HOMOEROTICA & HOMOPHOBIA: HATRED, PORNOGRAPHY, AND THE POLITICS OF SPEECH REGULATION

by

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ABSTRACT

This thesis analyses the question of the regulation, motivated by egalitarian concerns, of homophobic hate speech and homosexual pornography. I attempt to critically evaluate what both liberal humanism and postmodernism can tell us about these types of speech, and how we should best treat them, in a framework that takes lesbians' and gays' equality as the underlying organising principle.

Although homosexual pornography cannot be convincingly exempted from regulation by affirming that it is not, contrary to heterosexual pornography, implicated in gender oppression, the importance of free speech and the complexity of all pornography messages suggest that the state is not justified in suppressing sex expression relying on the reification of a single viewpoint about its harmfulness. The Law, in limiting pornography on the basis of the radical feminist rationale that assimilates it to hate speech, ends up making strong and arbitrary claims to truth, that are premised on doubtful assumptions, silence alternative knowledges, subjugate outsiders' experiences, and contribute to the creation of oppressive social identities. I advise against censoring pornography out of egalitarian concerns, and argue that, under certain conditions, engagement with court litigation and the deployment of the rights discourse can be promising strategies for lesbians and gay men challenging such obscenity laws.

Hate speech seems more evidently linked to discrimination than pornography, and speech act theory suggests that it enacts a specific kind of subordination. However, the role played by homophobic hate speech in perpetuating inequality for queers is limited when compared to other social/discursive practices: thus hate speech laws are the easiest but also, taken on their own, a largely ineffective way of responding to homophobia. As such, these laws bear a presumption of being an unnecessary burden on freedom of expression, a liberty that minorities have a vested interest in keeping as intact as possible. Against homophobia a radical measure is required that, focusing on education, will actively promote equality values. This remedy will be consistent with free speech doctrine to the extent that hate speech will, setting apart some specific cases, escape regulation, and that the State will assume an attitude directed to reaching understanding.

TABLE OF CONTENTS

HOMOEROTICA & HOMOPHOBIA:

HATRED, PORNOGRAPHY, AND THE POLITICS OF SPEECH REGULATION.

INTRODUCTION

I: *Premise.*

A great deal of controversy has been swirling around the issue of the legitimacy of regulating/suppressing speech in order to advance equality values, at least since the late 70's-early 80's, when one part of the feminist movement in Canada and the United States started engaging in a campaign aimed at the enactment of anti-pornography legislation. Likewise, it was in 1977 that the staunchness of American civil libertarians and First Amendment 'absolutists' was put to the test by the facts of Skokie - facts of painful symbolic significance, that involved the National Socialist Party of America meanly targeting the village of Skokie, Illinois, with a large Jewish population, for the purpose of marching along its streets in Third Reich attire.

Since the radical feminists' insightful analysis of pornography suggested this expressive material being akin to hate speech, the two types of expression have been generally dealt with, by both legal scholars and the Courts,[1] as the two manifestations of a same larger problem, *i.e.* that of speech promoting inequality.[2] Consistently, when the

[1] See *e.g. R* v. *Butler* [1992] 1 S.C.R. 452 [hereinafter *Butler*] at 505, where the Supreme Court of Canada draws explicitly a comparison between hate speech and pornography in order to justify its decision to uphold legislation criminalizing the latter.

[2] Hate speech is that form of speech promoting racial, religious or some other kind of legislatively defined hatred; whilst pornography is intended, in this context, as that kind of sexually explicit expression which objectifies human beings and focuses around dominance-submission themes, thus contributing, arguably, to women's and minorities' oppression. Regulation of hate speech and pornography, thus understood, is

relevant issues were brought before the Courts of both Canada and the United states, the outcome of equality-centred pornography cases was analogous to, and inspired by the same principles as, that of hate speech cases within the same legal system; although Canadian and American Courts took different, in fact opposite, views on the problem.

In fact, the Supreme Court of the United States, in *R.A.V.* v. *City of St. Paul*,[3] and in affirming *per curiam* the decision of the Court of Appeal delivered in the case *American Booksellers Association* v. *Hudnut*,[4] defended the right to freedom of expression respectively of hate-mongers and pornographers on the basis of the inadmissibility of viewpoint-based regulation, because of the risks such regulation creates of establishing a situation of government thought control.[5] On the contrary, the *ratio decidendi* that informed the Supreme Court of Canada's decisions in *R.* v. *Keegstra*[6] and in the *Butler* case justified the suppression of, respectively, hate and obscene speech on

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supported by arguing that measures that outlaw the expression of those viewpoints disapproved of in a society committed to equality are required in order to let minorities participate in the democratic process. Such a process is said to be distorted by the unequal power relations existing between dominant and oppressed groups, and therefore limitations on the freedom of dominant groups to spread bigoted views are called for in order to make the freedom and equality of oppressed groups actually effective (see *infra,* in the text, for a more detailed analysis). This notion was transfused into law in Canada, while is deemed unacceptable in the United States.

[3] 112 S. Ct. 2538 (1992). The circumstances of the case involved a burning cross placed in the garden of an Afro-American family, and a section of a local piece of legislation -St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis.Code 292.02 (1990)- which criminalized the conduct of he/she who placed an object on a private or public property that he/she knew or could reasonably expect to be cause of "anger, alarm or resentment in others on the basis of race, colour, creed or gender". The Court declared the legislation unconstitutional.

[4] 771 F.2d 323 (7th Cir. 1985), *aff'd per curiam,* 475 U.S. 1001 (1986) [hereinafter *American Booksellers*]. In this case the Court held unconstitutional an ordinance that allowed the victims of pornography, defined as the graphic sexually explicit subordination of women, to bring a civil rights action against pornographers in order to recover damages on a showing that they had suffered some specified harms (sexual assault, forced exposure to pornographic material, coercion taking place during the production of pornographic material and discriminatory treatment) occurred as a consequence or in the occasion of the pornographic expression.

[5] The free speech clause of the American Bill of Rights ("Congress shall make no law ... abridging the freedom of speech, or of the press:" U.S. Const. amend. I) is phrased, and the constitutional history of the United States has developed, in such a way as to afford very little scope for regulation of freedom of expression such as that outlined above. The grip that the principle of the free market of ideas still holds on American culture, a scepticism in the wisdom of the state and loyalty to a liberal conception of individual freedom contribute to a judicial interpretation according to which hate speech laws and equality-based anti-pornography legislation have no place in American society. The main idea is that the state cannot take a stand and decide which beliefs its citizens should express or not, because freedom of expression is the one liberty at the very root of a democratic system, which can be opposed to a totalitarian one precisely because the democratic state intervenes to suppress the expression of political beliefs only when they create an imminent, immediate and serious risk of violence.

the ground of the harm that such speech can cause by culturally legitimising and contributing to the discrimination of minorities.[7]

There is clearly a relationship of continuity between the Courts decisions and scholarly reflection on the subject of pornography and hate speech regulation.

The conceptual frameworks within which scholars have debated the issues of pornography and hate speech vary slightly, and occasionally more evidently; nevertheless, it is generally understood, among the majority of the authors dealing with pornography and hate speech, that these two types of expression are not radically different issues (however often it may happen that these authors focus their attention only or mainly on one of the two) and that they do not deserve a substantially differential treatment. Often, arguments to advise or reject regulation of one kind of expression are employed to suggest the same outcome for the other kind.

The fact that both pornography and hate speech relate to a conflict between egalitarian and libertarian values, and to the problem of the continuing inequality of powerless groups in society and its relationship with expressive activities of more powerful groups seems to suggest that there are indeed commonalities between the two types of expression. It might then be reasonable to expect that some of the conclusions drawn in one area may turn out to provide some kind of insight to deal with the other kind of expression.

However, an attention to context suggests that, as I will argue in chapter three, there are important differences between hate speech and pornography.[8] Juxtaposing the

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[6] [1990] 3 S.C.R. 697.

[7] On this basis, the constitutionality of the provisions of the Canadian *Criminal Code* which criminalize the production, distribution, circulation, sale, exposition, or possession (for the purposes of distributing, selling, exposing or circulating) obscene material (*Criminal Code,* R.S.C. 1985, c. C-46, s. 163) and the wilful promotion of hatred against any identifiable group (*Criminal Code,* R.S.C. 1985, c. C-46, s. 319(2)) were upheld, respectively, in the *Butler* and in the *Keegstra* case. As opposed to the U.S.A., in fact, Canada has: 1) a *Charter of Rights and Freedoms* that affords more flexible interpretations of the principle of freedom of expression; 2) a different idea from the United States' as to the legitimate role of the state and the relative positions the state and civil society should occupy; and 3) a greater commitment to social equality achieved through direct state intervention. Canada has thus both hate speech laws and equality-based anti-pornography legislation, both of which passed constitutional muster.

analysis of the two, however, is still meaningful to the extent that it helps highlight the difference between the concerns that, in any specific area, hate speech and pornography respectively may give rise to. This difference, in turn, may be said to be more marked when some specific contexts are considered: in particular, it can be argued that a relevant part of the homosexual community -especially, maybe, of its male component- generally favours pornography deregulation at the same time as supporting criminalization of hate speech, and asking, specifically, for protection against homophobic hate speech.

This thesis, following the recent trend towards a greater attention to the specific contexts in which the problems of pornography and hate speech arise, will analyse precisely the question of the regulation of pornography and hate speech with particular reference to homophobic hate speech and homosexual pornography.

In the case of homosexual pornography, my conclusion will be that it cannot be exempted from regulation on the ground of considering it, contrary to heterosexual pornography, harmless in terms of its relation to gender oppression. I will hold, instead, that, because of the importance of freedom of speech and the complexity and contradictory character of the meanings of all pornography, (both lesbian/gay and straight) the state is not justified in suppressing sexually explicit expression relying on the reification of a single viewpoint about the harmfulness of such speech; much more so that such reification at the same time is likely to bring about or strengthen such results as the de-authorisation of 'outsiders'' knowledges/experiences, and such have oppressive consequences.

As regards homophobic hate speech, my point will be that alternative solutions to the suppression of speech can be devised to deal with the problems of hatred and discrimination against lesbian and gay men. If such solutions, focusing on education, were accepted, not only could they be shown –certain conditions obtaining- to be perfectly compatible with the principle of freedom of speech, but they would also be likely to be more effective than measures that attempt to exclude homophobic hatred from the realm of expressible expression.

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[8] For an opinion strongly supporting a differentiation between hate speech and pornography analysis, see B. Cossman & S. Bell, "Introduction" in B. Cossman, ed., *Bad Attitude/s on Trial* (Toronto: University of

A body of scholarly literature, however limited, concerned with the question of regulating homosexual sexually explicit representations, shows that the specificity of the pornographic discourse within a homosexual context has already attracted some degree of attention within legal scholarhip.[9] Also the field of hate speech specifically directed at homosexuals is not utterly unexplored.[10]

II: *An Overview of Legal Literature on Hate Speech and Pornography.*

The discussion, among both scholars and judges, tends to be largely polarised between positions that either favour or oppose regulation of both hate speech and pornography, the debate about these issues being ridden with highly political oppositions such as powerful/powerless, disenfranchisement/empowerment, equality/freedom, formal equality/substantial equality, self-fulfilment/society's good, state wisdom/state authoritarianism, state partiality/state neutrality, moral autonomy/official morality, degradation/dignity.

Although the ways in which beliefs relating to these oppositions interact are neither simple nor necessitated, and however problematic some of these oppositions themselves are, it seems that the solutions proposed tend to lean towards either egalitarian models of state intervention or libertarian models of civil society self-regulation (with elements of social conservatism sometimes playing a role in either one or the other alternative).

Toronto Press, 1997) 3 at 42.

[9] See, *e.g.*: B. Cossman, ed., *supra* note 8; C.F. Stychin, *Law's Desire* (London: Routledge, 1995) especially at 55-90; C.N. Kendall, ""Real Dominant Real Fun!:" Gay Male Pornography and the Pursuit of Masculinity" (1993) 57(1) Sask. L. Rev. 21; D. Fraser "Oral Sex in the Age of Deconstruction: The Madonna Question, Sex and the House of Lords" (Oct. 1993) 3 Australasian Gay & Lesbian LJ 1.

[10] See: W.B. Rubenstein, "Since when Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective" (1992) 2 Law & Sexuality: Rev. Lesbian & Gay Legal Issues 19; M.T. Zingo, *Sex/Gender Outsiders, Hate Speech, and Freedom of Expression: Can They Say That about Me?* (Westport, Conn.: Praeger, 1998); M.-F Major, "Sexual-Orientation Hate Propaganda: Time to Regroup" (1996) 11 Canadian Journal of Law and Society 221; D. Marr, "How Can We Square Freedom with Anti-Vilification Laws?" (2000) 9 Australasian Gay and Lesbian Law Journal 9; C. Puplick, "Achieving an Equilibrium – A Response to David Marr" (2000) 9 Australasian Gay and Lesbian Law Journal 22; A. Scahill, "Can Hate Speech Be Free Speech?" (1994) 4 Australasian Gay and Lesbian Law Journal 1.

A reading of the works of Canadian and American scholars and activists who devoted some of their energies to the problem at issue shows that, among others, the main conceptual frameworks within which the anti-pornography/pro-hate speech laws position developed are those connected with critical race theory, Marxism-informed theories, and radical feminism.[11]

Their analysis generally proceeds from the recognisance of the unequal distribution of power among different societal groups. Then the role of the state is taken into consideration, along with its complicity in perpetuating power inequalities. The institutions and principles informing the liberal form of the state, it is suggested, behind a façade of neutrality, practically deny the equal participation of all the citizens to the democratic process by sanctioning the chronic power imbalances typical of the status quo. Also, it is sometimes implied or expressly suggested, this is no historical accident, but rather a mechanism devised by those in power to keep the less powerful under control. In this view, the law may be seen as either an instrument or an emanation of power, according to a pattern that recalls Marx's ideas of infrastructure/superstructure.

The idea is that the principle of freedom of speech is exploited by those who have enough power and means to make their voices heard, credible and conspicuous. On the contrary, the disadvantaged groups in society are silenced by their lack of power. They have no access to the free market of ideas and therefore their speech does not become part of the public debate. Besides, the all-pervasive presence of the discourse of the powerful,

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[11] See *e.g.* as to hate speech: K. Mahoney, "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) 3 University of Illinois Law Review 789; S. Sedley, "The Spider and the Fly: a Question of Principle" in L. Gostin, ed., *Civil Liberties in Conflict,* (London: Routledge, 1998) 136; C.R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) especially at 167-209; O.M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, Colorado: Westview Press, 1996) at 109-20; R. Delgado and J. Stefancic, *Must we Defend the Nazis?* (New York: New York University Press, 1997); M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320. As regards pornography, see *e.g.*: A. Dworkin & C. MacKinnon, *Pornography and Civil Rights: A New Day For Women's Equality* (Minneapolis, Minn: Organising Against Pornography, 1988); C. MacKinnon and A. Dworkin, eds., *In Harm's Way* (Cambridge, Mass.: Harvard University Press, 1997); C.R. Sunstein, *ibid.* especially at 210-26; C.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) XII (1) Wisconsin Women's Law Journal 21; J. Stoltenberg, "Pornography and Freedom" in M.S. Kimmel, ed., *Men Confronting Pornography* (New York: Crown Publishers, 1990) 60; and O.M. Fiss, *ibid.* at 67-87.

along with the 'common sense' in which their rhetoric is cloaked, makes the powerless internalise false notions about themselves, such as those spread exactly through hate speech and sexist forms of expression. Once this process of internalisation has taken place, the falsities thus instilled are particularly deleterious for the sense of self-worth of the disadvantaged. This, in turn, discourages them from feeling even entitled to take part in the free market of ideas.

