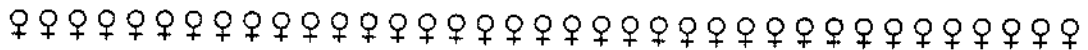


**LEAF AND PORNOGRAPHY:
LITIGATING ON EQUALITY AND SEXUAL
REPRESENTATIONS**

by Karen Busby

Associate Professor, Faculty of Law, University of
Manitoba, and a member of the LEAF National
Legal Committee.



September, 1993

TABLE OF CONTENTS

1. Introduction.....	1
2. What was the law before <i>Butler</i> ?.....	2
3. What position did LEAF take in the <i>Butler</i> case?.....	2
a. How does pornography contribute to women's oppression?.....	3
b. Is pornography amenable to state regulation?.....	6
4. What is the obscenity law after <i>Butler</i> ?.....	8
5. Did LEAF appeal to homophobia in the <i>Butler</i> case?.....	12
6. Is LEAF's position on pornography anti-lesbian?.....	13
a. Lesbian imagery and a systemic equality analysis.....	15
b. Discriminatory enforcement.....	17
7. How might the <i>Butler</i> decision affect the artistic community?.....	19
8. A note on LEAF's interaction with the media since the <i>Butler</i> case.....	21
9. Conclusion.....	22

LEAF AND PORNOGRAPHY: LITIGATING ON EQUALITY AND SEXUAL REPRESENTATIONS¹

In August, 1987 the Winnipeg police seized the entire inventory of the video store owned by Donald Butler. He and an employee were charged with about 250 offences under the *Criminal Code* obscenity² provisions. Most of the seized materials were sexually explicit videos or magazines for heterosexual men; a small number involved gay men. Ultimately the case proceeded to the Supreme Court of Canada where the court considered, for the first time, the effect of the *Charter's* free expression guarantee on the obscenity law. The issue *Butler* presented was whether the *Charter* limits or proscribes government power to criminalize the sale of pornographic materials.

The Women's Legal Education and Action Fund (LEAF) intervened in *R. v Butler*³ arguing the *Charter's* freedom of expression guarantee had to be read in light of the *Charter's* equality guarantees with a focus on pornography's harms to women⁴. While we have been involved in more than 100 cases and other projects, none has come close to generating the widespread controversy created by *Butler*. (Indeed many people think that pornography is the *sole* issue in LEAF's mandate, even though this is the only obscenity case in which we have participated.) Since *Butler's* release, our position has been simplified, even caricatured, and criticized, sometimes vociferously, by the media, civil libertarians, and some lesbians and gay men. This paper will discuss the

¹ The Women's Legal Education and Action Fund (LEAF) is a national organization that, among other things, participates in litigation that may impact on women's equality claims. This paper has been endorsed by LEAF's National Legal Committee and is intended, in part, to facilitate discussions on what position LEAF should take in the future on issues touching equality and sexual representations. The "we" in this paper is LEAF.

Writing this paper has been a collective process. The LEAF factum in *R. v. Butler* (1992) 8 CRR (2) 1 (SCC) was written in three intensive weeks by Kathleen Mahoney, Catharine MacKinnon, and Linda Taylor; I and a number of others reviewed all the videotapes and magazines. Jane Craig, LEAF's Director of Communications, first suggested that this paper be written and how it should be organized. The LEAF National Legal Committee, especially Sheila McIntyre, Andrée Côté, Helena Orton, and I worked together developing this paper's central ideas and Sheila, in particular, provided generous, supportive, and thorough feedback on innumerable drafts. I was encouraged that many others offered invaluable comments on later drafts of the paper in a spirit of commitment to social change even where they do not agree with everything in the paper. In particular, I should thank Brettel Dawson, Larry Clawson, Anne McGillivray, Doug Melnyk, Ngaire Naffine, Wes Pue, Janice Ristock, Becki Ross, Daniel Sansfaçon, Sheila Spence, and Mariàna Valverde. Elaine Carol, a Toronto-based artist, deserves special thanks for organizing a meeting of mainly Toronto-based activists to talk about LEAF's work on sexual representations. Finally, I must also thank my family and friends for their care and support during the often painful journey since the Manitoba Court of Appeal handed down its decision in *R. v. Butler* in November, 1991.

² While the *Criminal Code* just uses the word "obscenity", this term and "pornography" are often used interchangeably in *Butler*, *supra.*, and other cases. While some people use the words "pornography" and "sexually explicit" synonymously, for others "pornography" describes materials which are primarily intended to sexually arouse viewers. Many feminists have used "pornography" to describe harmful sexual imagery. Fewer use it in the same sense as the *Butler* court, i.e., as the descriptive term for materials which should be subject to legal regulation. Needless to say, these semantic differences lead to misunderstanding and confusion. In this paper, "obscenity" is used to refer to the criminal standard for proscribed materials. "Pornography" and "sexually explicit" are usually synonymously. However the context of the former will often import a sense of harm (eg., "some forms of pornography").

³ *Butler supra.*

⁴ This is analogous to LEAF's position in *R. v. Keegstra* (1990), 3 CRR (2) 193 (SCC) and *Taylor v. Canada* (1990) 3 CRR (2) 116 (SCC) where we argued that a free expression challenge to the *Criminal Code* hate propaganda provisions had to consider the equality rights of vilified groups.

obscenity law before and after *Butler*, LEAF's position in the case⁵ and how that analysis affects lesbians and gay men, the impact of *Butler* in the artistic community, and how LEAF has been presented in the media since *Butler*. In addition to providing information and responding to some of the criticisms, we also hope to foster continuing dialogue on what position LEAF should take in the future on issues related to equality and sexual representations.

What was the law before *Butler*?

Before the Supreme Court of Canada's decision in the *Butler* case, interpretations of the *Criminal Code* obscenity provisions were vague and inconsistent. The *Criminal Code* prohibits the "undue exploitation of sex" and judges had interpreted this as prohibiting materials that the community would not tolerate others seeing. In turn, determination of the "community standard" required a judge to articulate a "general instinctive sense of what is decent and what is indecent"⁶. For example, when the Manitoba Court of Appeal considered the *Butler* case, it condemned all sexually explicit imagery as immoral, finding that any deviations from conservative notions of modesty and permissiveness were illegal. The materials were considered inherently undesirable, independent of any harm.

Before the Supreme Court of Canada decision in *Butler*, it was not clear whether sexually explicit imagery whose apparent purpose was simply to entertain or sexually arouse, or artistic works dealing with sexual themes would violate the test on the basis of "undue exploitation of sex". And it was far from certain that lesbian or gay materials, even where they were not explicitly about sex, or heterosexual representations purporting to represent lesbianism would survive an application of the "community tolerance" test.⁷ Any change to these interpretations of the obscenity law had to be an improvement.

What position did LEAF take in the *Butler* case?

LEAF's mandate is to promote women's equality through challenges to laws and practices that contribute to systemic or institutional inequalities. LEAF is committed to developing arguments designed to promote substantive equality⁸ for all women, including women of colour, lesbians,

⁵ Copies of the *Butler* factum are available from the LEAF national office [new address].

⁶ The community standards test as defined in *R. v. Brodie* [1962] S.C.R. 681 at 705.

⁷ Most notoriously, as discussed *infra*. (see text accompanying notes **43-55), Canada Customs used the *Criminal Code* standard to bar entry of materials on lesbian and gay sexuality or orientation.

⁸ On "substantive equality" see Helena Orton, "Litigating for Equality: LEAF's Approach to Section 15 of the Charter", in Karen Busby et al, *Equality Issues in Family Law: Considerations for Test Case Litigation* (Legal Research Institute of the University of Manitoba: Winnipeg, 1989). She states at 9 that "LEAF has argued that the section 15 guarantee of substantive equality is to promote a society in which the hitherto powerless, excluded, and disadvantaged enjoy the valued social interests (such as dignity, respect, access to resources, physical security, membership in community and power) available to the powerful and advantaged. Conversely, section 15 is intended to alleviate the disadvantage and social

women with disabilities, and economically disadvantaged women. LEAF had four options in the *Butler* case. We could have accepted the law as it had been interpreted; supported a position that would have eliminated any criminal regulation of pornography; asked the court to strike down the *Criminal Code* provisions and to invite Parliament to introduce new legislation; or, asked the court to redefine the rationale for the *Criminal Code* obscenity provisions by focusing on its equality implications for women and children. Each option was assessed in light of its implications for women's equality and its effects on substantive equality claims of men who are part of historically subordinated communities.

