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GAY AND LESBIAN PORNOGRAPHY AND THE OBSCENITY LAWS IN CANADA

SUSAN R. TAYLOR†

The 1992 Supreme Court of Canada case of R. v. Butler articulated a new interpretation of “obscenity” under section 163(8) of the Criminal Code, which enables police officials, customs officers, and judges to prohibit the production, distribution, sale, and possession of obscene materials. In the aftermath of Butler, gay and lesbian pornography has been disproportionately targeted with the use of the test as set out in the Court’s judgment. This paper explores the literature surrounding this issue in order to demonstrate the inadequacy of the test for obscenity when applied to gay and lesbian pornography. The author concludes that Butler fails to recognize that same-sex pornography is inherently different from heterosexual representations in its production and use, as well as in the value it holds for its audience.

En 1992, la Cour Suprême du Canada dans l’affaire R. c. Butler a articulé une nouvelle interprétation d’ “obscénité,” sous l’article 163(8) du Code Criminel, en permettant aux officiers de police, aux officiers des douanes et aux juges d’interdire la production, la distribution, la vente, et la possession de matériel obscène. Il s’ensuivit que la pornographie gay et lesbienne devint une cible importante pour l’application de ce nouveau test tel qu’établi dans l’affaire Butler. Le présent article explore une variété d’articles de doctrine traitant de la question, de manière à démontrer l’insuffisance du test lorsqu’appliqué à la pornographie gay et lesbienne. L’auteur conclut que Butler ne reconnaît pas le fait que la pornographie homosexuelle est, de par son essence-même, distincte des représentations hétérosexuelles, de par sa production, son usage, ainsi que de par la valeur qu’elle possède auprès de son audience.

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I. INTRODUCTION

The case of *R. v. Butler*¹ was decided by the Supreme Court of Canada in 1992. This decision articulated a new interpretation of “obscenity” under section 163(8) of the *Criminal Code*.² Armed with this test, police officials, customs officers, and judges are able to prohibit the production, distribution, sale, and possession of obscene materials under various statutory instruments such as the *Customs Tariff Act*³ and the *Criminal Code*. *Butler* was declared a victory by anti-pornography feminists as it was premised upon the radical feminist approach to pornography. In the aftermath of the decision, however, it quickly became apparent that a noticeably disproportional amount of gay and lesbian pornography was being confiscated and deemed obscene by these authorities.

This essay will attempt to prove that the impact of *Butler* on the gay and lesbian community is not only attributable to the misapplication of the obscenity test by Canadian Customs officials, police officers, and judges, but also to the inherent deficiencies within the decision itself. In doing so, anti-pornography feminist theory will be examined and critiqued in order to demonstrate its inapplicability to gay and lesbian pornographic materials. Secondly, the unique features of homosexual pornography will be examined to reveal its difference from heterosexual pornography, and to demonstrate the values and benefits derived from its use and production. Thirdly, the Supreme Court of Canada’s approach to the issue of pornography will be critiqued for its exclusion of the gay and lesbian perspective from its analysis, and its inadequacy in handling issues of equality and freedom of expression. Lastly, the future of *Butler* and its application to gay and lesbian pornography will be considered.

In *Little Sisters Book and Art Emporium v. Canada*,⁴ the owners of a gay and lesbian bookstore challenged customs legislation by arguing that it infringed their rights to freedom of expression and equality under

¹ *Infra* note 8.

² *Criminal Code*, R.S.C. 1985, c. C-46.

³ *Customs Tariff Act*, S.C. 1987, c. 49, s.114.

⁴ *Infra* note 31.

section 2(b) and section 15(1) of the *Charter of Rights and Freedoms*⁵ by targeting shipments to their store and deeming the materials obscene. Smith J. found that the rights of the storeowners were not violated by the impugned legislation, but rather were violated by the administration of the customs legislation. On appeal, the British Columbia Court of Appeal upheld the trial judge's decision.⁶ Recently, however, Little Sisters has been granted leave to appeal by the Supreme Court of Canada.⁷ This will provide an opportunity for the highest court in Canada to consider the obscenity laws in relation to gay and lesbian pornography.

For the purposes of this essay, all sexually explicit material, including erotica, will be encompassed within the meaning of "pornography." Furthermore, although a discussion of the effectiveness of *Butler* in relation to the regulation of *all* pornography would be useful in determining the merits of the decision, the scope of this argument will be confined to its applicability to gay and lesbian pornography. Thus, this paper will not attempt to draw conclusions with regard to the value (or lack of value) of heterosexual pornography, nor will it address whether *Butler* provides the appropriate test for its regulation.

II. THE *BUTLER* DECISION

In 1992 the Supreme Court of Canada handed down the landmark decision of *R. v. Butler*.⁸ The accused was the operator of a sex shop who was charged with selling and possessing for the purposes of sale, obscene materials. He challenged the constitutionality of the obscenity provisions under which he was charged, claiming breach of freedom of expression. The Court held unanimously that the obscenity provisions

⁵ *Canadian Charter of Rights and Freedoms*, s.2(b) Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter *Charter*].

⁶ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1998), 160 D.L.R. (4th) 385 [hereinafter *Little Sisters* (C.A.)].

⁷ *Supreme Court of Canada: Bulletin of Proceedings*, February 19, 1999 291–327, online: University of Montreal, Faculty of Law: Centre of Research in Public Law <<http://www.droit.umontreal.ca/doc/csc-scc/en/bul/1999/html/99-02-19.bul.html>> (date accessed: March 14, 1999) [hereinafter cited as "*Leave to Appeal*"].

⁸ (1992), 89 D.L.R. (4th) 449 [hereinafter *Butler*].

of the *Criminal Code* violated his freedom of expression under the *Charter* but concluded that these violations were justified in a free and democratic society as per section 1 of the *Charter*. In coming to this decision, the court was required to interpret the meaning of “obscenity” under section 163(8) of the *Criminal Code*. This section states:

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 obscene.

The Supreme Court of Canada’s interpretation of this vague definition has become one of the most important aspects of the case.

Sopinka J., for the majority, offered a number of previously developed tests used to determine when the exploitation of sex will be considered “undue.” The first and most important test discussed is the community standards test. The Court relied upon the interpretation of community standards as articulated in *R. v. Towne Cinema Theatres Ltd.*⁹ and found that community standards are determined by an objective test that finds obscene that which “Canadians would not abide other Canadians being exposed to.”¹⁰ The second test examined by the Court for finding undue exploitation asks whether or not the material is degrading or dehumanizing to the participants. Consent is not determinative in this test. In fact, the appearance of consent may make the material *more* degrading or dehumanizing. According to the Court, degrading and dehumanizing materials offend the community standards test because they are viewed as harmful to society. Lastly, Sopinka J. considered the internal necessities test, which has been interpreted to assess “whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent ‘dirt for dirt’s sake.’”¹¹

Next, the relationship of the tests to each other was addressed. Sopinka J. focussed his discussion on the issue of harm, finding that community tolerance towards sexually explicit imagery is measured according to the amount of harm that emanates from exposure to the material:

⁹ [1985] 1 S.C.R. 494.

¹⁰ *Butler*, *supra* note 8 at 465–66.

¹¹ *Ibid.* at 469.

Harm in this context means that it predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.¹²

This definition of harm became the key for finding obscenity. For further elucidation, Sopinka J. found it useful to divide pornography into three categories and made a finding of harm for each. The first category was explicit sex with violence, which is almost always found to be undue exploitation of sex.¹³ The second category, explicit sex that is degrading and dehumanizing, was stated to be undue if there is a finding of substantial risk of harm.¹⁴ Last, explicit sex that is non-violent and neither degrading nor dehumanizing was deemed to usually be found not to be undue unless children were involved in the production.¹⁵

Finally, Sopinka J. dealt with the internal necessities test and held that community standards must be applied to determine if the sexually explicit material, otherwise undue, would be tolerated by the community when viewed in the context of the whole work.¹⁶

III. THE IMPACT OF *BUTLER* ON THE GAY AND LESBIAN COMMUNITY

The *Butler* decision was celebrated by anti-pornography feminists as a move away from using “obscenity law as a form of moral regulation.”¹⁷ Instead, the focus of the decision was directed towards the harm pornography posed to women. Despite accolades from anti-pornography feminists, the harmful reality of the *Butler* decision is reflected in its subsequent application. The gay and lesbian community has felt the brunt of the *Butler* decision with full force since its inception in 1992, while heterosexual pornography has been left barely affected.¹⁸

¹² *Ibid.* at 470–71.

¹³ *Ibid.* at 471.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ B. Cossman & S. Bell, “Introduction” in *Bad Attitude/s on Trial* (Toronto: University of Toronto Press, 1997) 3 at 20.

