
Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse

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The author critiques the uneven application of the sex equality test for pornographic harm advocated by many of the interveners in *Little Sisters Book and Art Emporium*. Contesting the interrelated claims that (1) homosexual pornography does not result in the perpetuation of the same kinds of harms documented in relation to heterosexual pornography; and (2) homosexual pornography is central to gay male identity and liberation, the author argues that the differential treatment of hetero- and homosexual pornography is not only legally untenable, but also dangerous given the high incidence of domestic violence and rape within the gay male community.

Arguing in support of the Supreme Court of Canada's decision in *Little Sisters*, the author contends that insufficient attention has been paid to the specific content of the gay male pornographic materials at issue in this litigation. In particular, he argues that both hetero- and homosexual pornography depend on similar sexist gender hierarchies, reify a conception of normalized sexuality valorizing violence, degradation, and non-mutuality, and, therefore, can be understood to encourage harmful sexual practices in those who consume these materials. In forwarding this argument, the author engages in an extensive description and critical analysis of the gay male pornographic exhibits at issue in the *Little Sisters* litigation and demonstrates that these materials operate according to a sexual logic comparable to that observed and denounced in respect of heterosexual pornography.

L'auteur critique ce qu'il considère être une application inégale du test du dommage causé par la pornographie invoqué par plusieurs des intervenants dans l'arrêt *Little Sisters Book and Art Emporium*. L'auteur remet en question les affirmations inter-relées selon lesquelles (1) la pornographie homosexuelle ne perpétue pas des torts semblables à ceux observés en relation avec la pornographie hétérosexuelle; et (2) la pornographie homosexuelle se trouve au cœur de l'identité et de la libération gaies masculines. L'auteur soutient que la différence de traitement entre les pornographies hétérosexuelle et homosexuelle est non seulement juridiquement intenable, mais de surcroît dangereuse au vu de l'incidence importante de la violence domestique et du viol dans la communauté gaie masculine.

L'argument de l'auteur se veut en faveur de la décision de la Cour suprême du Canada dans *Little Sisters*. Celui-ci soutient que trop peu d'attention a été dévolue au contenu spécifique des éléments de pornographie gaie masculine en l'espèce. Il soutient en particulier que les pornographies hétérosexuelle et homosexuelle reposent toutes deux sur une hiérarchie des sexes discriminatoire et réifient une conception de la sexualité normalisée promouvant la violence, la dégradation et l'absence de mutualité. Selon l'auteur, on peut donc en conclure que les deux types de pornographie encouragent chez ceux qui en consomment des pratiques sexuelles destructrices. Dans la présentation de son argument, l'auteur se consacre à une description extensive et à une analyse critique des éléments de preuve présentés dans l'affaire *Little Sisters* et explique en quoi ces documents de pornographie gaie masculine fonctionnent selon une logique comparable à celle observée et dénoncée en matière de pornographie hétérosexuelle.

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I was battered by my first lover, and the pornography each of us used condoned the violence.

When I was younger, I was exposed to heterosexual pornography, including Playboy, Penthouse, Oui, and other magazines. It was one of the places that I learned about sex, and it showed me that sex was violence. What I saw there was a specific relationship between men and women. The woman was to be used, objectified, humiliated, and hurt. The man was in a superior position, a position to be violent. In pornography I learned that what it meant to be sexual with a man or to be loved by a man was to accept his violence. When my lover was violent, I was taught that the violence was normal. I accepted the violence, which I did not like, and it was some time before I left the relationship.

...

There is a lot of sexual violence in the gay community, and pornography condones it. I was with my ex-lover after he had been raped by a casual sex partner, and my ex said that rape was just a risk you had to take. I was with a friend after he had been violently raped by his boyfriend, and his boyfriend did not understand that violence and force was not supposed to be a part of sex. The objectification and the violent themes in pornography promote and increase these kinds of violence.

Oral testimony of “Mr. C.” testifying before Minneapolis Hearings to make pornography an actionable civil rights violation.¹

Introduction

On 20 December 2000, the Supreme Court of Canada ruled in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,² a case concerning the right of Canada Customs to detain lesbian and gay male pornography, that lesbian and gay male pornography violates the sex equality test for pornographic harm first set down

¹ In Catharine A. MacKinnon & Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge, Mass.: Harvard University Press, 1997) at 107-108 [MacKinnon & Dworkin, *In Harm's Way*].

² [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters* (S.C.C.) cited to S.C.R.]. This paper will not outline the *Little Sisters* litigation in detail, other than to describe some of the gay male pornographic materials defended in that case by Little Sisters Bookstore and some of the interveners before the Supreme Court of Canada. For an analysis of the constitutional and criminal law issues relevant to the case and the limitations of the statutory regime in place to control the distribution of pornography in Canada, see 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 *Wis. Women's L.J.* 21 [Kendall, “Gay Male Cooperation”].

by the Court in its 1992 decision in *R. v. Butler*.³ In *Butler*, the Court ruled that legal efforts aimed at prohibiting the distribution of pornography were constitutionally sound because pornography undermined the rights of all Canadians to be treated equally on the basis of sex. Specifically, the Court ruled that

[t]he effect of [pornographic] material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism [and] non-violence ... are basic to any human interaction ... is clearly justified in controlling ... any medium ... which violates these principles.⁴

In *Little Sisters*, Little Sisters Bookstore (and many of the interveners that supported it) rejected the claim that same-sex pornography could result in the types of harms that result from the distribution of heterosexual pornography.⁵ This paper

³ [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [*Butler* cited to S.C.R.]. Pursuant to subsection 163(8) of the *Criminal Code* (R.S.C., 1985, c. C-46), “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one of the following subjects, namely, crime, horror, cruelty and violence,” is deemed to be obscene. Donald Butler, a distributor of pornography in Winnipeg, Canada, challenged this provision as a violation of subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), the section guaranteeing free expression. The Court upheld the legislation pursuant to section 1 of the Charter, reasoning that although the section did limit free expression, it was a justifiable limit because pornographic materials harm women (by undermining their right to equality) and hence harm society because they enhance pre-existing gender hierarchies. The Court specifically rejected morality as the measure of harm and opted instead for an equality context within which to interpret expressive means. This paper will not provide an in-depth analysis of *Butler*, nor the sex discrimination analysis of pornographic harm offered in that case. This has been done elsewhere. See generally Catharine A. MacKinnon, *Sex Equality* (New York: Foundation Press, 2001) [MacKinnon, *Sex Equality*]; Kendall, “Gay Male Cooperation”, *ibid.*; Christopher N. Kendall, “Real Dominant, Real Fun?: Gay Male Pornography and the Pursuit of Masculinity” (1993) 57 Sask. L. Rev. 21 [Kendall, “Real Dominant”]; Christopher N. Kendall, “The Harms of Gay Male Pornography: A Sex Equality Perspective Post Little Sisters Book and Art Emporium” (2001) 10 Gay & Lesbian L.J. 43 [Kendall, “Harms of Gay Male Pornography”].

⁴ House of Commons, Standing Committee on Justice and Legal Affairs, “Report on Pornography” in *Minutes of Proceedings and Evidence*, No. 18 (22 March 1978), cited in *Butler*, *ibid.* at 493.

⁵ An exceptional overview of the harms of heterosexual pornography can be found in the factum of the intervener, Women’s Legal Education and Action Fund (“LEAF”) in *Butler*, *supra* note 3 (Factum of the Intervener LEAF) [LEAF *Butler* Factum]. Copies of the LEAF Factum are available from the LEAF National Office, 415 Young Street, Suite 1800, Toronto, Ontario, M5B 2B7. Focusing specifically on the sex equality harms that result from the production and distribution of pornography, LEAF argued in *Butler* that

pornography lies about women and their sexuality: for example, that women live to be raped, love to be hurt, and are fulfilled by abuse. Pornography silences women’s expression and inhibits truth-seeking and works to deprive women of public regard. Sex toys do not generally run for Prime Minister. The pervasive presence of pornography thus deters women’s equal access to participation in community life.

...

examines this claim and does so specifically within the context of gay male rape and domestic violence—issues that have received little analysis by gay male writers, either before or after *Little Sisters*.⁶

My comments will be directed specifically at gay men and their defence of gay male pornography for a number of reasons. To begin with, I am one and have a vested interest in the outcome of those litigation and social reform strategies allegedly undertaken on my behalf. In addition, despite claims that the feminist movement has abandoned its fight against pornography, much *has* been written in recent years, by lesbian feminists in particular, outlining in considerable detail the harms that result from the production and distribution of lesbian pornography.⁷ Much of their analysis is helpful to the arguments I make with respect to gay male pornography, although it does not often address it squarely. I will focus on the central argument posed by gay activists and their supporters post-*Butler* and throughout *Little Sisters*: that gay male pornography is central to all that is gay male identity; that it can liberate us from the

[P]ornography promotes systemic discrimination against women through systematic bias and subordination. The status and treatment of women is affected even for those who do not experience abuse related to pornography directly. When reduced to their sexual parts and seen in terms of how they can be sexually used, women are forced to live in a social climate of disrespect, denigration and comparative deprivation of human regard. Women's opportunities for autonomy and self-determination are undermined throughout society (at paras. 53, 59).

⁶ I have argued elsewhere that gay male pornography, like heterosexual pornography, amounts to a practice of sex discrimination and that, as such, gay men need to rethink their defence of gay male pornography as “a source of gay male liberation”. In this paper, I aim to promote discussion on the specific physical harms we risk both justifying and normalizing should we fail to undertake such an analysis. For a more detailed analysis of the claim that gay male pornography amounts to a practice of sex discrimination, see Christopher N. Kendall, “Gay Male Liberation Post *Oncale*: Since When Is Sexualized Violence Our Path to Liberation?” in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004); Christopher N. Kendall, “Gay Male Pornography/Gay Male Community: Power Without Consent, Mimicry Without Subversion” in Joseph A. Kuypers, ed., *Men and Power* (Halifax: Fernwood Publishing, 1999); Christopher N. Kendall, “Educating Gay Male Youth: Since When Is Pornography a Path Towards Self-Respect?” *J. Homosexuality* [forthcoming in 2004]; Kendall, “Gay Male Cooperation”, *supra* note 2; Kendall, “Real Dominant”, *supra* note 3; Kendall, “Harms of Gay Male Pornography”, *supra* note 3. See also John Stoltenberg, “You Can't Fight Homophobia and Protect the Pornographers at the Same Time—An Analysis of What Went Wrong in *Hardwick*” in Dorchon Leidholdt & Janice G. Raymond, eds., *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990) 184; John Stoltenberg, “Gays and the Pro-Pornography Movement: Having the Hots for Sex Discrimination” in Michael S. Kimmel, ed., *Men Confront Pornography* (New York: Crown Publishers, 1990) 248 [Stoltenberg, “Pro-Pornography Movement”]; Robert Jensen, “Getting It Up for Politics: Gay Male Sexuality and Radical Lesbian Feminism” in Sara Miles & Eric Rofes, eds., *Opposite Sex* (New York: New York University Press, 1998).

⁷ On the harms of lesbian pornography generally, see Sheila Jeffreys, *The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution* (Melbourne: Spinifex Press, 1993); Irene Reti, ed., *Unleashing Feminism: Critiquing Lesbian Sadoomasochism in the Gay Nineties* (Santa Cruz: HerBooks, 1993).

oppressions we face; and that any attempt to regulate it is both homophobic and discriminatory on the basis of sexuality. Siding with the Supreme Court of Canada and those who have long argued that all pornography is an issue of sex discrimination, I will reject these assertions, arguing instead that gay male pornography will only achieve that which the homophobe has strived to do all along: silence gay men by encouraging masculine mimicry and the public expression of the antithesis of equality. The net effect of gay male pornography, particularly given the high incidence of gay male domestic violence and gay male rape within the gay male community, thus merits more critical inquiry.

I. Gay Male Pornography: Different Audience, Therefore Non-Harmful?

In 1996, the British Columbia Supreme Court was asked by Little Sisters Book and Art Emporium, a Vancouver-based bookstore specializing in the sale of lesbian and gay books, magazines, and videos, to determine the constitutional validity of the legislative scheme that allows Canada Customs to restrict the importation of pornography into Canada.⁸ The law governing the importation of goods into Canada is found in the *Canada Customs Act*,⁹ and the *Customs Tariff*.¹⁰ Section 114 of the *Customs Tariff* prohibits the importation of “any goods enumerated or referred to in Schedule VII” of that statute. Schedule VII lists classes of prohibited goods and assigns each class a code number. Code 9956(a) deals with “obscene material” and prohibits the importation of those goods which can be described as:

Books, printed-paper, drawings, paintings, prints, photographs or representations of any kind that: (a) are deemed to be obscene under subsection 163(8) of the *Criminal Code*.

Subsection 163(8) of the *Criminal Code* was judicially interpreted and defined by the Canadian Supreme Court in *R. v. Butler*.¹¹ Essentially, Code 9956(a) forbids the importation of materials caught by the *Butler* sex equality analysis for pornographic harm. Customs officials responsible for determining the legality of imported goods are expected to find guidance in *Customs Memorandum D9-1-1*, entitled “Interpretive Policy and Procedures for the Administration of Tariff Code 9956”. This memorandum incorporates a generally accurate summary of the present state of the law relating to obscenity, particularly in light of *Butler*, and is aimed at ensuring that

⁸ *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1996), 18 B.C.L.R. (3d) 241, 131 D.L.R. (4th) 486 (S.C.).

⁹ R.S.C. 1985 (2d Supp.), c. 1.

¹⁰ R.S.C. 1985 (3d Supp.), c. 41.

¹¹ *Butler*, *supra* note 3.

customs officials apply the sex equality reasoning in *Butler* when determining whether pornography, straight or gay, can be imported into Canada.¹²

In hearings before the Supreme Court of Canada, the appellant, Little Sisters, raised two main constitutional arguments, relevant to both section 163 of the *Criminal Code* and the administrative procedures in place for applying section 163 at the Canada-US border. Both arguments related to the appellant's perception that its section 2 and 15 Charter rights were unjustifiably infringed by Canada Customs legislation and the application of that legislation. The Court summarized these questions as follows:

[T]he appellants argue that the "harm-based" interpretation given to s. 163 of the *Criminal Code* in *Butler*, does not apply to gay and lesbian erotica in the same way as it does to heterosexual erotica, or perhaps at all. Because the prohibition against importation of obscene goods contained in the Customs legislation is rooted explicitly in s. 163 of the *Criminal Code*, acceptance of this argument would mean that gay and lesbian publications would not be subject to the ordinary border regime applicable to other forms of expression.

Secondly, the appellants say that the procedure laid down in the Customs legislation is so cumbersome and procedurally defective that it is incapable of being administered consistently with the protection of their *Charter* rights.¹³

Little Sisters was supported on both issues by six interveners. These included Equality for Gays and Lesbians Everywhere Canada ("EGALE") and the Women's Legal and Education Action Fund ("LEAF"), the same group that had successfully argued in 1991, in *Butler*, that pornography violated the Charter's sex equality provisions. Apart from the Attorney General of Canada, the only intervener seeking to uphold the sex equality arguments raised in *Butler* was the international feminist rights group, Equality Now.

In addressing Little Sisters' arguments, the Court supported the submission of Equality Now, ruling that:

My conclusion on the first branch of the appellants' attack is that 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. Nor in my view is the gay and lesbian community discriminated against in the Customs legislation, which is quite capable of being administered in a manner that respects *Charter* rights. The government *is* entitled to impose border inspections of expressive material. The obstacles experienced by the appellants and detailed at length by

¹² An overview of the customs legislation and the need for it to be applied in a non-discriminatory manner is discussed in Kendall, "Gay Male Cooperation", *supra* note 2. See also Catharine A. MacKinnon & Andrea Dworkin, "Statement on Canadian Customs and Legal Approaches to Pornography" in Diane Bell & Renate Klein, eds., *Radically Speaking: Feminism Reclaimed* (Melbourne: Spinifex Press, 1996) 218.

