Men in the Place of Women, from Butler to Little Sisters; Gay Male Pornography: An Issue of Sex Discrimination, by Christopher N. Kendall

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REVIEW ESSAY

MEN IN THE PLACE OF WOMEN, FROM BUTLER TO LITTLE SISTERS©


BY LESLIE GREEN²

I.

In their anti-pornography ordinance, Andrea Dworkin and Catharine MacKinnon proposed that: “Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words.” That is obviously a stipulation for a legislative purpose. It does not capture the ordinary meaning of “pornography,” for whether pornography subordinates women is not something that is true by definition. No one is seriously tempted to reply to the question, “Does pornography really subordinate women?” with the bare assertion, “Yes, or else it wouldn’t count as pornography.” The issue turns on matters of fact and morality, not semantics. Moreover, on the ordinary view, pornography does not necessarily involve women. Most people think that graphic, sexually explicit images of men may also be pornographic. Here, however, we need to be attentive. Notice that the Dworkin-MacKinnon definition does not require that pornography actually be pictures of women or stories about women; its gender essentialism is

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¹ [Gay Male Pornography].

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³ Andrea Dworkin & Catharine A. MacKinnon, Pornography and Civil Rights: A New Day for Women’s Equality (Minneapolis, MN: Organizing Against Pornography, 1988) at 113 [Dworkin & MacKinnon, Pornography]. This is a necessary condition of material being pornographic; the sufficient conditions are also outlined (ibid. at 113). This wording is taken from the Indianapolis version of the ordinance; the Model Ordinance and Minneapolis Ordinance vary in minor ways (ibid. at 101, 138).
functional, not representational. Pornography, they say, is something that is or causes women's subordination—that is its essence. Whether it does so by representing women is a purely contingent matter. No doubt that is the commonest case, but perhaps certain representations of males also subordinate women. At any rate, that is allowed for by their further stipulation: "The use of men ... in the place of women shall also constitute pornography."4

Christopher N. Kendall's book, *Gay Male Pornography: An Issue of Sex Discrimination*, is a faithful application of those ideas to the law and politics of two cases. In *R. v. Butler*,5 the Supreme Court of Canada upheld criminal penalties on the production, distribution, and public display of obscene materials, and on their possession for any of those purposes. Obscenity could be banned, the court said, to the extent that it is harmful, and in particular, harmful to women. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*6 the Court upheld Canada Customs' power to seize and ban the importation of obscene materials, including lesbian and gay male pornography, which it held to be subject to exactly the same analysis as heterosexual pornography. It agreed with the courts below that recent customs seizures had in fact been disgracefully biased and homophobic, but by a majority of six to three held that the legislation under which the customs officers acted was sound and that the injustices were largely due to poor administration.

*Butler* has been a puzzling decision. The Court said that the *Charter of Rights and Freedoms* prohibits Parliament from criminalizing obscenity in order to enforce community moral standards—that would be legal moralism—but it affirmed Parliament's power to do so in order to prevent social harm, and in particular the harm of inequality between men and women. Many who thought that was an attractive principle were stunned by the Court's further assertion that that is what Canada's obscenity laws actually do. Section 163(8) of the *Criminal Code* contains two independent definitions of obscenity. The less controversial is: any publication a dominant aspect of which is "sex and any one or more of

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4 *Ibid.* at 114. I have elided the words "children, or transsexuals."
5 [1992] 1 S.C.R. 452 [*Butler*].
6 [2000] 2 S.C.R. 1120 [*Little Sisters*].
the following subjects, namely, crime, horror, cruelty and violence ... .”\(^7\)

One can imagine how that might be aimed at preventing harms, and that definition rarely attracted complaint. But section 163(8) of the Code also makes it a sufficient condition of criminal obscenity that a publication has as its dominant characteristic “the undue exploitation of sex.” That definition, which had over the years proved quite supple, was in its history, text, and application shot through with moralism. In fact, the whole section appears under the heading “Offences Tending to Corrupt Morals,” along with the related crimes of publicly exhibiting a disgusting object, and “advertis[ing] or publish[ing] an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.”\(^8\) This 1959 definition of obscenity was certainly not crafted with an eye to promoting sex equality, nor had it actually been applied that way. In sustaining the prohibition on that ground, it seemed that the Court would therefore have to abandon the doctrine that unconstitutional laws may not be saved by imputing to them a new and “shifting purpose.”\(^9\) Instead, the Court rejected any conflict between legal moralism and the harm principle: “[T]he notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society.”\(^10\) Lesbians and gay men have long experience with what the authorities think about “moral corruption,” so it was hardly surprising that many thought that Butler cheated on the Charter’s promise to protect their liberty and equality.

The worry, which Kendall here tries to put to rest, was a familiar one. In an early defence of their anti-pornography ordinances, Dworkin and MacKinnon provided a list of questions and answers to reassure the sceptic. It included the following: “Q: But under the Ordinance, won’t gay and lesbian materials be the first to go?”\(^11\) Their answer was that representations of homosexual acts would not be illegal per se: “The

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\(^7\)R.S.C. 1985, c. C-46.

\(^8\)Ibid., s. 163(2)(d).


\(^10\)Butler, supra note 5 at 494.

