UNDRESSING THE CANADIAN STATE:
A Feminist Approach to Obscenity Legislation in Canada

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by

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IN CANADA

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A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements of the degree of

MASTER OF ARTS

ABSTRACT

This thesis examines whether the Canadian state's interest in maintaining the long-term legitimacy of current social relations has prompted a co-optive response to Canadian feminists' critique of pornography. Specifically, I question whether a feminist interest in promoting insurgent social change - by altering the nature of the state's approach to pornography - has been co-opted by the Supreme Court decision in *R. v. Butler* (1992). I argue - from a socialist feminist perspective - that pornography is an institution of an imperial-capitalist and hetero-patriarchal society.

Through pornography sexual subjectivity is constituted. As constitutive in and of socio-sexual subjectivity, pornographic practices reproduce gendered power relations. Owing to the fact that the state has done little by way of controlling pornography, I argue that the state implicitly supports the ideology of pornography. From this perspective, I interrogate the possibility of law - as a mechanism of state power - to transform gender relations. I conclude that agents of the state responsible for judicial praxis fail to comprehend the complexity of pornography from a sociological point of view. Owing to this failure, the law tends to persist in legitimizing, thereby normalizing, hegemonic socio-sexual subjectivity and practice.

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INTRODUCTION:

It is 15 years now since Canadian feminists took to the streets to protest the screening of a "repulsive shred of celluloid" entitled *Snuff* at Cinema 2000 in Toronto (Cole 1989:7). The advertisements for this film promised its viewers the ultimate erotic spectacle: the actual murder of a South American prostitute (Cole 1989). The screening of *Snuff* and films of this genre sharpened feminists' focus on the pornography trade in Canada. Today, there are more pornographic materials available than ever before. Magazines, T.V., the telephone, videos, movie theatres, and even personal computers provide virtually unlimited access to pornography. While most of the pornography in Canada is imported from other countries, principally it arrives from the United States (Cole 1989). Over the last 25 years, the North American pornography trade has mushroomed into a multi-billion dollar industry. It accounts for 50 to 60 per cent of all videocassette sales, which find their way into anywhere from one in ten, to one in seven middle class homes (Fox-Genovese 1991:87).

The 70s and 80s saw several unsuccessful attempts by the federal government to deal with the proliferation of pornography through parliamentary reform. In February of 1992, however, in *R. v. Butler*, the Supreme Court of Canada reinterpreted the section of the *Criminal Code* that deals with obscenity. This ruling recognized that a link exists between obscenity and violence; that depictions of degrading and dehumanizing sex and sex with violence are 'harmful' to the extent that they promote anti-social behaviour towards women and men.

Valverde (1985:122) argues that the "porn question" is actually many questions:

> It involves the issue of male sexual and non-sexual violence; the problem of masculine sexuality and masculine desire; the relationship of women to forms of culture seldom recognized as pornographic; the political question of how far feminists can expect the government and the police to behave in our interests; and also the problem of the dehumanized portrayal of women in the mass media.

This thesis engages the political "porn question" as it relates to the regulation of pornography in criminal law. The purpose of this thesis is to assess the long term implications for Canadian women of the Supreme Court decision in *R. v. Butler*. The central problematic of the thesis will be whether the *Butler* interpretation of obscenity law deviates from traditional interpretations of the law by articulating a feminist understanding of 'obscenity.' This undertaking necessitates a critical examination of feminist frameworks and conceptions influencing analyses of the efficacy of law reform. More specifically, the thesis will address two crucial questions: Does *Butler* "... represent an unwelcome alliance between feminism and the state" (Currie 1990:77)? Or, does *Butler* represent an instance where state interests converged with feminists' interests (Ursel 1991:262)? These questions are rooted in an understanding that law generates its own internal contradictions, and that feminist groups can use law against itself to promote social change (Brickey and Comack 1987). The nature of counter-hegemonic struggles to transform the law is a key focus of this thesis. From a sociological point of view, specific emancipatory strategies and the outcomes of these struggles are

particularly important as they help to identify points of successful resistance.

This thesis is organized into four chapters which, for organization purposes and clarity, are broken down into smaller sub-sections. Chapter One sets out the theoretical framework that informs the work in this thesis. This framework outlines a socialist feminist conception of society, human nature, and the role of the state - through law - in maintaining the status-quo. Chapter Two flows from these theoretical considerations to outline an understanding of pornography that connects it to the question of the insurgent potential of legal struggles. Here, I outline the substantive criteria used to guide my evaluation of the *Butler* ruling. Chapter Three focuses on 'obscenity' law and the feminist engagement with the state. This involves: outlining the history of obscenity law in Canada; examining feminist appeals for, and responses to, changes in obscenity legislation; and, finally, an explanation of the various notions of 'harm' that have informed and justified banning certain sexually explicit materials. In Chapter Four, I discuss the arguments presented to the Supreme Court by the Women's Legal Education and Action Fund (LEAF). As LEAF was the only nationally based feminist organization to intervene in *Butler*, I focus on the specific arguments they presented to the court. Following a summary the Supreme Court ruling in *Butler*, I formulate a socialist feminist analysis of *Butler*. In particular, I highlight the role of LEAF as a feminist organization engaged in counter-hegemonic legal struggle to promote women's equality.

CHAPTER ONE

Theoretical Framework

The purpose of this chapter is to outline a socialist feminist theoretical framework. This framework constitutes the basis for my evaluation of the *Butler* decision. Because the *Butler* decision engages the role of the state - through law - in the regulation of pornography,[1] I address the way in which women's sexuality has traditionally been defined and controlled both by the state and by the existence of pornography in general. Accordingly, this chapter includes a discussion of the relationship between society, the state and the law as a mechanism of state power. In the first section, I briefly outline the basic tenets of a socialist feminist theoretical paradigm. Included in the second section is a discussion of the feminist engagement with the state. By focusing on the nature of legal struggles, I highlight the importance of counter-hegemonic political practices.

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[1] In this thesis I use the term pornography and obscenity more or less interchangeably. However, I tend to use the term obscenity when discussing the law as this is the standard by which it evaluates sexually explicit materials (Busby 1993). I use the phrase sexually explicit when referring to visual and or written materials which I find unproblematic, that is, sexually graphic materials whose purpose is perhaps to arouse but also to engage the viewer in a social dialogue on sexuality as it relates to the forms, contents and purposes of sexually graphic materials. It is critical to stress that my focus is on mainstream, freely accessible, heterosexual pornography rather than gay and lesbian sexually explicit (re)presentations; some of which are pornographic according to my theoretical framework. I am aware, however, that it is more likely for gay and lesbian sexually explicit material to be deemed "pornographic" (i.e. more often than heterosexual material) owing to misogyny and homophobia, rather than to the eroticization of dominance. It is perhaps trite to note that the majority of pornographic materials depict heterosexuality.

Socialist Feminism:

Socialist feminism shares with Marxism the same basic method for describing and analyzing the structure of social relations that shape the human condition in contemporary society. Beginning with a conception of human nature that is defined in part by our biological characteristics, and in part by social activity, a socialist feminist framework provides an examination of the social world which accounts for the actualities of our lived experiences -- experiences that have been shaped historically by the forces of (re)production.

A socialist feminist epistemology and ontology constructs both a theory of oppression and practices for liberation that is both materialist[2] and historical. It is materialist in the sense that it accounts for the power relations and other factors that structure people's lives, and historical in the sense that it accounts for social changes as well as regularities that persist over time (Hartsock 1983:150). As Segal (1987:67) asserts "... *all* social relations and social practices are connected with the specific material and concrete world in which they occur, and are affected by changes in that world." The historically prevailing constitution of the human physiological and social-psychological character is continuously formed and transformed through the organization of (re)productive activities. These activities are determined by the underlying structures of society - structures that are in turn created by our theoretical-practical activity (Jaggar 1983). As a result, the human

[2] My use of the term materialist refers to the cultural, economic, historical, political, and social: to the relationship between their organization and *ideas*. Materialist refers to the dialectical relationship of ideas with our material surroundings.

condition is viewed as historically variable and therefore socially alterable. From this vantage point, the goal of socialist feminist politics is to fully understand the nature of social structures and the way in which these structures generate oppressive social relations as well as those practices that potentially alter oppressive relations in order to effect meaningful social change.

A socialist feminist expansion and reformulation of the analytic tools of Marxism understands (re)productive activity as organized around a 'gendered' division of labour, where the means and modes of production are inextricably linked to the means and modes of reproduction. By expanding the traditional Marxist analytic categories to include women, socialist feminism accounts for the lived reality of women's lives. Socialist feminism recognizes the distinct social location of women and holds that an adequate theory of knowledge must account for the lived experiences of women - it does not assume that women's standpoint is "available to all [women] and only to women" (Berger *et al* 1991:61). By rejecting a false universalization of women's experiences, socialist feminism argues that while men may find it difficult to understand women's specific experiences, nonetheless, they are able to identify with a woman's standpoint (Berger *et al* 1991).

This 'gendered' division of labour is said to be constituted by and constitutive of women's and men's consciousness. However, socialist feminist theory lacks a systematic inquiry into the forces that shape the construction of our social-psychological consciousness. This weakness is problematic since the focus

of this thesis is an interrogation of pornography. It is precisely because pornography is a visual (and textual) representation of gendered practices that a discussion of the role of language in the constitution of human consciousness and the reproduction of social relations is pertinent to my theoretical framework. Below, I argue that pornography is a medium in and through which gendered social consciousness and practices are realized. Accordingly, I expand the socialist feminist framework to include an analysis of language.

Palmer (1990:3) argues that language, broadly defined as "... systems of signification that extend well beyond mere words to include the symbols and structures of all ways of communicating (from the articulated to the subliminal), is the essential ground within which social life is embedded." Language articulates as well as constructs human consciousness and the material relations of (re)production. According to Palmer (1990:3), it "... constructs being: it orders the relations of classes and genders, ever attentive to specific hierarchies; it is the stage on which consciousness makes its historical entrance and politics is scripted."[3]

Accordingly, human consciousness and the material modes of (re)production exist in a dialectical relationship. Consciousness is more than a mere reflection of material conditions because agents act upon and are acted upon by historically specific material conditions. Subjectivities are constitutive of and constituted by language, which illuminates the sociological significance of an analysis of discourse and the practices embodied therein. Recognizing that

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[3] Here Palmer (1990) neglects the significance of language in ordering race relations. Language also constructs racialized being.

consciousness is socially constituted and constituting expands our understanding of the ways in which gendered, classed and racialized relations have historically been shaped by, yet constrain, consciousness. Within this view, "... the role of human agency in social change and the complex relationship between oppression and resistance" is highlighted (Morgen 1990:283). Human activity as shaped by the dual structures of patriarchy and capitalism sets limits on human understanding - our social practices constitute our knowledge, which in turn informs our social practices. Human subjectivity is constructed from "... the available knowledges in a culture as they circulate in discourses and institutional practices" (Hennessy 1993:37). Therefore:

> ... socialist feminists point to the important fact that when we engage in particular activities to satisfy needs, we also create a consciousness and personality structure (character structure) that endures beyond the social activities that shaped it. Character structure is an internalized pattern of behaviour, daily organized habit, experienced in terms of identity, which reflects the dominance/subordination relations found in production and reproduction. Although people, as both creatures and creators of society, have the capacity to make themselves, they are not free to do so as they might like. Unless they undertake consciously to change themselves, individuals are restrained by the character structures they have previously developed by interacting in the institutional structures of production and reproduction. (Messerschmidt 1986:30-31)

This view of the constitutive nature of language attends to the determinism found in both Marxist and feminist conceptions of the role of production and reproduction in the formation of human subjects. As Palmer (1990:5) argues, the importance of attending to language "lies not in establishing the tyranny of language as some prior, determining feature of human relations, but in excavating,

and hence materializing, the relations of economy and culture, necessity and agency, structure and process, that language mediates incessantly." It is an attempt to locate the construction of subjectivity through language within the realm of the material context of cultural (re)production. Language deals with the social construction of the subject within and through discourse and/or discursive practices. Differences between men and women are understood not as a pre-social givens, but rather are understood to be "... socially constructed and therefore socially alterable" (Jaggar 1983:304). Women and men are understood not as victims or passive bearers of social forces. We are viewed as agents - or 'creative historical subjects' - capable of accepting and/or subverting the socializing forces of our social class, gender, or race (Itzin 1992). The systems of production and reproduction that produce divisions of class, gender and race, interconnect and interpenetrate to shape society's 'superstructural' institutions -- institutions which in turn interact dialectically, shaping one another and the foundation of society. Messerschmidt (1986:30) explains:

> Socialist feminism views the "base" of society as a historically changing system of organizing reproduction, in interaction with a system of production. The base entails a dualistic system - production and reproduction - interacting dialectically. The interpenetration and interconnection between production and reproduction most pervasively influences the culture or "superstructure" of society - that is, its legal, political, religious, aesthetic, and philosophic forms - and therefore is most important in setting limits to what forms can ultimately exist in a society. These superstructural institutions interact with one another as well as the base. Consequently, we have dialectical interaction *within* both the "base" and "superstructure," as well as *between* them.

These basic structures are posited as both capitalist[4] and patriarchal.[5] Segal (1987:49) defines patriarchy as a

> ... social system of male domination, as the power of the father in the family, as the universal principle and symbol of male domination, or as men's power to exchange women in order to form kinship groups. But central to all these definitions of patriarchy [is] men's power over women's sexuality and fertility.

More specifically, a socialist feminist understanding of social structure posits *multiple* systems of exploitation; the mode(s) of (re)production are hetero-patriarchal and imperial-capitalist. For the purposes of magnifying the heterosexism of the current form of patriarchal relations, I use the term hetero-patriarchy. Compounding the terms imperial and capitalism signifies that the successes of the capitalist mode of production are a result of imperialist colonization practices, expedited through racialization. The expansion of the capitalist mode of production would have been impossible without the legalized slavery of non-European persons (Gayle 1992:235). These structures form the basis of exploitative class, gender and race relations of (re)production. A key premise of a socialist feminist theoretical framework is that these relations are power relations.[6] This 'systems' framework reveals the dynamic and

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[4] Capitalism refers to property relations which consist of the ownership of the means and mode of production by a small number of (predominantly white) men and the selling of their labour power by almost everyone else (Acker 1989:14), and which makes up the economic foundation of society.

[5] Patriarchy refers to gender relations such that the means and mode of reproducing human beings is socially organized and controlled by men as a group.

[6] My use of the term power has a two-fold meaning; the term 'power' signifies one's ability to exert control over one's own future, while 'power relations' refers to politics: social relations of dominance and subordination (Kittay 1984:146).

interconnectedness of contemporary power relations. The relations that construct class, gender and race are inextricably connected, constituting a web of domination (Collins 1991) affecting experience(s) of subjectivity. Socialist feminism is an analysis that views gender, class, and race relations as inextricably linked, and which does not priorize one or the other set of power relations as the root cause of women's oppression (Boyd and Sheehy 1986). This approach understands that structural determinants shape rather than determine historical, economic-social-political relations. Both hetero-patriarchy and imperial-capitalism are mutually dependent yet interacting relations providing the foundation for the modes of production and reproduction that construct class, gender and race hierarchy/ies.

In theorizing the notion of class formation and transformation, socialist feminists investigate the ways in which "... class is produced and reproduced in concrete social practices" (Acker 1989:14). I use the term class to refer to one's relationship to the means of production. The relationships between those who own and control the means of production and those who have only their labour power to sell -- are always already unequal and exploitative.

The term gender is understood by socialist feminists to be one of the fundamental processes that constitute social life. Initially, feminist theorists used the term to differentiate between biological sex differences with those differences generated through socialization. Today, however,

> [i]ts meaning has expanded and become more complex, referring not only to femininity and masculinity, but also appearing as a

> basis for social life, a ground for establishing identity and interpreting experience, and a symbolic and material line dividing work, resources, power, and honor between the sexes. (Acker 1989:17)

In short, gender "... is a major symbolic form in which power is justified" (Acker 1989:17) and sexuality is defined.

Similarly, Muszynski (1989:66) argues that race is a socially constructed set of dichotomized relations "... embedded in both patriarchal and class relations." Racism is a set of complex and systematic practices; colonization and imperialism, resulted in the commodification of human beings as slaves by white men of the capitalist class which was facilitated and legitimized through a pseudo-scientific hierarchical ranking of racialized groups in order to justify the enslavement of certain groups of people (Muszynski 1989:66). The commodification of racialized groups was further facilitated by the existence of a patriarchal consciousness which, once reformulated, came to include 'race' along with gender as an exclusionary category (Muszynski 1989). "It is the same mentality that created woman as Other that could be further pushed to create racial dichotomization" (Muszynski 1989:77). This construction of racialized social relations intersects and affects class and gender relations in such a way that each set of relations stands alone only for analytical purposes. Within this framework, racialization is understood as an historical construction operating in conjunction with gender oppression and class exploitation.

The centrality of men's control over women's sexuality is one of the key features of hetero-patriarchal relations and a specific focus of this thesis.

Accordingly, in the following section, I discuss the shift in the control of women's (and children's) sexuality as hetero-patriarchy shifted from a familial to a social form.

Familial Patriarchy to Social Patriarchy:

According to Ursel (1986) and Walby (1990), patriarchy is historically variable rather than a static phenomenon. Recent history has seen a shift in the degree and form of patriarchy such that private forms gave way to public forms of control over women and children. As material conditions have changed, so too have the forms of patriarchy.

Specifically, Ursel (1986) argues that patriarchy has gone through a number of phases. She posits three distinctive economic modes that historically have organized reproduction:

> ... (a) *communal patriarchy*, which corresponds with pre-class, kin-based social systems; (b) *familial patriarchy*, which corresponds with class-structured social systems characterized by decentralized processes of production; and (c) *social patriarchy*, which corresponds to advanced wage labour systems. (Ursel 1986;154)

More recently, patriarchal relations have shifted from a 'familial' to a 'social' form. Familial patriarchy is based mainly on household production, with a patriarch controlling the lives of women and children - individually and directly - in the relatively private sphere of the home. In their positions of power within the household, fathers, brothers, and husbands tended to have direct control over the daily organization of women's lives. Often women were subordinated to the

requirements of the household. In particular, this subordination was maintained by excluding women from participation in the public arena. According to Walby (1990:178), it is this exclusion from the public arena with all its attendant legal rights and privileges that is the causal mechanism in the maintenance of familial patriarchy.

In contrast, social patriarchy is based on the control of women - directly as well as indirectly - through means other than our exclusion from production. Walby (1990:77) identifies six key features of social patriarchy:

> ... the patriarchal mode of production; patriarchal relations in paid work; patriarchal relations in the state; male violence; patriarchal relations in sexuality; and patriarchal relations in cultural institutions including religions, media, education.

In documenting the shift from the control of women by individual men (as wives and daughters), to the control of women by the state (as workers), Ursel (1986:154) states that:

> Familial patriarchy is the hierarchical sexual organization for the reproduction of sex - gender identities and relations as it exists in the family; in contrast, social patriarchy is the societal organization of sex gender relations through rules and laws concerning marriage, property, inheritance, and child custody.

Thus, law plays an integral part in the maintenance of sex gender relations under social patriarchy. The shift from the control of women as the property of individual men, to the control of women as legal 'persons' by the state - through law - represents the shift from familial to social patriarchy. According to Walby (1990:178), social patriarchy exists when:

> The expropriation of women is performed more collectively than

> by individual patriarchy. The household may remain the site of patriarchal oppression, but it is no longer the main place where women are present.

Although, the home remains a significant site of patriarchal oppression,[7] institutions of society such as the law (through marriage, property, and inheritance rights), education, and religion are central to the maintenance of male domination and control under the social form of patriarchy. Women's lives tend to be organized systematically rather than by an individual male relative.

It can be argued that this shift from familial to social patriarchy occurred out of capital's requirement for labour that resulted in women's increased participation in waged labour. In addition, first wave feminist activism induced the erosion of patriarchal control within the family and the development of social patriarchy. The socialization of previously privatized labour of women with the rise of the welfare state under capitalist industrialization resulted in a shift from a private to a public form of patriarchal control (Ursel 1986; Walby 1990). In particular, women's sexuality is no longer under the direct and exclusive control of their fathers, brothers or husbands within the context of the family; the control of sexuality has shifted into the social realm where the state plays a key role in regulating women's access to information on, and use of, birth control, abortion and emerging reproductive technologies.

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[7] It should be noted that for many women the home is a site of refuge from the harsh realities of their everyday lives, as well as a site for political resistance. This is particularly relevant for racialized women who identify the home as a source of strength. According to hooks (1990:42): "Black women resisted by making homes where all black people could strive to be subjects, not objects, where we could be affirmed in our minds and hearts despite poverty, hardship, and deprivation, where we could restore to ourselves the dignity denied us on the outside in the public world."

It should be noted that familial patriarchy still persists in contemporary Western societies in that men as a group still tend to control the labour power of women as a group (for example, access to family resources, housework, and leisure time). Nevertheless, social patriarchy reflects an extension of power over women into the public realm, which has been partially facilitated through law. Accordingly, the following section examines the relationship between the state and the law, keeping in mind that hetero-patriarchy and imperial-capitalism circumscribe the superstructural institutions of society, in particular, the state and law, I discuss the way in which women have attempted to use the state as a political tool for liberation.

The State and the Law:

A feminist concern with the state and state practices is motivated by feminism's political project; that is, to understand the complex relations through which oppression is constructed and maintained and in the process to develop strategies for dismantling these oppressive structures. Such a project is undertaken with a vision of creating a society free from relations of domination constructed around class, gender and race divisions (Randall 1988:10).

It has been said that feminism has no theory of the state (MacKinnon 1989:157). What MacKinnon (1989:159) means is that:

> feminism has not confronted, on its own terms, the relation between the state and society within a theory of social determination specific to sex. As a result, it lacks a jurisprudence, that is, a theory of the substance of law and its relation to society,

> and the relationship between the two. Such a theory would comprehend how law works as a form of state power in a social context in which power is gendered.

While socialist feminist jurisprudence is grounded within the Marxist tradition of social philosophy, it nevertheless seeks to formulate a theory of the interrelationship between society, the state, and the law that accounts for the fact that one's class, gender and race define access to power. The state is seen to reproduce power relations in a variety of ways. As a result, the state is a source of considerable power for the dominant class -- a site where power is legitimized and maintained.

The framework developed here views the state as a relatively 'autonomous' organizer and mediator of exploitative class, gender, and race relations of power. In order to maintain 'hegemony,' the state is seen to act in a relatively autonomous manner, at times appearing to promote the interests of subordinate groups when its legitimacy is threatened. The state, as a complex site of social, political and economic power, is a central feature in the maintenance of contemporary class, gender and race hierarchies. Maroney (1988:26) defines the state as "... an executive, judicial and repressive apparatus ..." of civil society in which "... power is organized through two distinct mechanisms: hegemony and coercion." The state, "as a complex set of relations, institutions, agencies, resources and forces," (Randall 1988:14) acts to ensure the long-term reproduction of hetero-patriarchy and imperial-capitalism. As an organizer and mediator of class, gender and racialized interests, the state maintains and legitimizes imperial-

capitalist and hetero-patriarchal power relations. To ensure both its own legitimacy and that of the social system, the state must at times act in contradiction to the interests of dominant class (Brickey and Comack 1987; Snider 1991).

I argue that a synthesis of socialist feminist theory with a Gramscian concept of hegemony provides an effective theoretical framework to analyze the state. Briefly, this framework views hegemony as essential for the reproduction of exploitative power relations. As Maroney (1988:26) states, hegemony is the process of engendering spontaneous consent of the governed to the rule of the dominant social group (bourgeois white men) by promoting particular ideologies which act as 'social cement.' Ideological hegemony refers, therefore, to the way in which subordinate groups come to accept ruling ideology as Truth. This concept explains how the ruling class secures the consent of the subordinated members of society as a whole so that ruling class ideas, values and practices become the dominant ideas, values and practices and are viewed as common sense. From this perspective, ideological hegemony plays a key role in maintaining oppressive power relations by securing the consent of subordinated groups to what is essentially their own domination.