¹³ *Little Sisters* (S.C.C.), *supra* note 2 at 1154.

the trial judge were *not* inherent in the statutory scheme. The obstacles were, however, very real and in the end quite unjustified.¹⁴

In sum, the Court found that lesbian and gay male pornography could not be distinguished from heterosexual pornography, that the legislative scheme under review was constitutionally valid, but that the way in which the legislation had been applied was discriminatory against lesbians and gay men. With respect to the constitutionality of the legislation itself, the majority held that it would be inappropriate to invalidate constitutionally sound legislation, but that steps must be taken to ensure that it was applied correctly and fairly (i.e., in accordance with the equality rights to which the appellants were entitled). On this point, three members of the court (Iacobucci, Arbour, and LeBel JJ.), while still agreeing that lesbian and gay male pornography should not be seen as any less harmful or any more important than heterosexual pornography, held that the customs legislation was so vague as to constitute the source of any misapplication and that, as such, the legislation should be struck out as unconstitutional. The minority in this instance would have preferred that regulation remain a criminal matter determined only once pornographic materials had already entered the country.

The *Little Sisters* case raises a number of constitutional issues. Of interest here is the Court's finding that same-sex pornography violates the *Butler* standard for pornographic harm, and its finding that immediate action needs to be taken to stop what are clearly discriminatory and high-handed actions on the part of Canada Customs officials against lesbians and gay men. This latter finding makes it clear that the issue of how best to regulate the inequality arising from the production and distribution of pornography will not simply go away now that *Little Sisters* has been heard. Reform is required and it must, if it is to be effective, involve *all* persons with an interest in ensuring fairness and equality.¹⁵ What is also clear, however, is that, insofar as gay men and lesbians are concerned, the type of discussions needed to ensure effective change will not occur until the lesbian and gay communities rethink their present commitment to pornography as a central platform in the struggle for liberation. This paper aims to encourage such an analysis and does so specifically

¹⁴ *Ibid.*, Binnie J.

¹⁵ This paper will not examine what these reforms should look like or how they should be implemented as I have addressed these issues elsewhere. See Christopher N. Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver: UBC Press, 2004) [Kendall, *Gay Male Pornography*]. Briefly, my own preference is to see the implementation of a civil rights-based approach to pornographic harm that would allow pornography's victims to sue civilly or via a human rights tribunal system for the harms they have suffered as a result of the distribution and production of pornography—both heterosexual and homosexual. See also MacKinnon, *Sex Equality*, *supra* note 3; MacKinnon & Dworkin, *In Harm's Way*, *supra* note 1. Rather than focus on this issue, this paper seeks only to provoke a necessary rethinking of what gay male pornography is, what it does, and why, like heterosexual pornography, it is harmful within the context of gay male domestic violence and male rape. Until such an analysis occurs and until these harms are both discussed and accepted as real by gay men and their supporters, any attempt to implement necessary legal reforms that ensure equality and equal application of the law will prove futile.

within the context of the types of materials defended by pro-pornography activists and academics as harm free and hence *Butler*-proof. Focusing on gay male domestic violence and rape, this paper contends that, far from being a source of pride and liberation, gay male pornography risks inducing the same harms found to arise from the production and distribution of heterosexual pornography.

In its factum before the Supreme Court of Canada in the *Little Sisters* case, Little Sisters argued that

[t]here is solid academic criticism of the equation of homosexual pornography with mainstream pornography. Erotica produced for a homosexual audience does not and cannot cause the kind of anti-social behaviour generally or through stereotyping and objectification of women and children that Parliament apprehended might be caused in heterosexual obscenity. While heterosexual obscenity is often misogynist that cannot be said of homosexual material.¹⁶

This hypothesis warrants more analysis.

In arguing that there is a link between gay male pornography and violence, the first obstacle encountered is a considerable reluctance within the gay male community to acknowledge that some of the violence experienced by gay men is at the hands of other gay men. In *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*,¹⁷ for example, Kyle Raye, then a Toronto city councillor and director at the Community Centre for Lesbians and Gay Men, was asked if the presentation of violent behaviour in gay male pornography might encourage some men to replicate this behaviour. Raye testified that he had never received complaints about violence between gay men or about abusive sexual behaviour between gay males. Given that Toronto has the largest lesbian and gay male population in Canada, and given that, in North America, gay male domestic abuse is the third largest health problem facing gay men,¹⁸ Raye's opinion is questionable. More alarming, however, is the testimony of Barry Adams, a professor of sociology at the University of Windsor. In *Glad Day*, Adams testified that if a gay man wanted to avoid violence in a relationship, he could do so by "not staying in the relationship," and that although there is coercive sex in the gay community, "there is underlying consent and it is sexual theatre."¹⁹

These comments are not unusual. As rape education counsellor Michael Scarce explains, there is little appreciation or willingness to deal with the realities of intra-community violence. Describing one media report on the topic, Scarce writes:

As with sexual violence, not everyone sympathizes or recognizes the victimization of same-sex domestic violence. In the December 10, 1996, issue

¹⁶ *Little Sisters* (S.C.C.), *supra* note 2 (Factum of the Appellant at para. 63) [Little Sisters Factum].

¹⁷ [1992] O.J. No. 1466 (Ont. Ct. (Gen. Div.)) (QL) [*Glad Day*].

¹⁸ See David Island & Patrick Letellier, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* (New York: Harrington Park Press, 1991) at 1.

¹⁹ *Glad Day*, *supra* note 17.

of the *Chicago Tribune*, columnist Mike Royko described his lack of concern for gay men who are battered by their partners because he believes men should have the power and privilege to simply walk away from an abusive relationship, regardless of the circumstances:

“It seems to me that if Bill lives with Joe and Joe makes a practice of pummeling Bill, then Bill would have the good sense to just pack a suitcase and get the heck out of there. It should be easier for a man to walk away from an abusive relationship than for a woman since men don’t get pregnant and have babies.”²⁰

Royko continued by saying that if a battered partner chooses to stay with his partner, for any reason, “that is his choice and I respect it—so long as he is not my neighbour and doesn’t scream for help or pound on my door at night.”²¹

These assumptions make the task of trying to draw a link between pornography and violence both frustrating and difficult. Add to this the fact that, to date, little research has been conducted on the effects of gay male pornography per se, and one is left with little support from gay activists for the argument that harmful behaviour is encouraged by gay male pornography, or that pornography promotes those practices, attitudes, and stereotypes that undermine social equality.

In attempting to get gay men to rethink their position, it is worth noting that, although no social science data exists with respect to gay pornography specifically, if these gay male materials were heterosexual materials, and presented women with men rather than men with men, the evidence would be overwhelming. The legal briefs submitted in the *Butler* case provided the Supreme Court with profuse social and scientific evidence on the harmful effects of heterosexual pornography on women, men, and thus on society as a whole—research from which the Court concluded that there is “sufficient reason for Parliament to believe” that pornography amounts to a practice of sex discrimination.²² This evidence indicates that when rape is normalized as sex in pornography, women are more likely to be raped and subjected to sexual

²⁰ Michel Scarce, *Male on Male Rape: The Hidden Toll of Stigma and Shame* (New York: Insight Books, 1997) at 67-68 [Scarce, *Male on Male Rape*], citing Mike Royko, “500,000 Gay Men Don’t Have to Take Abuse from a Partner” *Chicago Tribune* (10 December 1996) 3.

²¹ *Ibid.*

²² This is an impressive and thorough body of work. A compilation of these findings can be found in MacKinnon, *Sex Equality*, *supra* note 3 at 1532-630. See also MacKinnon & Dworkin, *In Harm’s Way*, *supra* note 1; Catherine Itzin, ed., *Pornography: Women, Violence and Civil Liberties* (Oxford: Oxford University Press, 1992); Diana E.H. Russell, *Against Pornography: The Evidence of Harm* (Berkeley: Russell Publications, 1993) [Russell, *Against Pornography*]; Gail Dines, Robert Jensen & Ann Russo, eds., *Pornography: The Production and Consumption of Inequality* (New York: Routledge, 1998) [Dines *et al.*, *Production and Consumption of Inequality*]; Susan G. Cole, *Power Surge: Sex, Violence and Pornography* (Toronto: Second Story Press, 1995); Andrea Dworkin, *Pornography: Men Possessing Women* (New York: Plume Books, 1989) [Dworkin, *Men Possessing Women*]; Susanne Kappeler, *The Pornography of Representation* (Minneapolis: University of Minnesota Press, 1986).

violence.²³ Findings on materials that are not violent but that are nonetheless degrading or dehumanizing further indicate that pornographic materials “lower inhibitions on aggression by men against women, increase acceptance of women’s sexual servitude, increase sexual callousness toward women, decrease the desire of both sexes to have female children and increase the belief in male dominance in intimate relationships.”²⁴ The testimonies of women harmed during the production of pornography bolster these findings, as do the experiences of those whose partners have humiliated or terrorized them into imitating pornographic materials and who have been battered and psychologically abused by these same partners when they have refused to do so.²⁵ Moreover, the testimonies of those women who report that pornography renders them open to harassment, or unable to function as equals in a society ripe with sexual inequality, strengthen the argument that pornography is a practice of sex discrimination and gender inequality.²⁶

These studies, accepted by the Court, prove that the result of exposure to heterosexual pornography is sexual abuse, the sexualization of violence, and a lack of respect for the integrity of the “other” presented as sexual stimulus and practice. There is also considerable research indicating that the production and distribution of

²³ See MacKinnon, *Sex Equality*, *ibid.* at 1532-651. See also Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975); Andrea Dworkin, “Pornography Is a Civil Rights Issue for Women” (1987/88) 21 U. Mich. J.L. Ref. 55; Russell, *Against Pornography*, *ibid.*; Diana E.H. Russell, “Pornography and Rape: A Causal Model,” in Diana E.H. Russell, ed., *Making Violence Sexy: Feminist Views on Pornography* (1993) 120; Diana E.H. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* (Beverly Hills: Sage Publications, 1984); Diana E.H. Russell, *Dangerous Relationships: Pornography, Misogyny, and Rape* (Thousand Oakes, Calif.: Sage Publications, 1998).

²⁴ MacKinnon, *Sex Equality*, *ibid.*

²⁵ As LEAF noted in *Butler*:

Many women report that men abuse them through pornography. For example, in a study of 105 women staying in battered women’s shelters in Ontario, 25% of the women reported being forced to perform acts which their partners had seen in pornography. In another study, specific pornography was spontaneously mentioned by rapists during the course of the rape in 25% of 193 rapes reported by 200 street prostitute. Further studies find a substantial percentage of all Canadian women report they have been upset by someone trying to do something to them that came from pornography (LEAF *Butler* Factum, *supra* note 5 at para. 46, citing Minneapolis City Council, Government Operations Committee, *Public Hearings on Ordinances to Add Pornography as Discrimination Against Women*, 12-13 December 1983).

See also Evelyn K. Sommers & James V.P. Check, “An Empirical Investigation of the Role of Pornography in the Verbal and Physical Abuse of Women” (1987) 2 *Violence and Victims* 189; Mimi H. Silbert & Ayala K. Pines, “Pornography and Sexual Abuse of Women” (1984) 10 *Sex Roles* 857.

²⁶ See generally MacKinnon & Dworkin, *In Harm’s Way*, *supra* note 1 and the victim impact testimonies and works cited in MacKinnon, *Sex Equality*, *supra* note 3 at 1550-62. As MacKinnon notes, “With pornography, evidence from the real world shows the same results and dynamics as those found in laboratories and also documents a circular relation between production and consumption harms” (*ibid.* at 1550).

heterosexual pornography increases violence against women on an individual level and that the gender hierarchies and stereotypes promoted in pornography undermine systemic equality on the basis of sex on a social level.²⁷

The question for gay men is whether these findings are applicable to gay male pornography. That is, does the “gay” in gay male pornography make the pornography less pornographic in the harms-based equality analysis or is there something so qualitatively different about pictures of men violating other men that gay male pornography is harm-free and legally *Butler*-proof?

In arguments before the Supreme Court of Canada in support of Little Sisters Bookstore, EGALE attempted to exempt same-sex pornography from the application of *Butler*, arguing that its test was intended to apply to heterosexual pornography only:

The specific materials at issue in *Butler* consisted of mainstream pornography produced for a heterosexual, predominantly male audience. In contrast, this case involves the systematic detention and seizure of sexually explicit homoerotic imagery and text, produced by and for lesbians, gays and bisexuals. The expression conveyed by the *Butler* videos echoed the dominant

²⁷ As LEAF explained in *Butler*:

[I]t is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, a significant percentage of men, many not otherwise predisposed as well as the 25-35% who report some proclivity to rape a woman, come to believe that violence against women is acceptable. Such materials hence constitute direct threats of violence.

...

Materials which combine sex with aggression have perceptual effects which disadvantage women in society. They desensitize consumers to rape trauma and sexual violence. In one study, simulated juries after exposure were less able than the real juries to perceive an account of a rape as an account of a rape (LEAF *Butler* Factum, *supra* note 5 at paras. 34, 44).

See also Edward Donnerstein & Leonard Berkowitz, “Victim Reaction in Aggressive Erotic Films as a Factor in Violence Against Women” (1981) 41 J. Personality & Social Psychol. 710; Neil M. Malamuth & James V.P. Check, “The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment” (1981) 15 J. Res. Personality 436; Neil M. Malamuth, “Factors Associated with Rape as Predictors of Laboratory Aggression Against Women” (1983) 45 J. Personality & Social Psychol. 432; Neil M. Malamuth & James V.P. Check, “The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences” (1985) 19 J. Res. Personality 299; Neil M. Malamuth & James V.P. Check, “Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim’s Perceived Reactions” (1980) 10 J. Applied Social Psychol. 528; Dolf Linz & Jennings Bryant, “Effects of Massive Exposure to Pornography” in Neil M. Malamuth & Edward Donnerstein, eds., *Pornography and Sexual Aggression* (New York: Academic Press, 1984) 115.

refrain on sexuality, while the expressions conveyed in the materials at issue in this case are those of dissenting minority voices.²⁸

Similarly, Little Sisters argued that the Court in *Butler* “did not substantively or seriously consider gay and lesbian material.”²⁹ Relying on the work of lesbian legal academic Brenda Cossman, EGALE also argued that the research undertaken to date on the harm of pornography was exclusively directed at heterosexual pornography:

It is an understanding of harm set in a heterosexual framework. The pornography is male heterosexual pornography, and its harm is that heterosexual men are likely to mistreat women. The feminist literature on which this understanding of harm is based has similarly operated within this heterosexual discursive framework.³⁰

EGALE continued by arguing that the “*Butler* analysis of harmful effects of mainstream pornography is so embedded in a heterosexual context that it does nothing to elucidate the effects of lesbian, gay, and bisexual pornography” and that because gay pornography does not involve heterosexual representations, it “cannot eroticize a gendered power imbalance of male domination over women.”³¹

It is worth noting at this stage that the material before the Court in *Butler* was not limited to heterosexual sex acts. Rather, the videotapes at issue in that case included violent and degrading sexual acts between men. Same-sex material in *Butler* was not “restricted to so-called ‘lesbian sex,’ produced specifically for heterosexual male

²⁸ *Little Sisters* (S.C.C.), *supra* note 2 (Factum of the Intervener EGALE at para. 34) [EGALE Factum].

