Dickson C.J.C. in *supra* note 10 at 505, quoted by Sopinka J. in *Butler*, *ibid.* at 480.

[16] *Butler*, *ibid.* at 481. This is derived from Wilson J. in *Towne Cinema*:

> [A]t some point the exploitation of sex becomes harmful to the public or at least the public believes that to be so. It is therefore necessary for the protection of the public to put limits on the degree of exploitation and, through the application of the community standard test, the public is made the arbiter of what is harmful to it and what is not. The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.

Supra note 10 at 524.

[17] *Butler*, *ibid.* at 484.

[18] *Ibid.* at 485. Gonthier J. describes Justice Sopinka's approach in this way:

> Sopinka J. uses the community standard of tolerance to gauge the risk of harm. In this context, tolerance must be related to the harm. It must mean not only tolerance of the

Something is harmful if "it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men".[19] Antisocial conduct "is conduct which society formally recognizes as incompatible with its proper functioning."[20]

Applying the community standards test, Justice Sopinka decides that the community will not tolerate explicit sex with violence. As well, "explicit sex which is degrading or dehumanizing may [not be tolerated] if the risk of harm is substantial."[21] He emphasizes that degrading or dehumanizing material fails the community standards test "not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women."[22] It is insulting and hurtful to women and it predisposes male consumers to act in a violent or discriminatory way against women. According to Justice Sopinka the community standards test does not prohibit a third category of material, "explicit sex that is not violent and neither degrading nor dehumanizing".[23]

B. *A Conservative Restriction*

Justice Sopinka's feminist rhetoric, which emphasizes the harm of pornographic material to women, runs against the conservative language and structure of section 163.[24] The central problem for Sopinka J., in his interpretation of section 163, is to articulate a clear and legitimate purpose for the provision that will withstand *Charter* review but at the same time will not run afoul of the rule against shifting purposes.

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materials, but also tolerance of the harm which they may bring about. It is a more complicated and more reflective form of tolerance than what was considered by Dickson C.J. in *Towne Cinema, supra.* Such a development is fully in accordance with the emphasis put by this Court on harm as the central element in the interpretation of s. 163(8).

Ibid. at 520-21.

[19] *Ibid.* at 485.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.* at 479.

[23] *Ibid.* at 485. Gonthier J. takes issue with the complete insulation of this third category:

I would hold that materials falling within Sopinka J.'s third category (explicit sex with neither violence nor degradation or dehumanization), while generally less likely to cause harm than those of the first two categories, may nevertheless come within the definition of obscene at s. 163(8) of the *Code*, if their content (child pornography) or their representational element (the manner of representation) is found conducive of harm.

Ibid. at 519.

[24] A more shocking example of the use of feminist language to justify a conservative provision can be found in the judgment of Lamer J. (as he then was) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1 [hereinafter cited to S.C.R.]. Justice Lamer says:

I find that the legislative objectives...go beyond merely preventing the nuisance of traffic congestion and general street disorder. There is the additional objective of mini-

In *R.* v. *Big M Drug Mart Ltd.*[25] the Court stated that "[p]urpose is a function of the intent of those who drafted and enacted the legislation at the time"[26] and that it is not proper for a court to redefine the purpose of the legislation to save it from attack under the *Charter*. The respondents in *Butler* argued that a "feminist" re-interpretation of section 163 involves exactly this sort of impermissible shift in purpose.

Sopinka J. answers this argument in two ways. First, he observes that the legislation is intended to prevent harm, a purpose that is broad enough to encompass the concerns of 1959 and 1992. He says:

> I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however, this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials.[27]

In Justice Sopinka's view, when section 163 was enacted in 1959 its purpose was the prevention of harm. This focus on harm represented a break with the conservative moralism that characterized the pre-1959 obscenity laws.[28] Even though the community's awareness and understanding of the harms of pornography have

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> mizing the public exposure of an activity that is degrading to women with the hope that potential entrants in the trade can be deflected at an early stage and of restricting the blight that is associated with public solicitation for the purposes of prostitution.

Ibid. at 1194. Criminal punishment seems an odd way to deal with a degraded or exploited group of persons.

[25] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.].

[26] *Ibid.* at 335. In *Big M* the scope of the prohibition was fixed. The issue was simply whether there was a constitutionally legitimate reason for banning Sunday shopping. However, in *Butler* the definition of a different or narrower purpose for s. 163 to avoid the charge of vagueness (or unconstitutional purpose) affects the scope of the prohibition.

[27] *Supra* note 3 at 494-95.

[28] The opposite view is expressed by J.P.S. McLaren:

> Contrary to subsequent commentary on this provision, which has tended to see its purpose as a move away from the conservative morality enshrined in the *Hicklin* test, it is clear, as Professor Charles has established in his analysis of the parliamentary debates on the new provision, that Mr. Fulton was seeking to toughen up the law....Mr. Fulton's statements in debate make it clear that the revised subsection was not designed to replace the *Hicklin* test, which he fully expected would be the gauge against which serious literature and art would continue to be judged.

