# Feminist Considerations of Harm and the Censorship of Pornography

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> Yet what are the vices generally known ... which, though deeply felt, eating into the soul, elude description, and may be glossed over! A false morality is even established, which makes all the virtue of women consist in chastity, submission, and the forgiveness of injuries.[1]

## Introduction

Current New Zealand censorship law restricts or prohibits access to materials when they are considered likely to be "injurious to the public good".[2] However, this test is essentially meaningless, since:[3]

> Injury to the public good is a large, wide-ranging category of facts that simply does not lend itself to a where, how, when finding of fact .... [It] is in the same category as public interest which is nearly entirely judgmental.

Consequently, censorship decisions are based on conscious policy considerations rather than absolute rules.[4] Nevertheless, such decisions seem to follow three interrelated areas of inquiry:

(i) determining current community standards;
(ii) inferring the meaning of a work; and
(iii) deciding if the material is harmful.

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1 Wollstonecraft, *The Wrongs of Woman* (1798).

2 See the definitions of "indecent" in s 2 of the Indecent Publications Act 1963 and the Video Recordings Act 1987. See also s 15(1) of the Films Act 1983.

3 *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* [1987] 2 NZLR 80, 91-92.

4 See Hastings, "The Reform of New Zealand's Censorship Law: 'Feminist' Argument and the Freedom of Expression", Sex Industry and Public Policy Conference, Canberra 6-8 May 1991, p1. See also *Society for Promotion of Community Standards v Everard* (1988) 7 NZAR 33, 57.

This article discusses how feminist considerations of the harm of pornography fit into these tests. It also notes the effect of the Films, Videos, and Publications Classifications Bill 1992[5] on these areas.

## Community Standards

Community standards are interpreted as those of the community as a whole, not merely a small segment, as, for example, "a city where a picture was exposed".[6] In this sense, New Zealand is classified as a national community. As a result, the setting of a universal standard must consider all elements of the community and take account of changing mores.[7] These pluralistic considerations were outlined in *Society for Promotion of Community Standards v Everard* ("*SPCS*"):[8]

> [Although] "stern regard must be had to the balanced view of ordinary average people in society" ... the ultimate test is not whether such material affronts such sturdy citizens: the test is whether the material is injurious to the good of the public of whom they form part.

The community standards test is therefore descriptive, not prescriptive. Transgressions must offend the community's tolerance, not its taste. This was explained by the Supreme Court of Canada in *R v Butler* as:[9]

> [Being] concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to.

In New Zealand the Morris Report[10] is considered the most authoritative analysis of community standards to date.[11] The Report notes the increasing adoption of a "feminist" rationale of pornography. This rationale states that the harm of a pornographic work does not arise from its explicitness per se, but from the negative meaning or attitude it implies. It is a rights-oriented argument, based on women's right not to be degraded, humiliated or exploited by their exposure to, or portrayal in, pornography.[12]

The Indecent Publications Tribunal (the "IPT") acknowledged this rationale in the development of its tripartite test.[13] The second limb of this test prohibits:[14]

> Depictions of sexual activity which demean or treat as inherently inferior or unequal any person or group of persons, which are not serious treatments and which are intended as sexual stimuli ... (by way of example, this would include magazines the dominant content of which is the ... close up depiction of genitalia or other body parts ... which reduce a person to her or his sexual parts).

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5 While the Bill has been passed by Parliament, it has not, at the time of printing, been assented to by the Governor-General. It is for this reason that I discuss the new regime in its pre-Act form.

6 *R v Butler* [1992] 1 SCR 452, 476, discussing *R v Kiverago* (1973) 11 CCC (2d) 463 (Ont CA).

7 *R v Dominion News & Gifts* [1963] 2 CCC 103, 116-117 (Man CA).

8 Supra at note 4, at 56, quoting Jeffries J in *Gordon & Gotch*, supra at note 3, at 94.

9 Supra at note 6, at 478.

10 *Pornography: Report of the Ministerial Committee of Inquiry into Pornography* (1989).

11 See *Re "Penthouse" (US) Vol 19, No 5* [1991] NZAR 289, 323.

12 See Hastings, supra at note 4, at p5.

13 The IPT has designed and recently reworked a "tripartite" test. This is, in effect, a set of guidelines to assist interpretation of what is considered "indecent". See *Re Penthouse*, supra at note 11, at 325.