Some underscore also the extent to which the internalisation of dominant ideology can prevent the oppressed groups from taking even notice of their own plight and the injustice that they suffer from, thus making them accept uncritically the *status quo*. In this way the oppressed, albeit inadvertently, become complicit in their own oppression. Radical feminists, for example, have referred to the state of "false consciousness" that some women, according to them, find themselves in.[12]

Even if the oppressed have not internalised any sense of inferiority, the hideousness of hateful and sexist speech can cause resentment, alarm, consequent lack of trust in state institutions, or however, emotional distress: all of these lead to a sense of disenfranchisement that again has the effect of silencing those whose speech should be upheld and encouraged, precisely for their lack of power to participate on equal terms in the public debate.

Finally, it should be recalled that some authors go a long way towards applying the principles of substantive equality to hate propaganda and pornography, and advocate

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[12] According to radical feminism, patriarchy is a trans-historical phenomenon. Masculine values are enforced and reinforced mainly through the sphere of sexuality, which is the primary site of male supremacy, where women experience oppression owing to the sexualization of unequal relationships of dominance and submission and of actual violence. Pornography, intended as the graphic sexually explicit subordination of women, is neither fantasy, nor portrayal, nor representation, but reality: the reality of actual women being oppressed, the documentation and sexualization of their rape and coercion, and the perpetuation of all women's inequality (gender oppression), along with the reinforcement of male domination, through female objectification and victimisation. In this perspective, women who fail to realise their oppressed status, how strongly they have been encouraged to adopt submissive attitudes, and the role sex and pornography play in perpetuating and daily recreating patriarchy, are thought to be casualties of false consciousness, as a consequence of their internalisation of a gender culture that they assimilate, among the others, through sex speech. Again, this idea seems modelled on a Marxist understanding of the alienation of the proletariat, whose living within the superstructure of *bourgeois* cultural relations and values prevents it from being aware of its own oppression and thus requires its being guided by an intellectual *avant-garde*. This, however, also suggests that common perceptions of dominance feminism portraying women as *utterly* destitute of agency are misconceived: in fact they seem contradicted by the mere fact that radical feminists allow room for women's consciousness raising.

the suppression of the expression of hateful opinions only when directed at minorities: under this approach, for example, hate speech against whites should be allowed, while the discriminatory speech targeting people of colour should be prohibited.[13]

To summarise: those supporting legislation suppressing hate speech and pornography take the view that unequal power relations in society compromise the validity of liberal arguments about the free marketplace of ideas and the rhetoric of more speech as the best remedy;[14] instead, they argue, it must be recognised that an application of the principle of freedom of expression, especially in the case of hate speech and sex speech, has a discriminatory impact on the less powerful, who are the target of the bigoted speech of the dominant groups in society. Such speech produces a silencing effect that, along with the peculiar harms created by this speech itself (emotional and psychological distress, perpetuation of bigoted stereotypes about minorities), contributes to discrimination, violence and the maintenance of widespread inequalities.

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[13] See *e.g.* M.J. Matsuda, *supra* note 11. It should be also mentioned the position of those American authors who recognise the harmfulness of pornography and hate speech, advocate for redressing the status inequalities that these kinds of speech lead to, and nevertheless are sceptical as to the desirability or the efficacy and feasibility of state regulation in this field (because of the "procedural fetishism, severity, formalism, inaccessibility and delay" typical of the justice system: R.L. Abel, *Speech and Respect* (London: Stevens & Sons: Sweet & Maxwell, 1994) at 144). The alternative remedies suggested by these scholars to deal with the harms of hate and sexist sexually explicit speech include:

a) the proposal of an "informal processing of disputes", which should take place within the communities of the civil society, (sport teams, associations, shops, etc.) where effective social (as opposed to ineffective legal) sanctions, such as "gossip, cooperation and obstruction, deference and contempt, inclusion and ostracism", can be applied (*ibid*). The victim (by whose side every third party should stand unambiguously, acknowledging the social asymmetries overlooked by the state 'blind' neutrality) should initiate and have control over the process; thus whether the offender deserved rehabilitation or not should be the victim's decision. However, the offender should be given the chance to justify himself and beg the victim's pardon, acknowledging the harms caused by his expressive act: see *ibid* 123 ff.;

b) the proposal of redistributing the social cost of harmful *speech* on society as a whole, which is the actual beneficiary of a legal system where a full free speech principle is accepted. This should be done through a system that allowed the victims of bigoted speech to recover damages from the state, or through publicly funded insurance systems. This remedy, it is suggested, could be used every time a victim is denied the right to recover damages from the offender because of the chilling effect on the public debate that the recognisance of such a right would give rise to: see F. Schauer, "Justificaciòn Etica de la Libertad de Expresiòn" at (1997) 1 Perspectivas en Politica, Economia y Gestion.

[14] It is alleged, among other things, that more speech is no remedy because both hate speech and pornography operate at an unconscious and/or emotional level.

On the other hand, those authors who advocate unfettered freedom of speech tend to privilege classical civil libertarian arguments.[15] The classical rationales underlying the adoption of a generalised freedom of speech principle are reiterated in the field of hate speech and pornography.

The argument from democracy is said to fit these kinds of speech in a peculiarly meaningful way: given the highly political content of the forms of speech at issue, and the degree of controversy surrounding them, everyone should be left free to speak at liberty their beliefs on the subject; for, it is adduced, the principle of democratic self-government, even before being concerned with who will represent the people and the wisdom of governmental measures taken by the democratically elected on behalf of the people, involves a process of self-determination undertaken by the people themselves, to which, among others, uninhibited debate about the issues which are the object of hate speech and pornography is central.

Also the argument from truth is referred to by supporters of free speech. Contrary to what is often affirmed by critics of this argument, the idea that truth will ultimately emerge in the free marketplace of ideas is not at the core of such an argument.[16] John Stuart Mill's formulation of the argument from truth on which civil libertarians draw,

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[15] See *e.g.* N. Wolfson, *Hate Speech, Sex Speech, Free Speech* (Westport, Connecticut: Praeger, 1996); N. Dorsen, "Is there a right to stop offensive speech? The case of the Nazis at Skokie" and L. Gostin, "Editor's Notes: Unravelling the Conflict" in L. Gostin, ed., *supra* note 11, 122 and 145 respectively; H.L. Gates Jr. et al., *Speaking of Race, Speaking of Sex* (New York: New York University Press, 1994); and N. Strossen, *Defending Pornography* (New York: Scribner, 1995).

[16] To my knowledge, we have to go back to the seventeenth century to find unconditional support for the view that truth will win through if left free to vie against falsity. Milton, *e.g.*, argued: "And though all the windes of doctrine were let loose to play upon the earth, so Truth be in the field... [l]et her and Falshood grapple; who ever knew Truth put to wors, in a free and open encounter. Her confuting is the best and surest suppressing... For who knows not that Truth is strong next to the Almighty; she needs no policies, nor stratagems, nor licencings to make her victorious, those are the shifts and the defences that error uses against her power: give her but room, & do not bind her when she sleeps, for then she speaks not true, as the old *Proteus* did, who spake only when he was caught & bound, but then rather she turns herself into all shapes:" J. Milton, *Aeropagitica*, online: Project Gutenberg <http://promo.net/pg/_authors/milton_john_.html> (available in paper format (New York: Garland, 1974)). In a similar vein, for Locke, "[t]he business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth... For the truth certainly would do well enough if she were once left to shift for herself... She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men... [I]f Truth makes not her way into the understanding by her own light, she will be the weaker for any borrowed force violence can add to her": J. Locke, *A Letter Concerning Toleration,* online: Internet Encyclopaedia of Philosophy <www.utm.edu/research/iep/text/locke/tolerat.htm> (available in paper format, 2 ed. (Indianapolis: Bobbs-Merrill, 1955)).

relies instead on the idea that on every matter other than mathematical knowledge truth is not to be easily established, and, to some extent, is unattainable; and the state's proscribing any opinion on a given subject would amount to an inadmissible presumption of infallibility. Moreover, even when a truth is relatively well established (as is the case for Newtonian science or, for that matter, the equal worth and dignity of all human beings irrespective of race and sex), allowing for contrary opinions to circulate freely contributes to maintaining the vitality of the true opinion by challenging its validity and forcing it to reassert itself convincingly.[17] It is apparent how these arguments can be employed to question the desirability of enacting or maintaining hate speech and/or anti-pornography legislation.

Contemporary 'anti-censorship' scholars underscore as well how, by permitting the government to decide for the people which speech should be allowed to circulate freely in the civil society and which should not -no matter how hideous, loathsome, unpopular the speech at issue- we are actually taking a step down the slippery slope, as the principle of freedom of expression is designed to protect exactly the kinds of speech that government or majorities do not like. The suppression of the hateful speech of the privileged as opposed to the one of the disadvantaged is also strongly criticized: to entrust the government with the task of allocating speech power would be highly problematic to the extent that there are no objective ways to assess relations of power in society.

It is clear how this lack of trust in the state and the dreaded risk of authoritarianism and government thought-control are informed by a liberal view of the relative merits of the state and civil society.

The argument according to which freedom of expression advances individual self-fulfilment comes also into play. This free speech rationale is generally opposed by hate speech and pornography regulation advocates on the basis that the self realisation of hate-mongers and of pornography producers and consumers, achieved at the expense of discriminated groups in society and, in the case of pornographers, polluted by the profit

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[17] See J.S. Mill, *On Liberty,* online: Columbia University <www.columbia.edu/acis/bartleby/mill/html> (available in paper format with *The Subjection of Women* and *Chapters on Socialism* (Cambridge: Cambridge University Press, 1989)).

motive, does not deserve being taken seriously into consideration. Supporters of the principle of individual self-fulfilment answer in two ways:

First, by emphasising how a general free speech principle serves the cause of minorities themselves, by allowing them to be vocal in their claims, given *a)* that their speech cannot be lawfully silenced as long as a full free speech principle exists; and *b)* the tendency of legal actors to use hate speech laws and anti-pornography laws to enthusiastically curtail the speech of minorities that clothe their claims in anti-white rhetoric or in the provocative challenge of conventional sexual norms.[18]

Second, by grounding the principle of free speech on a general right to moral autonomy[19] even for hate-mongers and pornography producers and consumers, provided the harm principle is not infringed. In this view, a liberal perspective on the harm principle will consider the harm done to sensitivities not material enough to justify restriction of hateful and sexist sexually explicit speech.

An argument about a type of harm conceived in terms of everyday discrimination occurring as a consequence of the perpetuation of bigoted views about minorities will also be rejected within the logic of classical liberalism, because of the impossibility of proving a causal connection between the harm and the speech (and to the reply that in the field of laws against pollution, for example, a showing of a definitive causal link is not required, a civil libertarian would probably retort that in the case of speech we are not dealing with some physical/chemical law not already discovered, but with the human mind that inevitably mediates the message received before acting, and is ultimately endowed with free will).

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[18] See, for a paradigmatic instance of these abuses in the field of anti-pornography legislation, *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)* (1996) 131 D.L.R. (4th) 293 (B.C.S.C.) aff'd [1998] 160 D.L.R. (4th) 385 (B.C.C.A.) [hereinafter *Little Sisters*], where it was acknowledged that Canadian Customs officials were applying the rules of customs controls against the importation of obscenity in a discriminatory fashion, subjecting gay pornography to a higher degree of scrutiny than was used with straight material; as to hate speech abuses are documented, too: "In Britain the [hate propaganda] law was used, at least in its first decade of operation, more effectively against Black Power leaders than against white racists": G. Robertson and A. Nicol, *Media Law* 3d ed.(London: Penguin Books, 1992) at 169. See also H.L. Gates Jr. "Critical Race Theory and the First Amendment" in H.L. Gates Jr. et al., *supra* note 15, 17 at 43-5.

[19] Freedom of expression, according to Mill, "being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it": J.S. Mill, *supra* note 17.

Another anti-censorship argument considers the undesirability of removing bigoted speech from the public sphere and forcing it underground, where it is more likely to give rise to violent outbursts. Also this argument is liberal in that it is premised on the assumption that a system maximising freedom of expression is more likely to guarantee a "balance between stability and change", provided men "have learnt how to function within the law":[20] in order for men to function within the law, which seems desirable in this view, they must share the values underlying the law as it is, which means, essentially, to share liberal values.

Both utilitarian concerns (mainly in the rationales of democracy and truth) and rights-based considerations (mainly in the rationale about individual self-realisation) play a part, and overlap, in inspiring the arguments typically advanced by libertarians. It should be mentioned as well that some approaches are more clearly rights-based, and try to inscribe the issue of free speech within the framework of a moral system based on the principles of equal rights, equal respect, and individual moral autonomy. Under such views everyone has a right to assess for themselves which kind of speech they will want to be exposed to and whether to believe or not its contents.

In this perspective, it has been argued that, as regards pornography, the controversy existing as to the meaning of pornography itself and the legitimacy and wisdom of enacting or keeping anti-pornography legislation, especially within the feminist movement itself, shows how everyone's moral autonomy should be left essentially free to decide whether to read and look at pornographic material or not, and assess independently which messages, if any, it believes such material is capable of conveying in any given case. In the case of hate speech, it is suggested that precisely the falsity of the opinions expressed calls for individuals' right to autonomous evaluation and rejection of the kind of expression in question.[21]

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[20] T.I. Emerson, "Toward a General Theory of the First Amendment" in K. Middleton & R.M. Mersky, eds., *Freedom of Expression: A Collection of Best Writings* (Buffalo: William S. Hein, 1981) 135 at 142.

[21] For such an approach see the compelling Richards, D.A.J. *Toleration and the Constitution* (Oxford: Oxford University Press, 1998). In his philosophy of equal respect supporting freedom of speech for hate-mongers the author avers: "Persons are not ... the propositions that they believe. It is a vicious political fallacy ... to assume that our contempt for false evaluative opinions may justly be transferred to contempt for the persons who conscientiously hold and express such views": *ibid.* at 190-2.

Such rights-informed theories, generally elaborated at an extremely high level of theoretical sophistication, show a liberal slant in that they emphasise individual autonomy, and they are premised on contractarian ideas of societal organisation and the law. Their historical antecedents are easily identifiable with notions typical of the Enlightenment, such as natural law, individual rationality, and human rights inherently pertaining to the individual (by right of Nature or the Law of God).[22]

To simplify (perhaps more than is legitimate) the account that has so far been provided, it could be said that the main issue at stake in the confrontation between those who support pornography and hate-speech regulation and those who oppose it has to do with the degree of apprehension of the harm involved.

Synthetically: the reasoning of those advocating curtailment of hate-mongers' and pornographers' speech rights is that this kind of speech contributes to and results in the harm of everyday discrimination of minorities and creates a danger, dreadfully concrete, of violence against these groups. Sometimes the reasoning echoes that of the regulation of economic activities for the sake of preserving the environment and preventing pollution: even if a single dose of pollution (*i.e.* hateful, prejudiced speech) may not be dangerous *per se*, the accumulation of incremental doses will end up (or has already produced) in ecological disaster. No matter if actual evidence cannot be provided to establish a causal connection between the activity at issue and the resulting harm, the risks are high enough to justify an inference of harm and regulate the dangerous activity.