In fact, the mainstream industry appears to be flourishing in the aftermath. Lesbian academic, Becki Ross, claims that an “endless surge of mainstream, often violent” pornography is admitted across the Canadian border.¹⁹ In fact, by 1994, Canada’s most prominent pornography entrepreneur, Randy Jorgenson, expanded his number of stores from sixty to eighty-six.²⁰ Meanwhile, gay and lesbian bookstores are continually targeted by Customs officials, police officers, and judges.

There are only four homosexual specialty bookstores in the country,²¹ including Glad Day Bookshop in Toronto, Octopus Books in Ottawa, and Little Sisters Book and Art Emporium in Vancouver.²² These stores stock their shelves with educational information, gay and lesbian fiction, and homoerotic/pornographic materials. The content of the available homosexual pornography varies. Lesbian porn has been described as being extremely polarized between two endpoints of “romanticized, sexually impressionist” and highly sadomasochist representations.²³ Gay male pornography is available in greater quantity than lesbian pornography,²⁴ which allows for greater diversity. The scope of gay male pornography appears to extend from suggestive photos of youthful men striking body-building poses²⁵ to extravagant representations depicting “sadism, bondage, watersports, fisting, bootlicking, piercing, slapping, whipping.”²⁶

It is apparent that the gay and lesbian bookstores that stock these pornographic items have been disproportionately targeted by those applying the *Butler* obscenity test. In fact, the first invocation of the new law was in the form of a raid by the Toronto police department on Glad

¹⁸ K. Busby, “LEAF and Pornography” (1990) 9 Can. J. L. & Society 165 at 185.

¹⁹ B. Ross, “Launching Lesbian Cultural Offensives” (1988) 17 Resources for Feminist Research 12 at 14 [hereinafter “Launching Offensives”].

²⁰ A. Scales, “Avoiding Constitutional Depression: Bad Attitudes and the Fate of Butler” (1994) 7 C.J.W.L. 349 at 359.

²¹ *Infra* note 31 at 271

²² “Launching Offensives”, *supra* note 19 at 12.

²³ Scales, *supra* note 20 at 375.

²⁴ Busby, *supra* note 18 at 182.

²⁵ J. Sherman, “Love Speech: The Social Utility of Pornography” (1995) 47 Stanf. L. Rev. 661 at 688

²⁶ C.N. Kendall, “Real Dominant, Real Fun!”: Gay Male Pornography And The Pursuit of Masculinity” (1993) 57 Sask. L. Rev. 21 at 31.

Day Bookshop.²⁷ Nine sexually explicit gay and lesbian books were confiscated and found to be obscene based upon reasons such as the lack of “human dimension,”²⁸ and because “the descriptions [were] not necessary for the serious treatment of what purported to be the theme of these stories.”²⁹ This case foreshadowed the future path of the *Butler* decision in Canada. Anecdotal evidence reveals that the police still continue to raid these establishments.³⁰

Gay and lesbian bookstore owners face similar oppression by Canadian Customs officials. In the Customs case of *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, Smith J. of the British Columbia Supreme Court found that “a disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited.”³¹ He attributed his finding to systemic deficiencies within Customs administration. Officials were poorly trained,³² not following proper procedure,³³ and were intentionally targeting materials directed to gay and lesbian bookstores.³⁴ Furthermore, the guidelines followed by Canadian Customs officials to determine obscenity were more restrictive than the test set out in *Butler* with regards to what the impact should be on homosexual pornography. For example, Memorandum D9-1-1 listed “anal sex” as a ground for finding obscenity.³⁵ Conveniently, the night before the commencement of the *Little Sisters* trial, this guideline was amended.³⁶

Pornography has not been the only censored material. Such books as the “wholesome, health-oriented and comprehensive” *Lesbian Sex* by

²⁷ P. Wollaston, “When Will They Ever Get It Right? A Gay Analysis of *R. v. Butler*” (1993) 2 Dal. J. Leg. Stud. 251 at 251.

²⁸ *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1992] O.J. No. 1466, at 43 (Ont. Gen. Div.), online: QL (OJRE) [hereinafter *Glad Day*].

²⁹ *Ibid.* at 41.

³⁰ Busby, *supra* note 18 at 186.

³¹ (1996), 18 B.C.L.R. (3d) 241 at 312 (S.C.), aff’d (1998), 160 D.L.R. (4th) 385 (B.C.C.A.) [hereinafter *Little Sisters (S.C.)*].

³² *Ibid.* at 313.

³³ *Ibid.* Smith J. found that many Customs officials were only reading portions of books as opposed to the whole text as required.

³⁴ *Ibid.* at 315.

³⁵ *Ibid.* at 315.

³⁶ *Ibid.*.

JoAnn Loulan,³⁷ and the harmless *Long Time Passing: The Lives of Older Lesbians* have been confiscated at Customs.³⁸ Academic writings on homosexuality and pornography,³⁹ educational materials dealing with AIDS prevention,⁴⁰ lesbian romance novels containing neither sex nor violence⁴¹ have all been the target of Customs officials.

The impact of these acts of censorship is felt economically by those who specialize in selling gay-oriented materials. The shelves of these stores are sparse, and once materials finally pass through the administrative appeals process they are frequently out of date.⁴² Book distributors in the United States (where the majority of gay and lesbian materials are produced)⁴³ become frustrated with the stifling process at Customs, and often refuse to sell to Canadian, homosexual bookstores.⁴⁴ The mainstream bookstores, however, do not have the same problem and often have their shelves stocked with the same materials that are prohibited when their destination is a gay specialty bookstore.⁴⁵ Furthermore, the appeal process is a long, costly endeavor.⁴⁶ If an item is found to be obscene at Customs, there are a number of administrative steps that can be taken. Customs officers are authorized to classify goods under the *Customs Act*,⁴⁷ and if an item is found to be obscene (according to the section 163(8) definition) a redetermination may be made by another designated officer.⁴⁸ Further appeal can be made to the Deputy Minister of National Revenue for Customs and Excise.⁴⁹ A hearing is not mandated in this process until the next level of appeal to the Canadian International Trade Tribunal.⁵⁰ The final stage of appeal is

³⁷ "Launching Offensives," *supra* note 19 at 12.

³⁸ *Ibid.*

³⁹ Scales, *supra* note 20 at 362.

⁴⁰ "Launching Offensives," *supra* note 19 at 12.

⁴¹ Scales, *supra* note 20 at 362.

⁴² *Little Sisters* (S.C.), *supra* note 31 at 273.

⁴³ *Ibid.* at 272.

⁴⁴ *Ibid.* at 274.

⁴⁵ H. E. Cameron, "Queer Experts at the Little Sisters Trial" (1996) 16 *Canadian Woman Studies* 80 at 80.

⁴⁶ *Launching Offensives*, *supra* note 19 at 13.

⁴⁷ *Customs Act*, R.S.C. 1985, c.1, s.58.

⁴⁸ *Customs Act*, R.S.C. 1985, c.1 s. 60.

⁴⁹ *Customs Act*, R.S.C. 1985, c.1 s.63.

⁵⁰ *Customs Act*, R.S.C. 1985, c.1 s.67.

to the Federal Court of Canada.⁵¹ This procedure is exhausting, time consuming, and costly for a small business. Ultimately the struggle may not be worth it.

III. THE ANTI-PORNOGRAPHY FEMINIST PERSPECTIVE ON GAY AND LESBIAN PORNOGRAPHY

1. Anti-Pornography Feminist Theory

Anti-pornography feminism marched into the arena of the censorship controversy in the 1970s.⁵² Responding to the many misogynist and violent depictions of women found within the pages of men's magazines, books, and films, feminists such as Catharine MacKinnon and Andrea Dworkin developed a new approach to exploring inequality between the sexes that focussed on pornography. In their analysis of women's oppression, sexuality is targeted as the cause of inequality. These radical feminists believe that male dominance socially constructs gender difference through the sexual relationship between men and women.⁵³ Since power imbalance presents itself in the form of sex, this inequality appears enjoyable and is therefore disguised as gender difference.⁵⁴ Radical feminists concentrate on the idea that pornography is a mechanism that participates in the creation of this sexual inequality. It reflects, perpetuates, and constructs male supremacy and cements a gender hierarchy into the societal structure as man is defined as dominant, and woman as submissive. This form of obscenity eroticizes power imbalances.⁵⁵

Not all feminists share the anti-pornography position as espoused by MacKinnon, including her insistence on placing pornography at the center of the struggle for gender equality. In the introduction to her

⁵¹ *Customs Act*, R.S.C. 1985, c.1 s.68.

⁵² D. Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto: University of Toronto Press, 1994) at 26.

⁵³ C.A. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 3 [hereinafter *Feminism Unmodified*].