"Now You See it, Now You Don't": The Historical Record and the Elusive Task of Defining the Obscene in D. Schneiderman, ed., FREEDOM OF EXPRESSION AND THE CHARTER (Calgary: Thomson, 1991) 105 at 130-31.

developed since 1959, contemporary concerns about harm to women are continuous with the community's fear in 1959 of the harm of moral corruption. Second, Sopinka J. points out that the community standards test gives the provision a general inbuilt flexibility: "A permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959".[29]

For Sopinka J. combining the harm test and the community standards test gives section 163 both stability and flexibility. But how much stability does this combined test offer? Even if it is accepted that the purpose of the obscenity provision is the prevention of harm (and it is only recently that the courts have explicitly identified this as the purpose), harm is not a fixed concept. Harm occurs when there is an interference with, or injury to, an important human interest. However, human interests are not determinate and objective and so what counts as harm is open and contestable. There is no value-neutral way to identify harmful conduct. Indeed Sopinka J. recognizes the potential for controversy in determining what is harmful and relies on community standards to fix the content of the ban on harmful material in a way that does not require *judicial* value choice.[30]

The community standards test has been criticized on a number of grounds. These criticisms are of two types. The first type questions whether community standards are an appropriate basis for determining whether conduct should be criminalized. Even though the Court has now said that the purpose of the provision is to prevent harm, community standards are used to determine what is harmful — what *causes* harm and more fundamentally what is *harm*. It appears that the substance of the provision is that an individual should be prevented from publishing material simply because most members of the community think the material is harmful and should be banned. In this way the obscenity provision is different from other *Code* provisions, in which Parliament defines more specifically a category of activity that is harmful to a particular human interest. The community standards test seems to confuse reasons for politically supporting a ban with reasons for banning material.

In spite of the Court's attempt to portray the community standards test as neutral in its concern about harm to society, the test has a conservative bias. It has been suggested that the test is "liberal" relative to its predecessor, the *Hicklin*[31] test, because it draws on the more liberal attitudes of contemporary society about sexual representation.[32] However, the focus on community standards seems to rest on the

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[29] *Supra* note 3 at 496.

[30] *Ibid.* at 484.

[31] Cockburn C.J. notes:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

R. v. *Hicklin* (1868), L.R. 3 Q.B. 360 at 371.

[32] Freedman J.A. (dissenting) notes:

> Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One mani-

idea that the law should defend the integrity of the community's conventional morality — the community's conception of what is harmful, whatever that may encompass. It appears then that the provision is concerned as much or more with the protection of the moral bonds of society as with the prevention of harm.

A more specific problem with grounding feminist arguments for the restriction of pornography on community standards, is that the law's commitment to this understanding of the wrong of pornography is contingent. The law does not seek to prevent harm to women. It seeks to prohibit material that the community considers harmful and therefore is not prepared to tolerate. It may be that at the moment the community is not prepared to tolerate "degrading" or "dehumanising" representations because it thinks that these are harmful to women. But in theory, at least, this could change.

The confusing merger of the harm test and the community standards test represents the Court's attempt to transform section 163 without violating the shifting purpose rule. But more fundamentally this merger reflects the Court's subjectivist understanding of moral judgment.[33] The Court recognizes that value-based content must be given to the concept of harm. But it can see only two possible sources — conventional morality and judicial subjectivity. In the Court's view judicial judgment that is not grounded in community standards is simply judicial preference and illegitimate. And so the Court seeks objectivity and legitimacy in the values of the general community.[34]

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festation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether [the materials] are obscene....

R. v. *Dominion News & Gifts Ltd.*(1962), [1963] 42 W.W.R. 65 at 80, [1963] 2 C.C.C. 103 at 116 (Man. C.A.). *See also* Dickson C.J.C.'s comments in *Towne Cinema*, *supra* note 10 at 508.

[33] The Court's moral subjectivism is evidenced by a number of statements including the following: "Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.": *Butler*, *supra* note 3 at 493, quoting D. Dyzenhaus, *Obscenity and the Charter: Autonomy and Equality* (1991) 1 C.R. 367 at 376; and "[M]uch of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate": *Butler*, *ibid.*

[34] *See* the comments of Dickson C.J.C. in *Towne Cinema*:

> [T]his inquiry, though involving judgments about values, must be distinguished from the application of the trier of fact's subjective opinions about the tastelessness or impropriety of certain publications. The decision must focus on an objective determination of the community's level of tolerance and whether the publication exceeds such level of tolerance, not the trier of fact's personal views regarding the impugned publication.

Supra note 10 at 516. And of Wilson J.:

> The test by which the trier of fact must assess the community standard is an objective one. The community standard itself, however, necessarily contains an element of subjectivity since what must be objectified are the subjective views of the entire community as to what degree of exploitation of sex is acceptable.

Ibid. at 520.

The second sort of criticism made of the community standards test raises doubts about whether the test can fix the content of the ban on harmful sexual material. There is no shared view in the community about the harm of sexually explicit material and even if there were the courts are ill-equipped to discover what it is. Sopinka J. recognizes as much when he observes that there are different views in the community about what material is harmful and that there is "a range of opinion as to what is degrading or dehumanizing."[35] A court is not required to hear evidence about community standards — and even if it were to hear evidence that evidence would be either partial and not clearly tied to community values or vague and general. As many judges have realized the test is really about what they are prepared to tolerate. The test does not avoid what the Supreme Court wants so badly to avoid — judicial judgment (understood as the expression of judicial preference or taste) about what material should be covered by the prohibition. Judicial subjectivity (value judgment) is simply dressed up in the objective garb of community standards.[36]

This collapse of the objective community standards test may be less significant, if we reject the assumption that judicial value judgments are simply subjective and therefore illegitimate. However, even if we take a different view about the legitimacy (and inevitability) of judicial value choice, the choices that judges must make under section 163 seem very wide open. The provision gives little direction to the courts. The community standards test was meant to give content to the provision and save it from attack on the grounds that it does not provide sufficient guidance. More importantly, even if we accept the legitimacy of judicial value choices, the courts have not been prepared to make these choices openly and explicitly — by defining particular categories of harmful material. The courts' failure to take responsibility for the law's content — hiding behind the community standards test — leaves the obscenity ban vague and manipulable.

Since community standards do not tie down the content of the ban, the real concern with Justice Sopinka's interpretation of the prohibition is not that its feminist commitment is contingent but instead that the general language he uses to describe the prohibition's purpose and the material it restricts is open to varying applications by the police, the prosecution and the judiciary. To avoid the charge of shifting purpose, Sopinka J. relies on abstract terms such as harm, moral corruption, degradation and dehumanization, to express the purpose, and define the scope, of the prohibition. These terms are broad enough to accommodate both conservative and feminist understandings of the wrong of obscenity/pornography.

