Troubling the Definition of Pornography: Little Sisters, a New Defining Moment in Feminists' Engagement with the Law?

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Troubling the Definition of Pornography: *Little Sisters*, a New Defining Moment in Feminists' Engagement with the Law?

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This article explores feminism's relationship to the legal regulation of pornography. Of particular interest to the author is how the defining moment of the Butler *decision has been opened up to contestation and complication by* Little Sisters Book and Art Emporium et. al. v. Minister of Justice et al.*, a recent Supreme Court of Canada decision regarding Canada Customs violations of the free expression and equality rights of a Vancouver-based gay and lesbian bookstore. The focus of the article is on the role that the Women's Legal Education and Action Fund (LEAF) played in both* Butler *and* Little Sisters. *The author contends that while much has changed for the better since* Butler*, problematic legal strategies continue to be reproduced by LEAF. While LEAF has to some extent nuanced its arguments with regard to pornography's relationship to harm, the author argues that neither LEAF's* Butler *nor its* Little Sisters *facta work to destabilize the relationship of sex, gender, and sexual orientation identity and their complicated relationship with pornography.*

Le présent article analyse la relation entre le féminisme et les dispositions juridiques réglementant la pornographie. L'auteure s'intéresse particulièrement au point tournant survenu lorsque l'arrêt Butler *a été contesté et complexifié par l'arrêt* Little Sisters Book and Art Emporium et. al. c. Ministre de la Justice et al.*, décision rendue par la Cour suprême du Canada. Ce dernier arrêt porte sur des atteintes par Douanes Canada à la liberté d'expression et au droit à l'égalité d'une librairie s'adressant particulièrement à une clientèle gaie et lesbienne, librairie située à Vancouver. L'article s'attarde au rôle joué par le Fonds d'action et d'éducation juridiques pour les femmes (le « FAEJ ») dans les deux causes* Butler *et* Little Sisters. *L'auteure affirme que le FAEJ continue à adopter des stratégies juridiques problématiques, bien qu'il y ait eu des améliorations sensibles depuis l'affaire* Butler. *Le FAEJ a nuancé, dans une certaine mesure, ses arguments touchant la relation entre la pornographie et le préjudice, mais l'auteure soutient néanmoins que les mémoires du FAEJ dans*

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les affaires Butler *et* Little Sisters *n'ont pas réussi à déstabiliser les liens entre le sexe, le genre et l'identité fondée sur la préférence sexuelle, ni leur relation complexe avec la pornographie.*

> Pornography is the most combustible fuel in modern culture. You have a little simmering tension between different groups in society? Throw on a bit of pornography—aah, a satisfying fire. You want more heat? Toss in some whips, chains and academics who write about the "transgressional" glories of sado-masochism. Yikes, the bonfire is roaring out of control![1]

Feminism's relationship to the legal regulation of pornography represents one of the most recognizable moments of second wave feminism's engagement with the law. In *Butler v. The Queen*, the Supreme Court of Canada adopted the radical feminist equation of pornography with harm.[2] Recently, anti-censorship feminists along with gay and lesbian advocates have argued that the *Butler* decision has brought about some of the most restrictive obscenity laws in the Western world.[3] Others, however, have argued that "obscenity law has become more enlightened in the past decade compared to the pre-*Butler* situation."[4] Whether or not this moment constitutes a positive engagement of feminism with the law continues to be widely debated. The answer is dependent on one's feminist perspective, one's interpretation of pornography, and one's view of the most effective legal responses to it.[5]

The aim of this article is to provide a brief comment on how the defining moment of the *Butler* decision has been opened up to contestation and complication by *Little Sisters Book and Art Emporium et al. v. Canada Minister of Justice, et al.*[6] The owners of Little Sisters Book and Art Emporium claim that in a context of pervasive homophobia, the *Butler* decision has had the effect of increased targeting of marginal sexual voices by

1. Michele Landsberg, "Pornography Debate Distorts Reality" *Toronto Star*, 16 January 1999.
2. *R. v. Butler,* [1992] 1 S.C.R. 452 [*Butler*].
3. Colman Jones, "Porn Drama in Feminist Lobby: Legal Beagles Slug It Out over Surprise New Pro-smut Orientation" *NOW Magazine*, 6–12 January 2000.
4. Bruce Ryder, "The *Little Sisters* Case, Administrative Censorship, and Obscenity Law" (2001) 39 Osgoode Hall Law Journal 207 at 214.
5. Here, of course, I am referring to not only different feminist perspectives, such as radical, liberal, socialist, anti-racist, and postmodern feminists, but also to different legal approaches undertaken to address pornography such as criminal and civil interventions.
6. *Little Sisters Book and Art Emporium et al. v. Canada (Minister of Justice) et al.*, [2000] 2 S.C.R. 1120 [*Little Sisters*].

police, courts, and customs officials who too quickly equate homosexuality with obscenity.[7] The end result has been that access to gay and lesbian pornographic material has been limited. This targeting has led to a revisiting of the relationship between feminism, law, and pornography.

