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Defending Pornography: From Free Speech to Strategic Essentialism

Alex.dymock@rhul.ac.uk

Abstract

*This chapter offers a critical reading of the discourses employed in the context of the distribution of obscene publications through two recent legal developments in England and Wales. Firstly, in the recent case of *R v Peacock*,¹ in which a defendant was charged under indictment with six counts of distributing obscene material under Section 2(1) of the Obscene Publications Act 1959 (OPA); and secondly, the recent Audio-Visual Media Services Directive (AVMSD) and its apparent targeting of 'perverse' sexual practices. However, rather than focusing on the discourses employed in arguing for regulation, I will concentrate here on those used to defend pornography against the law. I argue that while in previous cases, classical liberalism tended to be the framing device used to defend pornography on 'freedom of speech' grounds, these two recent developments demonstrate that defence advocates and activists alike are utilising a strategic essentialism approach, affixing pornographic representation to sexual orientation or identity. While this approach is certainly strategic, this chapter will reflect on some of the drawbacks of this approach.*

Introduction

Historically, defences of pornography have tended to utilise traditional liberal claims on freedom of speech. I attend to a problem I see emerging from the practical application of more recent scholarship on the defence of pornography, focussing on the deployment of an 'identity politics' approach, used to affix representations of sexual practices in pornography to particular sexual identity categories, and hence lodge that approach as a rights-based claim that obscenity law is discriminatory. Such a strategy, while permitting certain sexual paradigms to gain legitimacy before the law, may be successful only at the expense of othering others. I argue that in *R v Peacock*, the deployment of what Janet Halley named the 'gay-identity approach'² was used extremely effectively to give credibility both to the pornographic material under evidence, and the sexual practices represented within it. I suggest that this approach has now been used to cover an even broader identitarian position in response to the AVMS: a 'sexual minority approach' to pornography. While the public reaction to the trial in some quarters intimated that Peacock's not-guilty verdict symbolised a wider victory for the

¹ *R v Peacock* (Southwark CC, 6 January 2012)

² Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2008) 113.

future of sexual liberty and the demise of the OPA,³ I argue that this approach taken by the defence inadvertently supports the conservative political impetus behind the OPA, and that we see this further played out clearly through the specific acts targeted by the AVMSD regulations.

A very short history of obscenity law in England: Practice and debate

The history of the criminalisation of distribution of pornography in England and Wales extends to the birth of the Caxton printing press in 1476, a time at which new books had to be vetted by the Church and government before they could be published. In 1695, it was decided that the *Licensing Act*, which had formerly made this system of vetting a requirement, should not be renewed, and this allowed publishers to print new books without prior vetting. However, these books were instead subjected to censorship post-publication under the new common law crime of 'obscene libel', which allowed publishers to be accused of distributing 'lascivious' texts that might be objectionable to God, the government, or a specific individual. In the late 17th and early 18th centuries a number of publishers had prosecutions brought against them, most famously Edward Curll for circulating a book entitled *Venus in the Cloister* in 1727. In the judgment, the Attorney-General ruled that the book 'tends to corrupt the morals of the king's subjects'.⁴

This series of rulings on 'obscene libel' formed the basis for the first codification of obscenity laws in England and Wales, the *Obscene Publications Act* of 1857, which sought to make the effective prosecution of authors and publishers much easier, particularly when the material contained in books or articles was clearly intended for the purposes of its audience's sexual gratification. However, the original Act left the definition and test of obscenity open to the courts. In the case of *R v Hicklin*, the previous ruling against Edward Curll was re-employed to support Chief Justice Cockburn's decision, reasoning that the OPA allowed a publication to be banned and destroyed if it had a 'tendency ... to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall'.⁵

The ruling in *Hicklin*, or the 'Hicklin test' as it became commonly known, remained the precedent in all cases of obscenity until 1959, when it was decided that the test in common law should be codified in statute. The resulting OPA of 1959 sets out the requirement that for an article to be found obscene, a jury must put themselves in the shoes of the likely audience and come to a decision as to whether the material has the effect, 'if taken as a whole, such as

³ Nichi Hodgson, 'Michael Peacock's Acquittal Is a Victory for Sexual Freedom' (*The Guardian* 6 January 2012) <<http://www.theguardian.com/commentisfree/libertycentral/2012/jan/06/michael-peacock-obscenity-trial>> accessed 1 September 2018.

⁴ Donald Thomas, *Long Time Burning* (First Edition, Kegan Paul International 1969) 81.

⁵ *R v Hicklin* [1868] LR 3 QB 360).

to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it' (Section 1(1) OPA 1959).⁶ However, the statute was also amended in 1959 to protect literary and artistic works. Such literary works often contained isolated passages that might fall within the threshold of obscenity, but were considered as a whole to have a social utility beyond sexual gratification. The long title of the amended 1959 Act explicitly states that its purpose is to 'amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography'. The legal distinction made in the Act between pornography and literature was thus borne.