\(^11\)Dworkin & MacKinnon, Pornography, supra note 3 at 85.
Ordinance requires proof of actual harm before any materials can be found illegal. The harm cannot be a moral one ... .” They even predicted that it would be unlikely that courts would enforce the ordinance against same-sex materials, where the lack of a gender difference would probably blind judges to any harm. If that was a plausible supposition with respect to civil remedies, it should have been amply confirmed in the criminal context with its more demanding standard of proof, and in areas that import the criminal definition of obscenity. That reassuring hypothesis was decisively refuted by the post-Butler experience. Lower courts had no difficulty in finding that even the mildest lesbian and gay pornography involved the undue exploitation of sex by causing harm through moral corruption. Customs inspectors continued their pattern of homophobic seizures, nearly putting out of business Little Sister’s Books and Art Emporium in Vancouver, and doing serious injury to Glad Day Books in Toronto—much-loved gay community bookstores that sold pornography only as a minor part of their trade. Pornography was not the sole target of the obscenity regime. Books detained because someone decided they might be, or were, criminally obscene include: Harold Norse, *Harold Norse: Love Poems 1940-1985*; bell hooks, *Black Looks: Race and Representation*; Quentin Crisp, *The Naked Civil Servant*; and Heinz Heger, *The Men With the Pink Triangle: The True, Life-and-Death Story of Homosexuals in the Nazi Death Camps*. Award-winning novels, children’s stories, safer-sex information, and dreary postmodernist tomes were all swept up when shipped to gay-identified bookstores. Censorship was followed by self-censorship. Seeking to avoid trouble, Oxford University Press would not even distribute Professor Richard Mohr’s important work, *Gay Ideas: Outing and Other Controversies*. Meanwhile, *Playboy*, *Penthouse*, and *Hustler* remained on prominent display in many a corner store, and heterosexual pornography popped up uninvited in one’s browser and email. Gay and lesbian materials had indeed been “the first to go.”

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12 Ibid.


How far was any of this connected to Butler? No one thought the decision had initiated the anti-gay bias of customs officers, police, and judges—the sweeping seizures targeting gay bookstores antedated the decision—but Butler had obviously done nothing to rein it in, and may even have legitimated it. Before Butler, it was arguable that two of the courts’ main doctrinal tests for what counts as the undue exploitation of sex—the “community standard of tolerance” test and the “degrading and dehumanizing” test—would ultimately have to give way or be qualified if obscenity law was to be purged of moralism. The problem was not merely the uncertain and unstable relationship between the two, it was their content. What a national majority regards as tolerable is no less moralistic than what it regards as virtuous. What people find degrading or dehumanizing in sex is inextricably bound up with their ideals of what sex should be. Without very significant modification, these tests could provide verbal ornaments with which police, customs officers, and judges would decorate their homophobic prejudices. Moreover, if some kinds of pornography were in fact harmful, then Parliament could surely legislate so as to precisely target them—it had made such efforts in both the hate speech and child pornography laws, so why not here? These rather obvious worries were not confined to liberal opinion. Radical feminists, following the lead of MacKinnon, had argued that criminal regulation of obscenity was a retrograde step in women’s rights: “Men’s obscenity is not women’s pornography. Obscenity is more concerned with whether men blush, pornography with whether women bleed ....”\(^\text{16}\) Obscenity law gives power to the state, not to the victim, and it is stained with masculinist assumptions about what is obscene. “The law of obscenity has literally nothing in common with this feminist critique.”\(^\text{17}\) If legal moralism had to end under the Charter, then the repeal or invalidation of the prohibition on the “undue exploitation of sex” would nicely mark the beginning of that end.

Bafflingly, the Court simply announced that the obscenity law as it stood was not moralistic. It seemed to have been particularly influenced by the arguments of one of the intervenors on the government’s side, the Women’s Legal Education and Action Fund (LEAF), who transmogrified the feminist critique of obscenity law into its


\(^{17}\) *Ibid.*
main support. Potential harm to women became not a reason to reject obscenity laws, but rather, a reason to uphold them. It took some experience with Butler for LEAF to lose its enthusiasm and significantly qualify that view. In Little Sisters, LEAF intervened on behalf of the bookstore and, together with civil libertarians and Canada's national lesbian and gay rights group, Egale Canada Everywhere (Egale), argued that social context is fundamental, that lesbian pornography's effect on lesbians may differ from heterosexual pornography's effect on women, that sexual speech plays a special role in the lives of sexual minorities, and that a community standard of tolerance is a moralistic one. None of those arguments found favour with the Court. Perhaps one can sympathize. In Butler, the Court had tried to be attentive to women's interests, and now leading feminists were telling it that harm and moral corruption were, after all, distinct. In other decisions, the Court tried to advance equality for lesbians and gay men, and now lesbian and gay lawyers were telling it that equal treatment does not always mean identical treatment. It must have been too much to take in. The Court unanimously rejected any criticism of Butler and said the rash of homophobic decisions had nothing to do with the standards it had laid down; a majority held that apart from the "reverse onus" provisions requiring importers to prove that their books were not obscene, the customs law was in good order as it stood. There had been serious anti-gay discrimination, but it was all a misunderstanding; everyone should try harder in future. Kendall agrees with the Court and, with few qualifications, admires both decisions; his main regret is that they have not resulted in more criminal convictions.