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 148.

book, *Pleasure and Danger: Exploring Female Sexuality*,⁵⁶ Carol Vance writes that although most feminists initially agreed with the contention that pornography was often sexist, “[b]efore long . . . it became clear that the claims and characterizations of anti-pornography leaders and groups were grandiose and overstated.”⁵⁷ In chronicling the emergence of the pornography debates within the feminist community in the 1980s, Vance explains how other feminists were eager to discuss not only the danger which sex presented to women in a sexist society, but also the importance of sexual pleasure to women.⁵⁸ These women challenged the narrow view of only seeing sex as subordination, as defined by anti-pornography feminists. These two factions clashed and continue to do so. Vance explains how throughout the 1980s and into the 1990s, academics, artists, and activists are attempting to expand the discussion of sexuality beyond the confines constructed by anti-pornography feminists.⁵⁹

It appears as though the division within the feminist community is still present. Testimonial evidence of the conflict is demonstrated in the commentary section of the lesbian magazine *Off Our Backs* where a self-proclaimed “radical feminist dyke”⁶⁰ criticizes the faction of the lesbian community participating in the production of gay pornography, condemning them for joining men in the further subordination of women. Accusatorily, the writer suggests that “[q]ueer women’s emphasis on “fun sex” was developed to undermine and divert the focus of the radical feminist anti-rape movement.”⁶¹

The *Butler* case was not decided in isolation from these debates. The Women’s Legal Education and Action Fund (LEAF), a feminist organization that participates in women’s equality cases, intervened in the case.⁶² Presenting only the anti-pornography feminist perspective,⁶³ this organization focused on the issues of violence against women and

⁵⁶ C. Vance, “Introduction” in C. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora Press, 1992) at xvi.

⁵⁷ *Ibid.* at xviii.

⁵⁸ *Ibid.* at xxii.

⁵⁹ *Ibid.* at xxxiv.

⁶⁰ C. O’Leary, “Queer Politics” (1994) 24 *Off Our Backs* 8 at 8.

⁶¹ *Ibid.*

⁶² Busby, *supra* note 18 at 167.

⁶³ L. Gotell, “Shaping *Butler*: The New Politics of Anti-Pornography” in *Bad Attitude/s on Trial* (Toronto: University of Toronto Press, 1997) 48 at 86.

gender equality. As Lise Gotell writes, “its intervention also draws heavily upon discourses of sexual danger, on an entirely negative view of sexual expression, and, much like the defenders of the status quo [such as right-wing conservatives] propels an image of women as passive victims.”⁶⁴

2. Gay and Lesbian Pornography from the Anti-Pornography Feminist Perspective

In light of *Butler’s* disproportionate impact on the gay and lesbian community, many proponents of this decision have been forced to question its value, and ask where gay and lesbian pornography fits within the pornography issue. Many anti-pornography feminists believe that regardless of whether the participants are of the same sex, “sexuality is so gender marked that it carries dominance and submission with it, whatever the gender of its participants.”⁶⁵ Thus, they would argue that there is no difference between the exploitation that occurs in the making of homosexual pornography and that of the heterosexual mainstream. For Catharine MacKinnon, sex is not possible without the gender hierarchy that defines it:

On a simple descriptive level, the inequality of hierarchy of which gender is the primary one, seems necessary for sexual arousal to work. Other added inequalities identify various pornographic genres or subthemes, although they are always added through gender: age, disability, *homosexuality*, animals, objects, race (including anti-Semitism), and so on. [emphasis added]⁶⁶

Therefore, anti-pornography feminists argue that within gay and lesbian sex, one partner plays the dominant male role while the other is deemed the weaker female regardless of whether the participants are of the opposite sex or not.

Many critics of homosexual pornography have looked to the content of gay and lesbian materials for demonstrations of these male-female gender roles. In his examination of the power relations within gay male pornography, Christopher N. Kendall claims to have

⁶⁴ *Ibid.* at 87.

⁶⁵ C.A. MacKinnon, *Toward A Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 142 [hereinafter *Feminist Theory*].

⁶⁶ *Feminism Unmodified*, *supra* note 53 at 172

discovered a “pervasive glorification” of masculinity within the genre.⁶⁷ The more dominant actors are often “straight-acting,” muscular, and youthfully good-looking.⁶⁸ They are frequently adorned with the costumes of cops, truckers, cowboys, and other stereotypically macho figures.⁶⁹ These “dominating” actors engage in beating, raping, and humiliating “descriptively” gay men.⁷⁰ Furthermore, it has also been argued that when an object of domination can withstand the beatings and rapes he is subjected to, he is perceived as being more of a man, as attaining “supermasculinity.”⁷¹

Proponents of anti-pornography feminist rhetoric argue that while masculinity is glorified in gay male porn, femininity is continually associated with weakness and submission. To be the subordinate partner in a sex act is to be a female. Often gay male pornography will explicitly refer to the “weaker” partner using derogatory, female terms. Andrea Dworkin gives examples of such works in *Pornography: Men Possessing Women*.⁷² For example, submitting men may be described as being “fucked as a girl might be” when characterizing a violent sexual encounter.⁷³

Less has been written about the supposed evils of lesbian pornography. Lesbian representations will often also depict gender role playing.⁷⁴ The clothing, poses, and interactions of the two females frequently simulate male and female stereotypes, and these representations sometimes include depicting similar sexual positions. Shannon Bell describes one such image where “a woman in classic showgirl attire—feather boa, garters, seamed nylons, and pumps—is receiving pleasure from her female friend who is in 1990s leather boy gear.”⁷⁵ The accompanying photo shows the showgirl lying on a trunk, as the “leather boy” is kneeling with her torso between the showgirl’s

⁶⁷ Kendall, *supra* note 26 at 31.

⁶⁸ *Ibid.*

⁶⁹ Kendall, *supra* note 26 at 31.

⁷⁰ *Ibid.*

⁷¹ J. Stoltenberg, “Pornography and Freedom” in M.S. Kimmel, ed., *Men Confront Pornography* (New York: Meridan, 1990) 60 at 66 [hereinafter “Pornography and Freedom”].

⁷² A. Dworkin, *Pornography: Men Possessing Women* (New York: E.P. Dutton, 1989).

⁷³ *Ibid.* at 39.

⁷⁴ S. Bell, “On ne peut pas voir l’image [The image cannot be seen]” in *Bad Attitude/s on Trial* (Toronto: University of Toronto Press, 1997) 199 at 232.

⁷⁵ *Ibid.* at 237.

legs.⁷⁶ The image could be interpreted as representing heterosexual penetration. For anti-pornography feminists, these images are given as proof that heterosexuality remains the substance and content of the sexual act. Furthermore, any possibility of attaining the status of men by masculinizing one of the partners is declared an exercise in futility, as the effect of the imagery will be outweighed by the hostilities felt by men feeling excluded by the image.⁷⁷

Even when this butch-femme relationship is absent from lesbian pornography, MacKinnon's theory of gender hierarchical sex asserts that these images still cannot be excluded from the realm of regulation: "[w]omen's sexuality remains constructed under conditions of male supremacy; women remain socially defined as women in relation to men; the definition of women as men's inferiors remains sexual even if not heterosexual, whether men are present at the time or not."⁷⁸ Lesbian images are often created and viewed in the context of the male perspective where he is invited to view the women as the objects of his desire, not of each others. Becki Ross analyses one such photo, which was published in *Hustler* magazine:

Two white (though unnaturally bronzed) women are splayed out across the rocks in the middle of a swift-running stream. They appear to be having sex with one another, but they're not. Each photo is painstakingly constructed to invite a straight male reader/viewer into the scene—in other words, "Lesbianism as (heterosexual) Foreplay 101," or girl + girl = titillation. The women are almost identical in shape, size, age and color (no butch/femme codes here); they sport long red fingernails . . . pouty pink lips and their bodies are positioned to be fucked by the reader and to double his pleasure.⁷⁹

Anti-pornography feminists would argue that this male perspective is never absent from lesbian pornography. The heterosexual gender hierarchy is considered inescapable.

⁷⁶ *Ibid.* at 236.

⁷⁷ J. Stoltenberg, "Gays and the Pro-pornography Movement: Having the Hots for Sex Discrimination" in M.S. Kimmel, ed., *Men Confront Pornography* (New York: Meridan, 1990) 248 at 250–251 [hereinafter "Pro-pornography Movement"].

⁷⁸ *Feminist Theory*, *supra* note 65 at 141–42.

⁷⁹ B. Ross, "The State/d Indefensibility of Lesbian Smut" (1993) Spring (38) *Fireweed* 38 at 42 [hereinafter "Lesbian Smut"]. Although Becki Ross gives this description of lesbian imagery to demonstrate how it can be manipulated for the purposes of a male, heterosexual audience, it should be noted that the author is not among those that support the inclusion of gay and lesbian pornography within anti-pornography theory as described in this section.

