

PORNOGRAPHY AS IDEOLOGY: DOES THE CONSUMPTION OF PORNOGRAPHY PROMOTE A MALE HEGEMONY?

TIM COCHRANE*

Introduction: The Issue of Pornography

Pornography is considered by many to be a taboo subject. Yet the production and consumption of sexually explicit media is a right for New Zealanders under law. Many have defended this as necessary to live in a liberal democratic society. However, some philosophers have questioned this approach, claiming pornography operates as ideology to support a patriarchal society. This essay will conduct a three-stage critical legal studies (CLS)¹ analysis of the treatment of pornography under New Zealand law to consider the validity of such concerns.

A. Does the legislation regulating pornography contain hidden philosophical and moral commitments?

A variety of laws regulate pornography in New Zealand.² These laws have three underlying elements, all of which are considered fundamental tenets of liberal philosophy.

1. The Public/Private Dichotomy

This is the idea that the state should limit its involvement in the

* Candidate for LLB; BA (Hons), University of Otago.

¹ Defined as 'A school of thought advancing the idea that the legal system perpetuates the status quo in terms of economics, race, and gender by using manipulable concepts and by creating an imaginary world of social harmony regulated by law – Bryan A. Garner (ed) *Black's Law Dictionary* (8th ed., 2004); See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard Uni Press, 1986); Mark Kelman *A Guide to Critical Legal Studies* (Harvard Uni Press, 1987); See especially; Matthew H. Kramer, *Critical Legal Theory and The Challenge of Feminism: A Philosophical Reconception; Contra* Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton Uni Press, 1990).

² See generally the Bill of Rights Act 1990 (BOR); Films, Videos and Publications Classification Act 1993; Privacy Act 1993.

personal lives – or ‘private sphere’ – of citizens. Various pieces of legislation in New Zealand support this approach.³

Dyzenhaus believes this public/private distinction in relation to pornography reinforces ‘the consumption [of this material as] a matter of private [...] morality. [...] The state must allow individuals maximum space in which to live according to their own lights.’⁴

2. Freedom of Expression

Another concept underlying liberalism is the ‘free marketplace of ideas’ – a forum in which all citizens freely debate and scrutinise ideas.⁵ To ensure this, liberals endorse a wide freedom of expression, outlined in the Bill of Rights Act 1990.⁶

This extends to the production and consumption of pornography. McRae explains that liberals believe that ‘what one person finds unappealing and even offensive, another person might find erotic and artistic.’⁷ Protecting different notions is important, liberals believe, because individuals should be free to achieve their own conceptions of ‘the good life’.⁸

Tipping J explains that this right ‘is as wide as human thought and imagination’⁹ and should be subject, under section 5 of the Bill of Rights, to ‘only such reasonable limitation[s] on freedom of expression as can be demonstrably justified in a free and democratic society.’¹⁰

³ See Privacy Act 1993, above n 2.

⁴ D Dyzenhaus ‘John Stuart Mill and the Harm of Pornography’ (1992) 102(3) *Ethics*, 534-551, 535.

⁵ *Ibid.*

⁶ Bill of Rights Act 1990, above n 2, s 14; See also *R v Secretary of State for the Home Department, Ex Parte Simms* [1999] UKHL 33: ‘the free flow of information and ideas informs political debate. It is a safety valve.’

⁷ H McRae ‘Morality, Censorship, and Discrimination: Reframing the Pornography Debate in Germany and Europe’ (2003) 10(3) *Social Politics*, 314-345.

⁸ Dyzenhaus, above n 4, 536.

⁹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (*Moonen*).

¹⁰ Bill of Rights Act 1990, s 5, above n 2.

3. The Harm Principle

The final concept concerns how and when harm is recognised under the law. The only ‘reasonable limitation[s]’ to the freedom of expression occur when ‘expression’ causes harm¹¹ to another. There are two important points: first, clear causation must be shown between the ‘harm’ and the alleged cause¹²; second, harm is defined very narrowly.¹³

This principle supports allowing most pornography because, as Vadas advises ‘[i]f you don’t like the pictures, friend, just don’t look.’¹⁴ But to quell fears, material can be classified as ‘objectionable’ under the Films, Videos and Publications Classification Act 1993 if ‘injurious to the public good’¹⁵

Prima facie, these underlying assumptions seem positive. They appear to support freedoms of all citizens equally. However, on closer inspection, the operation of these elements in terms of pornography reveals they support a male hegemony at the cost of freedoms of females in society.