Kendall's discussion of the political conflicts around the two cases is informed, lively, and engaged. It is a report from the front lines, by one who worked with an intervenor supporting the government in Little Sisters. It is also the record of a family dispute, addressed to other men who are part of the urban gay subculture to whom, and occasionally for whom, Kendall purports to speak. It is a reply to "the community's

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19 Kendall worked with the local branch of the American-based women's group, Equality Now, and I consulted briefly with Egale, Canada's national lesbian and gay rights group. As Kendall notes, Egale's factum adopted some of my earlier arguments about gay male pornography. See Egale Canada, Factum to the Supreme Court of Canada in the Little Sisters Appeal, online: <http://www.egale.ca/index.asp?lang=E&menu=&item=443>.
criticism of Butler," a community that he thinks failed to appreciate the identity between the interests of women and the interests of gay men, and that was guilty of inconsistency when it opposed the obscenity laws while welcoming Bill C-250 that added gay people to the list of those against whom it is an offence wilfully to promote hatred. Where, asks Kendall, was the exigent demand for proof of harm when what was at stake was the permissibility of things like bumper stickers urging people to “Kill a Queer for Christ”? Kendall’s assumption that both laws must stand or fall together may be hasty. One might think that there are morally relevant differences between magazines that represent men as sexual playthings and signs that incite people to murder homosexuals. One might also think that the starkly different character of the broad, absolute liability obscenity offences and the carefully drafted hate crimes with their demanding mens rea requirements might support a different assessment. But Kendall is right that we must somehow bring our views about pornography and hate speech under plausible and coherent principles of free expression, and to do that we must address some fundamental questions about political morality and about the nature of sexuality.

II.

What exactly does Little Sisters say about gay pornography? Kendall writes, “[T]he Supreme Court of Canada ruled unanimously ... that gay male pornography violates the sex equality test for pornographic harm first set down by the Court in its 1992 decision in R. v. Butler.” This is actually quite far from any ruling in Little Sisters. What the case decided on the point is merely that the Butler test for criminal obscenity is to be applied without regard to the sex of the people represented in the materials or to the sex of the audience reading or viewing them. Little Sisters did not decide that gay male pornography as a type of expression violates the test for obscenity; it decided that the test is to be applied without modification in order to decide whether any particular token of that type violates it.

The “Butler test” purports to replace a moralistic view of obscenity with one rooted in an assessment of harmfulness: “The courts

20 Kendall, supra note 1 at 4.
21 Supra note 1 at xi.
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." As every student of jurisprudence knows, the intelligibility of the underlying harm principle turns on the account of "harm" that it deploys. One cannot pretend to be invoking a harm-based test if one means by "harm" whatever reduces someone's utility, violates a community's shared morality, causes moral corruption, or gives offence to the majority. To count these as harms would collapse into legal moralism which, according to the Court, is impermissible under the Charter: "To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms ...." How then are we to think of "harm" for the purposes of obscenity law?

The usual answer is that it consists in those injuries to persons that criminal and civil law prohibits: assault, rape, exploitation, discrimination, and so forth. The standard defence of obscenity law accordingly proceeds in three steps: (1) it argues that the availability of obscene materials plays a significant role in causing such injuries; (2) it argues that existing laws against injuring people in these ways, attempting to do so, or counselling others to do so are inadequate to prevent such harm; and (3) it argues that banning obscenity achieves this end at an acceptable cost to other values. Kendall certainly wants to endorse that familiar claim (though only step (1) attracts serious discussion in this book). He also wants to insist, as would the fiercest opponent of censorship, that we must protect people from being coerced into making or using pornography. Those are fairly conventional arguments. More striking is his further claim that gay male pornography is, as his subtitle puts it, "an issue of sex discrimination." Kendall argues that all gay pornography causes or legitimates harms of discrimination by shaping gay sexuality in directions infused with sexualized hatred and self-hatred. It does this by representing, and in that way promoting and legitimating, bad sex—sex that incorporates or mimics unequal gender roles, or sex that is non-consensual, violent, or rough. But those are scarcely the beginning. Also on the index are an

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22 Butler, supra note 5 at 485.
23 Ibid. at 492.
Interest in penetrating or being penetrated during sex,\textsuperscript{24} a special interest in having sex with men of other races,\textsuperscript{25} and an interest in having sex without condoms.\textsuperscript{26} Encouraging men to go to bars is also very bad: "[G]ay men in bars cease to be people. They are denied a human identity and are instead offered a predetermined sexual identity void of humanity."\textsuperscript{27} The ways that gay male desire can go wrong seem to be legion. Kendall is not wholly negative, however; he is also moved by a positive ideal: "What I long for is a gay male sexuality that includes and is compassion, sensuality, tenderness, intimacy, inclusive love-making, and the equality found only in a life-affirming reciprocity...."\textsuperscript{28} It would be easy to mock the Hallmark-style sentimentality\textsuperscript{29} of this view—not to mention the jarring notion of "inclusive love-making" (as if our sexual desires should be non-discriminatory). But other men share those longings and, if they are lucky enough in this harsh world, they will find each other. The hope that animates this book, however, is much more ambitious. Kendall fervently wants everyone's sexuality to be like that, in all contexts, all the time—and he is quite willing to use the coercive power of the state to bring people onside. There is an evident obstacle to that plan: there is no more prospect of using criminal sanctions to enforce, say, "inclusive love-making" than there is of using them to enforce heterosexual love-making. Criminal punishments for homosexual conduct made no one straight, and criminal punishments for exclusive love-making would make no one more inclusive. But Kendall shares the conviction that criminal law can affect our sexuality indirectly, by removing the obstacles to the kind of sexuality he longs for. So while he probably wouldn't favour jailing Caucasians who have sex only with Asians, he is open to jailing those who produce pornography catering to such non-inclusive, racialized sexual interests. And why not—isn't a racially exclusive sexuality just the sort of harm