The anti-pornography feminists further argue that through the affirmation of the heterosexual, gender hierarchy, gay and lesbian erotica catalyzes homophobia, and thereby further isolates homosexual individuals. Sex that is dependent upon gender differences inherently rejects homosexual activity and labels it as unnatural.⁸⁰ Gay men are already persecuted and shamed by society for being homosexual, and are mocked and stereotyped as feminine. By identifying with images of straight men, they claim that gay men try to become what mainstream society has defined as masculine. “As artifacts of a heterosexist culture that is rigidly polarized by gender,” argues Stoltenberg, “gay male sex films exhibit the apotheosis of male sexuality functioning as imagined by men who, not unlike straight men, dread the taint of feminization.”⁸¹ Thus, it is argued that gay men are alienated from their true selves by gay male porn. Similar arguments for lesbian pornography have not been voiced.

John Stoltenberg claims that the actual process of consuming gay, male pornography further alienates and isolates the gay viewer from the rest of society:

The film edits go by quickly. A few seconds at one angle. Then a few seconds over there. The camera on the cock. Almost always on the cock. The cock almost always hard and pumping. No moments in between anything. How did they get from that to this? Quick cut to the cock. Wait, in between there, wasn't there a moment between them when they just briefly? Cut. Cut. The rhythms of sex film are the staccatos of sexual disconnecting; they are not the rhythms of any credible sequence of sexual communion—those moments of changing pace, remembering who you're with, expressing, responding. All of that is cut out. All of that doesn't show. All that shows is “the action”: the progress of the cock, the status of the cock.⁸²

Shielded from the total experience, exposed to quick broken images, Stoltenberg argues that the actual process of watching these broken images disconnects the viewer from the sexual act as a whole. The experience becomes a series of penetrations rather than a connection between two people.

⁸⁰ Kendall, *supra* note 26 at 28.

⁸¹ J. Stoltenberg as cited in Stychin, *infra* note 89 at 868.

⁸² “Pro-pornography Movement,” *supra* note 77 at 249.

Some advocates of *Butler's* application to gay and lesbian pornography free themselves from the boundaries of feminist theory, and provide other reasons for its prohibition. Some would argue that even if gender difference is not present, other differences such as race, class, age, and power are frequently exploited in homosexual pornography.⁸³ Kendall provides evidence of films where racial inequality and white supremacy are eroticized.⁸⁴ In the notes of his article on gay male pornography he quotes R. Fung who has found that white supremacy and non-white inferiority are the norm in homosexual pornography depicting Asian men.⁸⁵ With regard to the production of pornography, it is argued that the models and actors used in homosexual pornography are often exploited in the process. Kendall uses a conveniently anonymous study from University of California (Los Angeles) to show that men who are “psychologically and financially vulnerable,” and linked to prostitution, are often used in gay male porn.⁸⁶ It has also been suggested that the homosexual pornography industry is just a subset of the mainstream, in that it would not be possible for the former to thrive without the support of the latter.⁸⁷ However, minimal evidence is provided.

IV. A CRITIQUE OF THE ANTI-PORNOGRAPHY FEMINIST ANALYSIS

The anti-pornography feminist analysis is inherently problematic. Middle-class, straight women have dominated second wave, feminist discourse, theorizing and advocating for equal rights. In the name of equality, they have formulated theories of sexual oppression and put forth their single voice to speak for all women. Unfortunately, they have marginalized and excluded other equality-seeking groups in the process. The debate around pornography is one example of how the position of

⁸³ B.J. Crawford, “Gay Does Not Necessarily Mean Good: A Critique of Jeffrey Sherman’s ‘Love Speech: The Social Utility of Pornography’” (1996) 4 *J. Gender & L.* 9 at 11.

⁸⁴ Kendall, *supra* note 26 at 31.

⁸⁵ *Ibid.* at 31.

⁸⁶ *Ibid.* at 34–35.

⁸⁷ Scales, *supra* note 20 at 375.

the heterosexual feminist has pushed itself into the forefront. As one feminist academic has stated:

This heterosexist subtext positions the female subject in relation to men and, as a result, multiple and/or contradictory differences are reduced to this originary singular form of (hetero)sexual difference. A configuration of subjectivity within this (hetero)sexual framework ignores women working, living, and playing within a lesbian-centric context, a context that opens a space where differences between women and within women can be expressed.⁸⁸

Anti-pornography feminists created their theory of gender hierarchy in a heterosexist context. Structuring their viewpoints of pornography around the male and female relationship, they have silenced the homosexual perspective and merely superimposed the gay and lesbian experience onto this heterosexual framework.

Pornography created for and by gays and lesbians is inherently different than that of the heterosexual mainstream. Therefore, the stringent regulation called for by certain feminists—as articulated in *Butler*—is overly inclusive. Carl F. Stychin provides a detailed critique of the anti-pornography feminist analysis, and shows the flaws of regulating homosexual pornography in the same manner as heterosexual images. He agrees with MacKinnon and Dworkin when they argue that “male homosexuality operates within and is created by the dominant discourse” of male supremacy.⁸⁹ However, he argues that representations of gay and lesbian sexuality can disrupt this discourse and expose the constructs of gender as socially created. The context that a gay male viewer brings to his interpretation of pornography creates a new meaning or “signification” of what is occurring.⁹⁰ It is no longer about patriarchy, but about a representation of “a marginalized sexuality that is culturally ‘outlawed.’”⁹¹ Furthermore, Stychin believes that gay male fantasy—experienced in reaction to pornography—is not a confined event whereby the male viewer identifies with the dominant, masculine hero. Instead, when the participants are both gay males, it

⁸⁸ T. Bensinger, “Lesbian Pornography: The Re/making of (a) Community” (1992) 15.1 Discourse 69 at 77.

⁸⁹ C.F. Stychin, “Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography” (1992) 16 Vt L. Rev 857 at 874.

⁹⁰ *Ibid.* at 876.

⁹¹ *Ibid.* at 875.

becomes an “open and ‘boundaryless’” experience as the viewer is able to identify with both the subject (dominant participant), and the object (submissive participant) of the act.⁹²

It is argued that gay and lesbian pornography may actually promote the deconstruction of gender hierarchy. Postmodernist Judith Butler explains this deconstruction as she challenges the radical feminist analysis. She contends that both sex and gender are culturally constructed,⁹³ and criticizes feminism for imprisoning itself in the language of the dominant culture.⁹⁴ Butler explains that the identities of sex and gender, as well as the division of gender into subject and object, must be examined and deconstructed. Relying on Butler’s theory, Carl F. Stychin argues that radical feminists are seeking the position of “subject” in their condemnation of pornography, when they should be challenging the very existence of “subjecthood.”⁹⁵ For Butler, in order to destabilize and undermine the idea of “subject” and the other gender categories, and thereby create gender equality, an unregulated “proliferation” of representations is required.⁹⁶ Cossman and Bell present a similar postmodernist argument.⁹⁷ They contend that the attempts of anti-pornography feminists to bring “reality down to one truth” is an inadequate approach to examining sexuality.⁹⁸ They reject the idea of sexuality as domination, and put forth postmodern, “social-constructionist theory” to break down this idea.⁹⁹

One method for destabilizing the constructs of gender and male supremacy that perpetuate gender hierarchy is through parody and mimicry.¹⁰⁰ This tactic of recontextualization has often been a method of strategy for oppressed groups. Anna Marie Smith draws attention to the adoption of the word “queer” by the gay and lesbian community as

⁹² *Ibid.* at 878.

⁹³ J. Butler, *Gender Trouble* (New York: Routledge, 1990) at 7.

⁹⁴ *Ibid.* at 9.

⁹⁵ Stychin, *supra* note 89 at 883.

⁹⁶ Stychin, *supra* note 89 at 888.

⁹⁷ Cossman & Bell, *supra* note 17 at 22.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ A.M. Smith, “Outlaws as Legislators: Feminist Anti-Censorship Politics and Queer Activism” in Victoria Harwood et al., eds., *Pleasure Principles: Politics, Sexuality and Ethics* (London: Lawrence & Wishart, 1993) 20 at 23.

an empowering protest.¹⁰¹ The term loses its derogatory meaning when used by a member of the gay and lesbian community. Shannon Bell describes a lesbian pornographic parody and explains how it deconstructs our definition of gender:

Two women same size, same body type and shape, slightly different moustaches, both clad in leather pants, one wearing a Greek fisherman's hat, one wearing work boots, the other cowboy boots, redo scenes from Tom of Finland, the famous subcultural gay leather man excess artist of the fifties to seventies. They pose and wrestle. They do some general bad-attitude spanking and sneering around.

What do you have here? Two women parodying two gay men parodying the excess of masculinity. Judith Butler argues that drag is not imitation of any original; rather it is a parody of the idea of there being any original. Gender, as Butler puts it, is "the repeated stylization of the body, a set of repeated actions within a highly rigid regulatory frame that congeal over time to produce . . . a natural sort of being." Gender is imitation without any original, and drag, as the imitation of imitation, reveals the imitative non-essence of gender. Occurring in this representation is the repetition of the performance twice removed (remember gender requires a performance that is repeated); the "meanings" associated with all three "identities" lesbian/gay/hetero, are rendered indistinct.¹⁰²

Thus, society as a whole, including feminists, may reap the benefits of gay and lesbian pornography as it destroys the notions of male domination over submissive females, as well as the notions of "gay" and "lesbian." Without these categories, we are all individuals without an associated status. Inequality cannot function without these definitions.