I take my concept of ideology from Ramazanoglu (1989:146-147) who, developing the Marxist concept, understands ideology as a means of examining how dominant groups can construct certain representations of material reality that further their own interests. The emphasis is placed on drawing a connection

between ideology and people's material conditions of existence. Ideology is conceived here, then, to signify the use of:

> ... ideas which act to conceal key contradictions in any society, and ideas which work in the interest of the dominant class. In this sense ideology is distinguished from knowledge. Whereas ideology mystifies people's understandings of the societies they live in, knowledge reveals the essential social, political, and economic structures and relationships which constitute society. (Ramazanoglu 1989:146)

Ideologies form a particular discourse which is reinforced in and through various agents of socialization (for example: education, law, media, religion) which reinforce certain ways of interpreting social reality while disqualifying others, thereby constructing a particular hegemonic order (Snider 1992:8). Therefore, ideology is not then simply false consciousness or inaccurate knowledge, rather it is a means for representing social reality so that the contradictions which result from systems of (re)production are distorted so as to appear inevitable or natural. According to O'Brien and McIntyre (1986:74), "[i]deology is not simple fraud nor a triumph for propaganda; it is a complex social production in which class power is clothed in seemly robes of democratic consent in ways that are experienced intangibly." Ramazanoglu's (1989:147) conceptualization of ideology reveals its embeddedness in all systems of (re)production so "... dominant ideas of what is normal, natural, and desirable are closely linked with the interests of those who exercise power." Hence, the exercise of power is intimately connected to the manipulation and control of ideas. Therefore, "[o]ne function of ideology is to mystify reality and block social

change" (Gavigan 1987:267).

Accordingly,

> ... *ideology* is seen to play a key role in maintaining support for the state in liberal democratic societies.... Included in ideological representation are laws which give the impression the state is acting to improve the status of women through formal guarantees of equality, on the one hand, but which simultaneously reconstitute the ideological and material foundations of patriarchy. (Currie 1990:78)

By concealing these key contradictions by at times appearing to act in the interests of subordinated groups, the state ensures that both structures of hetero-patriarchy and imperial-capitalism persist over time. When certain oppressed groups manage to expose the contradictions, the legitimacy of the social system is jeopardized. According to Snider (1992:9):

> Where dominant ideology can be publicly demonstrated as untrue, then, states that are responsible for the long term survival of the status quo can be forced to enact policies which do not support dominant interests (or at least support them to a lesser degree). If they fail to act, they risk jeopardising hegemony. Most social institutions, then, have the potential (keeping in mind all the practical and ideological barriers outlined earlier) to be useful in battles for liberative change.

It is important to recognize that the state is one site of struggle. There is a dynamic relationship between class, gender, race and the state.

> The state does not simply reflect [class] gender [and race] inequalities but, through its practices, plays an important role in constituting them; simultaneously, [class,] gender [and racialized] practices become institutionalized in historically specific state forms. It is a two way street. (Pringle and Watson 1992:64)

It is when dominant ideology can be demonstrated as untrue that the state can be pushed to enact policies which do not support the interests of the dominant group.

According to Snider (1992:9) "if they fail to act, they risk jeopardizing hegemony." From this perspective then, most institutions can be potentially useful in struggles for emancipatory change (Snider 1992).

Since human consciousness is not strictly determined by social forces, many social movements have developed out of the contradictory and exploitative nature of social relations and attempted to bring about emancipatory social change. When the legitimacy of the social structure is challenged, as it has been by civil rights movements, feminist movements, and ecological movements, the state will reconcile the conflict. This mediation often creates the illusion that the system is a just system and that social injustices can be resolved through an appeal to state power. According to O'Brien and McIntyre (1986:74):

> ... it might be said that the consensual state has as a condition of its success the need to present itself as a *just* state, as well as to objectify the principle of justice in a visible legal system. Legal practice, equality before the law, legal knowledge, codified law, democratic legislative practice, and limited popular participation through party systems are the concrete conditions which can do this.

More often than not the state co-opts the insurgent potential of class, gender and race struggle by smoothing over the conflicts, once again concealing the key contradictions that gave rise to dissent in the first place. In the process, consent is once again secured through the ideology of justice. However, the state can at times be used against the interests of the dominant group. Walby (1990:159) argues that political struggles have a degree of autonomy from the material base of hetero-patriarchy and imperial-capitalism and that political struggles are

important in shaping the state's actions. Hence, while the state may appear to be more or less autonomous from the forces of production and reproduction, the actions it takes are in fact influenced by political movements. The concept of counter-hegemony illustrates that resistance by emancipatory movements can bring about substantive social change. According to Hunt (1990:312), counter-hegemony is "the process by which subordinate classes challenge the dominant hegemony and seek to supplant it by articulating an alternative hegemony." Because the state must *appear* to be just, it does at times act in contradiction to the interests of the ruling class. Legal struggles, according to O'Brien and McIntyre (1986:75) are therefore:

> ... progressive in a dialectical way: they may achieve some concrete improvements at the same time that they demonstrate experientially the partiality of law, its costs and delays, its mystified procedures and occasional flares of sheer brutality: all of these contribute to debate and equivocacy about the strained quality of justice. As Antonio Gramsci understood clearly, hegemonic activity constantly creates counter-hegemony.

The contradictions of power relations produce the fissures. It is during these struggles that cracks develop in the structure, and it is at these moments, when power relations are contradicted, that emancipatory movements use the system to push for insurgent change. Counter-hegemony is the process whereby subordinate groups attempt to subvert power relations. Hence, counter-hegemonic strategies begin from the experiences of subordinated groups who construct counter-hegemonic discourses by building upon their experiences of the social world. According to Hunt (1990:313-314), this process involves reworking certain

elements of the prevailing hegemony, to introduce new elements which ultimately transcend the prevailing discourse.

The state's role is the ongoing maintenance of the social, political and economic framework. It employs law as one method of legitimating hetero-patriarchal and imperial-capitalist relations. Marxist theory recognizes that:

> ... both theoretically and politically, law and state in capitalist societies are complex, double-edged and deeply fissured institutions. Law, society, economy, state and ideology cannot be treated as static, undifferentiated monoliths. Instead, they constitute heterogeneous entities, whose external and internal relations are characterized by continuity and discontinuity, function *and* disfunction, mediation, refraction and reinforcement. (Sugarman, 1983:2)

Socialist feminist theory builds on these assumptions to construct an analysis of the state and the role of law that is inclusive of women's lived experience. According to Randall (1988:12), "... not only is law an ideological force which upholds masculine dominance, it has a 'material identity' as well. It structures choices, options and so on, and in this sense has a real, material presence that at one and the same time mystifies other concrete relations of power."

For the purposes of this thesis, the law is conceptualized as an institution of society that plays a critical role in the legitimation and organization of prevailing beliefs and values in addition to being a legitimately coercive mechanism. One of the central features of law is its monopoly over the legitimate use of force to maintain order. In short, the law is one of the means whereby the state legitimately exercises force to maintain social order. Here, the law is viewed "... as part of the terrain on which hegemony is accomplished" (Brickey and

Comack 1986:157). Specifically, the law maintains hegemony by claiming to possess the method for establishing Truth. In the process of establishing these Truths, law disqualifies other knowledges, experiences and claims. According to MacKinnon (1989:163) "objectivist epistemology is 'the law of law.' It ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own ideal of fairness."

Carol Smart (1989:1) argues that the use of 'law' in the singular implies that it is a unitary body of principles and practices which provides the mechanism through which 'law' maintains its hegemonic power. Smart (1989:1) states:

> It is important to acknowledge the usage of the term 'law' operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance.

Specifically, legal discourse circumscribes a process through which the dominant version of Truth and Knowledge are advanced. "Law has its own method, its own testing ground, its own specialized language and system of results" (Smart 1989:9). This is one of the ways the law, as a claim to Truth and/or Knowledge, disqualifies counter-hegemonic truth claims. Furthermore, the appropriation of 'scientific' discourses such as medicine and/or psychiatry - also based on objectivist epistemology - expedites the process of establishing Truth, particularly when hegemony is challenged.

Smart argues that while the law *appears* to embody "... the ensemble of rules according to which the true and the false are separated and specific effects

of power attached to the true" (1989:9), in practice it is *refracted* in nature. According to Smart (1989:164), law's refracted nature is exhibited in and through contested and/or inconsistent applications of legal principles and method.

> That is to say that law does not have one single appearance, it is different according to whether one refers to statute law, judge-made law, administrative law, the enforcement of law, and so on. (Smart 1989:164)

Thus, the potential of law for social change depends "... on the kind of law employed (civil, criminal, administrative); the level of the state targeted (federal, provincial, local); and the relationship between the particular struggle and the broader social forces of resistance, domination, and change" (Snider 1991b:1). Understanding the law "on the level of praxis" (Snider 1991b:1) illustrates that law is a *contested terrain* (Smart 1989). Law is riddled with discrepancies affecting different levels of power and having different objectives and purposes depending on who attempts to use them (Smart 1989:164). Therefore, in addition to the *context* and the *process* within which law legitimates Truth claims, the law is - and does - at times act in *contradiction* to dominant interests. Snider (1991b:1) has argued:

> ... law is not invincible; it does not always work in ways which further the aims of those who use it. And it is not always possible to predict in advance the effects law will have in practice. Because it is not a homogeneous all-powerful monolith, it does not, necessarily, universally or inevitably, reproduce capitalism or patriarchy.

The contradictory nature of law is due in part to the liberal democratic ideology of "blind justice" and "equality of all" which constructs the law's appearance of

legitimacy; a legitimacy that is necessary for the preservation of capital accumulation and white male domination. To ensure the legitimacy of such exploitative relations, the law must *at times* live up to the tenets of liberal democracy (Brickey and Comack 1987:103). Owing to the state's role as a mediator and legitimator of power relations, there is a limit to the power the ruling class has in determining the content of law. In particular, law making is influenced by struggle. Inevitably, the process of law making is dynamic. And, while "... those social classes who control society's resources are more likely to have their interests represented by the state through criminal law than any other social groups," the state must at least appear to acknowledge the demands of subordinated groups (Chambliss 1976:67).

Identifying that the law is a site of struggle suggests that the law does not *exclusively* reflect but also *constructs* the conditions of historical development (Brickey and Comack 1987:105). Legal discourse is more than a direct articulation of hegemony because, as Kuhn (1978:63) argues, "... ideology is not necessarily a direct expression of ruling-class interests at all moments in history ... at certain conjunctures it may even move into contradiction with those interests." This insight suggests that engaging the law politically is an avenue for promoting social change both ideologically and materially. Accordingly, the potential for law reform to *alter* social conditions - rather than simply reconstitute existing social conditions - warrants feminist praxis through commitment to law reform as a mechanism for transforming social relations.

As an institution of a hetero-patriarchal and imperial-capitalist state, the law (re)produces and legitimates exploitative heterosexist, class, gender and race relations of power. The law reflects and (re)articulates hetero-patriarchal and imperial-capitalist ideology. But, in order to sustain hegemony, the state must be 'seen' to be acting in a 'relatively' autonomous manner, at times appearing to promote the interests of subordinate groups when its legitimacy is threatened. To this extent, the bourgeois state can be said to resolve conflicts through law reform which at certain times *strengthens* the position of subordinated groups.

Toward a Feminist Understanding of Legal Struggle:

Throughout the last decade, feminist legal scholars have been debating the efficacy of engaging the state through law to elevate women's social status. The dispute is due, in part, to the diversity of the feminist movement itself. As a political movement for social change and as an intellectual tradition, feminism approaches the issue of the state's responsibility to women diversely. The legacy of the women's movement reveals that because the state has always regulated the lives of women, the question of feminist engagement with the state (and the law in particular) has persisted since the late nineteenth century (Bland 1992). As O'Brien and McIntyre's critique of law suggests, the impetus of feminist jurisprudence is derived from "... contemporary efforts to develop a specifically feminist politics in which legal reformism is distrusted as a bourgeois blind alley and a certain discontent with radical critiques of law from a Marxist perspective"

(1986:71).

Because law reform is theorized as a response by the bourgeois state to counter-hegemony, the question of engaging the state through law reform is tenuously approached by socialist feminists. Not only is the state seen to smooth over the contradictions inherent in power relations, it promotes a false appearance of genuine equality. Indeed as Snider (1991a:255) argues:

> Reforms which aim at empowering women must challenge structures of patriarchy, question the status quo which reflects male values, and undermine the quest to keep women down both literally and figuratively.

Therefore, when feminists enter a legal struggle with the state the aim must be to transform the practices which structure hetero-patriarchy and/or imperial-capitalism in order to empower women.

Many feminist activists and scholars question whether law, as a coercive institution of the state, can be relied on to effect this structural change (Barnsley 1988; Currie 1990; Smart 1989; Snider 1991a; Ursel 1991). At the same time, however, it is recognized that:

> [t]he state is a web that surrounds us, intrudes into and shapes our experience, limiting the control we have over our lives. We need to reveal and challenge the ways the state intervenes in our lives. Such a challenge is not only necessary but possible, for the state is not a monolith: it does respond to pressure. (Adamson *et al* 1988:116)

Similarly, Snider (1992:7) recognizes the state as a site of considerable struggle:

> ... is by no means a 'level playing field', equally open to all forces and agents. Its shape (or tilt, to continue the geographic metaphor) reflects earlier struggles, and each new struggle is interpreted and resolved in light of the resolutions or compromises which preceded

it.

Flowing from a theory of the law as an hegemonic apparatus of the state is the view that state reforms *tend* to reconstitute existing social conditions. Thus, in this analysis, a primary criterion for evaluating the success of legal struggles will be *the extent to which a particular reform challenges the structures of hetero-patriarchal and/or imperial-capitalism.*

While it is important to assess legal struggles theoretically, it is equally as important to consider them practically. Consider Snider's (1991:257) argument:

> ... law is part of a social formation which generates its own internal contradictions [therefore] resistance to it will determine which of these contradictions can be built upon to first weaken and then transform the existing structure.

The challenge, therefore, is to identify these contradictions to avoid reconstituting existing power relations, thereby (en)gendering legal strategies that are potentially insurgent (Brickey and Comack 1987).

Thornton (1991:454) argues that is it precisely because of the nature of the law that the feminist movement cannot afford to ignore it:

> In light of the privileged status of law within our society, it cannot be neglected or social relations will continue to be reproduced within legal discourse as they have been, that is, from a masculinist point of view.

Nevertheless, as Snider (1992:24) argues:

> ... history shows us that law has limited independence from structural forces, and limited potential to act as an independent instrument of social change. Legal battles may be a means to an end however; the end being to increase the power of women, on the ideological, political, or economic levels. They must never replace strategies designed to empower, nor be confused with them.

> Law reform, then, is best envisaged as a defensive tactic, to be used when it cannot be avoided.

Citing Eisenstein, Randall (1988:15) argues that challenging the law through legal reforms begins to "erode *real material* aspects of patriarchal privilege" and that, moreover, challenges to law transform "patriarchy as it *presently* exists." For these reasons, argues Randall (1988:15), "... we must continue to engage in the specific struggles which are part of the feminist political agenda and many of these will inevitably involve confronting the state."

An evaluation of the potential of criminal law must recognize the nature of the criminal justice system and its relationship to power. Within this framework, the importance of evaluating the insurgent potential of a particular legal struggle is particularly important for determining which strategies are not co-optive, but which are instead transformative. In this spirit, I will discuss the Women's Legal Education and Action Fund (LEAF) as they engaged the state in pornography litigation at the Supreme Court level. Before turning to this discussion however, I outline, in the following chapter, my theoretical perspective on pornography. Included in this discussion is an articulation of the role pornography plays in the normalization of contemporary gender relations.

CHAPTER TWO

Pornography

The Social Regulation of Sexuality

The purpose of this chapter is to place pornography[8] within a context of the social regulation of women's sexuality. I argue that pornography constitutes the means through which women's sexuality is explicitly defined and controlled. The goal of this chapter is to attempt to *contextualize* pornography within the broader social, political, economic, historical and cultural context of social patriarchy. The main argument presented here is that the pornographic genre functions primarily as a means of *defining* and *controlling* sexuality. Sexuality is viewed as giving gender its constitutive meaning. More precisely, sexuality is *defined* and *controlled* socially through pornographic (visual and written) materials that *objectify* and *commodify* women by depicting us first and foremost as nymphomaniacs whose sole ambition is to prepare and present ourselves for the sexual pleasure of others.[9] Pornography's construction of women's desire to be sexually violated is a key feature of the social legitimation of violence against women. Through pornography we are taught that violence is pleasurable -- that

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[8] Following MacKinnon (1985:1 ftnt.1) I include the use of men, children or transsexuals in the subject position usually occupied by women in pornography. When pornography is pornography the genitals of the subjects involved are irrelevant.

[9] My 1982 edition of *Roget's Thesaurus of English words & phrases* Toronto: Academic Press, contains synonyms for the words *nymph*, *nymphet*, and *nymphomaniac* which are *woman* and *loose woman* respectively. *Funk & Wagnells Canadian College Dictionary* (latest edition), Toronto: Fitzhenry & Whiteside Ltd., 1989, defines 'nymphomania' as a psychiatric condition in women which manifests itself as "an extreme and ungovernable sexual desire in women." This is indicative of the reality that 'woman' is a creature defined by her very Nature as an insatiable sex fiend.

sexual violence is what women really want.[10]

In Chapter One, I argued that consciousness is constructed in and through the material world of lived socio-economic relations and practices. The concept of sexuality developed here is similarly understood as constructed out of the inter-relationships between and within the material relations of reproduction and production. For the purposes of this thesis I focus on a specific form of alienation -- women's sexual alienation. For the moment, I set the question of the feminist engagement with the state aside and focus in the first section of this chapter on explicating my understanding of the cultural process of pornography (Valverde 1985). In the second section, I return to the question of legal regulation by connecting the matter of pornography to legal-political struggles. Here, the criminal law is considered to be *one* avenue for dealing with pornography. As Busby (1993) argues, the criminal law can be a means for controlling the most problematic forms of pornography (such as, for example, child pornography). In concluding this section, I outline the substantive criteria to be used in my evaluation of the *Butler* ruling.

Alienation and Sexuality:

A materialist analysis of the human condition argues that humans are alienated from all aspects of our own (re)productive labour. Sexuality is materially embedded in the fabric of society and therefore is historically specific,

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[10] Indeed, advocates of sadomasochistic practices argue that violence/pain is integral part of women's liberation (see, for example, Eisenstein 1988).

socially constructed and socially alterable. Included in this conceptualization of sexuality is a recognition that sexuality embodies complex relationships that are determined in part by social institutions that perpetuate particular notions about women's sexuality, and indeed about women's nature more generally. Sexuality is critically examined on the basis of its material foundations. According to Berger *et al* (1991:61-62):

> ... socialist feminism offers a theory of sexual alienation from the standpoint of women. Patriarchal capitalism socially constructs women as sexual objects valued primarily for their sexual capital. Women's economic survival often requires them to present themselves as sexually pleasing to men in the labour and/or marriage marketplaces. Women receive the sexual attention of men whether it is welcome or not, and their sexuality is defined by masculine desires and for men's rather than women's enjoyment. Thus women's sexuality is socially constructed first for exchange in the marketplace and second for ownership by the (male) employer and/or husband.

One consequence of sexual inequality is that women have limited power to socially define sexuality, resulting in sexual alienation. Bartky (1990:35) argues that:

> The historic suppression and distortion of the erotic requirements of women are clearly an instance of *sexual* alienation, for just as workers can be alienated from their labour, so can women be estranged from their own sexuality.

The expression of sexuality ought to be a self-affirming power (Kittay 1984) and, yet, in contemporary society sexually explicit materials are a means of subordinating women both literally and figuratively.

The sexual objectification and commodification of women constitutes a unique form of alienation (Jaggar 1983). Because men rather than women have

historically defined sexual relations and practices, an understanding of sexuality is derived from the point of view of men,[11] rather from the point of view of women (Jaggar 1983). The historical requisite that women be the sexual commodity of men, rather than persons with our own interests, needs and desires further alienates us from ourselves, each other and indeed from men. Women's lack of control over the social practices involved in the definition of the sexuality results in a distorted view of sexuality.[12] This exclusion of women from cultural production is a significant feature of women's alienation -- we lack control over the cultural production or construction of sexuality. According to Bartky (1990:35):

> Women have little control over the cultural apparatus itself and are often entirely absent from its products; to the extent that we are not excluded from it entirely, the images of ourselves we see reflected in the dominant culture are often truncated or demeaning.

When women are evaluated primarily for the capacity to reproduce normative modes of femininity - femininity that fetishizes or reifies parts of the female anatomy - our value is reduced to little more than the sum of our bodily parts and functions. Indeed, it is often difficult to resist and redefine this construction of ourselves purveyed by the dominant male culture (Jaggar 1983). As a result, we tend to experience sexual subjectivity through a particular male identification of ourselves as fetishized parts of bodies. In short, women (and

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[11] I hesitate to say white powerful men - those who control the relations of ruling, because in many cultures outside of North America and Europe men tend to control the organizational practices of sexuality.

[12] I am not arguing that women (or men) possess an *essential* sexuality, but that our needs and desires - our definition of ourselves - remains culturally absent.

men) experience their sexuality through the lens of an historically specific filter which is a masculinist standpoint.[13]

Deriving erotic satisfaction from the internalization of the male identification with fetishized parts of our bodies leads to what Bartky (1990) identifies as feminine narcissism -- perhaps a significant aspect of femininity, but only one manifestation of the larger alienation from our bodies due to sexual objectification and commodification. The internalization of objectification - where we can be at once the objectifier and the objectified - is undeniably connected to a social order obedient to both the imperatives of imperial-capitalism and hetero-patriarchy (Bartky 1990:42). I contend that pornography is *one of the main vehicles* for the articulation and circulation of sexual ideology. For the remainder of this section I focus on pornography itself and the ways in which it functions as a reproductive mechanism of hetero-patriarchal gender relations.

Pornography:

Nearly every discussion of pornography begins with the challenge of defining it. Accordingly, for pornography to be fully understood it must first be defined. In my view, the challenge of this section is to demystify pornography by interrogating its operation as a socially privileged means of representing

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[13] I argue that men too are alienated from their sexuality given the imperatives of imperial-capitalist and hetero-patriarchal gender relations. Bartky (1990) identifies the impact of these social relations on women but fails to consider the impact of such relations on *men* as well. A failure to do so implies that it is 'natural' for men to objectify and commodify women. Ignoring the impact of gender relations on men denies the material conditions under which men too struggle.

sexuality. As MacKinnon (1991b:808) notes, "[t]he fact that pornography so often presents itself as love, indeed resembles much of what passes for it under male dominance, makes its construction as hate literature a challenging exercise in demystification to say the least." Accordingly, establishing - by definition - what pornography is and does to women has been a notoriously difficult and politically divisive enterprise. Consequently, Kuhn (1985:21) has noted that "[a]ny feminist who ventures to write about pornography puts herself in an exposed position." By writing about pornography, I, too, am in a position of exposure to personal rather than intellectual criticism. It is critical to stress, therefore, that this discussion is located in the context of a sociological analysis of pornography. My analysis of pornography is informed by my social location -- as the object of men's pornographic desire. More precisely, however, it is informed by sociological analysis of pornography.

The etymology of the word pornography literally means the depiction of prostitutes (Cole 1989). Segal (1992:1) notes that:

> Definitions of 'pornography' have changed dramatically since the word was first used in the mid nineteenth century to separate off the dangers of 'the sexual' from offensive religious and political material. At that time *any* type of sexually explicit writing or image, whether scientific, medical, poetic or popular, was equally liable to censorship. Throughout the twentieth century, however, recurring obscenity trials resulted in the progressive uncoupling of the 'pornographic' from anything which could be claimed to have 'scientific' or 'literary' value. Yet despite this narrowing of legal definitions, the meaning of 'pornography' remains today as contentious as ever; if not more so.

Owing to shifting historical meanings attached to the pornographic and to

the current diversity of definitions of pornography, a consistent definition is difficult to establish. This diversity of definitions seemingly depends upon such factors as age, sex, religion, politics and morality. Such differences are often understood to be the result of individual personal taste. This understanding of pornography rests on the assumption that pornography is fundamentally a personal issue; that pornography is about individual sexual preferences, rather than it being about political, economic and social power and powerlessness. In this sense, pornography's political nature refers "... to the power relations that exist between men and women, power relations which often remain invariant across different patriarchal political systems" (Kittay 1984:146). Indeed, for many feminists, pornography is understood "... as a dynamic process that includes all the social relations involved in the production, dissemination and consumption of violent, sexually explicit imagery and written material" (Hearn 1987:54).

The operative definition of pornography that informs this thesis highlights the representation of disparate power relationships as sexually arousing and desirable. I am in agreement with Smart that "... *pornography makes power sexual*, it also turns women's subordination into a 'natural' phenomenon because it becomes equated with (hetero)sex which is also held to be 'natural'" (1989:117, emphasis mine). Further, such an understanding recasts pornography not only in terms of power relations between sexual partners, but also identifies the relationship between pornography and corporate power, state power and the law (Smart 1993:184).