Free speech supporters, on the contrary, seem to subscribe to Mill's harm principle in a more traditional way: the balance between the state and society's intervention over the individual to prevent harm to others on the one hand, and the right

[22] Without currently referring to any such notion as the Law of God, these rights-based theories still rest on conceptions according to which the idea of equal respect for the critical conscience of everyone is a principle that cannot be dispensed with (and actually can be found almost) in any moral system; more generally their idea is that the law should reflect such ultimate moral tenets as the one just mentioned, and that every individual is entitled to some fundamental rights that cannot be violated. Besides, a less sceptical and relativist attitude than the one showed by utilitarian liberalism is apparent in that rights-based theories do not shrink from qualifying prejudices, grounded on racial or sexual hatred, as 'false' (albeit this, as already suggested, is not considered a sufficient reason to curtail freedom of speech, that is central to everyone's right to freedom of conscience and to the exercise of one's powers of critical rationality).

to individual self-determination on the other must be struck so as to justify state intervention only at the point were someone's expressive activity results in a clear and present danger of direct and actual harm. Given the central importance of the free speech principle to representative democracies, the advancement of truth and individual self-fulfilment, this means, arguably, that the ideal standard in hate speech cases should be the same as the one established by the Warren Court in the United States in the case *Branderburg* v. *Ohio*:[23]

"[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such *advocacy* is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action"* (emphasis added).[24]

Underlying such a generous approach to the free speech rights even of those who promote hatred is the (liberal) understanding that human beings possess agency and are capable of critical thinking although this does not necessarily mean that such faculties are utterly unrestrained and all-powerful (as eighteenth or nineteenth century liberals seemed to suggest). This means also that when the problem at issue, rather than violence against minorities, is the (related) harm of discrimination, concluding that bigoted speech results directly in discriminatory treatment (an activity justly proscribed), or however contributes to discrimination according to the pattern of the metaphor of pollution, would constitute an oversimplified and mechanical account of the way in which psychological processes and human interaction work.[25] Another implicit premise, as already suggested, is that the harm of hurt sensitivities and wounded feelings (emotional distress) is not (or should not be) deemed a kind of harm that justifies free speech restrictions because of the potential it has for wiping away freedom of speech altogether.

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[23] 395 U.S. 444 (1969).

[24] *Ibid.* at 447.

[25] It might be interesting to notice that occasionally judicial decisions protecting freedom of speech interests may be prone to accept somewhat cynically that hate speech or pornography do result, inevitably so to speak, in discrimination (then, the ground on which free speech claims are nevertheless supported is the interest in avoiding governmental thought-control). See, *e.g.*, the reasoning of Easterbrook, Circuit Judge, in *American Booksellers, supra* note 4.

If the controversy around hate and sexist sexually explicit speech has been mainly dominated by a clash between two ways of conceiving the common good, *i.e.* egalitarianism v. libertarianism, the account here provided would be seriously incomplete if it failed to refer to the fact that, especially as regards pornography, other voices have been taking part in the debate. In particular, there is a varied body of feminist literature addressing the issue of the undesirability of pornography regulation.

Part of it relies on the above illustrated civil libertarian arguments, albeit relocated within a feminist perspective. For instance, some feminists emphasise the role, in advancing women's claims, of a strong freedom of expression principle covering all kinds of unpopular thought.[26]

Both *in and outside* a libertarian framework, however, anti-censorship feminists claim a right to women's independent sexual imagery and pleasure, to which pornography is not, as opposed to censorship, always necessarily inimical. The reality of the sexism and harmfulness inherent in mainstream pornography is not discounted; nevertheless, anti-censorship arguments are advanced, grounded on the belief that anti-pornography laws, applied by legal actors influenced by dominant ideology, would end up being turned against women to suppress their own sexually explicit expressiveness and contain their sexual subjectivity. Another argument is that a sexist pornography is a symptom rather than the cause of a sexist society, and therefore, instead of relying on censorship, structural changes should be effected, women's inequality redressed, and women's power enhanced, *e.g.*, through the welfare system.[27]

The stigmatising effect of anti-pornography laws ostensibly directed at protecting women is also an issue taken into account, considering the possibly deleterious impact of a legally sanctioned view of women as helpless, childlike, victimised by male sexuality, and in need of paternalistic protection.[28]

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[26] See e.g. J. Callwood, "Feminist Debates and Civil Liberties" in V. Burstyn, ed., *Women against Censorship* (Vancouver: Douglas & McIntyre, 1985) 121.

[27] See V. Burstyn, ed., *ibid.*

[28] The question of agency is here often problematized: there is a strong sense of the societal constraints that limit women's choices and their ability to participate on equal terms in the free market of ideas, but at the same time it is recognised that the possibility of that participation is not foreclosed. Also the meaning and

III: *Methodological Approach.*

In dealing with the problem of homophobic hate speech and homosexual pornography I will draw on different theoretical/methodological approaches: poststructuralism (especially Foucauldian feminism and queer theory) and (contradictory as at first sight this may seem) more traditional humanist principles of liberal political theory. Let me clarify this methodological position.

Feminist re-elaborations of Foucauldian analysis have brought attention to the complex and ambiguous relationship between postmodernism/poststructuralism and modernist thought. In particular, I have found Kathi Weeks's heuristic account of this relationship in her book *Constituting Feminist Subjects*[29] greatly helpful.

In what might be read as a history of the postmodernist project, and using Kuhn's paradigm theory, she explains how a homogeneous and reductive postmodernist *paradigm*[30] was built *a*) at the cost of erasing differences among a variety of intellectual enterprises that chronologically developed in succession to French structuralism, and which can be referred to as 'poststructuralist tradition'; and *b*) in opposition to a likewise over-simplistically conceived modernist paradigm. This was done in order to serve the purposes of: i) facilitating communicative relations between undertakers of the new intellectual project (poststructuralism); ii) converting new forces to its development and elaboration; and iii) ensuring its imperviousness to critiques coming from positions - *i.e.* those to which the label of 'modernism' was attached - conceived as lying outside the postmodernist paradigm itself.

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the contradictory roles of pornography, along with the differences between fantasy and action, have been explored and problematized. For a thorough account of the feminist debate about pornography and a discussion about the reflection on women's agency that it stimulated, see: K. Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95 Columbia L. Rev. 304.

[29] K. Weeks, *Constituting Feminist Subjects,* (Ithaca: Cornell University Press, 1998).

[30] Paradigm here is defined as a "set of values questions, vocabularies, methods, and criteria of validity": *ibid* at 51.

The overall goal was (as generally in cases of paradigm building) to promote new research possibilities by substituting a new knowledge to the pre-existing theoretical/methodological systems which foreclosed such possibilities- these systems themselves having already been, at least to some extent, 'paradigmatised' by their practitioners (which operation had marked the birth of the modernist paradigm), and hence rendered rigid and impermeable to novelty.[31]

If we accept this account (to which some credit is perhaps lent by the objections to the use of term "postmodernism" raised by authors themselves identified as postmodernist[32]), then 'eclectic' methodological approaches that -like the one I propose to use here- attempt to combine features of what are no longer conceived as mutually exclusive paradigms but more permeable intellectual traditions gain a certain degree of legitimacy.

The poststructuralist insights that I will make use of in my analysis of homosexual sexually explicit representation and homophobic hate speech will be explained in the course of the analysis itself, as they from time to time become relevant with reference to specific problems. However, some basic, introductory notions can be set out now.

From a poststructuralist perspective, it can be argued that nothing exists outside discourse. This should be taken to mean that there are no ontological, permanent or ultimate truths, and that, rather, sundry competing truths are created by different social discourses. Science, as well as Law, are discourses that posit their own specific truths by making claims to authoritative interpretation of reality.[33] Deconstruction, as a method employed by poststructuralists, seeks (also) to reveal the contingency of what is presented as an ontological truth, and in so doing unmasks its constructed nature.

The gesture through which claims to truth are made is an exercise of power, as its implications are to exclude other productions of knowledge from the realm of truth and to disqualify other claims to truth. Since power is thus implicated in theories, and theories

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[31] *Ibid* at 48-69.

[32] See *e.g.* J.P Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernim'" in J.P. Butler and J.W. Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992), 3.

are discourses, categories constructed by different social discourses and presented as "given" bear a presumption of being functional to political ends.

Just as there is nothing outside discourse, there is no discourse outside power. One characteristic of modern forms of knowledge, (that can, more accurately, be referred to as power-knowledge regimes) is that they are aimed at regulating and containing. The most relevant dimension of modern power, that is, is its being 'disciplinary.' Disciplinary power is taken in opposition to repressive power: as such, disciplinary power is conceptualised as productive, for, through discourse, it creates categories, it constructs truths, and it constitutes subjects- all of which become disciplinary devices. At the same time power also produces sites of resistance and counter-knowledge, which participate in power.[34]

In this grid of analysis, homosexuality is conceived precisely as a social construction. Michel Foucault fixes the birth of the category 'homosexual' in the second half of the XIX century, when the sciences of man shifted the focus of attention from acts of sodomy (which had traditionally been the concern of civil and canonical codes) to the idea of a homosexual *identity:*

> As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them ... Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.[35]

Contemporary so-called queer theorists[36] have further elaborated, in a poststructuralist perspective, on how the category of the homosexual should be deemed to be a cultural construction.

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[33] On the subject of how the Law produces its own truths see C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 9-14.

[34] For a brief introduction to these concepts see E. Comack, "Theoretical Excursions" in E. Comack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax, N.S.: Fernwood Books, 1999) 19 at 61-67.

[35] M. Foucault, *The History of Sexuality: An Introduction, vol. 1* (New York: Vintage Books, 1990) at 43 [hereinafter: *The History of Sexuality*].

[36] For an introduction to queer theory see A. Jagose, *Queer Theory: An Introduction* (New York: New York University Press, 1996).

Part of the aim of deconstruction, as one of the methods (or the method) of poststructuralism, is to problematize binary oppositions, and to displace rigidly dichotomous modes of thinking, by showing that such oppositions are contingent, unstable- shortly, culturally constructed. By using this approach, it has been cogently argued that the notion of sex itself does not exist without discourse: cultural norms shape bodies, give them meaning by creating two sexes and choosing some biological characteristics as the salient, defining traits of either of the two sexes.[37] If sex is a social construction, sexual orientation, being in a relationship of continuity with the preliminary socially constructed binary opposition of two sexes, is no less contingent.[38]

The Law itself, both in its statutory and judicial dimensions, is familiar with categorical thinking. Actually, as a discourse, and at that a powerful one, the Law has often a primary role in producing or contributing to the production of arbitrary oppositions and categories, thereby legitimising or sanctioning or even establishing discriminatory treatment. In theorising the universal subject, queer theorists argue, both liberal philosophies and legal theories grounded on these philosophies performed a theoretical gesture of exclusion, to the effect that the universal subject of rights was conceived in ethnocentric, sexist and heterosexist terms.

Every act that constitutes a subject, according to poststructuralists, is also an act of exclusion and erasure. Some subjects are constituted at the expense of the de-

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[37] Judith Butler puts this question convincingly: "Somebody might well say: isn't it the case that certain bodies go to the gynaecologist for certain kinds of examination and certain bodies do not? And I would obviously affirm that. But the real question here is: to what extent does a body get defined by its capacity for pregnancy? Why is it pregnancy by which that body gets defined? [...] Now, it seems to me that, although women's bodies generally speaking are understood as capable of impregnation, the fact of the matter is that there are female infants and children who cannot be impregnated, there are older women who cannot be impregnated, there are women of all ages who cannot be impregnated, and even if they could ideally, that is not the necessary salient feature of their bodies or even of their being women. What the question does is try to make the problematic of reproduction central to the sexing of the body. But I am not sure that is, or ought to be, what is absolutely salient or primary in the sexing of the body. If it is, I think it's the imposition of a norm, not the neutral description of biological constraints. [...] Why shouldn't it be that a woman who wants to have some part in child-rearing, but doesn't want to have a part in child bearing, or who wants to have nothing to do with either, can inhabit her gender without an implicit sense of failure or inadequacy?": *Extracts from Gender as Performance: An Interview with Judith Butler* (Interview by Peter Osborne and Lynne Segal, London, 1993), online: www.theory.org.uk <http://www.leeds.ac.uk/ics/but-int1.htm> (full version originally published in (1994) 67 Radical Philosophy) [hereinafter *Gender as Performance*].

subjectivation of others - of '*the* other'. By erasing from its concerns the category of the homosexual after constituting a legal subject defined also by its heterosexuality, or by naming the homosexual to deny her status (as opposed to that of the heterosexual) of subject of rights in any given case, the law practically constructed legal subjectivity on a discriminatory basis premised on the exclusion and silencing of 'the other.'[39]

The very existence of a self-styled 'gay' identity (dependant on a previously installed medicalised 'homosexuality') and of a recognisable cultural specificity that can be associated with it reflect the extent to which the opposition homo/hetero is deeply embedded in society's way of understanding and making sense of reality, and how even those who fit the category of 'the homosexual' daily reinstall and reinforce the constructed opposition by naming it over and over again.

A poststructuralist/queer perspective takes issues with the identity politics of homosexual movements that, to advance their claims, organise around fixed notions of identity such as that of 'gay;' this is because of an awareness of the constructedness of social identities, of the historically oppressive origins of the category 'homosexuality,' and of the potentially oppressive (disciplinary) and exclusionary side-effects of a political strategy that ties individuals to a specific sexual identity (however partially redefined that identity might be, as is the case with 'gay,' which depends on , but is not the same as, 'the homosexual').

Since, as a result of the interplay of social and legal discourses, the heterosexual perceives the homosexual as the other, and the homosexual agrees that she is other than the heterosexual, there is room for hate speech directed at homosexuals. There is also room for a specifically homosexual pornography. To the extent that homosexuality, homosexual pornography and hate speech against homosexual are categories relatively well established in our cultural system, it is possible to engage in an analysis of the problem of legal regulation of sexual orientation-specific hate speech and pornography.

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[38] See, for a comprehensive poststructuralist reflection on sex, gender and desire, J.P. Butler, *Gender Trouble* (London: Routledge, 1990) at 1-34.

[39] For these concepts, see: J.P. Butler, "Contingent Foundations: Feminism and the Question of Postmodernism" in J.P. Butler and J.W. Scott, eds., *supra* note 32, 3; and C.F. Stychin, *supra* note 9 at 11-37; for examples of how the law constructs the homosexual see the essays contained in "Part 1" of C.F. Stychin & D. Herman, eds., *Legal Inversions* (Philadelphia: Temple University Press, 1995) at 3-73.

I have above referred to liberal principles as informing, in addition to poststructuralism, the theoretical perspective adopted in this thesis. The liberal position that at times will be recognisable throughout this work can be briefly summarised here.

My first general assumption, on which it is not possible to elaborate in this thesis, is that no convincing reasons have to date been provided to make us want to dispense with democratic systems that protect the civil and political rights of the people so as to allow the people -i.e. 'the governed'- to govern themselves. This brings me immediately to the relevance of freedom of expression in liberal discourse.

When I conceived this thesis, I did not mean it to be a stale reproduction of classic civil libertarian arguments on the subject of free speech, pornography and the dissemination of hate. As I attempted to examine these problems making use of less traditional theoretical approaches, however, I found myself indirectly reaffirming, one by one, precisely such liberal arguments. While this arguably shows that part of the discourse that constitutes me is liberal humanism, it can also mean, as I suggest towards the end of this section, that such discourse has still valid contributions to make to the reflection on the problems I have been dealing with.