V. GAY AND LESBIAN PORNOGRAPHY IS DIFFERENT

Not only have anti-pornography feminists constructed an exclusionary, heterosexist analysis of pornography and its effects on society, they have also failed to recognize that gay and lesbian pornography is fundamentally different from mainstream, heterosexual porn. The contrasts between homosexual and heterosexual pornography are

¹⁰¹ *Ibid.* at 23.

¹⁰² Bell, *supra* note 74 at 233.

demonstrated in terms of how it is made, who makes it, and the benefits both viewers and readers derive from it. Although it is acknowledged that there is little information available about how gay and lesbian pornography is produced, sufficient evidence suggests that the process is often a positive experience of self-expression for those involved.

Gay and lesbian pornography operations are often grassroots projects, small in scale, and therefore dependant on volunteers from the gay and lesbian community to contribute as writers and models.¹⁰³ The lesbian, hardcore porn magazine *Bad Attitude* is produced out of the home of editor and publisher Jasmine Sterling, with the help of four others.¹⁰⁴ Distributions for these magazines are small,¹⁰⁵ and those individuals involved in its production earn next to nothing.¹⁰⁶ The producers of homosexual pornography depend on specialty bookstores to carry their products, and suffer economic disadvantage when these businesses are unable to sell their materials because of fear of prosecution.¹⁰⁷

Another unique feature of gay and lesbian pornography is its ability to reach beyond the confines that restrict heterosexual pornography. In mainstream pornography, the female image is continually constructed as an invitation to the male viewer. This is the image that titillates, sells magazines, and generates a profit, which is most often the ultimate goal. As a result, within the limits of satisfying a specific market, there is minimal flexibility for self-exploration. Since the homosexual pornography industry is rarely lucrative and is almost exclusively made by gays and lesbians,¹⁰⁸ those involved—whether creators or models—tend to have a personal rather than a fiscal investment in their projects. Photographers, filmmakers, and writers are often involved in a process of self-exploration when creating pornography. Ross describes her experiences as a writer and states that:

¹⁰³ Scales, *supra* note 20 at 373.

¹⁰⁴ *Ibid.* at 373.

¹⁰⁵ T. Waugh, "Men's Pornography: Gay vs. Straight" in C. K. Creekmur & A. Doty, eds., *Out in Culture* (Durham: Duke University Press, 1995) 307 at 315.

¹⁰⁶ Scales, *supra* note 20 at 373.

¹⁰⁷ Smith, *supra* note 100 at 32.

¹⁰⁸ Waugh, *supra* note 105 at 315. In his comparison of gay male pornography with heterosexual male pornography, Waugh contends that gay male pornography is produced by gay men. See also Scales, *supra* note 20 at 373. Scales asserts that lesbian erotic materials "are produced by a few small collectives of women."

In composing my white, middle class lesbian self as sexual practitioner by assembling words on a page, I invent one strand of my own survival. I speak the terror and exuberance of my erotic outpourings. I speak the unfamiliarity of letting go, feeling reckless and able to enjoy the sensuousness of my body as one, tending to it tenderly as one.¹⁰⁹

The production of gay and lesbian pornography is a mechanism for understanding what it means to be homosexual in a heterosexist society. Admittedly, homosexual pornography arouses its viewers and intends to do so. However, its purpose extends beyond arousal and into the realm of self-discovery.

Testimonial evidence also reveals that the relationship between model and photographer is also different within the context of homosexual pornography. Unlike mainstream pornography where women models are directed by male photographers in an effort to construct masculine fantasy, in gay pornography the photographer and the model are usually of the same sex (and sexual orientation) and thus the male-female power imbalance is removed from the experience. Della Grace, a photographer who specializes in lesbian sadomasochism, describes her process of creating sexual images as one of consent, “based on respect, trust, and a belief in the validity of our existence.”¹¹⁰ She writes:

During the shoot I invite them to submit to my vision, to put themselves and their latent image in my capable hands. Our roles are clearly defined. I want to see them and they want to see themselves being seen. They want to please me and my pleasure is inextricably bound up in theirs.¹¹¹

Furthermore, although Kendall alleges that there is a frequent victimization of models in the production of gay male pornography, as stated earlier, he puts forth no evidence to prove this assertion other than an anonymous study.¹¹²

Grace also suggests that the models involved in her projects also have the potential to engage in an exploration of self-identity. She

¹⁰⁹“Launching Offensives,” *supra* note 19 at 13.

¹¹⁰ D. Grace, “Dynamics of Desire” in V. Harwood et al., eds., *Pleasure Principles: Politics, Sexuality and Ethics* (London: Lawrence & Wishart, 1993) 90 at 93.

¹¹¹ *Ibid.*

¹¹² Kendall, *supra* note 26 at 34–35.

asserts that when a model involved in one of her shoots allows herself to be free and controlled by the photographer, she is no longer responsible for constructing her own image. Thus, in the context of someone else's vision she is able to discover hidden things about herself.¹¹³

The possibility of self-exploration and discovery is not limited to those involved in the production of gay and lesbian pornography. Homosexual individuals as consumers of these materials also engage in an identity-seeking process, as gay and lesbian pornography validates their homoerotic feelings as "normal." Feminist writer Ann Scales writes about her first experience seeing two lesbians kiss in a movie. She describes this encounter as "not so much a turn-on as it was acquiring an application for license to be alive."¹¹⁴ For others, however, the need to experience homosexual sex goes beyond kissing or "running through a meadow in slow motion."¹¹⁵ It requires pornographic images depicting same-sex couples engaged in *sex*. This opportunity is especially important for gay and lesbian adolescents coming of age in a homophobic world. A gay male teenager describes his first experience with gay male pornography discovered in a corner store magazine rack:

Impossible to describe the hypnotic charge for a fifteen-year-old It wasn't just the beauty of the specimens, ripe but not overmuscled, squeaky clean as surfers. It was an attitude of showing off, a sassy wink of something I'd never seen before. When they were shot from the back, they shucked the strap and posed butt-naked, sometimes almost shaking it in your face. I was staring at men who wanted to be admired. And who clearly got down and did it as soon as the shutter stopped clicking. *It was the first clue I ever had that being queer existed out there in the world, with men as real as the shower parade at school.* [emphasis added]¹¹⁶

Not only does gay and lesbian pornography validate the homoerotic urges of youth, but it also provides a practical explanation of how gays and lesbians engage in sexual intercourse. A study conducted on students at an American university tells us that most people know less about anal or oral sex than other methods of intercourse and thus depend on pornography as an educational tool to provide more information.¹¹⁷

¹¹³ Grace, *supra* note 110 at 94.

¹¹⁴ Scales, *supra* note 20 at 381.

¹¹⁵ Sherman, *supra* note 25 at 683.

¹¹⁶ *Ibid.* at 688.

¹¹⁷ *Ibid.* at 682.

Gay and lesbian pornography as a mechanism of validation, encouragement, and instruction is extremely valuable to the homosexual community—particularly considering the persistent invisibility, discrimination, and occasional hatred they face in society. For example, mainstream entertainment rarely, if ever, depicts images of gay and lesbian sexual relations,¹¹⁸ and heterosexuals often make assumptions that others are straight “just like them.”¹¹⁹ These situations discourage gays and lesbians from presenting their real selves. Feelings of isolation and invisibility result from such experiences. The effects of this alienation are particularly intense in comparison to other equality-seeking groups, since few homosexual individuals are able to identify with family members in terms of sexual orientation.¹²⁰ Jeffrey G. Sherman writes that the exclusion of the gay and lesbian perspective from daily life, coupled with the “hatred that has come to be known as homophobia,” has created “extraordinary barriers to gay people’s self-awareness and self-acceptance.”¹²¹ He believes that the effects of this exclusion and isolation can be mitigated with gay and lesbian sexual imagery:

Only sexual images possess the liberatory power to counteract society’s *heterocentrism* and homophobia and offer young gay men models of affirming and unashamed sex between men. Without such models, a gay man may never take those crucial first steps towards self-acknowledgment and liberation.¹²²

Smith J., at the trial level of *Little Sisters*, acknowledged the importance of sexual imagery to the gay and lesbian community:

[S]exual text and imagery produced for homosexuals serves as an affirmation of their sexuality and as a socializing force; that it normalizes the sexual practices that the larger society has historically considered to be deviant; and that it organizes homosexuals as a group and enhances their political power.¹²³

Gays and lesbians need validation of themselves as homosexual beings, and information from the rest of the homosexual world explaining what

¹¹⁸ Sherman, *supra* note 25 at 682–83.

¹¹⁹ *Ibid.* at 676.

¹²⁰ *Ibid.* at 679.

¹²¹ *Ibid.* at 676–77.

¹²² *Ibid.* at 685.