> In taking (hetero)sexuality out of the sphere of the natural, many feminists, adopting quite different theoretical stances, began to see pornography as a form of deployment of power. Not all may agree that it represents a simple deployment of power by men against women, but at least the issue of power, and hence politics, became central. Once the issue of power was addressed, doubts were cast on the liberal moral argument that only the public sphere should be the realm of legitimate political (legal) intervention, leaving the private free of any form of investigation (analytical, legal or otherwise). (Smart 1993:184-185)

Viewed from this perspective, pornography becomes more than just a question of sexuality; it also questions the character of power more generally. In particular, it questions the way in which power relations are concealed in and through pornographic materials in the same way that power constructs social reality more generally. MacKinnon (1985:7) argues:

> Once power constructs social reality, ... pornography constructs the social reality of gender, the force behind sexism, the subordination in gender inequality is made invisible; dissent from it becomes inaudible as well as rare. What woman is, is defined in pornographic terms; this is what pornography *does*.

Hence, the power of pornography is its power to construct not only normative, yet alienating, conceptions women's sexuality, but to construct them in such a way that sex and inequality are fused.

From a socialist feminist point of view, pornography is conceived of as an institution of civil society. Institutions of civil society embody a specific set of norms and practices which are used to regulate a particular broad area of social life. Specifically, the institution of pornography plays a key role in the *regulation, legitimation, reproduction and normalization* of hetero-patriarchal and imperial-capitalist gender relations. Although, according to Berger *et al* (1991:62), "... an

explicitly socialist feminist analysis of pornography has yet to be developed, the socialist feminist critique of sexuality implies a critical stance toward much contemporary pornography." I am in agreement with Berger *et al* (1991:62) that, from a socialist feminist perspective, "[p]ornography can be seen as reinforcing patriarchal institutions, including the prevailing form of male domination over female sexuality." Male dominated societies have consistently subordinated women and it is no coincidence that women have, throughout history, been treated as women are portrayed in pornography (Hester 1992). Pornography is a means for articulating the norms, techniques and practices of sexuality that subordinate women (Hunter *et al* 1993). According to MacKinnon (1991b:802), the consumption of pornography "... institutionalizes a subhuman, victimized, second class status for women by conditioning men's orgasm to sexual inequality." Conceptualized as a social institution that reproduces hetero-patriarchal ideology, pornography *articulates* and in so doing *constructs* sexual social relations. Pornography is but one manifestation of oppression; a key feature of which is the material legitimation of women's subordinate status. As Itzin (1992:68) argues:

> The part played by pornography in the subordination of women has been unacknowledged, underestimated or ignored. But it is part of the picture, part of the apparatus of oppression which contributes to constructing and maintaining the sexual subordination of women.

Pornography contributes to the subordination of women by sexualizing domination and inequality (Cole 1989). Pornography celebrates, authorizes, and legitimates rape, battery, sexual harassment, prostitution and child sexual abuse (MacKinnon 1985). Through pornography, oppressive power relations are

glamorized (Smart 1989; Walby 1990). Pornography objectifies women and this "... objectification of women fulfils a clear function in the maintenance of male power" (Carol and Pollard 1993:48). In short, pornography is hetero-patriarchy's self-image (Assiter 1991), where a women's rapability is ontologized (Vadas 1992:95).

Pornography is more than simply "expression" or "speech," the industrial production of pornography that exploits its workers, feeding from their social vulnerabilities, is "... a practice consisting of specific activities performed by real people" (Cole 1989:18). According to Kuhn (1985:22):

> On one level, the contemporary pornography industry may be seen as part of a general trend to increased investment in, and consumption of, leisure goods and services, part of the tendency to promote privatised forms of rapid gratification which characterises late capitalism.

This increase of the investment in and exchange and consumption of women as a sexual commodity - characteristic of late capitalism - reinforces and reproduces the very conditions that produce women as objects for male consumption. Moreover, it is precisely because women are objectified and commodified that work in the pornography industry is viewed as 'women's' work. For example, Itzin (1992:65) notes that:

> Pornography is an industry in which women and children are exploited economically and sexually and which trades on women's and children's economic subordination. It is - like catering, cleaning and factory work - one of the traditional areas of women's work. It can be the only available way of making a living for some women. The pornography industry exploits the poorest and most vulnerable women, whose opportunities to earn a living are also limited by sexism and sex discrimination. It particularly

> exploits black and 'Third World' women and children, trading on race discrimination and perpetuating racist as well as sexist stereotypes.

Viewed from this perspective, working in the pornography industry is not an unconstrained choice of many women. As MacKinnon (1985:33) notes, "the further fact that prostitution and modelling are structurally women's best economic options should give pause to those who consider women's presence there a true act of free choice."

The increase in sadistic pornographic imagery coincides not only with the sophistication of technology during the industrial expansion, but also with the concomitant shift from private patriarchy to public patriarchy with the rise of the welfare state. Women's sexuality is no longer under the direct control of their fathers, husbands, or brothers within the family; that control has shifted into the public realm with pornography being one of the key institutions for reproducing hetero-patriarchal relations of sexuality. Barry (1980:307) argues that pornography is a *collective* form of sexual objectification and violence against women because its messages have something to say about women as a group rather than being specifically directed at individual women (as is the case with feminist issues like rape or wife-assault[14]). Similarly, West (1989:110) argues that pornography currently reflects the "legal text" of patriarchy; a body of knowledge that functions to legitimize and coerce sexual hierarchy:

> The recent increase in the amount of pornography and its change

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[14] Nevertheless, the *production* of pornography is a feminist issue like rape and wife-assault because individual women are the objects in its production.

> in content ... represents the transition of patriarchy from a political hierarchy enforced through brute strength - boots and fists - to a political hierarchy enforced instead through the legalistic mechanisms of authoritative texts - legitimation, mystification, and abstraction.

Therefore, as the organization of hetero-patriarchy changes pornographic practices, texts depicting sexual practices change as well. In particular, as women gain more autonomy in the so called 'public' realm, pornographers have become more prolific and the practices they reproduce have become more overtly sadomasochistic. In this sense, pornography is a political phenomenon, existing as a misogynist society's answer to women's demands for equality (Diamond 1980:191).

The proliferation and/or diffusion of pornography throughout society is a central means for the construction of normative heterosexuality. For example, Walby (1990:97) argues:

> There are further new forms of control through sexuality. While sex was supposed to take place only inside marriage there were restrictions on the public portrayal of sexuality. The gradual removal of these restrictions has opened the way to such things as the widespread availability of pornography. Degrading images of women as objects of male desire are to be found not only in hard-core pornography but are the staple of many forms of advertising. The main site of control over women through sexuality has shifted away from the individual husband or father in the home to more diffuse patriarchal practices in the public sphere.

As an institution of civil society, pornographic practices are supported (even legitimized) by state practices (Barry 1979; Hughes 1985; Longino 1980). The production of pornographic materials are social practices that contribute to the construction of social difference(s) and gender hierarchy (Kuhn 1985; Hennessey

1993). According to MacKinnon (1985:18), "... to the extent that gender is sexual, pornography is part of constituting the meaning of that sexuality." Pornography is the social construction of sexuality -- racialized and genderized; a social construction that sexualizes inequalities. Pornography institutionalizes and reinforces the sexism and racism in the structures of society. According to Itzin (1992:60), pornographic representations are instrumental in the process of constructing identity for both men and women.

As an institution of society, pornography exists in a dialectical relationship to the material foundation of society. This is why, for example, we see sexual myths and racialized stereotypes as a dominant characteristic of pornography. More precisely:

> Pornography presents the stereotype of supersexed blacks and kinky homosexuality and feeds it to the predominantly male heterosexual consumer for his private pleasure. Racism and sexism blend with the other characteristics of pornography to provide entertainment based on sexual objectification, violence, and contempt for women. It is the media of misogyny. (Barry 1979:207)

The fact that pornography, in Busby's (1993:4) words, "... 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" is no mere coincidence. Forna (1992) notes in particular that:

> Black women as represented in pornography are synonymous with deep carnality, animal desires and uncontrolled lust. The black woman is portrayed as the most sexually voracious, the most

> wanton of all females. 'Naturally' less civilized than her white counterpart, she exists solely for sex and is even more sexually insatiable.

In addition to sexualizing inequalities of race, pornography also sexualizes children. Kelly (1988) and Cole (1989) argue that pornography is part of a cycle of abuse women experience which often begins when women are sexually abused as children. According to Itzin (1992:66):

> ... it has been shown that many women who participate in pornography and/or prostitution are in fact themselves survivors of child sexual abuse. Statistics in the USA indicate that 75% of women involved in pornography are incest survivors. The pattern of repetition of childhood abuse in adulthood, either in the position of abuser or abused ... may attract women to pornography.

More precisely, MacKinnon (1991b:797) describes the overall character of contemporary pornography, which is worth quoting at length:

> Children are presented as adult women; adult women are presented as children, fusing the vulnerability of a child with the sluttish eagerness to be fucked said to be natural to the female of every age. Racial hatred is sexualized; racial stereotypes are made into sexual fetishes. Asian women are presented so passive they cannot be said to be alive, bound so they are not recognizably human, hanging from trees and light fixtures and clothes hooks in closets. Black women are presented as animalistic bitches, bruised and bleeding, struggling against their bonds. Jewish women orgasm in reenactments of actual death camp tortures. In so-called lesbian pornography, women do what men imagine women do when men are not around, so men can watch. Pregnant women, nursing mothers, amputees, other disabled or ill women, and retarded girls, their conditions fetishized, are used for sexual excitement.

Pornographers provide fuel for sexualized inequalities with the net effect of maintaining the religious prejudice, racism, and gendered inequalities, while physically harming women in the process. Moreover, pornographic materials

include lesbian and gay sexual practices.

Gay and lesbian pornography can also be seen to articulate a hetero-patriarchal and imperial-capitalist social structure when it reconstructs the implicitly hetero-patriarchal values of traditional pornography. The practices represented in lesbian and gay porn, while depicting same genital sex, often reflect the same power relations (rules and rituals) basic to heterosexual pornography -- seduction and conquest. For example, Busby (1993:12) notes:

> 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. Sexual imagery 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. Similarly, sexually explicit imagery presenting child sexual abuse cannot be justified simply because it is created for lesbians or gay men.

I argue that the extent to which any representations of sexual practices differ from the norm is the extent to which these representations challenge the ideology of objectification and domination. Certainly, the framework within which lesbian and/or gay sexual representations work can begin to challenge the dominant ideology as can other forms of sexual practice and expression -- including heterosexual ones.

Understood at the abstract level as discursive representations that articulate and reinforce this hetero-patriarchal ideology, pornography can be explained as:

> ... a set of *lived relations* constructing subjects in relation to the social formation through representations: 'Ideology consists of a practice of representation and a subject constructed for that

> representation and hence in the moment of its operation inscribes both a subject positioning and a set of relations. (Kuhn 1978:63)

This view of the role of ideology allows us to see pornography as practices that construct subjects constitutive of and constituted by hetero-patriarchal ideology. Through pornographic media, heterosexual relations - object/subject relations - are constructed as "normal" sexual relations. Indeed, the hegemony of heterosexuality is buttressed by the practices of pornography. In pornography, women are objects constructed primarily for the male subject seeking pleasure (Assiter 1991). For example, Hester (1992:72) argues that pornography is one of the central ways in which men are differentiated from women and children. In particular:

> The cruel objectification of men (sadism) as well as the objectified woman (the masochist) is presented as natural. Thus, women are constructed as (eroticized) objects in order that men, by comparison, can be constructed as powerful and dominant subjects.

Therefore, this materiality of pornography influences and shapes men's and women's consciousness of masculine and feminine subjectivity. For example, Itzin (1992:67) notes that pornography plays a significant educative role:

> Pornography also plays a part, together with other forms of sex-objectified, sex-stereotyped presentations, in the social and psychological conditioning of all men - in constructing *normal* masculinity *as the norm* and maintaining the whole system of male power. Pornography presents to men how it is permissible to look at and to see women. It relentlessly communicates: this is what women are, this is what women want, this is how women deserve to be treated. It educates men in what it communicates. Men learn to see women in terms of their sexuality and sexual inequality as presented in pornography.

Hence, pornography, has a powerful impact on women's and men's sexuality and therefore our own sexual practices. However, sexuality is by no

means *determined* by pornography. In this sense, pornography is similar to language; it structures ways of communicating with one another *sexually*. MacKinnon (1985:19) argues:

> pornography codes how to look at women, so you know what you can do with one when you see one. Gender is an assignment made visually, both originally and in everyday life.

Because, as I stated earlier, human subjectivity is composed from "... the available knowledges in a culture as they circulate in discourses and institutional practices" (Hennessey 1993:37), pornography can plainly be seen to shape subjectivity. Similarly, Itzin (1992:67) argues:

> In pornography, women's subordination is sexually explicit and it is sexualized. Pornography conditions male sexual arousal and orgasm to sexual objectification and sexual violence: to women's subordination. Through pornography men experience the sexual subordination of women as sex and they experience sexual inequality and sexual violence as sexually exciting and sexually arousing .... *By establishing a physical and emotional association between sexual inequality or sexual violence and sexual arousal, and by communicating that 'women's worth is in their sexual value alone,' pornography sexualizes women's social value.*(Emphasis in original)

However, many women and men resist current hegemonic notions of femininity and masculinity because sexuality is not determined by pornography. Pornography contains no built in mechanism that ensures that we all practice the messages it sends out, hence our sexual practices do not necessarily imitate its ideology. Nevertheless, the fact that women's sexuality continues to be 'Other' defined through pornography - and the fact that women consistently report being forced to imitate its specific contents -cannot be ignored.

There is more to pornography than its production. Pornography is a commodity that is bought and sold (relatively) freely. As a result, it is a multi-billion dollar a year industry, protected in part by organized crime. As such, state regulation or control of pornography necessarily presents a threat to those with a vested economic interest (Barry 1980). Both economic profit and sexual power are derived from the (re)production, sale and consumption of pornography. Pornography is identified as a cultural process of production for profit, as well as consumption and reproduction for the purposes of *predominantly* heterosexual male pleasure. "Women are the objects of pornography, men its largest consumers, and sexual degradation its theme" (Barry 1979:206). Itzin (1992:97) notes that:

> In the USA in 1984 the pornography industry grossed $8 billion, said to be more than the music industry and the movie industry combined. Six of the ten most profitable newsstand monthlies were 'male entertainment magazines' and the combined circulation of *Playboy* and *Penthouse* was greater than *Time* and *Newsweek*.

Here the role which pornography plays in the education of men (and perhaps women) is underscored.

In addition to being a lucrative commodity, consumed by individuals for the purposes of sexual pleasure, pornography's ideas are put into practice in sexual relations (Kelly 1988). The practices captured by the images and words in pornographic magazines, video, films, etc., are re-enacted over and over again in sexual relations (Cole 1989; MacKinnon 1987, 1991b). This dimension of pornography often goes unnoticed, yet its impact is profound. Barry (1979:206)

refers to pornography as 'cultural sadism' and argues that it "... is a distinct social form that consists of practices which encourage and support sexual violence, defining it as normal behaviour." The representation of women through pornographic "... practices are woven into the fabric of culture and as such they give cultural sadism its own evolution and history and support it by an ideology that legitimizes and justifies it" (Barry 1979:206). This diffusion of pornography throughout mainstream culture is the principle means through which cultural sadism becomes part of the sexual practices of individuals. These practices represented in pornography articulate masculinist ideology. The sexual domination of women is maintained in part through this ideology. On the basis of male self-interest in patriarchal power, this ideology reifies women, making them into something they are not -- the naturally masochistic sexual object existing only for male sexual pleasure. This is not merely the ideology of an elite group but rather something that has been diffused into mass consciousness (Barry 1979:217). Pornography is the principal means whereby these notions are systematized and structured into an ideology of cultural sadism that legitimizes and perpetuates sexual violence (Barry 1979:218). This ideology is maintained and legitimized to justify behaviour towards women that reproduce sexual inequality. As MacKinnon(1985:18) argues,

> From this perspective, pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy situation [...] Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, or symbol either. It is a sexual reality.

The very existence of pornography legitimizes and maintains hetero-patriarchal gender relations. This is perhaps a somewhat functionalist analysis, but for analytical purposes I think we can look at pornography as performing a critical role in the reproduction of heterosexist (aggressive, masculinist) gender relations. Its powerful ideologies (and practices) reinforce the ideology and practices of hetero-patriarchal gender relations (Currie 1992; Diamond 1980). Pornography, as ideology, establishes that our innermost desire is to sexually subordinate ourselves. According to Longino (1980:53-54):

> Pornography cannot be separated from sexism in this way: Sexism is not just a set of attitudes regarding the inferiority of women but the behaviours and social and economic rules that manifest such attitudes. Both the manufacture and distribution of pornography and the enjoyment of it are instances of sexist behaviour.

In this sense, then, pornography as social expression plays both a pivotal role in maintaining sexist gender relations and is a symptomatic manifestation of deeper underlying social problems. It is regarded as being simultaneously symptom and cause:

> As symptom, pornography is reflective of certain social and political relations between men and women; although as a mirror, it reflects through hyperbolic distortions. As cause, pornography is a contributing factor, perpetuating a social order in which men dominate. In its causal effect pornography is hate literature (where "literature" is meant to cover not merely the written word by spoken, graphic, and cinemagraphic materials as well) and is morally wrong, for it contributes to a political and moral injustice. As such it deserves the same moral and legal sanctions as other defamatory materials. In its aspect as symptom, we can see the disturbing reflections of a mode of social interaction so prevalent that the pornographic hyperbolic image is not only tolerated, but is experienced as an occasion for sexual, pleasurable, arousal for many. (Kittay 1984:145)

In addition to the diversity of generalized conceptualizations of pornography, there are also a range of pornographic practices around which certain distinctions are made: hard-core versus soft-core, violent versus vanilla, pornography versus erotica (Chaster and Wilson 1984). According to Kittay (1984:150):

> Where the lines between the erotic and the pornographic are legally or morally or aesthetically drawn varies from culture to culture. This is perhaps because almost anything can trigger sexual desire, providing only that it has been *eroticized* at some time in a person's history (and each person's individual history is both reflective of and a part of culture).

I reject the cultural (and legal) distinction between hard-core and soft-core pornography, as well as the distinction between pornography and erotica.[15] Typically, distinctions made between the erotic and the pornographic are rooted in classist notions of sexuality. For example, McCormack (1980:8) notes:

> This distinction between so-called erotic art and pornography based on some vague principle conceals a basic distrust of the masses: the erotica of the elites expresses a civilized sensuality, while the erotica of the masses is a projection of their lust.

In addition, sexually explicit materials defined as 'hard-core' (as distinct from 'soft-core') are done so in relation to the condition of the penis, rather than with reference to violence or misogyny. I find this distinction to be highly problematic given that there is nothing inherently violent or misogynist about an erect penis. Tolerance for the more 'benign' forms of pornographic practices characterized as soft-core or erotica tends to develop with reference to our

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[15] As stated earlier, the rejection of this distinction is not meant to indicate that all sexually explicit materials are pornographic.

*in*tolerance for extremely violent and/or misogynist forms of pornography. So called soft-core pornography is thus viewed as having less impact than hard-core pornography in terms of its social influence on the individual; in terms of constituting our understanding of sexuality. Soft-core representations have become acceptable in comparison to hard-core representation, yet soft-core pornography is the principle vehicle for the dissemination of popular ideas about women's 'Nature.' Therefore, distinctions between soft-core and hard-core pornography are misleading, given that misogynist messages about women have little, if anything, to do with the state of a penis. I argue that pornographic representations and practices can be illustrated on a *continuum of sexual practices* similar to the way in which Kelly (1988) discusses a continuum of sexual violence.

Kelly (1988:76) explains her concept of a continuum:

> My use of the concept of a continuum is based on two of its meanings in the *Oxford English Dictionary:* first, 'a basic common character that underlies many different events'; and, second, 'a continuous series of elements or events that pass into one another and which cannot be readily distinguished.'

My appropriation of the concept of a continuum and its application to the practices of pornography is an attempt to step outside the often classist or moralistic dichotomies created by distinctions made between erotica and pornography, or between soft-core and hard-core pornography, respectively. Mine is an attempt to identify first, the basic common character that underlies pornography (the ideology of misogyny) and, second, to identify the practices linked to the ideology of misogyny that exist as continuous (as in not mutually

exclusive) elements in pornographic materials.

By conceptualizing the practices represented in pornography as a continuum, a good sex/bad sex dichotomy is avoided. Misogynist, often violent, degrading and dehumanizing behaviours (including the sexualization of inequality) such as those practised and portrayed in pornography exist at particular points of a continuum. The concept of a continuum enables the exploration of the range of sexual practices represented within pornographic texts and allows us to see the ways in which many sexually explicit materials avoid sexualizing inequality.

Additionally, this concept of a continuum can be applied to pornographic attitudes and practices. Pornography does not negatively affect some persons and not others, rather, its ideology exists as a common element (or character) in men's attitudes about and practices with women. For example, MacKinnon (1985:44, ftnt 97) notes that "... researchers ... find it difficult to document differences between sex offenders and populations of normal men on virtually every dimension." This is perhaps why, according to MacKinnon (1985:44):

> Received wisdom seems to be that because there is so little difference between convicted rapists and the rest of the male population in levels and patterns of exposure, response to, and consumption of pornography, pornography's role in rape is insignificant.

Far from being insignificant, the role played by pornography in the rape of women is invisible (or viewed as insignificant) precisely because it constructs pornographic attitudes and practices as normative.

Challenging pornography means challenging the very ideals of a sexually

exploitive society (Barry 1980:308). The challenge to pornography threatens "... the sexual values promoted by masculinist ideology. In so doing, we are confronting the sexist double standard which, while legally condemning acts of sexual violence, in fact ideologically validates them in media such as pornography" (Barry 1980:308). The practices sanctioned within pornographic materials reproduce hetero-patriarchal practices (norms) sanctioned by the larger society. In particular, the state's failure or inability to enforce obscenity law is a key feature of pornography's status as a 'legitimate' discourse. For example, Barry (1980:307-308) explains that the intersection of pornography and the law establishes the conditions within which pornography is normalized:

> *Pornography has become a valid, legitimate institution, neither condemned nor supported by law.* The use of women as sexual objects is so pervasive as to be generally accepted as a *normal* representation of women. Such conditions constitute what I have called the ideology of cultural sadism, an ideology that permeates thinking and attitudes so deeply that its consequences (in the practice of sadism or masochism, for example) are assumed to be to some degree normal if not biologically determined. (Emphasis added)

This lack of condemnation by the law constructs the conditions where pornographic practices are considered to some degree normal -if not biologically determined. Indeed, the misogyny of pornography is rendered legally inconsequential if not invisible.

There are a number of ways in which the invisibility of pornography can be challenged, a discussion of which is beyond the scope of this thesis. However, in the following section I discuss the relationship between feminist politics and the

regulation of pornography employing the criminal law as a way to handle pornography's particularly violent forms.

Pornography and Legal Struggle:

The issue of pornography continues to be a source of analytical divisions and political disagreements among activists and scholars in the Canadian feminist community (Currie 1992). Much of the discussion about the legal regulation of pornography in Canada has occurred in response to various governments' proposed changes to the obscenity provisions in the *Criminal Code*. Some writers contend that criminal law reform in general has failed to improve the social conditions of women's lives (Currie 1990; Snider 1991a; MacKinnon 1987; Smart 1989). Indeed, the tactics used by feminists to deal with pornography have been numerous and diverse, and yet pornography remains a multi-*billion* dollar industry. Socialist feminist theorizing on the state's role in the criminal regulation of obscenity suggests that criminal law should be approached tenuously.