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[35] *Supra* note 3 at 484.

[36] As Alan Young notes:

> The [community standards] test was designed to insulate the judiciary from the obvious criticism that their application of the statutory definition was just as subjective as their application of the common law *Hicklin* standard.
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> Judicial application of the standard is characterized by the recitation of endless platitudes used to demonstrate that the standard is objective and neutral.

News from the Front — The War on Obscenity and the Death of Doctrinal Purity (1987) 25 OSGOODE HALL L.J. 305 at 322.

Sopinka J. does not recognize that his account of the prohibition is open to a conservative, as well as a feminist reading, because he understands only a caricatured version of the conservative argument for the restriction of obscene material. He believes that the current law's focus on the prevention of harm, represents a break with the previous conservative restrictions on sexually explicit representations. According to Sopinka J.:

> The obscenity legislation and jurisprudence prior to the enactment of s. 163 were evidently concerned with prohibiting the "immoral influences" of obscene publications and safeguarding the morals of individuals into whose hands such works could fall. The *Hicklin* philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society....In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society.[37]

He believes that the conservative position is that sexually explicit material should be prohibited because it is offensive and because it undermines the moral bonds of the community. It is concerned with the "prevention of 'dirt for dirt's sake'",[38] with "moral disapprobation"[39] and with "maintaining conventional standards of propriety"[40] rather than with the prevention of harm. It involves the imposition of "a certain standard of public and sexual morality, solely because it reflects the conventions of a given community".[41] Sopinka J. thinks that section 163's focus on harm is distinct from the effort to protect conventional morality and represents a non-conservative foundation for the restriction of certain kinds of sexually explicit material. This is his view even though he wants to rely on community standards to determine what is harmful. For Sopinka J. the focus is harm, and community standards are simply the means by which the Court identifies the harmful material that is caught by the prohibition. This, he believes, is something different from enforcing community standards for their own sake.

However, concern about public offence and the erosion of the community's moral bonds is the conservative position from an external perspective. This is not the only way, nor even the most helpful way, to describe this position. The conservative position has more substance than Sopinka J. realizes. It rests on a moral view about the roles of men and women, the importance of the nuclear family and the nature of sexuality and sexual relations. The conservative position reflects a very different moral outlook than that which underlies the feminist position but it involves more than a simple desire to protect the moral sensibilities of ordinary members of the community. As Justice Sopinka recognizes when he links "harm" and "moral corruption", the language of harm can be used to describe the injury that sexually

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37 *Supra* note 3 at 492.
38 *Ibid.*
39 *Ibid.* at 493.
40 *Ibid.* at 498.
41 *Ibid.* at 492.

explicit materials may cause to these conservative "family values".[42] More specifically the language of dehumanization or degradation can be used to describe the devaluation of sexual intimacy, the destabilization of monogamous relationships or the undermining of traditional gender roles. Certainly Justice Sopinka's description of harm as the predisposition to "act in an anti-social manner"[43] offers plenty of space for a conservative reading of the provision. Justice Sopinka's example of anti-social conduct is "the physical or mental mistreatment of women by men"[44] but his definition of the phrase is much broader: "Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning."[45]

III. Fitting Feminist Arguments into A Liberal Account of Freedom of Expression

The other space for conservative co-optation of the *Butler* decision arises from the Court's attempt to fit feminist arguments about the nature and harm of pornography into the existing structure of freedom of expression adjudication, which is built on classical liberal assumptions about language, agency and harm. The Court tries to avoid the tension between the assumptions underlying the existing structure of freedom of expression and its adoption of feminist arguments about pornography, by suppressing the issue of the way pornography causes harm. And so added to the uncertainty about the harm of obscenity, which is reflected in the general language of degradation and dehumanization, is an uncertainty about the way obscenity/pornography causes harm and the kind of material that should be restricted because it causes harm.

A. *The Scope of Section 2(b)*

Justice Sopinka follows the pattern of previous Supreme Court judgments by giving little time to the question of whether the obscene material caught by the *Code* prohibition is expression protected under section 2(b). "[T]here is no doubt", says Sopinka J., "that s. 163 seeks to prohibit certain types of expressive activity and

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[42] As Sopinka J. notes:

> First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society.

Ibid. at 494.

[43] *Ibid.* at 485.

[44] *Ibid.*

[45] *Ibid.* As Richard Kramer notes:

> What is disturbing about the court's definition of harm are the wild cards which remain undefined. For example, what are we to conclude about 'conduct which society formally recognizes as incompatible with its proper functioning'?

R. *v.* Butler: *A New Approach to Obscenity Law or Return to the Morality Play?* (1992) 35 Crim. L.Q. 77 at 85.

thereby infringes s. 2(b) of the *Charter*."[46] He accepts that expression cannot be excluded from the freedom's scope on the basis of the content or meaning being conveyed. Although, later in his judgment, when he considers proportionality under section 1, Sopinka J. recognizes that the restricted expression does not "directly engage the 'core' of the freedom of expression values"[47] and so deserves less weight in the final balance.

However, Justice Sopinka is delayed briefly under section 2(b) by an argument made by the Attorney General for British Columbia. In responding to the argument that films, photographs and videotapes should not be considered expression protected under section 2(b) if their sole purpose is to arouse or shock, Sopinka J. says:

> [I]n creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression. The same would apply to the depiction of persons engaged in purely sexual activity.[48]

Sopinka J. sees expression as the act of an individual and the meaning of this act as simply a matter of the individual's intention. He fails to recognize that expression is a relationship between two or more persons, either in dialogue or with one speaking and the other listening. And he fails to recognize that this dialogue is embedded in larger social/communicative practices so that the meaning of an individual's actions is not simply a matter of his or her intentions.