The first option, accepting the law as it had been interpreted, was rejected. LEAF argued that moral intolerance, which is the rationale underlying the conservative case for criminal regulation of most, if not, all sexually explicit imagery, should not be the basis for a conviction. It was this rationale that made materials depicting lesbians or gay men vulnerable to prosecution and reduced feminists' political critiques of pornography to disputes about good taste. We stated in our factum that the traditional rationale for obscenity laws contributed to a "...host of problems, weaknesses, and potential legal disabilities... includ[ing] vagueness, subjectivity, gender bias, potential for abuse as a mechanism for censorship, and difficulties of proof and effective enforcement."

The remaining three options required a more in-depth consideration of how some forms of pornography contribute to women's oppression and whether these are amenable to state regulation.

How does pornography contribute to women's oppression?

Most feminists are concerned about the harms some pornography engenders. As there is a gross distortion of power in our society in favour of heterosexual white men, any cultural forms and practices that may contribute to this distortion need to be examined. Sexual representations of women created by and for these men must be part of this study. In particular, therefore, we need to examine the theoretical and empirical links between pornography and systemic sexual violence.

Some pornography combines sex and the infliction of violence or humiliation, other depictions sexualize racism or the vulnerability of children or women with disabilities. These depictions eroticize sexual and racist aggression and male dominance, and perpetuate rape myths in a culture where sexual violence against women and children is pervasive. Some of the seized heterosexual materials in *Butler* presented women being raped (in one video an actual rape was filmed⁹), in bondage to men, subjected to racist insults, as children (some actually appeared to be

subordination maintained by dominant societal groups, whether or not intentionally imposed and whether explicit or by adverse effect." At 10 she state that "LEAF argues that the equality guarantee must reject laws and practices that reinforce and shape women's disadvantage, and support laws and practices that promote for women the equal enjoyment of valued social interests that have historically been available to men."

⁹ One commentator on this paper asked how I could "know" that an actual rape was filmed. In the segment in question, the woman was assaulted by two men. She struggled and pleaded with them to stop but ultimately she just attempted to protect herself from the assaults. The scene did not end with her proclaiming to have enjoyed the encounter

children¹⁰), sadists, and masochists. In a photo layout titled "Dyke Meat", lesbians were presented as rapists and aggressive recruiters to lesbianism. Brother-sister incest was presented. No materials presented safe sex. One video failed to edit out a Black woman being revived with an oxygen mask. She had passed out while performing oral sex at the bottom of a pile of five people performing oral sex on each other.

One form of harm that may exist is a connection between pornography use and an increased propensity to or tolerance of physical aggression including sexual assault against women. While some researchers have demonstrated a link between use of some forms of pornography and such actions or attitudes, others assert that the connection cannot be supported. The fact is that social scientists are not capable of proving whether there is or is not a *direct* link between pornography and other forms of violence including sexual assault. Clearly there is a need for further study on the causes of pervasive sexual violence, but in the meantime LEAF chose not to ignore the substantial body of empirical research indicating that pornography is implicated.

Another area of inquiry is to look to women's direct experiences in pornography production. Pornography produced by straight, white men capitalizes on women's social and economic inequality. Some¹¹ women and children in the pornography industry are sexual abuse survivors. Others living in poverty sell their bodies to survive. Some are coerced or forced into making the materials, or cope with the work through drug use. Some are physically, psychologically, and sexually hurt during production¹². It is trite to say that employment laws do not protect the

(see *infra.*, note ** 32 on "positive outcome rape") but, rather she was left lying on the floor. Two psychologists viewed the film and both were of the view that a rape had occurred. Furthermore, the camera was stationary throughout most of the shooting and the segment appears to be unedited except, perhaps, for length. For example, there are no close-ups or significant camera angle changes which, if there were, would suggest that the segment was shot more than once and that care might have been taken to ensure that no one was hurt during a simulation.

¹⁰ Obviously this observation is a guess as to the age of those involved in production. The guess is based on apparent physical development and my reading of the images' coding and text which seems to focus on the "actors'" actual youth rather than as adults impersonating children. While my observations may not be inaccurate in this case, it is undeniable that children are involved in making pornography. See, for example, Gitta Sereny, *Invisible Children and the Shattering Truth of Runaways On Our Streets* (London, Pan, 1986) (survey on child prostitutes in 3 countries—*every one* had been asked to make pornography); Liz Kelly, *Pornography and Child Sexual Abuse* in Catherine Itzin (ed.), *Pornography: Women, Violence and Civil Liberties* (Oxford University Press, 1992) (70-80% of runaways in one study had been involved in making pornography); Tim Tate, *Child Pornography: An Investigation* (London, Methuen, 1990) (description of the "cottage industry" for child pornography, in particular its reliance on amateur creation and distribution systems). See also, *R. v. Robinson* (15 April 1993) 9201-1805-C6 (Alta. Q.B.) *per* Hunt, J. (conviction for making obscene pictures of a 15 year old prostitute) and "Child Pornography Case Stuns Thompson", *Winnipeg Free Press*, April 8, 1993 (story on the arrest of a man for making sexually explicit films of 10 and 11 year old girls). In 1992, Winnipegger Karl Krantz was found in possession of videotapes of his sexual assaults of approximately 100 Aboriginal girls. Convictions were entered on only a small number of the assaults recorded on the tapes as many of the girls could not be identified or found. It was not an offense *per se* to possess the videotapes. See also note **19.

¹¹ Note that I have not claimed that all of the actors are harmed in the same way, nor do I see all of these individuals as voiceless or passive. The fact that some are is enough to give rise to concern.

¹² For example, Linda (Marchiano) Lovelace was hurt in the production of *Deep Throat* as is clear from the bruises on her body which are visible in the film and her accounts of what happened to her: Lovelace, *Ordeal*, (New Jersey: Citadel Press, 1980). In spite of this knowledge which, I think, should influence how we read the film, some have argued that *Deep*

participants¹³. A question that should be thought about in relation to every sexually explicit image is, "what did the women and men in the picture have to do so that the producers could get the shot?"

Pornography can also hurt women associated with its users. Some women's partners humiliate or terrorize them into imitating pornographic materials. Susan Cole's study on women staying at a battered women's shelter found that 25% were forced to perform acts their partners saw in pornography¹⁴. The presence of pornography in some contexts, like workplaces, serves to harass, even exclude, women.

The freedom of expression guarantee, which wrongly presupposes that everyone has equal access to the marketplace of ideas, is meant to facilitate truth seeking, foster social and political decision making, and permit diversity in individual self-flourishing. Some pornography, on the other hand, inhibits women from telling the truth, undermines respect for our words, and is the antithesis of self-fulfilment for most women. In other words, it denies women free expression. Furthermore, it sexualizes bigotry, contempt, and even hatred for every class of people white men have constructed as less than fully human: white women, women of colour, First Nations women, disabled women, lesbians, prostitutes, and feminists, as well as men from subordinated groups. Pornography is a multi-faceted, systemic practice of exploitation and subordination based on sex that differentially and materially harms women. It plays an important part¹⁵ in the social construction of sexual inequality and, in particular, erodes the potential for any serious assertion of equality rights. When seen in this way, our thinking around pornography must involve a serious assessment of its impact on substantive equality and not just on the unbridled protection of freedom of expression.

Throat is not "an unending paean to male dominance" because it shows a woman actively seeking to attain her own sexual pleasure: Lisa Duggan, Nan Hunter, and Carole Vance, "False Promises: Feminist Anti-Pornography Legislation in the U.S." in Varda Burstyn (ed.) *Women Against Censorship* (Douglas & McIntyre, Toronto: 1985) at 139.

Even under ideal conditions, the creation of sexual imagery is full of complicated dynamics. For example, the lesbian artist collective, Kiss and Tell, acknowledges that one reason why they used only two models in the creation of their "Drawing the Line" exhibition on representations of lesbian sexuality was that it was important to collaborate "...between women who had built trust over an extended period of time. It is our history together that has let us explore the often scary dynamics in explicit sexual photography." Kiss and Tell (Susan Stewart, photographer, in collaboration with Persimmon Blackbridge and Lizard Jones), *Drawing the Line: Lesbian Sexual Politics on the Wall*, (Vancouver, Press Gang Publishers: 1991) np.

