Sexually Expressive Materials for Gay Men: Sex Discrimination or Subversive Potential?

Donn Short, *University of Manitoba School of Law*
REVIEW ESSAY

SEXUALLY EXPRESSIVE MATERIALS FOR GAY MEN: SEX DISCRIMINATION OR SUBVERSIVE POTENTIAL?


... [A]ccomplishing little more than the reinforcement and promotion of ... gender hierarchies central to sex discrimination and homophobia, gay male pornography is itself an issue of gender inequality. Specifically, it offers gay men little alternative but to conform to hyper-masculinity or to ape femininity. Applying the harms-based test articulated in Butler, where materials pose a threat to systemic equality and violate society's sex equality interest, gay male pornography can be seen to result in harm.¹

I. INTRODUCTION: LITTLE SISTERS

On 15 December 2000, the Supreme Court of Canada issued its decision in the Little Sisters² case, assuring us that the Butler³ obscenity test was as appropriate for gay, lesbian, and bisexual sexually expressive materials as it had been for heterosexual materials. Judging by the “revved-up-lights-out” writing style of the prose in Gay Male Pornography: An Issue of Sex Discrimination, December 15, 2000, was a happy day for Christopher Kendall. For others, the Court’s brandishing of the soundness of “national community standards” as the trusted style guru as to what constitutes “harmful” and, therefore, “obscene” materials was met with a gloomier and, therefore, more sceptical reception.

Little Sisters Book and Art Emporium, a Vancouver bookstore serving Canada’s queer community, had frequently complained that Canada Customs was confiscating sexually expressive materials—under authority of section 163(8) of the Criminal Code—which Little Sisters imported from the United States. In some cases other, less queer, bookstores were regularly importing the very same materials without stirring the interest of Canada Customs. Little Sisters launched a constitutional challenge on the basis that the Customs legislation violated the freedom of expression and equality provisions in the


Little Sisters and the Interveners took aim at the Butler decision, asserting that intrinsic differences between heterosexual and homosexual expressive materials called for a different assessment of same-sex materials. The Supreme Court disagreed, underscoring the trial judge’s reliance upon the testimony of one professor, Professor Malamuth. His testimony offered the opinion that “homosexual pornography may have harmful effects even if it is distinct in certain ways from heterosexual pornography.”

In recent years, [there] has been increasing scientific research indicating that some of the behaviours that might be related to exposure to some types of pornography are a serious problem within the gay community as well as within the heterosexual one ... . [T]here are studies suggesting that within homosexual interactions the frequency of sexually coercive acts as well as non-sexual aggression between intimates occurs at a frequency quite comparable to heterosexual interactions.

Accordingly, the Supreme Court agreed with the trial judge and with the majority of the British Columbia Court of Appeal in rejecting any effort to carve out a particular exception for gay and lesbian erotica in the Butler test. The Court did find, however, that the reverse-onus provision of the Customs legislation, imposing an obligation upon the importers to prove that materials crossing borders were not obscene, to be unconstitutional.

II. PORNOGRAPHY AS PERFORMATIVE

Christopher Kendall’s book is comprised of eight chapters clarifying his support of Little Sisters and setting out his reasons why gay men and others should view gay male “pornography” as a problem of sex discrimination. Kendall disputes the claims put forward in Little Sisters that gay male sexually expressive materials are free from the same kinds of harms that are alleged to occur in and from heterosexual sexually expressive materials, and disagrees that sexually expressive materials play a harm-free or necessary role in the development of gay male identity and self-worth. Consequently, Kendall

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5 Little Sisters, supra note 2 at 1166-67.

6 Ibid.

7 Ibid. at 1167.


9 Little Sisters, supra note 2 at 1179.
argues that same sex “pornography” does not merit exclusion from the Butler test for obscenity.