¹²³ *Little Sisters* (S.C.), *supra* note 31 at 280.

that involves. Gay and lesbian pornography is an important mechanism in the validation process.

By establishing commonality among gays and lesbians, pornography not only serves as a tool of self-validation and identification, but aids in the development of a sense of gay culture and community. In his history of sexuality in Canada, Gary Kinsman tells of the increase in physique magazines filtering into Canada from the United States in the 1950s.¹²⁴ Kinsman attributes the foundation of the gay male pornography industry in the 1970s and 1980s to the emergence of these magazines, and moreover, stresses the importance of these materials to the formation of gay male culture. “Without these sources of identification and affirmation,” he argues, “little collective political practice would have been possible.”¹²⁵

More recently, a similar explosion of lesbian erotic imagery has sprung forth. This “lesbian renaissance” emerged in the 1980s as a response to the lack of validation of lesbian sexuality in the media.¹²⁶ Its growth is best demonstrated by the attention it has attracted from mainstream society. For example, in 1992, the popular culture magazine *Spin* acknowledged the rise in lesbian female pornography in an article entitled “Pussy Galore.”¹²⁷ Within this explosion of female erotica, lesbians have been focussing their energies on creating representations of women, for women, by women.¹²⁸ By 1994, Scales estimated that approximately nine lesbian pornography magazines were being produced worldwide,¹²⁹ and that lesbian videos numbered at approximately twelve.¹³⁰ Although this emergence is legitimately labelled as an explosion of lesbian imagery, as evidenced by these numbers, the production of lesbian pornography is still within its early stages and the resultant formation of a lesbian community is in a fragile position. Limiting the abilities of lesbians to interconnect by restricting homosexual pornography will disable their transformation into a political force.

¹²⁴ G. Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose, 1987) at 147.

¹²⁵ *Ibid.* at 147.

¹²⁶ Bensinger, *supra* note 88 at 81.

¹²⁷ E. Gilbert, “Pussy Galore” *Spin* (April 1995) 150.

¹²⁸ Bensinger, *supra* note 88 at 83.

¹²⁹ Scales, *supra* note 20 at 373.

¹³⁰ *Ibid.* at 374.

Concrete evidence of the link between pornography and gay culture is demonstrated by the overlap of gay and lesbian erotica with the homosexual community. Bookstores that openly sell gay and lesbian pornography have been described as “nerve centre[s] for the homosexual community” because they provide information about gay and lesbian events, organize activities, and create a meeting place for homosexual individuals.¹³¹ Furthermore, magazines such as *Bad Attitude* may be the only publication space available for many gay and lesbian writers.¹³² Thus these materials are considered more than mere pornography for the gay and lesbian community. They provide a voice for a suppressed group, and allow the sexual and political to merge in the creation of a common history and culture for homosexuals. J. Moldenhauer writes:

[A]s gay people we know how important literature is in informing our own evolving identity and furthering our social empowerment. Because our “difference” as gay and lesbian people is largely defined by our sexuality, it is especially important for us to be able to communicate and share experiences about this subject.¹³³

Any restrictions on the ability of gays and lesbians to express themselves as individuals disables them as a community.

VI. THE SUPREME COURT OF CANADA’S EXCLUSION OF GAY AND LESBIAN INTERESTS FROM THE *BUTLER* DECISION

As demonstrated above, not only is gay and lesbian pornography inherently different from mainstream pornography, it also acts as a cohesive, political force, uniting alienated gays and lesbians. When deciding the *Butler* case, the Supreme Court of Canada completely failed to take these considerations into account. Instead, the Court embraced the essentialism of the radical feminist movement, and firmly embedded it within Canadian law. The criticism that the judgment in

¹³¹ *Little Sisters (S.C.)*, *supra* note 31 at 271.

¹³² *Scales*, *supra* note 20 at 373.

¹³³ J. Moldenhauer, *Censorship Bulletin #4* (Toronto, Ontario: Glad Day Bookshop and the Glad Day Censorship Fund, 1986) at 13, as cited in Wollaston, *supra* note 27 at 257.

Butler relied on anti-pornography feminist theory and therefore neglected the gay and lesbian has been articulated by numerous commentators. In his analysis of the *Butler* decision, Paul Wollaston concludes that “while s. 163(8) was interpreted in a manner aimed ostensibly at protecting women from the harmful impact of degrading sexual images, there is no recognition or evaluation of its potential impact on gay and lesbian culture.”¹³⁴ Similarly, Brenda Cossman questions the applicability of the decision to gay and lesbian pornography.¹³⁵ She expresses concern that the decision is based on theories of “harm to women” found in comparatively heterosexist, feminist literature.¹³⁶

Throughout the decision, there is a focus on harm to women found in both the test for obscenity and the objective under the section 1 justification. Although it is not always articulated that the harm mentioned is specifically harm to women, the general tone of the case suggests this is the main focus of their decision. Reference is made in passing to harm to men, but in such a form that it appears secondary to the concerns for women. For example, Sopinka J. stated that pornography places “women (*and sometimes men*) in positions of subordination, servile submission or humiliation.”¹³⁷ Later he states that “[h]arm in this context means that it predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, *or what is perhaps debatable, the reverse.*”¹³⁸ There is nothing to suggest that Sopinka J. was referring to harm in gay male relationships in these statements. Instead, he seemed to be focussing on harm to men by women. Therefore, it would be presumptuous to assume Sopinka J. was including the gay and lesbian context with these few phrases.

Beyond these few references to men, the judgment refers frequently to pornography’s effect on women in society—especially when describing the impetus behind the obscenity laws. The purpose of

¹³⁴ Wollaston, *supra* note 27 at 252.

¹³⁵ B. Cossman, “Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler Decision” in *Bad Attitude/s on Trial* (Toronto: University of Toronto Press, 1997) 107 at 128.

¹³⁶ *Ibid.*

¹³⁷ *Butler*, *supra* note 8 at 466 [emphasis added].

¹³⁸ *Ibid.* at 470 [emphasis added].

the obscenity laws under section 163 is declared to be the avoidance of harm to society; however, the descriptions that Sopinka J. puts forth to demonstrate the objective of the legislation are blatantly, heterosexually focussed. For example, he quotes from *The Report on Pornography by the Standing Committee on Justice and Legal Affairs* when he states that “the effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes.”¹³⁹ Furthermore, in his discussion of the pressing and substantial objective of the legislation Sopinka J. states that:

[T]here is a growing concern that the *exploitation of women* and children, depicted in publications and films can, in certain circumstances, lead to “abject and servile victimization.” As Anderson J.A. also noted in that same case, if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. *Materials portraying women as a class as objects for sexual exploitation and abuse* have a negative impact on “individual’s sense of self-worth and acceptance.” [emphasis added]¹⁴⁰

Also, under the section 1 justification portion of the decision, Sopinka J. restates the objective of the obscenity law under step three of the proportionality test when weighing the effect of the law against its objective: “[i]t is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups *such as women* and children, and consequently to society as a whole, by the distribution of these materials.” [emphasis added]¹⁴¹ As argued above, gay and lesbian pornography is different from heterosexual pornography in that it lacks images of gender hierarchy and as such does not pose the same risks to women’s equality. However, it does vitalize the lives of homosexual individuals and communities, and may arguably contribute to the breakdown of patriarchy. This decision does not reflect this important consideration. Instead, it heavily relies on the problematic, heterosexist anti-pornography feminist analysis.

¹³⁹ *Ibid.* at 477.

¹⁴⁰ *Ibid.* at 479.

¹⁴¹ *Ibid.* at 488.

The most significant disappointment of the *Butler* decision is the discussion of the underlying values of freedom of expression. These values, accepted by the Supreme Court of Canada in *Irwin Toy v. Quebec*,¹⁴² are the search for truth, participation in the political process, and individual self-fulfillment.¹⁴³ Sopinka J., however, quickly dismissed an argument premised upon these values and explained that pornography “does not stand on equal footing with other kinds of expression that directly engage the ‘core’ of the freedom of expression values.”¹⁴⁴ However, the benefits flowing from gay and lesbian pornography, as described above, clearly demonstrate these values. Unfortunately, as stated by Cossman, “[t]he arguments that sexual representation is for some communities part of an inherently political process of forging community identities were not, in the Court’s view, even deemed worthy of mention.”¹⁴⁵

The Women’s Legal Education and Action Fund’s involvement in the *Butler* decision played a significant role in the marginalization of the gay and lesbian perspective. Although they claim to have presented an equality-based analysis of pornography,¹⁴⁶ they failed to address how restrictions on pornography may limit the equality of gays and lesbians. Members of the lesbian community criticized LEAF for neglecting to conduct outside consultations in preparation for the case.¹⁴⁷ However, not only did LEAF disregard the homosexual perspective in their argument, Sherman argues that they perverted the reality of gay male pornography to further their own feminist position.¹⁴⁸ He quotes LEAF representative Kathleen Mahoney’s explanation of how their successful outcome was obtained:

We showed them porn—and among the seized videos were some horrifically violent and degrading gay movies. We made the point that *the abused men in these films were being treated like women*—and the judges got it. Otherwise, men can’t put themselves in our shoes.¹⁴⁹

¹⁴² [1989] 1 S.C.R. 927 at 968–71.