To express something is to attempt to convey meaning to an audience through some more or less conventionalized symbolic form so that the audience will recognize your meaning. What makes expression significant and different from other human actions is not that it has an impact on others but that it has a particular kind of impact. There is a difference between a loud screeching noise that makes the listener cover his or her ears and the use of words or musical notes that the listener recognizes as meaningful. Expression is a valuable activity because the acts of speaking and listening involve the engagement/realization of reflective consciousness. Human agency emerges in the effort to articulate thought and feeling and in the effort to understand the expression of others.[49]

Expression involves giving symbolic form to inchoate ideas or feelings. An individual's ideas are manifested in, and shaped by, the form of his or her expression

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[46] *Supra* note 3 at 489.

[47] *Ibid.* at 500. He also considers it relevant that the production of pornography is economically motivated: *see ibid.* at 501.

[48] *Ibid.* at 489-90.

[49] R. Moon, *Lifestyle Advertising and Classical Freedom of Expression Doctrine* (1991) 36 McGILL L.J. 76 at 93.

— a form that is social in character in the sense that it belongs to the community and not simply to the individual. Because an individual's thoughts and feelings are partly constituted by the language in which they are expressed, the meaning of an individual's words etc. is not simply a matter of his or her pre-expression intentions. The individual cannot simply stand apart from the words she or he uses to express herself or himself in order to decide whether they match her or his real feelings or the way the world really is. In this way no act of expression is entirely transparent to either the speaker or the listener.[50] As I will argue below, recognition of communication as a relationship and language as partially opaque is vital to understanding feminist arguments for the restriction of pornography.

B. *The Application of Section 1*

Having decided that section 163 restricts expression protected by section 2(b), Sopinka J. then goes on to consider whether this restriction is justified under section 1. He goes through the various steps of the *Oakes*[51] test holding that the restriction advances a substantial and compelling purpose, is rationally connected to this purpose, achieves this purpose with minimal impairment to the freedom and represents a value that is proportionate to the detrimental impact on the freedom.

According to Sopinka J., the substantial and compelling purpose advanced by section 163 is the prevention of harm — and more specifically the prevention of harm to women. Pornographic materials "place women....in positions of subordination, servile submission or humiliation."[52] They portray women "as objects for sexual exploitation and abuse [and] have a negative impact on 'the individual's sense of self-worth and acceptance'."[53] As well, pornography creates a risk of harm to women because it affects the attitudes of male consumers about women and sexuality and may lead to acts of violence and discrimination against women.[54] In this way pornography runs against "the principles of equality and dignity of all human beings."[55]

When Sopinka J. considers the rational connection between the expression restricted by section 163 and the section's substantial and compelling purpose, he contents himself with vague statements about the link between pornography and harm — referring at the same time to the harmful effect that pornography has on its consumers and the harmful acts those consumers commit against women.[56] Sopinka

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[50] *See generally ibid.*

[51] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

[52] *Supra* note 3 at 479.

[53] *Ibid.* at 497. Sopinka J. borrows these claims from *R.* v. *Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1 at 7, 45 C.R. (3d) 36 at 43 (B.C.C.A.).

[54] Discussing the origin of s. 163, Sopinka J. says that "[t]he prohibition of [pornographic] materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole.": *Butler*, *ibid.* at 494.

[55] *Ibid.* at 479.

[56] This is also true of Justice Gonthier's concurring judgment. Gonthier J. states:

> Obscene materials debase sexuality. They lead to the humilation of women, and

J. observes that pornography "predisposes" consumers to commit anti-social acts, and in particular acts of violence against women. Exposure to material that degrades the human dimensions of life "contributes" to the moral desensitization of the male audience making it more likely that they will act in a violent way. However, Sopinka J. says very little about how this "predisposition" occurs and how it translates into harmful actions.

In his assessment of the rational connection between the restriction of pornography and the prevention of harm, Sopinka J. moves very quickly to consider empirical evidence about the connection between exposure to pornographic imagery and acts of violence against women. Yet, as Sopinka J. admits, the empirical evidence is far from conclusive and "the literature of the social sciences remains subject to controversy."[57] To the doubts raised about this evidence Sopinka J. has two answers.

First he says that it seems self-evident that exposure to this sort of material must have an effect on men's attitudes to women, contributing to a predisposition to do violence to women. He is prepared to rely on common sense:

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.[58]

According to Sopinka J. the link is recognized by the general community: "a substantial body of opinion....holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm".[59] However, he does not explain why this self-evident link does not show up clearly in the empirical evidence.

Second, Sopinka J. declares that as long as Parliament has a reasonable basis for believing that pornography causes violence against women, the courts should defer to Parliament's judgment. In taking this deferential approach, Sopinka J. is following the earlier decision of *Irwin Toy Ltd.* v. *Quebec (A.G.)*[60] in which the Supreme Court deferred to the judgment of the Quebec Legislature that certain kinds of advertising had a manipulative influence on children. The Court "afforded" the government "a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence."[61] In the *Butler* decision, Sopinka J. considers that "Parliament was entitled to have a 'reasoned apprehension of harm' resulting from the

> sometimes to violence against them....Without entering into the examination of the rational connection, some empirical evidence even elucidates the link between these materials and actual violence.

Ibid. at 524.

[57] *Ibid.* at 501.

[58] *Ibid.* at 502. Sopinka J. also says "it would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material.": *ibid.* at 479-80.

[59] *Ibid.* at 479.