For socialist feminists, symmetry between theory and practice results in the rejection of many strategies for change that engage the apparatus of the state. The law is cautiously employed as a means for ameliorating the conditions of women's lives because of the inherent dangers of reconstituting oppressive social relations. Many socialist feminists (see, for example, Burstyn 1985) object to the use of criminal laws prohibiting pornography on two levels. First, it is asserted that legal reforms are a reaction by the state to ensure the maintenance and legitimacy of the

social system when hegemony is threatened by dissident organizations.[16] Second, due to the nature of the criminal justice system, it is asserted that determinations of what materials constitute pornography are a matter of interpretation, and that interpretive acts by agents of the state result in anti-feminist - especially homophobic - applications of the law. Snider (1992:11) argues that this uneven application of the law is due to the patriarchal and capitalist values that permeate the legal system:

> From law passage to sentencing, then, officials exercise wide, unchallenged, and virtually unmonitored discretion - over which complaint is believed and which ignored; who is charged and who is let off with a warning; which crimes are high priority and which are given short shrift. These unwritten rules have been well studied, and we know that the system targets as offenders those with the fewest resources (political, economic, ideological), who can be processed with the least resistance. In most jurisdictions, for most offenses, this means young, poor, minority group males are singled out .... Patriarchal values dominate this process at least as profoundly as the more frequently documented biases against working class people and minorities. (Snider 1992:11)

Even though, in practice, the law is classist, heterosexist, and racist, pornographic materials ought to be legally prohibited. The problem, however, has been to determine the best way to approach the criminal law so that feminist political goals are achieved. This is particularly difficult because these goals include facilitating the production of sexually explicit materials that challenge the current hetero-patriarchal hegemony. Given state agents' power to define what is

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[16] Indeed the state acts to ensure the long term maintenance of the capitalist accumulation process - particularly with respect to pornography which, as I have stated earlier, is a multi-billion dollar industry. As a result, pornographers have considerable access to state resources which ensures that their financial interests are protected (see, for example, Catherine A. MacKinnon (1987) "'More Than Simply a Magazine': Playboy's Money" in *Feminism Unmodified*).

and/or what is not pornographic, the problem of defining which pornographic materials we want to see regulated has been a particularly daunting task.

It is precisely because pornography is a representation of the normative practices of traditional (male) heterosexuality that it tends to be neither condemned nor supported by law. As Barry (1980) succinctly argues, the legal condemnation of *certain* acts of sexual violence is in fact ideologically sanctioned in the practices of pornography that support sexism. Smart (1989:116) queries:

> There is, of course, no guarantee that legal regulation would be effective any more than rape law or equal pay legislation is 'effective' in feminist terms. This raises the question of whether on this topic which involves such a diversity of feminist views on sexuality and the representation of sexual desires and fantasies, is it a wise strategy to appeal to law at all.

Nevertheless, this question raised by Smart (1989) and many others (Burstyn 1985; Snider 1991; Currie 1992; Valverde 1985) in relation to the regulation of pornography risks leaving the law and its agents to their own devices. If feminists abandon or ignore the power of law, it will continue to be enforced and interpreted in ways that reinforce traditional values. In a sense, then, abandoning the criminal law risks throwing the baby out with the bath water because, as Itzin (1992:427) argues:

> Legislating against pornography could not guarantee the elimination of sexism and sexual violence any more than the abolition of slavery ended racism and racial violence. But black slavery in the USA - once, as pornography is now, a major international profit-making industry - was ended. Those particular practices of racism and racial violence were ended through legislation. Legislation could also be used to end the abuse of women through pornography and the practice of sex discrimination which takes the form of pornography.

While applications of the criminal law against obscenity may serve an ideological (hegemonic) purpose by giving the impression that pornography is socially unacceptable (and that as a society we deal with it effectively) when it is permeated throughout society, the criminal law nonetheless can provide one avenue for political change.

The discussion of law reform thus far has remained at an abstract level. As a framework for assessing law reform, however, it does not go far enough. Snider (1991a) stresses the need for feminists to engage legal strategies that empower women rather than the state apparatus. Because of the "... law's power to define - as well as to subordinate and disqualify - women's experiences" (Comack 1993:53), it is important to assess the impact of law reform from women's standpoint(s). Standpoint theory recognizes that experiences are mediated by one's social location; that race, class, gender and sexual orientation intersect and produce diversity. My knowledge of pornography is informed both by my experience(s) of pornography[17] and the understanding that women experience pornography in a variety of ways; either as consumers (willing or not) and/or participants in its production and/or when we/they are forced or choose to act out its script. Accordingly, my particular experiences of/with pornography provide the basis of my analysis. This analysis - informed by my own experiences - along with a literature review, enables me to shape an analysis of women's experiences

[17] I do not intend to universalize particular experiences of pornography. Instead, my aim here is to create "...the space for an absent subject, and an absent experience of actual women speaking of and in the actualities of their everyday worlds" (Smith 1987:107).

of pornography and to consider the potential of obscenity legislation to empower women to resist and/or engage pornography. Locating *women's diverse experiences of pornography* - including my own - yields an analysis of obscenity legislation that goes beyond the level of abstraction outlined above to the level of the particular. Through this analysis of obscenity legislation I incorporate these tenets of standpoint theory to illustrate that women have differing experiences of pornography; experiences that may include joy and pleasure as well as anger and pain (see, for example: Hester 1992; Eisenstein 1988; Ellis 1990).

Cole (1989:61-68) suggests the following substantive criteria for evaluating obscenity law reform that begin to address the impact of obscenity law on women's experiences of pornography.

1. *Consider pornography as practices, not merely pictures, words or ideas* (Cole 1989:61):

The law should recognize that pornography is not simply a collection of pictures or ideas, but that its production and sale "... involves very specific activities, including trafficking in women, using women without their consent, and physically assaulting women" (Cole 1989:62).

2. *Target the harm women experience* (Cole 1989:62):

The law must recognize that the women are harmed in the experience of producing pornography, and also "... when its users force the women they know to buy pornography, look at it and/or replicate the activities in its pictures" (Cole 1989:62).

3. *Make the law women-centred and not gender-neutral* (Cole 1989:63):

The law must recognize the inequality of gender relations and that pornography is a gender specific activity because it is women who are victimized by its practice (Cole 1989:63).

4. *Make the law women-initiated and women-driven* (Cole 1989:65):

Law must provide a means for articulating the harm that pornography causes. If the law gives more power to the male dominated judicial system to (re)articulate their own traditional beliefs about pornography, it cannot be viewed as empowering women. The law should provide the opportunity to act based on women's experiences of pornography.

5. *Compensate the victims of pornography* (Cole 1989:67):

Law regulating pornography should include a mechanism that provides monetary compensation for the women who are injured by pornography. If pornography is considered a crime acted out against a woman, then the state should compensate its survivors.

6. *Advance gender equality* (Cole 1989:67):

The law must view pornography as the result of gender inequality and must actively promote the eroticization of sex equality.

7. *Permit artistic and educational dialogue on sexuality* (Cole 1989:68):

The law must be dynamic so that it facilitates sex education and sexually explicit artistic expression that attempts to formulate visions of eroticized equality.

The purpose of this thesis is to contribute to this ongoing dialogue among

feminists by assessing the *insurgent potential* of the Supreme Court decision in *R. v. Butler*. I explore the possibility that the *Butler* decision represents an instance where feminist concerns to promote social change coincide with the state's interest in maintaining its legitimacy, thereby acting in *contradiction* to its own long term interests to secure the consent of subordinate groups (Ursel 1991). This consideration engages an issue of considerable import to feminist politics. If the state's tendency is to co-opt and depoliticize feminist issues, then a fundamental issue to be considered within feminist analyses of the law is the *extent* to which - and under what *circumstances* - particular reforms are *co-optive* and/or *insurgent*. Snider (1991a:241) argues that socialist feminist movements must be cautious because:

> ... legal reform as a tactic merely redefines problems which are caused by an inherently exploitative economic structure into debates over individual rights. Understanding social problems in these terms, then, trivializes them and encourages the population to understand them in liberal terms, as issues of equal rights allocation, demanding remedies to be found in the courts and not in the streets. Such "solutions" direct attention away from the system's class bias, and obscure the fact that this system is based on a structure of exploitative relations of production that give rise to the very social problems it purports to solve.[18]

From this point of view, law reform tends to redefine problems that are a result of the conflicts which emerge from exploitative class, gender and race relations, reconstituting an understanding of these issues in liberal terms. With respect to the criminal law specifically, these observations have an even greater significance,

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[18] Here Snider focuses on the class bias in law, a socialist feminist perspective recognizes the race, gender, class and heterosexist bias in law.

particularly since the criminal justice system has proven to be an unreliable ally (Snider 1991a:239). In my view, Snider (1991a) argues correctly that engaging the criminal justice system is dangerous: morally, practically, politically and theoretically. Entrusting more power to the criminal justice system "... means investing it with increased control over women's lives, control that is essentially invisible and unmonitored. It means giving over power which should be kept in feminist hands to a state bureaucracy with its own agenda - one which will not be consonant with feminist goals" (Snider 1991a:239).

This analysis of *Butler* engages the question of whether the state has (re)articulated its own definition of pornography or if this new interpretation represents an instance where a change in law transforms the "... material aspects of patriarchal privilege" (Randall 1988:15), thereby altering social conditions rather than reconstituting them. Before turning to an evaluation of the *Butler* decision, I outline a brief history of obscenity law in Canada. This includes a summary of the antecedents to the current version of the 1959 'obscenity' law contained in section 163 of the *Criminal Code.*

CHAPTER THREE

History of Federal Obscenity Legislation in Canada

The purpose of this chapter is to summarize the evolution of obscenity legislation in Canada in order to contextualize the current Criminal Code 'obscenity' provisions which proscribe pornographic material. A brief examination of the relationship between 'obscenity' regulation and the state is useful for illustrating the difficulty the courts have had in dealing with the regulation of pornography. As Mahoney (1984:33) argues:

> The question of obscenity, morals and the role of law has been debated for hundreds of years, largely by men. Women have been conspicuous by their absence in decisions regarding the definition of obscenity and the characterization of its harms.

Accordingly, I discuss, from a socialist feminist perspective, the emergence of the current Canadian definition of 'obscenity' in criminal law to illustrate its gradual transformation. This transformation is due, in part, to feminist organizing for equality. While there are other avenues in law with which to deal with sexually explicit materials, the focus here is on federal regulation, in particular, Criminal Code prohibitions of 'obscenity.'[19]

In the first section, I examine, beginning with feudal society in England, the origins and nature of 'obscenity' law as it relates the social, political and

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[19] The Customs Tariff Act which regulates the importation of obscene materials into Canada referentially incorporates Criminal Code provisions. In addition, obscenity is regulated provincially through film censor/classification boards and the various provincial Human Rights Codes, however, these avenues are not discussed here.

economic changes of the day. Historically, obscenity laws have been justified on the basis of morality. Typically the regulation of 'obscenity' has been linked to the power of the church and later to the state. To this extent, its proscription adopts different imperatives according to the social, economic and political organization of society. Canadian obscenity legislation has invariably promoted classist, sexist and racist hetero-sexuality. This observation exposes the ideological nature of obscenity law because of the way in which it attempts to normalize - indeed, make compulsory - hetero-patriarchal sexuality. Undoubtedly, historical state regulation of obscenity amounts to state sanctioned homophobia. According to Currie (1992:192-193), obscenity "[l]egislation reinforced the monogamous heterosexual family by giving the male-dominated courts the power to censor images that do not conform to this model."

The second section focuses on the feminist strategies for the reform of 'obscenity' laws in Canada; more specifically, on feminist responses to federal legislation meant to reform section 163 of the Criminal Code that deals with obscenity. For the sake of clarity and consistency, I focus on the responses and/or strategies of national women's organizations, such as the Canadian Advisory Council on the Status of Women, the National Association of Women and the Law, and the Women's Legal Education and Action Fund (LEAF). While these groups do not undertake to speak for all Canadian women, nor are they identifiably liberal, radical or materialist in their analyses, their writings nevertheless represent a general feminist response to federal attempts to reform

obscenity legislation in Canada.

Historical Backdrop

In the English feudal society, literacy was a privilege available only to the clergy and, as a result, the majority of the population was illiterate. According to Kuhn (1985:24):

> When the term pornography first came into use, virtually the only medium in which representations could be reproduced in very large numbers was print. The printed word demands literacy, and not everyone was able to read. As a written medium, pornography was consequently limited as to the audience it could reach, and seems to have been something of a gentleman's pastime.

In addition, most of the literature available was theological in nature and subject to ecclesiastical authorization (Chaster and Wilson 1984). Taylor (1984:3) argues that:

> Attempts at the legal definition and regulation of obscene material have a long history in the United Kingdom. Some form of licensing of literature existed from the time of Henry VIII (1509-47), although the preoccupations of such censorship were more frequently political and religious than they were directly moralistic.

As a result, material censored in a feudal society tended to be prohibited for reasons of blasphemy. Sexually explicit material was therefore banned on the basis of heresy rather than strictly sex[20] -- a condition for censorship that continued until the seventeenth century (Lacombe 1988; Chaster and Wilson

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[20] It is unclear if the Church objected to depictions of sexuality because women's sexuality was considered *inherently* heretical or if particular materials were banned because they questioned the legitimacy of the Church. It is possible to surmise that any depictions of sexuality not sanctioned by the Church, such as homosexuality and/or sex outside of marriage, would have been viewed as a threat to the hegemony of the Church.

1984).

Industrialization and urbanization soon gave rise to a new, more literate middle class along with a new system of state power. The state (supported by the monarchy) rather than the church began to assume greater control over societal affairs. In addition, the invention of the printing press facilitated the increase in literacy and the mass production of printed materials (Chaster and Wilson 1984). According to Kuhn (1985:25);

> Developments in techniques of mechanical reproduction of photographic images and consequently in the capacity to produce large quantities cheaply opened up limitless horizons for pornographers. The apparent realism of the photographic image undoubtedly proved an added attraction for consumers, too. Mechanical reproduction of still photographic images, then, offered a breakthrough in the public availability of pornography. The advent of cheap, mass-produced visual pornography opened up the market to the less well-off, foreign immigrants, the illiterate, the working classes.

It is significant, then, that prior to the invention of the printing press, the mass production and circulation of pornography was impossible. In addition, by the end of the sixteenth century, the state had taken over the licensing authority of publications from the church and the printing press became an important political rather than ecclesiastical tool (Chaster and Wilson 1984).

By the end of the seventeenth century, the capitalist expansion of the printing industry ensured that any religious restrictions on printing had been removed. The state, however, had not relinquished its control over the production and distribution of published material. Publications were regulated by a number of common law restrictions against libel, slander, defamation, and sedition

(Chaster and Wilson 1985). It is no surprise, then, that during this time materials that were considered 'seditious' rather than 'blasphemous' were linked to immorality and therefore banned. Little regard was given to 'obscene' materials unless of course such materials subverted the repressive moral imperatives of the state. According to Chaster and Wilson (1985), the state was more concerned with the suppression of overt sexuality rather than violent sexuality.

In 1727, Edmund Curl was prosecuted for publishing *Venus in the Cloister* or *Nun in Her Smock*, which was considered obscene because it subverted a religious morality sanctioned by the state (Taylor 1984; Lacombe 1988). According to Cole (1989:69):

> The judge ruled that the peace of society could be disrupted by something other than force - specifically, by an attack against society's morality.

This case illustrates what Mahoney (1984:37) characterizes as conservative morality, wherein obscenity is understood as inherently evil, thus posing a threat to the "... organizational structure of society and its institutions." Thus, the first case of 'obscene' libel to be adjudicated in Canada established in Canadian law a specifically conservative moral framework for obscenity legislation (Cole 1989). According to Mahoney (1984:38) "[t]his early case had two important consequences: it introduced the concept of obscenity as a punishable offense, and it placed the responsibility for public morality in the hands of the judiciary."

Meanwhile, throughout this period, the role of women - including the redefinition of sex roles - was undergoing transformation. These changes were

linked, in part, to the changing modes of production and reproduction. Gradually, the productive family unit gave way to a "putting out" system in which goods were produced for a fee with the raw materials provided by a merchant. Eventually, these goods were produced by craftspersons working collectively out of workshops. This signalled the beginning of the separation of work from the home, and with the advent of the industrial revolution and the shift from piece work to waged labour, the separation was practically complete. Eventually, the primary role of the 'new' white middle class woman became one of 'housewife' and 'mother,' while working-class women had little choice but to labour in the factories.

Just as work was becoming more alienating, sexuality became increasingly divorced from genuine social and sexual relations between people. Prevailing ideas about 'proper' sexuality were centred around the role of the middle-class woman -- a tiny minority of the population, since most women were working either in the home or in the factories to support their families. Working-class women - without whose economic contribution the family could not survive - could never aspire to the standards of femininity advanced by the dominant upper class (Chaster and Wilson 1984). It is during this shift in the organization of productive and reproductive practices that dominant attitudes towards sexuality and sexual practices began to change. At the same time, both pornography and prostitution were on the increase (Chaster and Wilson 1984).

Throughout the eighteenth century and up until the mid-nineteenth century

when 'obscene' materials began to be prosecuted, 'obscenity' continued to be proscribed on the basis of blasphemy and sedition rather than so called 'immoral' sexuality alone. During these two centuries, legislation was passed and court precedents were set in an attempt to deal with 'obscenity' or, more precisely, to regulate sexuality. The passage of legislation coincided with the printing revolution and a growing concern by the ruling class with controlling the proletariat; a social group that was becoming increasingly divided from the middle and upper classes. During this period, the control of women's sexuality was increasingly becoming a matter of public concern. For example, *The Vagrancy Act of 1824* provided the first codified prohibition of obscenity, while *The Customs Consolidation Act of 1853* was passed to prohibit the exhibition and importation of obscene books or prints. Finally, with the passage of *The Obscene Publications Act of 1857* - the first legislation aimed at proscribing 'obscene libel' - magistrates and the police were granted the privilege of entering private premises to seize any material they deemed to be obscene therein. None of these acts contained a specific definition of the term 'obscene'; the determination of which was to become established through legal precedent (Lacombe 1988:34-35).

According to Cole (1989:69):

> Between the 1600s and the mid-1900s, the legal definition of obscenity in western legal terms became fairly well-settled, focusing on the notion of "corrupting public morals" - a catch-all formulation that proved to be highly elastic and capable of sustaining varied political interpretations, depending on the social context of the day. In the 1800s, an element of class privilege was grafted onto the law of obscenity, as the combined forces of mass literacy and industrialism raised new concerns about the

> effects of obscene material on the "propriety" and industriousness of the working class. It is intriguing to note that this was the first context in which there is any concern expressed about the harms of pornography: the literature of the United Kingdom Society for the Suppression of Vice said that pornography caused sex crimes, but only when it fell into the hands of the working class.

Cole (1989) points to a shift in concern with the sexual practices of the working classes. This class character of morality expressed in obscenity legislation became firmly entrenched in Canadian law with the establishment of the "Hicklin test."

In 1868 a man named Scott was indicted for writing and distributing pamphlets entitled *The Confessional Unmasked* in which are detailed the methods used by priests to extricate erotic confessions from repentant women (Taylor 1984). This case provided the first legal definition of 'obscenity' and introduced the notions of 'depravity' and 'corruption' into the legal realm (Cole 1989; Chaster and Wilson 1984). In the judgment, Lord Cockburn rendered his test for the existence of 'obscenity' in a given publication:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (cited in Lacombe 1988:35)

It appears that the courts were concerned with inappropriate sexual arousal (Boyd 1984) and the effects of which on those whose minds were more susceptible to 'corrupting' influences. "If the materials had a tendency to 'deprave and corrupt ... minds open to such immoral influences,' they were likely to be found obscene" (Cole 1989:69). It is at this point in the history of obscenity regulation that the courts begin to adopt what Mahoney characterizes as 'liberal morality'; morality

that is concerned with the harm to individuals caused by the censorship of 'obscene' materials, rather than its potential to disrupt the social order. According to Mahoney (1984:38), "... liberal morality is not concerned with the material's inherent character, but rather asks whether more harm will be caused by banning it than by permitting its publication. The suppression of material is regarded as harmful since it is believed to erode the fundamental freedoms upon which democratic society is based." Given the class, race and gender bias of the law, it can be assumed that the court's concern is nevertheless rooted in the maintenance of the status quo, even though such concern is disguised in a benevolent yet paternalistic notion of the 'protection' of individual rights.

'Obscenity' was made an offense under codified law in 1892 whereby - with the introduction of the Draft Criminal Code in Canada - the Hicklin test was adopted. Although met with considerable judicial and academic criticism (Boyd 1984), the Hicklin test informed Canadian common and codified law until 1959 (Chaster and Wilson 1984; Lacombe 1988), "... when the Parliament of Canada enacted its own definition" (Mahoney 1984:58).

Following the adoption of the Hicklin test in 1892, 'obscenity' cases were few and far between, with only five reported cases between 1900 and 1940, all of which were concerned with the ensuing corruption of morals as a result of exposure to 'obscene' material. All cases followed the Hicklin precedent and, in all cases, the intentions of the authors were of little regard to the court's determination of obscenity (Boyd 1984; Lacombe 1988).

A number of significant changes were made to the test between 1944 and 1959. Most notably, in 1944 the test was altered with the addition of criminal intent or *mens rea*[21] (Lacombe 1988). In 1953, the court considered that part of the population that is readily susceptible to moral influences[22] (Lacombe 1988). In 1954, there were two new qualifications made to the Hicklin test: the notion of contemporary standards and the requirement that the material must be considered in its entirety.[23] Thus, the courts recognized that materials which 'deprave' and 'corrupt' one generation may not similarly affect the next (Lacombe 1988:35-36).

In 1957, amongst heated criticism of the Hicklin test, a Special Committee of the Senate, created in 1952 and headed by E.D. Fulton, gave its recommendations to the House of Commons (Boyd 1984; Lacombe 1988). These recommendations eventually took the form of Bill C-58 which was introduced to Parliament by E.D. Fulton (who had now become the Conservative Justice Minister) and became law in 1959. This bill, meant not to displace the Hicklin test but to expand and clarify its intent (Boyd 1984), "... resulted in the amendment of section 159 of the Criminal Code and in the addition of subsection (8) which defined the word 'obscene'" (Lacombe 1988:36). Subsection (8) - which remains unchanged to date (except for its section number) - reads as follows:

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[21] *Conway v. The King* (1944, 2 D.L.R. 530)

[22] *R v. National News* (106 C.C.C. 26)

[23] *R. v. Martin Secker Warburg Ltd. and Others* ((1954) 2 A11 E.R. 683)

> For the purposes of the Act, any publication a dominant characteristic of which is the undue exploitation of sex, of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence shall be deemed to be obscene. (Lacombe 1988:36)

This amendment "... produce[d] significant changes in the structure of the legal control of obscenity" (Boyd 1984:25). According to Mahoney (1984:58):

> By enacting the legislation, Parliament appeared to depart from the common law traditional emphasis on the immorality of explicit sex. Parliament enlarged the definition of obscenity to include the portrayal of certain forms of violence if accompanied by the undue exploitation of sex. Violence could not by itself be obscene. This became known as the "sex plus" requirement and its effect was to limit the reach of the obscenity law to sexual depictions.

In the first 'obscenity' case to be heard before the Supreme Court of Canada following the passage of Bill C-58,[24] the 'community standard' test for 'obscenity' - now defined as 'undue exploitation' - was introduced in an attempt to correct the subjective evaluation of the materials by providing an objective standard; a standard of 'obscenity' which the community would tolerate.[25] In the decision, Judson J. noted:

> There does exist in any community at all times - however the standard may vary from time to time - a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that there is any better tribunal than a jury to draw it. (Boyd 1984:25-26)

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[24] *R. v Brodie* [1962] S.C.R. 681

[25] The notion of 'tolerance' was advanced by Fulton who, in a House of Commons Debate suggested that the concept "undue exploitation" referred to "generally something going beyond what men [sic] of good will and common sense would tolerate" (Lacombe 1988:37). This notion of 'undue' exploitation begins to legally establish the distinction between soft-core and hard-core pornography, signifying that certain varieties of pornography which exploit women are not 'undue' because they are tolerated by the 'community'.

In addition, this judgment recognized the relevance of artistic and literary merit of a work in determining whether or not there is 'undue exploitation.' Mahoney (1984:58) notes:

> ... the majority of the Supreme Court held that the new definition was the exclusive test of obscenity, thereby rendering the *Hicklin* test obsolete. The cornerstone of the definition of obscenity became the "undue exploitation of sex" rather than the "tendency to deprave and corrupt". Community standards were to determine whether or not the exploitation of sex was "undue", but because the Crown was not required to adduce evidence of community standards, this determination was often made by the judge based on his understanding and appreciation of community levels of tolerance.

In a subsequent case,[26] the court determined that the community standard of tolerance test is a test of national 'community standards' (Boyd 1984) rather than standards of a specific community. According to Boyd (1984:27), the community standards test deviates from the Hicklin test in that no determination of harm is necessary, "... it is sufficient that the publication in question exceed the accepted standard of tolerance." The elimination of 'harm' was highly consequential for women given that the community standard of tolerance would accept exploitation of women so long as it was not 'undue.' Accordingly, this decision marks a significant departure from the *Hicklin* test. The concern of the court appears no longer to be the 'corrupting' influences of 'obscenity' on what were perhaps considered to be the 'lesser' classes: those persons whose minds were more susceptible to corrupting influences. The focus of concern appears to

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[26] *Dominion News and Gifts v. The Queen* ((1967) 3 C.C.C. 1 and 2 C.C.C. 103 (1969) (Man. C.A.)

have shifted to a consideration of the prevailing tolerance of the community. The fact that such "community standards" are rooted in class privilege - or that this language perpetuates the moral hegemony of the ruling class by re-articulating and obscuring a class based definition of 'obscenity' in democratized terms - seems, in my view, to have escaped critical attention. However, Cole (1989:70) argues that, currently:

> Obscenity doctrine does not ask whether materials under consideration violate women, it asks whether the materials violate Canadian contemporary community standards .... The community standard test was designed to avoid circumstances in which judges had to rely on their own personal tastes or on conventional moralist standards to determine whether something was obscene.