Since liberal free speech theory is part of the texture of this thesis, it is worth clarifying this position of mine on freedom of expression, although I do not purport to provide a detailed analysis of why freedom of speech is important, and assume a certain degree of familiarity with free speech principles.

I have above mentioned my subscribing to the view that *democratic* systems are a desirable form of societal organisation. While I consider civil libertarian free speech doctrine generally sound, (recognising that there is value in all the three rationales – namely, democracy, pursuit of truth, self-fulfilment- generally advanced to support freedom of expression) I do so especially to the extent that such doctrine links robust freedom of expression to *democratic self-government.* Furthermore, I believe in a very wide notion of self-government- one, specifically, that encompasses the right of a people to the dynamic, ongoing negotiation of its own self-definition. This means that my presumption, generally speaking, is to consider as much speech as possible protected by

the free expression guarantee (by this does I do not mean to suggest, obviously, that I do not find it desirable to restrict certain speech in certain circumstances).

As part of the stance that takes freedom of expression very seriously, I regard disadvantaged minorities as having an interest in keeping the free speech principle as intact as possible, accepting the view that where deference for this principle is strongest official suppression of subjugated knowledges/experiences should be most difficult to justify and hence easier to contain and denounce. As it is through self-expression that oppressed minorities/individuals can contribute to the construction of a less oppressive social reality, and as there is no guarantee that precedents allowing regulation that is not content/viewpoint-neutral won't be used to justify precisely the suppression of disadvantaged minorities' or individuals' views, I believe there is value in the idea that we should be wary of allowing regulation of speech that is content/viewpoint-based (of course this does not mean that such regulation is always necessarily wrong).

As should be obvious from what I have just said about the free speech of minorities, I subscribe to the view that governments in western countries have not ceased (nor could they cease, by their very nature) to pose a threat to the liberties and equality of individuals/minorities (I expand on this idea in chapter three, section II; and in chapter two, section II (1), where I also provide reasons for considering this view as not irreconcilable with the poststructuralist insight that puts into question both the notion of 'the individual' and the concept of repressive state/juridical power).

The point just made is important, as it can be said that it is precisely the recognisance of the persisting solid reality of repressive/juridical power that makes liberal theory a necessary supplement of poststructuralist analysis in dealing with my subject matter, that involves complex intersections between equality and liberty.

In chapter three section II I will somewhat further clarify my position regarding free speech, dealing sketchily with why I believe the argument from democracy is still valid, how I intend the argument from truth, how the clear and present danger test should be understood, why robust freedom of speech appears advantageous for minorities, and in which sense the free market of ideas needs democratising.

By endorsing in this work libertarian positions as regards freedom of expression, I hope I will not convey the sense of having a-contextually accepted, or advocating an a-contextual acceptance of, neutral principles merely for the sake of maintaining or reinstalling a narrative about state power encroaching on individual liberties. In this work I attempt to critically consider what both liberalism and postmodernism can tell us about lesbian/gay-specific pornographic and hateful speech, and about how we should best treat these problematic types of expression, in a framework that takes equality for lesbians and gay men as the underlying organising principle. How such equality can be furthered when pornography and hate speech are at issue is explored precisely with the aid of both poststructuralist and liberal insights.

IV: *Chapter Outline.*

Chapter one is about the regulation of pornography motivated by egalitarian concerns. It analyses, in particular, the *Butler* decision, in which the Supreme Court of Canada, as already mentioned, upheld the regulation of sexually explicit representation on a finding that it contributed to gender oppression. The importance of the Canadian experience when considering equality-based justifications for pornography regulation is prominent. Canada, in fact, occupies a peculiar position among other western countries, most of which, although adopting -unlike the U.S.A.- a similar position to Canada's as regards hate speech, tend -like the U.S.A.- not to be concerned with the regulation of pornographic expression on the basis of the harm it produces in terms of gender oppression (but rather justify censorship on the ground of protecting public morality).

In this chapter I argue that, contrary to what is sometimes adduced, the language of the *Butler* decision was not ambiguous in the first place, actually mixing conservative morality considerations with the ostensible concern of preventing harm to women and society. I therefore criticise the view that it is because of a conservative component of its that *Butler* lends itself to justifying the restriction of pornography that is, supposedly, not harmful to women, such as homosexual pornography. Instead I try to show that the Butler decision is perfectly consistent with its radical feminist premises, that is with the idea that

pornography should be restricted only on the basis of its constituting a form of discrimination. If homosexual pornography is then caught in the net of the obscenity provision, I contend, it is because from a radical feminist perspective this type of sexual expression can be viewed as just as harmful as straight porn. The idea is then that a radical feminist reading of the reality of both gay and straight pornography is reductive and brings about undesirable results, and that the Court did wrong in accepting such reading in the first place, when it delivered the *Butler* decision.

In Chapter two I refer to the *Little Sisters* case, in which several 'homosexual' plaintiffs sought to limit, in Canada, the consequences of *Butler* on the free speech rigths of the homosexual community (the impact of *Butler*, as a leading case, has gone beyond the obscenity provision of the criminal code discussed in that very case). I consider *Little Sisters* as an instance of the engagement of lesbians and gay men with court litigation when freedom of expression and equality are the values at stake, and proceed by exploring the extent to which such sort of engagement can be deemed to be endowed with liberatory and progressive possibilities, particularly in the light of the (not always, as I will try to show, completely justified) criticism that has been moved against the discourse of rights.

Chapter three considers the problem of hate speech. I first question the wisdom of strategies that try to make an argument for hate speech regulation by attempting to discredit free speech doctrine. I then examine more convincing ways of advocating for restrictions on hate speech -namely, those that focus unambiguously on *substantive* equality concerns- and, with the help of both poststructuralist insights and speech act theory, I explore to what extent homophobic hate speech can be considered an appropriate object of legal regulation. I eventually envisage a system directed at combatting homophobic prejudice that focuses on education, and provide some reasons for considering it the solution most compatible with freedom of expression theory.

CHAPTER I

I: *The Radical Feminist Critique of Pornography.*

In North-America, radical feminists'[40] anti-pornography campaign had a dramatic impact on the debate about the regulation of sexually explicit material. That debate, until the beginning of radical feminists' anti-pornography advocacy, had been revolving around the opposite arguments made by conservative public morality fans on the one hand and free speech supporters plus advocates of sexual liberation on the other. Anti-pornography feminists successfully changed the terms of the discussion by introducing a new rationale on which to ground the suppression of (some kinds of) pornography. This rationale -harm to women- was in fact presented as wholly divorced from traditionally conservative evaluations of sexually explicit representation.

The kinds of harm that radical feminists have been affirming flow from pornography are all tightly intertwined and can be fully appreciated, I would argue, only within the overall framework of dominance feminism itself.

I will attempt to outline briefly the anti-pornography position of radical feminists, trying to make clear some of the links (as I understand them) existing among dominance feminism various contentions - links that sometimes I have found to be more implicit than explicit.

According to radical feminism, sexuality is where power relations that subjugate women, while affirming male dominance, find their quintessential and primary expression. Unequal power relations - *i.e.* the submission and humiliation of women, and the supremacy of men - are established first and foremost through sex; and it is this association with sexuality that makes relations based on inequality appealing. Thus,

[40] Although there is no complete agreement on which movement/positions the expression 'radical feminism' points to, I use it here to refer to those perspectives developed particularly by Catharine MacKinnon and Andrea Dworkin, which provided the theoretical underpinnings of a feminist anti-pornography movement. In the text I will use the espression 'dominance feminism' in the same sense.

patriarchy and women's oppression are primarily established in the sphere of sexual relations, and from there they are 'transferred,' as it were, to everyday human interaction.

Among supporters of this view, there seems to be a shared understanding about sex: its incredible power in shaping social identities, its being absolutely central to each individual's life and self-definition- the primary constructing force of society and culture. Sex is not bad *per se*: it can be good if informed by equality and mutuality. Still, bad sex, *i.e.* sex portraying dominance and submission, is overwhelmingly present, especially in pornography; and its representation through the pornographic means legitimises and reinstalls unequal sexual practices continuously. At the same time, since pornography portrays (bad) sex, and relationships established in the sexual sphere are reproduced in everyday life precisely because sex makes them appealing, pornography's role in producing and maintaining women's oppression is unrivalled. Male violence and abuse to women, along with widespread sex discrimination, and women's passive acceptance of their own subjugation, are all natural consequences of pornography.

Such a view allows for only one reading of the reality of the pornography industry. Women who model or act in pornography are necessarily forced into it: directly, by men who compel them by making use of threats or physical violence; and indirectly, either because of the lack of opportunities for women that connotes our patriarchal society (created as such by male sexualization of unequal power relations), or owing to women's internalising a sense of their inferiority, of their being fit for men's abuse, even of their enjoying it. In this conception, pornography is never 'acted': instead, it is invariably the documentation of an actual rape because no woman, unless she is in a plight of false consciousness, desires her own abuse - and sex which is not overtly caring, mutual, where the partners do not occupy positions of perfect equality, in short pornographic sex, is necessarily 'abuse.'

The forcing of women into pornography is but a manifestation and a consequence of our patriarchal society, to the creation of which pornography itself contributes to a very large extent. Women's oppression, however, as accruing from pornography, shows a variety of other different aspects. Some are specifically related to the sexual sphere, and involve women being forcibly exposed to pornography, women being forced into

prostitution often with the aid of pornographic material, and women being raped, sexually abused, and sexually harassed in ways that clearly reproduce pornographic representations or 'philosophies.' Other harms are less overtly related to the sexual sphere: however, once recognised that sexuality is such a central force in shaping social practices, it cannot be seriously contended that pornography is not deeply implicated in general discriminatory habits and women's powerlessness, such as lack of bargaining and speech power.[41]

How does this conception of society, sex, and its representation relate to the issue of male and female homosexual pornography? Radical feminists, when they address the problem, tend to find that material produced by homosexuals for homosexuals reproduces the relations of dominance/submission, the sexualization of violence, the rape themes, the contempt for the 'other', the objectification and fragmentation, (*i.e.* reducing someone to their bodily parts and hence) the dehumanisation and absence of the 'spiritual' dimension which are typical of heterosexual pornography.

Both lesbians and gay men, apparently, have participated in, or supported, radical feminists' anti-pornography campaigns. Some gay authors, in particular, have examined gay male sexually explicit representation (a phenomenon far more conspicuous than lesbian pornography[42]) from a radical feminist perspective. In their view, gay male pornography is said to convey the view that male/dominant is good and female/submissive is bad. Gay male pornography, with its portrayal of 'beefy', muscular men, is said to glorify a hyper-masculinity that entails, by definition, a derogatory view of those who do not satisfy the requirements of the virile male. Bottoms as opposed to tops,

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[41] "The bigotry and contempt pornography promotes ... diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; encourage violent crimes; contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods; ... undermine equal exercise of rights to speech and action:" A. Dworkin & C. MacKinnon, *supra* note 11 at 33. For radical feminists' anti-pornography advocacy in general see: *ibid;* C. MacKinnon & A. Dworkin, eds., *supra* note 11; and C. MacKinnon, *Only Words* (Cambridge, Mass: Harvard University Press, 1993).

[42] "'There are... only eight [lesbian] magazines published world-wide that I have ever been able to locate that always or ever have sexually explicit materials'": J. Fuller & S. Blackley (N. Pollack, ed.), *Restricted Entry: Censorship on Trial* (Vancouver: Press Gang Publishers, 1995) at 64 (the statement here reported was done by Ann Scales during the *Little Sisters* trial, excerpts of which are contained in *Restricted Entry*).

are equated with women and, together with them, degraded and dehumanised. Gay sadomasochism is seen as eroticising violence and degradation of the human being. Consequently, all the harms identified by radical feminists with respect to heterosexual pornography are said to accrue from homosexual pornography as well: coercion of actors during the production of pornographic material; violence done to real people as a consequence of the eroticisation of abuse; status inequality and discrimination of those who do not fit the category of the dominant man; and the internalisation, on the part of the less powerful, of deleterious notions about their worth.[43]

Some give an explanation of the fact that gay pornography reiterates, unimaginatively, typical heterosexual themes, by underscoring that male homosexual pornography portrays the reality of homosexual sex, where gay men engage in acts of eroticised violence and/or dominance/submission in order to resolve their internalised homophobia. Since being penetrated is invariably interpreted as degrading and humiliating in our patriarchal culture, and men want to retain their position of supremacy while still keeping women in a position of servitude, homophobia is integral to women's oppression in that it ensures that men and women keep their proper sexual roles.

Gay men, allegedly, do not feel as if they were 'real men', and hence try to assume dominant roles during sexual intercourse, or seek sexual contact in submissive roles with him whom they perceive as a real man in order to 'absorb' part of his masculinity; or, even, engage in S&M practices as a kind of ritual passage from their half-feminine, inferior status to full masculinity and the privileges that go with it. Gay pornography reproduces faithfully this reality, -which is built on male supremacy and misogyny- and reinforces it by objectifying bodies and acts and severing them from any emotional dimension, in such a way as to suggest that real men do not feel love and sympathy, but are just concerned with dominating, abusing and fucking. Thus gay pornography, besides being detrimental to gay men, contributes also to gender

[43] See in general C.N. Kendall, *supra* note 11.

oppression, even in the absence of any explicit reference to women at all: this is because the values it is imbued with are premised on gender hierarchy.[44]

As is obvious, this reading of gay male pornography is grounded at least in part on the idea of gay men being victims of false consciousness: they fail to realise that their sexual practices are a result of internalised homophobia and misogyny, and the extent to which they actually run against their own self-interest.

The same explanation is advanced to justify negative evaluations of representations of lesbian S&M or, however, lesbian intercourse that either appears to propose unequal power relations between the participants in the sexual activity portrayed, or acts/scenarios that are deemed degrading. This is especially true with reference to anti-pornography feminists' evaluation of mainstream pornography representing lesbian intercourse, generally produced by heterosexual males for the enjoyment of heterosexual males. Lesbians who enjoy this sort of pornography, failing to find it degrading, cannot be seen but as victims of false consciousness.

As regards pornographic representations produced by lesbians for lesbians, there seems to be less agreement among radical feminists, who otherwise share negative evaluations of mainstream and gay male pornography. While, for example, a 'Mackinnonite,' more orthodox anti-pornography feminist reading of lesbian S&M representations would view them as uncompromisingly harmful, other radical feminists would not issue such condemnatory assessments.[45]

These different evaluations about lesbian pornography seem to reproduce the radical feminist understanding of the twofold position occupied by women who find themselves in a context of patriarchy. Women, in so far as they suffer from the consequences of -instead of participating in- domination, occupy either a peculiarly enlightened vantage point in interpreting reality and the causes of their oppression, or, to the extent that they internalise the dominant patriarchal culture, may fall into a state of

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[44] See in general J. Stoltenberg, "Pornography and Freedom" and "Gay and the Propornography Movements: Having the Hots for Sex Discrimination" in M.S. Kimmel, ed., *supra* note 11, 60 and 248 respectively.

[45] See *e.g.* the statements made by Ann Scales reported in J. Fuller and S. Blackley, *supra,* note 42 at 66.

false consciousness, failing to realise the ways in which male supremacy keeps them victimised mainly through sexuality and its representations.

Privileging the former of these conceptions about women's consciousness will lead a radical feminist to consider lesbian pornography as free of the power relations that pollute heterosexual and gay male pornography and that make it a means of domination/discrimination; subscribing to the latter will instead get her to view lesbian pornography that does not represent mutuality and affection as harmful and in need of legal regulation.