The OPA is still good law and has a clear and arguably useful objective, in that it allows contemporary standards of permissiveness to be tested and contested, left open to debate – at least under the restrictions dictated by the court room – and is therefore far more malleable than other more recent legislative restraints placed on pornography.⁷ However, because the Act deals specifically with the distribution of pornography, it has until recently proven difficult to use it to harness internet material, the majority of which is not produced or hosted in England & Wales. Internet pornography has far outgrown adult DVD distribution and the OPA is put to use far less frequently in the twenty-first century than the twentieth. Defendants tend to be unwilling to place their fate in the hands of juries and instead tend to plead out of court. Indeed, Jane Fae reported in 2012 that there had been only 71 prosecutions under the OPA in the previous year, in comparison with 1,000 for possession of 'extreme' pornography.⁸ Peacock's not-guilty plea led to his case being the first in over a decade in which pornographic material was subjected to the obscenity test in the Crown Court, and deliberated on by a jury of peers.

In 2014, however, Article 12 of the AVMSD – instituted through an amendment to the *Communications Act 2003* – attempted to bring regulation of internet content in line with the regulations already in place in respect of material that passes by the British Board of Film Classification (BBFC), and exceeds what they would grant an R-18 certificate. The classification guidelines stipulate that the following content is not acceptable:

- material which is in breach of the criminal law, including material judged to be obscene under the current interpretation of the Obscene Publications Act 1959
- material (including dialogue) likely to encourage an interest in sexually abusive activity which may include adults role-playing as non-adults

⁶ *Obscene Publications Act 1959*, Section 1(1)

⁷ For example, Section 63 of the Criminal Justice and Immigration Act 2008 operates a category-based approach towards criminalization of the possession of images of 'extreme' sexual acts.

⁸ Jane Fae, 'Comment: Are We Seeing the Death of Obscenity?' *politics.co.uk* (6 January 2012)

<<http://www.politics.co.uk/comment-analysis/2012/01/06/comment-are-we-seeing-the-death-of-obscenity>> accessed 1 September 2018

- the portrayal of sexual activity which involves real or apparent lack of consent. Any form of physical restraint which prevents participants from indicating a withdrawal of consent
- the infliction of pain or acts which may cause lasting physical harm, whether real or (in a sexual context) simulated. Some allowance may be made for moderate, non-abusive, consensual activity
- penetration by any object associated with violence or likely to cause physical harm
- Sexual threats, humiliation or abuse which do not form part of a clearly consenting role-playing game. Strong physical or verbal abuse, even if consensual, is unlikely to be acceptable

It is also worth noting that the guidelines specifically indicate that they will be 'applied to the same standard regardless of sexual orientation of the activity portrayed'.⁹ In many ways, it might be argued that this recent development fails to adopt the spirit of the OPA, given that the new regulations no longer require an indictment against a content provider and the judgement as to the permissiveness of the material by a jury of ordinary people. Instead, the relevant website can simply be automatically closed by the Authority for Television on Demand (ATVOD) if it fails to comply with the requirement that an age verification is sought on the front page. Perhaps most egregious, however, is that the new guidelines as to non-permissible content seemed to directly target material more likely to be made by independent small-scale cottage producers, who argued that 'what is most apparent is the enforced restriction on what appears to be acts from which women derive pleasure.'¹⁰

The question of the extent to which obscenity law, particularly that which concerns sadomasochism (SM) is gendered is a relatively recent development in the scholarship.¹¹ Typically, successful legal defences of pornography against obscenity charges have historically been reliant upon traditional Millian arguments. In this line of defence, pornography is considered 'harmless' insofar as there is no compelling evidence that it does any tangible, evidenced harm to others. This principle is also often raised in legal scholarship in response to feminist demands that pornography be regulated on the basis that it contains many of the same features as hate speech and is therefore a key contributing factor to the patriarchal organisation of sex inequality and the subordination of women. Catharine MacKinnon outlined

⁹ British Board of Film Classification (BBFC), 'Guidelines' (2014) https://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202014_0.pdf last accessed 6 December 2018

¹⁰ Erika Lust, 'The New UK Porn Legislation Will Turn Erotic Film into Boring, Unrealistic Male Fantasy' *The Independent* (2014) <<https://www.independent.co.uk/voices/comment/the-new-uk-porn-legislation-will-turn-erotic-film-into-boring-unrealistic-male-fantasy-9898052.html>> accessed 6 December 2018.

¹¹ See, for example, Sarah Beresford, 'Lesbian Spanners: A Reappraisal of UK Consensual Sadomasochism Laws', (2016) *Liverpool LR* 63; Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto University Press 2014), particularly Chapter 4, 'The Legal Fondling of S/M Pornography'.

this argument most thoroughly in *Only Words*.¹² The liberal response, put forward by Ronald Dworkin in a 2006 essay, *Women and Pornography*, is that pornography is best understood as a practice of speech that should be protected from repressive state powers under the assumption that 'freedom of speech' is universally aligned with a 'right to moral independence'¹³ and consequently individual emancipation.