[60] [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

[61] *Ibid.* at 990, quoted by Sopinka J. in *Butler*, *supra* note 3 at 503. According to the Court in *Irwin Toy*:

desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations."[62]

This willingness to defer to Parliament's judgment is surprising if only because in 1959, when the restriction was enacted, Parliament could not have made a judgment about non-existent empirical studies. More significantly, it is not at all clear what sort of causal judgment Parliament made when it enacted section 163. While the statutory test created by Parliament refers to sex combined with violence, cruelty and horror, it does not refer specifically to degrading representations of women. Instead the provision prohibits representations that unduly exploit sex. In his elaboration of section 163, Justice Sopinka insists that sexually explicit material is undue if it is harmful, or at least if it creates a risk of harm, and that the judgment about what material creates a risk of harm is to be based not on the judge's own preferences or feelings but rather on community standards, the perception of the general public. But if community standards determine the link between degrading and dehumanizing material and the unacceptable risk of harm to women, Parliament it seems has not made a causal judgment to which the Court can defer. Finally, the Court's deferential approach seems inconsistent with the idea that a restriction on freedom of expression can be justified only if a clear and convincing case is made under section 1 (i.e. only if the restricted material clearly and directly causes harm to important individual or societal interests). In deferring to Parliament's judgment on the issue, does the Court not fail in its obligation to defend *Charter* rights from unnecessary state interference?

But the reason for the Court's reliance on empirical evidence, common sense and deference to Parliament is obvious. Sopinka J. wants to uphold the obscenity restriction but he is unprepared to face the classical liberal claim that the answer to bad speech is not censorship but instead more and better speech. Ronald Dworkin, for example, opposes the legal restriction of pornography because he sees such a restriction as an attempt to silence the content or message of expression.[63] The

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> If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

Ibid.

[62] *Butler, ibid.* at 504.

[63] Dworkin notes:

> It would plainly be unconstitutional to ban speech directly *advocating* that women occupy inferior roles, or none at all, in commerce and the professions, even if that speech fell on willing male ears and achieved its goals. So it cannot be a reason for banning pornography that it contributes to an unequal economic or social structure, even if we think that it does.

"Liberty and Pornography", *The New York Review of Books* (15 August 1991) 12 at 14.

Similarly, Jamie Cameron believes that the restriction is based on the content of the message and is therefore illegitimate. She says:

> Because the Court's objective was advanced at the broadest level of generalization, what section 163(8) fundamentally prohibits is an unacceptable conception of equality and of female sexuality. However, if it is not permissible for Parliament to suppress dirt

negative impact of pornography, if there is any, is a matter of audience response — how the audience understands and reacts to the message of the material. For Dworkin any attempt to censor material, on the grounds that the larger community does not agree with the view of women it expresses, runs contrary to the very idea of freedom of expression. Individuals must be permitted to judge different points of view for themselves. If there is a risk that they may be persuaded by a view that we find objectionable then we should respond to that view and offer what we consider to be the better, and potentially more persausive, view. Because pornography is "subjectively" mediated,[64] empirical evidence about its harmful consequences is likely to be indeterminate but more importantly is simply irrelevant.

Instead of facing up to the argument of liberals like Ronald Dworkin, Sopinka J. offers a behavioural account of the harm of pornography, dropping from his analysis the whole question of human agency. He does not question classical liberal understandings of harm and expression and so he can only avoid liberal conclusions by completely suppressing the causal link between the restricted material and the harm caused to women. A response to the argument that it is illegitimate to censor the viewpoint of the pornographer must move past the classical liberal assumption that the meaning of an individual's act of expression is simply a matter of his or her pre-linguistic ideas and feelings and is always transparent to his or her audience, and the assumption that something causes harm only if it directly interferes with a clearly defined individual right or interest such as life or physical integrity or property.

C. *Rethinking the Harm of Pornography*

There are many feminist arguments for the restriction of pornography, but, either implicitly or explicity, all seem to rest on non-liberal understandings of expression, agency and harm.[65] Some feminists have argued that pornography should be restricted because it undermines the equality rights of women. Kathleen Mahoney, for example, argues that:

> for dirt's sake, because that would constitute the coercive imposition of a standard of morality, it is difficult to see how it is permissible for Parliament to impose a particular conception of equality.
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> ....
>
> [A] particular conception of equality can only be enforced by suppressing "unequal" thoughts, ideas and attitudes.

Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler (1992) 37 McGILL L.J. 1135 at 1149 & 1152.

[64] Frank I. Michelman notes that "[p]erception and understanding, meaning and feeling, are always in the chain of causation of the mischief": *see Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation* (1989) 56 TENN. L. REV. 291 at 301.

[65] I note that the judgment says little about the harms or abuses that take place during the production of pornography. This may not be so suprising given that the focus of s. 163 seems to be on obscenity and the consequences of audience exposure.

> Pornographic expression which causes harm to the social status and concrete interests of women negates and limits their equality rights, which ss. 15 and 28 affirm as fundamental values of Canadian society.[66]

However, in this abstract form the argument does not confront liberal assumptions about communication and agency. Equality rights are balanced against freedom of expression and in the balancing process equality rights are given greater weight because of their important position in the *Charter*, in sections 15 and 28. But there is no response to the argument that the realization of equality is dependent on freedom of expression — that real equality in the community can only emerge out of free and open debate, including debate about equality rights. The argument that pornographic expression interferes with the right to equality and so may be restricted, is incomplete without some recognition of the social conditions of agency, the non-cognitive character of the pornographic "message" and the systemic character of the harm of pornography.

Another argument in support of pornography censorship involves an internal claim about the value and operation of freedom of expression. The claim made is that the freedom of the pornographer to express his views about women and sexuality has the effect of undermining women's freedom of expression. Pornography silences women because it undermines their credibility as speakers in the community. Censorship of pornography is justified because it protects or promotes freedom of expression overall. However, instead of directly questioning liberal understandings of harm and expression, this approach trades on the general language of silencing and censorship. It joins without argument the "silencing" that occurs because a speaker is not taken seriously in debate with the silencing of a speaker by "physical" interference. But these two forms of silencing are very different in character, as Ronald Dworkin is keen to point out.[67] Much more needs to be said about the conditions of discourse — questioning liberal assumptions about the effective opportunity to communicate and the rationality of expression. When should expression that questions the credibility of another or is critical of another be suppressed because it undermines that other's freedom/power to communicate?