¹³ In making this observation I am not saying that sex trade workers should not be protected by employment laws. As Becki Ross stated in a letter to me, dancers and strippers, in particular, have long argued for improved working conditions, freedom from harassment, standardized wages, and job security. Feminists should support these claims. But until such law reforms are secured, criminalizing the distribution of some pornography, (eg., violent sexual imagery) may discourage its creation thereby protecting the women against dangerous work.

¹⁴ Susan Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Press, 1989) at 44.

¹⁵ Contrary to what some have said, LEAF does not assert that pornography is the *alpha* and *omega* of women's subordination by men or women's inequality. Women are subordinated and materially disadvantaged in multiple and intersecting ways. Most of LEAF's cases have focused on egalitarian laws relating to employment, reproduction, or sexual violence and the intersection between them.

In summary, the relationship between pornography and violence against women arising from its use and its creation as established by empirical evidence, and the theoretical links between pornography and the denial to women of freedom of expression are serious, present harms that deny women equality. In light of this, LEAF could not support a strategy of inaction. The *Butler* case could not be argued without reference to the equality interests at stake and, as ultimately proved to be so, only LEAF argued the case on the basis of equality.

Is pornography amenable to state regulation?

While feminists share a broadly-based consensus that there is a relationship between some pornography and sexual inequality, the issue of which strategies to pursue in the face of these harms is complex. Some advocate finding places for materials on diverse sexualities which do not exacerbate sex and race inequality. Others encourage direct action like picketing or boycotting. Still others emphasize education on the multiple meanings and effects of all media representations of women. But these strategies, which are not mutually exclusive, rely on isolated and often ignored counter-voices attempting to counter a multi-billion dollar business. Their ability to displace a culture of pervasive inequality is minimal.

In addition to these strategies some look to the law to regulate pornography. Since LEAF's mandate is to promote women's equality through legal action, our work on pornography focuses on obscenity law. Every woman working with LEAF recognizes that, at best, the legal arena is a forum where social change can sometimes be facilitated. In spite of law's limitations, we do not accept that women should abandon law while struggling to transform other institutions which contribute to the subordination of women, principally because law is so implicated in shaping and rationalizing these institutions. Furthermore, this forum has the potential to disrupt established social and political norms. Using litigation to accomplish feminist goals holds as much promise and as much risk as any other form of self-help political activism.

Feminist litigation on pornography provides opportunities for expressive moments on (and acts as the catalyst for further analysis¹⁶ of) the relationship between sexual subordination of women, sexual violence, and the laws that legitimate this violence. It can also lead to an exposure of subtle and not so subtle discrimination against those who produce and distribute materials--whether about sexuality or otherwise--that do not conform to gender role dictates imposed and enforced by dominant groups. Finally, it is one place to deliver an important social and political message about variously situated women's equality, which in the context of pornography, is a demand that the discourse on sexual representation be shifted from decency to power.

The *Butler* case focused on whether any sexually explicit representations could and should be subject to criminal prohibition. For some feminists, the disadvantages of criminal prohibitions outweigh its benefits. While aspects of pornography contribute to all women's sexual subordination, its proliferation especially harms some, including women of colour and poor women. But its

¹⁶ Since the *Butler* decision was released, there has been a resurgence of discussion in a number of forums on pornography and other sexual representations.

regulation poses greater risks to other women, most notably lesbians and artists¹⁷. Every feminist is concerned about violence against women and we agree that significant psychic energy and financial and other resources must be dedicated to exposing and working against sexual, racial and homophobic violence, whatever its form. At the same time, there is a concern that over-emphasizing sexuality's oppressive forms eclipses feminist explorations of eroticism¹⁸ both because the message about sexuality that this research reveals seems, at times, hopelessly pessimistic and because the work itself leaves little energy or impulse for desire.

While exploring women's sexualities must be a feminist project, LEAF could not support a position that would have eliminated any criminal regulation of pornography given the pervasive, direct effects of pornography on women's lives. Just as it will not end sexual assault, criminal prohibition will not eliminate harmful pornography. But it might discourage production of its violent forms, require distributors to evaluate what they are distributing, facilitate civil suits against pornographers, in addition to delivering a political message on pornography's contribution to women's inequality. We were reluctant to ask the court to strike down the *Criminal Code* provisions with an invitation to Parliament to introduce new legislation because we feared that the Conservative government would introduce another morals-based law¹⁹ that would have cast a long

¹⁷ In making this observation, I am not trying to line up women of colour and poor women against lesbians and artists, especially as there are lesbians of colour who are artists and who are poor. Rather, I am trying to encourage serious thinking about the differential impacts of pornography on variously situated women. This paper will consider this issue as it affects lesbians and artists in more detail *infra* (see text accompanying notes **38-62) because members of these communities that have identified this as a priority and requested that LEAF do this work. LEAF's position on racist hate speech in *Keegstra and Taylor* (*supra*), and on racism and pornography in *Butler* have not been subject to sustained comment by members of communities of colour. For the most part, there seems to be a some consensus among people of colour writing about these issues around harm, equality claims and the ways in which images and stereotypes of women and men of colour, including sexuality, are reproduced, read and received by white men. (But see Kobena Mercer, "Just Looking for Trouble: Robert Mapplethorpe and Fantasies of Race" in Lynne Segal and Mary McIntosh, Sex Exposed: Sexuality and the Pornography Debate (New Brunswick, New Jersey: Rutgers University Press, 1993).) Where controversy exists is whether the state should be enlisted given its historic role in subordinating these communities and their members, and whether pornography should have priority in the face of competing issues such as poverty, etc. See, eg., Aminatta Forna, "Pornography and Racism: Sexualizing Oppression and Inciting Hatred" in Itzin *supra*.; Pratibha Parmar, "Rage and Desire: Confronting Pornography", in J. Dickey and G. Chester (eds), Feminism and Censorship: The Current Debate (Prism Press, London: 1988). See also Katie King, "Producing Sex, Theory, and Culture: Gay/Straight Remappings in Contemporary Feminism", in Marianne Hirsch and Evelyn Fox Keller (eds), Conflicts in Feminism (New York, Routledge: 1990).

¹⁸ See Mariàna Valverde, "Beyond Gender Dangers and Private Pleasures: Theory and Ethics in Sex Debates", (1989) 15 *Feminist Studies* 237 where she attempts to provide a framework within which to answer the question, "what is the place of sexuality in both our oppression and our project for liberation?" For a superb discussion on the erotic as a source of information and power in women's lives, see Audre Lorde, "Uses of the Erotic: The Erotic as Power", in Sister Outsider (The Crossing Press, Freedom, Calif.: 1984).

¹⁹ Eg., in May, 1987 the federal government introduced Bill C-54 which would have prohibited all explicit sexual representations had it not died on the order paper when the 1988 election was called. Similarly, Bill C-388 (December, 1992) would prohibit all sexually explicit representations, but as this is a private member's bill, it is unlikely to receive a second reading. In May, 1993, with another federal election pending, the government introduced Bill C-129, and within months this bill passed through Parliament. An important provision in this bill is that it makes it an offence to *possess* child pornography, whereas simple possession of other obscene materials is not an offence. Given that most child pornography is created in private homes and distributed non-commercially, this amendment is important. The bill also prohibits visual

shadow over gay or lesbian imagery and artistic work without addressing harms to women.

LEAF argued that the existing obscenity law could be interpreted to promote equality, and to the extent that materials are proscribed on any other basis, the law is unconstitutional. The materials that pose the most serious threat to equality include those made from direct acts of coercion or violence. Pornography made from actual assaults is not worthy of protection. Similarly, using children to make sex pictures is a form of child abuse and should not be protected. We then argued that depictions of explicit sex with violence (including threats of violence) lead to an increased risk of sexual violence against women and therefore should be suppressed. Finally materials that degrade or dehumanize women have been shown, among other things, to contribute to an increased acceptance of women's sexual servitude and increased callousness towards women. Accordingly, we argued that these should be proscribed as well.