A liberal position like Ronald Dworkin's, however, seems premised on the idea that the greater the visibility of sexuality, the 'freer' we become. It is certainly not my intention to suggest that pornography is automatically exempt from discourse merely because it is 'low value' (or even 'no value') speech,¹⁴ that it is a 'free' speech or a signifier of 'moral independence', as Ronald Dworkin would have it. As Foucault claims, though, sexuality is always constrained to the realm of discourse,¹⁵ which commands that the subject's understanding of her own sexuality is always already the product of whichever available circulating speech act about sexuality best describes her own experience. Argumentation about pornography in the courtroom, or when discussed specifically in response to the law, will never 'rupture' discourse, nor 'free' sexuality.

However, if we accept that pornography itself may be one cultural arena in which dominant discourses of sexuality have often been resisted, transgressed and parodied as a specific feature of pornographic utterance, how do the discursive practices of responding to the law transform it? As Wiegman writes: '[w]hat are the consequences when the field imaginary that frames our turn to the case is steeped in legal reason and the argumentative and interpretive practices it conditions and begets?'¹⁶ In turn, this leads me to ask: what becomes of pornography when paradigmatic claims about its 'truths' are employed to defend it from the law? The fact that a case must be won at all, that it must be proven by the defence that the pornography in question does not meet the criteria for obscenity set out in Section 1 of the OPA, depends, as Foucault might claim, on the particular technologies that the institutional apparatus of the courtroom imposes. A defence of pornography in the courtroom, then, is both constructed in response to obscenity law, and qualified by the verdict given in a particular case. The sheer necessity of *winning* an obscenity case does not leave space to examine the tensions and contradictions that questions arising from the regulation of pornography must surely pose.¹⁷ Furthermore, the discursive markers of this 'field imaginary', the obscenity trial, tend to be repeated and re-repeated in legal scholarship on pornography, too often reducing pornography to political argumentation along the same old conservative,

¹² Catharine A Mackinnon, *Only Words* (Harvard University Press 1996)

¹³ Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985) 364

¹⁴ Larry Alexander, 'Low Value Speech' (1988) 83 *Northwestern University Law Review* 547

¹⁵ Michel Foucault, *The History of Sexuality Volume 1: The Will to Knowledge* (Penguin Books 1990) 10.

¹⁶ Robyn Wiegman, *Object Lessons* (Duke University Press Books 2012) 263

¹⁷ Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) 29

liberal and feminist lines. My aim is thus to use the discourses employed by the defence in *R v Peacock*, and those put forward by activists campaigning against the new AVMS guidelines, as a locus for thinking through the tensions and contradictions that the discursive practices of the law impose on pornography, but also to expose an impasse in contemporary approaches to defending pornography from the law. As the verdict in *Peacock* was solely reliant on the jury's assessment of the material based on the evidence presented to them, it also provides us with an opportune moment to evaluate which discourses about pornography and sexuality have retained the quality of 'truth' in the public consciousness, and how they are recuperated in the context of the obscenity trial.

R v Peacock:¹⁸ the 'gay identity' approach

The defendant in this case, Michael Peacock, was an activist and sex worker professionally known as 'Sleazy Michael'¹⁹ who was tracked down by police via the listings website Craigslist²⁰ on suspicion of selling and distributing obscene materials. Peacock used the website to advertise a large collection of pornographic DVDs, which he sold in person from his home. When the police officer in question, using the pseudonym 'Dave', emailed Peacock to enquire about the kinds of material he was distributing, he was sent a comprehensive and detailed list of the genres of pornography on offer. He telephoned the defendant and left a voicemail asking to purchase his '5 most popular fisting DVDs' before arranging to go to the defendant's home where he asked, in addition, for 'extreme BDSM and fisting material'. Once the Metropolitan police had reviewed the materials Peacock was selling, 'Dave' was instructed to make contact with Peacock again to ask for 'pissing and more extreme S&M material'. As the three categories of material 'Dave' asked for all fall under the classifications in the Crown Prosecution Service's (CPS) OPA guidelines on the representation of sexual practices 'most commonly prosecuted',²⁰ on 14th December 2009, the decision was made to arrest Peacock on six charges of selling and distributing obscene material. The acts in the clips stated by the CPS to be obscene were as follows:

- Fisting to the elbow; gaping anus as a result of fisting; 'spitting into it'
- Violence; whipping, urethral sounds and needles
- Urination to another person's face; drinking urine

¹⁸ This case was uncited. Quotations from the trial result from the chapter author sitting in the public box, and making extensive contemporaneous notes.

¹⁹ Myles Jackman, 'Obscenity Trial: The Law Is Not Suitable for a Digital Age' *The Guardian* (6 January 2012) <<http://www.theguardian.com/law/2012/jan/06/obscenity-trial-law-digital-age>> accessed 1 September 2012.

