

**Worried About the Misfiring:
Mapping Lesbian and Bisexual Women's Erotic Agency and
Identity Under Canadian Obscenity Laws**

by

Morghan Watson

Supervised by

Dr. Rachel Hope Cleves

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Introduction

In 1970 Glad Day Bookstore opened in the heart of Toronto, offering to the community a large selection of LGB¹ themed material. On April 15th of 1983, Little Sister's Book and Art Emporium opened its doors in Vancouver's West End, offering a selection of LGB themed literature and art work. Little Sister's store provided access to specialized literature, academe, art, advisory material and erotica that were not widely available, making the store a cultural and communal hub for Vancouver's LGB community.²

On June 14th of 1983, Little Sister's Christmas order was seized at the border by Canada Customs, on the grounds that it violated obscenity law.³ Shipments to Little Sister's continued to be seized consistently for the decade that followed. On April 2nd of 1992, an undercover police officer seized a copy of *Bad Attitudes*, a lesbian erotic magazine, from the shelves of Glad Day Bookstore, which served as evidence for the charge of "possession and distribution of obscene material" which was laid against the store's owner, John Scythes, twenty-eight days later.⁴ Following the seizure of materials, representatives from both stores fought in court. Scythes' legal team argued that obscenity law ignored the sociopolitical context in which lesbian S/M material was produced and consumed, but he ultimately lost his case in 1993. Little Sister's lawyers argued that Canada Customs' routine interception of the store's shipments had violated

¹ Although the bookstores in this thesis also provide material for, and about, transgender people my thesis is specifically looking at the persecution of lesbian same-sex erotic material. In the particular context of this thesis, and in the sources I use, lesbian and "same-sex" referred to sex between people assigned female at birth. This is not to erase the existence and involvement of trans individuals in the LGB community, but instead to acknowledge trans experiences within his history would be shaped by different discourses which fall outside the scope of this essay. For this reason, I use the acronym "LGB" in this thesis as it most accurately reflects the group I am writing about.

² Aerlyn Weissman (dir.), *Little Sister's vs. Big Brother*, produced by Carl Green, (Homeboys Production: 2002, DVD), [http://webapp.library.uvic.ca/videos/view.php?vfn=Little-Sisters-vs-Big-Brother-\(2002\).mp](http://webapp.library.uvic.ca/videos/view.php?vfn=Little-Sisters-vs-Big-Brother-(2002).mp)

³ Ibid.

⁴ Shannon Bell, et. al., *Bad Attitude/s on Trial, Pornography, Feminism, and the Butler Decision*, (Toronto: University of Toronto Press, 1997), 163. <http://deslibris.ca.ezproxy.library.uvic.ca/ID/417677>.

the *Canadian Charter of Rights and Freedoms*, particularly with respect to equality under the law.⁵ Little Sister's legal battle ended up in the Supreme Court which ruled predominantly in favour of Little Sister's, though the Supreme Court case did not conclude until 2000, over fifteen years after the initial seizures.⁶

Both the court cases of *R v. Scythes*, and *Little Sister's Book and Art Emporium vs. Canada* were held to the precedent of *R. v. Butler* which was concluded in 1992. *R v. Butler* was a Supreme Court case, in which the legal teams debated whether or not the pornographic videos sold by the owner of an adult film store could be deemed obscene under Canadian law. In order to build their case, both legal teams drew heavily from feminist discourses and debates about pornography.⁷ In the end, the Supreme Court ruled that a Manitoba man, Donald Victor Butler, was guilty of selling and distributing obscene material. Therefore, this seeming micro-history of two, small LGB bookstores was in fact situated in a larger context of homophobia, legal history and feminist discourse.

In this thesis, I use the court cases of Glad Day and Little Sister's to explore how the implementation of Canadian obscenity law impacted bisexual and lesbian women by criminalizing the erotic materials they produced and/or consumed. To do so, I specifically look at questions about sexual consent and agency in the production of women's same-sex erotica, and the relationship between same-sex sexuality, sexual materials and identity. This thesis ultimately argues, that the unique positionality of lesbian and bisexual women went unaddressed by the authorities and institutions, which resulted in tangible oppression and harm, that was antithetical to the objective of the obscenity legislation.

⁵ Ibid., 153.

⁶ Little Sisters Book and Art Emporium v. Canada (2000), 1264-1265, <http://canlii.ca/t/5239>

⁷ R. v. Butler (1992), <http://canlii.ca/t/1fsdj>

Literature Review

The historiography on the censorship of Glad Day and Little Sister's is minimal, but scholars and activists such as Becki Ross, Brenda Crossman and Janine Fuller have addressed a series of important questions pertaining to socio-political and moral forces that influenced the stores trials, detailing how homophobia, heteronormativity, and feminist discourses shaped the debates surrounding censorship laws, and the cases themselves.⁸ There has been considerable scholarship produced about censorship as it relates to women, feminism and/or heteronormativity that does not specifically look at the court cases I am interested in, but is helpful in setting a broader context for the trials. Scholars such as Lynn Segal and Whitney Strub have written about censorship movements, especially anti-pornography movements, and their relationship to different feminist ideologies, which I use to more broadly situate the relationship between law and feminism.⁹

The works of legal scholars such as Maneesha Deckha and Ummni Khan have demonstrated the relationship between heteronormativity and law, especially regarding S/M sex practices, which is helpful in identifying how sexual morality has been entrenched in legal systems.¹⁰ Similarly, historian Bruce MacDougal observes how law is heteronormative by

⁸ Becki L. Ross, *The House that Jill Built: a Lesbian Nation in Formation*, (Toronto: University of Toronto Press, 1995);

Brenda Crossman, "Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada," *Duke Journal of Gender Law & Policy* 21, no.1 (2013): 45-66 (Gale LegalTrac);

Shannon Bell, et. al., *Bad Attitude/s on Trial, Pornography, Feminism, and the Butler Decision*, (Toronto: University of Toronto Press, 1997) <http://deslibris.ca.ezproxy.library.uvic.ca/ID/417677>;

Stuart Blackley and Janine Fuller, *Restricted Entry: Censorship on Trial*, 2nd ed. (Vancouver: Press Gang Publishers, 1996).

⁹ Lynne Segal, "Only the Literal: The Contradictions of Anti-Pornography Feminism," *Sexualities* 1, no.1 (1998): 43-62, (SAGE Journals);

Whitney Strub, "Lavender, Menaced: Lesbianism, Obscenity Law, and the Feminist Antipornography Movement," *Journal of Women's History* 22, no.2 (2010): 83-107, <https://muse-jhuedu.ezproxy.library.uvic.ca/article/382771/pdf>

¹⁰ Maneesha Deckha, "Pain as Culture: A Postcolonial Feminist Approach to S/M and Women's Agency," *Sexualities* 14, no.2 (2011) (SAGE Journals);

analyzing how trial outcomes were shaped by the legal system's inability to adequately define and understand homosexuality. More broadly, the work of historian Tom Warner, outlines a broad history of homophobia and gay liberation in Canada, including the relationship between the state and gay communities via. law enforcement. Although many of these scholars did not directly address the censorship of Glad Day and Little Sister's, their discussions on heteronormativity, feminism and law still provide insight to the trials of these bookstores and I use them to contextualize the court cases.¹¹

There is scholarship that offers detailed insight into the legal battles of Glad Day and Little Sister's, and there is scholarship that theorizes on the relationship between censorship laws, women and feminism, but there is little scholarship that considers both. I have found that discussions regarding the unique experiences and positionalities of lesbian and bisexual women in relation to the Glad Day and Little Sister's court cases, are particularly lacking. Although notions of "women's rights" and "gay rights" were central in the trials, both of which impact bisexual and lesbian women, bisexual and lesbian women were not adequately considered in the outcomes of the trials, or in the subsequent scholarship pertaining to the trials. With this thesis I explicitly explore the relationship between bisexual and lesbian women and the censorship of the two LGB bookstores. To demonstrate how the trials specifically impacted lesbian and bisexual women, I analyze discussions around consent in the production of lesbian erotic material and the connection between LGB identity and the same-sex erotic material.

Ummni Khan, "A Woman's Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-legal Imaginary," *Law & Sexuality*, no.18 (2009) (HeinOnline).

¹¹ Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*, (Toronto: University of Toronto Press, 2000);

Tom Warner, *Never Going Back: a History of Queer Activism in Canada*, (Toronto: University of Toronto Press, 2002).