Enforcement of obscenity laws rests with state agents including the police, customs officers, Crown attorneys, and judges. If these agents ignore or do not care to understand the equality/harms-based analysis they will revert to enforcement policies based on moralism. LEAF has been criticized for naively relying on the patriarchal state for protection²⁰. Reliance on state power is always an incomplete, imperfect strategy and its use in relation to pornography is no exception. LEAF is simply attempting to force the state to extend its protection in order to fulfil its promise of security of the person for all women. In other words, we want criminal law to work for women. This is an equality argument. Further, the alternative is an unregulated pornography industry and there is little evidence that the other proposed strategies will have much effect on the so-called free market. Therefore, as will be discussed later, LEAF's response to state agents' abuse of an equality analysis is not to reject that analysis, but to expose, explore, denounce and, ultimately, legally censure the abuse.

What is the obscenity law after *Butler*?

The Supreme Court of Canada recognized that the obscenity law interfered with the freedom of expression guarantee. But, in upholding the law, the court recognized that such interference was justified under s.1 of the *Charter*, as there is a rational connection between the obscenity law and the objectives it sought to achieve, and as the law minimally impairs freedom of expression. The court rejected an approach to obscenity based on moral disapprobation and modesty stating that

representations of a "person who is or who is depicted as being under the age of 18 years and who is engaged in explicit sexual activity." On one hand, this provision is necessary for evidentiary reasons as it is extremely difficult to find those who were involved in making images and to ascertain their precise ages. Under the former law, this could lead to an inability to prosecute even where there was no doubt as to those being filmed were minors: see, *supra*, note **10. The bill may also be useful to the extent that it undermines normalization of pedophilia. On the other hand, the law may be over broad in that it fails to define "explicit sexual activity". Eg., would an image of two teenagers kissing and lightly fondling each other be prohibited? Would the standard be different if the pair were young-looking adults of the same sex?

²⁰ See, for example, Thelma McCormack, "Keeping Our Sex Safe", *Fireweed: A Feminist Quarterly of Writing, Politics, Art and Culture* (Winter, 1993) 25 at 33.

"...this particular objective is no longer defensible in view of the *Charter*"²¹. The court focused, instead, on the likelihood of harm and the threat to equality flowing from circulation of the materials. The court stated that

...if true equality between male and female is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading materials. Materials portraying women as a class worthy of sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance.²²

The court recognized that a direct link between pornography and violence was not susceptible to exact proof. But, as the court did in other cases where the link between expression and harm was impossible to prove conclusively (for example, cases on hate propaganda and advertising directed at children), it recognized a connection sufficient to uphold the impugned law. In other words, there was a reasonable basis for an obscenity law. It held that pornography showing sex with violence (including threats of violence) would almost always be prohibited. Explicit sex that is degrading and dehumanizing would be prohibited if the risk of harm is substantial, that is, if it predisposed people to act in an anti-social manner. Finally, sexually explicit materials involving children are prohibited.

Legislation which interferes with a *Charter* guarantee must do so as minimally as possible. The *Butler* decision made it clear that sexually explicit depictions were protected by the *Charter's* freedom of expression guarantee even if its sole purpose was to sexually arouse, as long as it does not involve sex and violence, degradation, or children. The court stated the obscenity law cannot "inhibit the celebration of human sexuality." In addition, the court stated that artistic work was at the heart of freedom of expression and accordingly was to be protected. Courts are to be "generous" when characterizing work as art and "any doubt must be resolved in favour of expression"²³.

LEAF, like many organizations which view violence against women as a measure and agent of women's inequality, count the court's decision in *Butler* as a feminist breakthrough. It marks an extraordinary shift in the traditional rationale for obscenity laws from a community standard based on a general instinctive sense of what is decent and what is indecent (the *Brodie* standard²⁴) to an obscenity law premised on sex inequality and harms to women. While *Butler* still refers to

²¹ *Butler*, supra., 30. Some commenting on the *Butler* decision have stated that it marks a return to a moralistic standard. This is a misreading of a fundamental principle emerging from *Butler*. After the court reviewed obscenity law history, which, given the nature of legal discourse, would start with reference to the sexual decency position, it stated at 30 that "the prevention of dirt for dirt's sake" is not a legitimate objective." The court did say is that "much of criminal law is based on moral conceptions of right and wrong". But the moral basis for the *Butler* standard is harms to women, not morality in an inchoate sense of appropriate sexual behaviour.

²² supra., 33.

²³ supra., at 25, 39.

²⁴ See also **note 6.

a "community standard", the test has been so altered that resemblance to the pre-*Butler* standard is in name only. The court explicitly recognized that the pre-*Butler* "community standards" test did little to elucidate the underlying question as to why some exploitation of sex falls on the permitted side and some on the prohibited side²⁵. The law no longer retains one universal standard of morally acceptable sexual representations.

LEAF believes that this law, *if appropriately applied*, will prohibit pornography's most harmful forms, that is, those that combine sex with violence, degradation or the depiction of children. It should also curb state repression of books, videos, images and art historically deemed morally "indecent" or "disgusting" by a heterosexual society.

The *Butler* decision does not say anything specific about depictions of lesbian or gay sexual activity. However, while discussing the moralism which had animated the law, the court stated that

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. David Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R.(3) 367 at 370, refers to this as legal moralism, of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.²⁶

"Minorities" in this context would seem to include lesbians and gay men. Nonetheless, it is frustrating that the court failed to be more explicit about lesbian or gay imagery, especially given the historic suppression of these materials²⁷. Their failure will, of course, result in more litigation.

The difficult component of the *Butler* test is, of course, what representations will be considered to be "degrading and dehumanizing". This standard, like any criminal standard, must have stable, clear boundaries. At the same time, as the court recognized, standards which escape precise technical definition are an inevitable part of the law.²⁸ For some, any reference to sexual activity outside of a loving, monogamous, heterosexual relationship would meet this new standard. These people may also say that depictions of nudity are, in themselves, dehumanizing. However, given the court's comments on the acceptability of sexually explicit imagery, it is clear that this is not what it meant by "degrading and dehumanizing". The court did hold that "the message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda....obscenity wields the power to wreck social damage in that a significant portion of the population is humiliated

²⁵ *Butler, supra.*, 24 quoting *R. v. Towne Cinema*, (1985), 1 S.C.R. 494 at 525.

²⁶ *Butler, supra.*, 30.

²⁷ See *infra.* text accompanying notes 44-55.

²⁸ *supra.*, 29.

by its gross misrepresentations."²⁹ The court gave some examples of what might come within the standard by quoting from *R. v. Ramsingh*:

They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as the object of male domination sexually, or in cruel, violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe that their *raison d'être* is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.³⁰

The court also went on to say that,

Among other things, degrading and dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In appreciation of whether the material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing³¹.

It is useful to work towards articulating a list of what depictions should be included within the degrading and dehumanizing test. This list, which is not carved in stone but is only intended as a starting point for engagement in the interpretative process by all members of equality seeking communities, might include depictions of:

1. sexualized racism (eg., insatiable Black women, compliant Asian women);
2. sexualized anti-semitism (eg. Nazi-prisoner scenes),
3. other sexualized vulnerabilities (eg. women with disabilities, women in prison);
4. incest;
5. child sexual abuse;³²
6. positive outcome rape and other rape myths³³;

²⁹ *supra.*, 36.

³⁰ (1984), 14 CCC (2d) 230 (Man. Q.B.) as cited in *Butler, supra* at 20.

³¹ *Butler, supra.*

³² See also notes **10, 19.

³³ "Positive outcome rape" is depictions or texts of sexual assaults where the woman (or child) initially resists but ultimately "enjoys" the assault. The encounter usually ends with profuse thanks. This scenario was featured in a number of the *Butler* materials. Most notably however it was an aspect of *all* the materials involving children or portraying young-looking women as girls (eg., pigtails, saddle shoes, shaved pubic hair, small hips and breasts). Other rape myths portrayed include women receiving pleasure from pain, being blamed for inciting sexual advances, desiring sex from any and every

7. heterosexist stereotypes of lesbians or gay men;
8. penetration with threatening or dangerous objects (eg., guns, glass bottles);
9. members of historically subordinated groups as naturally masochistic or sadistic;
10. members of historically subordinated groups as attracted to animals.

While *Butler* marks a new era in Canadian obscenity law, interpretations of the law do not end with the *Butler* decision. The entire community of feminists should participate in the debate that will shape the interpretation and enforcement of this law. For while we may have succeeded in exposing and begun chipping away at the misogyny embedded in the previous standard, a layer of heterosexism and homophobia has also been more clearly exposed, a layer that was always there and one which now needs to be carved out as well.

