

GAY MALE PORNOGRAPHY: AN ISSUE OF SEX
DISCRIMINATION (VANCOUVER, CANADA:
UBC PRESS, 2004) BY CHRISTOPHER N
KENDALL

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I INTRODUCTION

Speaking out against pornography, and in particular the individual and systemic harms it causes, is a difficult task. Firstly, there is the risk of being labelled a 'moral crusader', attempting to paternalistically censor freedom of speech and the sexual activities of consenting adults.¹ Secondly, those who oppose pornography are accused of defying legal logic by arguing that pornography causes harm, which is alleged not to be scientifically quantifiable.²

The task of speaking out against pornography is made even more

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1 An example of a civil libertarian approach in which pornography is defended as free speech is adopted by Nadine Strossen, President of the American Civil Liberties Union. See for example, Nadine Strossen, 'Hate Speech and Pornography: Do we have to choose between Freedom of Speech and Equality' (1995-1996) 46 *Case W. Res. L. Rev.* 449; See Nadine Strossen, 'Preface: Fighting Big Sister for Liberty and Equality' (1993) 38 *N.Y.L. Sch. L. Rev.* 1 where she states at 8:

we are convinced that censoring sexual expression would actually do more harm than good in terms of women's rights and safety. Therefore, we adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms - our freedoms to read, think, speak, write, paint, dance, dream, photograph, film and fantasize as we wish - but also because it would undermine our equality, our status, our dignity, and our equality. Women should not have to choose between freedom and safety, between speech and equality, between dignity and sexuality. We insist on the right to enjoy the thrills of sex and sexual expression without giving up our personal security. We can exercise our speech and our equality rights to denounce any sexist expression of any sort - including sexist expressions that are also sexual - rather than seeking to suppress anyone else's rights.

2 See eg, Nadine Strossen *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995) 183 - 184 where Strossen argues that pornography does not cause any provable harm.

3 See eg, Carl F Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995).

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difficult if one is speaking of the harms of gay male pornography, which is perceived by many gay men to be empowering.³ This is because some argue that gay male pornography provides positive representations of gay male sexuality in a homophobic society – a society in which gay male identity is stifled and censored by compulsory heterosexuality.⁴ Christopher Kendall, a gay male academic and long time opponent of the production and distribution of gay male pornography, has not been afraid to face these criticisms.⁵ Kendall's latest book '*Gay Male Pornography: An Issue of Sex Discrimination*' is no exception.⁶

II A SEX EQUALITY APPROACH TO PORNOGRAPHY

Kendall argues that gay male pornography, like heterosexual pornography, should be regulated as an issue of sexual inequality discrimination, as opposed to a censorship (obscenity) approach that is premised upon notions of morality.⁷ For him, gay male pornography does little more than reinforce that gendered power inequalities that harm all women and all gay men. Kendall adopts the sex discrimination approach first formulated by feminist attorney and law professor Catharine MacKinnon and feminist writer Andrea Dworkin in the United States. This approach was given legal expression in the form of an anti-

4 Carl F Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995), 63 where he states:

Gay male pornography may be particularly well situated as a point of resistance in an oppositional discourse to male dominance. This is because it makes visible what has been made invisible by male heterosexual culture. While gay male pornography may be a forum for the construction of male sexuality, it also represents a marginalised sexuality that is culturally outlawed.

- 5 See eg, Christopher N Kendall 'Gay Male Pornography and the Pursuit of Masculinity' (1993) *Saskatchewan Law Review* 21; Christopher N Kendall 'Gay Male Pornography's Harms: An Issue of Sex Discrimination' (1995) 5 *Australian Feminist Law Journal* 81; Christopher N Kendall, 'Gay Male Pornography and the Sexualization of Masculine Identity', in L. Lederer and R. Delgado, eds. *The Price we Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* (New York: Farrar, Strauss & Giroux, 1995), 102; Christopher N Kendall, 'Gay Male Pornography after Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality' (1997) 12 *Wisconsin Womens' Law Journal* 21; Christopher N Kendall, 'Gay Male Pornography/ Gay Male Community: Power without Consent, Mimicry Without Subversion' in J. Kuypers, ed., *Men and Power* (Halifax: Fernwood Press, 1999), 86-105; Christopher N Kendall 'The Harms of Gay Male Pornography: A Sex Equality Perspective Post Little Sisters Book and Art Emporium' (2001) 10 *Gay and Lesbian Law Journal* 43; Christopher N Kendall and Russell Funk, 'Gay Male Pornography's 'Actors': When Fantasy Isn't', in Melissa Farley, *Prostitution, Trafficking, and Traumatic Stress* (New York: Haworth Press, 2003).
- 6 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004).
- 7 For a critique of a morality (censorship) approach and the failure of such an approach to address the harms of pornography, see Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), ch 11.
- 8 Kendall discusses the Ordinance at 1-2 in his book. Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 183-

pornography Civil Rights Ordinance.⁸

The Ordinance originated in 1983, when MacKinnon and Dworkin were approached by residents of two working class areas of Minneapolis to help them draft a zoning ordinance which would only permit pornography to be sold in specified low income neighbourhoods.⁹ MacKinnon and Dworkin convinced the relevant Zoning and Planning Committee that this would only legitimise pornography and convinced them that the Ordinance should adopt a sex equality (civil rights) approach.¹⁰