The Canadian courts continued to rely on the 'community standards' test established in *R. v. Brodie* (1962) and *R. v. Dominion News and Gifts Ltd.* (1963) in which its effectiveness for verifying the 'obscenity' of a given publication was asserted before the courts (Cole 1989:70). At this juncture, case law established that 'obscenity' was to be adjudicated on the basis of "undue exploitation of sex" with "undueness" measured in accordance with a judicial determination of "community standards"; standards which are subject to transformation over time. The "community standard" test for the "undue" exploitation of sex "... required a judge to articulate a 'general instinctive sense of what is decent and what is indecent'" (Busby 1993:2).

Feminist Strategies/Responses to the State

Feminists have noted that judicial interpretations of the community standards test results in uneven application of the law. Given that the community standards are still very much defined from within a hetero-patriarchal framework (wherein traditional notions of 'family' and religious morality supersede feminist egalitarian values), the law continues to give the male-dominated courts the authority to suppress material that fails to conform to the community standards of society; standards that, ironically, judges are given the power to define.

In the seventies and eighties, pornography was an issue that precipitated considerable outrage and action on the part of women's organizations. Many women's groups - informed by social scientific and personal evidence linking pornography to violence in women's lives - conducted workshops and participated in many consciousness raising activities and argued for the need to eliminate or at least control the amount of violent and degrading pornography in Canada. This section outlines the continuing attempts by the state to define 'obscenity' in criminal law and the responses by Canadian feminist groups to such legislative intervention. Cole (1989:70) notes that:

> The history of criminal obscenity litigation is, in many ways, the history of how women's reproductive self-determination and sexuality have been repressed. Since their first enactment, Canada's obscenity provisions have been used to regulate information on birth control, abortion, women's sexuality, alternative sexualities and dissident politics.

This awareness - coupled with the state's blatant suppression of gay, lesbian and feminist materials and its implicit support of heterosexual pornography -

contributed to the growing dissatisfaction amongst many progressive organizations by the early 1980s. In particular, the formal criminal charge against the owner of Pages bookstore in Toronto for a window display created by a feminist art collective in 1985 demonstrated that "... sexual representations designed to challenge sexist social norms violate community standards" (Cole 1989:75).[27] More specifically, the purpose of this section is to illustrate and contextualize this history by focusing on the struggle between women's organizations and the state over the regulation of pornography through contemporary 'obscenity' legislation; in short, to historicize its current form.

According to Cole (1989:72), the late 70s and early 80s were years in which a new discourse developed around the meaning of pornography, informed in part by a growing awareness of the power of the pornography industry. According to Cole (1989:70-71):

> Against all the powerful currents driving these new legal initiatives, feminists began to add their voices and opinions to the discourse. This movement began with the declaration that pornography harms women in very specific and particular ways, and that those harms are different from whatever harms have traditionally been associated with obscenity. Instead of focusing on the effects that pornography has on public moral behaviours, public order and speech, or on the way pornography leads to nebulous notions like "corruption" or "depravity," feminists began to talk about how pornography harms women, both directly and indirectly.

In 1977, Women Against Violence Against Women (WAVAW) was formed by women in Toronto with the support of the Rape Crisis Centre of

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[27] *R. v. Esther Bogyo and Marc Glassman* Ont. Prov. Court, Nov 26-27 1985. Judge Sidney Harris presiding (unreported) (Cole 1989:176).

Toronto. The mandate of the group was to analyze the law dealing with the regulation of pornography (Lacombe 1988). It was evident that the law and its agents of enforcement were incapable of controlling pornography, since pornography was flourishing in Canada. Children were being used in its production without penalty, and violent and degrading pornography was increasingly available in the marketplace (Cole 1989).

In response to the feminist analysis of pornography and state sanctioned control of sexuality - generated in part by the members of WAVAW - Ron Basford, the Minister of Justice for the Conservative government, introduced Bill C-51 in 1978. Bill C-51 was an omnibus bill that introduced amendments to those sections of the *Criminal Code*, the *Canadian Evidence Act*, and the *Parole Act* (Canadian Advisory Council on the Status of Women 1978) dealing "... with rape, prostitution, parental kidnapping, child abuse, loan sharking, alternative sentencing, and a number of other matters dealing with the trial process" (Lacombe 1988:48). In addition, the Bill proposed specific amendments to "... the *Criminal Code* to make the production and distribution of material depicting obscene acts involving children an offense punishable by ten years in jail" (Lacombe 1988:47). The bill included the following definition of obscenity:

> Subsection 159(8) of the said Act is repealed and the following substituted therefor:
>
> (8) For the purposes of this Act, a matter or thing is obscene where
>
> > (a) a dominant characteristic of the matter or thing is the undue exploitation of sex, violence, crime, horror, cruelty or the undue degradation of the human person; or

> (b) the matter or thing unduly depicts a totally or partially nude child
>
> (i) engaged or participating in an act or simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality; or
>
> (ii) unduly displaying any portion of his or her body in a sexually suggestive matter.
>
> (9) In this section, "child" means a person who is or appears to be under the age of sixteen years.

The Canadian Advisory Council on the Status of Women (CACSW) report released in 1978 affirmed the definition of obscenity advanced by the state. Nevertheless, the authors doubted that this definition would prove any more effective in practice than the existing legislation (1978:3). This bill failed to become law when it died on the Order Paper because of a change in government.

In 1981, the Liberal Justice Minister Jean Chretien proposed similar legislative changes as those introduced in Bill C-51 in an attempt to deal with "kiddie porn." According to Lacombe (1988:48), these changes were eventually withdrawn because more effort was directed at reforming Canada's antediluvian rape law.[28] Following these unsuccessful attempts to define obscenity through legislative amendment, two major federal committees were struck to investigate pornography and prostitution. The Fraser Committee was provided with a mandate from the federal government to review obscenity legislation, and the Badgley Committee on Sexual Offenses Against Children and Youths was

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[28] This eventually culminated in the repeal of the old rape law and the addition of three new categories of "sexual assault" in 1983.

established to look into the harmful effects of pornography and prostitution. Between 1983 and 1985, both committees travelled to each province in the country listening to submissions from various agencies and women's organizations. The Badgley Committee submitted its report to Parliament in 1984, and the Fraser Committee submitted its report to Parliament in 1985. In their reply to the Fraser Committee Report, the National Association of Women and the Law (NAWL, 1985) asserted that the recommendations of the Fraser Committee established a sound basis for future legislation. NAWL accepted the recommendations of the Fraser Committee, provided that the modifications they suggested were to be included in future draft legislation.

Meanwhile, back in the courtrooms, judges were beginning to absorb the feminist assertion that pornography causes real harm to women. For example, in 1983, in *R. v. Doug Rankine and Act III Video*,[29] Borins, J. "handed down a judgment in an obscenity trial that made it plain that the grassroots feminist organizing and the development of feminist critiques of the law had made an impression" (Cole 1989:72). Mahoney (1984:62) argues:

> The *Rankine* case represents the first time a Canadian court has examined an allegedly obscene depiction specifically from the point of view of the victims of the sexual abuse, rather than of the sensibilities of the observers. Mr. Justice Borins, however, still maintained that a high degree of explicit sex is obscene.

Similarly, in *R. v. Ramsingh*[30] the recognition of harm rather than sexual

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[29] *R. v. Doug Rankine and Act III Video* 1983 9 C.C.C. (3d) 53 (Ont. Cty. Ct.)

[30] *R. v. Ramsingh* 1984 14 C.C.C (3d) 230 (Man. Q.B.)

explicitness was characterized as obscene:

> While Borins J. would require that sex and violence be accompanied by degradation and dehumanization in order to find depictions obscene, Ferg J. in *Ramsingh* suggested that degradation and dehumanization alone could be obscene.

A few years later in *R. v. Wagner*[31] the general principles set forth in *Rankine* and *Ramsingh* and were again articulated with significant new considerations. According to Mahoney (1984:62-63):

> In his analysis of the meaning of "undue exploitation of sex", Shannon J. of the Alberta Court of Queen's Bench distinguished three different types of sexually explicit material: violent, non-violent but degrading and dehumanizing, and erotica. He described the three categories in detail, providing examples of each, and held that the Canadian community will tolerate erotica, but not material falling into the other two categories. Unlike Borins J. in *Rankine*, Shannon J. was of the opinion that explicit sex *per se* is not obscene. He said that "[i]t is the message that counts, not the degree of explicitness". By emphasizing "the message", the Court is saying that the context of the sexual depictions is the paramount consideration.

Moreover, Shannon J. held that, due to the social harm caused by sexually violent or degrading and/or dehumanizing pornography, the *Criminal Code* provisions proscribing 'obscenity' do not infringe upon the freedom of expression guarantee in *The Charter of Rights and Freedoms* (Mahoney 1984).

According to Women's Legal Education and Action Fund (LEAF 1991:8), in *Towne Cinema Theatres v. The Queen*, the court acknowledged that the violence in - and therefore the harm of - pornography constituted "undue exploitation of sex" without concern for community standards, thereby implicitly

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[31] *R. v. Wagner* (unreported Alta. Q.B., 16 Jan. 1985)

stating that the objective of section 163(8) is the avoidance of harm.[32] While, according to Mahoney (1984:63), judicial acknowledgment of violence in obscenity was rare, it appears that by this point in the development of Canadian case law the existence of violence in pornography constituted harm and therefore obscenity. The principle of social harm seems to have supplanted the notion that sexual explicitness *per se* constituted a judicial determination of obscenity (Mahoney 1984).

In June of 1986, following the submission of the Fraser Report, Bill C-114 was introduced to Parliament by the Minister of Justice, John Crosbie. Bill C-114 introduced encyclopedic amendments to the *Criminal Code*. Rhodes (1988:134) notes:

> Since the Fraser Committee Report, the Conservative government has made repeated efforts to introduce amendments to the Criminal Code which would eliminate the vagueness of the current wording and explicitly define the types of activities which, if depicted, could be censored.

An exhaustive definition of 'obscenity' - specifically 'pornography' - was proposed for the new legislation. For example, degrading pornography was defined in Bill C-114 as

> any pornography that shows defecation, urination, ejaculation or expectoration by one person onto another, lactation, menstruation, penetration of a bodily orifice with an object, one person treating himself [sic] or another animal or object, an act of bondage or any act in which one person attempts to degrade himself or another.

Pornography was defined as "any visual matter showing vaginal, anal, or oral

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[32] This is an important recognition because until this decision, presumably if the community would 'tolerate' men's desire to masturbate to pictures of women being sexually brutalized, then any such practices were acceptable regardless of their harm to women.

intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other activity." Pornography that shows physical harm was defined as "any pornography that shows a person in the act of causing or attempting to cause actual or simulated permanent or extended impairment of the body of any person or of its functions." Finally, sexually violent behaviour was defined as "sexual assault and any behaviour shown for the apparent purpose of causing sexual gratification to or stimulation of the viewer, in which physical pain is inflicted or apparently inflicted on a person by another person or by the person himself." Further, the bill contained a number of supplementary recommendations regarding the sale and distribution of pornography in addition to provisions regarding defence of artistic and/or education merit.

This bill was criticized by feminists for its ridiculously broad definition of pornography. In response, the Canadian Advisory Council on the Status of Women (1986) submitted *A Critique of Bill C-114 as Proposed Legislation on Pornography* to the legislative committee reviewing the proposed legislation on pornography. The purpose of this paper was to provide the committee with a feminist analysis and critique of the proposed legislative amendments. In essence, CACSW provided the committee with an evaluation of Bill C-114 based on feminist principles of non-violence, equality, and women's right to freedom and privacy. Three criteria for a feminist evaluation of pornography legislation flow from these themes (CACSW 1986):

> Harm - does the legislation *prevent* harm to women, children and society at large?

> Healthy sexuality - does the legislation allow for an appreciation of healthy adult sexuality?
>
> Equality - does the legislation respect the legal, social and economic equality of women?

Working with the concept of harm, CACSW provided a three-tiered approach to the harm caused by pornography.[33] First, pornography is understood to undermine the tenets of a democratic society with its "propaganda of misogyny" and is therefore considered *harmful to society* as a whole. Second, pornography is considered to precipitate "generalized" *harm to women* as a group because it presents women as sexual objects desirous of sexual humiliation and/or sexual violence, thereby undermining women's equality and social esteem. Third, the production, distribution and consumption of pornography engenders physical and psychological *harm to women and children who labour in the pornography industry and to women and children who are coerced into acting out its script.*

Bill C-114 failed to become law. However, the public dissatisfaction with the existing Criminal Code provisions governing the regulation of pornography made it impossible for the government to let the issue rest (Cole 1989). The following year, therefore, the government introduced Bill C-54; a bill that delivered essentially the same laundry list approach to defining pornography as the earlier draft legislation (Cole 1989:77). This bill was again meant to replace current provisions in the *Criminal Code* under "Offenses Tending to Corrupt

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[33] In my view this three tiered approach to harm is reflected in the LEAF factum, and it is an approach agreed upon generally by the Canadian feminist community.

Morals" that define 'obscenity,' and to replace them with a definition that differentiates between 'erotica' and 'pornography.' Erotica was defined in Bill C-54 as:

> any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of the human sexual organ, a female breast or the human anal region;

Pornography was defined in Bill C-54 as:

> (a) any visual matter that shows
>
> > (i) sexual conduct that is referred to in any of subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be, under the age of eighteen years, or the exhibition, for the sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years,
> > (ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,
> > (iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context,
> > (iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,
> > (v) bestiality, incest or necrophilia, or
> > (vi) masturbation or ejaculation not referred to in subparagraph (iv) or vaginal, anal, or oral intercourse, or
>
> (b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any

subparagraphs (a)(i) to (v);

In addition, any person who deals in pornography is considered guilty of an offense punishable either on summary conviction or by indictment.[34] Indictable offenses are liable to prison terms anywhere from five to ten years based on the subject matter for which the person dealing in pornography is charged. The defence of artistic merit, and educational, scientific or medical purposes are included.[35] This bill also criminalizes the use of children (persons under the age of 18) in pornography or theatrical performances punishable by up to ten years imprisonment unless the defendant can show the court that they "took all reasonable steps to ensure that no person in the matter or communication, was depicted as being, appeared to be or was described as being under the age of eighteen years." Finally, Bill C-54 proposed that possession of child pornography be considered a criminal offence punishable by summary conviction.

Amid the expressions of disapproval voiced by "numerous groups in Canada representing a range of interests," (Rhodes 1988:133) CACSW (1988) responded once again to the government's proposal with a re-articulation of their recommendations for pornography legislation outlined in their 1986 critique of Bill-114.[36] The National Action Committee on the Status of Women (NAC) also

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[34] For the purposes of this bill "a person deals in pornography if the person imports, makes, prints, publishes, broadcasts, distributes, possesses for the purpose of distribution, sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, the pornography."

[35] These provisions, however, were viewed as highly problematic because they were reverse onus. This places the responsibility on the accused, rather than the state, to prove the artistic, educational, scientific or medical merit of the material (NAC 1988).

[36] A detailed description of the response articulated by CACSW is unnecessary here given that the essential point is that the government's proposals continued to fall short of the expectations of Canadian women's organizations such as CACSW and NAC.

responded to the proposed legislation. NAC submitted their *Brief to the House of Commons Justice Committee on Bill C-54* in which they rejected the "legislation as neither an effective nor an appropriate means of dealing with pornography" (NAC 1988:1). The following statement in NAC's brief provides a good summary of the positions espoused by women's organizations across Canada:

> Some N.A.C. member groups support the use of the Criminal Code to address the harm pornography poses to Canadians. These groups endorse the use of the state's greatest legal sanction - the Criminal Code - as the most appropriate and effective response to pornography.
>
> Other groups do not believe that criminal sanctions are the most effective means of controlling the use and proliferation of pornography, nor the most appropriate way of redressing the harm pornography causes. Instead, many of these groups support the development and implementation of civil remedies - such as municipal by-laws, film and video classification, human rights legislation and the creation of a statutory right of action based on the harm inflicted by pornography.
>
> Still other groups see a combination of civil remedies and criminal sanctions as being the most effective means of controlling pornography (1988:3).

On behalf of its member groups, NAC argued that Bill C-54 was a "superficial and simplistic legislative response," and submitted "four criteria essential for any legislative response to pornography":

1) That any legislation focus on violence rather than sex acts;
2) That legislation not affect the distribution of sex education materials to people under 18;
3) That legislation not reinforce heterosexism and thereby discriminate against lesbians and gays and that;
4) Any legislation put the onus on the Crown to prove that material charged does not have educational or artistic merit rather than placing the onus on the artist or educator to prove that it does. (NAC 1988:4)

According to NAC's brief, Bill C-54 fails to meet any of these criteria. Similarly, it fails to address the fundamental harm of pornography. NAC identified pornography as "... integrally connected to the economic, social, cultural, legal and political inequalities women currently face" (1988:8). As a result, NAC recommended that a greater focus be placed on providing resources for a full range of services and programs for incest survivors, battered women and rape victims, in addition to media literacy education, job training and re-training for women, and affirmative action programs. Finally, NAC suggested that the government not limit itself to *Criminal Code* amendments and encouraged the Committee "... to further investigate various alternative civil remedies to pornography and encourage the government to further explore the enactment of such legislation as a positive step towards redressing the harms posed by pornography" (1988:8). Bill C-54 failed to become law as an election was called before the bill could properly pass.

In my estimation, the feminist strategies for reform of the obscenity law can be characterized by a lack of strategy. The responses to the various bills put forward by the government and the numerous submissions to the Fraser Committee appear to be responses without a specific or coherent strategic agenda.[37] This was due, in part, to the feminist dissensus as to how to deal with pornography. Issues such as abortion and rape law reform were immediate issues upon which we could achieve consensus and, consequently, could be strategized

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[37] Rhodes (1988:134) notes that most of the submissions to the Fraser Committee "...provided an emotional purge for all women who are sickened by the extent of violent and degrading pornography, but few attempted to address the specifics of law reform."

more easily and effectively than the divisive issue of pornography. Nevertheless, what can be drawn out from the above discussion - and, indeed, from much of the feminist legal theory on pornography, the subsequent response to the various bills, and precedent setting court decisions - is the concept of *harm*. As Mahoney (1984) argues, the courts have shifted their understanding of harm from a conservative position, which understands obscenity as a harm that threatens the organizational structure of society, to an understanding of harm from a liberal position, which understands the censorship of 'obscenity' itself as harm to society because it inhibits free expression. Therefore, the courts see their role as one of determining whether the harm caused by censorship is greater than the harm caused by 'obscenity' to individual members of society. In order to contextualize the feminist principle of harm articulated in Butler, it is necessary to outline the conservative and liberal conceptions of harm as these principles are expressed through the legal regulation of 'obscenity.'

Conservative, Liberal and Feminist Notions of Harm:

From a conservative point of view, sexually explicit materials are intrinsically immoral and are judged harmful on that basis. Beneath this conclusion of the inherent immorality of sexually explicit material "... is an assessment of whether or not the material poses a threat to the organizational structure of society and its institutions (Mahoney 1984:37). Hence, the conservative approach to obscenity regulation focuses on the preservation of

society in general from the corrupting influences of sexually explicit material. According to Mahoney (1984:44):

> ... the conservative morality creates and advocates what is to many an unacceptable sexual ethic, one that asks the law to subordinate sex to procreation and condemn all sexual interaction outside marriage. Sexual morality is seen by conservatives as the "glue" holding together the rest of the structure of society.

Rather than the content of the sexual interaction depicted, it is the expression of sexuality itself that threatens the integrity of the social structure. Thus, legal restrictions are placed on sexually explicit material because of the harm that it causes to the social order.

The liberal approach to harm is similar to the conservative approach to the regulation of 'obscenity' in that a concern is with the harm caused to a democratic society if 'obscene' - or for that matter any - materials are censored. Unlike the conservative approach, however, the liberal morality underlying a conception of harm does not concern itself with the inherent character of the sexually explicit material to be banned "... but rather asks whether more harm will be caused by banning it than by permitting its publication" (Mahoney 1984:37-38). The liberal position focuses on the suppression of any material as harmful because of its potential for eroding the fundamental freedom of expression (right to political dissent) upon which a democratic society is based. The harm caused by censorship is weighed against the harm the expunged materials cause to an individual. So long as the material in question does not cause direct harm to the individual, liberal ethics encourage its unrestricted expression (Mahoney 1984:38).

For example, the Canadian Civil Liberties Association and the Manitoba Association for Rights and Liberties argued in their "Factum of the Intervenors" in *Butler* that:

> Freedom of expression is fundamental to a free and democratic society because a diversity of thoughts, opinions and beliefs is prized for its inherent value to both the community and the individual. Freedom of expression has been said to be the "indispensable condition of nearly every other form of freedom" and as being "little less vital to man's [sic] mind and spirit than breathing is to his [sic] physical existence". Indeed it has been said that it is difficult to imagine a guaranteed right which is more important to democratic society than freedom of expression.

Moreover, these liberal organizations state that:

> The guarantee of freedom of expression ensures that it is the individual and not the government that decides which of the diversity of thoughts, opinions and beliefs the individual accepts, listens to or believes. The freedom is a manifestation of the belief that individuals can only be creative, realize their individual potential and be intellectually robust if they are free to choose from the widest diversity of thoughts, opinions and beliefs no matter how unpopular, distasteful and contrary to the mainstream. An integral part of realizing ones potential is the freedom to define the terms of that potential. *It is only if individuals have these freedoms that the state and its institutions will remain robust and free. The alternative is tyranny, conformity, irrationality and stagnation for both individuals and the state.* (1992:3; my emphasis)

Unfettered freedom of expression is the linchpin of a liberal morality that underlies the regulation of 'obscenity'.[38] Recently, however, the courts have asserted that 'obscenity' does not constitute protected speech. For example:

> The British Columbia County Court in *R. v. Red Hot Video Ltd.* held that subsections 159(1) and (8) of the *Criminal Code*, which

[38] This reflects the courts inherently male standpoint. They view the harm in pornography from the point of view of men's freedom to masturbate rather than the women's harm. Obscenity regulation is similar in this sense to judges' interpretation of rape - the harm is always harm for the rapist rather than the woman.

> make it an offence to distribute obscene matter and which define obscenity, do not offend the guarantee of freedom of expression in subsection 2(b) of the *Charter*. The Court further held that section 159 could not be said to be vague, broad or unreasonable. More recently, the Manitoba Court of Queen's Bench in *R. v. Ramsingh* held that section 159 of the *Criminal Code* represents a reasonable limitation prescribed by law and that can be demonstrably justified in a free and democratic society within the meaning of section 1 of the *Charter*. The Court said that the purpose of section 159 is to protect society generally and that it is not unreasonable for a democratic society to impose some limits on what can be viewed, such as child pornography or sex with violence and horror. (Mahoney 1984:46-47)

Both the conservative and liberal evaluations of pornography fail to take account of the harms of pornography observed by feminists. By focusing on the harm caused by pornography to the social order, or on the direct injury caused to individuals respectively, both conservative and liberal perspectives overlook three specific ways in which pornography causes harm: social harm, harm to women and children generally, and harm to the participants in pornography. It is to this conceptualization of harm that I now turn to bring the discussion to an analysis of the *Butler* decision. Accordingly, for the remainder of this Chapter, I discuss a feminist analysis of harm.

In contrast to liberals and conservatives, feminist legal scholars have developed a distinct understanding of the concept of harm; a concept rooted in women's experience of harm (Howe 1990; Mahoney 1984). The concept of harm flows as a common theme throughout feminist writing on pornography and is a concept which feminist organizations such as LEAF struggled to have legally recognized in *Butler*. Underlying the feminist philosophy of harm is a feminist

conception of morality; a concept that is informed by the principles of equality, non-violence and women's right to self-determination.