II: *The* Butler *Decision.*

1. Butler*: Seeming Ambiguity.*

The *Butler* decision, in upholding the constitutionality of subsection 163(8) of the *Criminal Code*, and the definition of obscenity contained therein,[46] relied heavily on dominance feminism.[47]

The criminal provision at issue outlaws the public distribution or exhibition of material the "dominant characteristic of which is the undue exploitation of sex."[48] By "undue exploitation of sex," Sopinka J., for the Court, affirms it is meant almost every instance of sex coupled with violence, explicit sex involving children in its production, and explicit sex which is "degrading and dehumanizing" provided the danger that such

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[46] "For the purposes of this Act, any publication the dominant characteristic of which is the undue exploitation of sex or of sex and one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene:" *Criminal Code,* R.S.C. 1985, c. C-46, s. 163(8).

[47] During the *Butler* trial in front of the Supreme Court of Canada, the Women's Legal Education and Action Fund - LEAF - submitted a brief, about the connection between pornography and women's oppression and discrimination, which was clearly informed by a radical feminist perspective. C. MacKinnon herself has participated directly in LEAF's litigation related activities: L. Gotell, "Litigating Feminist 'Truth': an Anti-Foundationalist Critique" (1995) 4 Social and Legal Studies, 99 at 103. See also K. Johnson, *Undressing the Canadian State* (Halifax: Fernwood Publishing, 1995) at 63: "[In *Butler*] Leaf's arguments *parallel* those of Mackinnon." (emphasis added). Since *Butler*, however, the position of LEAF as regards pornography has become much more nuanced: see *Leaf and the Little Sisters Case:: Revisiting Butler* and *Law Arguments,* online: LEAF <www.leaf.ca/DisButler.htm#anchor_topofpage> and <www.leaf.ca/DisLaw.htm> respectively) and *Little Sisters Book and Art Emporium et al* v. *Minister of Justice et al - Factum of the Women's Legal Education and Action Fund (LEAF),* online: University of Manitoba <www.umanitoba.ca/Law/Courses/Busby/Gender/factum.html> [hereinafter LEAF *Factum*].

[48] See *supra* note 46.

material creates (*i.e.* "the risk of harm") is "substantial."[49] The harm that the provision seeks to avoid is, it is contended, individuals being predisposed, by the material, to enact "antisocial conduct", *i.e.* conduct that *society* considers dysfunctional, ("that society formally recognizes as incompatible with its proper functioning") "as, for example, the mistreatment of women by men."[50] To avoid subjective evaluations and arbitrariness, it is said, the judge must decide "what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."[51]

It seems fair enough to grant that the terms and concepts used, and the standards described, in the part of the *Butler* decision just outlined are ambiguous and could easily legitimise their being used to enforce a traditional moral agenda in matters of sexually explicit representation. Should this happen, of course, sexual minorities' sexual expression, such as homosexual pornography, would be the first casualty of the enforcement of s.163: with any likelihood, the community, taken as a whole (as the community standards test prescribes), would be more inclined to find degrading and dehumanising, likely to predispose individuals to dysfunctional conduct, and would therefore not tolerate the exposure of others to, the portrayal of homosexual sex acts, however performed in a context of mutuality, rather than, say, the picture of a woman in a posture of submission. This would obviously frustrate any egalitarian concern of radical feminists, at the same time as legitimise using *Butler* to repress homosexual expression.

Therefore, if we should think that the *Butler* decision was framed in the first place in such a way as to accommodate elements of social conservatism in its *ratio*, then we could blame such ambiguity for the employment of s.163 directed at suppressing sexual minorities' sexually explicit expression. Some authors have taken this view.[52]

In what follows, on the contrary, I will try to show that a reading of the whole decision (as distinguished to a partial one limited to its first part) can be said to be fairly consistent with the egalitarian concerns of radical feminism. This observation, as we shall

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[49] *Butler, supra* note 1 at 485.
[50] *Ibid.*
[51] *Ibid.*
[52] See *e.g.* J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 75-6, and B. Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in B. Cossman, ed., *supra* note 8, 107.

see, has important consequences as regards the restriction of sexual minorities' sexual expression under s.163.

2. Identification of the Legislative Objective Underlying s.163.

In testing the constitutionality of s.163, Sopinka J., when he comes to the point of determining whether the restriction posed on freedom of expression by this provision of the *Criminal Code* can be justified in a free and democratic society, makes some unequivocal statements, that contradict the legitimacy of employing the obscenity provision having in mind conservative considerations of public morality.

By affirming that the *Charter* forecloses a free speech infringement premised on the imposition of "a certain standard of public and sexual morality, solely because it reflects the conventions of a given community,"[53] Sopinka J. is actually denying that each and every sexually explicit material that the community as a whole can qualify as degrading and dehumanising, involving the undue exploitation of sex, and predisposing individuals to (anything that is perceived, again according to community standards, as) antisocial conduct can be restricted relying upon s.163. In order for it to be constitutional, moral disapprobation as the basis of some piece of legislation must be grounded, as the Court states forthwith, in "*Charter* values" or, at a minimum, must not undermine *Charter* values.[54]

It seems logical that, applied to the case of s.163, this general statement means that when a court is faced with the task of determining whether certain pornographic material is obscene or not (that is, justifiably caught by s.163), it should apply the community standards test in such a way as to *take into account only those moral conceptions of the community as a whole about the undue exploitation of sex* (or sex that is degrading and dehumanising), *that are consistent with -i.e. either further, or at least do not undermine- Charter values.* This, in turn, suggests that the community's concerns about sexual propriety, as opposed to sex inequality, should be left out of consideration.

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[53] *Butler, supra* note 1 at 492.
[54] *Ibid.* at 493.

In fact, while there is an equality clause in the *Charter of Rights and Freedoms* that would support a notion of morality based on radical feminist concerns about sex discrimination, not only there is no correspondent provision to back conservative, sexual propriety-centred, ideas of morality, but such ideas, if taken as the basis of a free speech infringement, can precisely be thought to *undermine* the value contained in the equality clause of the *Charter*. As conservative sexual morality is connected to a variety of gendered categories such as obligatory procreative sex and compulsory heterosexuality, it can well be conceived precisely as contributing to gender/sexual orientation oppression. The result of incorporating conservative morality in a piece of obscenity legislation would arguably undermine the *Charter* value of equality, denying the *equal* right to freedom of expression of those portraying 'inappropriate,' 'deviant' sexual practices and preventing the dissemination of sex expression that by definition challenges those gendered categories reinforced by notions of conservative sexual morality.

This interpretation of s.163, that would exclude sexual propriety from the realm of the legitimate justifications for regulating sex speech, could follow, in my view, rather straightforwardly from the ideas expressed by Sopinka J. Thus understood, s.163 would not expose homosexual pornography to the greater (if compared to those investing straight porn) risks of suppression that censorship grounded on notions of conservative morality would entail.

But actually Sopinka J. chooses a more winding route to make clear that there is no room for conservative, public morality considerations in the obscenity provision of the *Criminal Code*.

Instead of following the more accurate approach of distinguishing between different moral conceptions supporting the consideration of different kinds of harms,[55] the

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[55] *I.e.*: * Egalitarian radical feminist morality ↔ harm to women (subordination) } supported by *Canadian Charter of Rights and Freedoms*, s. 15(1), Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

* Conservative sexual morality ↔ harm to conservative sensitivities } no *Charter* support, and, furthermore, likely to undermine *Charter* values.

Justice limits himself to making some general observations at an abstract level,[56] and then relies, in assessing the constitutionality of the obscenity provision, on a rigid distinction between immorality and harm, arguing that actually "the overriding objective of s.163 is not moral disapprobation but the avoidance of harm."[57]

It is true this approach may appear to be not very rigorous; but it has the advantage of formally sanctioning the objectivity of the obscenity provision, declaring the rationality of the law, and reifying dominance feminism conceptions of pornography.[58] This, in fact, is what is accomplished once the obscenity provision is not even linked to the furtherance or protection of *Charter* values, but is presented as functional to some utterly objective, wholly uncontroversial ultimate end, that stands even above the moral values of the *Charter*: the avoidance of *harm.*

Shortly after trumpeting in this fashion the "overriding objective of s.163," however, Sopinka J. is forced to recant owing to a technical question of constitutional interpretation, the so called 'shifting purpose doctrine.' This doctrine would not allow the Court to save a provision from a finding of unconstitutionality, should the Court try to do that by characterising the objective underlying the measure restricting a *Charter* right (here: freedom of expression) as different (here: prevention of harm) from the one that had determined the legislature to enact the legislation at issue in the first place (here: public morality considerations). Sopinka J. is thus forced to admit that harm and morality are actually related, that it is some specific kind of moral disapprobation that makes the avoidance of equality-related (as opposed to sexual propriety-centred) harms the permissible pressing and substantial objective of the obscenity provision. Under this interpretation, the shift in the characterisation of the objective is only in emphasis, and not in purpose, and the legislation can be upheld.[59]

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[56] See *Butler, supra* note 1 at 492-3.

[57] *Ibid.* at 493.

[58] On a terminological level, 'harm' as opposed to 'morality' is a distinction at the very core of radical feminist justifications for pornography regulation, and typical of liberal legal language in matters of sex/sexuality.

[59] At any rate, it should be noted that, even in thus temporarily giving this (more accurate) account of the legislative objective underlying s. 163 (avoidance of harm grounded in some conception of morality, rather than avoidance of harm as opposed to moral considerations), Sopinka J.'s reasoning still contrives not to contradict radical feminism. The *Butler* decision here, if not a specimen of legal coherence and crystal-

As soon as he has reluctantly paid this forced tribute to constitutional legal formalism and its shifting purpose doctrine, however, the Justice prefers reverting to a discourse that dissociates obscenity regulation from any contingency that even a reference to *Charter* (let alone some other sort of) values, as opposed to ontological necessities, might suggest. Obscenity regulation is accordingly reified and presented as natural, unavoidable, and almost transcendent, by characterising it as a power "historically" pertaining to Parliament[60] (the paradigmatic institution of *democracy*), consistent with "Canada's international obligations,"[61] and a feature which is to be found in "most *free* and *democratic* societies"[62] (emphasis added). Here, the continuity between this judicial discourse and the rhetoric of dominance feminism is apparent: just as, for radical feminists, *pornography is discrimination*, for the Supreme Court of Canada the *criminalization of pornography is democracy*, its fundamental embodiment, necessitated by the ostensibly value-free objective of avoiding harm (and pornography *is* harm itself), by the exigencies of the international community of enlightened democratic countries, and, last but not least, by the natural state of things (a "power which ... [Parliament] has historically enjoyed").[63]

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clear reasoning, is still unambiguous in rejecting any form of restriction on pornographic material that is premised on prudish and traditional evaluations about the 'impropriety' of some sexual acts. As illustrated, in fact, the kind of morality on the basis of which pornography harms are apprehended is the one rooted in *Charter* values, *i.e.* in egalitarianism as opposed to social conservatism (and only the former, as opposed to the latter, is consistent with radical feminism).

[60] *Butler, supra* note 1 at 497.

[61] *Ibid.* at 498.

[62] *Ibid.* at 497. The idea goes something like this: 'Obscenity regulation is natural and unavoidable, as Canadian legal history and the international experience prove.' It should not be overlooked that, for the sake of the credibility of this narrative, the difference, highlighted just a few lines above by Sopinka J. himself, between the admissibility of the restriction of obscenity for egalitarian concerns and its impermissible suppression for conservative preoccupations about public morality is erased in a single quick stroke. In fact countries other than Canada restrict obscenity as prurient and immoral rather than as discriminatory, and Canadian law has historically (before *Butler*) limited obscene expression for the same public morality-centred interests.

[63] *Butler, supra* note 1 at 497.

3. The Internal Necessities Test.

A literary, artistic or scientific purpose, the Court argues in *Butler*,[64] redeems the undue exploitation of sex provided the portrayal of sex is *essential* to the purpose itself.

At first sight, the acceptance of the so-called internal necessities test would appear to be in stark contradiction with radical feminist views on the harmfulness of pornographic material. How could aesthetic concerns be possibly considered more important than the avoidance of harm to women, or sexual minorities? There would be an inconsistency here between the objective of s.163, defined on the basis of radical feminist theories about sex, sexual representation and discrimination, and the internal necessities test, unless... we recognise that the artistic defence is a fake. Actually, considering the language used by Sopinka J., it would seem that a work could have artistic merit only if it did not exploit sex unduly. In other words, artistic value and undue exploitation of sex are mutually exclusive.

In the context of art, Sopinka J. talks of "*portrayal* of sex,"[65] (emphasis added) as opposed to "undue exploitation of sex"; and he contrasts a situation in which the undue exploitation of sex is the dominant characteristic of a work, to that where sexual representations are "essential to a wider artistic ... purpose,"[66] and where therefore the undue exploitation of sex is not a dominant characteristic.

In the light of this language, it is apparent how the Court did not mean the artistic defence to have any true *redeeming* value of obscene material, irrespective of its preliminary, misleading statement according to which "[t]he need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex."[67] Obscenity is statutorily defined as "any publication *a* dominant characteristic of which is the undue exploitation of sex" (emphasis added).[68] Sopinka J., however, in order to apply the internal necessities test, explains that a judge

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[64] See *ibid.* at 486.
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*

must determine what is *the* dominant characteristic of a work.[69] If the main feature of a work is the undue exploitation of sex that work can be defined obscenity, while artistic work is intended by the Court as something the dominant characteristic of which is other than the undue exploitation of sex. In this sense, all that the internal necessities test, as interpreted by the Court, tells us is that we can feel free, if we please, to qualify as artistic, scientific, or literary that material that already falls outside the scope of s.163(8) because it does not meet its definitional requirements.

This way of interpreting the artistic defence is consistent with the Court's rejection of the reasonable person's viewpoint in assessing the artistic merits of the expression at issue, and its relying, rather, on judges determining "whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the *community as a whole*"[70] (emphasis added). An artistic defence based on the reasonable person's point of view would impact dramatically any obscenity legislation (be it motivated either by dominance feminism or public morality concerns), making it, if properly applied, altogether unworkable.

The opposition pornography/art has long since been shown to rest on rather shaky grounds, to put it mildly. It is not feasible to identify what amounts to reasonableness when the criteria to evaluate the distinctions between art and pornography are considered, because it appears impossible to distil an average perception as regards what is and what is not artistic in the realm of sexually explicit expression. Since, accordingly, no reasonable person could draw a meaningful distinction between pornography and art, and since art lies at the very core of the free speech guarantee (as Sopinka J. affirms), the result of a consistently applied artistic defence evaluated from the reasonable person's standpoint would be that all obscene material could be thrown back from the periphery (where its sexual content and its profit motive had placed it) to the very heart of freedom of expression; but then no obscenity law could work at all (the fact that such countries as the United States have in their -however alive- obscenity laws precisely such an artistic defence that privileges the viewpoint of the reasonable person could be taken to show

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[68] See *supra* note 46.
[69] *Butler, supra* note 1 at 486.

merely that such a defence, where it exists, is not consistently applied and is meant to stand for little more than a formal tribute to the importance of art in our society.)