Feminist involvement in this highly publicized case about pornography and the state's relationship to it has, to some extent, been a positive moment in feminism's use of the law to further equality struggles. However, while feminist interveners have used the *Little Sisters* case as a site in which to dispute meanings of categories, by incorporating a more complicated and nuanced understanding of sexual identity and pornography, they have not circumvented the simultaneous reproduction of, and reliance on, an essentialist understanding of both the queer and heterosexual communities and "their" respective pornography.

Before I begin my analysis, a brief digest of a partial history of *Butler* and its relationship to *Little Sisters* is in order. In 1992, the Supreme Court of Canada rendered a decision in the *Butler* case. This decision dealt with whether Canadian criminal laws against obscenity were constitutional or whether they infringed upon the section 2(b) freedom of expression guarantee in the *Canadian Charter of Rights and Freedoms*.[8] In *Butler,* the Women's Legal Education and Action Fund (LEAF)[9] intervened on behalf of the Canadian federal government and endorsed state censorship of pornography. LEAF argued that pornography is a form of sex discrimination and that it should not be protected by section 2(b) of the *Charter* because it is a violent form of expression that poses a danger to all women and their equality.[10] LEAF also put forth a request for the Court to abandon the conservative moral discourse that at the time framed the definition of obscenity. In its place, it proposed the adoption of a definition of obscenity that was understood to mean "harmful."[11]

In 2000, some eight years after the *Butler* decision was rendered, the Supreme Court of Canada revisited the pornography debate when it heard the *Little Sisters* case. Little Sisters is a Vancouver-based gay and lesbian bookstore that continues to be at the heart of a debate on the censorship

7. *Ibid.* at 1137, para. 37, 1150, para. 113.
8. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
9. Women's Legal Education and Action Fund (LEAF) describes itself as "a national, non-profit organization committed to using the provisions of the *Canadian Charter of Rights and Freedoms* to promote equality for women." For more information, see <http://www.leaf.ca/about-mandate.html>.
10. *Butler, supra* note 2, factum of LEAF, paras. 7 and 8. As reproduced in Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) at 205.
11. *Ibid.* at para. 11.

of its sexually explicit materials.[12] At the time, nearly 90 per cent of its stock had been imported from the United States and was allegedly unduly scrutinized, detained, damaged, destroyed, lost, and prohibited en route to its destination. LEAF was once again an intervener at the Supreme Court of Canada, only this time it argued against state censorship and on behalf of the bookstore whose porn was being targeted by government customs agents. LEAF contended that "no other bookstores have been subjected to this heightened scrutiny." Moreover, it noted that the same materials were claimed to have cleared Canadian Customs, even if inspected, when they were destined for other bookstores.[13] In its factum to the court, LEAF submitted that "lesbian materials, including sexually explicit materials, are important to all women and are essential to the emotional, social, sexual and political lives of lesbians."[14] LEAF accused Canada's *Customs Tariff*[15] of denying the constitutional equality and expression rights of lesbians and other disadvantaged groups.

Here, the court was asked to consider the constitutionality of a customs regime that has deemed a disproportionate amount of gay and lesbian pornography in and of itself harmful. It was requested that the court reconsider its harm based analysis of porn, as derived from *Butler,* in light of a social context of homophobia where the expression of gays and lesbians is suppressed in discriminatory ways. Part of the argument put forth to the court was that access to gay and lesbian pornography, unlike its heterosexual counterpart, is important because it contributes to a sense of community and identity.[16]

The Supreme Court of Canada, in a six-to-three decision, condemned the treatment of Little Sisters by Canadian Customs agents and allowed Little Sisters' appeal in part.[17] Justice William Binnie, writing for the majority,[18] concluded that while the relevant Customs legislation did violate section 2(b) of the *Charter*, this violation was demonstrably justifiable pursuant to the section 1 analysis of the *Charter*. The only exception to this was with respect

12. Little Sisters is back in the British Columbia Supreme Court arguing that nothing has changed since the Supreme Court of Canada ruling. They are challenging the constitutionality of Custom's powers.
13. *Little Sisters, supra* note 6, factum of LEAF, para. 3.
14. *Ibid.* at para. 2.
15. *Customs Tariff,* S.C. 1987, c. 49, Sch. VII, Code 9956(a) (now S.C. 1997, c. 36. s. 166, Sch., Tariff Item 9899.00.00).
16. *Little Sisters, supra* note 6, factum of LEAF, para. 15–16. LEAF also argued that the national community standard of tolerance test should be rejected (para. 41). In the interest of space, this aspect of the factum will not be discussed.
17. Justices Frank Iacobucci, Louise Arbour, and Louis LeBel dissented in part.
18. Chief Justice Beverley McLachlin and Justices Claire L'Heureux-Dubé, Charles Gonthier, John Major, and Michel Bastarache concurred with Justice William Binnie.