From a feminist point of view, sexual explicitness per se is not inherently immoral. The defining characteristic of immorality is the causation of harm to another human being. Feminist philosopher Helen Longino (1980:41) explains:

> What is immoral is behaviour which causes injury to or violation of another person or people. Such injury may be physical or it may be psychological. To cause pain to another, to lie to another, to hinder another in the exercise of her or his rights, to exploit another, to degrade another, to misrepresent and slander another are instances of immoral behaviour. Masturbation or engaging voluntarily in sexual intercourse with another consenting adult of the same or of the other sex, as long as neither injury nor violation of either individual or another is involved, are not immoral. Some sexual behaviour is morally objectionable, but not because of its sexual character. Thus, adultery is immoral not because it involves sexual intercourse with someone to whom one is not legally married, but because it involves breaking a promise (of sexual and emotional fidelity to one's spouse). Sadistic, abusive, or forced sex is immoral because it injures and violates another.

In short, according to Longino (1980:42), "pornography is immoral because it is harmful to people."

Flowing from a harms-based conceptualization of pornography is an articulation of the scope of harm engendered by pornographic practices. Pornography has been identified as causing harm in three specific ways. The following discussion summarizes this three tiered approach to harm.

Three Tiered Approach to Harm:

Harm to Society:

Feminists argue that pornography causes harm to society as a form of hate propaganda. Such propaganda advocates distorted images of women's (and men's) sexuality. Because of the distortion of sexuality through hatred, "[s]ociety suffers harm because hatred contributes to the destruction of a free and democratic society." The hatred encouraged by pornography undermines the principles of equality integral to a democratic society (Mahoney 1984:54). Pornography causes harm to society by promoting the ideology of women's sexual servitude as our paramount life ambition.

Harm to Women and Children:

In addition to the social consequences reproduced by pornography, feminists argue that the mass production, circulation and consumption of pornography contributes to and encourages abusive and exploitative attitudes toward - and practices against - women and children. According to Mahoney (1984:51):

> The harm it causes is public, generalized harm - the degradation of women as a class, resulting in assaults on institutions, values and practices relating to marriage, privacy, employment and the family, in a way not envisioned by male moralists. Many women's goals, such as greater participation in public life, equal pay for work of equal value and daycare, are that much more difficult to achieve when female credibility is assaulted on such a massive scale.

The influence of pornography on the social valuation of women and children constructs barriers to women's and children's equal participation in all spheres of

social activity. Moreover, women are harmed when they are coerced by their sexual partners into performing the sexual practices endorsed in and by the pornographic materials their partners consume (Barry 1979; Cole 1989; Jones 1980; Russell 1980).

Harm to Participants:

The institutionalized harm caused by pornography can be distinguished from the personalized harm caused to women and children by the production and consumption of pornographic material. The women and children photographed to create the pornographic images - images they are forced to portray by the men (and sometimes women) who control the industry - are physically and emotionally injured (Lederer 1980). "Unlike hair dyes and cigarettes, the items consumed in pornography are not inanimate objects but live women and children who are degraded and abused in the process" (Rush 1980:80). The practices engaged in by pornographers who employ[39] women and children for the manufacture of pornographic images cause these women and children real social and psychological injury (Lederer 1980).

In this section, I have illustrated the connection between obscenity legislation and social power. Historically, obscenity legislation has been regulated on the basis of its threat to power; regulation that was in turn justified by reference to religious morality. More recently, violent obscenity has - at times - been proscribed on the basis of the harm it does to women. Therefore, we have

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[39] I use the term 'employ' loosely here because women and especially children often fail to obtain adequate wages for their work in the sex trade.

seen a partial shift in the legal understanding of obscenity as harm in feminist terms. Governments have been particularly unsuccessful in their attempt to reform obscenity law. However, through particularly progressive precedent setting cases, the test for obscenity has evolved over time to account for the feminist critique. In the following chapter, I outline the Supreme Court decision in *Butler*. This description is integrated with my discussion of LEAF's intervention in this case. Finally, I provide a socialist feminist analysis of the *Butler* decision along with certain concerns relevant to the application of obscenity law post *Butler*.

CHAPTER FOUR

The *Butler* Decision

In *R. v Butler*, the Supreme Court of Canada considered whether section 163 of the *Criminal Code* violated the freedom of expression guarantee in *The Charter of Rights and Freedoms*, and provided a new comprehensive interpretation of section 163(8) of the *Criminal Code*. The events that precipitated this case began in August of 1987 when Winnipeg police seized the entire inventory of a pornography video store owned by Donald Victor Butler who, along with an employee, were charged with about 250 violations of the *Criminal Code* for possessing and exposing 'obscene' material for the purposes of distribution and sale. "Most of the seized materials were sexually explicit videos or magazines for heterosexual men; a small number involved gay men" (Busby 1993:1). Butler was subsequently convicted on eight of those charges and acquitted of the remaining charges. In 1989, however, following the Crown's appeal of this ruling, the Manitoba Court of Appeal overturned the original decision and convicted Butler on all counts. At this juncture, Butler's lawyers appealed to the Supreme Court, arguing that section 163 of the *Criminal Code* infringes on freedom of expression thereby violating section 2(b)[40] of the *Charter*. The Supreme Court rejected the ruling by the Court of Appeal, reinterpreted section 163(8) of the *Criminal Code*, and ordered a new trial for

[40] Section 2(b) of the *Charter* guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Butler.

The *Butler* case is significant in that it represents the first instance where the Supreme Court of Canada interpreted and applied section 163(8) of the *Criminal Code* in light of the provisions contained in the *Charter*. In the previous Chapter, I argued that the inconsistent interpretation of *Criminal Code* 'obscenity' provisions before the *Butler* decision resulted in an uneven application of the law. In this chapter, I discuss the legal strategy of the Women's Legal Education and Action Fund (LEAF). As LEAF is, in my view, the only *feminist* organization granted intervener status in *Butler*, I focus exclusively on the argument they presented to the Supreme Court. The *Butler* decision is then evaluated according to the criteria suggested by Cole (1989) outlined in Chapter Two. Finally, I develop a socialist feminist analysis of the outcome of this case in terms of its potential to effect meaningful social change.

The Women's Legal Education and Action Fund:

The Women's Legal Education and Action Fund (LEAF) is a national feminist organization that participates in litigation to educate and compel Canadian courts to interpret and apply *Charter* provisions in such a way so as to promote social justice and equality. LEAF and other equality seeking organizations argue that the *Charter* must be interpreted in accordance with the purposes of section 15 and section 28. The *Charter's* equality rights provisions - sections 15 and 28 - guarantee:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Orton (1990:8-9) argues that:

> The legislative purpose of section 15 can be discerned from both its language and history, which make it clear that section 15 was intended to continue the guarantees of equal access to justice found in the Canadian *Bill of Rights* (equality before the law and equal protection of the law), and, importantly, to go further to provide for substantive equality (equality under the law and equal benefit of the law). In particular, the history of the *Charter*'s guarantees of substantive equality demonstrates that section 15 was intended to benefit individuals and groups which historically have had unequal access to social and economic resources, either because of direct discrimination or because of the adverse effects of apparently 'neutral' forms of social organization.

Accordingly, LEAF's approach to *Charter* litigation is purposive. For LEAF members, equality is measured in terms of the impact legal intervention has on the condition of women's social status. LEAF advocates equality of result, recognizing that women's social condition of inequality demands that the courts interpret the overarching equality mandate of the *Charter* in such a way that the outcome of judicial decisions contributes to the advancement of women's equality.

In her study of the development of LEAF, Sherene Razack (1991:12)

writes that the Women's Legal Education and Action Fund "... emerged from the historical context of Canadian women organizing in the early 1980s for constitutional guarantees of sex equality." The specific planning for the birth of LEAF began in August of 1984, nine months before Section 15 of the Charter of Rights and Freedoms would come into effect (Razack 1991:46). LEAF was organized due to a concern over how judicial interpretations of the new section 15 would affect women's equality rights, particularly since most male Charter experts failed not only to examine constitutional issues from women's point of view, indeed, they "... seemed to have ignored the entire history of women's constitutional lobby" (Razack 1991:37). Similarly, Orton (1990:8) notes:

> Canadian women also knew that the concept of equality and legislated equality guarantees have been interpreted in a variety of ways by theorists and judicial decision makers over history and around the world, with results that have often reinforced rather than relieved the disadvantages of women and minorities. Therefore, just as important as obtaining the *Charter* guarantees is the participation of women and other equality seekers in the judicial process of interpreting and applying the *Charter*'s equality guarantees. The Women's Legal Education and Action Fund (LEAF), working with other equality seeking groups, has played an active role in developing and advocating an approach to section 15 that would make the legal right to sex equality effective in achieving sex equality in Canadian life.

Hence, LEAF's mandate is to agitate for substantive equality by encouraging "... 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" (Orton 1990:9). Moreover, LEAF argues that in

order to promote sex equality in Canadian life, the courts "... 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" (Orton 1990:10). LEAF members realize that equality must be engineered so that women and other disadvantaged members of society are not only treated as equals before the law, but that the outcome of that treatment will be equality of condition rather than perpetuated inequality. LEAF is informed by the insight that too often the law treats unequals as equals thereby perpetuating inequality; that inequality results when women are treated the same as men. Accordingly, "LEAF's mandate is to promote equality through challenges to laws and practices that contribute to systematic or institutional inequalities" (Busby 1993:2).

As a political public interest organization, LEAF's intervention in the judicial process is characteristic of what Hunt (1990:318) refers to as an important feature of the modern politics of law: "self conscious selection and pursuit of test cases ... marks out one of the important characteristics of the public interest law movement." As a feminist public interest organization committed to furthering women's substantive equality through legal struggle, LEAF's participation in *Butler* (and many other cases characterized as *Charter* challenges) is illustrative of contemporary feminist counter-hegemonic politics. As an equality seeking organization, LEAF is attempting to promote not only equality but social justice and, in the process, transform judicial practice(s). Accordingly, LEAF's

intervention in *Butler* was consonant with its goals as an equality seeking organization. In the following section, I outline the aim of LEAF's intervention in the *Butler* case. The purpose of this section is to provide a context for the arguments LEAF presented to the Supreme Court, which follow a discussion of LEAF's aims in *Butler*.

LEAF's Aims in Butler:

In the spirit of advancing women's equality, LEAF intervened in *R. v. Butler*.[41] Busby (1993:6) suggests that LEAF participated in litigation on pornography because it provided the opportunity to "deliver an important social and political message" and to voice a feminist legal opinion "on the relationship between sexual subordination, sexual violence and the laws that legitimate this violence." According to Busby (1993:3), LEAF's legal sub-committee,[42] responsible for developing the arguments presented to the Supreme Court, had four options in the *Butler* case:

> [They] could have accepted the law as it had been interpreted; supported a position that could have eliminated any criminal regulation of pornography; asked the court to strike down the *Criminal Code* provision 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

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[41] It is important to note that LEAF's strategy in *Butler* - similar to many of their other cases - was a reactive response to a situation in which the *Charter* was being used to erode women's equality rather than a proactive attempt to alter obscenity legislation. In other words, this case was initiated by Donald Victor Butler.

[42] The LEAF factum in *R. v. Butler* was co-authored by Kathleen Mahoney, Catharine MacKinnon, and Linda Taylor in consultation with LEAF's National Legal Committee. A broad consultation with equality seeking groups, such as that undertaken in *Keegstra* and *Taylor* was untenable due to the limited time (3 weeks) LEAF had in which to write the *Butler* factum.

> light of its implications for women's equality and its effects on substantive equality claims of men who are part of historically disadvantaged communities.

After careful consideration of social scientific and legal scholarship, the committee rejected the first three options in favour of arguing that the Supreme Court interpret the existing obscenity provision to promote constitutionally guaranteed equality.

Informed by MacKinnon's analysis of pornography, the members of the legal sub-committee sought to have the court recognize that pornography is a practice of sex discrimination that harms women. In 1984, Catharine MacKinnon and Andrea Dworkin drafted a civil ordinance at the request of the city of Minneapolis which has come to be known as the 'Minneapolis Ordinance.' This ordinance defines pornography as an act of sexual discrimination against women on the basis of sex, which would give women the right to sue pornographers for the harm done to them through pornography.[43] According to MacKinnon (1986:45), their "... argument is simple: tolerance of such practices is inconsistent with any serious mandate of equality and with the reasons speech is protected." As MacKinnon participated in drafting the LEAF factum, a conceptual framework which views pornography as an expressive form inequality takes and which harms women is reflected in LEAF's submissions to the Supreme Court.

MacKinnon (1985:23) argues that defining "... pornography as a practice

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[43] For a detailed discussion of the ordinance see, for example, Susan Cole, "The Minneapolis Ordinance: Feminist Law Making" in *Resources for Feminist Research/ Documentation sur la Recherche Feministe*, 1985 pp. 30-31.

of sex discrimination combines a mode of portrayal that has a legal history - the sexually explicit - with an active term central to inequality of the sexes -- subordination." Pornography is thus defined as discrimination because it is a subordinating activity - the opposite of equality - which is not protected by a freedom of expression guarantee (MacKinnon 1991b). Busby (1993:1) argues that this harms-based equality approach to pornography asserts that the *Charter's* freedom of expression guarantee must be interpreted in view of the *Charter's* equality guarantees with a focus on pornography's harm to women. Since Canada constitutionally guarantees equality, LEAF sought to counter the *Charter* challenge of the obscenity statute on harms-based equality grounds. MacKinnon (1991b:810) has argued that "... any nation that has a constitutional guarantee of equality can potentially defend a group defamation statute that is challenged as a violation of freedom of expression on equality grounds." This is precisely what LEAF proposed within the Canadian context. However, LEAF members realized that for such an argument to proceed, the equality provisions must be purposively interpreted to promote, in MacKinnon's words, "... equality in the application and formulation of the law, including promoting a society in which all of its members are recognized at law as equally deserving of concern, respect and consideration" (1991b:810, n. 46).

Members of the committee sought to connect this conceptualization of pornography with women's powerlessness to illustrate that subordination is the opposite of equality. According to MacKinnon (1993:100-101):

> LEAF argued that if Canada's obscenity statute ... prohibiting "undue exploitation of sex, or sex and violence, cruelty, horror, or crime," was interpreted to institutionalize some people's views about women and sex over others it would be unconstitutional. But if the community standards applied were interpreted to prohibit harm to women as harm to the community, it was constitutional because it promoted sex equality.

Accordingly, pornography is conceived as a harm of gender inequality; a harm which outweighs any social interest in its protection under the freedom of expression guarantee (MacKinnon 1985:25).

As this case invoked the *Charter* to challenge the constitutional validity of the obscenity clause of the *Criminal Code*, LEAF intervened specifically because of the impact a Supreme Court ruling in favour of constitutionally protecting pornography under the freedom of expression guarantee of the *Charter* would have on women's equality. LEAF argued that equality is a constitutional value and mandate; that the obscenity law, properly interpreted, is intended to promote equality. In short, LEAF demanded that the Supreme Court take equality seriously (MacKinnon 1993).

LEAF's Position in Butler:[44]

LEAF's argument is rooted in its larger mandate, which is to eliminate the discrimination experienced by historically subordinated groups (as it is perpetuated in and through pornography) by relying on the *Charter*. In their words, "... the *Charter* is not neutral on practices which promote inequality, but rather is a constitutional commitment to ending them" (1991:13).

Fundamentally, LEAF's argument parallels that of MacKinnon's. LEAF argued before the court that "... pornography amounts to a practice of sex discrimination against individual women and women as a group" and that its regulation "... can be constitutionally justified using a harms-based equality approach which focuses on the actual harms done by and through pornography" (1991:2). According to LEAF's factum (1991:15), pornography amounts to "... a practice of discrimination which disadvantages women and treats them as second class citizens on the basis of sex, it also uses race and age to discriminate through gender. Pornography sexualizes racism and racial stereotypes and eroticizes the vulnerability of children" (1991:15). Moreover, LEAF maintained that pornography is harmful to gay men because it "... arguably contributes to abuse and homophobia as it normalizes male sexual aggression generally" (1991:15).

LEAF argued that some pornography is unfit for protection by section 2(b) of the *Charter* "... either because it constitutes a violent form of expression or

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[44] This discussion of LEAF's position in the *Butler* case is informed by the arguments presented in their "Factum of the Intervener." Accordingly, I summarize the arguments LEAF presented to the Supreme Court as they appear in their factum.

because it is a discriminating form of expression proscribed by section 28 of the Charter, which applies to and controls section 2(b)" (1991:2). According to LEAF (1991:12), "[s]ection 28 of the *Charter* overrides every other provision therein. It mandates that all rights and freedoms, including freedom of expression and equality rights, are guaranteed equally to all women and men." LEAF submitted, therefore, that "... section 28 engages section 2(b) before any recourse to section 1 and requires a balancing of speech interests and equality interests. Failure to strike such a balance constitutes a breach of section 28" (1991:12).[45] Nevertheless, LEAF argued "... further and in the alternative that under section 1 of the *Charter*, any infringement of free expression is outweighed by the social interest of equality in society (1991:2).[46]

LEAF pointed to a number of cases[47] that incorrectly reinforce the traditional notions that:

> women's naked bodies are indecent, sexual displays are immodest, unchaste and impure, homosexuality is repulsive and sex outside of traditional marriage or in other than traditional configurations is a sin. (1991:3)

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[45] Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[46] LEAF advanced this same fundamental argument before the Supreme Court in the both the *Keegstra* and *Taylor* cases. In these cases LEAF asserted that the promotion of group hatred is a practice of discrimination (and a violent form of expression) which promotes inequality, and is therefore unprotected by section 2(b) of the *Charter*. Moreover, LEAF argued that section 1 limitations on expression are reasonable and justified when speech interests collide with equality interests within a free and democratic society that has equality as a constitutional mandate.

[47] *R. v. Sidley* (1663), 82 E.R. 1036 (K.B.); *R. v. Curl* (1727) 93 E.R. 849 (K.B.); *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 (Q.B.); *R. v. Beaver* (1905), 9 O.L.R. 418 (C.A.); *R. v. McCormick* (unreported, Ont. Co. Ct. January 10, 1980); *Lusher v. Minister of National Revenue* (1983), 149 D.L.R. (3d) 243 (Customs app.); reversed on other grounds (1985), 57 N.R. 386 (F.C.A.) (LEAF 1991:3).

According to LEAF, it is this interpretation of sexuality that obfuscates the harm pornography does to women (1991:3). As a result of the court's historic tendency to focus on transgressed morals, "[n]o recognition of the impact of pornography on the status and treatment of women was possible when the only harms of pornography were thought to be harms to the morals of consumers and infractions of moral rules" (1991:3). LEAF notes, however, that "[i]n Canada, obscenity law has evolved over time to go beyond morality toward a recognition of actual harms" (1991:3). The amendment of the *Criminal Code* in 1959 to include sub-section (8), which specifically defined obscenity as "... 'crime, horror, cruelty and violence' combined with sex, as well as the 'undue exploitation of sex,'" was a pivotal turn in this direction (LEAF 1991:3). Nevertheless, judicial interpretation of the obscenity clause continued to rely on the assumption that sexual explicitness was the primary criteria for determining whether the exploitation of sex in pornography was "undue," rather than focusing on the harm pornography does to women. As a result, the courts tended to criminalize "dirt for dirt's sake" rather than noticing the actual harm done to women. Furthermore, LEAF submitted that judicial applications of the community standards test for the 'undue exploitation of sex' tended to be "... gender biased insofar as its reference point was male consumers and audiences" (1991:3).

According to LEAF (1991:4), the court's historic failure to notice the substantive harm pornography does to women, coupled with the court's continued focus on sexually explicit material as obscene, resulted in "... a host of problems,

weaknesses, and potential legal disabilities for which obscenity law has long been criticized." These problems "... include vagueness, subjectivity, gender bias, potential for abuse as a mechanism of censorship, difficulties of proof and effective enforcement, and lack of compelling governmental interest to guide interpretation" (LEAF 1991:4). Indeed, the court's inability to cope with the increase in visual pornography throughout the 1970s and 1980s was seen as a consequence of the improper application of the community standards test. As a result of failing to base obscenity tests on the principle of harm - which finds harms to women to be conclusive evidence of obscenity - the courts have been singularly unable to control pornographic material. This material, according to LEAF "... features incest, forced intercourse, sexual mutilation, humiliation, beatings, bondage, and sexual torture, in which dominance and exploitation are directed primarily at women" (1991:4).

In particular, LEAF cites a number of cases[48] as illustrative of a harms-based test for 'obscenity' and which "... recognize the sex equality interest in its regulation" (1991:6). LEAF noted that in *Wagner* the court found the materials in question to be obscene because of the connection of overt violence with sex and further that the materials were degrading and dehumanizing (1991:6). Moreover, the court in *Wagner*, "... found that repeated exposure to these types

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[48] *R. v. Doug Rankine Company Ltd., et all*, (1983), 36 C.R. (3d) 154 (Ont Co. Ct.); *R. v. Nichols* (1984), 43 C.R. (3d) 54 (Ont. Co. Ct.); *R. v. Ramsingh et al* (1984) 14 C.C.C. (3d) 230; *R. v. Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.); aff'd (1986), 50 C.R. (3d) 175 (Alta. C.A.): leave denied 50 C.R. (3d) 175 (S.C.C.) *R. v. Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36 (B.C.C.A.); leave denied 46 C.R. (3d) xxv (S.C.C.); *R. v. Fringe Product Inc., et al*, (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.).

of pornography results in social harm," which it described as "... increased callousness toward women on a personal level and less receptiveness to their legitimate claims for equality and respect" (LEAF 1991:6-7). In addition, the court in *R. v. Red Hot Video* specified that obscenity law should be interpreted within the context of section 28 of the *Charter* (LEAF 1991:7). Here the court stated that the harms of pornography cannot be ignored given the "... threat to women's equality" which results when male audiences are exposed to violent and degrading material (1991:7). Moreover, the court expressed that the harms of pornography "... constitute a threat to society because they have a tendency to create indifference to violence insofar as women are concerned. They tend to dehumanize and degrade both men and women in an excessive and revolting way. They exalt the concept that in some perverted way domination of women by men is accepted in our society ..." (1991:7). Further, LEAF noted that in the dissenting opinion of Helper, J.A. in *R. v. Butler*, [1991] 1 W.W.R. 97 (Man. C.A.) the circulation of pornography "... 'may lead to an increase in the incidence of aggressive, harmful behaviour and further can lead to attitudinal changes that are antithetical to the Charter, specifically to s. 28 of the Charter (1991:7). Accordingly, LEAF asserted that the notion that pornography causes harm to women is "... consistent with a growing body of legal and social scholarship, evidence, expert and victim testimony and official acknowledgment that pornography is a systematic practice of exploitation and subordination based on sex that differentially harms women" (1991:7). Citing the court's decision in *Towne Cinema Theatres Ltd. v. The*

Queen [1985] 1 S.C.R. 494 where the harm of pornography was seen to constitute "undue" exploitation of sex - independently of the community standards test - LEAF noted that the avoidance of harm to women, children, and society in general is an implicit purpose of obscenity law (1991:8). Similarly, the court in *Fringe Product* reinforced this articulation by referring to *Towne Cinema*, recognizing that in a society where "... gender inequality and sexual violence exist as social problems ... dehumanization and degradation constitutes 'harm' from which our society has a right to guard itself against ...." (1991:8).

Following their argument for a harms-based approach to obscenity law, LEAF argued that pornography is unprotected by the *Charter's* section 2(b) freedom of expression guarantee. According to LEAF (1991:16):

> pornography is not a form of political speech as traditionally protected. It does not present a critique of the status quo or a dissenting but repressed voice. Rather, it entrenches and embodies society's most repressive and anti-egalitarian norms, which is indefensible in a society that has equality as a constitutional guarantee.

Hence, pornography is an illegitimate form of expression owing to its violent content. The harm of pornography outweighs its expressive value. For example, in *Irwin Toy Ltd. v. Quebec*,[49] the court decided that section 2(b) protects all meaningful forms of expression (including conduct) except forms of expression that are violent (LEAF 1991:9). LEAF noted that the courts have made it clear that a murderer or a rapist cannot properly invoke the protection of the freedom

[49] *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927

of expression guarantee to justify violent conduct (1991:9). Similarly, the Supreme Court in *R. v. Keegstra*[50] confirmed that acts of violence which induce physical injury are not protected by section 2(b). Indeed, such acts of violence are contrary to the "... value of gender equality [which] is embedded within section 2(b) itself" (LEAF 1991:13). Therefore, according to LEAF, the essence of obscenity "... regulation is not to restrict freedom of expression but rather to prevent harm" (1991:13).