Did LEAF appeal to homophobia in the *Butler* case?

Some of the seized materials in *Butler* involved sex between men, and some of these materials were extremely violent. The depictions included gay bashing, penetration with a rifle, gang rape scenes, and prison rape scenes. None of the materials portrayed safe sex. One magazine featured a nude teenage boy surrounded by children's toys. LEAF has been criticized for describing and for how we described materials involving gay men in our brief. As we were putting forward a harms-based analysis, a review of the materials was essential. Some media accounts have reported that LEAF presented the videos in court, and some have gone further to say that we did this to appeal to invidious homophobia. During discussions on what to present during the court time allotted for oral argument, those working on *Butler* briefly considered showing excerpts from the videos to the judges in open court, including the videos of sex between men, to impress upon the judges just how violent or dehumanizing the material was. For a variety of reasons--including a recognition that we might be unintentionally playing into judicial homophobia--we decided *not* to show the videos.

Some have expressed the view that, perhaps, LEAF should not have taken any position on gay male representations because it is difficult for women, including lesbians, to understand gay male culture³⁴. On the other hand, it would have been difficult to say nothing at all about the materials for gay men. We may have been criticized for rendering invisible gay male materials by ignoring them; as advocates we had to prepare an answer to questions about these materials that the court could and should have asked of all litigants in *Butler*; and we could not ignore the role these materials may have not only within gay communities but also within a broader social context.

LEAF has also been criticized for collapsing an analysis of gay male pornography into the harms-based analysis of heterosexual pornography. This critique is not in accord with any argument

man, expressing a secret desire to be raped, etc.

³⁴ Eg., Mariàna Valverde in a letter to me commenting on an earlier draft of this paper stated that, "I think that LEAF is not on strong grounds criticizing gay male culture or gay men....I think that most lesbians completely misunderstand gay male culture, just as they misunderstand ours....Perhaps it would be better not to discuss the gay male porn at all and confine yourselves to the heterosexual stuff."

we presented to the court. Our argument in support of legal prohibition of pornography is founded on equality principles, in particular, harms to women. Any argument that supports freedom of expression, including sexual expression, must be grounded in equality principles which means that it must take into account systemic inequalities. After a lengthy discussion on pornography's harms to women, the LEAF factum stated that:

Individual men are also harmed by pornography, although this is exceptional in that this harm does not define the social status and treatment of men as a group. Indeed, there is no systemic data to support the view that men as such are harmed by pornography. However, LEAF submits that some of the subject pornography of men for men, in addition to abusing some men in ways that it is more common to abuse women thorough sex, arguably contributes to abuse and homophobia as it normalizes sexual aggression generally.

That there is no systemic data on the uses and effects of gay male pornography should be cause for concern. But given this lack of information we could not say anything more specific as to how it might "contribute to abuse and homophobia". Since the specific issue of lesbian and gay materials inevitably will be addressed by higher courts, we--LEAF, other equality seeking organizations, and lesbians and gay men--must talk about these contributions to systemic inequalities in more detail before we can plan future strategies.

Is LEAF's position on pornography anti-lesbian?

For well over a decade, lesbians have divided on whether legal prohibition is a useful strategy for dealing with any pornography. Some lesbians say criminal prohibitions should be pursued given pornography's integral link to systemic sexual inequality and sexual violence, while others have said that regulating pornography poses too great a risk to lesbian self-representation and self-determination. The debate has been made even more complicated for lesbians by the protracted, divisive, and painful feminist discussions on the equality implications of lesbian sado masochism (s/m)³⁵. At the risk of over-simplifying, supporters of s/m believe that its practitioners are sex radicals who disrupt social conventions or pursue the cutting edge of sexual freedom. Those who critique the practice see it as modelling or replicating the worst aspects of a sexuality premised on male dominance and female subordination within a systemically unequal culture. Many lesbians

³⁵ The first issue is trying to define just when a particular activity or depiction becomes s/m. Unless we have some agreement on just what we are talking about when we speak of s/m, conversations are bound to be fraught with misunderstanding. I think that most sexual activity is about vulnerability and therefore about power in one form or another, so a power imbalance alone is not a sufficiently precise definition of s/m. Depending on who is doing the defining and why and in what context, s/m practices could include: forms of dress (leather, uniforms, chains, dog collars); using objects like dildos, butt plugs, nipple clamps; body modifications such as tattooing, body piercing, or scarification; bondage; sexual pleasure as coming from humiliation, power games, rape, or degradation; elaborate psychological or ritualistic scenes; infliction of physical pain through spanking, hitting, beating, whipping, or cutting. The definition would have to work through the notion that implicit or explicit negotiations around power are a part of most s/m sex. Finally, the definition would have to consider the constructed meaning of s/m outside of lesbian (sub) communities.

who critique s/m practices still object to state censorship of s/m depictions, arguing that this is an issue for lesbian communities to deal with internally. Others see the practice as so damaging to individual women and to communities that the state should censor the materials. Lesbians need to find safe places and ways to continue talking about s/m practices, its imagery, its public manifestations, and its legal regulation.

Reducing lesbian responses to pornography, including s/m depictions, to either "anti-porn" or "pro-sex" is an error. Not only is this an inaccurate rendering of a much more complex debate, but it divides lesbians (and other feminists) against each other, preventing us from sharing and pursuing our commonalities, while leaving misogynists and homophobes to divide the spoils. Further women, especially perhaps lesbians, in the western world have only recently begun to explore and create sexual representations³⁶. This work too forces us to reconsider the "anti-porn" and "pro-sex" straightjackets. Teresa de Lauretis suggests a much more fruitful starting point when she describes a tension for lesbians (perhaps better described as a fluidity, depending on place and time, but certainly not a polarity), between the "erotic" drive and the "ethical" drive:

An *erotic, narcissistic drive* enhances images of feminism as difference, rebellion, daring, excess, subversion, disloyalty, agency, empowerment, pleasure and danger, and rejects all images of powerlessness, victimization, subjection, acquiescence, passivity, conformism, femininity; and an *ethical drive* that works towards community, accountability, entrustment, sisterhood, bonding, belonging to a common world of women or sharing what Adrienne Rich has poignantly called "the dream of a common language".³⁷

She goes on to suggest that these two drives underlie and sustain at once both "the possibility of, and the difficulties involved in, the project of articulating a female symbolic".³⁸ Exploring the equality implications of this tension may move us towards exploring all women's sexualities.

Regardless of individual views on sexual violence or censorship, lesbians' specific, widely shared concerns include that the law will disproportionately impact on lesbian-created imagery and that it will be enforced in a discriminatory way. LEAF, in consultation with members of affected communities, needs to begin developing arguments which address these concerns. More

³⁶ See, for example: Tessa Boffin and Jean Fraser, *Stolen Glances: Lesbians Take Photographs* (Pandora Press: London, 1991) at 238; Linda Nochlin, *Women, Art, and Power and Other Essays* (Harper and Row: New York, 1988).

³⁷ Teresa de Lauretis "Upping the Anti (Sic) in Feminist Theory", in Hirsch and Fox Keller *supra*. at 266. Lise Weil, in "Lowering the Case: An After-reading of "Sex and Other Sacred Games"" in Judith Barrington (ed.) *An Intimate Wilderness: Lesbian Writers on Sexuality* (The Eighth Mountain Press, Portland, Oregon: 1991) at 247 describes the same tension in a this way:

I also understand that U.S. feminism, with its middle-class, sexually conservative bias, has been a major obstacle to this exploration [of Lesbian Desire]-that Pure Lust, in practice, has had a tendency to translate into puritanical lust. But having said all this, I am not ready to concede that what we are here for, along with Queer Nation, is to make the world safe for our raunchiness.

³⁸ de Lauretis, *supra*.

particularly, what might an argument in favour of sexually explicit lesbian imagery that was *also* founded on a systemic (in)equality analysis look like? And, what strategies could be pursued to address discriminatory enforcement of obscenity laws by the state?

Lesbian imagery and a systemic equality analysis.