¹⁴³ P. Hogg, *Constitutional Law of Canada (Student Edition)* (Toronto: Carswell, 1997) at 961–62.

¹⁴⁴ *Butler*, *supra* note 8 at 482.

¹⁴⁵ Cossman, *supra* note 135 at 124.

¹⁴⁶ Busby, *supra* note 18 at 172.

¹⁴⁷ Gotell, *supra* note 63 at 88.

¹⁴⁸ Sherman, *supra* note 25 at 691.

¹⁴⁹ *Ibid.* at 690.

LEAF presented these decontextualized gay male pornographic images without explanation, and preyed upon the underlying heterosexist attitudes of the judges.¹⁵⁰ In an effort to achieve the desired outcome, they perpetuated misinformed ideas about gay pornography, and played a part in the continuous persecution of gays and lesbians.

By excluding the gay and lesbian perspective from the *Butler* decision, judges, police officers, and customs officials are unable to properly apply the obscenity test in a homosexual context. Furthermore, any instructions given as to its application are geared towards heterosexual pornography. The degrading and dehumanizing test is very unclear since degrading and dehumanizing images are defined as “placing women (and sometimes men) in positions of subordination, servile submission, or humiliation.”¹⁵¹ This is a very subjective test and, as Wollaston suggests, gay male, anal sex in itself may be regarded as a subordinating or humiliating activity by some judges.¹⁵² This is especially true considering that the Court stated that the appearance of consent is not determinative.¹⁵³

This was clearly the attitude of the judge in the *Glad Day* case where Justice Hayes found a number of magazines depicting non-violent gay sex degrading and dehumanizing,¹⁵⁴ but provided few reasons for his decision. In reviewing the magazine *Oriental Guys*, for example, Hayes J. stated:

This magazine contains explicit descriptions of consensual oral and anal sex with oriental males. The article “Adonis” contains extensive excessive descriptions of the acts and professed pleasures and the appreciation of the physical activity. There is no description of violence. The description in the magazine of this sexual activity is degrading, I am of the opinion that this particular material does indicate a strong inference of a risk of harm that might flow from the community being exposed to the material. I am of the opinion that the community would not tolerate others being exposed to this item. The dominant characteristic is an undue exploitation of sex. It is obscene.¹⁵⁵

¹⁵⁰ *Ibid.* at 691.

¹⁵¹ *Butler*, *supra* note 8 at 466.

¹⁵² Wollaston, *supra* note 27 at 258–59.

¹⁵³ *Butler*, *supra* note 8 at 467.

¹⁵⁴ *Glad Day*, *supra* note 28.

¹⁵⁵ *Ibid.* at 37.

How may we expect the judge to understand the gay and lesbian context if this perspective is not acknowledged in the decision that defines obscenity? Without guidelines to follow, he or she is forced to formulate his or her own personal opinion about what is degrading or dehumanizing to Canadian society.¹⁵⁶ In her commentary on this case, Cossman asserts that the *Glad Day* decision goes beyond demonstrating the misapplication of *Butler*, but also shows the problems inherent within its application:

The vagueness of the test opens the door to, and invites the application of, a subjective determination on the nature of the sexually explicit materials The main point of potential conflict between the *Glad Day Bookshop* decision and the *Butler* decision is in the application of a heterosexist model of harm to gay sexual representations.¹⁵⁷

The approach to community standards is equally problematic. Applying a test that asks what is acceptable to “the community” is not workable in a heterosexist world.¹⁵⁸

In *R. v. Scythe*,¹⁵⁹ the defendant was charged with selling an issue of *Bad Attitude*. The fictional article entitled “Wunna my Fantasies” was particularly focussed upon by the judge. The lesbian author of the story describes how she stalks a strange woman to a locker room and then blindfolds, handcuffs, and performs sexual acts on the woman. In his judgment, Paris J. finds the story obscene and states, “[i]f I replaced the aggressor in this article with a man there would be very few people in the community who would not recognize the potential for harm.”¹⁶⁰ Replacing the characters in gay and lesbian pornography with heterosexual participants completely changes the meaning of the images being presented. Paris J. failed to realize this, and relied solely upon the only framework he had available to judge the material—the heterosexist *Butler* decision.

At the trial level of *Little Sisters*, the effects of the interaction between heterosexism and judicial interpretation are also apparent. Although Justice Smith found that Customs officials violated both the

¹⁵⁶ Cossman, *supra* note 135 at 132.

¹⁵⁷ *Ibid.* at 132.

¹⁵⁸ Wollaston, *supra* note 27 at 257.

¹⁵⁹ [1993] O.J. No. 537 (Prov. Div.), online: QL (OJRE) [hereinafter *Scythe*].

¹⁶⁰ *Ibid.* at 7.

freedom of expression and equality rights of the gay owners of Little Sisters book store in terms of their administration and application of the obscenity guidelines under section 163(8) of the *Criminal Code*, he held that the impugned *Customs Tariff* and *Customs Act* provisions were not discriminatory. In his section 15 analysis, Smith J. determined that the distinction found between homosexual and heterosexual pornography was relevant since sexuality “is defined in terms of sexual practices.”¹⁶¹ He further stated:

Since homosexuals are defined by their homosexuality and their art and literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations.¹⁶²

According to Brenda Cossman and Bruce Ryder, this statement is flawed. They purport that there is no evidence available proving that gay and lesbian depictions of sexuality are more often obscene than their heterosexual counterparts.¹⁶³ Increased sexual expression does not automatically lead to increased findings of obscenity. Thus based on Smith J.’s misunderstanding of homosexuality, the equality rights of the owners of Little Sisters were found not to be breached.

Some suggest that unless heterosexist attitudes are removed from the courtroom, broad, discretionary tests like the community standards test must be abandoned.¹⁶⁴ This approach seems reasonable. Admittedly, gays and lesbians have achieved significant gains in terms of equality rights over the last decade, and the judiciary appears to be ready to handle issues of direct discrimination against gays and lesbians. In *Egan v. Canada*,¹⁶⁵ sexual orientation was recognized as an analogous ground under section 15 of the *Charter* and read into the *Canadian Human Rights Act*.¹⁶⁶ However, as some academics have suggested, the inclusion of sexual orientation in the *Charter* and other human rights legislation does not “mean that the law now ‘sees’ lesbians and gay men,

¹⁶¹ *Little Sisters (S.C.)*, *supra* note 31 at 281.

¹⁶² *Ibid.*, at 281–82.

¹⁶³ B. Cossman & B. Ryder, “Customs Censorship and the *Charter*: The *Little Sisters* Case” (1996) 7 Const’l Forum 103 at 105.

¹⁶⁴ Wollaston, *supra* note 27 at 258.

¹⁶⁵ [1995] 2 S.C.R. 513.

¹⁶⁶ *Canadian Human Rights Act*, R.S.C. 1985, c. H–6.

or understands that systemic and highly destructive forms of discrimination are experienced by them.”¹⁶⁷ When issues of same-sex discrimination appear in more indirect forms that necessitate a firm understanding of homosexuality, judges are ill-equipped to handle it. Based on the exclusion of the gay and lesbian perspective from the *Butler* decision and its subsequent misapplication, as well as the heterosexist equality analysis formulated by the trial judge in *Little Sisters*, it is clear that this conclusion is indeed correct. Unless the *Butler* decision is reinterpreted from the gay and lesbian perspective, heterosexist judgments will continue to stand in the way of homosexual equality.

The problematic exclusion of gay and lesbian interests may not only stem from heterosexist attitudes, but may be further attributed to the inability of the judiciary to understand freedom of expression and equality as *complementary* principles, rather than opposing ones. McCormack refers to the *Fraser Commission on Prostitution and Pornography* that examined the connection between freedom of expression and equality in Canada.¹⁶⁸ They found that in the nineteenth century, democracy was deemed impossible without the accompaniment of freedom of expression. However, in the twentieth century, where the primary focus has been equality, freedom of expression has been perceived as a conflicting right. Anti-pornography feminist theory echoes this idea. Catharine MacKinnon advocates against the idea of free speech absolutism.¹⁶⁹ She argues that protecting freedom of expression results in repression because many equality-seeking groups lack the ability and opportunity to be heard. Thus, freedom of expression becomes a tool of suppression to be used against the oppressed.¹⁷⁰ Furthermore, when arguing their anti-pornography position before the Supreme Court of Canada in *Butler*, LEAF claimed their analysis was based on the idea that freedom of expression had to be interpreted in the context of equality rights under the *Charter*.¹⁷¹

¹⁶⁷ T. B. Dawson, “Sexual Orientation and Human Rights Law in Canada: An Overview” *Women, Law and Social Change* (North York: Captus, 1993) 401 at 401.