\textsuperscript{24} Kendall, \textit{supra} note 1 at 113.

\textsuperscript{25} \textit{Ibid.} at 123.

\textsuperscript{26} \textit{Ibid.} at 146.

\textsuperscript{27} \textit{Ibid.} at 151.

\textsuperscript{28} \textit{Ibid.} at xix.

that Parliament is competent to prevent, by criminal sanction if necessary?

It is not. Contrary to what Kendall supposes, the further malign consequences that he imputes to gay male pornography are not what the Court means by "harm." Justice Sopinka writes,

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.\(^3\)

That formulation leaves margins of doubt, but on the core point it is clear enough: harmful is only such conduct as society has formally recognized as incompatible with its proper functioning—for instance, various forms of physical and mental mistreatment. To dispose people to do harm is therefore to dispose them to mistreat others in ways that violate rights already protected by criminal and civil law. So even if the production, use, or display of pornographic materials makes it harder to universalize a sexuality that is "compassion, sensuality, tenderness, intimacy [and] inclusive love-making," that will not satisfy the Butler test for obscenity. It is not unlawful mistreatment to have selfish, rough, or casual sex. It is not unlawful to be "looks-ist," to be a "body fascist," to be racially exclusive, or even to seek out "unsafe" sex. It is not unlawful to cruise bars and thereby, on Kendall's view, to abandon one's humanity. Whatever the vices of such appetites, they have no more been formally declared incompatible with society's proper functioning than has a desire to have sex with someone because you feel sorry for him, because you find him witty, or because you want to see his smart loft.

It is important to grasp the significance of this: sexual liberty always makes it harder for some people to realize their sexual desires. Rapists and pedophiles are among them, of course—in having sex without valid consent, they fail to respect the liberty of others. But it also makes it harder for those who want everyone's sexuality to be like their own, and it does so even when their ideals are attractive. They are entitled to seek willing converts, they can demonstrate by example the superiority of their lives, they may encourage others to join them, but they may not rely on the strong arm of the law to achieve their goals. This is the centre of the harm principle. As Mill put it:

\(^3\) Butler, supra note 5 at 485.
He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else.31

To embrace this principle has consequences. Just as religious fundamentalisms are hampered when apostasy is not a crime, sexual fundamentalisms are hampered when sexual heresy is not a crime.

III.

Another distinctive feature of a harm-based approach to pornography is its concern that there be actual evidence of the evils that it causes. Kendall presents no new finding, survey, or experiment that would make plausible, let alone confirm, his conviction that access to gay pornography is a significant cause of homophobic discrimination, gay rape, partner abuse, teen suicide, or HIV infection. But on this score he is admirably honest. He freely concedes that he has nothing to offer, and that no one else does either: “[N]o social science data exist on gay pornography specifically ....”32 One might have anticipated, then, a short book. Unperturbed, Kendall argues at length that “gay male pornography can be proven harmful by way of analogy.”33 Arming himself with the epistemology that drove Donald Rumsfeld’s hunt for Iraq’s weapons of mass destruction, Kendall assumes that an absence of evidence is not evidence of absence.

That is an unreliable epistemic policy. We need positive evidence, and we need it at three different points and in three different forms. First, there is the evidence necessary for constitutionality—the evidentiary standard a court needs before it can conclude there is a sufficiently rational connection between Parliament’s aims in preventing harm and the restrictive policy it proposes. Second, there is the evidence required for political justifiability: the sort of evidence anyone—legislators, voters, commentators—needs before being entitled to

32 Supra note 1 at 89.
33 Ibid. at 93.
conclude as a matter of political morality that the legislature's policy is wise and just. Third, there is the evidentiary standard for liability—the sort of evidence a judge and jury need before they may convict on an obscenity charge. These are different standards, and *Butler* deals directly only with the first of them.

On the standard for constitutionality the Court was deferential: the harmfulness of pornography is controversial, perhaps not even susceptible of scientific proof, but Parliament is entitled to act on the basis of a "reasoned apprehension of harm." Kendall deplores the fact that the Court went no further. In contrast to many social scientists, he thinks that there is overwhelming, conclusive, and indeed "irrebuttable proof of harm" of pornography. Be that as it may, the Court's deference to legislative opinion on this point is entirely appropriate, for it has neither the expertise nor the legitimacy to pronounce on such matters.