In *Butler*, LEAF advanced and the Supreme Court of Canada accepted an analysis which renders moral censorship unconstitutional. *Butler* therefore makes possible a political argument, one that has been articulated within lesbian and gay communities and that may advance lesbian and gay equality rights without undercutting the substantive equality case law. The argument is that these representations affirm the identities of members of communities systemically vilified and abused on the basis of sexuality, culture, and intimate social arrangements. They claim visibility and celebrate the diversity of and within communities whose existence is denied and coercively suppressed. (Imagine, for example, the powerful effect of a billboard presenting a romantic embrace between two teenagers of the same sex.) Sometimes the images may provide information on safe sex practices. These are equality arguments. *Butler* creates legal space--space which did not exist under the former obscenity law--for such arguments to be constitutionally credited.

Lesbians have been and are extremely influential in all aspects of the pornography debate, whereas few gay men talk about harms to women or support any form of state regulation. As well, very few materials are made for lesbians, in contrast to widely available materials for gay men, many of which are produced and distributed by those who produce and distribute materials for heterosexual men. Furthermore, as already acknowledged, it is possible that lesbians (and other women) misunderstand gay male culture (and *vice versa*). These differences suggest that lesbian and gay concerns and strategies relating to sexual representations may not always be co-extensive. At the same time, particularly in the face of the AIDS crisis, lesbians have been more willing to create communities of resistance together with gay men to present stronger, more effective political voices. So, while lesbians must decide deliberately and carefully about whether and when to align with gay men on issues touching sexual representations, this paper will assume mutuality of interests.

While *Butler* establishes the equality framework for defending lesbian and gay imagery, that framework rests on the principle that the material to be defended must not, itself, exacerbate social and sexual inequality. Equality arguments must serve the interests of all systemically subordinated communities; arguments founded on individual freedoms are not exempt from this requirement. Accordingly, LEAF cannot join cause with those who champion freedom of expression, including freedom of sexual expression, without regard for institutionalized inequality. Therefore, we need to consider, theoretically and empirically, not only how the materials might offer affirmation and resistance but also how they might contribute to homophobia or other abuses of lesbians and other women, gay men and men who belong to other systemically subordinated communities.

Lesbians and gay men are not exempt from expressing or modelling the coercive sexual practices deeply embedded in the gendered, homophobic, and racist culture that has shaped us all. For example, sexually explicit imagery presenting child sexual abuse cannot be justified simply

because it is created for lesbians or gay men. Sexual representations that eroticizes rape fantasies, feminizes or infantilizes the violated party, sexualizes Nazism, or designates a "bottom" who derives pleasure from being degraded by a "top", may further some individuals' freedom, but it is difficult to see how it meets the criteria of an equality analysis. But as noted earlier, lesbians need to talk about s/m in more detail including whether and how to make equality arguments specific to s/m and sexual minorities³⁹. LEAF will not take a firmer position on lesbian s/m in litigation until a much clearer, systemic equality analysis emerges from lesbian communities across Canada.

Neither the producers nor the consumers of lesbian or gay sexual imagery define or control its use or its cultural meaning in wider society. Cindy Patton talks about the difficulty in creating lesbian imagery "so that even the most recalcitrant heterosexual male cannot help but be disturbed by his exclusion from lesbian produced representations. The "don't let men read it" ethos acknowledges that we have not yet produced images that defy colonization."⁴⁰ One gay critic commenting on the "Put the Homo Back Into Homicide" advertisement for *Swoon*, a film on the sexual relationship between two male murderers, said that

This is not to silence those voices among us who want to investigate stereotypes by pushing them to the edge....But let's not be disingenuous about the times in which we live, or the fact that we are breathing a bubble of freedom that is only 25 years old--historically speaking, a heartbeat. And that nothing we throw into the discourse is without consequence.⁴¹

No one can ensure that the sexualized racism of, for example, gay houseboy scenarios will not be used against men of colour in a racist culture, or that s/m⁴², or sexually violent or submissive materials will not be used against women or gay men in a misogynist, homophobic culture. Again, it is hard to trust that depictions of gay bashing and gang rapes in the context of materials intended to sexually arouse will not foster homophobia.

LEAF is committed to affirming the social and sexual identities of lesbians through law and

³⁹ Eg., Becki Ross stated in a letter to me that, "...fundamental disagreements on s/m, power and fantasy will continue to curtail the freedom of lesbians/gay men to represent our sexualities whether they include s/m sex or not....the AIDS Committee of Toronto, the Inside/Out Collective, and Buddies in Bad Times have all come under fire *because* of s/m; s/m has become the tried and true trope of sexual/moral conservatives and unless we-feminists figure out a way to defend non-coercive, consensual s/m specific to a minority sexual culture, we will lose many more obscenity cases."

⁴⁰ Cindy Patton, "Unmeditated Lust? The Improbable Spaces of Lesbian Desires" in Boffin and Fraser, *supra.*, at 238.

⁴¹ Robin Podolsky, critic for the LA Weekly (June 17, 1992) as quoted in Mandy Merck, *Perversions: Deviant Readings* (Virago Press, London: 1993) at 8.

⁴² For example, *La Presse* featured a front page photograph of lesbian s/m in its coverage of the 1993 Washington March thereby reducing the march to kinky sex. When discussing the police seizure of *Bad Attitude* from Glad Day Bookshop (see text accompanying ** note 45 *infra.*.) with the media, I rarely talk about the magazine's s/m content because I cannot trust that they will not sensationalize this aspect of the case thereby feeding into stereotypes about lesbian sexuality.

otherwise⁴³. Constitutional arguments protecting sexual imagery can and should be made but these arguments cannot be made at the expense of others. LEAF supports working towards this protection in concert with those who are also willing to ground their analysis on equality principles.

Discriminatory enforcement

Since *Butler* was released, very few *Criminal Code* charges have been laid regarding heterosexual materials, and few cases have proceeded through the courts. Anecdotal evidence suggests that Crown attorneys and the police have made little effort to understand what an equality driven, harms based analysis means. While *Butler* himself was convicted on a re-trial⁴⁴, the reasons for decision are disappointing as they do not give any guidance on how the *Butler* test is to be applied. What is outrageous is that state agents are not applying the obscenity law to heterosexual pornography.

To our knowledge, the Toronto police have not laid any obscenity charges regarding heterosexual materials since *Butler*. But before the ink was dry on the *Butler* decision, they seized, in their first raid in years, *Bad Attitude*, a lesbian erotic magazine from Glad Day Bookshop, a gay and lesbian bookstore. The bookstore was eventually convicted as the magazine described a woman stalking another woman in a shower, assaulting her, and then, now with her consent, having sex with her. While feminists may disagree on the defensibility of this material, it is, none the less, impossible to justify why this magazine would be chosen from all the other available pornography and why this store was raided. The police action was clearly discriminatory.

Within weeks of the *Bad Attitude* raid, a trial relating to the Canada Customs seizure⁴⁵ of sexually explicit gay male materials also destined for Glad Day Bookshop was held. (The shipment, which was from the United States, had been seized a few years earlier but the trial was delayed pending *Butler*.) In reasons for decision which are clearly homophobic, Judge Hayes prohibited all of the materials because he found sex between two men to be, in itself, degrading.⁴⁶ He completely failed to undertake any equality analysis of the materials. This decision is on appeal⁴⁷.

⁴³ LEAF recently completed a series of consultations with lesbians in Vancouver, Toronto, and Halifax. Specific issues addressed included what should be defined as "family" and whether inclusion of "sexual orientation" in human rights codes would benefit lesbians. The report is available from the LEAF's National Office.

⁴⁴ *R. v. Butler* (March 31, 1993) 88-01-04647 Manitoba Queen's Bench, per Hewak, J.

⁴⁵ Customs legislation on obscenity referentially incorporates the *Criminal Code* obscenity provisions, i.e., the *Butler* standard. Until 1985 customs legislation prohibited any materials that were "immoral and indecent", but this standard was struck down as too vague to be enforced: *Re Luscher and D.M.N.R.* (1985) 17 D.L.R.(4) 503 (Fed.CA).

⁴⁶ *Glad Day Bookshop v. DMNR* (14 July 1992) 619/90 (Ontario Court of Justice (Gen. Div.)) per Hayes, J.