Kendall argues not only that differential consideration of heterosexual and homosexual “pornography” is legally groundless, but that such consideration is also physically harmful. A chapter is apportioned to alleged harms suffered by actors during the production of these materials. Kendall recounts the experiences of actors ‘Linda Lovelace’ and ‘Joey Stefano’, the latter performing in works targeted to gay male markets, examples of two actors who suffered on-set “harms”. A subsequent chapter sets out Kendall’s conclusions on the connections between “pornography” and partner abuse. There is an unfortunate feeling of datedness throughout the book, in particular in the chapter dealing with actors and on-set harm, with far too much reliance on icons of the seventies and eighties.11

As well, too often relying on passion, and too little on argument and substance, the chapters read like a series of lectures. Too many sentences dawn with “Gay men should realize …” and “Until gay men understand …”. The dressing-down continues with a question—what went wrong with male gay liberation? One is tempted to point out that the answer to that question is typeset and bound between the covers of Kendall’s own book. Kendall states his mission early, declaring that he “will not stop” until his “vision of a just society is realized” and that he is “fighting for those who can’t.”12 If Kendall’s fight is against “pornography”, it takes him a long time to get around to defining it. Fourteen pages in, he sets out the “acts” caused by “pornography” with which he takes exception “acts that result in individual and systemic inequality on the basis of sex”,13 fighting words which could function just as well as a description of the fruits of organized religion—and much else, of course. The harm-based approach in Butler, affirmed in Little Sisters, never moves much beyond morality in disguise for repressivists of “pornography”.

10 In the documentary, Inside Deep Throat (2005), produced by Ron Howard and Brian Grazer’s Imagine Entertainment, Fenton Bailey, Randy Barbato, directors, “Linda Lovelace” complained of not receiving royalties from feminists who wrote books about her. The film documents her return to nude modeling and posing for magazine layouts. By stating for the record how “nice” she found performing nude at the age of fifty-one, the complicated story of “Linda Lovelace”—for those who wish to use it—continued. She died in April, 2002, at the age of fifty-three, following an automobile accident in Denver.

11 Joey Stefano, who died over ten years ago, is considered to have belonged to the so-called West Hollywood gay video “brat pack” from approximately 1988 through 1994. The group included directors Chi Chi LaRue, Geoffrey “Karen” Dior, who died in September, 2004; gender, Sharon Kane, a performer in heterosexual and bisexual videos; Crystal Crawford, video reviewer Mickey Skee; actor Christian Murphy, who died in 2001; Marshall O Boy, founder of the O Boys roving sex club; and Alan Gassman, also a member of O Boys.

12 Supra note 1 at xi.

13 Ibid. at xiv.
Despite their protestations to the contrary, did the Court do anything other than derive its sense of perceived harms from current socio-cultural considerations? The vagueness of thresholds such as “degrading” and “dehumanizing”, too easily and readily turned against homosexual imagery decelerates Kendall’s arguments throughout. The book never escapes the vagueness of its concerns and arguments, alluding to a mass of “conclusive” research regarding the harms of “pornography”, but discounting other research that does not support his decision. That some films and videos are “harmful” is taken as a given, and Kendall’s book takes off from there, without first considering whether or not there is a case-by-case basis by which such films can be assessed. For many, that threshold is not a given and cannot be established categorically (“pornography”) but is something that should not be attempted on anything other than a case-by-case basis—and for many others, not even then. Kendall tries when he identifies what is for him a performative aspect to such imagery:

Far from being the fantasy or mere fictional representation that its promoters would have us believe it is, gay male pornography presents and therefore is a form of male sexuality and male power.  

Kendall’s essentialist analysis reads like a semiological approach, one based upon an analysis of culture as language, relying upon a reduction of the meaning of the image to a sign. Reducing the meaning of images in this way is problematic. While language is meaningful, and while approaches to culture derived from knowledge of the performative aspects of language allows us to see more, deeper or different meaning, a semiological approach cannot capture the full meaning of all the events it attempts to describe. This has significant repercussions for legal argument and particularly legal argument surrounding “pornography”. Visually, this premise can be represented as a circle contained within a triangle, in which the circle represents language and the triangle represents meaning. Some meaning is caught by the circle, but some meaning remains outside the circle, but within the triangle. Semiotics is often employed in the analysis of texts, in which “text” refers to a message that has been recorded (e.g. in writing, video, film) so that it is physically independent of its sender or receiver. A text is an assemblage of signs (such as gestures, words, images, sounds) constructed and construed with reference to the conventions corresponding to a genre or form of communication. However, semiotics and speech act theory fail, in my view, to be capable of capturing all meaning, particularly tone—or the “attitude” of the material. As tone can modulate and create more meaning, so is tone, therefore, crucial to any medium that purports to convey it. What do I mean by tone? Examples are irony, satire, farce, and sarcasm. An actor on stage can alter the meaning of his lines by his