Taking, instead, the viewpoint of the community as a whole in assessing the artistic merits of any given work allows the Court to avoid inquiring into the deep meaning of, and consequently displacing, the arbitrary opposition that contrasts art to pornography. That is to say, the stress placed on what the community would tolerate gives the judges the opportunity to adopt ad hoc criteria to identify what art and porn respectively are, and thus distinguish between the two, for, as I already suggested and as we shall see below in greater detail,[71] the standards of the community as a whole that an adjudicator must consider to make its evaluations about obscenity are, in reality, the radical feminist standards of a subset of the community. Pornography, thus, is sexually explicit material that (part of) the community does not tolerate on the basis of considering it harmful for women's and other minorities' equality; whilst art, as above illustrated, is (part of?) that sexually explicit material that the community tolerates because its dominant characteristic is not the undue exploitation of sex, *i.e.* the portrayal of what is inimical to equality (rape and dominance/submission themes). The touchstone against which pornography and art are measured is the degree of toleration that part of the community shows, and specifically of that sort of toleration premised on egalitarian concerns (rather than conservative ones). Thus the Court can implicitly identify art with what is socially tolerable (that is what a subset of society perceives as equality-friendly) and pornography with what is socially intolerable, whilst no such equation, arguably, could have been made if the reasonable person's viewpoint had been adopted.

In conclusion, the way in which the artistic defence is interpreted ensures its perfect consistency with the radical feminist discourse.

Sopinka J.'s reference to the internal necessities test as one that provides a defence for material with an "artistic, literary or other similar [*unspecified*] purpose"[72] confirms once again that the pornographic expression that is targeted in s.163, according to the

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[70] *Ibid.*

[71] See *infra* note 111 and accompanying text.

interpretation of the Supreme Court, is the one that can be regarded, from a radical feminist perspective, as threatening the value of equality, rather than that which is simply prurient. In particular, it is the absence of any redeeming capacity of a possible *political* value of the material that is telling.

Contrast the internal necessities test of *Butler* with the scientific, literary, artistic or *political* defence in the *Miller* standard of American obscenity law, which is concerned with material that "appeals to the prurient interest,"[73] in a public morality/sexual propriety perspective, and not with the undue exploitation of sex running counter egalitarian values. The idea, in American obscenity law, is that obscene material can be restricted because it is dirty, not because it conveys discriminatory messages.

At least at first sight, it makes sense to allow in the U.S.A. a possible political value to save the pornographic expression from criminalisation, while the same does not apply to the context of Canadian obscenity law, that is concerned with suppressing discriminatory messages. In fact, discriminatory messages (as opposed to 'dirty' ones) are immediately and unequivocally perceived as political: it follows that adopting a 'political defence' would have utterly frustrated the objective of s.163, in that every sexually explicit representation found to be discriminatory under it would then have been salvaged by the redeeming force of the political defence. (Incidentally, it is noteworthy that the fact of choosing to restrict material because of its offensiveness in terms of sexual propriety is itself a highly political decision. Indeed, every sexually explicit expression found to be obscene in terms of sexual propriety could be regarded as conveying a political message, in that it would have, precisely by virtue of its being sexual, 'dirty,' the effect of challenging currently accepted sexual norms- nay: the more offensive the representation, the more political its effect. Still, in the U.S.A. sexual propriety-centred obscenity laws survive undisturbed by the political defences that they recognise -and which, consistently applied, would render such laws void just as recognising a political defence would practically invalidate s.163 in Canada. I would suggest that this is so because the political character of a message of 'dirtiness' is less immediately perceivable as such than that of a

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[72] *Butler, supra* note 1 at 486.
[73] *Miller* v. *California,* 413 U.S. 15 (1973), at 25.

discriminatory message: restrictions based on the sexual propriety rationale have become part of common sense and dominant ideology, thus assuming a *patina* of neutrality, an appearance of their being the result of a value-free choice).

4. Pressing and Substantial Legislative Objective & Rational Connection between the Obscenity Provision and the Objective of Preventing the Harm of Discrimination.

Since Sopinka J., by relying on radical feminist ideas, identifies the legislative objective of s.163 in the way described in section II (2) in this chapter, (i.e. avoidance of the harm of sex discrimination) and, as explained in the same section, connects obscenity regulation with democracy, the proposition that the objective of the obscenity provision is pressing and substantial –hence appropriate to override the constitutionally guaranteed free speech right- is a foregone conclusion for the Court.

One of the most common arguments advanced to question the desirability of laws restricting obscene expression because of its contribution to sex inequality and violence against women relies, however, precisely on the contention that there is no univocal evidence that shows a connection between the discrimination and mistreatment of women on the one hand and the consumption of pornography on the other. But if the perspective informing the law is one of radical feminism, these connections should be self-evident.

Recall that dominance feminism is not merely a discourse about the harms of pornography; it is a whole conception about society and the construction of individual identities. Male supremacy is the rule; patriarchy is all-pervasive. The sexual sphere is central, and unequal relationships there established are reproduced in everyday life because the sexualization of inequality makes inequality itself appealing. The messages conveyed by pornography speak of the sexiness of brutalising and objectifying women, and of the legitimacy of dominance/submission relationships. Men absorb this and end up associating sex with violence and violence with pleasure, and believing the subjugation of 'the other' as permissible and desirable.

Sopinka J. does not go quite so far as giving such a radical feminist account of the links between pornography and antisocial conduct, accepting instead that the social

science evidence relating to this issue is contradictory. This, however, as we shall immediately see, does not prevent the Justice from reaching the conclusion that the obscenity provision is rationally connected to avoidance of harm, *i.e.* preventing anti-social conduct. Why does the Court fail to follow radical feminism when it gets to the point of accepting as self-evident the connections between pornography and violence/discrimination?

It is interesting to notice how the Law, though appropriating radical feminist arguments to produce the juridical truth about pornography, seems at the same time unwilling to explicitly authorise Radical Feminism by way of sanctioning its status as an autonomous discourse. This strategy is put into practice in two ways: 1) the juridical discourse, as it unravels in *Butler*, never declares expressly on which other discourse (*i.e.* precisely, as I argued, Radical Feminism) it is actually drawing (nor does it ever cite or mention a radical feminist author!); 2) the juridical discourse prefers to dispense with some of the arguments of the other discourse (*i.e.* Radical Feminism) on which it is otherwise drawing, where these arguments are not un-problematically capable of appropriation by the Law, which, in order to exploit them, would be obliged to name the original discourse in which they were developed.

I would argue that radical feminist conceptions about the links between consumption of pornography and anti-social conduct belong precisely to that type of arguments that the juridical discourse, in order to credibly exploit, could not, because of their complexity, surreptitiously appropriate, and would instead have to contextualize by describing the framework of dominance feminism within which they took shape and in which they make sense. But the Law does not want to recognise its subservience to Radical Feminism by expressly acknowledging that the truth about pornography that the Law is producing is 'derivative' rather than original (partly, it seems to me, because it wants to retain a super-ordinated status for itself as a truth-defining discourse, and partly because it fears to lose credibility by referring to a knowledge, *i.e.* Feminism, that is not culturally dominant). Therefore the Law finds other ways to accomplish the same result that an explicit appropriation of those non-appropriable arguments would have led it to. Once again, achieving this result depends on the Court acceptance of radical feminist

arguments (other than those that explicitly link violence and discrimination to consumption of pornography). Let us follow how Sopinka J. performs this operation.

First, the Justice finds that a deferential attitude on the part of the Court towards the Parliament's choice to achieve a constitutionally permissible objective by means of s.163 is warranted because of the low value of obscene speech. The implication 'low value speech ⇒ deferential attitude' is part of the typical judicial review discourse of the Supreme Court. What is relevant, for our purposes, is the basis on which the Court assesses the value of obscene speech.

It is by relying on a characterization of pornography that is akin to radical feminist understandings of sexually explicit representation that Sopinka J. draws his conclusion about the low value of the speech at issue.[74] He then contrasts this characterization to the alternative account provided by the British Columbia Civil Liberties Association, ending up disqualifying altogether the BCCLA's interpretation of pornography by comparing it to an artefact, and by affirming that the contrasting (dominance feminism informed) approach describes the meaning of pornography "more accurately."[75] It is not difficult to recognise here a 'claim to truth,'[76] which the Court makes by exploiting its authoritative interpretative power. In other words, *Butler* produces the juridical truth about pornography: *the Court considers the meaning conveyed by obscene material capable of univocal interpretation and the category of obscenity itself is reduced to a homogeneous body.*

After and pursuant to making this universalising gesture the Court: *a)* can affirm that the (single and univocal) meaning of obscenity makes it a low value type of expression, which finding in turn calls for a deferential attitude on the part of the Court;

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[74] It is noteworthy that, in thus characterising pornography, the Court does not refer expressly to any radical feminist commentator, but rather quotes the statements of another Judge in a previous case: *Butler, supra* note 1 at 500. This self-referential attitude of the juridical discourse -that here takes place outside the of the operative scope of the principle of *stare decisis*, and works, indirectly, as a de-authorization of Radical Feminism- seems to confirm the contention that the Law, however much it wants to exploit the regulative potentialities of other discourses, does not want to yield its power to such other discourse.

[75] *Ibid.* Sopinka refers to the BCCLA's account of the meaning of pornography as to "the *picture* which the British Columbia Civil Liberties Association would have us *paint*" (emphasis added): *ibid.*

[76] John Stuart Mill would have called it 'a presumption of infallibility.'

and *b)* can engage *logically* in a discourse about the social evidence relating to the links between exposure to obscene material and sex discrimination.

As to point *(b)*, my contention is that if the Court had recognised from the beginning that obscene material is open to diverse interpretations and conveys a variety of different and contradictory meanings, a discourse about the existence of social evidence relating to the link between consumption of pornography and antisocial conduct (sex discrimination and violence) might have appeared not relevant at all. Since, on the contrary, a totalising meaning of pornography is given by the Court relying on dominance feminism conceptions, Sopinka J. can proceed with evaluating how this univocal meaning impacts on social life.

He does so by referring to the inconclusiveness of social evidence findings:[77] this, as the 'low value speech' factor, justifies deference to Parliament in deciding whether there is a rational connection between the criminalization of pornography and the avoidance of antisocial conduct, again according to a settled judicial discourse about constitutional adjudication (controversial issues $\Rightarrow$ deferential attitude[78]).

Both the contextual factors of 'low value speech' and 'controversial issues', whose believed relevance to the present case is respectively based and premised, as illustrated, on a radical feminist understanding of the meaning of obscenity, are therefore used to call for deference to the legislature in assessing a rational link between s.163 and avoidance of sex discrimination and violence. This means, basically, that a relatively loose standard of 'reasonableness' is all that the legislative choice of criminalizing

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[77] The relationship between the Law and the Social Sciences is less problematic than the one between the former and Radical Feminism. Radical Feminism is in some way a threat for the Law, because of the former's critique of the status quo and liberal juridical systems (which however does not prevent radical feminists from being considerably less than altogether sceptical as regards the emancipatory possibilities of recourse to court litigation, as LEAF's activity in the *Butler* case testifies to). Possibly, the Social Sciences (and the disciplinary power that accompanies them) have instead proven more useful than dangerous allies of the Law: see C. Smart, *supra* note 33 at 14-20. The Law, therefore, can afford reinforcing their already well-established authority by lending them its own, as it does in the act of naming them to recognise as 'true' their authoriattive interpretation of reality. So social science evidence is generally considered admissible in the courtroom, and Sopinka J. comfortably refers to it when it comes to establishing the links between consumption of pornography and anti-social conduct.

[78] No need to remark that this implication works, at the same time, as a formidable abdication of responsibility on the part of the Court.

obscenity must meet, in order for a 'rational connection' to be found.[79] Such reasonableness is eventually found, cursorily referring to vaguely psychological notions of "desensitization of individuals exposed to materials which depict violence."[80] And this finding is in perfect accord with the perspective of radical feminism adopted all the way through by the Court, considering, for instance, the ideas of dominance feminism about the rather tottering state of the critical powers of men's consciences.

5. Minimal Impairment of Freedom of Expression Effected by s.163.

It is arguably adopting the same deferential attitude motivated by the radical feminist perspective relied upon by the Court in considering the aforementioned contextual factors that Sopinka J. considers whether s.163 is constitutional under the respect of its minimally impairing the right to free speech. With reference to the requirement of minimal impairment, deference means that the measure will meet this standard as long as it is "appropriately tailored"[81] to the objective of avoiding harm.[82] And 'appropriately tailored', the measure of criminalization is easily found to be.

First, dominance feminist notions about the meaning conveyed by obscenity, and about the consequent relation between antisocial conduct and exposure to obscenity, justify implicitly the Court's statement that only "material that creates a risk of harm" falls into the net of s.163:[83] a different, more varied perspective on the meaning of pornography and on the links between its consumption and antisocial conduct might as well have led the Court to an opposite conclusion.

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[79] It should not be overlooked that 'reasonable' is different to, and arguably is something less than, 'rational', and therefore what a deferential attitude on the part of the Court achieves is actually a dilution of the standard used to test the constitutionality of a provision, albeit concealed behind a retention of the same heading – 'rational connection.'

[80] *Butler, supra* note 1 at 505.

[81] *Ibid.*

[82] No need to underscore the sea of difference existing between 'appropriate tailoring' and 'minimal impairment.' The latter term should clearly mean that the measure, as long as it effectively addresses the harm avoidance of which constitutes the legislative objective, should be the less restrictive on the freedom it affects. Appropriate tailoring is a much less rigorous standard.

[83] *Butler, supra* note 1 at 505.

Second, the artistic defence, appropriately interpreted (as above explained) in a way functional to radical feminist concerns, is relied upon in order to show that material which does not deserve criminalization is not caught by s.163.

Third, an identification of the harms that in a conceptual framework of dominance feminism pornography creates (discrimination and degradation) is used to deny the reasonableness of time, place and manner regulation (which would leave these harms untouched) as a measure alternative to criminalization.

Fourth, in a perspective quite consistent with a radical feminist sort of distrust in men's critical conscience, education alone is considered an inadequate response to the bad influences of pornography, and it is found to require support by s.163 of the *Criminal Code* (which Sopinka J. calls, here, in a neutral and generic way, "legislation,"[84] in the hardly successful attempt to half-erase the idea of a violent impact on individual rights that is associated with the criminal law; and maybe also with a view to dissociate 'education' from 'legislation,' -as if the former, conceived as a remedy to discrimination, did not depend on the latter- so as to make appear educational measures as a somewhat less official, and therefore less reliable, way to deal with the problem).

In this part of the analysis of the constitutionality of s.163, however, also the only true inconsistency of the Court's reasoning with a dominance feminism perspective is to be found. When, with the aim of further proving the appropriate tailoring of the obscenity provision, the Court upholds the view that private possession and consumption of obscene material is not actionable under the section, the radical feminist discourse is suddenly dropped: it is apparent that if the harm to be avoided is change in attitudes and conduct, it is precisely the consumption of the material which is the crucial stage, where the 'imprinting' process takes place, and that thus requires being eliminated.

At any rate, this does not have the effect of rendering the decision ambiguous in terms of its mixing public morality/sexual propriety considerations with radical feminism/egalitarianism concerns. Rather, the Court's support for the non-criminalization of possession is consistent with a civil libertarian approach to the problem, and not with one informed by conservative morality.

> Besides, as the British Columbia Supreme Court explained in *Little Sisters,* there is nothing in *Butler* that suggests that the dissemination of obscenity is not criminal conduct if the end result is personal use of that material ... Indeed, it is that very result that the criminalization of the dissemination of obscenity is intended to prevent. It is the use of obscenity by individuals that produces harm to society ... The criminalization of the propagation of obscenity has as its aim the limiting or preventing of such use.[85]

If this is the case, the radical feminist philosophy of the decision is not contradicted even if personal consumption of obscene material is not directly criminalized.