²⁰ Crown Prosecution Service, 'Obscene Publications: Legal Guidance' <http://www.cps.gov.uk/legal/l_to_o/obscene_publications/> accessed 4 September 2018

Six clips, one from each of the DVDs under consideration, were shown in Court. The defendant, the police officer involved ('Dave'), and an expert witness for the defence, Professor Clarissa Smith, were called as witnesses and cross-examined, and many of the images in question were located as being the productions of a well-known Berlin artists' collective. After summing up from prosecution and defence, the jury was quick to reach a not-guilty verdict on all six counts. Peacock's case was particularly noteworthy because his was the first 'contested obscenity trial in the digital age',²¹ an age in which it is perhaps presupposed that the proliferation and easy accessibility of pornography online renders distribution of obscene material by more old-fashioned means somewhat obsolete. It was the first time in over a decade that a defendant chose to fight OPA charges in the Crown Court rather than pleading guilty at an earlier stage, so the trial provided a rare occasion to put modern standards of obscenity to jury test.

However, Peacock's case was not fought on what we would ordinarily recognise as the traditional liberal freedom of speech grounds advocated by Ronald Dworkin, but nor was it prosecuted on feminist grounds. While it was exclusively gay pornography that was under scrutiny, this does not exclude gay pornography from feminist criticism. MacKinnon, and others who have adopted her position,²² reads the performance of the male performer who takes the 'bottoming' role as 'feminine' and the 'top' as 'hypermasculine', a repetition of the impermeable power relations of sexual difference, the dominant male and subordinate female. In the Canadian context, the Supreme Court judgment in the obscenity case, *R v Butler*,²³ suggests that MacKinnon's proposal, attributing to pornography the qualities of hate speech was largely accepted, but the law has been criticised for its disproportionate scrutiny of sexual minority publications, and its particular reading of 'harm'.²⁴

Stychin critiques MacKinnon's approach to gay pornography, and advocates a rights-based defence of gay pornography on the basis of liberatory rather than liberal strategy, which attempts to reconcile the contingent nature of subjectivity and social identity with the challenges inflexible legal policies pose to the subject as a bearer of rights. Briefly, Stychin makes a strict differentiation between pornographic representations of men and women. On the subject of heterosexual pornography, his argument is not dissimilar from the position taken by Andrea Dworkin and Catharine MacKinnon. He maintains that the pornographic

²¹ Myles Jackman, 'Obscenity Trial: The Law Is Not Suitable for a Digital Age' *The Guardian* (6 January 2012) <<http://www.theguardian.com/law/2012/jan/06/obscenity-trial-law-digital-age>> accessed 3 September 2018

²² See, for example, Christopher N Kendall, 'Gay Male Pornography after Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality' (1997) 12 *Wisconsin Women's LJ* 21

²³ *R v Butler* [1992] 1 SCR 452

²⁴ See, for example, Brenda Cossman, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (University of Toronto Press 1997); Mariana Valverde, 'The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law' (1999) 8 *SLS* 181

representation of women remains a site for the maintenance of their subordination because pornography 'necessarily objectifies, fractures and dehumanises'²⁵ (Stychin, 1995: 57) and creates the appearance of a sexuality in which the positions of male and female – as dominant and submissive – become polarised and impermeable. However, he departs considerably from MacKinnon's approach on the subject of gay pornographic representation. Gay pornographic representation, because of the already-empowered position of men as dominant within the feminist model of sexuality, instead functions for Stychin as the 'expression primarily of a political rather than a sexual experience' (p. 56).²⁶ Gay pornography should, he argues, be classified as protected speech because of its role 'in securing the political rights of a subject forged from marginalised political experience'.²⁷

This is a move adopted from Spivak, who contends that 'strategic essentialism' is often an effective approach to achieving political goals by disrupting and displacing the idea that a universal subject of law exists. In other words, essentialism is often usefully mobilised as a 'scrupulously visible political interest'.²⁸ (Spivak, 1985: 214) In this case, the universal subject of law would maintain a heteronormative, procreative sexuality and, as Stychin writes, provide that homosexuality functions as 'an excluded 'other' against which heterosexuality can be consolidated' (Stychin, 1995: 7).²⁹ Stychin echoes Spivak in his call for a pragmatic 'postmodern identity politics' that the gay liberation movement might adopt with respect to pornography, claiming that a certain degree of unification of identity is inevitably required to engage in any political strategizing. By approaching pornography as a question of 'visible political interest', the fact of its explicit eroticism is side-lined.