A History of Homophobia

In 1983, the government of Pierre Elliot Trudeau introduced a *Charter of Rights* that would enshrine particular fundamental rights into the Canadian Constitution. The new bill offered, among other protections, the right to freedom of expression and equality before the law. This legislation is a pivotal piece in the cases examined by this thesis, as questions regarding “obscene” material centred around the constitutional validity of obscenity laws in relation to the fundamental freedoms outlined by the charter. Trudeau already introduced a series of criminal code amendments in 1967, one of which was to relax the legislation around sex between two consenting adults when done in private.¹² Trudeau’s revisions were met with resistance, particularly from conservative and religious groups that argued legislation “condoning” homosexuality would result in the erosion of traditional values and the family.¹³ Nevertheless, Trudeau’s famous declaration that “The state ha[d] no place in the bedrooms of the nation” gained enough traction in society and in Parliament that his bill passed in 1969.¹⁴

Despite the legal revisions and the addition of constitutional rights, discrimination against LGB peoples continued throughout the following decades, not only in society but also in legislative bodies and in the courts.¹⁵ Historian Bruce MacDougall, through an analysis of hundreds of court cases spanning nearly 20 years (1960-1980), concluded that the lack of stable legal meaning for homosexuality meant stereotypes infiltrated trials and shaped their outcomes.¹⁶ Conversely, MacDougall argues some judges treated legal cases involving homosexuality with

¹² Warner, *Never Going Back*, 44.

¹³ *Ibid.*, 46.

¹⁴ *Ibid.*, 44-46.

¹⁵ MacDougall, *Queer Judgments*, 4.

¹⁶ *Ibid.*, 17.

particular delicacy which took shape as a sort of paternalism over, and infantilization of gay people, which resulted in harmful protection measures such as censorship.¹⁷

MacDougall's work is supported by the later scholarship of historian Tom Warner, who wrote *Never Going Back: A History of Queer Activism in Canada*. Warner similarly notes that individuals who worked in law enforcement grew up and were socialized in a homophobic society and were not exempt from being prejudiced.¹⁸ His research extends beyond the judicial system to demonstrate how law enforcement and social services also had a history of homophobia. Warner's work looking at the 1970s and 1980s identifies bathhouse raids, entrapment, over involvement of Child Services with LGB parents, authorities colluding with the media, police negligence towards LGB people experiencing violence, and verbal, physical and institutional violence at the hands of law officials, as pivotal examples of homophobic law enforcement.¹⁹

Within this history, LGB women occupied a particularly ambiguous position legally and socially. Sociologist Becki L. Ross in her book *The House that Jill Built: A Lesbian Nation in Formation* traces the emergence of lesbian politics and communities amidst broader gay rights and feminist movements. Her work demonstrates that gay liberation movements focused more on gay men because they were more explicitly and publicly targeted by anti-gay campaigns, and feminist work often centered around the experiences of heterosexual women, so lesbian and bisexual women have often existed in the periphery of gay rights issues in popular media, and public imagination.²⁰ For this reason, many lesbian and bisexual women sought out their own spaces; literally in establishments such as bars or political organizations and figuratively in the

¹⁷ Ibid., 234.

¹⁸ Warner, *Never Going Back*, 99.

¹⁹ Ibid., 100-118.

²⁰ Ross, *The House that Jill Built*, 6.

production of women-only literature, magazines, and art. Many lesbian and bisexual women found their emergence into their community in tandem with their awakening to feminist politics. However, even within the feminist community lesbian and bisexual women faced routine ignorance or even total exclusion.²¹

The Feminist Sex Wars

The already fractious feminist movement only grew farther apart in the wake of the so-called sex wars. Although the ideological roots of the feminist sex-wars may extend as far back as the early 1970s, the rift intensified greatly after a fight that erupted over the 1982 Barnard Conference on Sexuality.²² The conference, hosted at Barnard College in New York, brought together a panel which discussed topics in sexuality studies ranging from pleasure through pain, youth and child sexualities, and theories of feminism and sex. As a result, radical (anti-pornography) feminists protested the event in line with their belief that particular kinds of sex cannot be understood as sexual identities, but instead as cultural productions. This notion suggested that particular sex acts and desires were based not in preference or interest but in pathology and social conditioning.²³ Sex acts involving women in subordinate positions, such as S/M, were seen as particularly sinister as they were considered a reinvestment in patriarchy.²⁴ Radical feminist theory also suggested that women's consent to engage in S/M sex was not valid under patriarchy, as patriarchy facilitated women's psychological, physical and financial

²¹ Ibid., 8-10.

²² Gayle Rubin, "Blood Under the Bridge: Reflections on 'Thinking Sex'," in *Deviations: A Gayle Rubin Reader*, (Durham: Duke University Press, 2011), 195.

²³ Andrea Dworkin and Catherine A. MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, (Cambridge: Harvard University Press, 1997), 17.

²⁴ Karen Rian, "Sadomasochism and the Social Construction of Desire," in *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto: Frog In The Well, 1982), 31-32.

dependence on men, which discredited any consent given.²⁵ This theorizing on sex even implicated gender expressions, as both the embodiment of masculinity and femininity -including butch/femme lesbian roles- were seen as adherence to the gender binary through which sex-based oppression was facilitated.²⁶

This divisive debate not only fractured the feminist movement but also caused rifts within lesbian and bisexual women's circles, with some of the central activists on either side of the debate being lesbian and bisexual women.²⁷ Renowned radical feminists such as Andrea Dworkin and Catharine Mackinnon laboured to criminalize pornography, citing sexuality as the primary arena through which women's oppression was facilitated and perpetuated.²⁸ On the other hand, anti-censorship feminists such as Pat Califia and Gayle Rubin fought for the embracing of a multiplicity of sexual identities and acts, resisting essential and narrow visions of sexuality, and emphasizing consensual sex between equals.²⁹ Both of these groups addressed a plethora of sex acts ranging from exhibitionary sex, to intergenerational sex, to (sado)masochism to pornography creation. This thesis is particularly interested in the discourses pertaining to sadomasochism and the creation of erotic same-sex material.

Radical feminism was a branch within the larger feminist movement that believed gender was the primary axis of oppression along which power was distributed. Radical feminist ideology sought a socio-economic reordering of society in order to liberate women from patriarchy. Many radical feminists identified sexuality as a pivotal arena through which women's

²⁵ Ibid.,

²⁶ Gayle Rubin, "Blood Under the Bridge," 202-203;

Gayle Rubin, "The Leather Menace: Comments on Politics and S/M," in *Deviations: A Gayle Rubin Reader* (Durham: Duke University Press, 2011), 127-128.

²⁷ Strub, "Lavender, Menaced," 95.

²⁸ Andrea Dworkin, *Pornography: Men Possessing Women* (New York: Putnam, 1981), 22.

²⁹ Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Deviations: A Gayle Rubin Reader* (Durham: Duke University Press, 2011), 146;

Pat Califia, *Speaking Sex to Power: The Politics of Queer Sex* (San Francisco: Cleis Press, 2002), 371-372.

subordination and exploitation was facilitated, which is why these feminists were adamantly anti-porn.

Radical feminists, such as Dworkin and Mackinnon, understood perverse sexuality as a product of gendered social conditioning. Radical feminist thought postulated that women's participation in S/M sexual acts was the result of gender norms that conditioned women to be subservient to men to uphold male supremacy.³⁰ This ideology suggested that women's sexual choices had to be understood in the context of the power relations in which they occurred, rendering women's participation in sex, particularly sex with violence, the result of women uncritically participating in the patriarchal sexual standards imposed on them.³¹ Women who were the 'bottom' or 'sub' (the receiver) in sexual acts, were considered to be the embodiment of harmful gendered sexual socialization. Mackinnon's analysis of sex and power went so far as to suggest that women's consent to heterosexual intercourse was the result of social conditioning and that because this sexual engagement occurred across gendered power differentials, consent was always tailored by social pressure.³²

Anti-censorship feminists, such as Rubin and Califia, on the other hand, centred individual bodily autonomy in their analysis. These feminists argued that sexuality and desire can manifest in diverse pleasures, and that attempting to govern the parameters of people's sexuality is dangerous, particularly when governing power is placed in the hands of the state. Rubin argued that imbuing the state with power could open a gateway for legislation that prosecutes sexual and gender minorities such as LGB peoples, to uphold heteronormative sexual

³⁰ Dworkin, *Pornography*, 149-150.

³¹ *Ibid.*, 22-23.