LEAF further argued that since sexual assault, physical violence and coercion are proven features of the mass production of pornography - violating women's physical liberty and integrity - neither the physical acts of violence themselves *or the pornography resulting from the physical acts of violence* are protected by the freedom of speech guarantee (LEAF 1991:9-10). To support this assertion, LEAF (1991:10) argued that:

> This approach to coerced or violent pornography is consistent with the way the United States Supreme Court treats child pornography. Because using children to make sex pictures is regarded as child abuse, the harm of their making is exacerbated by their circulation, sex pictures of children are regarded as child abuse. The Court has thus permitted, consistent with freedom of expression, criminalizing the entire chain of sale and distribution, as well as possession, as a means of eliminating these harms. The Court also recognized that in addition to harm to child victims, harms can occur to third parties; for example, pedophiles may use child pornography to abuse other children.

Hence, the violent and coercive practices necessary for the production of pornography are not legitimately defensible by the freedom of expression

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[50] *R. v. Keegstra* [1991] 2 W.W.R. 1 at 106.

guarantee. More precisely, nor is the actual material produced (in whatever form) from pornographic practices.

LEAF (1991:11) extended this argument and submitted that, in addition to overt violence, threats of violence coupled with explicit sex are unprotected by the freedom of expression guarantee. LEAF presented social scientific research indicating that men - when exposed to materials that define rape as positive and a pleasurable experience for women - are significantly more likely to consider sexual violence against women legitimate conduct. Hence, LEAF (1991:11) argues that "such materials ... constitute direct threats of violence," which are proscribed by Canadian law and when purposively interpreted using a harms-based equality rational sanctions the regulation of pornography to prevent harm. Additionally, LEAF argued that "degrading and dehumanizing" forms of pornography perpetuate the subordination of women. For example:

> Such material has been shown to lower inhibitions on aggression by men against women, increase acceptance of women's sexual servitude, increase sexual callousness toward women, decrease the desire to both sexes to have female children, increase reported willingness to rage and increase the belief in male dominance in intimate relationships, among other known effects. (1991:14)

LEAF noted that this evidence confirms what women report of their own lives: "that men abuse them through pornography" (1991:14). Consequently, degrading and dehumanizing pornography is found to cause harm to women and children as well as to men by contributing to the notion that a woman's social status accrues from her value as a sexual object -- depicted in pornography as one whose primary desire is to submit in every way to male sexual desire. Accordingly,

LEAF (1991:16) argued that pornography constitutes hate propaganda since it is a verbal and pictorial form of defamation against women. Citing the Supreme Court's decision in *R. v. Keegstra*, where it was held that the purpose of the hate propaganda law was to promote equality, LEAF noted that pornography law must be similarly considered.

Finally, as an alternative to the harms-based equality argument, LEAF (1991:17) proposed - in the event the Supreme Court rejects the harms-based equality argument - that the court apply section 1 of the *Charter* to justify limiting the expression guarantee of section 2(b) by regulating pornographic material. LEAF (1991:17) argued that:

> Under section 1 this Court must balance the harms which flow from regulating expression under section 163 against the harms which are actualized through the promotion of women's inequality through pornography. Sex inequality in society provides the "context" in which pornography must be assessed for section 1 purposes. In this context, prohibiting pornography promotes equality.

Accordingly, these limitations must be weighed against the provisions in section 1 within the context of promoting equality guaranteed by section 28 (LEAF 1991:18). Citing the courts ruling in *R. v. Keegstra*, LEAF argued that "... the very real harms of hate propaganda, and not its offensiveness, supported upholding legislation against it under section 1." Obscenity legislation, if properly interpreted, promotes the freedom of expression of women (LEAF 1991:18).

In brief, LEAF presented an argument to the Supreme Court which addresses the substantive harm(s) engendered in and through pornography. LEAF

argued that equality is a constitutional edict which compels the court to uphold obscenity legislation. Indeed, the goal of obscenity legislation is to promote equality for women. Placing limitations on misogynist speech not only provides space for the voices of those who have been historically disadvantaged in this area, it also promotes women's equality by recognizing that pornography is an inimical practice analogous to hate propaganda which systematically subordinates women (and children) on the basis of sex.

The Supreme Court Decision:

In February 1992, the Supreme Court of Canada determined, by virtue of section 1 of the *Charter*, that the state is constitutionally authorized to criminalize the distribution and sale of particular categories of pornographic materials. While section 163 of the *Criminal Code* was found to violate section 2(b) of the *Charter*, its violation is constitutionally justified in accordance with the principles of a free and democratic society. Section 163(8) remains the exclusive statutory prohibition against obscenity. Obscenity is defined in terms of what the Canadian community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. This ruling recognizes that a link exists between pornography and attitudes and beliefs; that depictions of sex coupled with violence and sex that is degrading and/or dehumanizing is 'harmful' to the extent that they promote anti-social behaviour towards women (and arguably men). As a result,

the Supreme Court did not strike down the obscenity section of the *Criminal Code*. Post-*Butler*, the text of sub-section (8) remains in its original 1959 form while the judicial interpretation has changed.

In its unanimous ruling, the court noted that, historically, courts have sought to establish tests for the existence of 'undue exploitation' as a dominant characteristic of pornographic materials. Therefore, the court begins its discussion in *Butler* by reviewing the judicial interpretations of section 163(8) employed pre-*Butler* to determine if the dominant characteristic of materials is the 'undue exploitation' of sex.[51] In a statement which significantly clarifies the common law definition of pornography, Sopinka, J., writing for the court, refers to three tiers of pornographic material:

> Pornography can be usefully divided into three categories: (1) explicit sex with violence; (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both actual physical violence and threats of physical violence (1992:36).

It is particularly notable that the court stated:

> In making [a] determination [of community standard of tolerance] with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. (1992:37)

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[51] Often this discussion is mistaken for the court's interpretation of the law. The court's interpretation appears later on in the ruling.

Thus, explicit sex that is neither violent or degrading and/or dehumanizing is exempt from criminal prosecution.

From the court's review of the case law emerges three tests for the existence of undue exploitation of sex: the community standard of tolerance test, the degradation and/or dehumanization test, and the internal necessities test (or the artistic defence). The first test, the community standard of tolerance test, is a test of our tolerance for obscenity which must be measured against that which the contemporary Canadian community as a whole "would not tolerate other Canadians being exposed to" (1992:28 emphasis in original). The second test, the degrading and dehumanizing test, is a test for the undue exploitation of sex which, if found to exist, would exceed the community standards test of tolerance (1992:28). The court states that:

> Among other things degrading or 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 the appreciation of whether material is degrading or dehumanizing the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading and dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing. (1992:29-30)

Further, the court asserts that "[t]his type of material would fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women ... and therefore to society as a whole" (1992:30). The third test, the artistic defence, is the last step in a determination of the 'undue exploitation' of sex. The court stated that

"[e]ven material which by itself offends community standards will not be considered 'undue', if it is required for the serious treatment of a theme" (1992:33). In addition, the court notes that "[a]rtistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression" (1992:38). Consequently, the court concluded that these three tests would enable the courts to determine:

> ... as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standard is desirable but not essential. (1992:37)

Finally, a number of questions were relevant to the court's application of the section (1) tests of the *Charter*. First, the court determined that the definition of obscenity in section 163(8) provided an "intelligible standard" upon which to judge the impugned materials. Second, the court determined that the objective of section 163(8) is to prevent harm to society; that such an objective is valid and consequently justifies infringement upon the right of freedom of expression. Lastly, the court considered the violation of freedom of expression in section 163(8) in proportion to the legislative objective of the law. In its application of the proportionality test, the court affirmed that s. 163(8) is directly related to and addresses the goal of protecting society from harm; that its infringement upon the

freedom of expression is minimal, and therefore justifiable and congruent with legislative objectives to protect society from harm.

The Supreme Court's decision in *Butler* represents a significant improvement over previous judicial interpretations of obscenity law. According to Busby (1993:9), the ruling:

> marks an extraordinary shift in the traditional rationale for obscenity laws from community standards based on a general instinctive sense of what is decent and what is indecent ... to an obscenity law premised on sex inequality and harms to women.

The *Butler* ruling establishes that the courts must determine, on the basis of community standards of tolerance, the *degree of harm* that may result from the consumption of pornography. Indeed, according to Busby (1993:9), LEAF marks *Butler* as a feminist breakthrough. Commenting on the decision in her recent book, MacKinnon notes that, for the first time, a court of law has recognized the inequalities faced by women. MacKinnon (1993:103) states:

> Fundamentally, the Supreme Court of Canada recognized the reality of inequality in the issues before it: this was not big bad state power jumping on poor powerless individual citizen, but a law passed to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups.

In my view, the Supreme Court has shifted the traditional definition of obscenity from one which views pornography as causing the moral depravity of men, to one which views pornography as promoting unhealthy attitudes and beliefs towards women and therefore to society as a whole. Plainly, the traditional moral framework has been substituted with a feminist ethics.

Given that the *Butler* ruling is considered - at least by some - a feminist breakthrough, it is appropriate at this point to address the questions and criteria set out at the beginning of this thesis. In the following section, I pick up on the specific questions which form the basis of this investigation. Again, these questions are: Does *Butler* represent an unwelcomed alliance between feminism and the state? Or, does *Butler* represent an instance where state interests converged with feminists' interests? Before discussing these questions, however, I consider whether there is any evidence that LEAF's arguments had an impact on the court's reasoning and rationale for its decision. Following my discussion of the central questions of the thesis, I assess whether the *Butler* ruling addresses the substantive criteria for evaluating obscenity law outlined in Chapter Two. Again, these criteria are: 1) *Consider pornography practices, not merely pictures, words or ideas;* 2) *Target the harm women experience;* 3) *Make the law women-centred and not gender-neutral;* 4) *Make the law women-initiated and women-driven;* 5) *Compensate the victims of pornography;* 6) *Advance gender equality;* and 7) *Permit artistic and educational dialogue on sexuality.* Finally, I consider from a socialist feminist perspective some of the potential consequences of the *Butler* ruling. This discussion will address some of the broader issues raised by *Butler* as they relate to the administration of the law.

Analysis of Butler:

In my view, it is difficult to determine the extent to which the Supreme Court's ruling can be attributed to LEAF's intervention, since nowhere in the ruling does the court explicitly confirm LEAF's arguments. Recall that the court stated, contrary to LEAF's assertion, that section 2(b) does indeed infringe on freedom of expression. Although the court determined that section 163 violates section 2(b), this infringement of the *Charter* is demonstrably justified under section 1 of the *Charter* as a reasonable limit prescribed by law (1992:69-70).

In fact, it would appear that the court wholly disregarded LEAF's equality argument. In the decision there is no reference to either section 15 or section 28 of the *Charter*, implying by omission that the court rejected LEAF's position. Moreover, the court disagreed with LEAF on the constitutional question as to whether section 163 of the *Criminal Code* violates section 2(b) of the *Charter*.

Nevertheless, the court essentially agreed with LEAF that the objective of obscenity legislation "... is not moral disprobation but the avoidance of harm to society" (1992:47). Additionally, the court noted that the objective of obscenity legislation

> ... is of fundamental importance in a free and democratic society. It 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. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other. (1992:68)

While the court fails to explicitly state - as LEAF asserted -that "gender equality

is embedded within section 2(b) itself," it nonetheless acknowledges that part of the objective of the law is the avoidance of harm and the advancement of equality between all members of society. As the Supreme Court refers to the some of the same legal authorities cited by LEAF, it appears as though LEAF's argument was at least considered. In addition, the court (1992:51) draws a connection between pornography and hate propaganda to determine if the objective of laws restricting freedom of expression are legitimate to determine that restrictions are indeed justified.

Even though it failed to explicitly endorse LEAF's equality argument, and rejected the argument that pornography is a practice and therefore does not violate freedom of expression, in my view, the Supreme Court had to *appear* as though it contemplated the feminist argument. According to *Butler*, obscenity law violates pornographers' freedom of expression. However, the *Butler* ruling establishes that the law is no longer intended to uphold sexist values and morals of a patriarchal society; rather, its intent is to prohibit sexually explicit materials depicting violence and/or degradation against women.

Does this mean, then, that *Butler* represents an unwelcome alliance between feminism and the state - or - an instance where state interests converged with feminists' interests? To address this problematic from a socialist feminist perspective, it is important to ask if the state (in this case, through legal precedent), reinforces hetero-patriarchal and/or imperial-capitalist ideology in practice. If the *Butler* decision can be seen to buttress existing practices and

structures then it is difficult to argue that the patriarchal legal practices have been revolutionized. However, if the state, through obscenity law (in this case, legal precedent), no longer promotes a view that sexually explicit material is inherently criminal due to its sexual content, viewing it instead as criminal activity on the basis of its harm to women, then certainly one of the traditional mechanisms of the state's control of women's sexuality could potentially be constrained.

Given the state's historic inability to address the feminist movements' demands that it address the problem of pornography, I suggest that state interests in maintaining its hegemony coincided with the *Butler* trial. In other words, it can be argued that state interests coincided with feminist demands - rather than co-opted feminist politics - since a legal framework now exists for a determination of 'pornography' which departs from traditional hetero-patriarchal ideology and practice. Historically, these interpretations have legitimized and maintained pornographic practices. Indeed, the Supreme Court notes that earlier

> ... attempt[s] to provide exhaustive instances of obscenity [have] been shown to be destined to fail (Bill C-54, 2nd sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. (1992:64)

It appears as though the court was aware of the failure of the state to effectively deal with pornography, and therefore took it upon itself to settle the matter in such a way so as to satisfy the concerns of the greatest number of interested parties. In my view, therefore, the court felt the pressure of the feminist critique, prompting it to address pornography in such a way as to incorporate a feminist

analysis while remaining within the boundaries of common law. In doing so, the state was compelled to live up to the constitutional mandates of equality. Even though the equality argument is insufficient in the decision, the court nonetheless asserts that democratic principles compel it to constitutionally endorse obscenity law.

Had the *Butler* decision failed to recognize the egalitarian principles of a democratic society, the legitimacy of the state would have been severely undermined. The state had to appear responsive to public demands. In this regard, it is notable that the Canadian Civil Liberties Association (CCLA) and the Manitoba Association for Rights and Liberties (MARL) argued - contrary to LEAF - that section 163 unconstitutionally impinges on freedom guaranteed by section 2(b) of the *Charter* and that section 163 cannot be saved under section 1 of the *Charter*. In my view, the *Butler* decision marks at attempt by the court to satisfy both LEAF and the CCLA and MARL in order to be seen as responsive to public concern.

From this perspective, a feminist interest in promoting a harms-based obscenity law premised on achieving women's equality coincided with the long-term interests of the state to maintain its own legitimacy. Moreover, by reformulating the tests for obscenity, the Supreme Court put the law into contradiction with the imperatives of hetero-patriarchal and imperial-capitalist relations. The *Butler* decision can be viewed as a resolution of the conflict between feminists' interests in regulating the institution of pornography and those

interested in promoting current gender relations through pornography. In my view, the state has resolved this conflict in favour of feminists' interests by supporting the obscenity law. Under Canadian criminal law, rationalizing pornographic representations of women as a constitutionally guaranteed right to expression is untenable once pornography is viewed as harmful to women. Hence, the standard of obscenity law - one of the traditional mechanisms for controlling women's sexuality - has shifted from decency to harm.

In Chapter Two I argued that current gender relations are possible because the institution of pornography capitalizes on the subordination of women while at the same time contributing to the very conditions from which it benefits. Pornography embodies the representation of power though sexual imagery which extends itself into every other area of life. The extent to which the law prohibits the production and circulation of pornography, therefore, becomes a measure of the extent to which pornography can be eradicated. Nevertheless, this suggestion should not be taken to imply that, if we eradicate pornography, contemporary gender relations will automatically transform. Rather, I suggest that the power relations - of which pornography is a part - can be significantly altered though law.

If it can generally be argued that the *Butler* decision marks a shift in obscenity law, then it is important to evaluate the potential of this change to promote feminist aims. At this point in the discussion, therefore, I assess whether the *Butler* ruling addresses the feminist criteria for evaluating obscenity law

developed by Cole (1989). Below, I consider each of these criteria in turn to evaluate *Butler's* potential as feminist jurisprudence.

1. ***Consider pornography as practices:***

Referring to the findings of the Fraser Committee, the court fails to accept that there is "... any causal relationship between pornography and the commission of violent crimes, the sexual abuse of children, or the disintegration of communities and society" (1992:58). Clearly, the feminist argument that pornography is a practice not only of sex discrimination, but one which also contributes to violence against women and children, has been ignored. The Supreme Court is only willing to accept that pornography produces changes in the attitudes and beliefs of its consumers. Citing the evidence of the American Attorney General's Commission on Pornography (Meese Commission Report), which contradicts the evidence in the Fraser Committee Report, the court states:

> While a direct link between obscenity and harm to society may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. (1992:58)

Following the court's construction of contradictory evidence, it refers to *Irwin Toy* and *Keegstra* and the American approach in *Paris Adult Theatre* to establish a link between pornography and harm to society (1992:61). The court concludes with the view that it is reasonable to assume that harm results "... from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations" (1992:61). Moreover, in

determining whether there is a "rational connection" between obscenity legislation and the objective of the state, Sopinka, J. (1992:61) notes:

> I am of the view that there is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and which restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective.[52]

While the Supreme Court does not specifically address the practices of pornography as they relate to the specific activities involved in the production, distribution, and circulation of pornography, the ruling does however recognize that pornography socializes people to act in "anti-social" ways so as to contribute to the "mistreatment of women by men." In my view, the court does indeed recognize the sexist social consequences resultant from the consumption of pornography as far as it affects attitudes towards women. The court views pornography as definitive practices only insofar as the activities presented in pornographic materials are not transformed into "expression" simply by the use of certain mediums (such as magazines or video) to convey meaning. For example, Sopinka, J. states:

> ... if the activity captured in hard core pornographic magazines and videotapes is itself not expression, the fact that they are reproduced by the technology of a camera does not magically transform then into "expression": the appellant cannot hide behind the label "film" to claim protection for the reproduction of activity the sole purpose of which is to arouse or shock. (1992:42)

Here Sopinka gives away more than he perhaps means to! Clearly, pornography

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[52] Note that in this passage the court states that pornographic material affects changes in *behaviour*.

is recognized as "activity" captured in magazines and/or videotapes rather than merely "expressions" of ideas.[53] The production of pornography constitutes actual practices captured or reproduced by technological means. Therefore, in my opinion, the *Butler* ruling considers only the production of pornography a practice -- more than simply pictures and words which express ideas. Moreover, since the notion that the production of pornography is an activity exists as part of the official record, the potential exists for it to be exploited at a later time to promote a feminist argument. However, this court fails to acknowledge that pornography is imitated in socio-sexual relations and that this reproduction of pornographic ideology constitutes a practice as well.

2. ***Target the harm women experience:***

Harm is the most salient feature of the *Butler* decision. Cole (1989:78) has argued that:

> In order for a law to reach the real harm of pornography, it must be concrete. It must consider the activities of people and not the interpretation of pictures. If pornography is considered just a two-dimensional artifact, the legal discourse will focus on philosophical questions concerning personal taste and the meaning of representation, rather than who is getting hurt by whom.

The *Butler* decision represents a significant departure from traditional patriarchal notions of morality, which tend to find sexual explicitness inherently immoral owing to the nature of sexuality, to a feminist notion of harm reproduced through

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[53] MacKinnon (1985:65) argues that this is one of the only things that obscenity law gets right; that "[p]ornography is more act-like than thought-like."

pornography. In this respect, this harms-based determination of pornography has a wider symbolic value, because the terms of the discussion have "... shifted away from the terrain of sex and sexual prudery, towards that of discrimination" (Smart 1989:133). By shifting the terms of the discussion on pornography, a traditional approach is subverted.

For the first time in Canadian history, the Supreme Court recognizes that women (and men) experience harm as a result of the "undue exploitation" of sex inherent in pornographic materials. However, in the decision, the court assumes that women live under conditions in which harm is absent and that the consumption of pornography creates this harm condition. The court does not recognize that pornography exists *in the first place* precisely because of systemic inequalities. Appropriately however, harm is interpreted to undermine the egalitarian principles of a democratic society. MacKinnon (1993:101) notes that the court:

> said that harm to women - which the Court was careful to make "contextually sensitive" and would include humiliation, degradation, and subordination - *was* harm to society as a whole.

In this respect, Canadian obscenity law has become more amenable to the advancement of feminism in law (Smart 1989:130).

However, the *Butler* decision fails to address the three tiered notion of harm advanced by feminists detailed in Chapter Three. Feminists have argued that pornography causes harm to society, harm to women and children, and harm to the participants in pornography. In my view, the *Butler* decision fails to

apprehend harm to society in the manner contemplated by feminists. *Butler* views pornography as harm to society in terms of is promoting conduct "incompatible with its proper functioning," rather than acknowledging that pornography reproduces hetero-patriarchal and imperial-capitalist ideology and practice. *Butler* does, however, recognize that one of the consequences of pornography is harm to women as it is contemplated by feminists. The court acknowledged that harm flows from the consumption of pornography resulting in "the physical or mental mistreatment of women by men." However, the court omits any substantive reference to pornography's harm to children. This lack of consideration for children is highly problematic given the social scientific evidence of the ways in which pornography is used to coerce children. Finally, *Butler* fails to consider the physical and emotional harm done to women whose entire reality is exploited, abused and objectified in the production and circulation of pornography.

3. ***Make the law women-centred and not gender-neutral:***

The *Butler* decision recognizes that pornography is more apt to have a negative impact on women than on men. The court concludes that pornography is harmful to women because it "predisposes persons to act in an anti-social manner as, *for example, the physical or mental mistreatment of women by men*, or perhaps what is debatable the reverse." Elsewhere in the ruling, the court refers to *R. v. Wagner* to describe the "realities of the pornography industry":

> 'Women, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and

> instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts.' (1992:57)[54]

Thus, the court seems to recognize the disproportional impact pornography has on women as opposed to men. This is, however, not necessarily women-centred. Simply because the court refers - a number of times - to women does not imply that this is a women centred interpretation of the law as contemplated by Cole (1989). Nor, however, is it entirely gender neutral.

While this ruling recognizes that pornographic materials have a negative impact on women insofar as they incite men to act in an "anti-social" manner, it fails to comprehend the way(s) in which pornography contributes more generally to the social construction of what is considered 'Natural' sexuality. Nevertheless, this interpretation *begins* to address Cole's (1989:63) criterion that "the law has to accept the fact that pornography is not gender-neutral and that women carry an unequal burden of the victimization that occurs in this practice."

A truly women-centred law would grasp the importance of regulating pornography to alleviate harm *in addition* to promoting women's equality. The court fails to recognize the disproportional impact pornography has on women -- that it contributes to the production of women's social, economic, and political status as second class citizens. Rather, it contemplates harm from the point of view of the consumer -- from the point of view of men. It is *men's experience as consumers of pornography* which results in the mental and/or physical

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[54] In addition, this is the only place where it is clear that the court is referring to heterosexual materials.

mistreatment of women which informs this decision. If this were actually a women-centred decision, pornography itself would have been viewed as problematic. Instead, it is men's consumption of pornography that is the central problematic *resulting* in a negative situation for women. Therefore, the solution is simply to limit men's access to pornography in order to promote a better society, rather than alter *the conditions which make pornography possible.*

In many respects, the gender neutrality (as a lack of reference to women's harm) of the decision is problematic. The court's underlying assumption appears to be one which views men and women as *already equal* -- pornography merely threatens this existent equality. What the law fails to comprehend is that inequality between women and men exists as a structural condition -- a condition which pornography helps to construct. In my view, this underscores the court's historic tendency to ignore women's inequality, particularly as it is constituted through pornography.

4. ***Make the law women-initiated and women-driven:***

By its very nature, the criminal law cannot accommodate the criterion that the law be initiated and driven by women, unless women have access to the mechanisms of the law by virtue of their positions within the state bureaucracy. However, *Butler* does nothing to alter the obscenity law itself, which continues to be enforced by police officers, crown attorneys and judges. In my view, Cole (1989:65) argues correctly that:

> pornography law relies on increased powers for law enforcement officers. Increased powers are given to police officers who decide whether criminal charges should be laid; to bureaucrats who decide whether films should be cut and how they should be classified; to Customs officials who determine whether or not materials ought to be allowed into the country.

From a socialist feminist perspective, this is a particularly significant problem, precisely because history has demonstrated that state power tends to be used to further the interests of the powerful (Currie 1991; Snider 1991; Smart 1989). Snider (1991a:239) notes that law reform and/or public interest lobbying has merely encouraged inhumane and repressive actions by agents of the criminal justice system towards persons who are already the recipients of its systemic class, gender and race prejudice. Accordingly, tinkering with the administration of the criminal law often increases the degree of social control over people who are defined as problematic - owing to their class, gender, or race location -as well as promoting a politics which sees issues such as pornography as an individual, rather than a social problem. Effectively, such an approach "... obscures the fact that the criminal justice system is based on a structure of exploitative relations of production [and reproduction] that give rise to the very problems it purports to resolve" (Snider 1991a:241).