to the reverse onus provision in s. 152(3) of the *Customs Act*.[19] With respect to this section the court concluded that the onus belongs to the government to prove that material seized by Canada Customs is obscene, and that it should not be up to the importer to prove it is not obscene. On the question of whether or not the legislation violated s. 15 of the *Charter*, it was determined that it did not violate the equality rights of the appellants.[20]

Justice Binnie's judgment focused on the implementation of the legislation and found fault at this level rather than with the legislation itself as drafted. The dissenting decision argued that the violation was not simply one of implementation but, rather, that the problems were inherent to the statutory scheme and required that the whole of the Customs legislation dealing with the importation of obscene materials be struck down.[21] The dissenting justices argued that "the problems with the customs regime are not simply the product of isolated mistakes by individual Customs officers; instead, they reflect systemic problems that can only be adequately addressed by rewriting the applicable legislation."[22]

LEAF played a major role in both *Butler* and *Little Sisters*. Much has been made of this dual involvement, particularly the belief by some that LEAF was committing a so-called "about-face" in their more recent position on pornography.[23] Those who believed that the success of LEAF's anti-pornography arguments in *Butler* were to be blamed for customs agents' disproportionate targeting of sexual minority materials felt that LEAF's position in *Little Sisters* was a "make-good project to lesbians and gay men."[24] Nevertheless, a deconstruction of LEAF's reconstruction of porn in *Little Sisters* reveals that while much has changed since *Butler*, other more problematic legal strategies continue to be reproduced. When it comes to feminists' engagement with pornography specifically and anti-discrimination argumentation more generally, the strategy by which LEAF chose to make its arguments in *Little Sisters*, while acknowledging a plurality of experiences and the complexity and diversity of porn and its effects, simultaneously depends on essentialist understandings of lesbians and queer pornography that are similar in form, if not content, to its earlier position about women and heterosexual pornography in *Butler*.[25]

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19. *Customs Act,* R.S.C. 1985 (2nd Supp.) c. 1.
20. *Little Sisters, supra* note 6 at 1159–1160, para. 159–61.
21. *Ibid.* at 1179, para. 252.
22. *Ibid.* at 1161, para. 168.
23. Jones, *supra* note 3.
24. Elanor Brown, "Change of Heart?" *Xtra!*, 30 December 1999.
25. For a discussion of the reliance on stereotypes as a short-term strategy to gain legal rights, see Christopher Nowlin, "The Relevance of Stereotypes to s. 15 Analysis: *Little Sister Book and Art Emporium et al., v. The Minister of Justice et al.*" (1996) 30 University of British Columbia Law Review 333 at 345.

While both of LEAF's interventions in the pornography debate revolve around obscenity legislation they do so in different ways. The arguments posed in *Butler* dealt specifically with the constitutionality of obscenity laws as they existed in the *Criminal Code*[26] as well as with the test by which "obscene" should be defined. *Little Sisters,* by contrast, did not ask the Court to decide on whether any specific materials are obscene, instead it asked whether the Canadian Customs regime is constitutional. LEAF did not argue that lesbian and gay materials should be exempt from the operation of obscenity law, as was argued by the appellants.[27] Rather, LEAF argued that sexual orientation is a relevant factor to be considered in the harms-based analysis.[28]

In its *Little Sisters* factum, LEAF explicitly affirms a harms-based approach to obscenity law.[29] This time around, however, their factum attempts to explain how a harms-based analysis should be applied to *different* kinds of materials aimed at *different* communities: "One of LEAF's concerns is that materials should not be prohibited because of discriminatory attitudes towards lesbians and gays. Not only does such prohibition offend against equality; it does not prevent harm to women and minorities, which is another important concern to LEAF."[30]

In *Butler*, LEAF relied on an anti-pornography discourse that rested on the authoritative claim that "pornography has one meaning, pornography is harmful, the harms of pornography have been scientifically established, criminalizing porn reduces harm."[31] In LEAF's *Butler* factum, all complexity is denied. According to Brenda Cossman, LEAF and anti-pornography feminists insisted that "there is no possibility of a diversity of sexual representation within the pornography industry. Nor is there any room to admit that these sexual representations may be subject to different interpretations."[32] LEAF's legal claims were represented as if articulating

26. *Criminal Code*, R.S.C., 1985.
27. *Little Sisters, supra* note 6 at 1137, para. 42: "The appellants argue that the 'harms-based' interpretation given to s. 163 of the *Criminal Code* in *Butler*, does not apply to gay and lesbian erotica in the same way as it does to heterosexual erotica, or perhaps at all."
28. *Little Sisters,* factum of LEAF, *supra* note 6, para. 25, 28, and 32.
29. *Ibid.* at para. 28: "LEAF submits that, while the harms-based equality approach to obscenity law articulated by this Court in *Butler* must remain the cornerstone of obscenity law, a more constitutionally sensitive analysis of obscenity law is now required."
30. LEAF memo to Karen Busby, March 2000.
31. Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography," in Brenda Cossman *et al.* eds., *Bad Attitudes on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1994) at 378.
32. Brenda Cossman, "Feminist Fashion or Morality in Drag?: The Sexual Subtext of the *Butler* Decision," in Cossman *et al.*, *supra* note 31 at 430.