In two important and related ways feminist arguments involve a rethinking of classical liberal assumptions about the *cause* of *harm*. First, pornography *causes* harm not by persuading an audience to think or act in a particular way but rather by shaping or constructing non-cognitively the way the male audience views women. Second, the *harm* of pornography is not simply that it leads to discrete acts of violence or discrimination against women but that it creates or contributes to a larger social understanding of gender and sexuality that shapes individual thought and informs individual action.

Pornography is a concern not because of its sexually explicit content but because of the ways in which it organizes images of women — the ways in which

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[66] K. Mahoney, *Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law* in Schneiderman, ed., *supra* note 28 at 167.

[67] Dworkin, *supra* note 63.

women are presented as available and submissive. Ronald Dworkin and other liberals assume that the message of pornography is transparent to the viewer and available for reflection and judgment. However, pornography causes harm not because it carries a message that persuades consumers but rather because it presents women and sexuality in a way that does not ask for reflection and judgment. The consumers are not meant to see the pornographic image as meaningful or significant, as something that should be viewed carefully in order to gain understanding. The pornographic image does not give reflective form to emotion or idea. Rather, it is a representation of a woman meant for the sexual stimulation of the consumer.

The pornographic image appears natural and innocent, a representation of a real event, because photographs "simply show reality as it is",[68] and the expression of a natural impulse because pornography is "assumed to tap a natural response."[69] Yet beneath the apparent reality of these images are the highly conventionalized codes or devices by which pornography creates sexual arousal and builds an association in the consumer's mind between sexual pleasure and domination. The connection between pleasure and domination is implicit rather than explicit.[70] In the words of Rosalind Coward, the meaning of pornographic photographs arises "from *how*

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[68] As pointed out by Susan Sontag, photographs are seen as capturing reality:

> Such images are indeed able to usurp reality because first of all a photograph is not only an image (as a painting is an image), an interpretation of the real; it is also a trace, something directly stenciled off the real, like a footprint or a death mask. While a painting, even one that meets photographic standards of resemblance, is never more than the stating of an interpretation, a photograph is never less than the registering of an emanation (light waves reflected by objects) — a material vestige of its subject in a way that no painting can be.

ON PHOTOGRAPHY (Toronto: McGraw, Hill, Ryerson, 1978) at 154. Of course "[a] photograph is not simply a mechanical record. It is composed by the photographer, who selects the subject matter [the pose], the angle [and] the lighting." As well the photograph is always "touched-up" to "improve upon reality". *See* Moon, *supra* note 49 at 113.

Susanne Kappeler states: "The aim of realism is to obliterate our awareness of the medium and its conventions and to make us take what is represented for a reflection of natural reality." *See* THE PORNOGRAPHY OF REPRESENTATION (Minneapolis: University of Minnesota Press, 1986) at 2.

[69] C. Smart, FEMINISM AND THE POWER OF LAW (New York: Routledge, 1989) at 126. Smart further notes:

> [P]ornography....turns women's subordination into a 'natural phenomenon because it becomes equated with (hetero)sex which is also held to be 'natural'. Feminists have pointed out that if both men and women are sexually aroused by sights or accounts of eroticized domination, then it is assumed (wrongly) that domination (by men) and submission (by women) in the field of sex must be natural.

Ibid. at 117. Rosalind Coward states: "Visual images are constantly exempted from scrutiny, either they are 'real' or they are just 'aesthetically pleasing'." *See Sexual Violence and Sexuality* (June 1982) 11 FEMINIST REV. 9 at 12.

[70] C.R. Sunstein notes:

> Whether particular speech is low-value does not turn on whether the materials contain an implicit ideology; if it did, almost all speech would be immunized. The question instead turns more generally on the speaker's purpose and on how the speaker communicates the message. The pornographer's purpose in disseminating pornographic

various elements are combined, how the picture is framed, what lighting it is given, what is connoted by dress and expression, *the way these elements are articulated together*."[71] For example, in most pornographic photos the female model gives "the look" to the male consumer who is being addressed by the material, her eyes looking up, her mouth open and her lips wet, suggesting submission and desire.

In the image there is no claim, no argument and so nothing to be accepted or rejected. It is just a picture of a woman that is meant to sexually arouse the consumer, a natural process. Yet exposure to this material, which is presented, and therefore viewed, for sexual pleasure, directs and shapes the consumer's "natural" sexual response. In the words of Frank Michelman, "[Pornography] operates to affect people's minds at the level of ideological preconception rather than that of critically examinable argumentation....[I]t exploits the especially powerful mind-bending potential of sexual stimulus".[72] The power and the invisibility of the pornographic "message" is greater because the image is repeated so frequently. The barrage of pornographic images that are meant to sexually stimulate come to define, rather than reflect, the reality of female and male sexuality for its consumers.[73]

Some feminist arguments against pornography, such as that made by Helen Longino in her contribution to TAKE BACK THE NIGHT, hold that pornography should be restricted because its message is hurtful and defamatory. Longino believes that pornography has an explicit message. She says that:

> Pornography lies when it says that our sexual life is or ought to be subordinate to the service of men, that our pleasure consists in pleasing men and not ourselves, that we are depraved, that we are fit subjects for rape, bondage, torture, and murder. Pornography lies explicitly about women's sexuality, and through such lies fosters more lies about our humanity, our dignity, and our personhood.[74]

The attempt to justify the restriction of pornography by identifying a clear message that is unfair and hurtful, plays into the liberal argument that all issues should be open to public debate, that it is wrong to foreclose consideration of a particular social or political argument and that the answer to bad speech is more and better speech. In

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> materials — to produce sexual arousal — can be determined by the nature of the material. And any implicit "ideology" is communicated indirectly and noncognitively.