14 Ibid.

A similar approach was taken in *R v Butler.*[15] In determining what would be an "undue exploitation of sex" pursuant to s 163(8) of the Criminal Code, the Supreme Court of Canada also noted a "growing recognition" that material exploiting sex in a "degrading or dehumanising manner" would necessarily fail that test.[16] It reasoned that such depictions place women (and sometimes men) in postions of "subordination, servile submission or humiliation", and this ran against the principle of "equality and dignity for all human beings."[17] A graphic example of such material was cited:[18]

> Women are portrayed in these films as pining away their lives waiting for the huge male penis to come along, on the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe their raison d'être is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.

However, although the basis of a feminist rationale has been recognised, feminist viewpoints "along with [any] other viewpoints"[19] are still only a *part* of the community. Consequently, other, more radical viewpoints have yet had little impact on the censorship process. Two polarised theses are those of Karen DeCrow and Andrea Dworkin. Although both see pornography as an expression of unequal male-female power relations, DeCrow advocates the removal of pornography restrictions. She sees such laws as a greater evil because they reinforce cultural paternalism against women, and suppress women's sexuality.[20] Dworkin defines pornography more widely and sees it as confirming masculine superiority over women in the mind of the reader.[21] One example is her rationale of pregnancy pornography:[22]

> In the male sexual system, the pregnant woman ... shows her sexuality through her pregnancy. The display marks her as whore. Her belly is her sex. Her belly is proof that she has been used. Her belly is his phallic triumph.

## Inferences of Meaning

Meaning is a combination of content and manner of representation. However, whereas content can be objectively determined, interpreting the manner of

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15 Supra at note 6.

16 Ibid, 478.

17 Ibid, 479.

18 Ibid, quoting Ferg J in *R v Ramsingh* (1984) 14 CCC (3d) 230, 239 (Man QB).

19 *Re Penthouse*, supra at note 11, at 329.

20 Précis of affidavit presented on behalf of K. DeCrow, for Penthouse International Ltd, cited in *Re Penthouse,* supra at note 11, at 306.

21 Dworkin, *Pornography: Men Possessing Women* (1981) 44-45, cited in IPT Decision No. 45/93, at p3.

22 Ibid, 222-223, cited in Hastings, supra at note 4, at p8.

representation requires a subjective inquiry. Gonthier J (dissenting) in *R v Butler* explained the importance of a work's representation:[23]

> [I]t is the element of representation that gives this material its power of suggestion, and it seems quite conceivable that this power may cause harm despite the apparent neutrality of the content.

To illustrate this, his Honour gave the example of "an explicit portrayal of "plain" sexual intercourse" and demonstrated that its interpretation is affected by the medium used and immediacy of its representation:[24]

> If found in words in a book, it is unlikely to be of much concern .... If found depicted in a magazine or a movie, the likelihood of harm increases but remains low. [But if] found on a billboard ... it may well be an undue exploitation of sex.

The manner of representation is also affected by what a depiction is seen to imply. It is here that conscious policy decisions are most apparent. An example of the development of feminist interpretations is apparent in a comparison of the *SPCS* case,[25] concerning the video *Pretty As You Feel*, and the more recent Video Recordings Authority ("VRA") decision on *Double Penetrations*.[26] Both considered whether the videos "denigrate[d] any particular class of the general public by reference to ... the sex ... of the members of that class".[27] Both had negligible plot development and both consisted of numerous sequences of explicit sex. They typically included, on a detailed basis, oral sex, intermammary sex, vaginal sex, and some anal sex:[28]

> The treatment of such activity is prolonged and detailed, and frequently on a close-up basis .... There is a considerable emphasis on close up shots of body positions and sexual techniques.

*Pretty As You Feel* was found not to be denigratory. McGechan J considered the male character a "pathetic and inadequate person"; the women involved (who ran a "sex clinic") were, by contrast, "in control of the sexual activity carried on".[29] Overall, he described the video as "a sexual fantasy designed to titillate heterosexual viewers".[30] The conceptual difficulty that his Honour came up against in applying the section was that "denigrate" concerns reputation rather than dignity.[31] Consequently, while women as a class may suffer denigration (as in a

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23 Supra at note 6, at 517. Gonthier J concurred with the majority's rationale and decision. His dissent concerned the degree of effect that "representation" could have on "content", and that moral concerns were still valid in the community standards test.

24 Ibid, 518.

25 Supra at note 4.

26 VRA Decision No. 61591 (Wellington, 6 September 1991).

27 Section 13(2)(d) Films Act 1983; s 21(e) Video Recordings Act 1987.

28 *SPCS*, supra at note 4, at 38.

29 Ibid, 63.

30 Ibid, 61.

31 Ibid, 62.

reference to "women drivers", for example), he considered it a logical fallacy that such a representation of women in a publication could denigrate *all* women.[32] He reasoned that:[33]

> The male mind by no means necessarily associates the woman he [sic] sees in pornographic situations with all women, any more than it associates prostitutes with all women.