The Ordinance drafted by MacKinnon and Dworkin, addressed pornography as a civil rights issue, or in other words, an issue of sex discrimination. The Ordinance empowered those harmed in or by the production and distribution of pornography by allowing them to sue the makers and distributors of pornography to obtain damages and injunctive relief and to stop pornography being sold, exhibited and distributed. The Minneapolis Ordinance was enacted but vetoed by the Mayor.¹¹ In 1984, Indianapolis passed a similar Ordinance as legislation that was later held to be unconstitutional because it was a violation of the right to freedom of speech, protected by the United States' Constitution.¹²

III JUDICIAL RECOGNITION OF PORNOGRAPHY AS AN ISSUE OF SEX DISCRIMINATION: BUTLER AND LITTLE SISTERS.

In '*Gay Male Pornography: An Issue of Sex Discrimination*', Kendall provides a detailed analysis of the Canadian Supreme Court decisions of *R v Butler*¹³ ('*Butler*') and *Little Sisters Book and Art Emporium v Canada (Minister for Justice)*¹⁴ ('*Little Sisters*'). Although the decision in *Little Sisters* was the subject of much criticism in the gay and lesbian communities, Kendall argues that the decision was the correct one because the decision upholds the sex equality approach from *Butler* (which concerned heterosexual pornography) and correctly finds that gay male pornography violates the equality rights of all Canadians (gay

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9 The history of the Ordinance is outlined by MacKinnon and Dworkin in Catharine A MacKinnon, and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Boston: Harvard University Press, 1997).

10 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004).

11 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004).

12 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004). See also *American Booksellers Association v Hudnut* 771 F 2d 323 (7th Cir. 1985).

13 [1992] 1 SCR 452.

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and non-gay) guaranteed by the Canadian Charter of Rights and Freedoms. He writes:

Despite the best efforts of Little Sisters and others to justify lesbian and gay pornography as life affirming and liberating, Canada's highest court has now ruled unequivocally that gay and lesbian pornography, simply because it is gay or lesbian, is not harm-proof and is not, therefore, Butler-proof. This strengthens the sex equality analysis of pornographic harm articulated by the Court in its earlier free speech and equality jurisprudence and, in so doing ensures that Canada remains at the forefront of judicial efforts aimed at ensuring that gender equity remains a central human and legal value.¹⁵

In both *Butler* and *Little Sisters*, the Canadian Supreme Court had to consider whether legislation that regulated pornography was unconstitutional on the grounds that the legislative provisions in question offended freedom of expression, guaranteed by s 2(b) of the *Canadian Charter of Rights and Freedoms* ('the Charter'). Section 2(b) provides that:

Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression including freedom of the press and other media communication.¹⁶

In *Butler*, the legislation in question was s 163 of the *Canadian Criminal Code*. In *Little Sisters*, provisions of the *Customs Act* and *Customs Tariff* were challenged.

The issue before the Canadian Supreme Court in both cases was whether s 2(b) had been contravened by the legislation, and if so, whether the contravention was justified under s 1 of the Charter which provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁷

A *BUTLER*

In *Butler*, the appellant Donald Victor Butler, the owner of a store called the 'Avenue Video Boutique' in Winnipeg, Manitoba which sold 'hardcore' videotapes and magazines as well as sexual paraphernalia¹⁸, made a constitutional challenge to his convictions for selling and

14 [2000] 2 SCR 1120.

15 Christopher N Kendall *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), xi.

16 *Constitution Act 1982* being sch B to the *Canada Act 1982* (UK) clause 11, Part 1 s 2(b) *Canadian Charter of Rights and Freedoms*.

17 *Constitution Act 1982* being sch B to the *Canada Act 1982* (UK) clause 11, s 1 *Canadian Charter of Rights and Freedoms*.

possessing obscene material. Butler argued that s 163 of the Canadian *Criminal Code* contravened his freedom of speech and expression guaranteed by s 2(b) of the Charter.