²⁹ *Little Sisters* Factum, *supra* note 16 at para. 69.

³⁰ Brenda Cossman, “Feminist Fashion or Morality in Drag?: The Sexual Subtext of the *Butler* Decision” in Brenda Cossman *et al.*, eds., *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) 107 at 128.

³¹ EGALE Factum, *supra* note 28 at para. 40. In concluding, EGALE relied on the work of Leslie Green, who has argued that

[w]hatever role straight pornography plays in the complex causal network that keeps women in their place, gay pornography obviously plays a much different role [if any] in keeping gay people in their place, for that is by and large the work of straight people. Here, the oppressor class, if there is one, is in the wrong socio-erotic location.

...

[I]f we begin with the new paradigm’s view of the harm that pornography causes women, we will find that the analogous harms suffered by gay men are not in the main caused by gay men. They are caused by heterosexual women and men whose attitudes are not significantly influenced by gay male pornography. Thus, while in the gender-dominance theory of pornography the oppressor class and the class of consumers of pornography strongly overlap, in the reality of lesbian and gay life, the oppressor class and the class of consumers of gay pornography are disjoint (“Pornographies” (2000) 8 J. Pol. Phil. 27 at 41-42).

audiences,” as Little Sisters claimed.³² Nor has the feminist anti-pornography/sex equality literature relied on by the courts ever drawn a distinction between non-gay and gay pornography when describing and analyzing the harms of pornography as the harms of sex inequality—quite the opposite.³³ In any event, even if *Butler* had not focused on same-sex pornography and even if the research and writing undertaken on pornography thus far had only focused on heterosexual pornography, the question remains: is this analysis applicable to same-sex pornography? In particular, does something about gay pornography ensure that it does *not* present issues of sex discrimination and gender inequality and does not produce individual and systemic harm?

In 1985, the Special Committee on Pornography and Prostitution presented its report (the *Fraser Report*) to the Canadian federal minister of justice. The committee observed that “sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context.”³⁴ The committee concluded that these materials offend the value of respect for human dignity of which Quigley J. spoke in the case of *R. v. Keegstra*,³⁵ a case involving the constitutionality of Canada’s anti-hate speech laws, and that the social harm to which the prohibition on pornography in the *Criminal Code* is directed is based on respect for human dignity in general and is not restricted to human dignity in the heterosexual context.³⁶ Accepting this, the Canadian

³² *Little Sisters*, *supra* note 2 (Factum of the Intervener Equality Now at para. 19) [Equality Now Factum]. See generally Karen Busby, “LEAF and Pornography: Litigating on Equality and Sexual Representations” (1994) 9 C.J.L.S. 165 at 179-80; LEAF *Butler* Factum, *supra* note 5 at para. 5.

³³ In this regard, see the arguments presented in LEAF *Butler* Factum, *ibid.* at para. 48 (the text of this paragraph is quoted in connection with note 75 *infra*). See also Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) [MacKinnon, *Feminist Theory of State*]; Andrea Dworkin, *Women Hating* (New York: Plume, 1974); *Joseph Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998 (1998) (Brief of Amici Curiae, National Organization on Male Violence) [MacKinnon, Amici Curiae Brief]; Andrea Dworkin, *Right Wing Women* (New York: Perigee Books, 1978); Jeffreys, *supra* note 7; MacKinnon & Dworkin, *In Harm’s Way*, *supra* note 1; MacKinnon, *Sex Equality*, *supra* note 3.

³⁴ Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol. 1 (Ottawa: Supply and Services Canada, 1985) at 268.

³⁵ [1990] 3 S.C.R. 697, 2 W.W.R. 1 [*Keegstra* cited to S.C.R.].

³⁶ *Keegstra* concerned the interpretation and application of sections 318 and 319 of the *Criminal Code*. These provisions make it an indictable offence to communicate statements that willfully promote hatred against any identifiable group. In *Keegstra*, the Supreme Court held that although these provisions do infringe the right to free expression, the infringement is nonetheless justified because of the threat to equality posed to target groups and to society at large from speech aimed at undermining equality (*ibid.* at 747). Much has been written on the *Keegstra* decision. See generally Tamsin Solomon, “Anti-Semitism as Free Speech: Judicial Responses to Hate Propaganda in *Zundel* and *Keegstra*” (1995) 13:1 *Australian-Canadian Stud.* 1; Kathleen Mahoney, “*R. v. Keegstra*: A Rationale for Regulating Pornography?” (1992) 37 *McGill L.J.* 242; Richard Moon, “Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda” (1992) 26:1 *U.B.C. L. Rev.* 99; Bruce P. Elman, “Combating Racist Speech: The Canadian Experience” (1994) 32 *Alta.*

courts, prior to *Little Sisters*, recognized that lesbian and gay male pornography could cause harm and that the sexual orientation of the material was irrelevant.³⁷ In *Little Sisters*, on appeal to the British Columbia Court of Appeal, MacFarlane J.A. extended this analysis, arguing that harm was not reduced simply because the materials were only shown to or used by lesbians and gay men. Specifically, quoting the decision of Wilson J. in *R. v. Towne Cinema Theatres Ltd.*,³⁸ where she reasoned that “[i]t is not ... open to the courts ... to characterize a movie as obscene if shown to one constituency but not if shown to another.”³⁹ This argument was also raised by the Attorney General of Canada in *Little Sisters* who argued that MacFarlane J.A. was correct when he said:

If the appellants’ argument is that Parliament had no reasoned basis for apprehending harm because no harm results from the receipt and use by the gay/lesbian community of obscene material, then I must reject it. Harm is not to be determined by the standard of the gay/lesbian community but by application of a general community standard. The question is not whether harm will be caused to the gay and lesbian community by the importation of obscene material, but whether harm to society generally may be caused by importation and proliferation of such material. The objective of the legislation is not to prohibit non-obscene gay and lesbian literature, but to prohibit importation of obscene material as defined in s. 163(8) of the *Criminal Code*.⁴⁰

To some extent, the Attorney General’s support of these comments risks implying that, in some circumstances, gay pornography can be harmless for gay men themselves but nonetheless harmful to society as a whole. With respect, I find this reasoning somewhat illogical. Given what we know about the links between homophobia and sex discrimination, it is unreasonable on its face to distinguish between the harm-producing effects of heterosexual as compared to homosexual pornography. Logically, it would seem that each of these two categories of pornography should either stand or fall together when subjected to the sex equality analysis outlined in *Butler*; that is, either both kinds of pornography are harm-producing (in which case the distribution of both types should be prohibited), or neither is harm-producing (in which case neither should be prohibited). In other words, to the extent that the harms produced in both heterosexual and homosexual pornography derive from sexist gender hierarchies, it is reasonable to conclude that the harms to women that have been ascribed to heterosexual pornography produce analogous harms to gay men in the context of homosexual pornography.

L. Rev. 623; Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press, 2000) at 146.

³⁷ Note, for example, the comments of Paris J. in *R. v. Scythes*, [1993] O.J. No. 537 at para. 6 (Ont. Ct. (Gen. Div.)) (QL) [*Scythes*].

³⁸ [1985] 1 S.C.R. 494, 18 D.L.R. (4th) 1 [*Towne* cited to S.C.R.].

³⁹ *Ibid.* at 521.

⁴⁰ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1998), 160 D.L.R. (4th) 385 at 406, [1999] 12 W.W.R. 445 (B.C.C.A.) (Factum of the Intervener Minister of Justice in *Little Sisters* (S.C.C.) at para. 59).

This line of reasoning is also problematic because there is a possibility of ignoring the very real risks to gay men that might in fact result from gay male pornography—harms that, in turn, feed into the types of broader systemic sexual inequalities referred to above. Hence, it is futile to attempt to address the wider social harms of pornography unless we recognize and address the extent to which the attitudes and inequalities promoted in gay pornography harm gay men and, in so doing, *then* serve to reinforce the biases and inherent gender hierarchies that result in the systemic inequality referred to in *Butler*, through which *both* gay men and all women are harmed.

There are other aspects of the Attorney General's submissions in *Little Sisters* that are problematic. In addressing the claim that no proof exists that gay male pornography is harmful, for example, the Attorney General again relied on MacFarlane J.A.'s conclusion that:

the argument of the appellants that no causal link has been demonstrated between homosexual erotica and harm, and that there is no evidentiary foundation to support Parliament's view that harm may result from the proliferation of obscene matter, must fail ... *Butler* holds, at pp. 501-502, that a causal link may be impossible to establish and that harm may be presumed. There are references throughout the reasons of Sopinka J. in *Butler* to difficulties in proof, and to the controversial opinions held by those trained in the social sciences. In the end, the evidence is inconclusive ... [but] [c]onclusive evidence from social scientists is not required.⁴¹

This claim that there is no causal connection between harm and pornography merits clarification. Although there is, of yet, no social science data on the links between gay male pornography and harm per se, there is irrefutable evidence to this effect with respect to heterosexual pornography. This is an important point and one that should not be overlooked. It is important because it raises the question of whether gay male pornography can be proven harmful by way of analogy. In *Little Sisters*, EGALE argued that an analogy could not be drawn because of the way in which same-sex pornography is used by gay men and lesbians, the way and reason for which it is produced, and the different socialization processes that occur prior to and when gay men and lesbian women use pornography.⁴²

This rejection of any analogy-based argument is interesting given that gay men themselves have long argued that an analogy should be drawn between the harms of racial hate speech, for example, and anti-gay hate speech. There is, of yet, no absolute scientific proof that racist hate speech causes harm and yet gay men have argued that when the courts recognize such speech as harmful, an analogy should be drawn

⁴¹ *Ibid.*

⁴² A more detailed overview of the arguments raised by EGALE and the other interveners in *Little Sisters* is provided in Kendall, *Gay Male Pornography*, *supra* note 15.

between it and anti-gay hate speech, despite the fact that no “absolute” proof of harm for either form of speech exists.⁴³

In the pornography context, the analogy would seem to be even stronger given that heterosexual pornography *has* been proven harmful. Indeed, researchers have long argued that although harms-based research has thus far relied on the effects of heterosexual pornography, the reality of gay men generally (already affected by pervasive homophobia and resulting self-hate⁴⁴), once influenced by what gay

⁴³ See generally N. Kathleen Sam Banks, “Could Mom Be Wrong? The Hurt of Names and Wrongs: Hate Propaganda and Freedom of Expression” (1999) 6:2 Murdoch U.E.J.L., online: Murdoch U.E.J.L. <<http://www.murdoch.edu.au/elaw/issues/v6n2/banks62nf.html>>. See also Marie-France Major, “Sexual Orientation Hate Propaganda: Time to Regroup” (1996) 11:1 C.J.L.S. 221. Arguing for the inclusion of sexual orientation in section 319 of the Criminal Code, the provision that criminalizes racial vilification, Banks continues:

Hate propaganda represents a serious threat to a free and democratic society through its messages calculated to divide, demean and discriminate. Individuals who are the target of hate speech lose their dignity, self-worth and sense of belonging to the community, the targeted group suffers a loss of cultural identity and group reputation, and society as a whole is damaged by its messages encouraging division, prejudice and intolerance. Equality and inherent human dignity are not tentative concepts: without protection from the harms of hate propaganda, these ideas themselves are demeaned and marginalized. On balance, our commitments to equality, multiculturalism and social harmony are enhanced rather than diminished by expanding s. 319 (2) of the *Criminal Code* to include sexual orientation within its prohibitions (*ibid.* at para. 89).

As Major notes, there is little reason to believe that anti-gay prejudice does not manifest the same social and psychological damage as racial and other ethnic prejudices (*ibid.* at 227). See generally Gregory M. Herek, “Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes” (1987) 13 *Personality & Soc. Psychol. Bull.* 34; Gregory M. Herek, “Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy” (1989) 44 *Am. Psychologist* 948; Gary B. Melton, “Public Policy and Private Prejudice: Psychology and the Law on Gay Rights” (1989) 44 *Am. Psychologist* 933.

⁴⁴ The links between racial vilification and low self-esteem are well documented. As Lawlor notes:

People ... seem to have only a blunted sense of what racial insult and discrimination do to the self-esteem, aspirations, and modes of life of the targeted individual or groups, and especially to the children. It can be and is too often devastating; they are treated as less than human, they are dehumanized. They react aggressively in anger, which usually only worsens the situation, frustrates the victim and drives the injury deeper; or supinely, they come to accept their stigmatization, as a fated fact of life, with all the misery and degradation that that entails (Patrick Lawlor, *Group Defamation: Submission to the Attorney General* (Toronto, March 1984) at 17 [unpublished, on file with author]).

Similar findings hold true for homophobia and self-hate. As Plummer notes:

To be called a “homosexual” is to be degraded, denounced, devalued or treated as different. It may well mean shame, ostracism, discrimination, exclusion or physical attack. It may simply mean that one becomes an “interesting curiosity of permissiveness”. But always, in this culture, the costs of being known as a homosexual must be high (Kenneth Plummer, *Sexual Stigma: An Interactionist Account* (London: Routledge, 1975) at 175).

pornography says about appropriate gay male sexual behaviour, suggests that findings on the sex-based harms of heterosexual pornography are applicable within the context of gay male pornography. As Dr. Neil Malamuth explains:

there may be similar processes operating regardless of the sexual orientation of the material. I therefore suggest that it may be appropriate to generalize from this research to the specific content in question, even though there are some differences in content. In keeping with considerable research I am suggesting that processes of influence, attitude change, normative effects, consequences of arousal, etc. do not differ fundamentally as a function of a person's sexual preference. Therefore, in many areas, similar theoretical models may be applied to both heterosexuals and gays. Furthermore, there are many similarities among gay and straight people in motives for various behaviours, including sexual activity and in problems of sexual and non-sexual coercion.⁴⁵

In *Little Sisters*, the trial judge, accepting this argument, concluded that there was sufficient evidence to support Parliament's reasoned apprehension that homosexual

A recent report by the Western Australian AIDS Council, entitled "Here for Life: Youth Sexuality Project", notes that "the process of realizing a same-sex orientation typically results in: damaged self esteem, distancing from family and peers, attempts to avoid disclosure, distortion of nearly all relationships, increasing sense of isolation and a sense of inferiority and self loathing." A copy of the Report is available from the Western Australian AIDS Council, 664 Murray Street, West Perth, WA, Australia, 6005 or via e-mail at waac@highway1.com.au. See also U.S. Department of Health and Human Services statistics, as quoted in Kevin Jennings, *Becoming Visible* (Boston: Alyson Publications, 1994) at 264; U.S.A. Task Force on Youth Suicide, *Final Report*, specifically the chapter by P. Gibson, "Gay Male and Lesbian Youth Suicide" (U.S. Department of Health and Human Services, 1989).

Martin and Hetrick quote Erving Goffman to substantiate the proposition that the effect of anti-gay stereotypes on a naïve, developing adolescent is to produce a form of cognitive dissonance that radically undermines the adolescent's sense of self. As Goffman notes:

[T]he standards he has incorporated from the wider society equip him to be intimately alive to what others see as his failing, inevitably causing him, if only for moments, to agree that he does indeed fall short of what he really ought to be. Shame becomes a central possibility, arising from the individual's perception of one of his own attributes as being a defiling thing to possess (Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, N.J.: Prentice-Hall, 1963) at 7, cited in A. Damien Martin & Emery Hetrick, "The Stigmatization of the Gay and Lesbian Adolescent" (1988) 15:1-2 J. Homosexuality 163 at 167).