³² MacKinnon, Catharine A. *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987).

standards.³³ In relation to S/M and the creation of erotic material, many feminists have argued that women's right to sexual expression is an integral element of women's liberation, and that stigma around such practices is rooted in a lack of understanding. This discourse resists the notion that sadomasochistic sex acts are a response to negative experiences such as trauma, or that women are not capable of participating in, and determining their own erotic interests. In fact, the position taken by pro-sex feminists suggested that framing women's participation in sex, including S/M sex, as inherently harmful or negative actually denied women's sexual agency.³⁴

In this history and in these discourses women, particularly women who were romantically and sexually involved with other women, often occupied an unclear position. Although historically marginalized, lesbian and bisexual women did not face the same level of public ridicule and demonization as their gay male counterparts, even holding liminal positions in the law, as the criminalization of homosexuality in Canada explicitly targeted males. The dominant radical-feminist framework for thinking about S/M sex, was predominantly based on females who engaged in particular sex acts with males, which could not be aptly applied to similar acts willfully engaged in by two women.

Within the feminist discourses which ideologically underpinned the trials, lesbian and bisexual women faced erasure while simultaneously being prosecuted. As a result, ideas around womanhood and sexuality conjure contradictions and tensions which can be identified in the trials. One tension this thesis is particularly interested in, is the lack of consideration, or ability to ideologically situate, women who willingly engaged in same-sex S/M, and who created and consumed same-sex sexual material.

³³ Gayle Rubin, "The Leather Menace," 112-113.

³⁴ Carole S. Vance, "More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference," *New York Law School Law Review* 38, no.1-4 (1993): 290.

Section One: The Butler Decision

Linking Radical Feminism to The Butler Decision

The cases built against Little Sister's and Glad Day, both cited the precedent case of *R. v. Butler*. This 1992 Supreme Court case was to determine whether Donald Victor Butler was guilty under Canadian obscenity law, for owning and distributing pornography and sex paraphernalia from his adult entertainment store, which catered to a heterosexual (mostly male) clientele. After his success in the lower courts, Butler was tried at the level of the Supreme Court and was found guilty. The outcome of this Supreme Court case and the legal sanctity of the "Butler test" it generated, was a landmark for the application of obscenity law in Canada, and set a menacing precedent for merchants dealing in LGB materials.³⁵ There were many anti-porn organizations, particularly women's organization, that served as interveners in the trial. The work of one particular organization, the Women's Legal Education Action Fund (LEAF), demonstrates the interconnected nature of law and feminist ideology, as it shows how radical feminist ideology was employed at the trial to build a case against pornography on the grounds that it was harmful to women.

Dworkin and Catharine Mackinnon were two prolific American radical feminists. In the 1980s they helped produced an "anti-pornography ordinance" that they tried to implement and it gained a lot of attention from the media and in feminist circles. This ordinance identified pornography as being pivotal to women's subordination and recommended charges be laid upon those who created or distributed pornographic material.³⁶ It was so well known that it was actually emulated by LEAF who reached out to Mackinnon for her help when they acted as

³⁵ Cossman, "Censor, Resist, Repeat," 4.

³⁶ *The Minneapolis Pornography Ordinance, 1985*, 1985, <https://open.mitchellhamline.edu/wmlr/vol11/iss1/5>

interveners on the *R v. Butler* case.³⁷ After the trial MacKinnon praised Canada for the precedent it set and said:

It [Canadian law] is less worried about the misfiring of restrictions against the powerless and more concerned about having nothing to fire against abuses of power by the powerful... [this is not] big bad state power jumping on poor powerless individual citizens. What it did was make space for the unequal to find a voice.³⁸

Ironically, when observing the trends in what material was deemed obscene and which was left alone it was state institutions, such as Canada Customs and police officers, who were intervening on the rights and freedoms of individual citizens. While mainstream heteronormative pornography continued to enter and circulate throughout Canada, and while larger commercial stores would often be able to sell LGB themed material, material identified as s/m and same-sex, or shipments crossing the border going to known LGB stores, would be confiscated.³⁹ So the radical feminist discourses that posited pornography as a crime against women and as inherently harmful were actually entrenched in the law when Butler lost his case.

R. v. Butler (1992)

Donald Butler was brought to court by the state and charged for violating section 163 of the Criminal Code under “offences tending to corrupt morals.” This section prohibits obscene material which it defines as:

any publication, a dominant characteristic of which, is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.⁴⁰

Butler’s defense team argued that the charges laid against him violated the *Canadian Charter of Rights and Freedoms* by refusing Butler his rights under section 2(b) of the fundamental

³⁷ Lynne Segal, “Only the Literal,” 52.

³⁸ *Ibid.*, 52.

³⁹ Weissman, *Little Sister’s vs. Big Brother*.

⁴⁰ *Criminal Code. R.S.C., 1985, 1985*, (Lexum Online).

freedoms, such as freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications.⁴¹ The prosecutors responded by arguing that section 2(b) was subject to interpretation on the basis of section 1, which states that

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁴²

Moreover, the court case centred around whether or not the material sold by Butler was protected under his right to expression or whether the material presented an undue exploitation of sex, which made it subject to prosecution.

In order to determine if materials contained an “undue exploitation of sex,” the courts used a “community standard of tolerance” test to measure the acceptability of the materials, and indicate the risk of harm. According to the judicial order, the test was not concerned with what Canadians “would not tolerate being exposed to themselves,” but instead, was concerned with what Canadians “would not tolerate other Canadians being exposed to.”⁴³

In a country where judicial and social systems have a history of excluding, or even criminalizing purchasing sex, homosexuality, and non-heteronormative sex acts, this test is able to reflect social stigmas and oppressive structures on the bases that they are inherently harmful to participants and to society. In relation to questions of consent to such sex acts the judge in *R v. Butler* even noted that, “the appearance of consent is not necessarily determinative” in whether the case is deemed obscene, but rather if, “it is perceived by public opinion to be harmful to society, particularly women.”⁴⁴ The test defined harm as something that would “predispose

⁴¹ *Constitution Act, 1982*, being schedule B to the *Canada Act of 1982* (UK), 1982, (Lexum Online).

⁴² *Ibid.*

⁴³ *R. v. Butler*, 454.

⁴⁴ *Ibid.*, 455.

persons to act in an anti-social manner...which society formally recognizes as incompatible with its proper functioning.”⁴⁵

LEAF, acting as an intervener on the case, argued that a harms-based approach should consider not only the harms caused through desensitization through repetitive consumption, but also to the exploitation of women in the industry. Failing to do so, LEAF postulated, would make the harms-based analysis biased towards the harm inflicted upon male audiences to the exclusion of women.⁴⁶ Despite its critique, LEAF ultimately stood behind the harms-based analysis, as opposed to a measure of explicitness, which LEAF argued could neglect to address women’s exploitation in scenarios where material featuring “incest, forced intercourse, sexual mutilation, humiliation, beating, bondage and sexual torture” were not flagged as obscene due to the lack of particular visual requirements.⁴⁷ LEAF’s opinion on the pornographic material in question was that “it attempt[ed] to make degradation, humiliation, victimization and violence in human relationships appear normal and acceptable,” which “diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women’s equal access to protected rights.”⁴⁸

LEAF submitted that pornography was the marketing of assault for entertainment which “provides a profit motive for harming people.”⁴⁹ To demonstrate, LEAF used the famous story of Linda Lovelace who -upon her exit from the porn industry- revealed a series of abuses she had experienced at the hands of porn industry giants and producers.⁵⁰ After leaving the industry, Lovelace, under her maiden name Linda Marchiano, testified in the Minneapolis hearings as a

⁴⁵ Ibid.

⁴⁶ Women’s Legal Education Action Fund, “Factum of the Intervenor” for *R. v Butler*, 1992, 1992, (LEAF Digital Archives), 3.

⁴⁷ Ibid., 4.

⁴⁸ Ibid., 5-7.

⁴⁹ Ibid., 10.

⁵⁰ Ibid.

part of Dworkin and Mackinnon's Ordinance.⁵¹ Similar to the Ordinance, LEAF based its report off stories of coercion and abuse to argue that:

When explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women is known to increase as a result of exposure.⁵²

So, although LEAF suggested that certain pornography (rape scenes) might be "particularly" damaging it did not discuss the possibility that some porn may not be damaging, or what -if possible- that porn might look like. LEAF suggested that pornography is an umbrella term under which all range of materials fall, and it offered no differentiation between the different contexts in which porn was produced. This is reflective of radical feminist theorizing on pornography, that presented pornography as a monolith that was the pivotal organizing force in women's sexual experiences and oppression.⁵³

LEAF concluded that if section 28 of the Charter (gender equality under the law) does not operate under 2(b), then Canada is neglecting to uphold 28 and it is rendered meaningless.⁵⁴ Moreover, it concluded that mediating section 2(b) and section 28 requires following the virtues of "respect for the inherent dignity of the human person, commitment to social justice and equality, and respect for cultural and group identity," which LEAF saw as antithetical to porn which "lies about women's sexuality" by suggesting that women "live to be raped, love to be hurt, and are fulfilled by abuse."⁵⁵

Ultimately, LEAF and the Crown prosecutor were successful, and Butler was charged with over 200 counts of Criminal Code violations under section 163, which prohibited obscene

⁵¹ Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 60-66.