However, a reasoned apprehension of harm will not suffice when we turn to the question of justifiability. Even if an obscenity law would be constitutional, Parliament should not enact it unless it has persuasive evidence that doing so achieves more good than harm. The operative distinction is simple enough—it is essentially the difference between there being a good case for doing something and there being no good case for others to prevent one from doing it. This distinction is sometimes missed by lawyers who slide silently from arguments about legality of a statute to conclusions about its justice or wisdom. MacKinnon, for example, writes that *Butler* held that "[t]he evidence on the harm of pornography was sufficient for a law against it." But the only sense in which this is true is that the Court thought a reasoned apprehension of harm is an adequate foundation for the constitutionality of the law. Had it meant to pronounce on its wisdom, Justice Sopinka could not have said that obscenity may be prohibited "because it is perceived by public opinion to be harmful to society." That is a tolerable, if somewhat loose, formulation of the constitutional principle that courts should defer to the perceptions of the legislature as

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34 *Butler*, supra note 5 at 467, 504.
35 *Supra* note 1 at 4.
37 *Butler*, supra note 5 at 454, 479.
the authoritative voice of the public. But if read as a suggestion that adverse public opinion can *make* some activity harmful and thereby justify a law as matter of public policy or, worse still, that adverse public opinion can warrant convicting someone under such a law, it would amount to a complete surrender to legal moralism.

Justification is a matter of what laws we should have, not what laws the legislature has the power to enact. A harm-based justification needs not only reliable evidence of the harmfulness of obscenity, but also reliable evidence that censorship *prevents* this harm at a cost no greater than the harm it prevents. The harms of criminalization are plain. There are the penalties and the collateral injuries that flow from them, to the accused and to others. There are also the costs of applying and enforcing the laws, including not only administrative costs but also the opportunity costs of devoting resources to obscenity rather than to other concerns (a customs officer looking for pornography at the border could be looking for handguns; a police officer investigating a video store could be investigating an assault). A defender of criminalization therefore needs to demonstrate not only the harms of pornography but also the efficacy of the remedy. The facts in *Little Sisters* provide one reason for pause: they evidence a standing temptation to use prior restraints against unpopular people and views; another is that the status of women in places like Denmark, which has decriminalized pornography for a generation, is no worse than it is in Canada or the United States. There is even evidence that within the United States gender equality is greater in states that have *higher* circulation rates of pornography. The plausible inference is not, I hasten to add, that pornography improves the status of women; it is that decriminalization need not harm it, and that a more liberal social order may be associated both with greater access to pornography and with greater security for women’s rights.

Consider, finally, the role of evidence in the context of criminal liability. The *Butler* test requires that obscenity be established on the basis of the risk of harm, where “harm” means the unlawful

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38 This shares the structure of a section 1 analysis under the *Charter*, but it is free of any degree of deference, and its aim is to establish the wisdom, and not just the legality, of the restriction.

mistreatment of people. The Court also tried to give some direction about how that might work out in practice:

[T]he 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.\(^{40}\)

Notice how this classification works. Harmfulness is a reason for an obscenity conclusion, not the other way round. Thus, the Court does not say that if materials are obscene then they are harmful per se. Had it decided that, we would be no further ahead in knowing what is criminally obscene. It said that to the extent that material is harmful it is criminally obscene. Note also the carefully modulated formulations: representations of sex with violence will “almost always” (not always) be harmful and therefore obscene; non-violent explicit sex that is “degrading or dehumanizing” may be obscene when the risk of harm is substantial—modestly or even moderately harmful materials in this category may therefore not be obscene. The only materials categorically banned are those that employ children in their production. Apart from that solitary class, someone needs to assess the harmfulness of the materials and on that basis determine whether they are obscene. Who should that be, and how should they decide?

That does not seem like it ought to be a difficult question. No offence is committed if the materials in question are not actually obscene, so it must fall to the judge and jury to determine whether they are, and the Crown will need to prove it beyond a reasonable doubt. The Butler test says that it is to proceed on the basis of proving their harmfulness. That is the natural understanding of the matter, and it is endorsed by the Ontario Court of Appeal in \(R. v. Hawkins\).\(^4\) Kendall, however, rejects this interpretation. He detects a note of bad faith: “[T]here is hypocrisy in the claim that, within the context of criminal laws aimed at controlling systemic inequalities, an incredibly high standard of proof, and lots of it, must be presented every time the Crown tries to take concrete action to stop those materials that cause

\(^{40}\) Supra note 5 at 485.

inequality.” He thinks that the requirement that the Crown prove its case creates a legal nightmare, yet this sits uneasily with his assertion that the harmfulness of pornography has been established “unequivocally,” that the “proof” is “irrebuttable.” If that is so, then in a given case the Crown need only draw on the armoury of these convincing, unequivocal, irrebuttable proofs to establish that the materials in question are of a sort that is harmful. It is difficult to see what the alternative could be. It is true that “the Crown could not be required to adduce a higher level of proof than the subject matter admits of.” But that cannot mean that the Crown may substitute the standard of constitutionality in the context of liability. We can’t start convicting people of criminal offences on a “reasoned apprehension” that they committed a prohibited act, or even on the strength of a fairly persuasive case. This accords with MacKinnon and Dworkin’s view. In 1994 they wrote, “[t]o date one indictment under Butler has been brought against lesbian sadomasochist material … . If this magazine is proven to harm women, including by producing civil inequality, the case should result in a conviction.” They did not think that anyone should be convicted in the absence of proof of harm.