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14 Ibid. at xv.
delivery of a line through tone. A musical composition can be upbeat or downbeat to the listener, if not perhaps the reader of music, depending on the key in which it is performed.

The imagery of sexually expressive materials, which for Kendall is a "goes without saying"\(^\text{15}\) reproduction of dominant subjectivities, can, in fact, contain the subversive. We can speak meaningfully of the false obviousness of the image (or the false obviousness of language) in which the image is limited by the false obviousness of the apparent meaning it projects—that is, there is a tendency of words and images to seem, albeit falsely, obvious in their meaning to the extent that the listener believes he or she has all the information required to understand what is being said. The "false obviousness" of the image must be rejected. The real usefulness of this way of seeing lies in the complexity of its approach: rejecting the false obviousness of the text simultaneously discounts objectivity in favour of a recognition of the ideological control that informs the image/language/text, but also opens up the image/language/text so that it may be read in terms of its oppositional meanings and/or the subversive potential it may contain.

Does sexually expressive material create a reality external to sexuality, or does it create, by the very act of the representation, the sexual act, the reality that we seek to depict, to define? Filmic representation is not an expression in the sense that a verbal act of language can be said to be an utterance. Film may have elements of language, but it fails as a language. A 'shot', even a brief 'shot', contains far too much information to be equated with a word. Human communication and experience is multisensory, and representation of experience is subject to the constraints and interferences of the medium implicated in the representation—photography, videography, music, editing, mise-en-scene. Every medium is bound by the modes of conduct that it utilizes; film is a strictly one-way form of communication, no matter how moving the medium may be, and that is not a language. Kendall's grievance with gay male sexually expressive materials is that such materials embody "what it means to be male as socially defined."\(^\text{16}\) I would disagree that such a blanket statement can be applied to gay male sexually expressive materials in particular. There is often a satiric knowingness in gay male sexually

\(^{15}\) Louis Althusser & Etienne Balibar wrote about the "false obviousness of everyday practice" in Reading Capital (Thetford: New Left Books, 1979) at 101-102. See Roland Barthes, Mythologies (London: Paladin Books, 1973) at 11 who applied Althuser's observations in the context of the construction of "goes without saying" mythologies. See also Dick Hebdige, Subculture: The Meaning of Style (London: Methuen & Co. Ltd., 1979) at 101-102. My application of Althusser's approach is to address the specific "false obviousness" of the image or of language within the context of understanding the text, whether the text is articulated through the channels of language or uttered by the codes of cinematic expression, and the multiple levels of meaning that a reductivist approach cannot capture.

\(^{16}\) Ibid.
expressive materials—even a playfulness that cannot be equated with a mere reproducing of unchallenged sexually discriminatory presumptions, no matter how ‘dumb’ the plots. The videos often toy with power structures (schools, sports, workplaces—often with repairmen—locker rooms, hospitals, and very frequently, prisons and the military, and their hierarchies of power), acknowledging them and often ridiculing them.

Little Sisters and some of the Interveners viewed gay male sexually expressive materials in this way and argued that such materials challenged conventional notions of sexuality by undermining dominant sexual premises. The Supreme Court rejected the argument and I wish to suggest that one reason for that failure was the inability of language to capture the subversive “tone” of the sexually explicit material it attempted to describe—that is, the full meaning of the sexually explicit material remained outside the triangle of the legal argument that attempted to capture it. The result was that the cultural distinctions which might have been embedded in the material—that is, between images of gay sex, on the one hand, and images of heterosexual sex, on the other—were not fully considered. Rather, the specificity and cultural practices which Little Sisters argued differentiated the sexually explicit materials of sexual minorities from the sexually explicit materials produced for the dominant group, were negated. The false obviousness of the language used to describe the sexually explicit materials under consideration by the Supreme Court in Little Sisters allowed the Court to feel that it had all the information that it needed and the Court refused to find that there might be cultural differences between the two types of materials.