See also Christopher Bagley, "Suicidal Behaviours in Homosexual and Bisexual Males" (1997) 18:1 Crisis 24; Gary Remafedi, "Risk Factors for Attempted Suicide in Gay and Bisexual Youth" (1991) 87:6 Pediatrics 869; Virginia Uribe & Karen M. Harbeck, "Addressing the Needs of Lesbian, Gay and Bisexual Youth: The Origins of Project 10 and School-Based Intervention" (1991) 24:3-4 J. Homosexuality 9; Ron MacDonald & Trudi Cooper, "Young Gay Men and Suicide" (1998) 17:4 Youth Stud. Australia 23; Jonathon Nicholas & John Howard, "Better Dead Than Gay" (1998) 17:4 Youth Stud. Australia 28; Gary Remafedi *et al.*, "The Relationship Between Suicide Risk and Sexual Orientation" (1998) 88:1 Am. J. Public Health 57; Neil Buhrich & Carlson Loke, "Homosexuality, Suicide, and Parasuicide in Australia" (1988) 15:1-2 J. Homosexuality 113.

⁴⁵ Testimony of Dr. Neil Malamuth in *Scythes*, *supra* note 37.

pornography could cause the types of harms at issue in *Butler*. The Supreme Court of Canada affirmed this finding.⁴⁶

It is important to note that Malamuth and others are not suggesting that the result of exposure to gay male pornography is exactly the same as the result of exposure to heterosexual pornography. What they are saying is that it is not unreasonable to conclude that scenarios of violence and degradation might lead to increased violence against real people. Although the resulting harms are not exactly the same (because gay men are not in the same social position as women), an analogy can nonetheless be drawn—an analogy that says that exposure to certain forms of visual material causes certain behaviours and that these behaviours result in harm inflicted on real people. If, as I will argue, masculinity is the defining and preferred construct in gay male pornography, does this not simply reinforce those male-female stereotypes that result in systemic inequality? Is this not particularly problematic when used by gay men—men who are already encouraged socially to buy into these stereotypes? If the presentation of what is acceptable male behaviour in heterosexual pornography is a source of male aggression against women, can it not be readily inferred that some gay men, already subject to the rejection resulting from being socially defined as non-masculine, might also be negatively affected by a medium that encourages the use of

⁴⁶ The Supreme Court of Canada rejected the arguments put forth by Little Sisters and those interveners arguing on their behalf, ruling that there is nothing about the harm that results from lesbian and gay pornography that distinguishes it from the harms that result from the production and distribution of heterosexual pornography. Rejecting LEAF's position on sado-masochism, for example, the Court noted:

The appellants, supported by the interveners LEAF and EGALE, contend 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 celebration 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 (*Little Sisters* (S.C.C.), *supra* note 2 at 1159).

The Court then continued:

The intervener LEAF took the position that sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture.

...

The portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable (*ibid.* at 1163-64).

male power over others, with the potential to result in rape, domestic violence, and other forms of male hostility and aggression against other men?

II. Gay Male Pornography: What It Says, What It Does

A. *Why a Description Is Necessary*

It is helpful, at this point, to discuss and describe what gay male pornography *is*. Although to some this might at first seem unnecessary given the amount of pornography readily available to those who care to look for it, the need for description and discussion does become evident once the paucity of existing analysis seeking to interrogate the conception of masculine identity championed by those advocating the sale and distribution of gay male pornography is acknowledged. Indeed, a careful reading of the evidence and analysis presented in *Little Sisters* reveals a rather unsettling omission on the part of those defending the materials in issue before the Court.

Despite considerable effort to defend gay male pornography as a source of equality, justice, and freedom before, during, and after the *Little Sisters* hearings, there has been little description of what the materials in issue in this case look like, what their message is, and how these materials work individually and socially. If gay male pornography is a source of affirmation, as its proponents claim, then the question that needs to be addressed is: what type of gay identity does it affirm and what is it specifically about the materials defended in *Little Sisters* that allegedly makes them represent all that *is* gay male identity? If these materials are empowering, what is it about them that makes them so? In other words, how do these materials promote and produce equality?

I have had an opportunity to review the materials at issue in the *Little Sisters* case, in addition to other materials that, while not specifically defended before the Supreme Court of Canada, would nonetheless be legal now had *Little Sisters* convinced the Court to allow the unrestricted distribution of gay male pornography in Canada. I summarized these materials in October 1999 over a two-day period at the Civil Exhibits Division of the British Columbia Court of Appeal. A sampling of some of the gay male pornographic materials at the centre of the *Little Sisters* litigation is described and analyzed below.⁴⁷

⁴⁷ Much of the pornography quoted in this paper comes from the pornography exhibits defended in the *Little Sisters* case, argued before the Supreme Court of Canada in 2001. What is offered here is a sampling of magazines, videos, and books that had been detained by Canada Customs since 1985. In October, 1999, I flew from Perth, Australia to Vancouver, Canada to view these exhibits. The exhibits had been classified illegal and were being detained at the Civil Exhibits Division of the British Columbia Court of Appeal. I was given permission by the Federal Department of Justice to view the exhibits. I had approximately two days to do so. There were approximately 200 exhibits in the *Little Sisters* litigation. Of these, this paper offers a summary of or quotations from a very small sample. I

Little Sisters ordered, and Canada Customs excluded as socially harmful, many of the materials described below. Others are materials ordered by other gay importers, such as Glad Day Bookstore in Toronto, and similarly prohibited as harmful. Still others are examples of materials that could be freely imported into Canada had the remedy requested by the appellant in *Little Sisters* been granted. Many were presented as exhibits at trial and were available to the Supreme Court of Canada when deciding whether or not gay pornography violates the *Butler* sex equality standard. My aim in providing these summaries is to offer a diverse overview of some of the materials now

also offer other examples of materials that Little Sisters would have sold if it had proven victorious before the Supreme Court of Canada.

Some of the materials before the Court clearly did not violate the *Butler* equality mandate but were nonetheless detained by Canada Customs. This was recognized by the Court and is an issue that I have addressed elsewhere when analyzing how best to implement the *Butler* equality test in a way that is not discriminatory. See Kendall, “Gay Male Cooperation”, *supra* note 2. For the time being, however, it is worth noting that of the 200 exhibits before the Court, many *did* violate *Butler*. Despite this, Little Sisters, LEAF, EGALE, and others drew no distinction between harmful and non-harmful materials, requesting, instead, the dismantling of an entire regulatory system aimed at stopping pornographic harm. This litigation strategy would allow the distribution of pornography (heterosexual or homosexual) into Canada, regardless of the effect this would inevitably have on those harmed by the production and use of those materials that result in the injury caused by systemic inequality on the basis of sex and sexual orientation.

The quotations provided from those materials that were exhibits in the *Little Sisters* case were read into a tape recorder in Vancouver and later typed upon my return to Perth. As far as is possible, the quotations offered from these exhibits are accurate summaries of what appears in the materials I was allowed to view. I say “as far as possible” because I was working under a very tight time frame in legally constrained conditions. Each exhibit was bought to me individually in a locked room. I was then allowed to dictate into a tape. I was not allowed to photocopy more than a few pages of the written materials because Canada Customs had ruled that these materials were illegal under Canadian law. I was not allowed to remove the materials from the courthouse and could only view one exhibit at a time. Some of these exhibits did not list the authors, years of publications, et cetera because pages had been removed or blacked-out in earlier court proceedings. If they did provide this information, I often did not record all of it because my aim was to use specific quotes for the purpose of critical analysis and I had no opportunity to re-check the quotations once the materials were removed from the room I had been allocated. I could not later return to find this bibliographic information because, once the Supreme Court ruled that Canada Customs could detain these materials, they were either destroyed after subsequent court proceedings or returned to the United States, from whence they came. Many of these materials were also dated (as far back as 1985) and it was not possible to find the specific magazines in Canada, even in those stores that would have continued to sell them illegally. I have tried to track down some of the magazines in Australia but this is difficult without full bibliographic details. Many of the magazines are now out of stock and, I might add, illegal in Western Australia, where I now live. I was thus reluctant to purchase them even if I could find them. They would also now be illegal in Canada as a result of the *Little Sisters* case. It is also worth noting that because of the nature of the pornography industry, the names of “authors” are often fictional. This makes getting verification from individual writers extremely difficult. In my summaries, I thus tend to provide only the name of the magazine, book, or video and the exhibit number from the case, where applicable. Any mistakes made during dictation are entirely my own. For these reasons, the editors of the McGill Law Journal were not able to verify the extent to which passages excerpted from the exhibits at issue in *Little Sisters* have been reported verbatim.

available, some of which were defended by Little Sisters, all of which would be considered legal if the Court had accepted the appellant's argument that gay male pornography is harm-free and hence *Butler*-proof.

B. Inequality and Violence Normalized Through Sex

If the materials defended in *Little Sisters* typify the gay identity defended by pro-pornography and pro-gay advocates, as they say they do, what has the Supreme Court of Canada just been told about homosexual identities? In answering this question, it is worth noting the quotation below, found in an article in *Manscape Magazine*, not in issue in *Little Sisters*, but available nonetheless from the plaintiff's bookstore. It, like many of the materials defended in *Little Sisters*, reminds the reader that to be "male" is to be empowered, but that maleness requires conformity to a clearly defined gender norm—a gender role according to which some are entitled to sexually abuse and control, while others, because they are descriptively less "male", are socially less relevant, less equal, and not entitled to the respect, compassion, and human dignity that only true equality can provide:

I pushed him lower so my big dick was against his chest; I pushed his meaty pecs together. They wrapped around my dick perfectly as I started tit-fucking him like a chick. His hard, humpy pecs gripped my meat like a vice. Of all the things I did to him that night ... I think he hated that the most. It made him feel like a girl.

I sighed, "Oh, my bitch got such pretty titties! They was made for tittie fuckin, made to serve a man's dick."⁴⁸

As in a great deal of written or pictorial gay male pornographic presentations,⁴⁹ what

⁴⁸ William Willcox, "That Old Time Religion" *Manscape Magazine* 10:11 (1995) 4 at 15.

⁴⁹ I am not suggesting that the type of harm arising from pictorial or video presentations is the same as that which arises from purely written or descriptive pornography. On the contrary, pornography that presents real people does just that—it presents and uses *real* people. Regarding the abuse and exploitation of gay male pornographic models, see Christopher N. Kendall & Rus Funk, "Gay Pornography's 'Actors': When Fantasy Isn't" in Melissa Farley, ed., *Prostitution, Trafficking, and Traumatic Stress* (Binghamton, N.Y.: Haworth, 2003); Roger Edmonson, *Boy in the Sand: Casey Donovan—All American Sex Star* (Los Angeles: Alyson Books, 1998); Charles Isherwood, *Wonder Bread and Ecstasy: The Life and Death of Joey Stefano* (Los Angeles: Alyson Publications, 1996). Having said this, however, I should also not be seen as saying that non-pictorial presentations are *not* a threat to gay male equality, hence not socially harmful. This was a claim made by Little Sisters in their Supreme Court of Canada factum. Specifically, the store argued that

the apprehension of harm supposedly avoided by the impugned [Criminal Code] provisions is further attenuated when textual material is involved. The trial Judge said *Butler* could not be distinguished on this basis since the material under consideration there included magazines. However, there were no books at issue in *Butler*; and most of the evidence in this case concerned books, a medium that strictly involves the imagination of both the writer and reader. No one is exploited or in any way harmed in the writing of a book. Even if text can give rise to a reasonable apprehension of harm,

one gets from the above excerpt is a “source of affirmation” in which the physically more powerful, ostensibly straight male is glorified. The linking of manliness with heterosexuality and overt masculinity is a common theme throughout many of these materials, where masculinity is often gained at the expense of a woman or ostensibly gay male’s safety and self-worth. The misogynistic overtones in these materials are clear.

The December 1989 edition of *Advocate Men*,⁵⁰ a magazine which is modelled along the lines of *Playboy* and *Penthouse* magazines, includes both features and photo spreads of youthful, muscular, well-toned men. The article accompanying one of these collections of photographs reads:

The first thing people notice about Glen Fargus, apart from his stern masculinity and animal sexuality is those muscles of his. It is easy to resent him when he remarks that he has never lifted weights but all is forgiven when Glen gives the reason for his physique. “I like to fuck a lot,” he says. He is described as working as a foreman and although this requires a lot heavy lifting, this is nothing compared to “the work I put into pumping some young stud’s butt.” ... “Sometimes my muscles get me in trouble. Some guys say I’m too rough during sex. I get into it and all the other guys end up all bruised. Like they say, no pain no gain.”⁵¹

An article in the same magazine entitled “Perfect Husband” tells the story of a young gay man’s attraction to another ostensibly married (read: non-gay) man who is described as “so hetero it’s unbelievable.” Jack (the married, heterosexual man) is described in terms that make it clear that he is a “real” man in this relationship. We are told for example, that he cannot cook because that is his wife’s duty and forte. The story describes Jack having anal sex with his young gay male companion. The gay man is described performing oral sex on his straight friend. Jack is quoted as saying to

such texts will be sufficiently rare that they can be left to the normal criminal law process (Little Sisters Factum, *supra* note 16 at para. 74).

This is a statement that, like many of the arguments made during this trial, seems to have been made with little or no appreciation of the materials in question. Within the context of this case, subsection 163(8) of the *Criminal Code*, *supra* note 3, which both defines “obscenity” and is incorporated by reference into the *Customs Tariff*, *supra* note 10, applies equally to books and visual materials. *Butler* did not confine its analysis of harm to visual materials. Also, while the use of real people to make pornography can, and often does, result in considerable harm to that person, it can also result in harm to others negatively impacted as a result of the attitudes conveyed by the presentation of another person’s abuse. Similarly, when the abuse, torture, dehumanization, or sexual exploitation of people is promoted in such a way as to sexualize this abuse and inequality and present it as positive, normal, even liberating, then abusive and anti-egalitarian behaviour toward others is also promoted. The risk is not eliminated, however, simply because real people are not used to market the harm promoted.

⁵⁰ Little Sisters Trial Exhibits, Exhibit number 198, *Advocate Men*, December 1989, published by Liberation Publications.

⁵¹ *Ibid.* at 66.

this man, “You were right ... Men are better at it than women and a mouth has no sex. You know I don’t feel any guilt at all. It’s great.”⁵²

Another quotation from the same article reads:

Usually Jack brings over a porn flick to watch while I take my sweet time sucking him off. The tapes always star the same large breasted, incredibly pink females. I can’t see the action very well but I don’t mind at all. My taste in porn is quite different. Jack comes around for my services just often enough that neither of us becomes bored or frustrated by lack of action. He does get awfully excited even a bit brutal when he shoots his wad. But I don’t mind at all. Rather the contrary. And he is considerate, always keeping the scotch well supplied, casually dropping a gift on me now and then. And sometimes stock market tips, all of which have proved to be good ones. He is always deliciously clean and good smelling. I am so lucky. He is a wonderful gentleman and a good provider. I couldn’t ask for more. He is the perfect husband.⁵³

Similar themes to those raised in “Perfect Husband” are emphasized in the next story in the same magazine. Titled “Night Watchman”, this story describes a gay man who has a number of sexual experiences with married men. One quotation from that article describes one non-gay male encouraging another non-gay male to rape a gay man. It reads: “Now, fuck that hard ass man he told me yanking my cock hard and placing it against his hole. Shove that big cock up there until he screams. Fuck him man, you know how bad he wants it. Just do it until he screams and you load him full of cream.”⁵⁴ The article continues: “‘The man’s got a tight, tight pussy man,’ Phil told me. He wrenched his hand free and slapped Saul in the back. ‘Lean over and show this man your pussy ass.’”⁵⁵

Another article, “The Plan”, describes the sexual encounters of a young gay man in drag. It details how he is sexually used by another older man (who is represented as not gay). The theme, like those described above, draws a clear distinction between who is and is not the “man” in the sexual relationship and outlines what it takes to fit either the masculine or feminine role. In one quotation, the “straight” male says to the ostensibly transsexual male in drag:

What you want is me putting you on your knees. You want me stuffing money down your bra and fucking your face until cum runs down your chin while you are creaming your panties. You want fancy motel rooms and big double beds and my meat rammed up your ass. You want drive in movies with petting and kissing and my dick in your mouth. You want to be a lady and a tramp right?⁵⁶

⁵² *Ibid.* at 26.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 39

⁵⁵ *Ibid.* at 40.