If women's experiences of the harms of pornography are to be the basis upon which to criminalize pornography, then the system must be able - at some level - to accommodate women's voices. Currently, this is perhaps possible only through public complaints to agents of the state responsible for dealing with pornography. Given that *Butler* recognizes that pornography promotes harm to

women, certain agents of the state *may* be somewhat more amenable to adopting women's - indeed feminists' - interpretations of pornography's abuses, and then acting on them in a way that begins to address the systemic nature of pornography.

5. ***Compensate the victims of pornography:***

Given that the obscenity law remains unchanged, there is no compensatory provision for the recipients of its harms. Obscenity law itself fails to criminalize the harm to women through the production, consumption or imitation of pornography. However, given that the court recognizes, on the one hand, the harm of pornography, it would be interesting to see if the state would allow a feminist claim for monetary compensation before a Crimes Compensation Board. These boards are set up provincially to administer monetary compensation to applicants who are the recipients of criminal actions proscribed by the *Criminal Code*. Arguably, a claim to one of these Boards - relying on *Butler's* assertion that pornography causes harm to women - would be successful. If a woman could demonstrate a causal link between sex acts which were forced on her and pornography, it is conceivable that she might win monetary compensation.

6. ***Advance gender equality:***

While LEAF argued that pornography must be seen as an issue of sex equality, the court only refers to equality in its section 1 analysis by reference to

the effect that pornography has in promoting unhealthy stereotypes in a society which holds egalitarianism as an ideal. The court stated:

> The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles. (1992:48)

Hence, the Supreme Court states that egalitarianism is part of the overall objective of obscenity law. However, the court does not view pornography as an issue of sex equality per se; rather, it views pornography as an issue of harm within the context of society's constitutionally mandated egalitarian ideals. Indeed, the court's articulation of harm is ambiguous, viewing pornography as harm to women in certain passages but harm to society in others. The ambiguity has consequences for the advancement of women's equality.

Butler recognizes equality as one of society's values, rather than recognizing that the court has a role in promoting women's constitutionally mandated right to equality. The court could have ruled - as LEAF argued - that the obscenity law does not violate the freedom of expression guarantee because Canadian laws must be interpreted within the context of the equality guarantees of section 15 and section 28 of the *Charter.*

7. ***Permit artistic and educational dialogue on sexuality:***

With respect to artistic and educational material, the Supreme Court insisted that if there is any question as to the validity of the materials in question, "... the courts must be generous in its application of the 'artistic defense'" (1992:63). It is important to note the distinction the court makes between sexually explicit material and sexually explicit material with artistic, educational and/or scientific merit. Sexually explicit materials with artistic, educational and/or scientific merit are protected by section 2(b) even if they are violent or degrading and/or dehumanizing. The court differentiates between non-violent sexually explicit material, sexually explicit material with artistic merit, and pornography, thus allowing for sexual expression in a variety of ways including sexually explicit artistic works.

In referring to materials that are sexually explicit, the court stated that:

> ... the impugned provision does not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing. It is designed to catch material that creates a risk of harm to society. (1992:63)

According to the court, "[t]he objective of the test is not to inhibit the celebration of human sexuality" (1992:56). This objective is particularly evident given the court's three tiered definition of pornography which, if properly applied, does not restrict sexually explicit materials. Specifically, the court cites West to note that sexually explicit materials which are not violent or degrading and dehumanizing should not be restricted:

> Good pornography has value because it validates women's will to

> pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography when it is good celebrates both female pleasure and men's rationality. (1992:56)

Notwithstanding the essentialist overtones of this passage - an essentialism which, in my view, pornography helps to construct - the court nonetheless asserts that sexually explicit material is socially acceptable, indeed, socially valuable. However, this passage encourages the celebration of particular sexual practices -- those which deny male pleasure and women's rationality. Hence, 'good' pornography is that which reproduces dominant assumptions about men's and women's so called 'Natural' experiences of sexuality.

By way of concluding this section, I suggest that, by recognizing pornography is harmful, and that its regulation is constitutionally justified in accordance with the egalitarian principles of a democratic society, the *Butler* decision *begins* to address the issues raised by Cole (1989). While *Butler* fails to adequately address a number of the requirements for a feminist obscenity law, it is nonetheless significant that it identifies - albeit in a limited fashion - a feminist analysis of the harm engendered by pornographic practices. The limitations of *Butler* perhaps owe more to the application of criminal law itself rather than the specific tenets of the decision. In this respect, it may well be the case that, given the uneven development of law, obscenity law simply cannot deal with all of the criteria suggested by Cole.

Smart (1986:117) has argued that the idea of the uneven development of law "... allows for an analysis of the law that recognizes the distinctions between

law-as-legislation and the effects of law, or law-in-practice." As a result, it seems more useful to focus on the practice of law as a site of political resistance. According to Smart (1986:117), analyzing law in this way "... creates the possibility of seeing law both as a means of 'liberation' and, at the same time, as a means of the reproduction of an oppressive social order." In the final section, therefore, I focus on the broader implications of the administration of obscenity law.

Toward a Sociology of Obscenity Law:

A feminist conception of harm is articulated in *Butler* owing to the court's identification of harm to women and, therefore, society resultant from the consumption of pornography. However, it is reasonable to surmise that, while a narrowly feminist articulation of harm exists in legal precedent, *it is an articulation without the underlying feminist analysis to support it.* Historically, police officers, lawyers and judges have been irresolute about incorporating feminist analyses into their practices. Indeed, as Cole (1989:66) argues:

> these arbiters are not necessarily best situated to determine what the harm of pornography really is. Some of them are themselves users of pornography; some of them believe that pornography, unless there are children involved, is a victimless crime; some of them have trouble distinguishing between materials that are harmful and materials that aren't. Some have used laws to harass people who are not pornographers.

Therefore, it seems likely that, in the application of obscenity law, the concept of harm will be understood from a traditionally conservative framework where the

harm condition is produced when society's consensual moral order is threatened by "anti-social" behaviour. Traditionally, the role of the law - indeed the role of the criminal law - has been to restore order and to protect certain members of society from harm (Currie 1990: Snider 1991). The historic mandate of obscenity law in general has been to protect society from moral disintegration by suppressing materials that engender wide moral disapproval. Indeed, Sopinka, J. states:

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. *Harm in this context means that it predisposes persons to act in an anti-social manner* as, for example, the physical or mental mistreatment of women by men, or what is perhaps debatable, the reverse. *Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning*. (1992:37, emphasis mine)

Note that the underlying assumption within this particular statement is one of a societal moral consensus (albeit rooted in harm) which, if breached, would destabilize social order. Notwithstanding any legal considerations, from a sociological perspective this interpretation of harm underscores an underlying assumption of the law -- that its role is to ensure the proper functioning of society. While the concept of harm here has shifted its focus away from sex itself as morally injurious to recognize that pornography threatens women's autonomy by promoting misogynist ("anti-social") behaviour, the harm contemplated is done not to women, but to the proper functioning of society. From this perspective, the *Butler* ruling can be construed as defining harm in terms of an amorphous "society," rather than noticing that actual women are harmed.

Furthermore, when Sopinka J. states that the objective of the obscenity law "... relates to the actual causal relationship between obscenity and the risk of harm to society at large" (1992:58), he reinforces the criminal law's traditional role as an agent of social control. In my view, the court's interest here is not with women's equality, but with maintaining an assumed consensual status-quo; that which is threatened by the existence of pornography. It is precisely because the law fails to recognize that inequality exists as a systemic social condition that it is singularly unable to address pornography as one of the ways in which inequality is institutionally legitimated and maintained.

Alternatively, however, the language of the *Butler* decision provides a window of opportunity for feminist praxis. In particular, it provides a potential basis for a counter-hegemonic discourse on pornography. The principles expressed in the *Butler* decision can be built upon by employing the concept of social harm as gender-specific social injury (Howe 1990) to promote substantive social - even social structural - change. According to Howe (1990:125), this concept of social injury,

> developed in relation to women's social injuries could ... become a valuable tool for feminist theorists and lawyers wanting to devise litigation strategies in which women's substantive difference - for example, the way we feel the pain of sex stereotypes substantively differently from men - will be taken into account by law reform.

Indeed, given a feminist interpretation of *Butler*, the way in which pornography differentially harms women is now recognized by legal precedent. Consider, for example, the following passage with added emphasis:

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. *Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men*, or what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. (1992:37, emphasis mine)

Further, consider this statement the court makes when defining the harm of pornography:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. *A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other,* is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles. (1992:48, emphasis mine)

Thus, pornography is no longer viewed as morally harmful, but has now become legally visible as socially harmful because of the harm it does to women's social status. As a result, criminal legislation proscribing obscenity can be interpreted as a law whose purpose is to promote the group status of women -- a goal that is constitutionally mandated and compatible with the principles of an egalitarian society.[55]

Owing to the individualizing nature of the criminal law, however, obscenity

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[55] A critical feature of the judicial discourse is that when a judge -- in this case, Sopinka -- states that pornography causes harm, from a lawyer's point of view this statement becomes an uncontestable fact. It is the judge's position of power that is the proof of the verity of his statements. Power relations construct the conditions wherein judges can articulate certain opinions which are then considered Truth even in the face of social scientific evidence to the contrary. Historically, this practice has been used to exclude -- rather than include -- women's experiences.

law provides limited potential both for the regulation of all forms of pornography as well as social structural change. One of the main problems with criminalization is that it individualizes the attribution of responsibility (Pitch 1990; Snider 1992). Due to the criminal justice system's focus on the individual as the source of the problem, its solutions often rest on putative measures designed to rehabilitate and/or punish the offender in order to protect society from further harm from that individual. As a result, issues such as pornography are solved by reference to the individual rather than the social structure, thereby effectively depoliticizing social issues. The consequence of criminalization is that only the person who is charged with the crime is held accountable for the problem. With respect to pornography, this deflects attention away from the fact that pornography is symptomatic of the present *social system* because the law expresses it as the product of aberrant behaviour. Viewed as an aberration in criminal law, pornography effectively becomes individualized and, hence, depoliticized. In fact, MacKinnon (1986:38) notes that pornography flourishes precisely because of obscenity law. The depoliticization of pornography through criminal law is perhaps one of the key ways in which the law functions to deflect attention away from the social system while giving the appearance of promoting women's interests.

In addition, the underlying assumption of criminalization is that the actions of the individual are 'intentionally' deviant rather than the consequence of a social structure that makes specific sets of social practices possible. In effect, the criminal law renders the individual accountable for problems of a systemic

character. Indeed, the law constructs the conditions that make sexual objectification, subordination and exploitation of women a multi-billion dollar industry. From this perspective, it is important to ask if the *Butler* ruling will alter the way in which the law is practised. History has demonstrated that agents of the state lack feminist consciousness, resulting in sexist, classist and racist application of the law. As Brants and Kok (1986:272) have noted:

> Criminal legislation and the enforcement of criminal law are social processes which cannot be separated from existing economic and other social networks and relations of power. The patriarchal ... nature of society, as expressed in pornography, is reflected in (criminal) law and the way in which it is enforced.

Smart (1989:133) argues that old problems remain when feminists simply give pornography a new name as either violence or discrimination. The problem Smart refers to is pornography's construction of sexual subjectivity. I am in agreement with Smart (1989:133), who notes that:

> ... the pornographic genre succeeds by transforming the meaning of domination into (natural) sex and thereby rendering it invisible. By focusing on violence or sexual discrimination we continue to avoid the real challenge of the dominant, pervasive, and routine regime of representation which sexualizes and limits women.

This insight is illustrated time and time again through the practical application of the law. For example, in a post *Butler* judgment (released October 19, 1993), the Court of Appeal for Ontario rejected the Crown's post-*Butler* arguments against a number of earlier acquittals, in addition to acquitting pornographer Randy

Jorgensen on one appeal of two earlier (pre-*Butler*) convictions.[56] The court attempted to determine - in accordance with the principles of *Butler* - if the videotapes in question constitute obscenity. What is particularly significant about this decision is the judge's inability to *see* the way in which the pornographic videotapes contribute to women's inequality. Admittedly, the videotapes which the court found unproblematic contained no scenes of overt violence. And yet, scenes which display, *ad nauseam*, women anally, orally and vaginally penetrated, engaged in cunnilingus with other women so that men can first watch, and then penetrate both women, fail to be judged degrading and/or dehumanizing.

From a socialist feminist perspective, it is particularly problematic that these practitioners fail to see that such pornography exists precisely because of male domination. Notably, judges reject this theoretical analysis. For example, the appeal court judge (1993:8) stressed the trial judge's characterization of a videotape entitled "Pretty 'n' Pink":

> It's not about male domination. It's not about violence or anything approaching violence and, if anything, the female is the dominant character.

Apparently, pornography is degrading and/or dehumanizing and creates a substantial risk of harm only when it contains overt acts of violence. Undoubtedly, the fact that women are portrayed as sexually insatiable - actively seeking

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[56] In this instance, the court of appeal dealt with five obscenity appeals at once: *R. v. Hawkins, Jorgensen v. R, R. v. Ronish and Ronish*, and *Jorgensen and 913719 Ontario Ltd. v. R* and *Smeenk v. R.* The appeal court upheld the initial convictions of both *Smeenk* and *Jorgensen and 913710 Ontario Ltd.* disallowing their appeals, but also disallowed the appeals of the Crown in both *Hawkins* and *Ronish and Ronish.* The only appeal which was allowed was that of *Jorgensen v. R.* All references below are to this judgment released October 1993.

perpetual penetration - confirms in the judge's view that this is how women like it. Indeed, according to Robert Payne, past Chair of the Ontario Film Review Board, there is nothing wrong with such scenes in terms of the community standard of tolerance, for this type of sex is "sex for fun" (1993:9).

Such assertions epitomize the way in which pornography actively constructs community standards. According to MacKinnon (1986:39):

> The more pornography exists in a community, the more likely it is that community standards will *de facto* come to correspond to it.

Therefore, the problem of perceiving pornography is the problem of its pervasiveness. Misogynist practices tend to look more like women having fun. In my view, the social invisibility of the pornographic genre is its camouflage against criminal regulation.

So, one might wonder what kind of pornography it takes for the courts to recognize that such material is degrading and dehumanizing to women? In the *Smeenk* ruling, given prior to *Butler* and upheld on appeal post-*Butler,* it took the portrayal of

> ... a male engaging in necrophilia with a female lying in a coffin; implicit violence in which bite marks and blood are viewed on a woman's breast; a male biting a female's vagina; blood smeared on a female's neck after a man has performed cunnilingus and has had intercourse with her; two women zombies rising from coffins with rats crawling on one who then performs fellatio and has intercourse with a male; and a male dressed as a vampire who places a female, who is in a washroom on the toilet, under a spell and bares her breasts which later show bite marks and blood from being bitten by his fangs, and the woman is apparently dead. (1993:21)

According to the Ontario Court of Appeal (1993:21), these films were described by the trial judge as being "entirely concerned with sexual activity" and obscene -

- owing not to their depiction of crime, horror or violence, but because of their explicit nature. Note that this ruling was given prior to *Butler*. However, the Appeal Court post-*Butler* would only go so far as to say that the

> ... violence, vampirism and necrophilia shown in these films ... are patently such as to bring the films within the second of the *Butler* categories. I think it manifest that these explicit depictions of indignities to the human body render the material degrading or dehumanizing and create the risk of harm contemplated by *Butler*. (1993:21)

One has to wonder if women would have had to be actually murdered for this court to assert that sex with apparently dead women, covered in blood and crawling with rats, falls within the *first* category of pornography outlined in *Butler*? In this regard, the law fails to identify the power disparity reproduced in and through mainstream pornography. As a result of this deficiency, the law's power to advance women's equality is severely limited. While the courts acknowledge that the coupling of sex with violence is pornographic, they fail to see the eroticization of inequality as pornographic.

In my view, the wider symbolic value of the law is more forcefully articulated through practices such as these -- through the interpretation and application of the law. I suggest that the message of the courts, along with the fact that the very same videotapes seized in *Butler* are available in most "adult" video shops on Yonge Street in Toronto (MacKinnon 1993a), have much greater social significance than the *Butler* decision's interpretation of obscenity law contained on file in courthouses and libraries! Nevertheless, the public attention gained by the *Butler* case has certainly served to publicize the contents of the ruling.

Accordingly, perhaps one of the only ways to challenge the constitutive nature of pornography is by expressing our outrage when the law is improperly interpreted and applied by agents of the state (Busby 1993).[57]

In this respect, it is important to question the extent to which feminism participates in perpetuating the sexual status quo through an argument which views only the most violent types of pornography as problematic -- does this discussion accept the parameters of a dialogue which is too limited for our purposes? My concern - and this has been said before - is with pornography as it contributes to the reproduction of misogynist sexual practices; practices which include the so called 'benign' forms of pornography which the law tends to ignore. Because these practices are not considered problematic - either in law or feminist sociological theory - is precisely the reason that tests like *Butler* can legitimize all but the most violent aspects of pornography. Perhaps I privilege the law's power to define the parameters of the pornography. However, in my view, the legal discourse advances a particular definition of pornography that allows it to flourish.

I have argued that agents of the state lack feminist consciousness to the extent that they are unable to readily observe that pornography reproduces women's subordination specifically when it fetishizes parts of women's bodies. The fact that a post-*Butler* court (including the Crown attorney responsible for

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[57] This insight is perhaps nowhere more relevant than in the state's repression of sexually explicit materials produced by and for women loving women. It will take a great deal of feminist action and education in order to stop the state from discriminating against sexually explicit lesbian materials.

articulating the harm of pornography) failed to find pornography - in which women's every orifice is served up as entertainment for men - as socially harmful underscores the inability of most legal practitioners to see harm from a socialist feminist perspective. If anything, *Butler*'s assertion that pornography causes attitudinal harm could have been reflected in this recent decision. However, the court seemed to be more concerned with *proving* that the pornography in question was more harmful to society, rather than being harmful to women's social status.

In my view, the court's lack of vision *contributes to and legitimates the pornographic status quo*. As long as legal practitioners fail to understand the systemic nature of pornography, the law will continue to perpetuate and support - by omission - the institution of pornography and its construction of normative hetero-patriarchal sexuality. One has to ask: to what extent does the law - by framing a discourse as to what constitutes pornography - contribute to, or subvert existing social sexual practices? It would be useful for feminists to engage in research which undertakes to describe the harms of pornography from the standpoint of women.

In my estimation, legal practitioners of criminal law will continue to ignore all but the most violent forms pornography. The application of obscenity law, like rape law, will capture only the most brutally violent materials - including those with children (if they notice the children) - and continue to ignore most heterosexual pornography. The legally constructed line which it draws limits what

can be socially considered pornographic. In this respect, the institution of law buttresses the institution of pornography.

As the foregoing discussion suggests, it is unreasonable to expect that feminist tools will be readily applied in a politicized manner. In my view, history teaches us that feminist tools tend to be depoliticized in various ways. It is important, therefore, to recall that feminist principles in law do not in and of themselves alter social conditions. Politicized practices alter these conditions. Therefore, I conclude that the feminist principle of harm articulated in *Butler* provides only an *opportunity* for insurgent social practices. The potential is severely limited by the fact that obscenity law is driven by agents of the state who are subject to the socializing forces of pornography. Nevertheless, we can continue to hold them politically accountable for their misogynist practices. Holding people in positions of power publicly accountable for their actions is an empowering - counter-hegemonic - act which can propel the system further along the path of insurgent change.

As we have seen, this strategy is reflected in LEAF's engagement with the state in *Butler*. By demanding that the Supreme Court uphold the constitutionally guaranteed right to equality, LEAF engaged in a feminist struggle. Basing their argument on the existing legal discourse reinforced a specifically feminist definition of obscenity which resulted in a transformation of the legal basis for determining obscenity. According to Hunt (1990), the process of counter-hegemony involves a reworking of certain elements of the prevailing hegemony

to introduce new elements that ultimately transcend that discourse. Indeed, the litigation strategy employed by LEAF involved articulating a particular discourse on obscenity, with the support of cases such as *Rankine*, *Ramsingh*, *Wagner*, *Towne Cinema*, and *Red Hot Video* -- cases which contained elements of the prevailing hegemony yet also contained the seeds of counter-hegemonic feminist principles. LEAF simply challenged the Supreme Court to live up to its own established principles. The *Butler* decision moves the interpretation of obscenity away from the traditional discourse toward a feminist discourse predicated on harms to women.

CONCLUSION

The purpose of this thesis has been to evaluate the potential of law to promote feminist concerns. Specifically, my focus has been on the criminal law of obscenity to determine - from a socialist feminist perspective - whether the Supreme Court's interpretation of obscenity law in *Butler* represents an instance where a feminist interest in dealing with pornography coincides with the state's interest in maintaining the long-term legitimacy of contemporary social relations.

In Chapter One, I outlined a socialist feminist paradigm. This framework then provided the basis for my evaluation of the relationship between pornography as an institution of hetero-patriarchal and imperial-capitalist society and the law as one of the mechanisms employed by the state in its role as a mediator and legitimator of social relations. In Chapter Two, I argued that pornography is an institution of society which contributes to the social construction of sexual subjectivity. The problem of pornography is the problem of gender relations -- pornography is constituent in and constituting of human consciousness to the extent that most of what is defined as pornographic from a socialist feminist viewpoint appears normative to most. In this regard, I contend that pornography contributes to the maintenance and reproduction of social sexual practices by naturalizing inequality through violence and coercion, making it appear sexy. In short, pornography sexualizes power. In Chapter Three, I outlined the history of obscenity legislation in Canada. The purpose of this chapter was to contextualize current obscenity standards in Canada. I illustrated the way in which the legal

view of pornography has shifted from a concept rooted in classist morality, to a concept rooted in an understanding that pornography harms women and children on a number of levels, owing in part to feminists' organizing for change. In Chapter Four, I outlined LEAF's strategy as an intervener in the *Butler* case and the resulting Supreme Court decision. Finally, in my analysis of the *Butler* decision, I drew on my theoretical paradigm set out in Chapter One and concluded that *Butler* represents an historical moment where the state's interest in maintaining the legitimacy of social relations coincided with feminists' interests in criminally regulating pornography. On evaluation, it was found that *Butler* did contain the seeds of a counter-hegemonic feminist analysis. While feminist principles have begun to be articulated in law, some cautions were raised as regards the administration of law. This discussion raised some questions about the limitations of the law in terms of its underlying assumptions and the inability of its practitioners to comprehend the broader sociological consequences of pornography. I conclude that it is precisely because there is a difference between the law-as-legislation and the law-in-practice that *Butler* can be viewed as providing the potential for insurgent feminist praxis.

Directions for Future Theory, Research and Political Activism

The discussion in this thesis raises a number of considerations for theory, research and political activism. In Chapter One, I discussed the idea that language produces human subjectivity to argue that pornography is a cultural product which, like language, shapes human subjectivity with a way of thinking and acting in the world that has particular material consequences.

The institution of pornography produces a particular discourse within which ideology circulates. Pornography constructs a gendered subject and normalizes a set of relations through which male power augments itself. In this respect, it is just as important to study pornography in order to understand material reality as it is to study economics or philosophy. If one of the goals of feminism is the eradication of the gendered subject, an analysis of pornographic texts could illustrate the ways in which pornographic practices normalize gendered power relations. This deconstruction of the gendered subject produced in and through pornography is one of the ways we can begin to question the inevitability of gendered power relations.

Similarly, legal texts construct a particular set of power relations - object/subjects relations - which are gendered. In this regard, it would be interesting to see if legal texts justify the normalization of power relations that are gendered in and through pornography. To what extent does law reproduce pornographic object/subject relations which reinforce and normalize the status quo? I think it would be interesting to see the extent to which pornographic texts

and legal texts operate using the same underlying assumptions about women's Nature, thereby buttressing one another and strengthening gendered power relations.

Since the ends to which legal and pornographic texts are put are more important than just the texts themselves, it is particularly critical to research the impact pornography has - including law designed to regulate pornography - on women's lives. If we can identify the ways in which the institutionalized practices of pornography intersect with the institutionalized practices of the law - to illustrate their relationship to each other and identify the ways in which such practices reproduce power and domination - then we can begin to challenge those practices which reproduce and normalize power relations. For example, by actually monitoring the application of the obscenity law, post-*Butler*, we can see if the law is being used to challenge - or reproduce - power. When the law reproduces power relations, feminist activists can hold the practitioners politically accountable for their sexist practices. Feminist activists, theorists and researchers, by identifying the interconnections between pornographic texts, legal texts and their implementation by human agents, can begin to alter these practices to eradicate the relations which reproduce domination.

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