⁵² LEAF, "Factum of the Intervenor," 1992, 11.

⁵³ Vance, "More Danger, More Pleasure," 293.

⁵⁴ LEAF, "Factum of the Intervenor," 1992, 12.

⁵⁵ *Ibid.*, 16.

material.⁵⁶ Many feminists applauded this verdict as a victory for the rights of women.⁵⁷

However, for feminists who were sex-positive and anti-censorship, particularly those whose lifestyles and identities were centred around their sexual identities, this outcome was cause for concern. In the years following, the precedent set by the Butler decision was wielded in court against both *Little Sister's* and *Glad Day*. Butler's loss in the Supreme Court meant that particular ideas about harm, women and pornography were entrenched into the Canadian legal system, which would later manifest in the erasure of bisexual and lesbian women's agency and the repression of their identities.

⁵⁶ Ibid., 525.

⁵⁷ Cossman, *Censor, Resist, Repeat*, 51.

Section Two: Glad Day Bookstore - A Case of Bad Attitude

R v. Scythes (1993):

John Bruce Scythes, the owner of Glad Day, an Ontario based LGB bookshop, was charged with multiple counts of obscenity for possession and distribution of materials containing lesbian S/M erotica.⁵⁸ Particularly, he was charged for owning and selling the lesbian erotic magazine *Bad Attitude* in his downtown Toronto Store in 1992. *Bad Attitude* was a magazine that contained articles by lesbian authors writing about their sexual fantasies and experiences, usually on S/M themes, with photographs that loosely complemented the stories.⁵⁹

When the charges were brought before the court, Scythes' legal team including lawyers and a series of expert witnesses attempted to persuade the courts that lesbian S/M erotica could not be understood using the same analytical framework as heterosexual S/M erotica and pornography. Similar to Butler's legal team, the main line of argument in Scythes' defense was that owning and distributing the erotic material should be protected by the Charter of Rights and Freedom under the right to expression, section 2(b).⁶⁰

The prosecutor -the Crown- argued, using Butler as the benchmark, that limiting personal freedoms was justified under section 1 of the Charter.⁶¹ The Crown utilized the same methods for justifying its charges as could be seen in Butler, drawing on the community standards of tolerance test, and the notion that exposure to particular forms of sexual material results in 'anti-social' behaviour that was inconsistent with society's proper functioning.⁶²

⁵⁸ R. v. Scythes (1993), 1 (LexisNexis).

⁵⁹ Ibid., 1.

⁶⁰ Ibid.

⁶¹ Ibid., 2.

⁶² Ibid., 2.

The Crown prosecutor insisted that consideration of sexual orientation was not a reasonable defence and was actually irrelevant:

I have detected during this trial a concern that the Court will find relevant the sexual orientation of Bad Attitude. In recent years, many courts and tribunals have struck down laws and practices held to discriminate against gays. This is an indication that our society has moved beyond tolerance to the actual recognition that homosexuals form an essential part of our community. It follows then that as members of a sexual minority they have the right to communicate publicly on the subject that binds them together. That right, however, will on occasion be curtailed in the public interest. The community tolerance test is blind to sexual orientation or practices. It's only focus is the potential harm to the public. Any consideration given to the sexual orientation of the material would constitute an unwarranted application of the test.⁶³

The Crown specifically argued for the charge of obscenity on the basis of a single article, "Wunna My Fantasies," in which the author describes following a stranger into a locker room where she binds and blindfolds the women before engaging in a series of sexual acts with her.⁶⁴ As the article depicts "bondage in various forms, the pulling of hair, a hard slap and explicit sex" it fell under obscenity law for intermingling sex and violence. The prosecutor pointed out that the victim in the story who "is immediately aroused by the acts of the writer, becomes an eager participant and eventually has an orgasm."⁶⁵ Although an easy assumption would follow that the depicted interest of the woman in the story would serve to defend the material, the prosecutor borrowed from Butler to argue that the implied interest was actually a crucial part of what made the erotica damaging. He quoted Butler:

Consent cannot save materials that otherwise contain degrading and dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading and dehumanizing.⁶⁶

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

The lawyer continued quoting Butler to insist that obscene material “would apparently fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women.”⁶⁷ Moreover the court accepted the notion that the community standards test could accurately classify material as harmful or safe without consideration of who produced it.

The prosecutor's argument insisted that the treatment of heterosexuality, homosexuality, and bisexuality were the same under obscenity law. This neglects to consider the history of state-sanctioned homophobia, as outlined by MacDougall and Warner, who demonstrate that systems of government -including the legal system- have a history of discrimination against LGB peoples and communities. The court also did not consider that the notion that pornography was inherently harmful was bound to a particular feminist ideology, that was based predominantly on an analysis of heterosexual porn creation and consumption.

Scythes' legal teams and expert witnesses argued that there were critical ways in which heterosexual material differed from LGB sexual materials, and therefore the precedent set in Butler could not and should not, be applied in *R. v. Scythes*. Despite the defence's protest, Butler was applied as the precedent, homosexual and heterosexual erotica were deemed analogous, and the material was found to be obscene. Scythes was accordingly charged with possessing and distributing obscene materials.

Reading Sadomasochism: Consent in a Post-Butler Canada

Many scholars and activists have identified common assumptions and misunderstandings

⁶⁷ Ibid.

that underpin the social and political rejection of particular sexual acts or identities. Gayle Rubin's 1982 essay, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," offers a comprehensive framework for understanding sexual difference and how society interprets and understands it. Rubin's approach is constructivist in nature, suggesting that libidinal desires are shaped and produced by specific historical and cultural contexts.⁶⁸ With this foundational concept in mind, Rubin identifies five 'ideological formations' through which sexuality is socially interpreted: sex-negativity, the fallacy of the misplaced scale, the hierarchical valuation of sex acts, the domino theory of sexual peril, and lack of concept of benign sexual variation.

Sex-negativity is the assumption that sex is 'inherently sinful,' with moderate hope of redemption when it occurs within the parameters of certain social norms.⁶⁹ The 'misplaced scale' demonstrates how these social norms sanction certain kinds of sex -marital, reproductive and heterosexual- and render them the highest form of sexual behaviour. Those who live up to society's sexual standards are placed at the top of an "erotic pyramid" and are rewarded with social status.⁷⁰

The appointment of marital, reproductive, heterosexual sex to the top of the pyramid creates a hierarchy of sexual acts and identities marked by their distance from the golden standard. Rubin asserts that heterosexual, marital, monogamous, reproductive, noncommercial, coupled, relational, same-generational, sex that occurs in the home occupies the point of the

⁶⁸ Rubin, "Thinking Sex," 146.

⁶⁹ *Ibid.*, 148.

⁷⁰ *Ibid.*, 149.

pyramid. Sex that is outside of those parameters or includes pornography, fetish objects or role playing, exist on the lower echelons of the sexual hierarchy.⁷¹

The domino theory of sexual peril suggests that if sex from the lower branches of the sexual hierarchy become morally and socially accepted, then the line between good and bad will be lost and people will participate in ‘problematic’ sexual behaviours in increased numbers.⁷² This anxiety, quite opposite to Rubin’s notion of constructionist sex, is rooted in the belief that there is a single type of sex that is healthy and natural, and everything outside of that is abnormal and threatening.⁷³

Similarly, Ummni Khan is a legal scholar whose work focuses on S/M practices in relation to what she calls the “social imaginary.” She defines the social imaginary as,

an epistemic site, not wholly stable, but not without discernible patterns where ordinary people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.⁷⁴

She asserts that unlike sociological theory which has a discursive focus on, and about, the most privileged people in society, the social imaginary emphasizes collective ideas and understandings which are heavily shaped by media consumption.⁷⁵ In her essay, “A Woman's Right to be Spanked,” Khan analyzes various movies involving themes of S/M and she concludes that films portraying S/M often depict tragic endings, conflate sadomasochism with criminality, and separate sadomasochistic practice from notions of health and love.⁷⁶ This aligns with Rubin’s argument that sex outside of the golden standard is seen as unhealthy and unsafe.

⁷¹ Ibid., 151.

⁷² Ibid.

⁷³ Ibid., 154-155.

⁷⁴ Khan, “A Woman's Right to be Spanked,” 83.

⁷⁵ Ibid., 83-84.

⁷⁶ Ibid., 85-93.