6. Balancing Avoidance of Harm and the Deleterious Effects of s.163.

Even in the very last step of the test determining the constitutionality of s.163, dominance feminism considerations play a major role.

In balancing the importance of avoiding discrimination/violence-related harms against the deleterious effects of the obscenity provision on individual rights, Sopinka J. justifies his deciding that the former outweigh the latter by stating that the expression at issue "appeals only to the most base aspect of individual fulfilment."[86] This should not be taken, in my view, to point towards the immorality of finding pleasure in sexually explicit materials.[87] Rather, given the previous clarification provided by the Court as regards the objective of the obscenity provision, and the overall radical feminist philosophy of the judicial discourse in the *Butler* decision, it is more plausible that the "most base aspect of individual fulfilment" stands, in this case, for the pleasure taken in the sexualization of dominance and submission.

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[84] *Ibid.* at 508.
[85] *Little Sisters, supra* note 18 at 533.
[86] *Butler, supra* note 1 at 509.
[87] Cossman, on the contrary believes that "Sopinka J. seems to endorse the position advocated by the Ontario Attorney General, which ... described this most base aspect of self-fulfilment as phisical arousal:" B. Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in B. Cossman, ed., *supra* note 8, 107 at 122.

III: *The Impact of* Butler *on Lesbian and Gay Pornography.*

As I have attempted to show, the conceptual framework within which *Butler* was decided is one informed, all the way through, by a consistent radical feminist perspective. Considering the whole decision, Sopinka J. develops a justification of the constitutionality of s.163 which does not rely on elements of social conservatism.[88]

Therefore, if subsequent decisions have restricted the sexually explicit expression of sexual minorities, in particular of gay men and lesbians, it is not because the *Butler* decision, properly understood, is ambiguous and lends itself to conservative ends; it is because, either the Butler decision was blatantly misapplied (when the restriction targeted homosexual pornography that did not involve objectification, dominance and submission, or violent themes), or *because suppression was, in a radical feminist view, actually required in the light of the content of the homosexual sexually explicit material* (which anti-pornography advocates have shown often reiterates sexist and homophobic themes).

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[88] Cossman, as already mentioned (see *supra* note 52 and accompanying text), advances a different, and eloquently argued, interpretation. Her emphasis is on the subtext of traditional morality that pervades *Butler*. I do not think, however, that the substance of her analysis is always in contradiction with mine (although sometimes it is, see previous note). One reason is that, if my understanding of radical feminist arguments is correct, at least part of Cossman's observations apply not only to the *Butler* decision, but also to the conceptions of Dominance Feminism itself. For example, the binary opposition bad sex/good sex, which Cossman conceives as a typical element of traditional morality, besides underlying the *Butler* decision, (see B. Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in B. Cossman, ed., *supra* note 8, 107 at 121-22, 127) also informs anti-pornography feminism (to the extent that radical feminists condemn the objectification -intended as the absence of a human/spiritual dimension- that characterises pornographic -*i.e.* 'bad'- sex). This dependance of dominance feminism on conceptions and assumptions that have first been elements of traditional morality does not make the former a copy of the latter, as there are obvious, important differences; it simply proves that radical feminist discourse did not develop in a *vacuum*. The *Butler* decision, in drawing on radical feminism, contains both novel, original conceptions (contributed by radical feminism itself) and a limited set of pre-existent elements of conservative morality that are not only compatible with radical feminism's original contributions, but were also necessary for those novel contributions to be built in the first place. In this sense, I would still defend my contention that *Butler* is not an ambiguous decision, is not "morality in drag:" the elements of moral conservatism that are present in it, as they are those that have been re-inscribed by radical feminism within its own framework, and thus critically re-elaborated, can, in my view, more accurately be described exactly as radical feminist ones rather than public morality/sexual propriety concerns. This is the sense in which I have been, and will go on, both drawing a distinction between radical

In my view, for example, the decision delivered in *Glad Day Bookshop* v. *Canada*[89] that "even *Advocate Men*, the gay male equivalent to *Playboy*"[90] was obscene (whatever the judge's personal reasons for believing so) could be regarded as an altogether justifiable conclusion in the light of radical feminists' critique of soft-porn such as, precisely, *Playboy,* which is by them understood as far from being innocent of objectification and fragmentation of the female body. Only if the incriminated issues of *Advocate Men*, unlike *Playboy,* did not reduce human beings to their bodily parts, did not portray relationships devoid of any spiritual/emotional dimension, or otherwise avoided objectification/degradation, the ratio of the judge's decision could be thought to have been inadmissibly informed by a view of conservative morality.

But in that case we would be facing a *misapplication* of the precedent established in *Butler,* for this is clear and peremptory in denying any citizenship, within the obscenity discourse, to decisions justifiable only on the basis of community standards inspired by social conservatism.

Likewise, the decision in *R.* v. *Scythes*,[91] where it found obscene lesbian representations of S&M, can be considered consistent with the precedent *Butler,* although not in terms of the former decision exploiting a supposed potential of the latter for repressing explicit sexual expression considered 'prurient' or 'improper' from a public morality perspective. Rather, in condemning lesbian S&M, *Scythes* is faithful to *Butler* in so far as the latter follows radical feminist arguments, a strain of which, by emphasising considerations about women's false consciousness, does not exempt lesbian representations of explicit sex from the general operation of the principles identifying bad pornography:

"Consistent with anti-porn feminists who have historically identified s/m as the 'epicentre of harm,' during the *Bad Attitude* trial the Crown (and the judge) relentlessly

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feminism and traditional morality and contending that *Butler* is informed by the former, but not by the latter.

[89] (1992) O.J. No 1466 (QL).

[90] B. Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in B. Cossman, ed., *supra* note 8, 107 at 131.

[91] (1993) O.J. No. 537 (Ont. Ct. Prov. Div.).

centred and recentred sadomasochism [which in this case happened to be lesbian S&M] as evil incarnate."[92]

For the same reasons, the judgement in *Little Sisters* can be seen as consistent with the egalitarian concerns and radical feminist assumptions of *Butler,*[93] where it failed to read down, to the extent that they applied to homosexual pornography, the legislative provisions allowing customs officers at the border to seize and detain obscene material as defined in s.163(8) of the *Criminal Code.*[94]

Far from being shaped by public morality considerations, the decision arguably recognised the conservative bias (avoiding to expressly qualify them as such, however) on the part of Canada Customs officials against homosexual material crossing the border.[95] A discriminatory impact on homosexuals and an infringement of their free speech rights was held to follow precisely as a consequence of the arbitrary or mistaken implementation, on the part of Customs officers, of the provisions at issue: gay and lesbian pornography was found to be unjustifiably subjected to a higher degree of scrutiny and to harsher standards of review than those reserved by officers to straight pornography.

The legislation itself, however, as opposed to its administration, was not regarded as either unjustifiably infringing homosexuals' freedom of expression or treating them

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[92] B.L. Ross, "'It's Merely Designed for Sexual Arousal':* Interrogating the Indefensibility of Lesbian Smut" in B. Cossman, ed., *supra* note 8, 152 at 158.

[93] A different interpretation is provided by Joel Bakan, who places *Little Sisters* among those decision following *Butler* and exploiting what he sees as the potential of this leading case for legitimising repression of non-mainstream sexually explicit material on the basis of public morality considerations: J. Bakan, *supra* note 52 at 75-6.

[94] The provisions at issue in the case were ss. 58 and 71 of the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) and s. 114 and Code 9956(a) of Schedule VII of the Customs Tariff, S.C. 1985, c. 41 (3rd Supp.) (now s. 136(1) and tariff item 9899.00.00 of the List of Tariff Provisions set out in the schedule to the Customs Tariff, S.C. 1997, c. 36).

[95] "Imported shipments destined for those [*i.e.* homosexual] bookstores are methodically identified and scrutinized by customs officers. Moreover, estimates ... of the proportion of all materials they detained ... that were produced for homosexual audiences ranged form 20% to 75%, a proportion far in excess of the relative size of the [minority] group [concerned]. Further, a disturbing amount of homosexual art and literature that is arguably not obscene has been prohibited:" *Little Sister, supra* note 18 at 553-4. "[S]ome customs officers have from time to time exercised their discretion in an arbitrary and improper manner. Books have been prohibited without any proper consideration of whether the exploitation of sex was undue ... Materials have been routinely prohibited on the ground that depictions ... of anal penetration are obscene:" *ibid.* at 559.

discriminatorily; therefore a sentence invalidating the provisions at issue -as opposed to a declaration of unconstitutional administration- was not issued.

The Court's failure to declare unconstitutional the legislative provisions challenged by the Little Sisters bookshop and the BCCLA was premised on those conceptions that, informing the *Butler* decision, are consistent with the radical feminist belief according to which an exclusive, univocal interpretation can be un-problematically placed on all sexually explicit material -whether straight or not- that presents certain features -dominance/submission themes, degradation, objectification, etc.- (this belief obviously justified as well the Court's view that there is an objective way for Customs officers to give proper application to the legislation, if they are properly trained):[96]

> [T]he plaintiff's submission that pornography produced for homosexuals audiences is not within the ambit of the Butler decision cannot be accepted ... There is a body of social science evidence that would support Parliament's reasoned apprehension that obscene pornography produced for homosexual audiences causes harm to society ... Butler has settled the point that there is a rational connection between s.163(8) of the Criminal Code and the objective of preventing obscenity, both heterosexual and homosexual.[97]

Since homosexual pornography can be obscene -*i.e.* exploit sex unduly in a radical feminist sense- the infringement on lesbians' and gay men's free speech rights was held constitutionally justifiable on the same grounds that, according to *Butler,* warranted the limitation of the rights of consumers/producers of obscene material in general.

Similarly, the judge's discussion of the discrimination question focused on whether the *disproportionate* impact of the legislation on gay and lesbian obscenity was discriminatory (which it was not found to be), seemingly taking for granted that the fact of whether the legislation should apply to homosexual pornography at all (because of its peculiar characteristics) was not even an issue.

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[96] See *ibid.* at 555.
[97] *Ibid.* at 538, 540, 542.

IV: *Differences between Homosexual and Heterosexual Pornography.*

Even accepting the harmfulness of straight pornography as radical feminists describe it, is it really the case that we should consider gay and lesbian pornography equally harmful? Aren't there important differences?

Obviously, the specificity of the homosexual context, in considering obscenity regulation motivated by egalitarian/radical feminist concerns should not be overlooked; however, it should not be overrated either. Let us consider the case of gay male pornography, and try to make some observations that could constitute a starting point to claim a peculiarity for gay porn that would exempt it from regulation.

The most apparent trait of male homosexual pornography is the absence of portrayal of cross-gender relationships. Isn't this, by itself, sufficient to dispel any preoccupation about its contribution to gender oppression? And isn't the non-dominant position of homosexuals likely to make their own sexual representation sensitive to issues of oppression and discrimination?

But we already know the radical feminist response to these remarks: the absence of cross-gender relations from the representations is not decisive, as sexism, relying on the internalisation of dominant ideology, can easily push its way through same-sex sexual relationships and their portrayal: this is arguably proven both by the use pornography makes of sexist language, and by the submission/degradation of the 'feminised' one(s) in the sexual intercourse portrayed in gay porn.

Another distinctive feature of gay pornography is that sexual expression is often perceived as absolutely central to homosexuals' collective self-definition.[98] This peculiarity is not difficult to explain, considering that the 'autonomous' identity of 'gay' rests on the historically antecedent 'heteronomous' category of 'the homosexual', that was socially constructed in such a way as to give a central role precisely to sexuality (which,

[98] See, *e.g.*, the judge's statements to this effects in *Little Sisters, supra* note 18 at 522.

in turn, is constructed so as to include desires, bodies, acts etc.).[99] But then doesn't this mean that control over their own sexual representation, since it lies at the very core of the collective self-definition of their own identity, is vital for the emancipation of gay men, who are a historically disadvantaged group?[100]

A radical feminist could answer with an alternative set of questions: how acceptable is gay men's emancipation where it contributes to keeping women in chains? Do not homosexual men, by virtue of their maleness, participate at least in some of the privileges of their sex, and aren't these privileges instead denied to women by virtue of their being women? Considering the pervasiveness of patriarchy and precisely gay men's less than complete exclusion from the prerogatives and power of masculinity, isn't gay male sexual expression highly likely to be imbued with rape themes and sexism? Wouldn't consequently a gay identity constructed through the aid of pornography be built on ideas of dominance/submission and assumptions of gender hierarchy, and wouldn't it end up incorporating not only sexism, but also, in a rather schizophrenic fashion, a great deal of homophobia?

Still another difference between gay male sexually explicit representation and straight pornography are the different sites of their production and consumption. Gay material, in particular, is produced and enjoyed within the homosexual community, that is

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[99] The category of homosexuality developed, towards the end of the XIX century, in the context of the 'psy' professions. According to these disciplines, the truth about oneself was revealed by the expert's interpretation of what the patient confessed as regarded his/her sexuality: see M. Foucault, *The History of Sexuality, supra* note 35 at 42-43 and 53-73.

[100] See also the factum submitted by EGALE in the *Little Sisters* trial before the Supreme Court of Canada: "[§ 12:] Censorship of sexually explicit material has a distinct and more detrimental effect on us than on the majority heterosexual population because the material serves a unique role in our communities. As Judge Smith concluded, lesbian, gay, and bisexual imagery and text normalize sexual practices that society considers to be deviant, provide affirmation of our sexualities, and serve as a socializing and politicizing force within our communities. Mass-market heterosexual pornography does not function in the same way for members of the heterosexual population, whose sexuality is widely and positively represented in other aspects of Canadian culture (eg. in mainstream film and theatre, on billboards, and in fashion magazines):" *In The Supreme Court of Canada (On Appeal from the Court of Appeal of British Columbia) between: Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe -Appellants- and Minister of Justice, Attorney General of Canada, and Minister of National Revenue, and Attorney General of British Columbia -Respondents- Factum of The Intervener Egale Canada Inc.*, online: EGALE <www.egale.ca/~egale/legal/littlefactum.htm> [hereinafter EGALE *Factum*].

arguably less involved in discrimination and violence against women.[101] From a radical feminist viewpoint, however, this means only, at most, that the harmful effects of gay pornography do not take place on such a large scale as those of straight pornography. Still, they take place.

For every argument that claims a specificity of meaning for male homosexual pornography, another argument can be made, from another perspective, such as one of radical feminism, highlighting that the same general considerations work for the interpretation of both heterosexual and gay sexually explicit material.

As we have already seen, besides, for every radical feminist argument that claims a specificity of meaning for female homosexual pornography, another argument can be made, from a more orthodox radical feminist perspective, that the same general considerations work for the interpretation of both heterosexual and lesbian sexually explicit material.

Any contention such as "homo-erotism, by definition, does not involve hetero-sexual representation and thus cannot eroticize a gendered power imbalance of male domination over women,"[102] or any such generalising statement as "in the lesbian materials... [c]onsent is not the end of the matter [and there is] an ongoing interrogation of the actual quality, comfort and well-being of the parties involved,"[103] or "gay representation ... reveals the contingency of the relationship between signifiers and signified",[104] or "[i]n *Sex*, Madonna's blonde ambition drapes itself over the dangerous

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[101] Such an argument was advanced, *e.g.*, in the appellants' factum submitted to the Supreme Court of Canada in the *Little Sisters* trial: "[§ 62-3:] Gay and lesbian pornography can be distinguished from mainstream pornography in many ways. The entire framework of production, exhibition and consumption is different ... Erotica produced for a homosexual audience does not and cannot cause the kind of anti-social behaviour generally or through stereotyping and objectification of women and children that Parliament apprehended might be caused in heterosexual obscenity:" *In the Supreme Court of Canada (on Appeal from the Court of Appeal for British Columbia) between Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe -appellants (plaintiffs)- and Minister of Justice and Attorney General of Canada, Minister of National Revenue, Attorney General of British Columbia -Respondents (Defendants)- Appellant's Factum,* online: BCCLA <www.bccla.org/lsfactum.html> [hereinafter *Appellants' Factum*].