⁵⁶ *Ibid.* at 56.

At one stage, the younger man is forced to have sex in public. When he explains that he is worried about what people might see and say, the older man says, “Fuck em. You’re my cunt. Not theirs.”⁵⁷

Frequently, sexual subordination is enforced through extreme forms of torture and violence, with masculinity again epitomized and celebrated in men who ridicule and emasculate others in the name of sexual pleasure. Those who are emasculated in these materials are often specifically described as gay males, while those who abuse them and who are held out as sexual role models are described as straight (read: “real”) men. Note, for example, *MACH 19: A Drummer Super Publication*, Volume 19.⁵⁸ This magazine contains an article entitled “Prisoner” that details the torture and sexual mutilation of prisoners of war during a fictional military coup. Many of the prison officers are described as “straight” and “real men” whose masculinity is shown through the sexual abuse of their prisoners, most of whom are belittled as gays, queers, sissies, et cetera. The rape and torture of one these men is described as follows:

The next day they started on him early. “Hi, I’m Sam,” the man poked his head in the doorway. “Yer goin to be seen a lot of me. My friend Barney says ya got a tight ass,” his sadistic sneer spelled trouble. Sam was tall and lanky with a country-hick shuck of brown hair, large nose and thick lips. He slipped off his belt. “I jes love to beat faggot ass,” he smirked, swinging the leather across Steve’s chest.

Steve grabbed the strap and pulled, trying to wrest the damn belt from the bastard. Sam tugged back, grinning, and Steve realized he’d made a mistake.

“I like faggots with spunk,” Sam jerked the belt. “Makes me relish puttin em in thar place,” he kneed Steve in the groin.

Steve’s ears rang. He gasped for breath and tried to scrunch into a tight knot to ward off the incessant blows. The belt stripped across his arms and side. He yelped helplessly “Please,” he cried, and Sam kicked him in the ribs. Steve slumped over.

“Fuckin queer!” Sam yelled.

Sam kicked him again. “Show me that faggot ass,” Sam yelled.⁵⁹

A similar theme is found in *Bear: Masculinity Without the Trappings*, Issue 9.⁶⁰ The emphasis in this magazine is on overt, hyper-masculinity. Like *MACH 19*, many of the themes in this magazine mock gay men, describing them in strongly feminine

⁵⁷ *Ibid.*

⁵⁸ Little Sisters Trial Exhibits, Exhibit number 49, *MACH 19: A Drummer Super Publication*, Volume 19, January 1990, published by Desmondus [*MACH 19*, Exhibit number 49].

⁵⁹ *Ibid.* at 24.

⁶⁰ Little Sisters Trial Exhibits, Exhibit number 197, *Bear: Masculinity Without the Trappings*, Issue 9, 1989, published by COA.

terms. One article, for example, quotes a trucker who, while bragging about the men who have “serviced” him at truck stops, says:

truckers sure know about the clean finger nail faggots taking up stalls all day playing footsies, tossing toilet paper and love notes at any pair of boots along side. Most truckers ignore them. Some want to kill them and others figure a blowjob for free is one hell of a lot better than tossing dollars at a whore.⁶¹

This publication, like many others, promotes violence and aggressive, non-egalitarian behaviour. The personals in the classified section at the back of this magazine typify this inequality in action. The theme throughout is hyper-masculinity achieved at the expense of someone else’s liberty and self-worth. Merit is found in degradation and rewards are attached to one’s ability to use or be used. Equality is found only, if at all, in reciprocal abuse.

All of these examples provide a sexualized identity politics 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 subjected to degrading and dehumanizing epithets usually invoked against women, such as “bitch”, “cunt”, and “whore”. These men are in turn presented as enjoying this degradation. In sum, these materials reinforce a system in which, as MacKinnon explains, “a victim, usually female, always feminized” is actualized.⁶² 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 that ensure that homophobia and sexism remain intact.⁶³

⁶¹ *Ibid.*

⁶² MacKinnon, *Feminist Theory of State*, *supra* note 33 at 141.

⁶³ On the links between homophobia and sexism and the need to fight both simultaneously, see Suzanne Pharr, *Homophobia: A Weapon of Sexism* (Berkeley: Chardon Press, 1988); Diana Majury, “Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context” (1994) 7 C.J.W.L. 286; Lynne Pearlman, “Theorizing Lesbian Oppression and the Politics of Outness in the Case of *Waterman v. National Life Assurance*: A Beginning in Lesbian Human Rights/Equality Jurisprudence” (1994) 7 C.J.W.L. 454; Andrew Koppelman, “Why Discrimination Against Lesbians and Gay Men is Sex Discrimination” (1994) 69 N.Y.U.L. Rev. 197; Andrew Koppelman, “The Miscegenation Analogy: Sodomy Law as Sex Discrimination” (1988) 98 Yale L.J. 145; Marie Elana Peluso, “Tempering Title VII’s Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination” (1993) 46 Vand. L. Rev. 1533; Francisco Valdes, “Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender’ and ‘Sexual Orientation’ in Euro-American Law and Society” (1995) 83 Cal. L. Rev. 3; Mary Anne C. Case, “Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence” (1995) 105 Yale L.J. 1; Elvia R. Arriola, “Gendered Inequality: Lesbians, Gays and Feminist Legal Theory” (1994) 9 Berkeley Women’s L.J. 103; Amelia A. Craig, “Musing About

In examining the exhibits before the Supreme Court of Canada in *Little Sisters*, many of which were defended by Little Sisters and their supporters, and all of which would have been legal had Little Sisters' arguments been accepted, we also find sexually explicit materials that sexualize racist stereotypes and degrade members of racial minorities for the purpose of sexual arousal. The message conveyed is one in which gay Asian men, for example, are presented as smaller and more feminine than their Caucasian counterparts and thus willing to be sexually subordinated by a more dominant, stereotypically white male. An example of this type of publication is found in the magazine *Oriental Guys* ("OG"). This magazine, as its title indicates, consists of photographs and written collections of articles about Asian men. A quick review of the magazine makes it clear, however, that, although about Asian men, the magazine is directed at the Caucasian gay male market.

OG presents photographs of young Asian men, usually posing by themselves. These photo spreads are often accompanied by articles with titles like "Be My Sushi Tonight"⁶⁴ or "Behind Bars in Thailand",⁶⁵ which discusses sex for sale in that country—a country where the sale and sexual use of young boys via sex tourism is rampant. The magazine does not present more than one young man at any one time. There is no apparent presentation of violence or physical pain. The magazine does, however, focus on and sexualize the youth and race of those used to produce this publication with stories throughout the magazine describing, among other things, older white men cruising Asian boys and male prostitutes. In this context, young Asian men are described as "pearls of the orient", "easy to find", "accessible", and "available". Often, the photo spreads of young Asian men, shown face down with buttocks elevated, are accompanied by "news" articles that tell the reader how, for example, to recruit young Balinese men.⁶⁶ These, in turn, are accompanied by "letters to the editor" that detail successful overseas conquests of young Asian men by the magazine's readers.

The entire focus and content of this publication sexualizes racism and sexual exploitation. This is its intended result, and it is marketed as such. Although degrading to Asian gay men, the theme promoted also justifies through sex the types of attitudes and inequalities that make racism and sexism a powerful and interconnected reality. The white male is described as one who seeks out an inferior Asian other; the young Asian is described and presented as ready and willing to serve his sexual needs and

Discrimination on Sex and Sexual Orientation as 'Gender Role' Discrimination" (1995) 5 S. Cal. Rev. L. & Women's Stud. 105; James D. Wilets, "Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective" (1997) 60 Alb. L. Rev. 989; Patricia A. Cain, "Feminist Jurisprudence: Grounding the Theories" (1989) 4 Berkeley Women's L.J. 191.

⁶⁴ Little Sisters Trial Exhibits, Exhibit number 262, *Oriental Guys*, Issue 4, Spring 1989 at 10 [*Oriental Guys*, Exhibit number 262].

⁶⁵ Little Sisters Trial Exhibits, Exhibit number 6, *Oriental Guys*, Issue 6, Spring 1990 at 10.

⁶⁶ See e.g. *Oriental Guys*, Exhibit number 262, *supra* note 64.

fantasies. The white male is superior; the Asian male inferior. The resulting harm is an affront to all persons seeking equality.

In many of these materials, rape is normalized and consent implied. In the story, “Sucks Brother Off Before Wedding” from *Juice: True Homosexual Experiences*, for example, the writer describes being raped by his older brother when he was eight-and-a-half:

He crawled between my legs with that fuck pole of his. He located the hole and started to push. Naturally I felt like he was making a new hole. I must have been very resilient from a very early age because he did get it in eventually the whole length. I felt like I truly had a telephone pole up there. The pain was excruciating but for some reason I enjoyed the thrill of debasement. I knew instinctively that I was a fucking slut. He fucked for what seemed like hours, and with the mixed feeling of pain and whoredom I survived.⁶⁷

Explaining that this formed the basis of his preferred sexual experiences in adulthood, the reader then details another of his sexual encounters as follows:

Once when I was about 25 I got raped by a powerful young guy that I had taken home to blow. I always say that was the best sex I ever had. Rape at that stage of the game was enjoyable. God he was good. He knew just what to do to a willing asshole that kept saying no. He took me with force and I fought him right to the bitter end and—thank God—he won out. When he got through with my asshole I knew I had had it. The bastard never came back though.⁶⁸

The identity sold in these materials is one in which violence by one man against another man or men is presented as sexual for both the persons involved and the consumer of these materials. Sexualized violence is a common theme. Note, for example, the book *Entertainment for a Master*, specifically defended by Little Sisters, in which reciprocal battery, pain, and abuse are promoted as a form of equality:

Then I struck out at him. The leather was longer than a belt would have been. It allowed me to use it on the whole of both his cheeks. It left one broad stripe of red across the white expanse of muscle. He reared up. No amount of preparation would have steeled him so well that he wouldn't scream at the shock of the whipping. When, he moved, he jerked the rawhide holding his balls to Glen and the chains that joined the nipple, forcing his lover to experience a jolt of pain himself.⁶⁹

Similarly, the magazine *Dungeon Master—The Male S/M Publication*,⁷⁰ that would have been freely imported into Canada had Little Sisters had its way, presents men torturing other men in sexually explicit ways with hot wax, heat, and fire while

⁶⁷ Little Sisters Trial Exhibits, Exhibit number 213, *Juice: True Homosexual Experiences*, Volume 5, 1984.

⁶⁸ *Ibid.*

⁶⁹ Little Sisters Trial Exhibits, Exhibit number 19, *Entertainment for a Master*, by John Preston, 1986.

⁷⁰ Little Sister Trial Exhibits, Exhibit number 48, *Dungeon Master: The Male SM Publication*, No. 39, 1990, published by Desmodus [*Dungeon Master*, Exhibit number 48].

portraying this abuse as sexually arousing for the abusers, the persons injured, and, again, for the consumer. The magazine *Mr. S/M 65*⁷¹ presents photographs of men being defecated on and who derive pleasure from eating and drinking excrement. The film *Headlights and Hard Bodies*⁷² includes footage of men sexually using other men who are being pulled by neck chains, hit and whipped while tied to poles, penetrated by large objects, and/or subjected to clamping, biting, and pulling of their nipples and genitals. Men presented as “slaves” are shown in considerable pain but finding sexual enjoyment from the abuse inflicted on them by others. Those released from bondage kiss the man or men who beat them and thank them for putting them in their place with whips and verbal degradation. *MACH* magazine,⁷³ in turn, glorifies sexually explicit torture in a military setting while detailing the kidnapping, torture, and sexual mutilation of prisoners of war. In a photograph in the same magazine, two young men are shown confined in a cage. One, face down and bent over, is being slapped by an older man in a Nazi military uniform. Another is chained and hung in stirrups with a hand shoved down his throat.

What one sees in these and other examples of gay male pornography is an almost pervasive glorification of the idealized masculine/male icon. Cops, truckers, cowboys, bikers, and Nazis are eroticized; racial stereotypes are sexualized and perpetuated; muscles, “good-looks”, and youth are glorified; and ostensibly straight (or at least “straight acting”) men beat, rape, and/or humiliate descriptively (frequently stereotypical) gay men. Sadism, bondage, water sports, fisting, bootlicking, piercing, bestiality, slapping, whipping, incest, branding, burning with cigarettes, torture (of the genitals and nipples with hot wax, clamps, and the like), child sexual abuse, rape, and prison rape are presented as erotic, stimulating, and pleasurable. In most, if not all of these materials, it is the white, physically more powerful, more dominant male who is romanticized and afforded role model status. In those scenarios where male sexual partners “take turns” being the “top”, the characteristics of dominance and non-mutuality remain central to the sexual act. In those photos where men are alone, positioned, and posed, humanity is removed and objectified. As Men Against Rape and Pornography, a US activist group, accurately explains, the man exposed becomes non-human, an object waiting for another to do something to him or wanting to do something to another because he has what it takes to do so. The message conveyed is that some people want and deserve to have sex forced on them. They both solicit and deserve this treatment.⁷⁴ In all cases, the result is a sexuality that is depicted as hierarchical and rarely compassionate, mutual, or equal. This conclusion was first put forward by LEAF in its submission to the Supreme Court in *Butler* in 1991. Specifically, in summarizing the materials before the Court in that case, LEAF argued:

⁷¹ Little Sister Trial Exhibits, Exhibit number 216, *Mr. S/M 65*.

⁷² Little Sister Trial Exhibits, Exhibit number 192, Film: *Headlights and Hard Bodies*, produced by Zeus Video.

⁷³ *MACH 19*, Exhibit number 49, *supra* note 58.

⁷⁴ See Men Against Rape and Pornography (“MARAP”), *Looking at Gay Porn* (1993), available from MARAP, P.O. Box 8181, Pittsburgh, PA, 1517.

A small number of the subject materials present men engaging in sexual aggression against other men, analogous to the ways women are treated in the materials described above. Men are slapped with belts. A man is anally penetrated with a rifle. Men are presented as being raped. Men's genitals are bound. They are in dog collars and in chains. Men lick other men's anuses and are forced to lick urinals during anal intercourse. Men are presented as gagging on penises down their throats. Men urinate on men and ejaculate into their mouths. Boys are presented with genitals exposed, surrounded by toys.⁷⁵

These materials lead LEAF to conclude that

[i]ndividual men are also harmed by pornography. ... LEAF submits that much of the subject of pornography of men for men, in addition to abusing some men in the ways that it is more common to abuse women through sex, arguably contributes to abuse and homophobia as it normalizes male sexual aggression generally.⁷⁶

An overview of the materials, available since *Butler* was first heard, reveals that little has changed, other than perhaps LEAF's somewhat disappointing decision to defend the very materials it opposed in *Butler* as sexist, misogynist, and racist.⁷⁷

The materials summarized here, many of which were defended in *Little Sisters* as free of harm and central to gay liberation, and all of which would have been legal had *Little Sisters* won, provide but a small overview of the content of the types of pornography available to and consumed by gay men. They are, however, indicative of what is available and, if *Little Sisters*, and those who intervened in the case on their behalf, prove successful in their bid to throw out the Supreme Court of Canada's

⁷⁵ LEAF *Butler* Factum, *supra* note 5 at para. 5.