Khan did note an exception, a film by the name *9½ Weeks*, in which the kinky protagonists find a fairy-tale ending. In line with Rubin’s theory of sexual hierarchy, Khan noted that this film cushioned S/M content in a context of love and commitment that made the S/M palatable. Moreover, Khan’s work demonstrates that conceptualizations of S/M exist amidst a web of power and therefore the “project of rescuing sadomasochism from the realm of the unacceptable appears inextricably tied to marginalizing other identities upon whom disgust can be displaced.”⁷⁷ She concludes that in *9½ Weeks*, “the couple’s desires were reigned in through the tropes of heterosexual domestication: romantic love, marriage, and suburban domesticity.”⁷⁸ Of course, the antithesis to this couple would be pre-marital, casual, same-sex S/M sex, onto which disgust could be projected.

Rubin and Khan’s scholarship is helpful when examining the discourses of sexual normalcy that undermined the *R v. Scythes* trial. The theoretical framework of Rubin’s erotic pyramid and a Khan’s socio-imaginary help to situate the trial within larger social power structures, and to understand the inability of the court to see S/M, especially same-sex S/M, as anything other than socially harmful and threatening.

Sociologist Becki Ross, who served as an expert witness in *R v. Scythes*, contributed to the collaborative book *Bad Attitudes on Trial: Pornography, Feminism and the Butler Decision* in which she highlighted what she identified to be a series of presuppositions that undermined Scythes chances at winning his trial. Ross stated that her “refusal to interpret lesbian S/M as ‘harmful to women’ was simply unintelligible to gatekeepers of obscenity law in Canada” and she concluded that the “battle to defend *Bad Attitude* was lost before it began.”⁷⁹

⁷⁷ Ibid., 100.

⁷⁸ Ibid.

⁷⁹ Bell et. al., *Bad attitude/s on Trial: Pornography, Feminism, and the Butler Decision*, 153.

According to Ross, the Crown called upon expert witness, Neil Malamuth (whose work was also used in the Butler trial), whose studies in psychology asserted there was a causal link between porn consumption and violence against women.⁸⁰ Though none of his work had studied the impacts of pornographic material produced by and for LGB people, Malamuth testified that the materials found in *Bad Attitude* were comparable to heterosexual pornography he had seen.⁸¹ The Crown specifically asked him to “speculate on the negative effects of lesbian S/M fantasy on readers of *Bad Attitude*,” which Ross points out assumes that there is an effect, and that it must be a negative one.⁸² Ross asserted that Malamuth’s testimony did not give empirical evidence that could demonstrate the similarity between heterosexual and LGB S/M pornography, and gave no evidence that reading *Bad Attitude* was harmful, and was dismissive of the norms and rituals that were central to lesbian S/M communities and pornography production.⁸³

The norms and rituals surrounding lesbian S/M practice were based in mutuality and consent. According to Ross, lesbian S/M involved, “role playing, exchange of power... attention to rules and restrictions, [and] staged sexual scenes.”⁸⁴ She specifically pointed out that in “Wunna My Fantasies” the woman who is pursued and becomes the bottom is sporting a nipple ring, which signals her belonging to the lesbian S/M subculture.⁸⁵ Ross’ analysis of lesbian S/M to defend *Bad Attitude* is affirmed by the scholarship of lesbian S/M practitioners.

Pat Califia⁸⁶ is a scholar and sex educator who was heavily involved in the lesbian S/M community. His work offers insight into the sexual practices within lesbian S/M communities.

⁸⁰ Ibid., 154.

⁸¹ Ibid., 155.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid., 159.

⁸⁵ Ibid., 161.

⁸⁶ Patrick Califia identifies himself as a bisexual, trans man. However, he did not come out as bisexual or trans until later in his life, and he spent much of his time as a youth and young adult writing and advocating as an active

Califia defines sadomasochism as, “an erotic ritual that involves acting out fantasies in which one partner is sexually dominant and the other partner is sexually submissive.”⁸⁷ He argues that S/M scenes are always “preceded by a negotiation process that enables participants to select their roles, state their limits, and specify some of the activities which will take place.”⁸⁸ He concludes his definition by emphasizing that, “the basic dynamic of sexual sadomasochism is an eroticized, consensual exchange of power -not violence or pain.”⁸⁹

Califia’s work offers a deeper understanding of the norms of lesbian S/M practice during and before the trials, which challenges the assumptions of radical feminist analysis and the ‘harms-based’ framework utilized in the Butler test. Califia says that the top only has power because the bottom has agreed to temporarily relinquish it, and that power is restricted by predetermined boundaries which the bottom participates in setting.⁹⁰ In fact, Califia asserts that:

The bottom need not be self-destructive, nor is she genuinely helpless. She is likely to be very aware of her own sexual fantasies and preferences and exceptionally good at getting what she wants.⁹¹

In addition to the participation of the sub in orchestrating the scene, participants would also agree on a ‘safe word’ which would slow or cease the scene any time someone felt tired or distressed.⁹² Therefore, the notion that the bottom was taking on a harmful role of objectification and exploitation ignored the larger context of mutuality and consent in which S/M plays occurred. Overall, Califia’s work demonstrated that “great attention is given to the safety,

member of lesbian S/M communities. In his more recent work, *Speaking Sex to Power*, he articulated a wish that his earlier work in these spaces not be erased or ignored due to his trans identity. Therefore, I include his experiences as someone who has personally been a part of the lesbian S/M community, though I refer to him using his chosen name and ‘he/him’ pronouns to respect his gender identity.

⁸⁷ Pat Califia, *Sapphisty: The Book of Lesbian Sexuality*, 3rd ed. (Toronto: The Naiad Press, 1993), 118.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid., 119.

⁹¹ Ibid.

⁹² Ibid., 122.

comfort and arousal of the bottom,” which contradicts the idea that S/M inherently victimizes women.⁹³

Legal scholar Maneesha Deckha offers a compelling argument regarding S/M practice and Canadian law, by drawing parallels between S/M and more socially accepted practices involving pain. In doing so, she highlights the inherent moral undertone of legislating against S/M. Deckha defines S/M play as, “consensual sexualized encounters involving an orchestrated power exchange characterized by domination and subordination typically involving the infliction of pain.”⁹⁴ Deckha concedes that, “acts do not occur in a social void and together constitute a cultural and social fabric that we can subject to critical evaluation,” and therefore her analysis is not based on a notion of individual sexual agency.⁹⁵ Although she does argue that “the ability of individuals to make choices with less than ideal alternatives... cannot negate those choices outright.”⁹⁶

For this reason she does not necessarily take a stance that condones S/M practice, or discourages people from critically examining certain sexual practices. However, she does indicate the absurdity that society tries to legislatively regulate certain painful sex practices, but does not impose the same limits on other practices of pain that could also be interpreted as oppressive.⁹⁷ Deckha points to other painful practices that women engage in to highlight the social stigma held against S/M. She states that:

In pursuit of an oppressive and elusive aesthetic ideal, many women book regular appointments for waxing, electrolysis or other painful beauty treatments and push their bodies through exercise, straining tendons, muscles and ligaments to the next level despite the resulting burn. And, of course, women get pregnant and give birth -not

⁹³ Ibid., 120.

⁹⁴ Deckha, “Pain as Culture,” 130.

⁹⁵ Ibid., 139.

⁹⁶ Ibid., 141.

⁹⁷ Ibid., 136

exactly a painless process- every day to widespread social approval.⁹⁸

Deckha's work demonstrates that articulating pain as the pivotal issue with S/M is inherently hypocritical so long as the above practices are socially accepted, or even socially celebrated.

If the above practices have not been subject to legislation even though they inflict pain, then there must be reasons -in addition to pain- as to why S/M has been considered harmful. The different treatment of S/M from other practices involving pain make sense when considering that S/M has been deemed morally and socially dangerous, as was demonstrated by the work of Rubin and Khan. Therefore, Ross' proclamation that the defense of *Bad Attitude* was "over before it began" is not surprising, considering the cultural, sexual morality that operates in society. Since the crux of the prosecution's argument in *R. v. Scythes* relied on a harms-based analysis, that was conducted through a "community standard of tolerance test," any discussion or evidence of consensual S/M practice was effectively undermined by a social understanding that S/M was inherently harmful. Moreover, the consent of lesbian and bisexual women as it was depicted in the erotica, and as it was practiced by the communities and individuals who produced the erotica, was inconsequential at the trial, even though -as noted by Califia- consent was an important way to avoid harm, which is what obscenity legislation was supposed to be concerned with minimizing.

⁹⁸ Ibid., 136.