However, in *Double Penetrations*, the VRA was able to infer the denigration of all women from its content. The Authority emphasised that the video appeared to indicate:[34]

> [T]hat women engaged in non-sexual activites, such as working or sitting at home, on their own, actively welcome sexual approaches from men.

In this context the appearance of consent is harmful because it impliedly reinforces the validity of certain depictions.[35] The VRA reasoned that:[36]

> [T]hese portrayals conveyed an image of women as being constantly sexually available and welcoming any sexual attention from men, which, it was felt, is denigrating to women.

Furthermore, although *Double Penetrations* contained no overt sexual violence, its language, examples of which referred to a man as a "piledriver" and a woman as "just hamburger", was considered to convey a "contemptuous and abusive" attitude towards women.[37]

Although it is possible that *Double Penetrations* could have been found "injurious to the public good" without considering its representation of women, the decision demonstrates a willingness to interpret such materials as denigratory, and therefore harmful, to all women.

## Considerations of Harm

A depiction will only be censored when it is "injurious to the public good". Implicit in this test is "that at some point the exploitation of sex becomes harmful to the public or at least the public believes it to be so."[38] This is determined to some extent by evaluating a work's "meaning" in light of current community standards. That is, "the public is made the arbiter of what is harmful to it".[39]

Two considerations of harm feature in the censorship process:

(i) identifying the type of harm; and
(ii) linking it to the material under examination.

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32 Ibid. This follows the full court of the High Court in *Gordon & Gotch*, supra at note 3.
33 Ibid, 63.
34 Supra at note 26, at p4.
35 A similar conclusion was reached in *R v Butler*, supra at note 5, at 479.
36 Supra at note 26, at 4.
37 Ibid.
38 *Towne Cinema Theatres v The Queen* [1985] 1 SCR 494, 524.
39 Ibid.

*Identifying the type of harm*

The primary harm identified in pornography is the promotion or reinforcement of negative, stereotyped attitudes towards groups in society.[40] This notion of harm is well summarised in *R v Butler*:[41]

> 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.

The IPT has recently discussed the meaning of "harm" in relation to male homosexual pornography.[42] In considering a number of gay magazines, the Tribunal found that the depictions involved, despite violating the second limb of its test,[43] were not unconditionally indecent because men were harder to demean than women. The depictions contained explicit material, including close-up photographs of male genitalia and body parts, of men in contorted positions, and of men engaged in sexual activity.[44]

Although the Tribunal acknowledged the possibility that pornographic depictions can demean men, this did not occur here. Instead, the basis for its decision was that, despite the same law and policy applying to male homosexual material, the primary harm identified in the Tribunal's test was not present:[45]

> There is no danger of reinforcing negative male attitudes towards women. No women are photographed. Women are not objectified, dehumanised, or demeaned by these photographs.

The IPT's decision is consistent with the application of the mainstream feminist rationale of harm found elsewhere in pornography. However, this decision also highlights how both the Dworkin and DeCrow analyses of harm would be offended. First of all, Dworkin argues that the absence of women in gay male sex magazines reinforces the same hierarchy of "subject over objects" as does their presence in heterosexual depictions:[46]

> Without the presence of the female, masculinity cannot be realised ... so the female is conjured up, not just to haunt or threaten, but to confirm the real superiority of the male in the mind of the reader ... the significance of the penis cannot be compromised.

Furthermore, from DeCrow's approach, the decision of the IPT can be seen as an example of the protections given in law to women over men. It is an example of legal paternalism which, in itself, is harmful.

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40 *Re Penthouse*, supra at note 11, at 328.

41 Supra at note 6, at 485.

42 IPT Decision 45/93, supra at note 21.

43 See supra at note 13.

44 IPT Decision 45/93, supra at note 21, at p3. Compare the decision of the VRA on *Double Penetrations*, supra at note 26, at p4.

45 Ibid.

46 Supra at note 21, 44-45, cited ibid, at 3.

*Linking the harm to the material under examination*

The second consideration is that the likelihood of harm claimed must be "sufficiently real to be discernible or actual".[47] However, to establish the likelihood of harm it is not necessary to prove a causative link to the depiction.[48] Such a requirement would negate the efficacy of censorship. This is explained in *R v Keegstra*,[49] a case concerning the constitutionality of Canadian "anti-hate" propaganda laws. Dickson CJ stated that:[50]

> First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of ... groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group.