⁷⁶ *Ibid.* at para. 48.

⁷⁷ It should be noted that, despite the claims of some of the litigants in *Little Sisters*, some of the materials seized from Donald Butler's store were magazines and videos intended for sale to gay men. LEAF was widely (and unfairly) criticized in the gay community for using them as part of its argument before the Court in *Butler*.

An overview of LEAF's strategy and a response to the claim that the group appealed to judicial homophobia in order to win the case is found in Busby, *supra* note 32. With respect to the gay male pornography relevant to the *Butler* case, Busby notes that, because the analysis LEAF offered was one based on equality (a point that the Court accepted), to omit any discussion of gay pornography would have been to omit a necessary discussion of the role these materials have, not only on gay communities, but also within a broader social context. An analysis of the materials before the court more than justifies this stance. As Busby explains:

Some of the seized materials in *Butler* involved sex between men, and some of these materials were extremely violent. The depictions included gay bashing, penetration with a rifle, gang rape scenes, and prison rape scenes. None of the materials portrayed safe sex. One magazine featured a nude teenage boy surrounded by children's toys (*ibid.* at 179).

Busby's justification is well-founded. As such, one is left to query why LEAF, nine years later in the *Little Sisters* case, found itself able to justify a litigation strategy which, if accepted, would have allowed the unlimited circulation throughout Canada of the very materials that the group earlier criticized as a violation of society's sex equality interest.

Butler-based sex equality analysis of pornographic harm, would be readily available throughout Canada.

These materials typify the identity that pro-pornography litigants, academics, and activists defend when they seek to strike down anti-pornography legislative regimes on the basis that gay male pornography is co-extensive with gay male identity.⁷⁸ In the name of liberation and equality, these pro-pornography supporters advocate the dissemination of a form of expression that plainly creates, packages, and resells a sexuality that epitomizes inequality: exploitation and degradation of others; assertiveness linked with aggression, strength equated with violence, physical power, and the right to overpower; intimidation, control of others, lack of mutuality and disrespect, humour found in the sexual debasement of another, and being hurt presented as pleasurable; violating and being violated presented as identity politics; and aggressive, non-consensual behaviour advanced as normal and sexually promoted as liberating. In sum, gay male pornography merges with an identity politics that personifies all that is masculine, hence gender “male”, and that rejects all that is non-masculine, feminized, and hence gender “female”—an identity through which, as Andrea Dworkin explains, gay men are not only penetrated like women, but are expected to lust after pain and degradation like women are thought to under male dominance.⁷⁹

By referring to the presentation of gay men as “feminized” and therefore “female”, I am not suggesting that gay men and women are equally oppressed. Nor am I suggesting that the harms of gay porn are exactly the same as those that result from the production and sale of heterosexual pornography. As Andrea Dworkin explains, “devalued males can often change status, escape; women and girls cannot.”⁸⁰ What I am saying, however, is that to the extent that some gay men reject socially defined “male” behaviour and express a sexuality and politics that has the potential to subvert male gender supremacy, their behaviour is deemed unacceptable and is devalued as such. The gay male who does so is, as John Stoltenberg explains, “stigmatized because he is perceived to participate in the degraded status of the female.”⁸¹ Once “smeared with female status,” the gay male assumes a position inferior to those who, not feminized, reap the benefits of male-female polarity.⁸² Feminized men thus assume an inferior position in a gendered power hierarchy, and herein lies one of the very real harms of the gay porn defended in *Little Sisters*: it tells gay men that in order to become more valued, they must become more “male”, less

⁷⁸ On gay male pornography as gay male identity, see, in addition to the pro-pornography authors and arguments noted throughout this paper, Carl Stychin, “Exploring the Limits: Feminism and the Legal Regulation of Pornography” (1992) 16 *Vt. L. Rev.* 857; Jeffrey G. Sherman, “Love Speech: The Social Utility of Pornography” (1995) 47 *Stan. L. Rev.* 661; John R. Burger, *One-Handed Histories: The Erotico-Politics of Gay Male Video Pornography* (New York: Haworth Press, 1995).

⁷⁹ Dworkin, *Women Hating*, *supra* note 33 at 89.

⁸⁰ Dworkin, *Men Possessing Women*, *supra* note 22 at 61.

⁸¹ Stoltenberg, “Pro-Pornography Movement”, *supra* note 6 at 250.

⁸² *Ibid.* at 251.

“female”. It encourages them to do what they can do: “change status”. In doing so, gay male pornography, like all things homophobic, acts as a weapon of sexism.

III. But Is It Harmful?

The court’s 1992 Butler decision has stuck us with the burden of common law that says images lead to action and that violent images lead to violent action—usually by straight men against straight women.

Perhaps the best (but most unlikely) argument is that sex between men, and sex between women—and all the kinky representations of it we can muster—is indeed an exception. Nobody wants to be a separatist, but Butler leaves little room. For gay men and lesbians, sexual expression takes place in a self-contained, idyllic universe that has little effect on how women are treated in society.

In homo couplings, societal inequalities between the genders don’t come into play. There is more freedom in queer relationships, less worry about power going awry; the Supreme Court needs to acknowledge it.⁸³

The summary of the content of gay male pornography provided in this paper is indicative of what gay male pornography *is*. Although content and presentation vary in degree and explicitness from one medium to another, what one gets from the above is an overview of what gay male pornography says and does. In arguing, as they did before the Supreme Court of Canada, that gay male pornography should be exempt from the sex equality standard set by the Court in *Butler*, Little Sisters Bookstore and others defended, or would have allowed, the production and distribution of the same kinds of pornography described in the preceding section, and they defended it on the grounds that it expressed gay male identity—an identity which equals, promotes, encourages, hence *is* violence, cruelty, degradation, exploitation, assertiveness linked with aggression, strength equated with violence, physical power and the right to overpower, intimidation, control of others, lack of mutuality and disrespect, being hurt presented as pleasurable, violating and being violated presented as identity politics, and aggressive, non-consensual behaviour advanced as normal, liberating, and sexually promoted as such.

In sum, gay male pornography encourages all that is socially defined as masculinity (“male”) and rejects that which is non-masculine (“female”). Like heterosexual pornography, it thus glorifies those in our society who have always had the most power and who have always benefited from dominance and social inequality—white, able-bodied, middle-class, straight men. Like homophobia, it

⁸³ Paul Gallant, “We Need a Porn Plot Twist: I Thought Pro-Sex Feminists Had Won” Editorial, *Xtra! Magazine* (13 January 2000) 15.

silences those who either refuse or who are excluded from being able to so benefit. The result for society, once accepted, is a sexual politics based on a male-female dichotomy—in essence, a remarkably accurate description of what it takes to get and maintain both power and heterosexual male privilege.

Having looked at what gay male pornography is and what it says, and given its similarities with heterosexual pornography, it requires considerable self-denial for gay men to argue that gay pornography is not harmful in much the same way that other forms of pornography are harmful. Indeed, in that its message is that “manliness is the only real virtue [and] other values are contemptible,”⁸⁴ one must ask whether this gay male identity will result in liberation or whether, in the name of liberation, we are promoting homophobic, and therefore sexist, politics that result in individual and systemic harms. In *Little Sisters*, the Supreme Court of Canada accepted that harm would result. The remainder of this paper offers support for this finding.

A. Gay Male Rape

One of the arguments advanced against the production and distribution of heterosexual pornography is that it makes men more tolerant of sex as violence, resulting in higher rates of sexual assault and abuse against women. Pornography does much more than interact with sexual fantasies; it is not purely ideational, but rather shapes and produces actual sexual practices. As the brief analysis of the attitudes of and about men who rape men and who are raped by men below indicates, the risk of harm resulting from gay male pornography, like the harms that result from heterosexual pornography, is real. This is particularly true given what gender inequality, now sexualized, has come to mean socially and the effect of sex role stereotypes on gay men in particular. Specifically, if we look at what rape is, what it is about, and what it says about male aggression generally, it does not require much to at least infer that any expressive medium that eroticizes male sexuality as dominance, inequality, abuse, and hierarchy might result in physical and psychological harm to others.

In his insightful and much needed book on male rape, Michael Scarce explains that “[a]lthough it remains uncertain, evidence suggests gay men are more likely to be raped than straight men. Despite the fact that heterosexual men far outnumber gay men in sheer masses, gay men seem to be more at risk, on average, than their heterosexual counterparts.”⁸⁵ In a 1989 study by psychologist Caroline Waterman at

⁸⁴ Seymour Kleinberg, “The New Masculinity of Gay Men, and Beyond” in Michael Kaufman, ed., *Beyond Patriarchy: Essays by Men on Pleasure, Power, and Change* (Toronto: Oxford University Press, 1987) 120 at 123.

⁸⁵ Scarce, *Male on Male Rape*, *supra* note 20 at 65. See also Michael Scarce, “The Reality of Male Rape” (Winter 1993) *National Coalition Against Sexual Assault* J. 7; Michael Scarce, “Same-Sex Rape of Male College Students” (1997) 45:4 *J. Am. C. Health* 171; Michael Scarce, “Harbinger of Plague: A Bad Case of Gay Bowel Syndrome” (1997) 34:2 *J. Homosexuality* 1.

the University of Albany, twelve per cent of thirty-four men in gay relationships “reported being victims of forced sex by their current or most recent partner.”⁸⁶ Similarly, in another study conducted the following year, researchers found that gay college students reported significantly higher lifetime prevalence of sexual victimization than did heterosexual men participating in the same study.⁸⁷ Finally, in a study of 930 gay men living in England and Wales, 27.6 per cent reported they had been sexually assaulted at some point in their lives.⁸⁸

It is clear that rape is a gay male issue and one that must be taken seriously. Although this might seem to some like a restatement of the obvious, what becomes apparent from a reading of the testimonies offered in Scarce’s book is that the horrors experienced by some gay men risk being dismissed as mere sexual theatre by those who defend pornography as harm-free. This risk increases so long as gay men sexualize inequality and powerlessness. By sexualizing masculinity and femininity through pornography, gay men do exactly this by making the masculine-feminine interaction sexy to gay men. Consuming pornography is done sexually, experienced sexually, *as* sexuality, the practices of which are virtually identical to the top-bottom sexuality of male dominance. It is the sexuality of male dominance that gay male pornography promotes and eroticizes, and the result is male dominance in action with all the harms, including rape, that flow from and sustain it. In his work, for example, Scarce provides an account of one man, “Darren”, who was abducted by two men in the car park outside his gym. The men held a gun to Darren’s head and forced him into their van, handcuffed him, and drove him to a house where they proceeded to sexually humiliate, abuse, and ultimately, rape him. His ordeal says much about power, abuse, and the effect of sexualized gender dichotomies in his life and in the lives of his attackers. That he continues to survive is miraculous. That he is willing to talk about his ordeal in order to assist others shows an inner strength perhaps known only by those who have survived similar abuse. As such, his words deserve repeating and all gay men would do well to think critically about the tortuous events he describes:

They took me down to the basement, and they had a platform in the center of the room. They made me stand up on it, my hands still cuffed behind me. They walked around and looked at me and told me they were going to uncuff my hands. At this point they both had guns, and one of the guys uncuffed my hands. They told me to pull off my gym shorts and I did. They made me pull my T-shirt back behind my neck. All I had on was gym shoes, socks, and a jock strap. They made me get into different poses and positions for them for a long

⁸⁶ Caroline K. Waterman, Lori J. Dawson & Michael D. Bologna, “Sexual Coercion in Gay Male and Lesbian Relationships: Predictors and Implications for Support Services” (1989) 26:1 Sex Res. 118.

⁸⁷ See David F. Duncan, “Prevalence of Sexual Assault Victimization Among Heterosexual and Gay/Lesbian Students” (1990) 66 Psychol. Rep. 65 at 66.

⁸⁸ See Ford C.I. Hickson *et al.*, “Gay Men as Victims of Nonconsensual Sex” (1994) 23 Archives of Sexual Behav. 281.

time. They held the guns on me the whole time. I was really scared because I was afraid the guns might even go off accidentally. I kept thinking I didn't know what they were going to do to me, that they might cut me up or mutilate me. They were touching themselves with one hand, masturbating while they were watching me.

One of the guys started talking about how he was going to fuck my butt. They put me over a wooden sawhorse and made me lie across it. They pulled my jockstrap off and then tied my hands and legs to it so I was over it. Then they both took turns raping me. That went on for a long, long time, an hour and a half or so.

They seemed angry when they were fucking me because they did it so hard, with so much force. Earlier when they were using the switch on me, it was like they were trying to get every piece of anger or rage they had out on me. The rest of the time they were more sarcastic or condescending, more trying to humiliate or degrade me than angry.⁸⁹

Darren's experience is not pornography. After reviewing the materials outlined above, however, it is clear that it could be. From an equality perspective, if this description of a rape appeared in a gay male pornography magazine and was sold and used as sexual practice, it would be pornography, particularly as it encourages the sexualization of sexual assault. And to the extent that individuals use pornography and then act out the kinds of abusive scenarios portrayed, their victims should be taken seriously when they question "the right" of those who produced and published such materials to do so.

Indeed, if the above passages had appeared in the previous section of this paper, the reader could be forgiven for mistaking Darren's horror for the "pleasure" defended as sexuality and liberation in quite a few of the exhibits defended in the *Little Sisters* trial: a young, attractive, physically fit male is abducted in a car park. His captors, threatening to kill him and laughing at his fear, drive him to their "rape house". They handcuff him, make him perform and masturbate while watching him. Stripping him naked, they objectify his body, sexualize his fear, and act out their most vivid pornographic fantasies. Handcuffed, the young man is whipped with switches, then tied to a sawhorse where he is brutally raped. Degraded and ridiculed throughout, he is made to service men who, while simultaneously sexualizing and condemning his sexuality, find validation by inflicting abuse as a means of reaffirming their masculinity through violence, humiliation, and the stripping away of another man's manhood.

Darren's experience, like that of many men who have been raped, says a great deal about the dangers inherent in a society that sexualizes inequality. What his story

⁸⁹ Scarce, *Male on Male Rape*, *supra* note 20 at 128-30. See also Fred Pelka, "Raped: A Male Survivor Breaks His Silence" in Patricia Searles & Ronald J. Berger, eds., *Rape and Society: Readings on the Problem of Sexual Assault* (Boulder: Westview Press, 1995) 250.

epitomizes is misogyny gone mad. Feminizing him in order to both condemn and use him as an unequal, while at the same time reasserting their own masculinity by acting out sexualized violence, these men play out the sexual logic of male dominance. By degrading Darren and mocking him sexually for going to gyms (for daring to be more masculine than them—a masculinity that they eroticize), these men, through violence, dehumanization, and rape, successfully put Darren back in his “place”, thereby empowering themselves as men. By feminizing and stripping Darren of his manhood, they prop up their own. Their actions typify homophobia and self-hate in action, sexism made sexy.