The upshot of Kendall’s argument is that “gay male pornography” is not simply a label for a state of affairs between men having sex with other men, but rather one that attains its meaning by pointing to consequences within a structure of obligations—namely, “what it means to be male socially” under heteronormative relations. Additionally, while his model of communication and language may facilitate some forms of expressions of heterosexual experience, namely in respect of the constitutive rules and obligations of heterosexual sexual relations, it nonetheless inhibits others, namely those who would critique them. To capture the full breadth of meaning in gay male sexually expressive materials, a different framework is required. Kendall ignores other issues at play in the theory of reference he devises, and to accept his approach would adversely impact our perception of norms and our ability to understand the means by which gay male sexually expressive materials can subvert them.

III. LAW AND CULTURE

Legal pluralism is a socio-legal theory that the law flows from all social and economic contexts—for example, schools, the workplace, families, and art.
Legal pluralism, as an approach among legal scholars, developed out of the tradition of social scientists to link the law with other similar forms of social phenomenon concerned with normative ordering. Legal pluralists reject the law-centeredness of traditional studies of legal phenomena, arguing that not all law takes place in the courts. The important implication of focusing on "legal pluralism" is that it expands the research framework used to observe a culture—here, the culture of sexual minorities in the hetero-normative context and in particular in respect of the functions and meanings of the sexually expressive materials of each. From a pluralist’s perspective, law is not just a confrontational process of 'truth finding', but a system of thought by which particular forms of relations come to seem "natural" and “taken for granted in support of their categories and theories of explanation.”

Under such an approach, differences in gay male sexually expressive materials can be seen to posit a different and potentially subversive relationship to the artistic tradition from which heterosexual "pornography" descends.

The main problem with Kendall's position regarding "gay male pornography" is that he presents an evaluation of gay adult material that is divorced from its representative nature. Throughout art history, the unclothed figure has been employed to communicate ideas and feelings and to present cultural positions. Under a pluralistic approach, the legal scholar is aware that the regulation of normative behaviour occurs at various cultural sites. This suggests alternative ways to approach problems in the depictions of "pornographies"—the power of re-education or modulation of sexism in the culture and, therefore, the potential and possibilities of affecting the constituent elements of the representations. To the extent that the representation of sexuality is a repository for dominant subjectivities, they can be influenced, transmuted, and diversified.

Through its construction and costuming, the nude has reflected male and female sexuality identities during particular periods of history. Greek artists expressed energy and dynamism in the nude—in the figure of the male nude and in two constructions, the athlete and the hero. The art demonstrates, also,