The court in *Butler* held that s 163 did contravene constitutionally guaranteed freedom of expression in s 2(b) of the Charter because 'both the purpose and effect of s 163 are specifically to restrict the communication of certain types of materials based on their content' and 'to prohibit certain types of expressive activity'.¹⁹

The Court also held that this violation was justified under s 1 of the Charter because 'the objective of avoiding harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression'.²⁰

In reaching its decision that s 163 was a justifiable infringement of freedom of expression, the court adopted a sex equality approach to pornography. The court recognised that pornography was a means of creating and sustaining systemic gender inequality that was so harmful to women in society that it warranted restrictions being imposed by Parliament.

The court noted that the message of inequality portrayed by pornography was analogous to hate propaganda²¹ and that after considering social science evidence, that there was a 'causal relationship between obscenity and the risk of harm to society at large' and that 'the relationship between pornography and harm was sufficient to justify Parliament's intervention'.²²

B *Little Sisters*

Little Sisters concerned a similar constitutional challenge, however the pornography in question in *Little Sisters* was specifically gay and lesbian in content, as opposed to the heterosexual. The appellant, Little Sisters Book and Art Emporium ('Little Sisters'), owned a book-store in Vancouver, Canada.²³

Since its establishment in 1983, Little Sisters had experienced ongoing difficulties in importing books and magazines into Canada from the

18 *R v Butler* [1992] 1 SCR 452, 461 (Sopinka J).

19 *R v Butler* [1992] 1 SCR 452, 489 (Sopinka J).

20 *R v Butler* [1992] 1 SCR 452, 498 (Sopinka J).

21 *R v Butler* [1992] 1 SCR 452, 501 (Sopinka J).

22 *R v Butler* [1992] 1 SCR 452, 501 (Sopinka J).

23 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1136 (Binnie J) and at 1206 (Iacobucci J).

24 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR

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United States because, pursuant to Customs Legislation, Canadian Customs would often delay, seize or order shipments of books and magazines to be returned to the sender.²⁴ This caused Little Sisters financial hardship and resulted in some suppliers refusing to make further shipments of goods to Little Sisters.²⁵ The court noted that imported materials destined for gay and lesbian bookstores 'were subjected to delays and seizures that were not only unjustified but disproportional'.²⁶

Little Sisters argued that the sections of the *Customs Act* and *Customs Tariff* in question, infringed s 2(b) and s 15(1) of the Charter in their application to gay and lesbian books and magazines. Section 15(1) provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.²⁷

Little Sisters argued that *Butler's* harms-based interpretation of s 163(8) of the *Criminal Code* should not apply to gay and lesbian 'publications'.²⁸ Central to Little Sisters' argument was the assertion that:

... homosexual erotica plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream. Erotica provides a positive representation of what it means to be gay or lesbian. ... As such, it is argued that sexual speech in the context of gay and lesbian culture is a core value and Butler cannot legitimately be applied to locate it at the fringes of s 2(b) expression. ... Erotica, they contend, plays a different role in a gay and lesbian community than it does in a heterosexual community, and the Butler approach based, they say, on heterosexual norms, is oblivious to this fact. ... Gays and lesbians are defined by their sexuality and are therefore disproportionately vulnerable to sexual censorship.²⁹

The Canadian Supreme Court held that the Customs legislation did infringe the constitutional right to freedom of expression in s 2(b) of the

1120,1136 - 1137 (Binnie J).

25 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1136 - 1137 (Binnie J).

26 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1184 (Binnie J).

27 *The Charter* quoted in *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1144 (Binnie J).

28 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1154 -1155 (Binnie J).

29 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1155 (Binnie J).

30 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1205 (Binnie J).

31 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR

Charter.³⁰ However, as in the *Butler* case, the court found that this infringement was justified by s 1 of the Charter because applying the equality approach from *Butler*, gay and lesbian pornography also infringed the sex equality interests of the Canadian public.³¹

The Court also held that Little Sisters' rights were not disproportionately discriminated against by the Customs legislation and therefore did not violate s 15(1) of the Charter.³² Rather, it was customs officials, as opposed to the legislation itself, who disproportionately discriminated against gay and lesbian materials imported by Little Sisters. Customs officials did so by disproportionately targeting these imports and by failing to apply the sex equality test first outlined in *Butler* - opting instead to restrict materials that they deemed 'morally offensive'.

In *Little Sisters*, the Canadian Supreme Court recognised that gay male pornography could be as individually and socially harmful as heterosexual pornography:

the *Butler* analysis does not discriminate against the gay and lesbian community. *Butler* is directed to the prevention of harm, and is indifferent to whether such harm arises in the context of heterosexuality or homosexuality.³³

The harm, according to the court, was that of gender inequality. Kendall supports this finding, arguing that the Court's ruling that the *Butler* test could be applied to gay male pornography, while criticising Canada Customs for failing to apply the test in a non-discriminatory manner, offers the gay male community and anti-pornography feminists an opportunity to work together to fight against sexism and homophobia - something, he argues, gay men have failed to do by defending their use of pornography.