¹⁶⁸ T. McCormack, “Keeping Our Sex ‘Safe’” (1993) 37 *Fireweed* 25 at 26.

¹⁶⁹ Kendall, *supra* note 26 at 26.

¹⁷⁰ *Ibid.* at 27.

¹⁷¹ Busby, *supra* note 18 at 167.

In contrast to the perspective presented by LEAF in *Butler*, Thelma McCormack attacks the perception of conflict between equality rights and freedom of expression. She attributes the idea of balancing *Charter* rights to liberal political theory. She states that equality and freedom of expression should be looked upon as two sides of the same coin, and trying to split them “is like asking us to rank economic democracy and political democracy when, in reality, they are contingent upon each other.”¹⁷² She further articulates that equality should not be rigidly structured in the language of “equal opportunity or equality of condition,” but instead recognized as a “quality of life which includes freedom to think for and about ourselves.”¹⁷³ This theory on the interaction of the principles of equality and expression more adequately explains the position of gays and lesbians struggling to be heard beneath the silencing majority. True equality is unattainable without the accompaniment of freedom to explore their personal and community identities through art, literature, and pornography.

The emergence of the intersectionalist model of oppression presents further clarification of the relationship between freedom of expression and equality. Initially, this model was used to explore the multi-dimensional nature of discrimination. It is argued that under the essentialist feminist model, victims of prejudice are disadvantaged because they are often unable to define themselves within one category of discrimination such as sex or race. In reality, the oppression they face is able to be divided into categories. Sherene Razack demonstrates the interrelation of race and sex in a harassment context when she asks, “[w]hat is a White, male colleague really thinking when he suggests to me that he has heard that women from the Caribbean are highly sexed? Is he thinking about my race or my sex?”¹⁷⁴ She suggests that a more effective model for defining discrimination is through an integrative model where recognition is given to the intersectionality of characteristics such as race, gender, or sexual orientation.¹⁷⁵

¹⁷² McCormack, *supra* note 168 at 29.

¹⁷³ *Ibid.* at 30.

¹⁷⁴ S. Razack, “Beyond Universal Women: Reflections on Theorizing Difference Among Women” (1996) 45 U.N.B.L.J. 209 at 211.

¹⁷⁵ *Ibid.* at 213.

Brenda Cossman and Bruce Ryder have suggested that this model of intersectionality can be applied to situations of rights violations.¹⁷⁶ They claim that the violations experienced by gays and lesbians in the name of censorship cannot be separated into violations of equality rights and violations of freedom of expression, because the two are inseparable:

[T]he way in which the gay and lesbian community experiences the violation of their freedom of expression is not just like the way the heterosexual community experiences the violation of this freedom. The violation of the freedom of expression has a disparate impact on the gay and lesbian community because of the importance of sexual expression to the political identity of the community.¹⁷⁷

For Cossman and Ryder, the violation of freedom of expression is discriminatory in the way it applies to the gay and lesbian community. They further this position in their critique of Smith J.'s decision at the trial level in *Little Sisters*, and assert that a law that allows a finding of non-discrimination, based on the belief that gay and lesbian pornography is inherently more obscene than heterosexual pornography, is itself discriminatory.¹⁷⁸ Therefore, they argue that a breach of the complainant's equality rights under section 15 of the *Charter* did in fact occur.

VII. THE FUTURE OF *BUTLER*

A solution to the disadvantage created by the censorship of gay and lesbian pornography must be sought. Ideally, removing homoerotic representations from the scrutinizing gaze of the obscenity laws is the best strategy. However, reformation of the obscenity law to allow for unrestricted gay and lesbian erotica is not in the imminent future. For now, the gay and lesbian community should direct their efforts towards distinguishing *Butler* and creating a new interpretation of the obscenity laws from the gay and lesbian perspective.

¹⁷⁶ Cossman & Ryder, *supra* note 163 at 107.

¹⁷⁷ *Ibid.* at 108.

¹⁷⁸ *Ibid.*

Thus far, any attempts to distinguish the decision have met with much resistance. At the trial level of *Little Sisters*, Smith J. declared this distinguishment impossible. He referred to the fact that some of the pornography confiscated from the video store in *Butler* depicted homosexual practices.¹⁷⁹ He also drew attention to the few references made in the decision with regard to harm to men (mentioned earlier in this essay) and inferred that Sopinka J. was referring to homosexual men. Furthermore, Smith J. argued that the language of the decision showed its applicability to obscenity *generally*.¹⁸⁰ Lastly, he asserted that to distinguish *Butler* would “derogate from the community standards test,” which he states, “does not permit of the proposition that material that would otherwise be obscene is not obscene if it is produced for a homosexual audience.”¹⁸¹ These reasons are weak and unreasonable considering the argument presented above concerning the explicit heterosexist focus of the decision. The application was not defined generally, but was defined according to the specific issue of harm towards women. Furthermore, the supposed homosexual material presented at the *Butler* trial were actually depictions geared towards a heterosexual audience.¹⁸² Smith J.’s argument regarding the community standard’s test is illogical. As Cossman and Ryder explain: “[t]he point is not simply that the audience is different, but that the entire framework of production, distribution, and consumption of gay and lesbian material is fundamentally different.”¹⁸³ Clearly, there was a heterosexist tone to the decision excluding homosexuals, and Smith J.’s brief dismissal of the subject is disappointing.

It should be noted that the *Little Sisters* decision was appealed by the plaintiff book store owners to the British Columbia Court of Appeal on the grounds that the trial judge erred in not finding that the Customs legislation violated both section 15(1) (equality rights) and section 2(b) the (freedom of expression) under the *Charter*.¹⁸⁴ As stated above, the legislation allows Customs officials to evaluate materials based upon the definition of obscenity provided in section 163(8) of the *Criminal*

¹⁷⁹ *Little Sisters* (S.C.), *supra* note 31 at 294–95.

¹⁸⁰ *Ibid.* at 295.

¹⁸¹ *Ibid.* at 296.

¹⁸² Cossman & Ryder, *supra* note 163 at 106.

¹⁸³ *Ibid.* at 107.

¹⁸⁴ *Little Sisters* (C.A.), *supra* note 6.

Code. Writing for the majority, MacFarlane J.A. dismissed the appeal. Heavily relying upon the decision of Smith J. at the trial level, MacFarlane J.A. found that freedom of expression had been infringed but was justified as per section 1, and that section 15(1) had not been violated. With regards to distinguishing the *Butler* decision, the Court of Appeal agreed with the trial judge and found that *Butler* was “concerned with obscenity, whether it was homosexual or heterosexual.”¹⁸⁵ He also supported the trial judge’s argument that the community standards test is not to be applied to specific audiences, but to society as a whole.¹⁸⁶ “Harm is not to be determined by the standard of the gay/lesbian community but by application of a general community standard.”¹⁸⁷ Furthermore, MacFarlane J.A. found that the Custom’s legislation, which the Court of Appeal held should be interpreted to include section 163(8) of the *Criminal Code*, did not create a distinction between heterosexual and homosexual materials so as to support a finding of discrimination.¹⁸⁸

Although these decisions are disappointing in their sparse analysis of the issue of *Butler*’s application to gay and lesbian pornography, the Supreme Court of Canada has recently given leave to appeal to Little Sisters book store.¹⁸⁹ This gives the highest court in Canada the opportunity to determine how section 163(8) of the *Criminal Code* and *Butler* will be interpreted with regard to gay and lesbian pornography.

VIII. CONCLUSION

Although allegations of the improper application of *Butler* are indeed supportable, it must be recognized that the discrimination facing gays and lesbians at the hands of the both Customs officials and the judiciary stem from much larger problems. *Butler* is ill-equipped to evaluate the merits of gay and lesbian pornography. It fails to recognize that same-sex pornography is inherently different from heterosexual

¹⁸⁵ *Ibid.* at 405.

¹⁸⁶ *Ibid.* at 406.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* at 413.

¹⁸⁹ “*Leave to Appeal*,” *supra* note 7.

representations in its production, use, and in the value it holds for its audience. It also fails to recognize that gay and lesbian pornography lacks the presence of gender inequality and is therefore unable to perpetuate the gender hierarchy that exists between men and women. Regulating gay and lesbian imagery in the same manner as heterosexual representations—without accounting for these differences—is dangerous. Judges and customs officials are making determinations of “degrading and dehumanizing” and applying the community standards test in a heterosexist context that will inevitably lead to findings of obscenity where the materials are not obscene. *Butler* must be reconsidered from the gay and lesbian perspective. It is hoped that in hearing the *Little Sisters* case, the Supreme Court of Canada will recognize the discriminatory impact of superimposing the anti-pornography feminist theory onto gay and lesbian imagery and distinguish *Butler* in a way that demonstrates the uniqueness of homosexual pornography.