a unified, authoritative, universal, and literalist approach to pornography. Lise Gotell argues that

> [n]owhere [in the *Butler* factum] does it attempt to make a distinction between forms of pornography that may harm women and those that may not. Nowhere does the factum acknowledge that some women make pornography that is explicitly for women. All pornography is brushed away with the same broad stroke—that is through its complete equation with "harm."[33]

LEAF has to some extent nuanced its arguments with respect to pornography's relationship to harm. That is, in *Little Sisters,* it put forth an understanding of harm that is only obtainable when one recognizes and takes into consideration the context in which it is being defined.[34] However, while it appears as if LEAF has in fact nuanced its understanding of pornography's relationship to harm, it has at times continued to rely on essentialist identity categories upon which to base its arguments. In the same way that LEAF in *Butler* relied on an essentialized and fixed understanding of all "women" as victims of pornography, LEAF in its *Little Sister's* factum continued to rely on essentialized views of the queer community and "its" porn. While I do not take issue with many of the claims that they put forward,[35] I am weary of the way in which these arguments are structured and the negative results that they may have.[36] Of particular concern is the fact that neither LEAF's *Butler* nor its *Little Sisters* facta work to destabilize the relationship of sex, gender, and sexual orientation identity and its complicated relationship with pornography.

While LEAF remains the constitutional voice of Canadian feminism, it exercised that voice in *Little Sisters* in a way that responds to previous critiques around its lack of accountability. This response is made obvious in the opening paragraph of its factum, which states: "LEAF's intervention in this case is based on its work on obscenity law and on the

33. Gotell, *supra* note 31 at 397.
34. *Little Sisters,* factum of LEAF, *supra* note 6, para. 27–32.
35. Such as the arguments about the effect of sexual expression to help create community, to counter dominant misrepresentations of queer sexuality as perverse and deviant, and to challenge compulsory heterosexuality.
36. Christopher Nowlin argues that at the trial level, "transcripts of testimony by various witnesses (expert and otherwise) for the plaintiffs emphasize the personal, social, and cultural significance of erotic and/or sexual expression among gay and lesbian people. This comment does not take direct issue with this evidence. It does point, however, to the difficulty of concluding that erotica and other forms of sexual expression play a relatively less significant role for heterosexuals than they do for homosexuals." Nowlin, *supra* note 25 at 343–4.

equality rights of lesbians, including Canada-wide community consultations on the issues that arise in this case."[37] With this statement, LEAF hopes to addresses concerns of accountability and its right to speak on behalf of marginalized groups. This was not the case in *Butler,* although at the time LEAF claimed that its lack of national consultations with the lesbian community was the result of a three-week time line.[38] In fact, it appears as if Equality Now, an international organization that is also apparently dedicated to the promotion of sex equality, has taken on the role in *Little Sisters* that LEAF played in *Butler*. Suffice it to say, this organization is now experiencing the same criticisms that LEAF once did. Brenda Cossman rallies against Equality Now's involvement in *Little Sisters* by cheekily charging them with refusing to learn the most obvious lesson of the sex wars: "[I]t's not nice to speak on behalf of people that you haven't consulted with."[39] Ironically, however, LEAF's nation-wide consultations for *Little Sisters* were questioned by those within LEAF National for failing to be broad enough—not out of a concern for greater representation as one might guess given the aftermath of *Butler* but instead out of dismay that only lesbians had been consulted for their opinions. The implied critique of the consultation process by some of LEAF's own members was that if heterosexual women had been approached then LEAF's earlier position about pornography would not need to be reassessed.[40]

Carol Smart refers to LEAF's strategy in *Butler* as "new and improved standpoint feminism."[41] She defines this standpoint as preserving "a method and politics more appropriate to modernity than it is to postmodernity."[42] She then rejects this new standpoint feminism because "it celebrates difference but speaks homogeneity."[43] LEAF's *Little Sisters* factum reproduces the outlook that Smart critiques in earlier feminist legal strategies. While in its most recent intervention concerning pornography LEAF attempts to acknowledge the diversity of identities and experiences in

37. *Little Sisters,* factum of LEAF, *supra* note 6 at para. 1.
38. Gotell, *supra* note 31 at 411.
39. Brenda Cossman, "Return of the Loonies: Feminists tell Supreme Court That Gay and Lesbian Porn is Evil," *Xtra!*, 30 December 1999.
40. This debate arose at a time when it was still being clarified to the LEAF membership that LEAF's position in *Little Sisters* would not be challenging the harms-based analysis put forth in *Butler*.
41. Carol Smart, "Proscription, Prescription and the Desire for Certainty: Feminist Theory in the Field of Law" (1993) 13 Law, Politics, and Society 41. Feminist standpoint epistemology is the notion that women have a particularly privileged vantage point on male supremacy and that practices of sexual inequality are apparent only when one views the world from a position of marginality. Lise Gotell argues that this is deemed a privileged foundation from which to interpret the law and its guarantee of equality. Only by looking at pornography from the standpoint of women can we have a "clear and undistorted insight into the operations of power." Gotell, *supra* note 31 at 394.
42. *Ibid.*
43. *Ibid.* [emphasis in original].