IV.

Kendall’s claim is not simply that gay male pornography may be harmful in some way or other—it is that it is unequivocally harmful, and that its harm sounds in sex discrimination. How do texts or images that represent men alone manage this? By using men “in the place of women.” That thesis was provocatively and pungently defended by John Stoltenberg back in the 1980s, building on some ideas of Andrea Dworkin’s. In its general form, the thought is that even in the absence

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42 Supra note 1 at 27.
43 Ibid. at 4.
44 Little Sisters, supra note 6 at 1166.
of a sex difference there may be a gender difference, provided there is an eroticized hierarchy to stand in for the opposition of man/woman. Almost anything will do—top/bottom, old/young, rich/poor, white/black, viewer/viewed. (As Danish poet Piet Hein reminds us, topology will work too: "Everything's either concave or -vex / So whatever you dream will be something with sex.")

47 Seen though the lens of gender reductionism, gay male pornography embodies the eroticized hatred of women. Using it conditions men to hate femininity, whether in women, in other men, or in themselves, and thus to repeat the harmful objectification of heterosexual pornography.

The fact that this picture is familiar is no objection. There is nothing wrong with sticking by a view that is correct; legal and political theory have often been marred by the compulsion to originality for its own sake. But there have been at least two developments that warrant some reconsideration of Stoltenberg's line. First, analytical feminists now have a fresh account of how it could be true that pornography subordinates women, an account that does not depend on the crude sort of Pavlovian conditioning that earlier feminists posited and for which there is so little reliable evidence.

48 On this view, it is not that pornography conditions men to want to rape or abuse women, it is that it influences everyone's view of the rules of the game in sex. It does not inspire a taste for sex without consent as much as it shapes general norms about what counts as consent.

The second development is a more subtle understanding of sexual objectification. Most ordinary pornography does not in fact consist of the images of violence, butchery, and torture that obsessed the old anti-pornography movement—that is a specialized market, even among straight men. But if the theory cannot explain what is wrong with the great bulk of ordinary, non-violent pornography then it is of little use to the feminist cause. The explanation that older feminism proposed

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was that this too is harmful, because to be photographed as an object for the male gaze is already to be objectified and therefore to be made available for other kinds of abuse. Here again, analytic feminists took the lead, demonstrating the context-dependent and multi-valent character of "objectification." Whether it is bad to be treated as an object depends on who is doing the treating and on what the object is—it is one thing for a bed-mate to treat you as a pillow, another for a bed-mate to treat you as a doormat.

These theories raise questions about how smoothly the analysis of heterosexual pornography carries over to the homosexual case. The norm-dependent account of subordination suggests that we need to attend to what the prevailing norms of sexual conduct actually are in lesbian and gay contexts, to what norms are expressed in or supported by their pornographic materials, and to what authority those materials enjoy. In the heterosexual case, pornography is said to recapitulate, secure, and legitimate the already subordinate position of women in a sexist society. In a heterosexist society, gay people are subordinate to straight people, but it is far from clear what gay pornography has to do with that, in part because the oppressor class, if that is what it is, doesn't seem to be much influenced by gay pornography. Similar doubts arise about objectification. "All women live in sexual objectification the way fish live in water." Do gay men swim in the same pond? Is the typical image of a gay man in our society that of a sex object? We are not exactly surrounded by sexualized images of gay men being used to sell everything from breath mints to sports cars. What difference any of this makes is open to argument, but it does make it hard to feel confident in simply applying the old theories unmodified.

One way of dealing with the mismatch between the oppressor class and the consumers of gay pornography is hinted at in Kendall’s


50 MacKinnon, Feminist Theory, supra note 16 at 149.

discussion of the American case, *Oncale v. Sundowner Offshore Servs.*\(^5^2\) Joseph Oncale was subjected to horrific on-the-job sexual harassment and abuse by other men. The question was whether he, a (presumptively) straight man could sue other (presumptively) straight men under Title VII of the 1964 *Civil Rights Act*, which prohibits employment discrimination “because of ... sex.” The court said he could. What does this have to do with obscenity law? Kendall is aware that there is no evidence that any of the men who oppressed Oncale had ever seen, let alone been influenced by, gay pornography. But we might think of it this way: Gay pornography supports a masculinist culture as proved by the gender-reductionist argument. That culture makes possible the kinds of humiliation and abuse that Oncale was made to suffer on the job. If we ban gay pornography, we weaken one of the supports of that culture, and make it less likely that the Oncales of the world will suffer sex discrimination at the hands of other men. The link is a tenuous one. And we should be a little cautious in accepting the idea that anything that supports a masculinist culture is a candidate for criminalization: that charge has been frequently laid at the door of male homosexuality itself; and it is plausibly laid at the door of many world religions.