This approach to pornography has previously been adopted in Canada. In the case of *Little Sisters Book & Art Emporium v Canada*,³⁰ which followed the decision in *R v Butler*,³¹ specifying that pornography could be subjected to obscenity laws on the basis that the materials were 'degrading and dehumanising', it was argued that not only did the precedent arising from the *Butler* ruling discriminate against sexual minorities, but that the decision *only* applied to heterosexual pornography. *Little Sisters* argued that the importation of gay and lesbian pornography, unlike its heterosexual counterpart, provides LG communities an important sense of sexual visibility, which contributes to 'a positive sense of community and identity'.³² While the Supreme Court held 6-3 that the government had indeed violated Section

²⁵ Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge, 1995) 57

²⁶ *Ibid*, at 56

²⁷ *Ibid*, at 56

²⁸ Gayatri Spivak, *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (Donna Landry and Gerald MacLean (eds), Routledge 1996) 191

²⁹ *Supra* note 25, at 7

³⁰ *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* [2007] SCC 2

³¹ *Supra* note 23

³² Lara Karaian 'The troubled relationship of feminist and queer legal theory to strategic essentialism: theory/praxis, queer porn and Canadian anti-discrimination law' in Jack E Jackson, Martha Albertson Fineman

2 of the Canadian Charter,³³ they also ruled that it was justifiable under Section 1. However, the bookstore argued that the onus placed on the importer of pornographic material to disprove obscenity was an overreach, and that Customs could not pre-emptively or punitively detain material that had not already been judged obscene. Interestingly, the store employed the expertise of a number of academics in the initial trial, such as Becki Ross, a sociologist specialising in women's studies, who argued that lesbian sadomasochistic material needs to be understood in the context of the subcultures it represents, and that such material 'validated lesbian sexuality'.³⁴ While this argument vis-à-vis sadomasochism was thrown out in the Supreme Court, it did acknowledge that discrimination against gay and lesbian texts was of concern.

The defence strategy for Peacock employed a very similar strategy to that used in Canada. By couching the sexual practices seen in the clips within a 'gay-identity approach',³⁵ his advocate argued that the jury should come to the conclusion that the pornographic materials and the practices the videos demonstrated were, to be sure, niche 'gay interests' whose appeal they might not understand, but whose existence they should accept and tolerateⁱⁱ. To *not* do so and find the materials liable to 'deprave and corrupt', as the OPA requires a jury to do to convict, would smack of homophobia. The materials in front of them made simply made visible marginalised sexual difference. An approach such as this allows a defence advocate to make claims about the *normality* of particular sexual practices as components of, as Valverde describes, a 'deep personal identity',³⁶ and that the injustices, stigma, disproportionate scrutiny and implied discrimination a person with that orientation might face must be diminished via the permissiveness of pornography.

In winning his case, Peacock became a subject of law rather than its 'other', a visible bearer of rights whose sexual practices, through the lens of pornography, gained legal legitimacy. When witnesses were questioned, much was made of Peacock's own personal interest in practicing fisting (which three of the images depicted) both as 'giver' and 'receiver'. Indeed, even the police constable acting as witness for the CPS admitted in cross-examination that fisting was a 'common sexual practice' for men at sex clubs such as *Fist* and *The Hoist* in London, which Peacock revealed he had frequently attended. By verifying his own participation, Peacock was able to demonstrate that fisting was not only a 'normal' practice for gay men participating in a particular subculture, about which a jury might be assumed to know

and Adam P Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate Publishing Ltd 2009) 382

³³ Section 2 outlines the fundamental freedoms of Canadian citizens, the relevant subsection of which is S2(b) 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.

³⁴ Supra note 11, at 207

³⁵ Supra note 2, at 113

³⁶ Supra note 17, at 95

little, but nevertheless, the defence advocate argued, should be reluctant to cast moral judgment upon, but that the pornography he sold demonstrated a deeply vested sexual practice he fully understood. However, by affixing sexual practice to orientation, the implication of the advocate's claim was that the sexual practices on display in the images were to be understood as norms *only* for men who have sex with men. When questioned about whether any of the pornographic DVDs under examination included images of women, the defendant was careful to state that although fisting was considered a run-of-the-mill practice in his line of work, he had never sold or distributed images of heterosexual fisting, or indeed any DVDs involving women, as his customers never asked him for them. The inference of this claim was that if the images had involved women, the jury might make a very different assessment of their content.

While this strategy was no doubt effective it has limitations on three grounds. Firstly, it created what Lara Karaian calls a 'strategically essentialised understanding of the "Truth" of "queer porn"'³⁷ by affixing particular sexual practices to a sexual identity and, further in the case of gay male pornography, to the masculine. Secondly, it supposes that the mere visibility of sexual variation in pornography is enough to ascertain sexual freedoms and rights. Thirdly, perhaps this strategy's most problematic effect, it plays into precisely the collapse between representations of sexuality and sexual conduct that MacKinnon advocates *in support* of the use of obscenity law: the idea that pornography is instructive of the social reality of sexuality because it is its own, deeply human, social reality. As Lee Edelman writes of pornography, however, perhaps what it stands in for is a recognition of just the opposite: that it stands in for 'the end of the era of the human.'³⁸ Can pornography be so easily understood, to use Stychin's term, as 'a *representation*'³⁹ of the reality of a minority sexual orientation's practices, and should it purport to be?