Section Three: Little Sister's Book and Art Emporium - Identity and Erotica

“Little Sister's Book and Art Emporium” (hereafter Little Sister's) in Vancouver, started having its orders from the United States routinely held at the border in the early 1980s due to materials being deemed ‘obscene’ in nature. Despite regular attempts to have their orders re-accessed and/or to make agreements with Canada Customs, orders continued to be held, go missing and be destroyed.⁹⁹ After a series of smaller legal run-ins, Little Sister's met Canada Customs in the Supreme Court of British Columbia in 1996, to argue that certain elements of Customs legislation pertaining to section 168 of the Criminal Code were infringing on the Canadian Charter of Rights and Freedoms. Little Sister's argued that it was unconstitutional that the onus to prove material was not obscene fell on the accused, and that materials going to LGB book stores were being specifically targeted and incorrectly categorized.¹⁰⁰

The court acknowledged that a systematic injustice had occurred insofar as material was being withheld from LGB bookstores in higher frequency than from other stores, and it determined that Little Sister's was due reparations and should not face a recurrence of the problems in the future, placing onus on enforcement to ensure non-discriminatory practice.¹⁰¹ However, the court did not agree that the legislation was, in and of itself, unconstitutional, but,

⁹⁹ Little Sisters Book and Art Emporium v. Canada (1996), 46, <http://canlii.ca/t/1f1p6>; Weissman, *Little Sister's vs. Big Brother*.

¹⁰⁰ Little Sister's v. Canada, 1996, 1-5.

¹⁰¹ *Ibid.*, 130-131.

rather found that the issue lay in the incorrect application of legislation which it attributed to lack of funding, inadequate training and the volume of material customs was expected to assess.¹⁰²

Little Sister's appealed its case to the Supreme Court of Canada, positing the same arguments, especially since the discriminatory practices at Canada Customs continued after the ruling of the previous court case.¹⁰³ The main arguments of both sides were reiterated at the level of the Supreme Court, with Little Sister's case being strengthened by the compounded issues that had occurred at the border during and after the previous court case.

Little Sister's court cases were involved and complex, including many testimonies, expert witnesses, legal histories and a series of convoluted legal considerations and interpretations. For this reason, my thesis is not able to adequately address all areas of the legal battle between Little Sister's and Canada Customs. I will only outline the main challenges made by Little Sister's and will then demonstrate, through the testimonials of women who experience same-sex desire that literature, erotica and media images are integral to the formation of lesbian and bisexual identity and community, which censorship would inhibit.

Little Sister's Book and Art Emporium v. Canada (1996 & 2000)

Little Sister's argued that it faced routine discrimination at the hands of border customs officers who unjustly withheld store orders on the grounds that they were obscene, a charge

¹⁰² Ibid, 20-22.

¹⁰³ Ibid., 1772; 1885.

Little Sister's argued was often misplaced. In addition to this accusation, Little Sister's argued that the Canada's *Customs Act* was unconstitutional due to its "burden of proof" exemption rule.¹⁰⁴ Section 176(4) of the *Customs Act* states that:

In any prosecution under this Act, the burden of proof in any question relating to the matters referred to in paragraphs (3)(a) to (d) lies on the person who is accused of an offence, and not on Her Majesty, only if the Crown has established that the facts or circumstances concerned are within the knowledge of the accused or are or were within his means to know.¹⁰⁵

This legislation means that in the event of a prosecution the accused are responsible for matters outlined in 3(a) through (d) which means the ability to prove the identity or origin of the goods, the time and place of importation, the payment of duties and "the compliance with any of the provisions of this Act or the regulations in respect of any goods."¹⁰⁶ Essentially, this meant that when Little Sister's was accused of obscenity by Canada Customs, it was the responsibility of Little Sister's to prove the charges of obscenity were false and not the job of Customs to prove that they were true.¹⁰⁷

The defendants argued that Canadian Customs Officers were not legal experts and had to screen mass amounts of mail. When customs officers identified obscene material, it was classified with the tariff code 9956, and due to their time and volume constraints officers relied on a series of guidelines in an attempt to quickly discern if material was "obscene" under section 168 of the Criminal Code.¹⁰⁸ The guidelines prompted officers to consider if the "importers and exporters [are] known to deal in pornographic goods," and/or if the "geographic origin and

¹⁰⁴ Little Sister's v. Canada, 1996, 130-131.

¹⁰⁵ *Customs Act. R.S.C., 1985* (2nd Supp.), 1985, 176, <http://laws-lois.justice.gc.ca/PDF/C-52.6.pdf>

¹⁰⁶ *Ibid.*,

¹⁰⁷ Little Sister's v. Canada, 1996,, 1-2;
Little Sister's v. Canada, 2000, 1177.

¹⁰⁸ Little Sister's v. Canada, 2000: 1136-1137.

production company of the goods” dealt with obscene material.¹⁰⁹ This resulted in particular importers and exporters being flagged for “heightened inspection” at particular customs centres, for example the Vancouver Mail Center examined “virtually all imported mail addressed to Little Sisters.”¹¹⁰ Once material was flagged as obscene under code 9956, the officer had to fill out a form identifying what medium the material was (picture, book, etc.) and why it was being flagged for obscenity. The form gave the option of identifying the issue as one of the following: sex with violence, child sex, incest, bestiality, necrophilia, hate propaganda, anal penetration or ‘other’ which was followed by a blank line for description.¹¹¹ Little Sister’s argued that this system predetermined LGB material to be targeted, but the “anal penetration” flag was suspiciously removed from the custom policy in September of 1994, a few days before the start of the trial.¹¹²

Little Sister’s struggled with Canada Customs from nearly the time of its inception.¹¹³ The store owners had even preemptively approached the border to try to negotiate a way to ensure their deliveries would arrive on time, and they were told to submit a copy of each item to the border in advance for screening. The owners found this unreasonable as it was not time and cost effective, and they also felt that heterosexual materials being imported were not treated in the same manner.¹¹⁴ Initially, the owners tolerated the obstacles presented by Customs but when Customs seized issues of *The Advocate Magazine*, the managers began to suspect they were being targeted since traditional bookstores and newsstands were still receiving that magazine.¹¹⁵

In fact, in preparation for the trial, one of the key organizations supporting Little Sisters, the

¹⁰⁹ Ibid., 1187-1188.

¹¹⁰ Little Sister’s v. Canada, 1996, 27.

¹¹¹ Ibid., 1996, 26-27.

¹¹² Little Sister’s v. Canada, 2000, 1154-1155.

¹¹³ Little Sister’s v. Canada, 1996, 46.

¹¹⁴ Little Sister’s v. Canada, 2000, 1129-1130.

¹¹⁵ Little Sister’s v. Canada, 1996, 47.

British Columbia Civil Liberties Association (BCCLA), requested the manager of a traditional bookstore in Vancouver to import titles that had been withheld from Little Sisters, and she was successful.¹¹⁶

The Customs defense team acknowledged that “the defining characteristic of homosexuals... is their sexuality” and that therefore homosexual erotica served a more significant function in gay communities than in their heterosexual counterparts.¹¹⁷ However, it actually used this point to justify the disproportionate numbers of homosexual material being prosecuted:

[The] witnesses established that sexual text and imagery produced for homosexuals serves as an affirmation of their sexuality and as a socializing force...Because sexual practices are so integral to homosexual culture, any law proscribing representations of sexual practices will necessarily affect homosexuals to a greater extent than it will other groups in society, to whom representations of sexual practices are much less significant.¹¹⁸

This suggests that the disproportionate persecution of LGB material was due to the fact that LGB material was more sexual, and not because of heteronormative law enforcement. This notion was further reinforced by the idea that harm-based tests calculated harm and not taste, as was already determined in Butler.¹¹⁹

The Crown defence aligned well with the Butler precedent which ruled that interference with section 2(b) was permitted to avoid “harm caused to society by the detrimental impact on its members of exposure to obscene material,” which was equally applicable to heterosexual and

¹¹⁶ Little Sister’s v. Canada, 2000, 1138-1139.

¹¹⁷ Ibid., 1158-1159.

¹¹⁸ Little Sister’s v. Canada, 1996, 61.

¹¹⁹ Little Sister’s v. Canada, 2000, 1123.

homosexual material.¹²⁰ To further the argument, the prosecutor of the Butler trial was quoted directly:

While a direct link between obscenity and harm to society may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs...Parliament [is] entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.