B. Do these underlying commitments in the law tend overall to support the continued power of some groups over others?

The groups in issue are males and females. Pornography operates to support a patriarchal society through, initially, the portrayal of women in pornography and, subsequently, the effects this portrayal has on society. Each element will be re-examined to reveal this support.

¹¹ Dyzenhaus, above n 4, 536. Harm is defined as more than just offence.

¹² This was described, in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* [2005] 3 NZLR 403 as ‘a real or material or substantial risk’ of harm; in ‘in marginal cases’, explained Tipping J in *Moonen* [2000] 2 NZLR 9, above n 10, the court will ‘favour freedom of expression over objectionability [sic]’.

¹³ Dyzenhaus, above n 5, 535; See also, *Bill of Rights*, above n 2, s 6. This requires a narrow definition of ‘harm’ in legislation for consistency with s 14.

¹⁴ M Vadas ‘A First Look at the Pornography/Civil Rights ordinance: Could Pornography by the Subordination of Women?’ (1987) 84 *The Journal of Philosophy* 9, pp. 487-511.

¹⁵ For example, under s 3(2) material that ‘tends to promote or support’ illicit behaviour can be banned.

1. Public/Private Dichotomy

The belief that the state should limit involvement in the private sphere necessarily requires that individuals should be free to pursue their own interests there. For pornography, this has three effects:

Firstly, '[p]orn is consumed in a private realm'.¹⁶ By claiming that intervention in this arena is wrong, the state leaves men free to 'consume' as much pornography as they desire. This material directly affects how citizens view the roles of the sexes.¹⁷

Furthermore, as Dyzenhaus writes, 'the particular character of pornography is that its consumption generally takes place in private, in the same place of much of the relationship of subordination of women to men is acted out'.¹⁸ Thus, the state, by distinguishing between spheres, leaves men free to exert their dominance simply because this is done in 'private'.¹⁹

Thirdly, without proof of 'overt violence or coercion', the state is reluctant to interfere in this sphere. This disproportionately affects women, who spend more of their lives in this arena, as opposed to the 'public' sphere.²⁰

Lacey believes 'the private consumption of porn inevitably impacts on this public status of women'.²¹ The distinction is said to protect the rights of all citizens. In reality, it allows the reinforcement of male dominance through the consumption of pornography and the freedom (supported through this consumption) for males to constrict the rights of females in this 'private' arena.²²

¹⁶ Dyzenhaus, above n 4, 536.

¹⁷ C R. Sunstein 'Pornography and the First Amendment' (1986)(4) *Duke Law Journal* 4, pp. 589-627.

¹⁸ Dyzenhaus, above n 4, 537.

¹⁹ N Lacey 'Theory into Practice? Pornography and the Public/Private Dichotomy' 20(1) *Journal of Law and Society* 1, pp. 93-113.

²⁰ McRae, above n 8; See also Catherine Itzen *Pornography: Women, Violence and Civil Liberties* (Oxford, Oxford University Press, 1992), 577. 'A [...] woman's home is the place where she is most vulnerable to exploitation and abuse'.

²¹ Lacey, above n 19.

²² Dyzenhaus, above n 4, 537.

2. Freedom of Expression

Some limitations are considered acceptable to this freedom.²³ Liberals claim pornography is already quite limited. For example, any material that is ‘degrading or dehumanising’ to women can be declared ‘objectionable’²⁴. However, this limitation also operates to reinforce male dominance.

By justifying material on the grounds of freedom of expression, the dominant group attempts to legitimise their view of females, on both an individual and a societal level. This is achieved because, as Sunstein remarks, much of this material – promoting male dominance – ‘bypasses the process of [...] debate that underlies the concept of the marketplace of ideas’. Pornography as expression does not operate in the manner in which expression is meant to – to facilitate debate and discussion. It works in precisely the opposite way, at ‘a subconscious level, providing a form of social conditioning that is not analogous to the ordinary operation of freedom of speech.’²⁵

Pornography typically depicts females in submissive roles, portraying the ‘inferior’ party.²⁶ Viewing females consenting to such submissive sexual roles has the effect of legitimising such female submission in society in general. As Dyzenhaus explains: [I]t is the portrayal of consent, not of force and coercion [...] that legitimises inequality and subordination’.²⁷

Furthermore, by disguising the consumption of pornography as a fundamental ‘freedom’ it is legitimised in the eyes many individuals of both genders:²⁸ Shaw describes a survey of females who expressed

²³ For example, the Defamation Act 1992 prohibits untrue attacks in order to protect people’s characters.