⁴⁷ LEAF will not be intervening in the Glad Day appeal. For strategic and practical reasons, LEAF intervenes when no one else will be making equality arguments. (For example, in *Butler* we only intervened before the Supreme Court of Canada, and we were the only intervenor to present an equality analysis.) Further, as it is more than likely that the Federal Court (Trial Division) will recognize on appeal that Judge Hayes' decision is an abuse of *Butler*, our intervention is not essential. Further, LEAF currently has the financial, staff, and volunteer resources to participate in six or seven new

These two applications of *Butler* against a gay and lesbian bookstore, very shortly after the decision was released, have served to galvanize some members of lesbian and gay communities, particularly in Toronto, against the *Butler* decision⁴⁸. It should be noted however, that, to our knowledge, no other *Criminal Code* charges have been laid regarding lesbian or gay materials in Toronto or elsewhere,⁴⁹ although anecdotal evidence indicates that Toronto police continue to regularly enter Glad Day to review its magazines.

While Canadian police forces have been relatively inactive, the same cannot be said for Canada Customs. Customs officials have retained and prohibited entry into Canada materials on lesbian and gay sexuality and orientation for years⁵⁰. Indeed, it seems that Canada Customs has a practice of targeting these materials and ignoring heterosexual materials. These seizures are much more pervasive, and regulate, often illegally, lesbian and gay materials much more than enforcement of the obscenity standard under the *Criminal Code*. These practices are not open to public scrutiny and it is difficult to prove the claim of discrimination in the absence of comparative data. For example, Canada Customs does not publish annual or other reports outlining their seizures and no other agency collects this data in the same way as, for example, crime statistics are collected. They will advise if a publication is on the banned list but they will not permit access to the whole list. The seizures are made without the kind of police action inherent in a raid on a commercial outlet and most individuals tangled in the Canada Customs web will forfeit the materials before the internal administrative proceedings are finished and public oral hearings begin. So the general public, even diligent researchers, have little or no direct knowledge of Canada Customs standards and practices.

The charge of discriminatory practices by Canada Customs against lesbians and gay men is, however, supported by other evidence. If materials are seized at the border, the person who was to have received the materials will be sent a form that will have one or more boxes checked off as the reason for refusing entry. "Anal penetration" is a proscribed category which will result in prohibition of virtually all materials for gay men⁵¹. There is also evidence that Canada Customs has singled out for review and seizure, shipments to lesbian and gay bookstores, and more recently,

consultations or cases a year. In the context of pornography, we think that our energies are best spent engaging in broad consultations, including, eg., preparation of this paper.

⁴⁸ It is not always clear whether individuals or groups voicing objections to the Hayes decision are against any form of censorship or whether they oppose Judge Hayes' gross misreading of *Butler*.

⁴⁹ Police in a few Canadian cities have seized the inventories and laid obscenity charges against Randy Jorgensen, the owner of about 75 pornographic video outlets across Canada. Most, if not, all the seized materials were for heterosexual men and therefore, likely have scenes of women having sex with each other. As in the *Butler* case, some materials may involve gay men.

⁵⁰ In recent years, in addition to seizing sex manuals and sexually explicit magazines and videos, Canada Customs has also seized books by, eg, Jane Rule, Gertrude Stein, Oscar Wilde, Andrea Dworkin, Jean Genet, and Jeffrey Weeks.

⁵¹ Canada Customs has refused entry for educational materials on safe sex for gay men. For years it prohibited entry of *The Joy of Gay Sex*.

feminist and alternative bookstores.⁵² American book distributors are increasingly reluctant to deal with gay and lesbian bookstores in Canada because of the long delays in processing the books, and because so many shipments are refused entry or are lost or damaged by Canada Customs. These bookstores are now having to make special arrangements that threaten their commercial viability, such as payment in advance for materials rather than on delivery⁵³. Finally there is anecdotal evidence from individual lesbians and gay men who have been questioned and searched when entering Canada on the suspicion that they are carrying pornography, or who have had shipments detained and prohibited.

Most information on customs seizures of lesbian and gay materials relates to pre-*Butler* seizures. One would expect that Canada Customs would have revised all of its policies post-*Butler*. However a Globe and Mail article reported a Customs official as saying that it is "business as usual"--guidelines and practices have not changed since *Butler*⁵⁴. Again it is outrageous that these state agents are failing to properly apply the law. Canada Customs must be pressured to revise its seizure guidelines and practices so they are more open to public scrutiny and in line with the constitutional standards articulated in *Butler*. Some of these issues are being litigated in Vancouver by the British Columbia Civil Liberties Association and Little Sisters Book and Art Emporium⁵⁵, a lesbian and gay bookstore in Vancouver, with financial assistance from the American Booksellers Association. LEAF supports their claim to a declaration that customs legislation has been construed and applied in a manner that discriminates on the basis of the sexual orientation of the authors and readers contrary to the equality rights guaranteed by s. 15 of the *Charter*⁵⁶. The action against Canada Customs is scheduled to go to trial in October, 1993.

How might the *Butler* decision affect the artistic community?

Many artists are pre-occupied with religion, politics, or sexuality since it is within these spheres that we, artists and non-artists, experience our deepest desires and our deepest fears. But it is also within these same spheres that the state and other institutions have attempted to restrict or control public dialogue. Artists have always known that their work might provoke negative, even hostile reactions. Susan Sontag once said that artists *seek* to make their work "repulsive, obscure,

⁵² "Canada Customs Hits Feminist Stores and Others", *Feminist Bookstore News*, March/April, 1993 pp 11, 21.

⁵³ Presentation by Janine Fuller, manager of Little Sisters Bookstore (a lesbian and gay bookstore in Vancouver) at National Association of Women and the Law, Vancouver, February 20, 1993.

⁵⁴ Globe and Mail, March 26, 1993 p.A7.

⁵⁵ *Little Sisters Book and Art Emporium et. al. v. Minister of Justice (Canada) et al*, File # A901450, Vancouver Registry, British Columbia Supreme Court.

⁵⁶ See also the press release issued by LEAF and a group of anti-censorship activists on June 21, 1993 condemning the discriminatory use of *Butler* to harass and intimidate lesbians and gays, and sex trade workers. LEAF was approached in late July, 1993 to participate in the *Little Sisters* litigation at the trial level. Two months was just not enough time to prepare for the case.

inaccessible; in short, to give what is, or seems to be, *not* wanted"⁵⁷. Paradoxically, since they still want to be able to create their work, artists work within boundaries while at the same time always pushing the outer edges. Some artists and anti-censorship activists express concern about the fear or threat of criminal prosecutions⁵⁸ although it is extraordinarily rare for such charges to be laid in Canada. In terms of artists' everyday lives, far more restrictive factors than the criminal law include arts funding agencies' policies and practices, provincial film censorship and classification regimes, personal concerns or doubts about how the work will be received or understood, and curators, theatres, and galleries who are reluctant to show controversial work. Those who identify the new obscenity standard as the primary source of "obscenity chill" are overshooting the mark.

Moreover, *Butler* makes it clear that "artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of expression."⁵⁹ The court also held that "...materials which have scientific, artistic or literary merit are not captured by the provision...the court must be generous in its application of the artistic defence". The constitutional artistic defence is distinct from and much more encompassing than the statutory defence of "public good" set out in s. 163 of the Criminal Code. For example, the standard does not seem to require that the materials have "serious" artistic purpose--a standard which may be nonsensical when applied to postmodern art.⁶⁰ In the context of criminal prohibitions, this is a *clear* improvement over the pre-*Butler* law and should result in a reduction of the obscenity chill for artists.

In rejecting a morals-based rationale for sexual representations, implicitly *Butler* also calls into question the underpinnings of arts funding and film policies based on this rationale. *Butler* arguably requires that the state's participation in art production cannot bring with it considerations of decency. Any suggestion, for example, by the state that it will not fund work by lesbian or gay artists or work on sexuality must be strenuously denounced⁶¹.

⁵⁷ Susan Sontag, Styles of Radical Will (Farrar, Strauss, Giroux, New York: 1966) p.45.

⁵⁸ The *Criminal Code* (1985) prohibits blasphemous libel (s. 296), seditious libel (ss 59-63), and offences tending to corrupt morals (obscenity) (s. 163).

⁵⁹ *Butler, supra.*, 25. None of the parties before the court in *Butler* argued that the materials were anything resembling "art", so the artistic merit defence did not directly arise.