Pornography and the First Amendment (1986) DUKE L.J. 589 at 607.

[71] Coward, *supra* note 69 at 11.

[72] Michelman, *supra* note 64 at 299.

[73] S. Kappeler states:

> Sex or sexual practices do not just exist out there, waiting to be represented; rather, there is a dialectical relationship between representational practices which construct sexuality, and actual sexual practices, each informing the other.

Supra note 68 at 2. Susan Cole says: "Far from expressing dissent, pornography's message is becoming the cultural norm." *See* PORNOGRAPHY AND THE SEX CRISIS (Toronto: Amanita, 1989) at 38.

[74] *Pornography, Oppression, and Freedom: A Closer Look*, in L. Lederer, ed., TAKE BACK THE NIGHT (New York: William Morrow, 1980) 40 at 46 (emphasis added). She also says: "[Pornography]....is material that explicitly represents or describes degrading and abusive sexual behaviour so as to endorse and/or recommend the behaviour as described." *Ibid.* at 48.

this way the position of Longino gives too much ground. For as Catharine Mackinnon points out:

> The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, a political idea, does not make the pornography itself a political idea. That one can express the idea a practice embodies does not make that practice into an idea.[75]

This understanding of the way pornography affects the consumer, points to a very different understanding of its harm. Of central importance in the contemporary censorship debate has been the question of whether there is a discernable link between the consumption of pornography and the commission of acts of violence or discrimination against women. The focus on this question reflects the liberal understanding of harm as an interference with a tangible individual interest, an invasion of the individual's personal sphere. But the harm of pornography is more pervasive than this.

Pornography causes harm not because a particular story or image leads to a particular violent act against a woman. As Catharine Mackinnon recognizes, the harm "is not linearly caused in the "John hit Mary" sense."[76] The harm of pornography is the way it shapes the larger social understanding of gender and sexuality. This understanding, of course, informs the actions of individuals — actions that are sometimes violent: "[P]ornography doesn't just drop out of the sky, go into his head, and stop there. Specifically, men rape, batter, prostitute, molest, and sexually harass women. Under conditions of inequality, they also hire, fire, promote, and grade women...."[77] But perhaps Robyn Eckersley is right that: "The important 'effects' are not....the direct ones of violence of the kind focused on by the anti-pornography campaigns, but rather the way in which everyday viewing is organised."[78] At the root of men's violent and discriminatory actions "is the way men see women".[79]

A particular pornographic representation has an impact only as part of a larger system of pornography. There are copycat incidents where a man acts out the violence portrayed in a particular pornographic picture, film or story.[80] But even this sort of imitation must depend on the larger context of representation. The particular pornographic piece only gives form or direction to attitudes that are created by the larger culture of pornography.

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[75] FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Cambridge, Mass.: Harvard University Press, 1987) at 154.

[76] *Ibid.* at 156.

[77] *Ibid.* at 186.

[78] *Whither the Feminist Campaign?: An Evaluation of Feminist Critiques of Pornography* (1987) 15 INT'L J. OF THE SOC. OF L. 149 at 164. Smart, *supra* note 69 at 126: "[T]he expectation grows that this is woman's potential and destiny. Women may increasingly be viewed in this light, and pornography comes to inform the everyday viewing of women."

[79] Kappeler, *supra* note 68 at 61.

[80] Catharine Mackinnon notes: "Specific pornography does directly cause some assaults. Some rapes *are* performed by men with paperback books in their pockets.": *supra* note 75 at 184.

D. *The Ambiguity of Cause and Harm*

The Court in *Butler* approaches the pornography issue from a liberal perspective, looking for direct links between pornography and violence, but settling for a common sense recognition that a pornographic work creates a risk of violence. The evidence of a link between pornography and sexual violence is uncertain first because pornography acts through human agents who consume this material[81] and second because no piece of pornography causes a particular act of violence.[82] The link cannot simply be asserted or assumed but must be drawn out by examining "the cultural relations between representations, fantasies and behaviour."[83]

Because the Court has not been willing to rethink the liberal assumptions of the existing model of freedom of expression, and has simply avoided serious consideration of the way that pornography causes harm to women and to the community, there is great uncertainty about the scope of the obscenity provision. According to Sopinka J., section 163 restricts material that causes physical and other harm or, at least, creates a risk of such harm. But we are still not very clear about how harm is caused and so it is difficult to say what material is caught by the prohibition. Not only is there space for a conservative interpretation of the harm which section 163 is intended to

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[81] T. McCormack, *Must We Censor Pornography: Civil Liberties and Feminist Jurisprudence* in Schneiderman, ed., *supra* note 28 at 180. Concerning the empirical evidence linking pornography with sexual violence, McCormack observes that:

> The research was solidly within a positivist tradition of experimental stimulus/response studies that feminists, and others, had criticized for its narrowness and ahistoricity. Moreover the studies were based on a theory of human nature which made almost the same assumptions about human nature as pornography did, an irony that was either unnoticed or lost.

Ibid. at 196.

[82] This is why the analogy some writers make between the risk of violence from pornography and the risk of cancer from cigarette smoking does not work. Kathleen Mahoney, for example, says:

> While hundreds of studies indicate that pornography reinforces sexual attitudes and behaviour antithetical to equality rights and contributes to the perpetuation of violent and dangerous behaviour, the same causal and methodological problems arise in this kind of research as in research which attempts to positively prove that alcohol causes traffic deaths or smoking causes cancer. The links are suggestive, but none of them are dispositive. Uncertainty as to the nature and extent of the link, however, should not be enough to make obscenity laws unconstitutional. Evidence of potentially serious harm has justified government regulation of the tobacco and alcohol industries as well as many others where health and safety are concerned. The effects of pornography on women should be of no less concern when so much evidence suggestive of harm exists. (Sunstein, *supra* note 70 at 601 makes the same claim relying on similar comparisons.)