IV A SEX EQUALITY APPROACH APPLIED TO GAY MALE PORNOGRAPHY

Central to Kendall's work on gay male pornography is his assertion that, rather than being a source of liberation and a positive affirmation of gay male identity, gay male pornography can be as harmful as heterosexual pornography in that it celebrates and sexualises inequality. Kendall argues, like Catharine A. MacKinnon and Andrea Dworkin, that a sex equality approach should be adopted (as opposed to a censorship/morality approach) to regulate gay male pornography. He writes:

'The coupling of two biological males does nothing to destabilize sexual

1120, 1155 (Binnie J).

32 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR 1120, 1205-1206 (Binnie J).

33 *Little Sisters Book and Art Emporium v Canada (Minister for Justice)* [2000] 2 SCR

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and social power inequalities divided along gender lines if those behaviours - central to the preservation of gender hierarchy (cruelty, violence, aggression, homophobia, sexism, racism, and ultimately compulsory heterosexuality through which heterosexual male dominance is preserved) - are not themselves removed from the presentation of sexuality as power-based. Because gay male pornography sexualizes gender stereotypes and the inequalities inherent in them, it reinforces those behaviours and characteristics that ensure heterosexuality remains the norm and is compulsory because it does little to advance a model of gay identity that subverts those socially prescribed gender roles that ensure and enforce heterosexual male privilege.³⁴

Kendall argues that gay male pornography is a source of homophobic oppression and inequality for gay men because it sexualises dominance and submission and the sex-based, patriarchal hierarchies that flow from a system in which 'male' is top and 'female' is bottom. Kendall writes that the gender hierarchies in gay male pornography mimic those in heterosexual pornography and consequently serve to reinforce inequality between men and all women and men and gay men. By maintaining these hierarchies, Kendall argues, gay male pornography buys into the very system it seeks to subvert - a homophobic power structure in which heterosexuality is compulsory and in which gay men, like all women, are inferior and unequal.

Kendall illustrates this point by painstakingly analysing the exhibits that were in issue in *Little Sisters*. Kendall himself attended the Civil Exhibits Division of the British Columbia Court of Appeal in Vancouver in order to summarise these exhibits.³⁵ His analysis of the exhibits in question illustrates that there is little to redeem them 'as a source of equality, justice and freedom'³⁶, with many of the materials being violent, degrading, dehumanising and detailing torture and sexual mutilation - the very antithesis of equality:

What all these examples provide is a sexualised identity politic that relies on the inequality found between those with power and those without it; between those who are dominant and those who are submissive; between those who are top and those who are bottom; between straight men and gay men; between men and women. From these and other materials, we are told to glorify masculinity and men who meet a hyper-masculine, muscular ideal. The result is such that men who are more feminine are degraded as "queer" and "faggots" and are subjected to degrading and dehumanizing epithets usually used against women. These men are in turn presented as

1120, 1155 (Binnie J).

34 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 108.

35 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 54.

36 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004), 53.

37 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination*

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enjoying this degradation. In sum, they reinforce a system in which, as MacKinnon explains, 'a victim, usually female, always feminized' is actualized. Insofar as sex equality is concerned, the result is the promotion and maintenance of those gendered power inequalities that reject a non-assimilated gay male sexuality and ensure that homophobia and sexism remain intact.³⁷

Kendall's in-depth analysis of the actual content and resulting message of the gay male pornography available to gay men today tackles his critics' arguments head on. He does so with a level of courage and intellectual rigour that more writers would do well to emulate. His analysis is bullet-proof, honest and quite plainly exposes gay male pornography as anything but positive and affirming representations of gay male sexual expression.

V CONCLUSION

'*Gay Male Pornography: An Issue of Sex Discrimination*' is the book that the pornography debate simply had to have. There is no doubt that this book will rate as one of the most important texts on gay male pornography this century. This book is also critically important for victims of incest and sexual assault whose voices are consistently berated and silenced by those who enjoy pornography and who benefit financially from the pornography industry. It offers hope for all persons concerned about inequality and discrimination and paves a much-needed path for a greater commitment by gay men to the feminist struggle against sexism and homophobia. As Kendall himself notes:

This book offers a different perspective on the role of pornography in gay men's lives, in the hope of convincing at least some to align themselves with those feminist women and pro-feminist men who take sex equality seriously. The decision of the Supreme Court of Canada in *Little Sisters* provides a unique opportunity for gay men, who quite rightly oppose the unjustified state suppression of legitimate sexual expression, to support women committed to eliminating the many sources of sexual subordination and to assist them in gaining equality.³⁸

(Vancouver: UBC Press, 2004), 59.

38 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination*

(Vancouver: UBC Press, 2004), 188-189.