On one point, *Oncale* consorts more closely with the arguments of LEAF and Egale in *Little Sisters* than Kendall has noticed. Justice Scalia writes,

> In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.\(^5^3\)

There are things to worry about in this decision,\(^5^4\) but that observation seems sound: what a smack on the buttocks amounts to depends on the whole social context. The same applies to a *picture* of a

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\(^{52}\) 523 U.S. 75 (1998) [*Oncale*].

\(^{53}\) Ibid. at 81.

\(^{54}\) The equality-affirming aspect of the decision was somewhat spoiled by Justice Scalia’s further assertion that Title VII gives no remedy for run-of-the-mill sexism: the statute “does not reach genuine but innocuous differences in ways men and women routinely interact with members of same sex and of opposite sex ....” Ibid. at 75.
smack on the buttocks. But that is just the core objection to a gender-reductionist analysis of gay male pornography. Kendall asks what it does to a person to kneel to perform sex for a camera. Forget the camera for a moment, and ask: what does it do to a person to kneel to perform sex? Someone who had absorbed the lesson of Oncale should answer: it depends. It depends on whether it is a person kneeling freely or being forced. It depends on what sort of sex act is being performed. And, it may also depend on whether the kneeler is male or female.

In Little Sisters, the bookstore, LEAF, and Egale all argued that various aspects of the lesbian and gay context could be expected to modify the harmfulness of certain materials. It is wrong to understand this, as the Court did, as requesting a "general exemption" for gay pornography, a sort of free pass in spite of its harmfulness. It is also wrong to suppose, as Kendall does, that it holds that "the production of same-sex pornography should be exempt from legal regulation because harms cannot result from it." That would be a preposterous view. If people are enslaved, or exploited, or hurt in the production of gay pornography, or if people are forced to view or read it, then harm results just as surely as it does in the heterosexual case. Of course, neither section 163 nor judicial doctrine limits obscenity to just those circumstances (which are in any case unlawful on other grounds). The fair interpretation of the argument is simply this: by the very standards the Court articulated in Butler, gay materials will sometimes merit a different conclusion than would otherwise similar heterosexual materials, and the rules of thumb set out in the tripartite scheme ought to reflect this.

That does not seem like such a strange idea in light of the insistent emphasis in Butler on the way pornography's harm is bound up with inequality between the sexes. Kendall accepts that understanding of Butler, and tries to show how sex inequality persists through the absence of sexual difference. Pressed to consider the relevance of context, the Supreme Court veered off in a rather surprising direction: "Violence against women was only one of several concerns, albeit an important one, that led to the formulation of the Butler harm-based test, which

55 Supra note 1 at 168.
56 Ibid. at 70 [emphasis added].
itself is gender neutral.” Who would have predicted that after adopting so much of the gender-essentialist view of pornography in Butler the Court would later conclude that gender has nothing to do with it?

Kendall is certainly not tempted by that view. For him, sexuality is centrally about gender. There is a modest and an extreme version of that idea. The modest thesis is that homophobia and sexism are mutually supporting vices. Sometimes it seems that that is all Kendall wants to argue, for example, when he says, “I query ... how one can advocate for the eradication of homophobia without first understanding the role of sex discrimination in our society ....” He is right about that. For one thing, different forms of discrimination have lots in common, and the origins and scope of sexism make it a good primer. Work at understanding the ways, overt and covert, in which men discriminate against women, and the illusions and superstitions by which they legitimate it, and you will have a good model for understanding the ways that straight women and men discriminate against gay people. Moreover, there is a substantive connection between sexism and homophobia. One way of being homophobic is to regard gay men as feminized by their sexuality, and to hate them for it.

Sexism is thus part of the picture. But is it all there is? Or is it the main thing? That would be a more extreme thesis. The gender reductionism on which that view rests underestimates one of the most interesting things about modern lesbian and gay sexualities: the extent to which they have escaped the nineteenth-century idea that sexual variation is a kind of gender inversion, a “hermaphroditism of the soul,” as Foucault memorably put it. The history of that transformation has yet to be told, but it marks one of the most important distinctions between lesbian and gay sexualities as we now have them and many earlier ones. Unconventional masculinity is no longer necessarily interpreted as femininity; it is now subject to being deplored in its own right. That being so, the centre of gravity of homophobia has shifted somewhat. The specific character of sexuality injustice is now better

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57 Little Sisters, supra note 6 at 1164.
58 Supra note 1 at 41.
understood as what Cheshire Calhoun calls pseudonymity: access to the public sphere is conditioned on pretending to be something other than what one is, on condition of remaining closeted. In a queer way, the gender-reductionist view of gay male pornography collaborates in this. To think that gay male pornography is nothing but straight pornography using men in the place of women is to enact this pseudonymity within the theory. Of course there is nothing wrong with taking the gender story just as far as we can, no more than there is in trying to get a class-based analysis to do as much work as it can in understanding the persistent injustices between men and women. But to miss the specific character of sexuality injustice, and the ways it comes to bear on our thinking about pornography, is to miss an important part of the picture.

V.