While the argument that 'strategic essentialism' may be a pragmatic tactic for successfully defending individual cases like Peacock's is certainly convincing, the application of a 'gay identity approach' undoubtedly has other troubling side-effects. It suggests that the representation of 'abnormal' sex in any pornography involving women, and almost certainly in material depicting sadomasochism, must be entirely excluded from the 'protected speech' defence afforded gay male pornography. This has not been the case in Canada. As Khan points out, the 'legal fondling' of sadomasochistic pornography has tended to operate with a degree of tolerance towards heterosexual representations not afforded its lesbian and gay counterparts. As we will see, however, as soon as women enter the pornographic frame in

³⁷ Supra note 32, at 384

³⁸ Lee Edelman, 'Unbecoming: Pornography and the Queer Event', in Tim Stuttgen (ed) *Post/Porn/Politics: Queer Feminist Perspectives on the Politics of Porn Performance and Sex Work as Culture Production* (b_Books, 2009) 35

³⁹ Supra note 25, at 63

England & Wales, the legal assessment of this material tends towards an assumption of its harmful properties. While news media after the trial suggested that the return of a not-guilty verdict in Peacock's case was a 'great day for sexual liberties',⁴⁰ the 'gay identity approach' the defence team used makes this triumphant claim only individually applicable to Peacock himself, at best.

A 'Sexual Minority' Approach?

The historical application of the OPA suggests that it is 'abnormal' sexual practices, no matter how they are represented, that 'deprave and corrupt' moral sensibilities while the most conventional of heterosexual pornography, no matter how degrading its representations of women, faces no restriction at all. In this sense, the test for obscenity in the OPA resorts to restricting what Rubin terms the 'charmed circle' of sexuality, in which attribution of sexual value is granted to sexuality that is "good", "normal", and "natural", ideally heterosexual, marital, monogamous, reproductive and non-commercial',⁴¹ while the pornographic representation of practices that fall outside this circle remain vulnerable to prosecution.

One possible solution to the problem of the silencing of a perverse feminine sexual imaginary was first put forward in the late 1970s and early 1980s. It was advocated by the lesbian SM group, Samois, that perverse sexual practices, specifically sadomasochism, were compatible with feminism. Their statement of purpose furthered this contention:

We believe that S/M must be consensual, mutual, and safe. S/M can exist as part of a healthy and positive lifestyle....We believe that sadomasochists are an oppressed sexual minority. Our struggle deserves the recognition and support of other sexual minorities and oppressed groups. We believe that S/M can and should be consistent with the principles of feminism. As feminists, we oppose all forms of social hierarchy based on gender. As radical perverts, we oppose all social hierarchies based on sexual preference.⁴²

It is important to note, as Gayle Rubin contends, that Samois never especially advocated feminism and in the booklet were simply stating that SM was not incompatible with an egalitarian gender politics. Rubin explains that: 'it was instead groping toward a proto-queer politics that contained a broader and more inclusive sense of sexual oppression based on specifically sexual inequalities'.⁴³ However, the statement nevertheless seems to advocate the same 'strategic essentialism' applied in the 'gay identity approach'. By declaring

⁴⁰ Supra note 3

⁴¹ Gayle Rubin, 'Thinking sex: notes for a radical theory of the politics of sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Rivers Oram Press/Pandora List 1993) 268.

⁴² Samois, *What Color Is Your Handkerchief?: A Lesbian S/M Sexuality Reader* (SAMOIS 1979) 2.

⁴³ *Ibid*, at 4

sadomasochists 'sexual minorities', Samois shore up sadomasochism *itself* as a 'fixed' category of sexual identity, through which a rights-oriented claim can be articulated. Perversion for Samois is rendered an 'abnormality' specific to a particular community of people rather than a universal feature of sexuality per se. Moreover, their claim seems to support *only* lesbian sadomasochism. By stating that 'all forms of social hierarchy based on gender' should be opposed, there is a supposition that sadomasochistic acts undertaken by participants of different genders would not and should not receive similar protection or approval because it would not necessarily advocate the same 'sexual minority' interests.

However, Samois were writing a decade before the explosion of queer theory in the academy, and two decades before the explosion of internet discourses, which have allowed subcultures of SM practitioners to pen their own narratives, and develop their own claims. That heterosexual sadomasochism is not simply the 'dramatic exhibition of the logic of contract and of the full implications of the patriarchal masculine 'individual',⁴⁴ but 'straight with a twist'.⁴⁵ Since Samois penned wrote this statement, there have been several attempts to initiate a claim that a predisposition towards sadomasochistic activity itself constitutes a valid, minority sexual identity or orientation deserving of legal protection under equality legislation. In Canada in 2005, the BC Rights Tribunal was faced with a claim that a man named Peter Hayes' 'lifestyle, practices and preferences' ought to be investigated as to whether or not they fell under the definition of sexual orientation, and therefore of the protection of humans rights legislation, when he was prohibited from driving a limousine because of his involvement in the 'bondage and discipline, domination and submission, sadism and masochism' (BDSM) underworld'.⁴⁶ In his case, the tribunal's preliminary decision was that the claim should go forward. In the UK context, Jane Fae Ozimek's booklet, *Beyond the Circle*,⁴⁷ made a similar claim, suggesting that all consensual sexual preferences are deserving of similar protections under the *Equality Act 2010*.