After demonstrating that overrepresentation could not be attributed to discriminatory practice, Customs postulated that any infringement of section 2(b) of the charter was reasonably justified by section 1.¹²¹

The ruling of the provincial court case rejected the claim that legislation in the Customs Act was unconstitutional, but agreed that Little Sisters had suffered from systemic discrimination due to Canada Customs' processes and policies which would have to be remedied moving forward.¹²² The appeal in the Supreme Court saw a repeated reprimand of Canada Customs, as well as an acknowledgement that code 9956 was not constitutional.¹²³

The Importance of Erotica in Identity and Community

The Women's Legal Education Action Fund (LEAF), which had taken a radical feminist stance against pornography in Butler, became champions of lesbian and bisexual right to sexual self-expression in the Little Sister's case. They began their court factum arguing that lesbian materials were, "important to all women and are essential to the emotional social, sexual and

¹²⁰ Little Sister's v. Canada 2000, 1126-1127.

¹²¹ Little Sister's v. Canada, 1996, 7;
Little Sister's v. Canada, 2000, 1155-1156.

¹²² Little Sister's v. Canada, 1996, 130-131.

¹²³ Little Sister's v. Canada, 2000, 1264-1265.

political lives of lesbians.”¹²⁴ This demonstrates that lesbian’s sexual expression was intrinsically tied to identity and community and was threatened under obscenity law.

Both LEAF and the British Columbia Civil Liberties Association (BCCLA), who also acted as intervenors in the case, argued that the ‘Butler’ or ‘community standard’ test was majoritarian by its nature. LEAF postulated that “the inherently majoritarian analysis of national community standard of tolerance test” was unable to adequately interpret material of a “disadvantaged minority” due to the prevalence of heterosexism in Canadian society.¹²⁵ Similarly, the BCCLA argued that the notion of a community standards test “is incompatible with Charter values that were enacted to protect minority rights.”¹²⁶

The irony of a case built on a harms-based analysis that employs a majoritarian test is evident in the intervenor’s reports and the testimonies of lesbian women regarding the importance of same-sex erotica and literature. Becki Ross testified that lesbian produced erotic material is a source of validation for lesbian women and that they “contribute to the positive formation of lesbians consciousness community and culture.”¹²⁷ In addition to the positive affirmation of minority sexuality, sexual materials also resisted a history of erasure and repression and combat stereotypes. Ross argued that lesbian sexual material, “is crucial to interrupt both the stubborn invisibility in the culture at large and also the negative, problematic stereotyping of lesbians as either, on the one hand, asexual, pinched spinsters, or as sex-crazed, man-hating monsters.”¹²⁸

¹²⁴ Women’s Legal Education Action Fund. “Factum of the Intervenor” for *Little Sister’s v. Canada, 2000*, 2000, 1 (LEAF Digital Archives).

¹²⁵ *Ibid.*, 19.

¹²⁶ The British Columbia Civil Liberties Association, “Factum of the Intervenor,” for *Little Sister’s v. Canada, 2000*. 1999, 12 (BCCLA Digital Archives).

¹²⁷ *Little Sister’s v. Canada*, 1996, 110-111.

¹²⁸ *Ibid.*,

This is reflected in the testimonies of lesbian women at the trial. For example, Janine Fuller, the long time lesbian-identified manager of Little Sister's, testified in the court that it was due to reading Pat Califia's book *Sapphisty* that she was able to understand her own sexual feelings, overcome isolation and come out.¹²⁹ She also said that as she was first emerging in the lesbian scene, finding the Toronto Women's Bookstore was an integral part of finding information about lesbian identities.¹³⁰ Fuller's story was highlighted by LEAF who used it to demonstrate the importance of lesbian materials in "facilitat[ing] the emergence and development of lesbian identity," particularly when public and school libraries often did not offer books with lesbian and gay themes.¹³¹

S/M practitioner and lesbian author Dorothy Allison, who was a contributor to some of the erotic magazines that were seized from Little Sister's, such as *On Our Backs*, also wrote about finding identity through books, specifically erotic material. In one of her essays she wrote about reading 'trashy' erotic books as a young teenager:

What the books did contribute was a word -the word *Lesbian*. When she finally appeared...I knew her immediately... that's what it was, and I wasn't the only one even if none had turned up in the neighbourhood yet. Details aside, the desire matched up. She wanted women; I wanted my girlfriends. The word was Lesbian. After that I started looking for it.¹³²

This quote demonstrates the centrality of representation, however limited, in learning one's own sexual identity.

Another writer, Pat Califia testified at the Little Sister's case, and spoke of the writing and publishing of his short story "Jessie," which was a fictive piece about a lesbian S/M encounter. Califia argued that this work "became a way to signal to other women who might be

¹²⁹ Ibid., 46.

¹³⁰ LEAF, "Factum of the Intervenor," 2000, 6.

¹³¹ Ibid.

¹³² Dorothy Allison, "A Personal History of Lesbian Porn," in *Skin: Talking About Sex, Class & Literature* (Ithaca, N.Y: Firebrand Books, 1994), 187.

interested in [S/M] sexual practices that there was someone else...who was available to discuss those things with them.”¹³³ Califia further testified to the impact of not being able to find yourself, and your sexuality, reflected in literature:

If you cannot find any fiction that describes people who are like you...people who have the kind of relationships you would like to have, people who have the kind of sexuality you would like to have, then you begin to feel as if you are crazy. You don't exist. You're marginal, you're not important, and this creates a great deal of self-hatred and self-doubt.¹³⁴

Califia's discussion of representation in literature combined with Fuller's testimony and LEAF and the BCCLA's legal analysis of the 'community standard' test, show how access to literature could shape the experiences of lesbian and bisexual women, especially as they were finding their identities and communities.

Within the community of lesbian and bisexual women, those who belonged to other minority groups faced even greater barriers in finding lesbian literature that represented them.¹³⁵ Lesbian and bisexual women who were racial minorities, working-class, and engaging in sexual subcultures, saw even less of themselves represented in lesbian and bisexual erotic material. Although it is difficult to compile evidence demonstrating the impact of censorship on minority lesbian and bisexual women in this context, one can find testimony of minority women who felt relieved upon discovering that other women like them existed.

However minimal, exposure to lesbian material that included women of colour was significant to young, or not yet realized, lesbians of racial minority. As examples, lesbian authors Lisa C. More, who is black, and Judy Grahn, who is Indigenous, both talked about the relief they felt in finding out there were communities of black and Indigenous

¹³³ Blackley and Fuller, *Restricted Entry*, 59.

¹³⁴ Ibid.

¹³⁵ LEAF, *Factum of the Intervenor 2000*, 7-8.

lesbians.¹³⁶ More articulated feeling that there was a ‘new home’ for her in black lesbian communities when reading the work of Audre Lorde, after having only been a member of white lesbian communities.¹³⁷ Grahn recalls crying upon seeing a poster about an organization of Gay American Indians and stating that she felt that, “a huge burden of isolation, and of being defined only by [her] enemies, left [her] on that enlightened day.”¹³⁸

The intersection of sexuality and working-class experiences was another area where representation was sparse. In her writing, Dorothy Allison argues that her working-class background fundamentally shaped her sexual identity, and that the woman she will like is “invariably the kind of woman who embarrasses respectably middle-class, politically aware lesbian feminists.”¹³⁹ She described her ideal woman as “butch, exhibitionistic, physically aggressive, smarter than she wants you to know, and proud of being called a pervert...often she is working class, with an aura of danger and an ironic sense of humour.”¹⁴⁰ Allison insists that her sexuality was shaped by her working-class experiences and by a butch/femme, leather fetishism which many feminists, especially middle-class radical feminists, look down on.¹⁴¹ Allison writes unapologetically about sexuality, filling a gap in lesbian literature which often ignores the issues and experiences of the working class.

Racial minority and working-class lesbians experience a heightened form of erasure and oppression, as they occupy multiple marginalized identities, as is apparent by the words of these women themselves. Although explicit discussion of the impact of Canada Customs’ censorship on minority lesbian and bisexual women is not available, reviewing the books that were censored

¹³⁶ Ibid., 6-9

¹³⁷ Ibid., 6.

¹³⁸ Ibid., 9.

¹³⁹ Allison, “A Question of Class,” 23.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

will show that books about racialized and classed experiences were withheld as they were coming to Little Sister's. For example, *Black Looks, Race and Representation* by scholar bell hooks and Dorothy Allison's own book, *Trash*, were both held at the border.¹⁴²

Beyond the structural and symbolic harm caused by censorship through the repression of women's sexual expression, there were also more material and immediate concerns with censorship. One section of Little Sister's store was a "recovery section" that offered information on HIV/AIDS among other health-centred material, and sometimes works containing safety information regarding the spread of AIDS were flagged as obscene and held at the border.¹⁴³ A pertinent example is the seizure of a magazine called *The New York Native*, which was known "for carrying extremely important progressive thinking about HIV and AIDS" which many people read to get "the most recent information about HIV."¹⁴⁴ Other important titles seized included *The Lesbian S/M Safety Manual*, *The Joy of Gay Sex* and *The Lesbian Sex Book*.¹⁴⁵

The Lesbian S/M Safety Manual contained information regarding safe S/M practice that many people may not have otherwise had access to. Califia authored this work and argued that he wrote it "to educate women who do S/M with other women" so that they could learn to engage in S/M in a way that was both "physically and emotionally safe".¹⁴⁶ Califia elaborated that although he did not necessarily oppose it, a lot of mainstream pornography was "not very accurate from a sex education standpoint" and could actually be dangerous to emulate. The manual was produced out of concern especially for those who were isolated from S/M communities but wished to engage in that kind of sex.¹⁴⁷

¹⁴² LEAF, "Factum of the Intervenor," 2000, 2-3.