the queer community,[44] it does not manage in the end to avoid reproducing "new and improved" essentialist arguments throughout its factum. While LEAF argues that its newly proposed approach to understanding obscenity is attentive to a context of pervasive homophobia, it would appear that LEAF all too often "collapses" (to borrow the term from Smart) the nuances of its arguments into already pre-established and problematic categories. Before I discuss LEAF's take on the legal subject, however, I would like to take some time to address the strategy that they employ in this case.

The evidence that LEAF draws on to support its claims consists of social science evidence and testimonials similar in form, if not content, to those found in *Butler*.[45] In *Butler*, LEAF attempted to prove the link between pornography and harm through the deployment of what Gotell refers to as the "rhetorical and epistemological strategy" of recalling actual women's stories and experiences as a privileged site of knowledge. Women's claims are held up as the hidden "truth" and, Gotell argues, act as an insulator against critique and contestation: "By challenging LEAF's conclusions, one appears to be denying the realities of these less privileged women for whom LEAF claims to speak."[46] These women's statements are, as Smart warns, used to draw the reader into reaching apparently logical conclusions and seemingly inevitable consequences. With this method, LEAF claims the moral high ground, "and it assumes that those feminists that challenge its anti-pornography and pro-censorship position are either misguided or else not really feminists at all."[47]

In *Little Sisters,* LEAF draws on anthologies and testimonials from items that have been banned entry into Canada, only this time the logical conclusion to be drawn is not that pornography harms all women but rather that there exists a liberating potential of homosexual pornography as experienced by sexual minorities. In the same line of thinking as Christopher Nowlin, it is not that I take issue with the claim that this form of expression is personally, socially, and culturally important to the communities being represented, but rather that I am uncomfortable with the conclusions that these assertions help create, such as that all heterosexual porn is unhealthy and therefore less worthy of protection or that homosexuals are defined by their homosexuality.[48]

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44. *Little Sisters,* factum of LEAF, *supra* note 6, para. 16–20, where LEAF makes reference to Lesbian sexualities and communities in the plural.
45. *Ibid.* at paras. 14–20.
46. Gotell, *supra* note 31 at 399.
47. *Ibid.* at 404.
48. *Little Sister's Book and Art Emporium v. Canada (Minister of Justice)* (1996), 18 B.C.L.R. (3d) 241 (B.C.S.C.) [*Little Sisters* 1996]. Justice Smith found that "[the] defining characteristic of homosexuals—the element that distinguishes them from everyone else in society—is their sexuality" (at 280).

Nowlin, in his discussion of the relevance of stereotypes to the judicial analysis of *Little Sisters,* argues that, at the trial level, problematic assumptions about what defines a homosexual inform the section 15 analysis of the Court. This, he claims, eventually prevents Justice Robert Smith from "consider[ing] the range of factors that may be important to one's sense of so-called personhood . . . [this] ultimately justifies further discrimination against homosexual writers and readers of homosexual pornography."[49] Nowlin refers to this occurrence as more of a "generalization than as an incontestable statement of fact."[50] He argues that given that for the purposes of section 15(1) analysis, differential treatment by the law cannot be based on "*presumed* group or personal characteristics,"[51] the stereotypical characterization of the diverse queer community by the witnesses in *Little Sisters* was part of a short-term legal strategy that did more harm than good.[52] Nowlin argues that "it was precisely Justice Smith's categorical assertion that sexuality is the distinguishing characteristic of homosexuals that enabled him to conclude that the impugned legislation itself does not discriminate against homosexuals within the meaning of s. 15 of the *Charter*."[53]

Nowlin charges evidence adduced on behalf of the plaintiffs at trial, evidence similar to that provided by LEAF at the Supreme Court of Canada level, with fostering this problematic "portrait of homosexuals as somewhat sexually obsessive."[54] To its credit, LEAF actively denies that "lesbian and gay men are primarily defined by their sexual practices."[55] However, LEAF makes the point and then never returns to it. Instead, LEAF continues to rely on claims that may in fact reproduce stereotypical understandings of the queer community—as seen at a latter point in their factum when they submit that Customs is ill-suited to analyze "materials which are of *fundamental* importance to the social, emotional, sexual and political life of a disadvantaged minority."[56]

Whether or not LEAF intended to produce a dualistic relationship between heterosexual and queer pornography, this is what has in fact happened. LEAF's arguments in *Little Sisters* continue to foster a distinction between heterosexual and homosexual sexual expression wherein the homosexual half of the binary is predominantly heralded as positive/transgressional/healthy, while the heterosexual expression continues