These conclusions are further supported by the work of those who have detailed those factors that motivate the rapist. In a 1980 study on men who rape men, for example, Groth and Burgess⁹⁰ outline the following motivating factors for men convicted of raping other men:

1. *Conquest and control.* All assaults served as an expression of power and mastery on the part of the offender. ...
2. *Revenge and retaliation.* In some cases of male rape, the offense is activated by the assailant’s anger toward his victim and is regarded by him as some form of retaliation. ...
3. *Sadism and degradation.* For some assailants, aggression itself becomes eroticized, and they find excitement in the sexual abuse and degradation of their victim. ...
4. *Conflict and counteraction.* Another component in some male rapes is the assailant’s attempt to punish the victim as a way of dealing with his unresolved and conflicting sexual interests. ...⁹¹

In the same study, the authors describe the views of one man detailing his attitude toward his victim as follows: “I had the guy so frightened I could have made him do

⁹⁰ A. Nicholas Groth & Ann Wolbert Burgess, “Male Rape: Offenders and Victims” (1980) 137 Am. J. Psychiatry 806. It is not my purpose here to offer a detailed analysis of male rape. This has been done elsewhere, most recently by Scarce, *ibid.* See also Arthur Kaufman *et al.*, “Male Rape Victims: Noninstitutionalized Assault” (1980) 137 Am. J. Psychiatry 221; Deryck Calderwood, “The Male Rape Victim” (1987) 7 Med. Aspects Hum. Sexuality 53; Gillian C. Mezey & Michael B. King, *Male Victims of Sexual Assault* (Oxford: Oxford University Press, 1992); Peter F. Goyer & Henry C. Eddleman, “Same-Sex Rape of Nonincarcerated Men” (1984) 141 Am. J. Psychiatry 576.

⁹¹ Groth & Burgess, *ibid.* at 808. As Richie McMullen further notes:

[I]n many cases, it is the feared or actual loss of positive power and aggression which motivates the offender to behave negatively. It is as though the offender is overcompensating for any other potential hurts to his otherwise already fragile masculinity. Being unable to find the resources in himself to deal with feared or actual loss, he must act out or externalise his fears in such a way as to be seen to be more dominant, more masculine ... (*Male Rape: Breaking the Silence on the Last Taboo* (London: GMP, 1990) at 26).

anything I wanted. I didn't have an erection. I wasn't really interested in sex. I felt powerful, and hurting him excited me. Making him suck me was more to degrade him than for my physical satisfaction."⁹²

Similarly, in analyzing the rape of men by men in prisons, Susan Brownmiller notes that to talk of rape as violence only, without acknowledging the extent to which that violence is gendered, risks overlooking the extent to which the "sex" in the expression "sex crime" is very much socially constructed and enforced by sexism and the homophobic desire for male supremacy. Within the context of gay male pornography, any analysis that omits gender also risks valorizing, sexualizing, and, thus, normalizing violence. Brownmiller notes, for example, that prison rape can be seen "as an acting out of power roles within an all-male, authoritarian environment in which the weaker, younger inmate ... is forced to play the role that in the outside world is assigned to women."⁹³ As MacKinnon explains, "[T]his lowers the victim's status, making him inferior as a man by social standards. For a man to be sexually attacked, by placing him in a woman's role, demeans his masculinity; he loses it, so to speak ... What he loses, he loses through gender, as a man."⁹⁴ To this, one would only add that a male who perpetuates acts of sexual violence against other men seeks to confirm his status as a "real man" and, thus, to reaffirm his masculinity. What he maintains or gains, he gains through gender, as a man. Hence, when a man sexually abuses another man, his actions are gender-based, thus sexual. Male domination of some men over other men is therefore part of the social system of gender whereby men dominate women and through which straight men dominate gay men. Hence, male rape, like anti-gay violence generally, is also a weapon of sexism, finding its source in the social institutions that prop up masculinity and, in so doing, suppress any sexual expression that threatens it. As McMullen concludes:

The general attitudes inherent in this rapist's words remind me so much of various school bullies from my own childhood. How males see themselves as male, and how that perception is enabled in the family, schools and other institutions, is central to any understanding of male rape. Male upon male bullying in schools is all too often positively sanctioned and treated by both parents and teachers as normal behaviour. It is, of course, not right for one person to bully another. How often one hears the unqualified male-propelled phrase "boys will be boys" used to justify such bullying. Undefined and therefore confused notions of what it means to be a masculine, powerful, dominant man echo through our culture like football chants, arbitrary and self-congratulatory.⁹⁵

⁹² Groth & Burgess, *ibid.*

⁹³ Brownmiller, *supra* note 23 at 258. See also Mary Willcox, "The Sexually Assaulted Prisoner" (1986) 12 New Eng. J. Crim. & Civ. Confinement 349; Peter Nacci & Thomas Kane, "The Incidence of Sex and Sexual Aggression in Federal Prisons" (1984) 48 Fed. Probation 46; David Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (Lismore, N.S.W., Aust.: Southern Cross Press, 1998).

⁹⁴ MacKinnon, Amici Curiae Brief, *supra* note 33 at 10.

⁹⁵ McMullen, *supra* note 91 at 27.

Some of the work outlined above is not specific to gay men who rape gay men. This does not, however, make their risk of being raped any less real. Indeed, given these findings, gay men might well discourage, rather than sexualize, the harms documented. Unfortunately, gay men are not discouraging them. And so I ask: in examining what gay male pornography is, should we not acknowledge that harm is at least possible given that this medium is intended for an audience of gay men who are socially feminized, told they are inferior, and, as such, likely to take quite seriously the message conveyed in a medium that fuses dominance with sexuality and promotes male empowerment by dictating that power is to be found in a sexuality in which he who dominates is powerful while he who succumbs deserves to be dominated? Should we not be concerned that gay male pornography represents sexuality generally and it is *this* sexuality, the sexuality of male dominance, that is at the root of all that is anti-woman and anti-gay, but pro-male? Gay male pornography encourages this hierarchy, from which harm seems inevitable.

Consider, for example, the following images and stories contained in some of the gay male pornography magazines at issue in the *Little Sisters* case. The first is of a young office worker, dressed in suit and tie, who leaves his office and enters his car. From behind he feels a knife. In his rear-view mirror he sees two men, both dressed in leather, army boots, and studded jackets. He is urinated on, raped orally and anally, but described throughout as enjoying it and anxious for more. The story reads:

Hands on my waist he rammed, slamming the unlubricated head and the whole dry shaft deep inside me. It hurt like hell. I moaned ... in agony. It was tearing me apart like a chisel in the crack of a stone. I felt myself splitting into two halves and I could do nothing to stop it and I felt my cock stiffen in response. He was ramming into me now like a man possessed, sliding in and out without attention to my screams of pain. It felt like a goddamned log, bark and all, being slid up my crack. I heard his friend screaming, "fuck him, fuck the hell out of him" and I loved it.⁹⁶

In another magazine exhibit, a "slave training manual" teaches the reader the proper etiquette for training a slave over the phone. It reads:

Whenever he phones his Master, the slave should be naked, kneeling and wearing tit clamps. When phoned by his Master, the slave should always immediately drop to his knees and continue the call, looking downwards and with his spare hand behind his back. Alternatively, the slave can be taught that when his Master phones, the slave should always, ring off, strip naked except for tit ring and then phone his Master back from a kneeling position of course. The Master should always stand up when making telephone calls to his slave. A curious fact acknowledged by business psychologists is that standing up while conducting a phone conversation increases the apparent authority of the speaker, particularly if the receiver is not standing up. Conversely, kneeling

⁹⁶ *MACH 19*, Exhibit number 49, *supra* note 58.

will increase the apparent servility of the speaker. When one party stands and the other kneels, the Master servant relationship is powerfully enforced.⁹⁷

As the activist group Men Against Rape and Pornography explains, this type of material provides a user's manual on how to get and keep power through sex and sexuality—transmitting messages that, given the level of anti-gay violence within the community, can only hinder the call for equality:

Although unrecognized and hidden well within our community, rape is very common. Typically, as with male-female rape, the rape is likely to happen on a date or other situation where the rapist and victim already know each other. ... One man is at another man's apartment and he is pressured or forced to "have sex." This is rape. One man tries to talk his partner into trying a new position he has seen in porn. The partner says no because of the pain; the first man continues anyway against his partner's will. This is rape. One man insists on tying another man to the bedpost and says that he needs to do this in order to really "get off." He saw this done to someone else in a video. This is rape. It is about power, domination, force, and control over another person, which has been sexualized.⁹⁸

Building on this analysis, it is also clear that a number of myths about male rape are reinforced through gay male pornography. These myths, once sexualized, both encourage and undermine attempts to prevent rape. Central in this regard is the myth that "no" means "yes". The effects of this stereotype are of particular concern when it is a gay man who says no because, according to this myth (propagated through pornography), gay men actually enjoy rape. According to this stereotype, rape *is* sex so all sex is therefore consensual and enjoyable.⁹⁹ Another myth assumes that men are entitled to sex with their partners whenever they want, even to the extent their partners refuse. Any guilt attached to non-consensual sex is mitigated by the myth that ejaculation or the appearance of sexual arousal during sex connotes enjoyment and desire and cannot, therefore, constitute rape. This myth is perpetuated despite the fact that the opposite attribution is often warranted. As Scarce notes, an erection should not be equated with consent, particularly if an erection and subsequent ejaculation is caused by the adrenaline build up expected in situations of intense fear or a belief that ejaculating will signify and lead to an end of the assault.¹⁰⁰

If we look at the messages conveyed in gay male pornography and compare them to reports of the actual experiences of rapists and rape victims, it becomes evident that gay male pornography promotes a sexuality that encourages gay males to covet a

⁹⁷ *Dungeon Master*, Exhibit number 48, *supra* note 70 at 13.

⁹⁸ Men Against Rape and Pornography, *supra* note 74.

⁹⁹ Greater analysis of the rape myths outlined here is given in Allison Salmon, Sharon Isle & Trevor Morton, "Sexual Assault in the Gay and Lesbian Community" *West Side Observer [of Perth, Western Australia]* (October 1994) 11.

¹⁰⁰ Scarce, *Male on Male Rape*, *supra* note 20 at 61. See also D.E. Redmond, T.R. Kosten & M.F. Reiser, "Spontaneous Ejaculation Associated With Anxiety: Psychopathological Considerations" (1983) 140 *Am. J. Psychiatry* 1163.

form of social power—one that fundamentally depends on the violent degradation of others—traditionally denied to them. By sexualizing degradation, gay male pornography—including the materials that gay rights advocates would have us defend as non-harmful—increases the probability that consumption of these materials will culminate in rape. Gay male pornography also teaches the rapist that other men enjoy the violation through which he can seek empowerment—that he will both find and deliver pleasure through acts of violence committed against another. Rape, normalized though sex, becomes gay sex and in so doing, ensures that gay sex does little more than prop up the sexual hierarchies that make homophobia and sexism sexy and the cornerstone of inequality on the basis of sex. Finally, gay male pornography, produced by and sold to a community in which sexual violence is common, continues to promote materials that tell those who have been raped that they should enjoy and want this abuse. When rape is equated with sex and subsequently with gay male identity, equality (both within the gay community and in society generally) is not afforded a meaningful role to play.

B. Gay Male Domestic Violence

Similar concerns arise when we analyze the harms resulting from gay male domestic violence. In a study of 105 women staying in battered women's shelters in Ontario, twenty-five per cent of the women interviewed reported being forced to perform acts that their partners had seen in pornography. Although similar statistics have not been recorded within the gay male context (in part because no one has yet seen fit to offer safe shelters for male victims of violence, making it rather difficult for these men to talk safely about their experiences), we do know that there exists a massive consumption rate of gay pornography in our community.

Worldwide, sales of gay pornography represent a disproportionately high percentage of the pornography market.¹⁰¹ In an informal US survey conducted in

¹⁰¹ See Ronald Weitzer, *Sex for Sale: Prostitution, Pornography, and the Sex Industry* (New York: Routledge, 2000) at 49. Pornography is big business and gay male pornography sales are growing at a phenomenal rate. Mickey Skee reports that the industry as a whole raked in approximately US \$2.5 billion. Of that, it is estimated that one-third to one-half of all profits were from the sale and rental of gay male video pornography through mail order services and video stores. See Mickey Skee, "Tricks of the Trade" *Frontiers Magazine* (22 August 1997) at 43. See also Will Harris, "Porn Again" *Campaign Magazine* (December 1993) 47 at 48. An excellent overview of the economics of the pornography industry is provided in Ann Russo, "Feminists Confront Pornography's Subordinating Practices: Politics and Strategies for Change" in Dines *et al.*, *Production and Consumption of Inequality*, *supra* note 22. See also Catherine Itzin, "'Entertainment for Men': What It Is and What It Means" in Itzin, *supra* note 22 at 27-53. This may in fact be an understatement. As columnist Will Harris explains within the context of the Australian market (a market comparable to that found in Canada),

today the Californian group sex scenes by the pool are only a fraction of the diversity of the mostly US-produced gay porn videos on the market. Now there are literally hundreds of titles on the shelves of the gay pornography outlets, catering to just about

1979, half of the 1,038 gay men surveyed stated that they used pornography for masturbation. In 1997, more than half of the gay men who participated in a *Frontiers Magazine* survey stated that they used pornography videos as a prelude to sex.¹⁰² These surveys did not take account of the amount of pornography being accessed on the Internet—an amount that cannot be discounted. It is believed the pornography industry has grown during the last twenty-five years from approximately US \$2 billion in total annual revenue to at least US \$10 billion; some go so far as to argue that this industry may now be worth as much as US \$20 billion. Of that total, adult Web sites contribute an estimated US \$1 to \$2 billion a year.¹⁰³ Applying the surveys conducted thus far on gay male pornography use, there is little reason to believe that, of this amount, gay male use of pornography available on the Internet is not as significant as that of heterosexual men.

Examined within both the context of gay male domestic violence and the overview of pornographic content thus far provided, these figures are alarming. A 1991 study on gay male domestic violence, for example, reported that there are 350,000 to 650,000 victims of gay male domestic violence in the United States each year.¹⁰⁴ These statistics establish gay male domestic violence as the third largest health problem facing gay men in the United States today.¹⁰⁵ Insofar as an analysis of gay male pornography is concerned, the study's most revealing findings pertain to the

every known sexual proclivity. Canberra-based Champions Video has more than 800 titles on its shelves, selling videos on group sex, nude wrestling, foot fetishes, bondage and S & M (Harris, *ibid.*).

When you take into account the fact most people are probably “unwilling to tell research companies how much they spent on foot fetishes etc. in the last financial year,” the total sale estimates are probably conservative (Harris, *ibid.*). Indeed, the average number of entries at the Gay Video Guide “Erotic Video Awards” exceeds 500 videos every year and Adult Video News reviews as many as 400 gay, bisexual, and transsexual videos each year. Add to this the sale of magazine and paperback products like those in issue in *Little Sisters* and the downloading and sale of gay pornography from the Internet, and what emerges is the picture of a remarkably lucrative business in which what you want is quite literally what you get.

¹⁰² See Skee, *ibid.* at 62.

¹⁰³ See Frederick S. Lane III, *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age* (New York: Routledge, 2000) at xiv-xv. See also MacKinnon, *Sex Equality*, *supra* note 3 at 1509; Marti Rimm, “Marketing Pornography on the Information Superhighway” (1995) 83 *Geo. L.J.* 1849.

¹⁰⁴ Island & Letellier, *supra* note 18. For more information on gay male domestic abuse, see also Waterman, Dawson & Bologna, *supra* note 86; “Battered Lovers” *The Advocate* (4 March 1986) at 42-45; H. Donat, “Domestic Violence Strikes Gay Relationships” *Sentinel* (2 August 1990) at 5; Pierce Reed, “Naming and Confronting Gay Male Battering” *Gay Community News* (16-22 April 1989); T. Kingston, “Breaking the Silence: Gay Domestic Violence” *Coming Up!* (February 1989) at 10-11.