Nevertheless, for a work to be found "injurious" it must somehow be assessed in relation to consequences which are more than "[m]ere paranoid possibilities".[51]

*Gordon & Gotch*[52] and *American Booksellers Association v Hudnut*[53] are examples of where the harm claimed was found to be of insufficent likelihood. In *Gordon & Gotch*, it was submitted that the magazines *Fiesta* and *Knave* degraded and consequently denigrated all women. The material in question contained "depictions of awkwardly posed single naked women".[54] However, the Court was not satisfied that denigration of all women was a probable consequence, and considered such an inference to be based on "personal preferences".[55]

*American Booksellers* concerned the constitutional validity of an Indianapolis "anti-pornography" ordinance. The ordinance allowed, essentially, for the prohibition of pornographic material based on a subjective apprehension of harm. In question were various "pregnancy pornography" publications, such as the magazine *Pretty Pregnant*, which contained captioned pictures of heavily pregnant naked women. The ordinance was declared unconstitutional in that:[56]

> [T]he state may not ordain *preferred viewpoints* in this way. The Constitution forbids the State to declare one perspective right and silence opponents.

Furthermore, interpretations of the materials as promoting the "sexualizing of violence against, and the subordination of, women generally"[57] were found untenable. It could not be said that these were likely consequential effects.

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47 *SPCS*, supra at note 4, at 57.
48 *Gordon & Gotch*, supra at note 3.
49 [1990] 3 SCR 697.
50 Ibid, 776.
51 *SPCS*, supra at note 4, at 57.
52 Supra at note 3.
53 771 F 2d 323 (1985), aff'd 475 US 1001 (1986).
54 Hastings, supra at note 4, at p13.
55 Supra at note 3, at 94.
56 De Crow, affidavit for Penthouse International Ltd, p8. Emphasis added.
57 Hastings, supra at note 4, at p9.

**The Films, Videos, and Publications Classifications Bill 1992**

The long-awaited Films, Videos and Publications Classifications Bill reorganises the three existing censorship bodies into one Classification Office. But does the Bill affect existing feminist considerations of harm? Although it will not specifically legislate against harm to women, the Bill may still indirectly extend feminist concerns. This might result from a combination of two factors.

First, the Bill, in addition to the "injury to the public good" test, lists two sets of extremely imprecise "classification criteria" that must be considered when a publication is examined.[58] Clause 3(2) deems certain materials "objectionable".[59] These are generally those materials already banned under existing law, and include material dealing with sexual violence, pædophilia, coprophilia and bestiality. However, also deemed objectionable are "publications" which tend:[60]

> [T]o promote or support ... the use of ... coercion to compel any person to participate in ... sexual conduct.

Clause 3(3) sets out criteria to be considered when examining publications other than those deemed "objectionable". These require, inter alia, that:

> [P]articular weight be given to the extent and degree to which, and the manner in which, the publication
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> [P]articular weight be given to the extent and degree to which, and the manner in which, the publication –
>
> (a) Describes, depicts, or otherwise deals with –
>
> (iii) [S]exual ... conduct of a degrading or dehumanising nature ... [and]
>
> (c) Degrades or dehumanises any person.

These clauses can be interpreted as providing some degree of legislative legitimacy to the development of the implementation of feminist concerns in decisions on pornographic material.

Secondly, in replacing the three existing authorities with the new Classification Office, the Bill is effectively calling for new personnel. Whereas current appointments to the IPT and the VRA are made by the departments of Justice and Internal Affairs respectively, they will now be made by the Minister of Internal Affairs with the concurrence of the Minister of Women's Affairs and the Minister of Justice.[61] The new Film and Literature Board of Review, which replaces the appellate jurisdiction of the High Court on questions other than those of law,[62] will also follow the same appointment process. Although the new process does not presuppose any radical change in the capabilities of those who hold office, appointments to the Classification Office may be more receptive to departmental directives.

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58 See clauses 3(2) and 3(3).

59 The term "objectionable" replaces the out-moded "indecent".

60 Clause 3(2)(b).

61 Clause 72(1).

62 See clauses 82-92.

## Conclusion

As the influence of considerations based on morality has waned, feminist analyses of harm have been accepted by censorship offices and the courts as workable tests to determine the effects of pornography. Nevertheless, these considerations of harm still compete with dominant liberal concerns surrounding censorship of pornography and the freedom of the individual to have access to such matter.

Amid widespread political calls for increased restrictions on pornographic material,[63] the breadth of the Films, Videos and Publications Classifications Bill may provide the opportunity for greater emphasis to be placed on feminist analyses of harm when deciding just what is an injury to New Zealand's "public good".

63 Examples include Hon Jenny Shipley, Minister of Social Welfare, 532 NZPD 12757 (2 December 1992), Christine Fletcher, 532 NZPD 12773 and Hon Katherine O'Regan 532 NZPD 12770 (2 December 1992).