49. Nowlin, *supra* note 25 at 342.
50. *Ibid.* at 344.
51. *Ibid.* citing *Miron v. Trudel.*
52. *Ibid.* at 345.
53. *Ibid.*
54. *Ibid.* at 343.
55. *Little Sisters,* factum of LEAF, *supra* note 6 at para. 36. LEAF cites Nowlin at this point.
56. *Ibid.* at para 41 [emphasis added].

to be seen as negative/conformative/harmful. Of course, LEAF does well to argue that

> the harms-based obscenity analysis must be sensitive to a myriad of factors, some of which include: the sex, race, age, disability and sexual orientation of the participants, characters, and creators; the purpose of the materials; the intended audience; real or apparent violence; consent and dialogue; the nature of the publication, including the relationship of the impugned materials to the entirety of the publication; the framework and manner of production, distribution and consumption; and the benefits to viewers/readers from the production and dissemination of the materials.[57]

Nevertheless, throughout the factum, only evidence about the transgressional and emancipatory impact of queer porn is presented. As a result, the moralism that LEAF claims to have avoided in its *Butler* factum remains intact in its *Little Sisters* intervention. Only this time, the moral subtext is reversed.

As described previously, LEAF made the argument in *Butler* that the interpretation of obscenity should no longer be based on a notion of morality but rather on an analysis of actual harms committed against women as a result of pornography. LEAF claimed that its argument in favour of censorship was not a moral one. Gotell rejects this assertion as being representative of a narrow conception of what constitutes morality. In fact, she claims that feminists have often wrongly ignored the manner in which moral ideas and rhetoric have grounded feminist speech:[58] "While purporting to embrace a politics *sans* morality, anti-pornography feminism has imbued its own assertions of feminist politics with a moral superiority constituting its own claims about sexual representation as 'true,' as 'good,' and as the expression of the best interests of the 'disempowered.'"[59]

Carol Smart argues that by denying morality the anti-pornography rhetoric gains strength.[60] This distinction between sexual politics and sexual morality, she claims, is a false one. Smart contends that while anti-pornography speech denies traditional moral dimensions, the form of the arguments speaks directly to traditional and unreconstructed moral paradigms. This construction establishes sharp dichotomies of "good" and "evil" without any recognition of nuance. Similarly, Cossman highlights

57. *Ibid.* at para. 30.
58. Gotell, *supra* note 31 at 356–7.
59. *Ibid.* at 357.
60. Carol Smart, "Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives," in Lynne Segal and Mary McIntosh, eds., *Sex Exposed: Sexuality and the Pornography Debate* (New Brunswick, NJ: Rutgers University Press, 1992) at 186.

the oversimplification of the anti-pornography feminist arguments in her alternative reading of the *Butler* decision. Due to a never-addressed underlying sexual morality, sexual representation is classified as degrading and dehumanizing, and, at the same time, sexual binaries and hierarchies, of some sex as good and other sex as bad, are constructed.[61]

In *Little Sisters*, dichotomies of homosexual sex as good and heterosexual sex as bad continue to be reproduced. This development can be seen in the shift from a discussion of obscenity law as an issue of morality versus harm as was posited in *Butler* to the recognition of the relationship between morality and benefit. LEAF submitted that those applying obscenity laws should recognize the benefit of queer pornography in order to be sufficiently inclusive so as not to entrench disadvantage and promote harm to the queer community:

> Without the requirement that harm be articulated, obscenity determinations may be filled with little more than discrimination dressed up as morality further dressed up as undue exploitation. Such inappropriate applications promote harm to lesbians and gay men by silencing *legitimate* sexual expression and by encouraging the view that this expression is less worthy of respect and more deserving of prohibition.[62]

LEAF's politics in *Butler*, according to Gotell, reflect a kind of "simplified certainty in which the complexities of sexuality are reduced to an assertion of male domination and pornography is constructed as both the ideological support and the expression of male sexual power."[63] Gotell argues that, in the end, a feminine, passive object is created, and the state is idealized as her protector through its restrictions on pornography. In *Little Sisters*, however, it is the "new and improved" obscenity law that has the potential to harm, and it is the pornography that bestows a benefit. LEAF's argument that "obscenity determinations may be filled with little more than discrimination dressed up as morality" denies that LEAF's determination of homosexual pornography as *legitimate* expression more worthy of respect and more deserving of protection is in fact a moral position. This line of argument echoes what Brenda Cossman refers to as the need to "own up" to the morality that underpins LEAF's arguments. As Smart contends, "[w]e [feminists] are now responsible for the production of knowledge and hence the production of the subject of knowledge. Such a responsibility should not

61. Cossman, *supra* note 32 at 433.
62. *Little Sisters,* factum of LEAF, *supra* note 6 at para. 32 [emphasis added]
63. Gotell, *supra* note 31 at 368.