The sex discrimination theory of pornography began its life as an attack on obscenity laws. Feminists argued that such laws were not only misguided, but wrong: “Obscenity law helps keep pornography sexy by putting state power—force, hierarchy—behind its purported prohibition on what men can have sexual access to.” In Butler this trenchant critique of obscenity laws was somehow co-opted in their defence: the rejection of moralism and the insistence on a gendered analysis of harm became reasons for upholding obscenity laws rather than replacing them. The most that Dworkin and MacKinnon ever gave by way of justification for this about-face was this: “We are encouraged ... that the Butler decision under Canada’s new Charter makes it likely that our civil rights law against pornography would be found constitutional if passed there.” But that is no more persuasive than saying that it would be encouraging for the courts to uphold criminal prohibitions on blasphemy, since that would demonstrate their readiness to uphold civil remedies for libel.

Kendall seems ambivalent on this point. He makes frequent mention of the vices of obscenity laws, and he understands well why


61 MacKinnon, Feminist Theory, supra note 16 at 214.

62 MacKinnon & Dworkin, supra note 45.
MacKinnon originally opposed them. At the same time, he seems to treat them as complementary rather than competing cures for the evils he identifies. The problem in Canada was the one-track approach: "The Glad Day decision ... made apparent the problems inherent in an anti-pornography approach that relies solely on the criminal courts for enforcement."63 In an unstable compromise, his final suggestion is that we add to the criminal apparatus mechanisms for educating and training those charged with deploying it and, in due course, an ordinance-style system of civil remedies for those who have been provably harmed.

To her enormous credit, Dworkin always refused to collaborate in this sort of thinking. She opposed LEAF's position in Butler; she vigorously continued to reject all criminal prohibitions on obscenity.64 At the same time, however, her argument gave only a negative case for freedom of sexual expression. To show what is wrong with repression is not to show what is of positive value in the liberty itself. Nor does Kendall help us much with this question. Perhaps he feels no need to address it, having created for himself opponents who oppose criminal obscenity law because they are in favour of pornography. His imagined interlocutors "support the production and distribution of pornography"65; they are "pro-pornography advocates"66 in a "pro-pornography crusade."67 This is either a rhetorical excess (and, by the end of the book, a wearying one) or it is the mark of an elementary mistake. One need not support pornography in order to oppose criminal restrictions on it, still less the particular restrictions of the Criminal Code as they have been construed by the Canadian courts. Compare other familiar liberty rights. One can favour legal protection for a woman's right to choose and yet think that abortion is normally regrettable or even wrong. One can oppose restrictions on the publication of the Bible or Koran while thinking them handbooks for the oppression of women and gays. One can even believe that people have a right to engage in homosexual conduct while thinking it sinful. Similarly, a critique of obscenity laws does not depend on anything like

63 Supra note 1 at 169 [emphasis added].
64 Ibid.
65 Ibid. at xi.
66 Ibid. at 22, 104.
67 Ibid. at 55.
the view that pornography is good. The sensible attitude to take towards pornography itself is surely one of ambivalence: what value it has comes part and parcel with its vices. But to assess the matter only in these terms is already to pitch it at the wrong level of abstraction. It is to repeat the mistake of the majority in *Bowers v. Hardwick*, who scorned the idea that there could be a "fundamental right to engage in homosexual sodomy." As Justice Blackmun replied in dissent,

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies .... Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." The question we need to address is not what is the value of pornography, but rather, what is the value of those liberties whose reach is broad enough to protect (some of) its uses.

When MacKinnon and Stoltenberg wrote, it was largely under the assumption that the liberty at stake was of value only as a means to bodily pleasure: on one side we had women's equality, on the other men's orgasms. A similar attitude is evident in Justice Sopinka's judgment. He writes, "[T]his kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfillment ...." It is a fair question why one should regard any form of sexual fulfillment as "base." But we must also ask why anyone would think that sexual fulfillment is all that is at stake here. Contemporary writers, like the intervenors in *Little Sisters*, are apt to see values of authenticity, identity, and even community at stake in censorship. One does not have to think that pornography itself is the means through which the true self is recovered, identities explored, or relationships and institutions built. One need only suppose that a generous portion of liberty, including a liberty of expression broad enough to protect many sorts of pornography, is crucial. This will have wider ramifications. Societies in which sexual liberty flourishes come to look a lot more like London or Toronto than they do like Riyadh or Tehran. Where there is sexual liberty, men and women mix and flirt in public; they discuss their loves and their lusts; public displays of

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68 478 U.S. 186 at 199 (1986).
69 *Ibid.* [internal citations omitted].
70 *Butler*, *supra* note 5 at 509.
affection are common; it is normal to bring a date to the high school prom or a mate to the office party. When all that happens, however, the stakes for sexual minorities change dramatically. In a sexually private culture everyone is equally in the closet; in sexually open societies, the balance shifts. Greater openness makes sexual minorities more aware of their difference, because it makes it salient in so many more contexts. In familiar ways this helps consolidate minority identities. Liberty, we might say, produces sexual minorities who then need more liberty if they are to shape their lives according to their needs. The liberties in question include those that enable sexual minorities to make their way in a highly sexualized public culture. These are not (or not usually) the gifts of pornography itself, but they are the gifts of an expressive liberty that goes so far as to encompass pornography. They are what is at risk in any regime of censorship and prior restraint; we know that risk can materialize, because we have watched it happen.