Supra note 66 at 169. There are important differences between the risk of cancer from smoking and the risk of sexual violence from pornography. Pornography creates this risk because it shapes the thinking and guides the behaviour of a human agent. Pornography has an impact because it contributes to the social construction of sexuality — a systemic process that makes degradation, violence and subordination appear unexceptional and even natural.

[83] Kappeler, *supra* note 68 at 42.

prevent but as well there is considerable space for conservative concerns to influence the judgment about what material causes harm.[84]

Even if the Court were clearer about the harm and its cause, the possibility of a prohibition with clear parameters seems remote. Once we recognize the systemic character of the harm, there is no clear line separating harmful from harmless sexual representation — or pornographic material from the larger culture.[85] No particular representation causes harm. Images throughout the culture shape our attitudes about gender and sexuality. For example, images of women in advertising often have the same structure as sexually explicit pornography and contribute to the social picture of women as subordinate and men as dominant.[86]

The recognition that pornographic harm is systemic in character has led to radical disagreement in the feminist community about the use of legal censorship. On the one hand, this understanding of pornography's harm may support very significant intervention by the state into the way sexuality is represented. The concern, however, is that such intervention would overwhelm public discourse

[84] *But see* Kathleen Mahoney who argues:

> [I]f the harm-based equality interpretation is adopted, the rational connection is there. The impairment to expression is minimized because the harm is more explicit, resulting in more predictable application of the law.

R. v. Keegstra: *A Rationale for Regulating Pornography* (1992) 37 McGILL L. J. 242 at 265. However, Mahoney simply asserts the link between pornography and harm:

> Evidence demonstrating that exposure to pornographic material produces scientifically measurable harm to society, based on a causative link between exposure to such material and the commission of particular crimes, is not necessary to support government regulation.
>
> ....
>
> As it is overwhelmingly women who are portrayed in pornographic depictions, the proposition that obscenity promotes inequality based on gender is very difficult to dispute.

Supra note 64 at 169-70.

[85] Catharine Mackinnon writes:

> The difficulties courts have in framing workable standards to separate 'prurient' from other sexual interest, commercial exploitation from art or advertising, sexual speech from sexual conduct, and obscenity from great literature make the feminist point. These lines have proven elusive in law because they do not exist in life. Commercial sex resembles art because both exploit women's sexuality. The liberal's slippery slope is the feminist totality. Whatever obscenity may do, pornography converges with more conventionally acceptable depictions and descriptions just as rape converges with intercourse because both express the same power relation. Just as it is difficult to distinguish literature or art against a background, a standard, of objectification, it is difficult to discern sexual freedom against a background, a standard, of sexual coercion. This does not mean it cannot be done. It means that legal standards will be practically unenforceable, will reproduce this problem rather than solve it, until they address its fundamental issue — gender inequality — directly.

Supra note 75 at 154. It is unclear why Mackinnon thinks that once there is a real effort to address the issue of gender equality, application problems will dissolve or at least become manageable.

[86] Coward, *supra* note 69 at 13. The fashion photograph is often seen as sexual not just because of its structure but because of the dominance of pornographic codes which affect how we view women.

about sexual issues, making the state the arbiter of acceptable sexual representation. Such an approach would involve significant risk of repression of non-mainstream sexual representation. More generally it would involve a rejection of the possibility of meaningful freedom of expression in the shaping of collective ideas about sexuality.

The alternative, however, is no censorship at all. No one class of representation creates a culture of sexual subordination. To focus on a particular category of representation will not bring about gender equality and may even advance conservative values.[87] Indeed, the belief that it is possible to define with reasonable clarity a category of material that causes harm and the use of sexual explicitness as an essential element in the definition of that category indicates that conservative concerns about the pollution of the moral person continue to dominate thinking about obscenity/pornography.[88] Yet the no censorship response seems extreme in its own way, rejecting any sort of legal restriction on harmful material.

The difficult question is whether or not it is possible to reconcile a limited form of censorship with a recognition of the systemic character of pornographic harm. It is sometimes suggested that the focus of a ban should be on violent sexual representation. Violent sexual representation, whether or not sexually explicit, may be only a small part of the picture of sexual subordination, but it is a particularly dangerous and frightening part. The impact of violent representations may depend upon the larger pornographic culture but they give brutal shape to that culture. Violent representations extend the boundaries of "ordinary" and "natural" sexual behaviour in ways that make its suppression necessary.[89] (This, of course, makes definition of the category of violent material difficult). However, it seems unlikely that the existing *Code* provision could provide a reliable grounding for either a broad or narrow harm-based ban on pornography.

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[87] Eckersley writes:

> The problem, as I see it, is whether it is at all possible to devise a legislative strategy that is able to break down dominant forms of feminine visibility across a range of different media whilst simultaneously ensuring diverse, non-repressive sexualities for women *and* men. This is indeed an ambitious goal and one which the current institutions of the state and their various law reform agencies are not particularly well equipped to envisage, let alone accomplish.

Supra note 78 at 169.

Smart states:

> The radical feminist campaign on pornography risks becoming a latter day moral crusade which is prepared to concede more power to an anti-feminist legal system in order to achieve limited legislative regulation over some forms of pornography.

Supra note 69 at 116.

[88] Coward, *supra* note 69 at 13. This idea was also suggested to me by Iain Ramsay.

[89] Mackinnon notes: "[M]ore and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex is (and he is) daring and dangerous." *Supra* note 75 at 151.