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the widespread composure in Greek society with male nudity. Conversely, the
tradition of the female nude, also established by the Greeks, but sustained
throughout art history, is one of passivity, or energy-removed, the presenta-
tion of beauty for the gaze.\footnote{Clark, \textit{ibid}.} Variations on the subject-theme of the Hellenistic
embellishment of female beauty—Aphrodite/Venus—constitutes an
understanding of the historical position of women throughout various periods
of history: woman turns away from the imaginary on-looker, often in
cultural policies associated with male and female nudity have current usage in
debates surrounding “pornography” in which an intensification of the
traditional ideas of energy and passivity occurs through the use of sexual
imagery that is ‘blunt’;\footnote{Julia Lesage, “Women and Pornography” (1981) 26 \textit{Jump Cut} 46.} direct, and up close—such that one is turned against
the other, energy against passivity, male against female. The pleasure of
‘looked-atness’, the pleasures inherent in the ‘look’ which Mulvey addresses,
the voyeurism, sadism, punishment and guilt, comprise the modes of narrative
address of the heterosexual pornographic film, the means of articulating the
wants of narrative, the organization of the subject and its suspension in
structures of effect, with ‘bluntness’ and ‘dumbness’ of images and narrative
codes. How it is possible for gay male “pornography” to be seen within this
regime, or what relationship gay male sexual imagery bears to it is never
adequately explored by Kendall. What is missing is the development and
 politicizations of depictions of the nude. By staking out social and political
developments, for example, avant-garde artists regarded the nude form in
radically different ways, distorting and misrepresenting the physical reality of
it, discarding traditional goals of presenting the female nude as an object of
beauty, as opposed to the idealized Classical-influenced nude.\footnote{See Peter Burger, \textit{Theory of the Avant-Garde Theory and History of Literature} (Minneapolis: University of Minneapolis Press, 1984); Maud Lavin, “Mass Media, Modernism and the Avant-Garde” in \textit{Cut With the Kitchen Knife: The Weimar Photomontages of Hannah Hoehch} (New Haven: Yale University Press, 1993) at 47-50.} Similarly, the
withdrawal of the “nude” into the medium of photography in the nineteenth
century, and the transformation of the male into the voyeur, possessor of the
IV. CONCLUSION

In summary, Kendall argues for a reorientation of current theoretical programs seeking to understand norms and harm in "gay pornography". His position is that prior to being able to do that, it is necessary to view gay male "pornography" as sex discrimination, thus creating a more appropriate research model in understanding the "harm" of this kind of material. Further, Kendall argues that it is necessary to understand how the social world of gay male "pornography" is intrinsically linked to heterosexual "pornography" because both are depictions of rule-governed activities. Kendall’s understanding of social action in respect of "gay male pornography" and of norms governing the social action of gay men is defective because of his fundamental misunderstanding of the function of the images often found in gay adult material and its oppositional stance to the artistic tradition from which heterosexual "pornography" derives and to which gay male "pornography" can bear a different relationship.

The incompleteness of Kendall’s assessment of gay male "pornography" reveals that an analysis of sexually expressive materials should include an assessment of its aesthetics—no matter how blunt. Considering aesthetics discloses at least two points: (i) the differences between heterosexual and homosexual sexually expressive materialism, and (ii) the need for individual analysis of films because of the operation of aesthetics. A consideration of "pornography" as genre, for example, could, in theory, argue for a consideration of all sexual materials on a categorical basis, that is, that sexually expressive materials "could" be considered generically and labelled "pornography"; however, further analysis reveals that this is not true all the time. Just as there are artists who subvert generic convention in other visual media, so, too, must it be acknowledged that individual sexually expressive video or film may possess varying relationships to dominant codes of sexual organization, i.e. some are satiric, drawing attention to the dominant sexual subjectivities and not merely reinforcing them. For example, in classic Hollywood cinema, for every filmmaker who observed and was, therefore, limited by the generic conventions, there was an artist who confronted the limitations of the genre and transcended them—Fritz Lang in the film noir, Max Ophuls in melodrama, and Howard Hawks, Nicholas Ray, and George Cukor with the western and comedies.24 My approach is to suggest the interdependence of ideology, genre, and authorship in ordering a work’s full meaning. The problem of a purely legal centralist approach to "pornography"

24 See While the City Sleeps (1956), RKO-Radio, Fritz Lang, director; Letter From an Unknown Woman (1948), Universal Studios, Max Ophuls, director; Caught (1949), Enterprise Studios for MGM, Max Ophuls, director; Bringing Up Baby, RKO-Radio, Howard Hawks, director; Holiday (1938) RKO-Radio, George Cukor, director; Johnny Guitar (1954) Republic Pictures, Nicholas Ray, director.
and a reliance solely on legal arguments about attitudinal harm is that such an approach cannot fully appreciate all of the cultural sites at which "pornography" can be said to function and, therefore, be evaluated and addressed.

DONN SHORT†

† Ph.D. Candidate, Osgoode Hall Law School. My thanks to Bruce Ryder and Ron Levy for their helpful conversations.