Gayle Rubin's work, from which Jane Fae's booklet adopts its title, has been central to the development of this claim, situating sadomasochism outside the 'charmed circle' of sexuality that avoids the scrutiny of the police, law and medical profession. If this assertion were harnessed with respect to pornography, it might be possible to claim that not only were the acts displayed in the DVDs Michael Peacock sold those of a 'sexual minority', regardless of gender, but that all users and distributors of heterosexual sadomasochistic pornography

⁴⁴ Carole Pateman, *The Sexual Contract* (Stanford University Press 1988) 101.

⁴⁵ Calvin Thomas, Joseph O Aimone and Catherine AF MacGillivray, *Straight with a Twist: Queer Theory and the Subject of Heterosexuality* (University of Illinois Press 2000).

⁴⁶ Hilary White, 'Sado-Masochism Might Be "Sexual Orientation" Says BC Human Rights Tribunal' (*LifeSiteNews* 5 January 2006) <<https://www.lifesitenews.com/news/sado-masochism-might-be-sexual-orientation-says-bc-human-rights-tribunal>> last accessed 25

⁴⁷ Jane Fae, *Beyond the Circle* (CAAN 2010).

should be offered the same protections. In short, the “Truth” of sadomasochistic pornography would be that it purports to make visible a coherent, and minoritised, sexual identity. However, I remain particularly dubious of the equation between the possession and distribution of heterosexual ‘kink’ pornography and sadomasochism as an orientation in need of protection. Firstly, it is by no means the case that all pornography the CPS might identify as depicting ‘abnormal’ sexual acts purports to ‘represent’ those who would identify as sadomasochists. Indeed, to take the example of fisting, one of the practices represented in the material in Peacock’s case, it is hard to determine precisely where on the BDSM continuum it would sit, if at all. Secondly, this claim once again risks the possibility of supporting precisely the discourses that create an elision between pornographic representation and sexual conduct; that pornography acts as an imperative to sexual practice, or that it is an entirely ‘authentic’ display of those practices. Thirdly, such a strategy cannot avoid the assumption that if an interest in niche sexual practices constitutes an ‘essential’ characteristic of a person, it risks giving credence to now-discarded notions on the part of the psychiatric profession that sadomasochism has the characteristics of a ‘pathological fixity’, reducing perverse sexual desires to precisely the medicalised pathology from which the self-same activists have attempted to rescue them. Lastly, and most worryingly, were this strategically essentialist claim taken to its logical ends, it would be all too easy for men who abuse to claim that their violence is merely a component of an ‘essential’ sexual minority identity about which they can do little, and for which they should be ‘treated’ rather than prosecuted.

Nevertheless, as per ‘gay-identity’ based approaches, where sadomasochism is raised as a political standpoint it is almost always in the context of battles with the law, and thus only really exists as a discrete perspective when certain sexual practices are under threat of regulation. In the same volume published by Samois, Skip Aiken, a member of the gay leather organisation, Society of Janus, writes:

The oppression we experience today is similar to that that other groups have known. Like homosexuals we are labeled ‘sick.’ Like women we are portrayed sensationally by the media and are denied a forum to refute the charges against us. Like all minorities we have been fragmented by shame and self-hatred.⁴⁸

While in the above instance Bond was specifically organising against the criminalisation of SM practices themselves, it is notable that while he makes an equation between the stigma and shame often associated with an interest in SM and the oppressions suffered by women, he avoids arguing that SM should be regarded as a protected characteristic. Contemporarily, this debate has resurfaced. In a much-debated article for *Slate*, Jillian Keenan argues that not only do SM practitioners share some of the institutional discriminations and marginalisations

⁴⁸ Supra note 42, at 26-7

suffered by LGBTQ+ communities, and therefore that 'kink' should be added to the rubric. 'From the inside, kink is so much more than merely physical', she writes. 'Our orientation is so deeply rooted than many of us feel we were born with it.'⁴⁹

Interestingly however, the 'sexual minority' approach to pornography tends to be used only where women enter the frame, perhaps for the reasons cited above. In the case of *R v Price*⁵⁰ in Canada, the defence team utilised evidence given by a woman named Sylvia Schneider, a self-identified practitioner of SM, who was described by one of the justices presiding over the case as 'an intelligent, well-spoken and thoughtful person'.⁵¹ Once more, the 'truth' of pornography was shackled to a scrupulously visible political interest, embodied through Schneider as 'the hegemonic terms of citizenship',⁵² as Khan aptly puts it, and recasting SM pornography as an intelligible representation of an 'authentic' sexual practice.