¹⁰⁵ As Island and Letellier explain:

Domestic violence is a big problem for America's 9.5 million adult gay men. We estimate that as many as 500,000 gay men are victims, and, of course, equal numbers are also perpetrators. Thus, only substance abuse and AIDS adversely affect more gay men, making domestic violence the third largest health problem facing gay men today (Island & Letellier, *ibid.* at 1).

characteristics of abusers, including how abusers perceive themselves and why. The conclusions reached say a great deal about any medium that reinforces the idea that masculinity is equated with dominance, while feminized non-masculinity is equated with subordination.

Gay men who batter and abuse their partners have specific ideas about masculinity and what it means to be “male”. This is in part a reaction to a complete lack of positive gay role models, a homophobic environment in which being gay means being “non-masculine”, and the internalization of social rejection and self-hate.¹⁰⁶ Gay men, growing up in a world with little or no positive reinforcement, are

¹⁰⁶ It is worth noting that much of the literature draws out the link between violence and perceived gender violations or the need to prove gender adequacy and masculine conformity. Herek, for example, notes that the ideological link between sexuality and gender has at least three consequences:

First, gay people are stigmatized not only for their erotic behaviours but also for their perceived violation of gender norms. Second, because homosexuality is associated with deviation from something so “natural” as masculinity or femininity, its labelling as abnormal receives further justification. Heterosexuals with deep-seated insecurities concerning their own ability to conform to cultural standards for masculinity or femininity may even perceive homosexuality as threatening their own sense of self as a man or woman. Third, a dual pattern of invisibility and hostility, denial and condemnation, is associated with gender that parallels that for cultural heterosexism. People who do not conform to gender roles—regardless of their actual sexual orientation—often are labelled as homosexual and stigmatized or attacked. Fear of such labelling leads heterosexuals and homosexuals alike to monitor their own behaviour carefully to avoid any appearance of gender nonconformity (Gregory Herek & Kevin Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (New York: Sage Publications, 1992) at 260).

See also Plummer, *supra* note 44 at 175. These “costs” often result in an attempt to mimic the social stereotype of what a “real man” is, for as Pharr explains, “misogyny gets transferred to gay men with a vengeance and is increased by the fear that their sexual identity will bring down the entire system of male dominance and compulsory heterosexuality” (Pharr, *supra* note 63 at 18). Pharr continues by explaining that homophobia, which finds expression in gay bashing, employment discrimination, and both familial and social ostracization, reminds all men that if they “break ranks with males through bonding and affection outside the arenas of war and sport,” they will be “perceived as not being ‘real men,’ that is, as being identified with women, the weaker sex that must be dominated and that over the years has been the subject of male hatred and abuse” (*ibid.* at 19). The gay male, socially feminized, internalizes this misogyny and seeks to mimic, because he can, those behaviours and characteristics that will, he hopes, allow him to “pass” for the “male” he is supposed to be. Within the context of gay male domestic violence, this need to “mimic”, to prove one’s masculinity, can result in catastrophic results. Internalizing society’s hatred of one’s perceived non-conformity brings with it a high price. For as Plummer explains:

To be called a homosexual is to be degraded, denounced, devalued or treated as different. It may well mean shame, ostracism, discrimination, exclusion or physical attack. It may simply mean that one becomes an “interesting curiosity of permissiveness”. But always, in this culture, the costs of being known as a homosexual must be high (Plummer, *ibid.* at 175).

Gay men, internalizing this societal reaction often act out in ways that can prove both self-damaging and harmful for those closest to them. On the effects that this pairing has on gay male domestic

inundated with a value system that equates masculinity (as the determinant of appropriate male behaviour) with aggression, control, and frequently with violence. As Island and Letellier explain:

Hollywood, television, sports, the military, advertising, music, and many visible male heroes and leaders are all guilty of making this unfortunate connection ... Negative ideas about masculinity popular in America include acting tough at all times, not showing tender feelings at all. The lean, mean super-cool, stoic cowboy is a perfect example of this ... view of masculinity. Another particularly obnoxious interpretation of masculinity teaches men to get their way by flexing muscles, drinking to excess, getting angry, and hitting people. To some men, being masculine means to intimidate, to dominate, and to do what they damn well want to, no matter what the consequences to themselves and to other people. To these men, being masculine is their attempt to control others so that they are sure that no one controls them, because being influenced by others is scarily unmasculine.¹⁰⁷

Nowhere is this cultural logic more evident than in the pornography used by these men. Made sexy, masculinity itself becomes a turn-on. Gay male pornography is comprised of “values” including strength, power, lack of tenderness, vulnerability of the other, control, and non-mutuality. A re-examination of the masculine ideal held by those men who psychologically abuse, rape, beat, and sometimes kill their partners reveals that their practices and value systems bear a striking resemblance to the “values” promoted in gay male pornography. This means, quite literally, that gay male pornography promotes and sexualizes *this* view of masculinity—the same view that results in gay men abusing and killing the men who love them. Although no research has been conducted to determine if gay men who abuse other gay men use gay male pornography, there is no evidence that they do not. To my mind, the fact that gay male pornography uses sex to promote the “macho” as a value means that this message, once interpreted by men who may not fit the desired norm, but who are nonetheless told and feel that they can and should through sex, has the potential to cause considerable harm.

For some gay men, overcompensation for their sense of non-worth becomes inevitable. Applying what they believe will provide control, power, and social acceptance, those who ultimately do batter quite literally come to embody the value system that they equate with masculinity—something that society thinks is more socially “male”, hence appropriate.¹⁰⁸ According to Island and Letellier, “[a]s real-live

violence, see Island & Letellier, *ibid.* For more information on gay male domestic abuse, see Waterman, Dawson & Bologna, *supra* note 86; “Battered Lovers”, *supra* note 104; H. Donat, “Domestic Violence Strikes Gay Relationships” *Sentinel* (2 August 1990) at 5; Pierce Reed, “Naming and Confronting Gay Male Battering” *Gay Community News* (16-22 April 1989); T. Kingston, “Breaking the Silence: Gay Domestic Violence” *Coming Up!* (February 1989) at 10-11.

¹⁰⁷ Island & Letellier, *ibid.* at 50.

¹⁰⁸ As lesbian feminist Susanne Pharr explains, this is not surprising given the intended effects of homophobia. Pharr writes, “anti-gay stereotypes can be seen to silence the public expression of non-heterosexual sexual identities and both foster and maintain ‘appropriate’ gender-role behaviour”

puppets, [gay men who overcompensate] perform a role, read a script and mechanically act out whatever their ideas are about masculinity.”¹⁰⁹ For some, the result is an effort to become the masculine prototype. These men interpret assertiveness to mean aggression (and hence ignore the rights and feelings of others), think of strength as a licence to be sexually violent or intimidating, see power as a licence to terrorize, and view mutuality as a threat to these privileges.¹¹⁰ They follow a prescription, a recipe for masculinity made sexy and normal through pornography and, after beating their partners, excuse their behaviour by claiming that their actions are sexually acceptable.

Although much of the above also applies to heterosexual men, the effects of this “masculinity as norm” myth for the gay male already affected by deeply embedded stereotypes are particularly significant. Indeed, while one might think that it is only those who already conform to the masculine prototype who beat their partners, studies reveal quite the opposite. Many gay male domestic batterers do not “fit the stereotypical super-macho man.”¹¹¹ Rather, they suffer from what can only be termed “failed macho syndrome”.¹¹² Socially rejected for their failure to conform, they feel that they do not reach the masculine ideal of “dominance and coolness”¹¹³ and, in an

(*supra* note 63 at 18), ensuring that women and men do not violate those gendered norms central to male power and that all lesbians and gay men are suppressed and punished to the extent that they do. As Pharr goes on to explain:

To be a lesbian is to be perceived (labeled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males ... A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism (*ibid.*).

Pharr further explains that gay men are also perceived as a threat to male dominance:

[A]nd the homophobia expressed against [gay men] has the same roots in sexism as does homophobia against lesbians. Visible gay men are the objects of extreme hatred and fear by heterosexual men because their breaking ranks with male heterosexual solidarity is seen as a damaging rent in the very fabric of sexism. They are seen as betrayers, as traitors who must be punished and eliminated. In the beating and killing of gay men we see clear evidence of this hatred (*ibid.* at 19).

The desire to be identified as a man and reap the benefits of male privilege is, in a homophobic society, socially appealing. No one should underestimate the power of homophobia and the extent to which it literally terrorizes gay men into wanting to pass as “real” men. Nonetheless, gay men must reject the pressure to do so. A failure to resist this pressure only results in considerable individual and systemic harms. Gay men would do well to take these findings seriously, whether the harm that results from hyper-masculine role-play takes the form of abuse directed at women or at other men.

¹⁰⁹ Island & Letellier, *supra* note 18 at 52.

¹¹⁰ See *ibid.* at 52-53.

¹¹¹ *Ibid.* at 51.

¹¹² *Ibid.*

¹¹³ *Ibid.*

effort to reach the desired “norm”, attempt to control other people, often through sex, in an effort to become that which society has told them they are not.¹¹⁴

These findings say a great deal about the power of systemic homophobia as a social force aimed at limiting same-sex sexual activity. Gay men, to the extent that they threaten to undermine masculine-feminine polarity, are terrorized as a means of diffusing this threat. Ridiculed as feminine and defined as socially inferior to “real” men, gay men are silenced so as to ensure that they do not reveal their sexual orientation and that those who do are systematically attacked.¹¹⁵ Left with few

¹¹⁴ The perception of verbal and physical abuse is correlated with the experience of this dynamic. See Roy Gibson, “Gay Man Was Battered Wife” *The West Australian* (8 February 1996) 11.

¹¹⁵ The extent to which others will go to ensure the silencing of those who do not “conform” is well documented. In its submission before the Supreme Court of Canada in *R. v. Keegstra*, dealing with hate speech, LEAF argued that the wilful public promotion of hatred inhibits truth seeking because it intimidates disadvantaged persons from seeking the truth:

[H]atred promotes ... disadvantage and, as such, is a practice of discrimination ... enmity, ill-will, intolerance and prejudice produce exclusion, denigration and subordination. Stereotyping and stigmatization ... through hate propaganda shapes their social image and reputation, often controlling the opportunities of [individuals] more powerfully than their individual abilities (Factum of the Intervener Women’s Legal Education and Action Fund (LEAF) in *Keegstra*, *supra* note 35 at para. 9).

To some extent, LEAF’s arguments on the need to restrict speech that silences and produces violence relied on the earlier work of Patrick Lawlor who, in 1984, had written a comprehensive report on hate speech and group defamation for the Attorney General of Ontario (Lawlor, *supra* note 44). In this document, Lawlor argues that target groups are entitled to protection, not only against the actual physical violence against minority groups caused by hate speech, but also against calumny, fear, and threat that infects and diminishes their lives.

Lesbians and gay men are well aware that people do listen to hate and that it does result in harm, both physical and psychological. As Kirk and Madsen note with respect to anti-gay propaganda in the United States, “the excitable masses are listening” and there is no dearth of evidence to prove their point. The authors provide the following examples:

While witnesses look on, a young man—a gardener for the city of San Francisco—is stabbed to death by four youths shouting “Faggot! Faggot!” In the same city, a lesbian is beaten in the face, knocked to the ground and kicked repeatedly while attackers scream “dyke” and “bitch.”

In New Jersey, three college-aged men are charged with entrapping a twenty-year-old gay at midnight in a shopping mall; after working him over and burning cigarettes in his face, they allegedly tied him by the ankles to their truck and dragged him down the road.

...

In Winston-Salem, the killer of a gay man is released on probation, then murders another by cutting his throat and planting a butcher knife in his chest. (Prosecutors reportedly let the killer plea-bargain after concluding that jurors won’t impose a stiff sentence for cutting a gay man’s throat).

...

options, the result for many is fear, confusion, and self-hate. They are told that they can reject the masculine norm and be further harassed, or they can attempt to become it (and, in so doing, hide any distinct, non-misogynistic gay male identity), thus making themselves (as gay) invisible. Unfortunately, the pervasiveness of anti-gay male violence and discrimination means that many gay men may overcompensate through sex and attempt to adhere to those sexual “values” that they believe will make them less visible, more “male”. As Island and Letellier’s findings indicate, this overcompensation can result in some particularly destructive behaviours, causing physical and emotional harm to others. They also ensure that male dominance, now sexualized, hence normalized, remains in place.

Conclusion

To date, our community has shown an apparent unwillingness to take seriously the very real harms of intra-community rape and domestic violence. There are undoubtedly a number of reasons for this tendency. The question I have attempted to pose in this paper, however, is whether our inaction can be explained, to some extent, by the perceived need to defend pornography as central to gay male identity and liberation. The facts seem to support this assertion. The materials in issue in *Little Sisters* were defended by many as indicative of what it means to be a gay male today. If this is the case, the only conclusion one can draw is that we have become so obsessed with defending pornography that many of the most serious subjects are

A statistical report of antigay violence in the Bay Area catalogs the following “favorite” implements of assault: knives, guns, baseball bats, bottles, crowbars, large boards without nails, large boards with nails, and chains (Marshall Kirk & Hunter Madsen, *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the '90s* (New York: Doubleday, 1989) at 103-104).

For further evidence, see Martin Kazu Hiraga, “Anti-Gay and Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies and Incident Descriptions” in Laura Lederer & Richard Delgado, eds., *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* (New York: Hill and Wang, 1995); Gary David Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991); Herek & Berrill, *supra* note 106; Gail Mason & Stephen Tomsen, *Homophobic Violence* (Sydney: Hawkins Press, 1997); People for the American Way, *Hostile Climate: A State by State Report on Anti-Gay Activity* (Washington: People for the American Way, 1997).

Although few statistics exist in Canada for anti-gay attacks, there is little reason to believe that similar stories are not as pervasive and real within the Canadian context and much reason to believe that the incidence of such attacks is comparable. While Lawlor notes and accepts that hate speech results in violence, he also argues persuasively that almost as hurtful as the physical attacks upon minorities is their perception, resulting from “what they hear, what they are told and what they witness, that their fellows do not care, that they are abandoned to their fate, that no protection is forthcoming” (Lawlor, *supra* note 44 at 6). Not surprisingly, many do then feel the need to conform, often resulting, as Island and Letellier point out within the context of domestic violence, in serious harm inflicted on those against whom they act out their own insecurities and fears.

sexualized, trivialized, or worse (as in the case of anti-gay violence), glorified as a source of sexual empowerment.

For many pro-pornography advocates, gay male pornography is harm-free. To these people, I ask: is it unreasonable to assume that materials promoting a conception of masculinity according to which male sexuality is defined as aggression, violence, and the degradation of others might encourage gay men, taught by a homophobic society to believe in their social inferiority, to compensate for feelings of low self-worth by expressing increased levels of non-mutuality in their sexual practices? Although disturbing and easy to ignore, the consequences of male rape and gay male domestic abuse remain too real and too serious for us to simply assume that the effect of gay male pornography is non-harmful.

In many ways, this paper calls for gay men to reject the violence endemic in our community, to question both its causes and where we go from here. Gay rights today, as exemplified by the *Little Sisters* litigation, has come to mean male dominant rights, the very essence of all that is anti-gay. Defined by the pornographic sexual exploitation of others, from whose presentation and use we are told to define our identity and community, we have now accepted—and promote—a model of identity that is more concerned with the use and abuse of others found in the form of sexual hierarchy than with liberation from that hierarchy. Ultimately, gay men may find that they have at last achieved manhood and the power that comes with it. But at what price? Becoming a man, learning to be one, does nothing for gay male liberation. It ensures only that some of us become more heterosexually acceptable—a liberation tactic devoid of strategy and which is neither radical nor empowering.