¹⁴³ Little Sister's vs. Canada, 1996, 43.

¹⁴⁴ LEAF, *Factum of the Intervenor 2000*, 8.

¹⁴⁵ Ibid., 2-3.

¹⁴⁶ Blackley, *Restricted Entry*, 58.

¹⁴⁷ Ibid.

The production of lesbian erotic material was of great significance to its lesbian and bisexual readers in regards to identity, community and information. Materials pertaining to minority lesbian and bisexual women were of particular importance due to the underrepresentation of minorities amidst lesbian materials. Considering the importance of erotic material in the formation of minority sexual identities and the importance of information pertaining to safe-sex for those who practice S/M or those facing epidemics such as AIDS, it is paradoxical that such materials were seized on the basis of harm prevention.

Conclusion:

The court cases of Glad Day Bookstore, *R. v. Scythes*, and Little Sisters Book and Art Emporium, *Little Sister's v. Canada*, provide a fascinating study of socio-political discourse, theory and structure and the drafting and application of obscenity law. I used these cases to specifically look at the persecution of women's same-sex erotic material under Canadian obscenity law, and the impact this censorship had on women who created and consumed this material. Specifically, I looked at discussions regarding consent at the trials, and the importance of sexual material to the formation of bisexual and lesbian identity and community.

The trials of Glad Day and Little Sister's show that Canadian obscenity law, by operating through a harms-based framework, actually resulted in the systematic targeting of LGB material. I drew from scholarship about the censorship of Glad Day and Little Sister's that unpacked how the notions of harm used in the court cases of the two stores, were tied to larger social and political discourses about sex and gender. For example, I demonstrated how radical feminist discourses, which positioned women as the victims of pornography, infiltrated the court system through women's advocacy groups and became entrenched in law by the Butler decision, which was then held as a precedent for Glad Day and Little Sister's.

I argued that in the complicated ideological and legal network that encompassed the court cases, lesbian and bisexual women occupied a liminal space. As the state and police persecution of LGB identities and communities fell heavily onto gay men, and radical feminist theorizing focused predominantly on relationships between men and women, lesbian and bisexual women's experiences were rarely considered in larger gay and women's liberation movements. Similarly, in the Glad Day and Little Sister's trial, arguments on either side were often framed as 'gay rights' vs. 'the rights of women' without explicit consideration of those who occupy both

categories. The result was that discussions about the erotic agency, identities and communities of LGB women were often dismissed by the courts as extraneous or minute. In this thesis I explored the relationship between bisexual and lesbian women and the censorship of the two LGB bookstores. To demonstrate how the trials specifically impacted lesbian and bisexual women, I analyzed discussions around consent in lesbian S/M practice and porn production, and the connection between LGB identity and same-sex erotic material.

Bibliography

Academic Sources:

- Aerlyn Weissman (dir.). *Little Sister's vs. Big Brother*, produced by Carl Green. Homeboys Production: 2002, DVD. Accessed online: [http://webapp.library.uvic.ca/videos/view.php?vfn=Little-Sisters-vs-Big-Brother-\(2002\).mp4](http://webapp.library.uvic.ca/videos/view.php?vfn=Little-Sisters-vs-Big-Brother-(2002).mp4)
- Allison, Dorothy. "A Personal History of Lesbian Porn." In *Skin: Talking About Sex, Class & Literature*, 183-194. Ithaca, N.Y: Firebrand Books, 1994.
- Allison, Dorothy. "A Question of Class." In *Skin: Talking About Sex, Class & Literature*, 13-36. Ithaca, N.Y: Firebrand Books, 1994.
- Bell, Shannon, Brenda Cossman, Lise Gotell, and Becki Ross. *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision*. Toronto: University of Toronto Press, 1997. <http://deslibris.ca.ezproxy.library.uvic.ca/ID/417677>.
- Blackley, Stuart and Janine Fuller. *Restricted Entry: Censorship on Trial*. 2nd edition. Vancouver: Press Gang Publishers, 1996.
- Califia, Pat. *Sapphistry: The Book of Lesbian Sexuality*. 3rd edition. Toronto: The Naiad Press, 1993.
- Califia, Pat. *Speaking Sex to Power: The Politics of Queer Sex*. San Francisco: Cleis Press, 2002.
- Cossman, Brenda. "Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada." *Duke Journal of Gender Law & Policy* 21, no.1 (2013): 45-66, (Gale LegalTrac).
- Deckha, Maneesha. "Pain as Culture: A Postcolonial Feminist Approach to S/M and Women's Agency." *Sexualities* 14, no.2 (2011): 129-50, <http://journals.sagepub.com.ezproxy.library.uvic.ca/doi/pdf/10.1177/1363460711399032>
- Dworkin, Andrea and Catherine A. MacKinnon. *In Harm's Way: The Pornography Civil Rights Hearings*. Cambridge: Harvard University Press, 1997.
- Dworkin, Andrea. *Pornography: Men Possessing Women*. New York: Putnam, 1981.
- Khan, Ummni. "A Woman's Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-legal Imaginary." *Law & Sexuality*, no.18 (2009): 79-120, (HeinOnline).
- MacDougall, Bruce. *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*.

- Toronto: University of Toronto Press, 2000.
- MacKinnon, Catharine A. *Feminism Unmodified: Discourses on Life and Law*. Cambridge: Harvard University Press, 1987.
- Rian, Karen. "Sadomasochism and the Social Construction of Desire." In *Against Sadomasochism: A Radical Feminist Analysis*, 45-50. Palo Alto: Frog In The Well, 1982.
- Ross, Becki L. *The House that Jill Built: a Lesbian Nation in Formation*. Toronto: University of Toronto Press, 1995.
- Rubin, Gayle. "The Leather Menace: Comments on Politics and S/M." In *Deviations: A Gayle Rubin Reader*, 109-136. Durham: Duke University Press, 2011.
- Rubin, Gayle. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In *Deviations: A Gayle Rubin Reader*, 137-181. Durham: Duke University Press, 2011.
- Rubin, Gayle. "Blood Under the Bridge: Reflections on 'Thinking Sex'." In *Deviations: A Gayle Rubin Reader*, 194-223. Durham: Duke University Press, 2011.
- Segal, Lynne. "Only the Literal: The Contradictions of Anti-Pornography Feminism." *Sexualities* 1, no.1 (1998): 43-62, <http://journals.sagepub.com.ezproxy.library.uvic.ca/doi/abs/10.1177/136346098001001003>
- Strub, Whitney. "Lavender, Menaced: Lesbianism, Obscenity Law, and the Feminist Antipornography Movement." *Journal of Women's History* 22, no.2 (2010): 83-107, <https://muse-jhu-edu.ezproxy.library.uvic.ca/article/382771/pdf>
- Vance, Carole S.. "More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference." *New York Law School Law Review* 38, no.1-4 (1993): 289-318.
- Warner, Tom. *Never Going Back: a History of Queer Activism in Canada*. Toronto: University of Toronto Press, 2002.

Legal Sources:

- The British Columbia Civil Liberties Association. "Factum of the Intervenor" for *Little Sister's v. Canada*, 2000. 1999, (BCCLA Digital Archives).
- Constitution Act, 1982*. Being schedule B to the *Canada Act of 1982* (UK). 1982. <https://lexum.com/en/>
- Criminal Code. R.S.C., 1985*. 1985, (Lexum Online).
- Customs Act. R.S.C., 1985* (2nd Supp.). 1985, <http://laws-lois.justice.gc.ca/PDF/C-52.6.pdf>

The Minneapolis Pornography Ordinance, 1985. 1985, <https://open.mitchellhamline.edu/wmlr/vol11/iss1/5>

Women's Legal Education Action Fund. "Factum of the Intervenor" for *R. v Butler, 1992*. 1992, (LEAF Digital Archives)

Women's Legal Education Action Fund. "Factum of the Intervenor" for *Little Sister's v. Canada, 2000*. 2000, (LEAF Digital Archives).