Similar arguments were levelled against the AVMS regulations, which were labelled 'kink-phobic' and accused of instituting 'vanilla values' onto pornography,⁵³ and possibly society at large. Haley specifically uses the term 'marginalised communities' to outline the discriminatory effect he believes AVMS 2014 has on the BDSM community.⁵⁴ However, more emphasis in response to the regulations was placed on the question of gender than on sadomasochism as a specific or discrete identity. One of the acts explicitly deemed 'unacceptable' was female ejaculation, a long-held point of contention for the BBFC.⁵⁵ Campaigners argued that the new regulations risked disproportionately penalising female porn makers, and forbidding material that in fact challenged certain pornographic orthodoxies, such as the ubiquity of the 'money shot' of male ejaculation. Despite a number of porn makers, such as Erika Lust, mobilising sex-positive feminist arguments that the kind of material the AVMS regulations sought to ban would curb their ability to film sexual practices they themselves enjoyed, Parliament, Ofcom and ATVOD remained unmoved. Strategic essentialism may garner results in the context of individual criminal cases, where there is at stake the freedom of a defendant who appears, to a jury or justices, otherwise a harmless 'good citizen', but appears to have little effect with respect to broader campaigns about pornography's regulation.

⁴⁹ Jillian Keenan, 'Is Kink A Sexual Orientation?' (*Slate*, 18 August 2014) <https://slate.com/human-interest/2014/08/is-kink-a-sexual-orientation.html> last accessed November 25 2018

⁵⁰ *R v Price* [2004] BCJ No. 814 (Prov. Ct) (QL)

⁵¹ *Ibid*, at [30]

⁵² *Supra* note 11, at 220

⁵³ Jake Hall, 'Why the UK's New Laws Could Destroy Queer and Female-Led Porn' (*Dazed Digital*, 20 November 2016) < <http://www.dazeddigital.com/artsandculture/article/33878/1/how-the-uks-new-laws-could-destroy-queer-female-led-porn> > last accessed 5 December 2018

⁵⁴ Daniel Haley, 'Dirty Laws: A Critique of the Audiovisual Media Services Regulations 2014 and Section 63 of the Criminal Justice and Immigration Act 2008' (2016) 22 *Cardozo JL & Gender* 504

⁵⁵ Debate with the BBFC over the existence of female ejaculation, and its presence in pornography, is longstanding. See Murray Perkins, 'Pornography, Policing and Censorship' in Paul Johnson and Derek Dalton (eds), *Policing Sex* (Routledge 2012) for a summary.

Conclusion

It is certainly encouraging that defence advocates are beginning to engage with discourses outside the classical liberal approach, conferring newer knowledges about pornography to a jury and altering the course of obscenity trials as a consequence. However, the question of whether identitarian approaches to pornography in the face of the law have wider reaching effects than trial outcomes remains uncertain. The defence advocate's closing speech in *R v Peacock* quoted Foucault in order to reiterate the distinction between 'abnormal' sexual practices as 'not being normal' and 'sick'. But this was but a brief departure from her earlier schema. Rather than mobilising an anti-identitarian to the representation of perverse sexual acts in pornography, more attention, as I have outlined, was paid to the *gender* of those performing those acts, with the inference that sexual 'abnormal' is merely 'not normal' rather than 'sick' when it is men who have sex with men performing such acts. While this was undoubtedly a successful defence strategy, and led to Peacock's acquittal, the display of women partaking in similar acts is unlikely to be afforded a similar defence. As we have seen, when attempts are made to mobilise a 'sexual minority' approach to the broader basis of the OPA, from the standpoint of sex-positive feminism, it has no effect on the impetus of pornography law.

Despite the outcome in *Peacock*, which suggests that a contemporary jury's reaction to representations of sexual acts such as fisting is no longer that it is liable to 'deprave and corrupt' the likely viewer, it is also not the case that the CPS prosecution guidelines over obscene publications substantially altered after the conclusion of the case. Fisting, for example, remains listed under the types of activities most commonly prosecuted.⁵⁶ The ways in which contemporary ideas about sexuality or pornography are disseminated into forms of legal knowledge are unlikely ever to prove liberatory. However, since opportunities to contest the OPA so infrequently arise, defence teams should seek to operationalise arguments for pornography that pragmatic immediacy of any one particular case, and could consider more carefully the kind of truth-production and myth-making that assigns merit to discourses that inadvertently exclude, limit and pathologise.

⁵⁶ Crown Prosecution Service 'Obscene Publications: Legal Guidance' (undated) <https://www.cps.gov.uk/legal-guidance/obscene-publications> last accessed 7 December 2018