be felt lightly."[64] Yet LEAF continues to go ahead and replaces old truths (*all* pornography is harmful to *all* women) with new ones: "Lesbian materials, including sexually explicit materials, are important to *all* women and are *essential* to the emotional, social, sexual and political lives of lesbians."[65]

While LEAF goes some distance to deconstructing the uncomplicated and unified legal subject that it put forth in *Butler*, it also continues to fall back on claims about "lesbians" upon which to ground its legal arguments. While LEAF first recognizes that what constructs the category of sexual minority is diverse and intersecting,[66] it then proceeds to group lesbians, gay men, bisexuals, and transgendered persons together so that throughout the remainder of the factum this diverse group's experiences are combined and their differences elided. In *Little Sisters,* the category lesbian or sexual minority is simultaneously complicated and fixed and prioritized. Recognition of the intersecting understanding of identity is adopted and then relegated to the sidelines in order to present a "unified" argument.

It may be then that LEAF has adopted what Janet Halley refers to as a "gay identity project" rather than a "queer project." By a "gay identity project," she means "one that supposes that there are and should be gay men and lesbians [and bisexuals and transgendered people] that are subordinated unjustly, and that justice projects should focus on their equality." By "queer project," she means "one that emphasizes the fictional status of sex, gender, and sexual orientation identity and that affirms rather than abhors sexuality, 'dark side' and all."[67] It is the case that LEAF in *Little Sisters* affirms rather than abhors sexuality, however, this time it wants the state to exercise caution when determining what constitutes the "dark side." LEAF does not, however, destabilize the categorical understandings of sexual identity and its complicated relationship to pornography.

A queer sexuality according to Carl Stychin "seeks to destabilize the entrenched categories of identity and the essentialising of those categories through a discourse of immutability."[68] Stychin claims that it has become increasingly apparent, however, that a tension exists between, on the one hand, the queer desire to deconstruct the categories of identity and render

64. Smart, *supra* note 41 at 50.
65. *Little Sisters,* factum of LEAF, *supra* note 6 at para. 2.
66. *Ibid.* at para. 8.
67. Janet Halley, "Sexuality Harassment," in Wendy Brown and Janet Halley, eds., *Left Legalism/Left Critique* (Durham: Duke University Press, 2002) at 82.
68. Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 153.

them problematic and, on the other, the necessity of asserting coherent categories as a strategy of political reform and transformation.[69] Given that categorical thought is the foundation of the common law method of analysis, Stychin argues that legal strategies might ultimately demand some sort of essentialism.[70] Drawing on Ernesto Laclau and Chantal Mouffe's *Hegemony and Socialist Strategy*,[71] Stychin adopts their notion of an anti-essentialist, "partial fixity" approach to the use of identity as a way out of the precarious relationship between postmodernism and subjecthood. "Identities," he argues, "will always effect exclusions, but a provisional unity and coherence is required to engage in collective political struggles."[72]

Gotell claims, however, that to really push the radical edge of "new egalitarian movements" we need to develop a more complex politics, one that does not assert, depend on, or reproduce the "truth" of a unified queer voice derived from the liberal legal conception of the homosexual subject as essentialized and coherent.[73] Gotell argues that if there is to be a strategy of "partial fixity," legal activists will have to take responsibility for the construction and effects of normalized and homogenous identities that comprise the basis for their strategies.[74] As she writes, "[a]s we develop our legal positions in these cases it is crucial to recognize that it is possible to articulate complexities and nuance within the context of legal strategies."[75]

That said, *Little Sisters*, like *Butler*, is another example of what Gotell identifies as the contradictory nature of LEAF's strategy—one that both facilitates feminist engagement with the law and inhibits feminist politics, when politics is viewed as a space for arguing about feminist norms. Along these lines, Christine Littleton questions why the "divergent views within feminist legal thought appear as a deadly danger rather than an exciting opportunity."[76] Instead, she claims, "we need to recognize difference among women as diversity rather than division, and difference between women and men as opportunity rather than danger."[77]

LEAF at times appears to be wary of divergent views within its organization as opposed to embracing them as an exciting opportunity and

69. *Ibid.* at 140.
70. *Ibid.* at 148.
71. Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy : Towards a Radical Democratic Politics* (London: Verso, 1988).
72. Stychin, *supra* note 68 at 154.
73. Lise Gotell, "Queering Law by Same Sex Marriage??!!" Queering Political Science Panel, Canadian Political Science Association (CPSA), University of Toronto, 2002, at 45.
74. *Ibid.* at 45.
75. *Ibid.* at 46.
76. Christine A. Littleton, "Reconstructing Sexual Equality," in Diana Tietjens Meyers, ed., *Feminist Social Thought: A Reader* (New York: Routledge, 1997) at 721.
77. *Ibid.* at 721.