²⁴ *Films, Videos and Publication Classification Act*, above, n 3, s 3(2) (explained above n 13).

²⁵ Sunstein, above n 17.

²⁶ For example, pornography involving anal sex, blow jobs and similar are often considered worthy of an ‘R18’ rating. C.f. the New Zealand Censorship Database - <http://www.censorship.govt.nz/oflcdd/home.asp> - lists, as some titles classified R18: ‘Anal Takeover’, ‘...Like a Dog’, and ‘Anal Fever’.

²⁷ Dyzenhaus, above n 4, 538.

²⁸ *Ibid.* Dyzenhaus explains this may create a ‘false consciousness’ which would render the views of women who support pornography as ‘false’. These women cannot know

'reluctance to speak out against this type of activity. [...] The women seemed to feel that their opinions and feelings were somehow not 'legitimate' because of their partners' freedom of choice and individual rights.'²⁹

Diamond explains that conceptualising the consumption of pornography as involving 'abstract rights and principles' disconnects pornography from the 'grim reality in actual communities'.³⁰ Despite this 'freedom', women are subjected in a variety of ways, ranging from feelings of obligation – that the woman's place is at home with the children – to physical acts of assault and rape.³¹

Analysis of these two concepts has shown how males use underlying assumptions to support their consumption of pornography. However, the final element is the most important. Unless harms can be identified that the status quo does not recognise – because of an ideological application of the harm principle – pornography cannot be viewed as a tool of a patriarchal dominant group.

3. The Harm Principle

In two different ways, this 'principle' allows for the subjugation of women by males. The first involves the benefits males gain at the cost of females by legislating against material that does fall within this principle. The second involves the interpretation of this principle by the courts.

When legislating, the dominant group does prohibit some material. This typically involves clearly heinous acts, e.g. 'a young woman [...] and a dog.'³² By outlawing such material, the dominant group seeks to consolidate its hold on power in two ways.

what they really desire because they have never experienced a state of 'pure equality'.

²⁹ S M. Shaw 'Men's leisure and women's lives: the impact of pornography on women' (1999) *Leisure Studies* 18, 197-212.

³⁰ I Diamond 'Pornography and Repression: A Reconsideration' (1980) 5 *Signs* 4, pp. 45-77.

³¹ Sunstein, above n 17.

³² *R v Sinclair* unreported, CA, 258-03, October 22, 2003, Glazebrook, Baragwanath & Goddard JJ.

Firstly, they appear to be on the side of the oppressed group – females – by lieu of legislation outlawing some of this material. However, material that is obviously demeaning, e.g. rape, is not as ideologically effective as subtler material can be because the oppressed group will never accept it. In contrast, as Shaw points out, many females believe the consumption of ‘mainstream’ pornography to be acceptable for males and this is therefore the material that can have stronger ideological effects.

Therefore, the second way males use this principle to strengthen their dominance is to use it to successfully disguise the ideological operation of this ‘freedom’.³³ The harm principle – by requiring a high threshold – means ‘degrading or dehumanising’ is defined narrowly, leaving much ideological material free to permeate society.

The courts also use this principle to consolidate male dominance. The words ‘degrading or dehumanising’³⁴ are interpreted by the courts in a way that fails to take into account the many harms caused by pornography. Sunstein writes:

Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes [...] pornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it.³⁵

Pornography often depicts women in a (limited) variety of subservient poses and roles.³⁶ As McRae explains, ‘pornography may be violent, or it may imply violence through its portrayal of women and their subordination of men.’³⁷

Pornography also has a structural effect on the minds of those who view it. This is disregarded by the courts. Rhode states:

Most males first learn about sex through pornography, and the

³³ Robin Morgan *Goodbye To All That* (Know, Inc, 1971), p. 10 described this tactic as ‘[T]he liberal co-operative masks on the face of sexist hate and fear’.

³⁴ Film, Videos and Publication Classification Act 1993, above n 2, s 3(2).

³⁵ Sunstein, above n 17.

³⁶ Ibid.