⁶⁰ Unlike modern art, with its explicit pretensions to seriousness, postmodern art may be derivative (from both "serious" art and other media, including pornographic materials), lacking a narrative, mocking often irreverent, or deliberately shocking. See, eg., Andrea Juno and V. Vale, *Angry Women* (Re/Search Publications, San Francisco, 1991), a collection of interviews with and essays about women performance artists. In *Roth v. United States* 354 U.S. 476 (1957), the United States Supreme Court held that obscene materials would be protected if they have "even the slightest redeeming social importance". The much narrower standard of whether "the work taken as a whole lacks serious...artistic...value" was adopted in *Miller v. California* 413 US 15 (1973).

⁶¹ Such state action is not unprecedented. The infamous Helms Amendment to the funding criteria for the American National Endowment for the Arts prohibited funding to artists whose work was homo-erotic. See, eg., Stephen Rohde, "Art of the State: Congressional Censorship of the National Endowment for the Arts", (1990), *Hastings L.J.* 353. Litigation by the American Civil Liberties Union (A.C.L.U.) challenged the constitutionality of the amendment on behalf of four artists

Furthermore, the state has an obligation to protect artists against unlawful censorship and, in some cases, it actually attempts to fulfil this mandate. For example, it has been inaccurately implied in various contexts that the Winnipeg lesbian artist collective, Average Good Looks, has been censored by the state. In fact, the collective has turned to the state for redress and protection against private forms of censorship. They were first censored by the "free" market when Mediacom refused to print a billboard stating "Homophobia is Killing Us". (Mediacom had misread the original copy as stating "Hemophilia is..."). A sexual orientation discrimination complaint to the Manitoba Human Rights Commission was settled when Mediacom agreed to provide money for materials and art work, as well as billboard space, for more varied and sustained presentations. Then when the Ku Klux Klan sent collective members threatening telephone messages (and may have been responsible for paint bombing the "Homophobia" billboard), criminal charges were laid against the Klan members. Unfortunately, sloppy police practices resulted in the charges being stayed half way through the trial. (Note that the Klan's defence was to have been freedom of expression.)

Butler also takes away the excuse of "the work is prohibited" from gallery operators who may be reluctant to show the work for other unarticulated reasons. During the *Festival du Voyeur: A Celebration of Queer Culture* in Winnipeg (January-February 1993), a gallery operator who had agreed to exhibit homoerotic work, subsequently wanted to back out because, he said, the work was prohibited by criminal law. When I told him that the work would be protected by the *Butler* test, it became clear that his real concern was that the institution within which he worked did not want to be associated with the festival. The criminal law excuse had looked like an easy way out of his prior commitment. In the end the work was exhibited. It is also interesting to note that there was no police presence at any of the festival's more than 20 events, including a performance of "My Queer Body" by Tim Miller⁶². On the other hand, Toronto police presence at art events and the fact that they issue pre-show warnings has a decidedly chilling, if not destabilizing effect, on the artist community in Toronto. The police must be held accountable for this completely unacceptable practice.

Censorship issues for artists are complex and serious. No one at LEAF has ever denied this and LEAF members have worked with artists, artist organizations, and art journalists on censorship issues in the art community both before and since the *Butler* decision.

A note on LEAF's interaction with the media since the *Butler* case.

LEAF members have given extensive media interviews since the *Butler* decision. We talk about how the morality-based rationale is no longer constitutionally legitimate. But this groundbreaking change is not described by the media and the reader is left to believe that we have entered

who lost their funding as a result of this amendment. This litigation was settled in the summer of 1993 when the amendment was repealed, the artists received their funding and damages, and the A.C.L.U. received its legal costs.

⁶² Tim Miller was one of the four artists represented by the A.C.L.U. in the litigation challenging the Helms amendment. See *supra*.

an era of repressive state censorship. The media rarely mentions, unless to reject it, the broadly based feminist consensus that there is a relationship between pornography and sexual violence, male dominance of women, and male-centred, racist and heterosexist myths about lesbian and other women's sexuality. We talk about how *Butler* has been used to discriminate against lesbians and gay men or our work with artists, but the media does not talk about this work, so it appears that we are indifferent.⁶³ Rather the media is only interested in LEAF's "short, simple answer" to questions such as "should the police lay more obscenity charges?" or "should more people lay complaints?"⁶⁴ When we have submitted responses to print articles misconstruing LEAF's position, the press has chosen not to publish them.

The media has an interest in presenting information that fits into its readership's established patterns of thinking. One pattern is to describe feminists as either "anti-pornography" or "anti-censorship" and then to imply that these women have nothing in common. It does not explore whether these appellations wrongly infer that all women who oppose censorship are in favour of pornography nor does it recognize, for example, that many women share concerns about sexual violence but also desire sexual imagery. A woman quite easily could be opposed to some forms of pornography but also opposed to censorship. Another could favour censorship but spend her time working against inappropriate uses of censorship power. Regrettably the media has steadfastly refused to explore any of these subtleties. LEAF has become, in the eyes of the media, and now more generally, the quintessential pro-censorship organization⁶⁵.

Conclusion

⁶³ For example, in a half hour interview with a *Globe and Mail* reporter, I insisted on focusing on discrimination against lesbians and gays. None the less, the article (*Globe and Mail*, (March 26, 1993 p.A7) stated that "feminists opposed to censorship" were concerned about this abuse implying that LEAF was not. The only quote attributed to me was incomplete and taken out of context. The *Globe and Mail* failed to respond in any way to a written complaint. A happy, but rare, exception is a piece in the *Village Voice* (March 30, 1993) where Robert Atkins talks about the work I am doing relating to an appeal on a customs seizure of "Sluts and Goddesses", a video on women's sexualities by Annie Sprinkle and Maria Beatty, even though he was sceptical about LEAF's approach in *Butler*.

⁶⁴ These questions do not admit a "short, simple answer" but involve a consideration of at least three factors. Before the police lay more charges they must first understand the nature of the harms based, systemic inequality analysis as identified in *Butler* and not use morality-based rationales for prosecution. Further, it may be inappropriate to lay charges only in response to complaints as these are most likely to be generated by art work in public spaces. Finally, the police must not discriminate by targeting materials created for lesbians or gay men whilst ignoring heterosexual materials.

⁶⁵ Eg., students in Calgary viewed a number of sexually explicit videotapes and then reported to the police that they thought a number of them should be seized. The police then seized the videos. *Western Report* (June 7, 1993) reported that "feminist and conservative women's groups applauded" the students' initiative. It went on to state that the students met as a result of their common involvement with LEAF. No one has ever proposed that LEAF take on this project and it has never been approved for adoption by LEAF. None the less, many now believe that LEAF is behind the project. LEAF National Office only heard about the project when the newspaper report was brought to our attention. See also, Sheila McIntyre, "Backlash Against Equality: The "Tyranny" of the "Politically Correct", (1993) 38 McGill L.J. 1 where she argues that mainstream media's focus on "politically correct" is part of a movement to generate and fuel popular fear against substantive egalitarian change.

Some discussion issues emerging from this paper include:

1. On the obscenity standard:

- a. When should sexually explicit heterosexual materials come within the degrading and dehumanizing standard?
- b. How might materials created for lesbians and gay men contribute to homophobia and other abuses of lesbians and other women, and gay men and men who are members of other subordinated communities? How do these materials function within these communities and wider society? How might these materials be distinguished from heterosexual materials and defended? Does the answer differ depending on the gender of those represented?
- c. How can feminists and others move towards articulating and depicting diverse sexualities within an equality analysis framework, that is, without undercutting the substantive equality claims of subordinated communities?

2. On future action:

- a. What specific activities can LEAF and others undertake to expose the lack of state response to heterosexual materials since *Butler*?
- b. What specific activities can LEAF and others undertake to expose the long term and ongoing discriminatory enforcement by Canada Customs against materials for lesbians and gay men, and police harassment within these communities?
- c. What specific activities can LEAF and others undertake to move government actors involved in art production away from criteria founded on decency rather than artistic merit?

While *Butler* recognizes the relationship between pornography and inequality thereby marking a new era in Canadian obscenity law, no one expected that discriminatory enforcement of the obscenity law would end or harmful forms of pornography would disappear from Canada the day after the decision was released. Feminists and other equality seekers must participate in the debate which will shape the law's interpretation and enforcement while at the same time pursuing other strategies for considering uses and effects of all sexual representations. LEAF looks forward to continuing this work.