a means to fulfill its commitment to diversity.[78] LEAF lawyer Karen Busby, in her statements to the press, has described dissent within LEAF as to be expected. While she refuses to publicly speak about this dissent, at least hers was a recognition that dissent does exist. An internal memo within LEAF, however, pleaded for LEAF to "present a *united voice* before the Supreme Court of Canada, not only to assure arguments in this case are given full consideration but also to maintain the *credibility* and *reputation* of LEAF as an intervener in future cases."[79] The utility of internal harmony is echoed by Michele Landsberg when she writes: "Sadly for the radical chic rebels who would love to see LEAF implode with internal strife, LEAF will actually take another—and united—step forward when the *Little Sisters* case goes to court."[80] Who *are* these "radical chic rebels" and where can I find them? Why *not* adopt Smart's claim to regard the law as a site in which to dispute meanings of categories? Why, as Christine Littleton asks, must "divergent views within feminist legal thought appear as a deadly danger rather than an exciting opportunity?"[81]

It appears as if Gotell's description of the "new politics of anti-pornography" has become the "new politics of *pro-homo*-pornography." That is, LEAF's arguments in *Little Sisters* can continue to be seen as privileging certain understandings of sexual representation while marginalizing others. While women as a category, and sexual minorities as a category, need state protection, it is for different reasons. Heterosexual women are passive objects whose bodily integrity needs protection, and sexual minorities are active subjects whose expression needs protection. So, while LEAF abandons the position that pornography has one meaning and that meaning is harm, it only does so by putting forth generalizations about the disproportionate significance of sexuality and sexual expression to gay and lesbian people.[82]

Apart from some of the problems with LEAF's *Little Sisters* factum, I am also disheartened by the fact that attempts at complexity and contingency have not, to date, been successful strategy-wise. For example, the Canadian Civil Liberties Association/Manitoba Association for Rights

78. Dissent within LEAF centred around the position that LEAF was taking in *Little Sisters* and whether or not their role in the case undermined their position in *Butler* and was thus inconsistent with LEAF's mandate. There was some speculation that LEAF's factum would be pulled because of this dissent but this did not happen.
79. Internal memo sent by LEAF Manitoba/Winnipeg branch, 10 January 2000. At the time of this memo, I was acting as interim co-chair of LEAF Toronto.
80. Landsberg, *supra* note 1.
81. Littleton, *supra* note 76 at 721.
82. Nowlin, *supra* note 25 at 344. Nowlin claims that arguments about departmental ignorance and sexism could have been relied upon instead of choosing a strategy that focused so much on personal characteristics (at 346).

and Liberties (CCLA/MARL) and the British Columbia Civil Liberties Association (BCCLA) intervened in *Butler* and, much like LEAF in *Little Sisters,* put forth the assertion of the value of sexual expression to community life—the idea that sexuality is not only something confined to the private sphere. Sexual expression, according to the BCCLA, plays a fundamental role in creating and constituting sexual norms. Sexual speech is, in other words, important precisely because it is political. The BCCLA also emphasized that this form of expression is of particular significance to certain groups within the community. For sexual minorities, sexual speech constitutes a "means of self affirmation in a generally hostile world." For women, as well, "the development of sexual imagery can be a means of finding voice and creating a sexuality that challenges how women have hitherto been constructed."[83] In sum, the BCCLA asserted that sexuality has no essence, that it is a site of conflict and the result of social construction. They rejected the notion of sexuality as inherently dangerous and offered it up as a force of change, liberation, and pleasure. They also rejected the division of sex into "good sex" and "bad sex" and asserted a respect for sexual plurality and diversity. Finally, the BCCLA emphasized the role that pornography might play in the erosion of dominant sexual norms.[84]

According to Gotell, the downfall of these arguments was the Court's refusal to structure the meaning of pornography as neither singular nor apparent.[85] While its critique of a "common sense understanding of sexuality" was a powerful one, "the force of its critique placed its arguments on the outside—outside of dominant understandings of sexuality and outside the kinds of rhetorical strategies privileged in the arena of law."[86] While the BCCLA's arguments reflected our postmodern condition, these arguments were also uncertain and unstable in this "anxiety ridden and stability craving character of these times."[87]

The failure of these arguments at the time may be one reason why LEAF rejected the integration of nuanced arguments about pornography in its *Little Sisters* factum. Whether or not LEAF and other feminist organizations will ever adopt a legal strategy that rejects essentialism and foundationalism is hard to determine. Given the liberal legal framework of Canadian law, we may be limited to Stychin's notion of "partial fixity" as a means to articulating a group identity while at the same time recognizing that identities

83. Gotell, *supra* note 31 at 382–3.
84. *Ibid.* at 384.
85. *Ibid.* at 383.
86. *Ibid.*
87. *Ibid.* at 385.

are fragmented, intersecting, and unstable.[88] In the end though, it seems that as long as there exists burning desire, the flames of passion, and their representation in one form or another, both the bonfire that is the pornography debate, and feminists, will roar on.

88. Stychin, *supra* note 68 at 112.