³⁷ McRae, above n 7.

messages it sends are not exactly calculated to encourage relationships or mutual respect, caring and intimacy... [by] link[ing] sexual pleasure with female degradation.³⁸

Studies have shown a strong correlation between pornography and later sexual deviance.³⁹ Furthermore, females' thinking is also structured by pornography. One typical belief is that 'if you figure men are comparing you to that type of body [in pornography], then you probably don't feel as good about yourself as you should [...] I think it makes them look down on us.'⁴⁰

In contrast, when adults are involved, the courts are much more reluctant to ban the material.⁴¹

The judiciary also uses this principle to argue that 'correlation' between (even accepted) harms is insufficient. One film, *Visitor Q*, was deemed acceptable for limited consumption in New Zealand – despite showing acts of rape and necrophilia – because it was filmed from a detached point of view and did not 'promote or support' the actions. The courts use the fiction that explicit material cannot encourage men to commit such acts unless it overtly encourages them.⁴²

Lacey again provides an apt summary: 'the profusion of the pornographic regime of representation inevitably effects the social constitution of femininity [...] and hence [...] the status of all women.'⁴³ By ignoring much of the negative effects pornography causes and by requiring clear cause-and-effect between harms and

³⁸ Deborah L. Rhode, *Speaking of Sex: the Denial of Gender Inequality* (Cambridge, MA: Harvard University Press, 1997), 60.

³⁹ Dr G Ratcliffe 'An integrated approach to the origins of sexually abusive behaviour' (1996) 2(1) *Feminist Law Journal*, 14.

⁴⁰ Shaw, above n 29. Such beliefs arise because females are blinded by the 'freedom of expression' to believe that pornographic material should be allowed to exist in the private sphere. The fact that females accept the consumption of pornography on these grounds shows the power of the dominant ideology.

⁴¹ See n 26 for examples of demeaning material that is legal in New Zealand.

⁴² *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* [2005] 3 NZLR 403; see also Sunstein, above n 17; *Contra the Smoke-free Environments Amendment Act 2003* amending the *Smoke-free Environments Act 1990* – in this, mere correlation is considered enough to protect citizens from the 'harms' of smoking.

⁴³ Lacey, above n 19.

pornography, the dominance of males is reinforced.

The final step in a CLS analysis is to ask whether such domination can be justified.

C. Are the existing power relationships undesirable?

Any conclusion supporting this dominance is indefensible. Women deserve real equality. It is ironic that one of the main elements supporting this patriarchy – freedom of expression – is considered a fundamental right and resides in the same document as a supposed ‘right from discrimination’.⁴⁴

Conclusion

What should those seeking change do from here? Many feminists have sought to have pornography recognised as discrimination. But this approach would alienate many females who do enjoy viewing pornography.⁴⁵ Many women find consuming pornography empowering.⁴⁶

Also, restricting pornography risks further restricting women’s freedoms.⁴⁷ Strossen believes restriction could ‘jeopardise [...] free speech precedents and principles’.⁴⁸ After a stringent censorship law was adopted in Canada⁴⁹, over half of the gay and feminist bookstores there had material seized.⁵⁰

Thirdly, just as pornography is depicting a certain view of women (as subservient) the prohibition of pornography depicts another stereotype

⁴⁴ Bill of Rights, s 19, above n 2.

⁴⁵ But see Dyzenhaus, above n 4 (explained above n 28).

⁴⁶ M Vadas ‘A First Look at the Pornography/Civil Rights ordinance: Could Pornography by the Subordination of Women?’ (1987) 84(9) *The Journal of Philosophy*, 487-511.

⁴⁷ Ibid.

⁴⁸ N Strossen *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (New Ed Edition, NY University Press, 2000), 117.

⁴⁹ *R v Butler* [1992] 1. S.C.R. 452.

⁵⁰ L S. Chancer ‘Feminist Offensives: ‘Defending Pornography’ and the Splitting of Sex from Sexism’ (1996) 48(3) *Stanford Law Review*, 739-760.

(as frigid and un-sexual). The US Supreme Court described such a restriction as 'thought control,' since it 'establish[es] an approved view of women, of how they may react to sexual encounters, [and] of how the sexes may relate to each other.'⁵¹

The subjugation of females would not be stopped by restricting access to pornography. It is only one of many elements supporting male dominance.⁵² Narrowing the focus will blunt further debate on these other elements. Instead, females should seize a tool being used by males – freedom of expression – and turn it back on them to amplify feminist concepts.

What is required is more freedom, not less.⁵³ Only through forcing real debate – in either sphere – can the ideological chains of male oppression be broken and true equality achieved.

⁵¹ *American Booksellers Ass'n v Hudnut* 771 F.2d 323, 328 (7th Cir. 1985).

⁵² *Ibid.*

⁵³ Chancer, above n 50.