[102] EGALE *Factum, supra* note 100 at § 40.

[103] J. Fuller & S. Blackley (N. Pollack, ed.), *supra* note 42 at 66 (the statement here reported was done by Ann Scales during the *Little Sisters* trial, excerpts of which are contained in *Restricted Entry*).

[104] C.F. Stychin, *supra* note 9 at 67.

transgressive sexuality of two radical leather dykes, titillating straight sensibilities ... at the same time underscoring that this experience is a mere throw away-change,"[105] and, in general, any suggestion to the effect that sexual political correctness is the banner and privilege of the category 'homosexual (or gay male, or lesbian) sexually explicit representation' as opposed to 'heterosexual pornography' sound (almost) just as unacceptable (and annoying) a claim to truth as is the radical feminists' idea that a single, univocal meaning -an unequivocal 'dominant characteristic'- can be attached to all S&M, or to all obscene material, be it straight or queer. Both positions are deeply essentialist.[106]

I am not suggesting that we should stretch the contextualization called for by postmodernism to the point of rendering whatever category meaningless and losing sight of broad patterns of sexist discourses and practices. But surely attempts at drawing a rigid distinction between L&G and straight porn in order to exempt the latter from radical feminism-inspired critiques are a whit redolent of self-interest, and of abdication of responsibility.

V: *Regulation or De-Regulation?*

But what should we do then? The alternative of taking an even more essentialist position that places a single meaning on the majority of both heterosexual and homosexual pornography, such as the radical feminist refrain 'pornography *is* discrimination,' is, if anything, even less appealing.

The value of pornographic expression is so controversial that one wonders how a democratic system can do otherwise than allowing different individuals to place different meanings on different instances of different kinds of pornography,[107] and thus let the merits of sexually explicit representation be assessed publicly.

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[105] B.L. Ross (quoting Susan Stuart), "'It's Merely Designed for Sexual Arousal':* Interrogating the Indefensibility of Lesbian Smut" in B. Cossman, ed., *supra* note 8, 152 at 170.

[106] At least when the irreducibility of the merits of lesbian/gay porn is framed within a postmodernist discourse, however, these statements may well not be meant to describe the *invariable* nature of all homosexual sexually explicit expression.

[107] In this sense the state could pursue diversification of the producers of pornography by encouraging productions from non-mainstream organizations.

This position, of course, is tenable only under the condition that we reject any degrading and dehumanising suggestion of women's and men's critical powers being necessarily weak or non-existent. If the idea of an ontological free will sounds outdated, it seems impossible to imagine any human interaction and political engagement severed from a notion of agency. If power is at work through different discourses that constitute us in a never-ending process, even if we are merely a position in discourse, there is power in that position as well. And if power is fluid, there is room for us to frame new discourses about sexuality and for them to frame our sexuality in turn.[108]

The problems of the *Butler* decision do not lie with its concealing a heart of moral conservatism behind a façade of sex egalitarianism. In the *Butler* decision, it is not a supposedly sub-textual sexual bigotry that poses a hazard for lesbian and gay pornography. The true heart of the judgement is, I believe, egalitarianism as promoted by radical feminism.

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[108] Poststructuralist accounts of subjectivity hold that the subject itself, being constituted by power through discourse, participates in power. Discourses make the subject possible and give meaning to the subject; but this meaning is not fixed and determined once for all: the subject is said to be the very possibility of resignification. This should be understood as the notion of no discourse being all powerful and monolithic: discourses have, as it were, seams, crevices and interstices, and that is were the subject can turn the discourse against itself and change it, and thereby itself undergo a process of resignification. Subjective agency, that is, is not denied: only, through a process of deconstruction, the idea of a subject prior to discourse should be put into question, and therefore, along with it, an idea of agency which presupposes a subject merely situated in, instead of constituted by, discourse. Agency is not an ontological quality inherent to the subject which employs it against a reality which is outside the subject itself: agency is the construction of a discourse that claims that a subject with agency is pre-given, and this is, paradoxically, what makes agency possible. Therefore, a postmodern critique of ideas of primary agency (*i.e.* of an agency that precedes discourse) is made possible by the very discourses that the postmodern critic aims at displacing, and that constitute her as a subject with agency. In this sense, agency should be understood in connection to the poststructuralist notion of the constructedness of the subject. The construction of the subject is seen as a somewhat artificial process that erects an apparent division between the subject itself and the discourse from which the subject is 'extracted' through a cultural process of disavowal of the subject's dependency on (*i.e.* of construction by) the constituting discourse. The construction of the subject is but the concealment of such a process: it is this concealment that allows one to think of a pre-given subject in the first place. The way in which discourses interact in constituting subjects gives rise to a combination that allows for other discourses to be elaborated, because no discourse is complete and perfect in itself, and because the constitution of a subject is a never-ending process: for these concepts, see J.P. Butler, "Contingent Foundations: Feminism and the Question of Postmodernism" in J.P. Butler and J.W. Scott, eds., *supra* note 32, 3; and N. Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York: Routledge, 1997) at 207-223.

There is some sense in a radical feminist interpretation of obscenity. It is undeniably possible to interpret some pornography (even if soft-core, even if queer) as conveying sexist and/or homophobic meanings. The same is true for a wide variety of other kinds of speech, for that matter.[109]

I think that critiques about the vagueness and indeterminacy of such expressions as "undue exploitation of sex," or "degrading and dehumanising" tend to be misplaced, too. Since *Butler* adopts a radical feminist perspective, it makes sense to read in those categories consistent radical feminist meanings.

Critiques about the indeterminacy of the categories relied upon in the decision assume that the philosophy underlying *Butler* is ambiguous. Once it is acknowledged that *Butler* is clearly informed by dominance feminism, however, the determination of the meaning of these categories from a radical feminist viewpoint takes the place of what we would otherwise have perceived as the indeterminacy of their meaning (admittedly, lesbian portrayal of explicit sex would maybe remain a contested kind of pornography, as radical feminists do not agree about its merits). Since sexist meanings, objectification, submission etc. are more common than we are instinctively prepared to recognise, all we have to do is accept the fact that the undue exploitation of sex and the other categories reach a large range of explicit materials, including "even *Advocate Men*, the gay male equivalent to *Playboy*"[110]- and yes, *Playboy* itself.

In this sense the precedent of *Butler* is misapplied when decisions fail to incriminate *Playboy*, rather than when they incriminate *Advocate Men*: as before clarified, in fact, the community standards that a court should take into consideration when deciding the harmfulness of pornographic material are those limited sets of opinions that reproduce radical feminist understandings of pornography, as the moral conventions of a community can constitute a legitimate basis to limit a *Charter* right only where they find support in another *Chater* value/right. As we have seen, this is exactly the case with s.163

[109] This observation, of course, already suggests something as regards the problem of obscenity regulation. Carol Smart, without denying –actually: highlighting- the harmfulness of sexist representation, argues: "It is … the case that if we direct ourselves to the problem of the extension of the pornographic genre [*i.e.* advertising, soap operas, romantic novels, etc.] rather than pornographic material as such, then the law as a possible remedy appears less and less useful:" C. Smart, *supra* note 33 at 136.

[110] See *supra* note 90.

as reinterpreted in *Butler* that, in restricting pornography on the basis of the harm it does to women, subscribes to a radical feminist conception of sex representation, that can be supported by s.15 (the equality clause) of the *Charter.*

The fact that the community standards thus reflected in a court's assessment of a given instance of pornographic material end up representing the community's beliefs in a highly selective fashion becomes immaterial.

In fact, applying community standards to define what is degrading and dehumanizing means applying them to identify which material creates the risk to bring about harm to (=mistreatment of + violence to + discrimination against) women, children and perhaps (certain) men (these are, the Court says all along, the evils that s.163 is aimed at addressing). Since the very idea that pornography creates these harms makes sense only within a radical feminist framework of analysis, it is only by applying the same framework for analysis that we can identify which material creates a risk of harm, *i.e.* which one exploits sex unduly or is degrading and dehumanizing. In other words, the only standards of the 'community as a whole' that are *relevant* in order to identify what constitutes the undue exploitation of sex are radical feminist standards.[111]

Which is the real problem with s.163 as (re)interpreted in Butler? The problem, in my view, is that it looks altogether arbitrary to single out sexist meanings among others and consider them 'dominant' in the material in question.

To fully appreciate what I am arguing here, we have to go back to s.163 (8).

This provision proscribes the undue exploitation of sex when it is a "dominant characteristic" of the material at issue. As we already know, not only the decision about

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[111] Sopinka J., after describing the three categories into which, he says, pornographic material can be classified, states: "Some segments of society would consider that all three categories of pornography cause harm to society because they tend to undermine its moral fibre. Others would contend that none of the categories cause harm. Furthermore there is a range of opinion as to what is degrading and dehumanizing." This, of course sits at odds with the claim that community standards can determine what *the community as a whole* tolerates Canadians being exposed to. But if this claim is qualified by specifying that "[t]he courts must determine as best they can what the community would tolerate others being exposed to *on the basis of the degree of harm that may flow from such exposure"* and harm is further identified throughout the decision as being harm in radical feminist terms (see *e.g. Butler, supra* note 1 at 497 and 507), then it seems obvious that the relevant community standards are selectively chosen to represent radical feminist understandings. For the quotations reported see *Butler, supra* note 1 respectively at 484 and 485.

whether a work exploits sex unduly, but also that about whether such exploitation is a dominant characteristic in the work is made by applying the community standards test.[112]

On the other hand, we have already seen that the community standards are really a radical feminist subset of those standards. Now, from a radical feminist perspective, *pornography is discrimination*[113] (to the point of each becoming the other's synonym). No other legitimate meaning can be attached to obscenity.

It follows, in my view, that the requirement posed by s.163 that the undue exploitation of sex be the dominant trait of the material turns into a requirement that the undue exploitation of sex be merely present: where the undue exploitation of sex is there, discrimination is there, and if discrimination is there, then the material becomes obscene and prohibited. That is to say, where anything perceived as an element of undue exploitation of sex is present, it seems that it would automatically become the dominant characteristic of the speech, and no balancing between sexist meanings and other meanings is actually required on the part of the judge. To require it, would be inconsistent with a radical feminist perspective, and with the rationales of the *Butler* decision.

Given the degree of controversy that exists among feminists themselves as to the meanings and the effects of pornography, privileging in the way just explained one reading and automatically deriving from it such drastic consequences as the use of the criminal law and the restriction of such a vital right for individuals and groups, especially minorities, as freedom of expression is quite as unwarranted, totalising and foundationalist as, say, defining a woman on the basis of her capacity for impregnation.[114]

It is a universalising move, and an unacceptable claim to truth, much more so that the specific meaning thus singled out as the dominant characteristic of obscenity entails necessarily, at the same time, the preliminary acceptance of very particular, and very

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[112] See the discussion in section II (3) of this chapter.

[113] Here 'pornography' is meant as 'bad pornography,' as opposed to 'good pornography' (or 'erotica'); in the Court's terminology we would be speaking of 'obscenity' as opposed to non-obscene pornography.

[114] Emphasising the importance of free speech for minorities is not just orthodox free speech rhetoric (which, at any rate, is not destitute of merits): if the social world and we ourselves are constituted through discourse, an effective way of empowering minorities, included sexual minorities, in order to assist them in contributing to the construction of a less oppressive social reality, is to let them be free to speak. For the arbitrariness of defining the category 'woman' on the basis of the notion of reproductive capacity see *supra* note 37.

debatable, 'truths' about society as a whole, individual capacity for independent criticism, the centrality of sex, the sameness of fantasy and action.

Consider, also, that the Law, as illustrated in section II (4) of this chapter, avoids referring explicitly to the discourse on which it draws (i.e. Dominance Feminism) in order to justify the legislative regulatory measure at issue. It could be argued that the acceptance, on the part of the Court, of one particular world-view at the cost of the disqualification of a range of others would at the very least have required a more open and direct defence. This is especially true if we consider that the whole of the radical feminist narrative about pornography (expounded in s. I of this chapter) depends on the basic assumptions about the all-pervasive, unrivalled power of *patriarchy* (as distinguished from the widespread presence of sexist practices and discourses) and the central role of sex in moulding social reality;[115] but precisely these points in the radical feminist discourse are far from being the least contentious- both in my view and, as already suggested, in a number of feminist accounts.

The operation performed by the Court is also a presumption of infallibility in that it disqualifies different evaluations about the worthiness of different sexual practices. For example, S&M becomes by definition unacceptable because it involves dominance/submission themes; and another assumption of the radical feminist model is that sexual objectification is invariably bad.

Still, there are accounts challenging a negative evaluation of S&M and objectification in the field of sexuality. The latter, besides or instead of sex discrimination, may point to "the sexual power women wield over men,"[116] while sadomasochism, far from degrading the bottom, can be thought to "underscore ... the willingness of the individual to entrust his sexual subjecthood to another and to allow the boundaries of his autonomy to be undermined, knowing that he will reappear no less a subject."[117]

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[115] Such a notion, for example, can be radically reconsidered if we acknowledge the constructedness of the category sex and sexuality.

[116] S. Bell, "On ne Peut Pas Voir l'Image [The Image Cannot Be Seen]" in B. Cossman, ed., *supra* note 8, 199 at 201; quotation originally contained in C. Paglia, "Rape and the Modern Sex Wars" in *Sex, Art and American Culture* (New York: Vintage Books, 1992) at 66.

[117] C.F. Stychin, *supra* note 9 at 71.

Furthermore, by supporting a radical feminist foundationalism, the law, through the *Butler* decision, is actually contributing to the construction of oppressive social and sexual identities: again, S&M practitioners, *e.g.*, are being labelled as 'dysfunctional', and perceived as enacting 'antisocial conduct,' even if the activities they engage in are consensual and do not affect others in any meaningful way.

The assumptions and conclusions of radical feminism are not true or false in any ordinary sense. They are, rather, political: even social sciences findings that would confirm the existence of causal links between consumption of pornography and violence/discrimination could not possibly be called objectively true, to the extent that the human sciences -as we shall see later on, and especially in chapter two, section II (1)- are better conceived as power-knowledge regimes that produce their own truths, rather than objective knowledges that discover pre-existing truths (in this respect, it can be argued that the contradictory findings of different social scientists as regards the connection between pornography and harm are very telling).

Such being the case, the problem, in the Court's acceptance of radical feminism as a rationale to justify pornography regulation, is not so much that of bringing about such a serious result as speech suppression with a view to promoting a political opinion, -namely, the little questionable view that sex inequality is bad- but rather the antecedent one of bringing about speech suppression by relying on a political truth- namely, that according to which sex inequality is caused by sex speech. Indeed, by thus singling out this view and taking it as the ground to regulate pornography, the Law not only suppresses speech, but de-authorises alternative perspectives while (re)installing sex essentialism/sexual correctness in the sense above specified. The important contribution that radical feminism makes to the complex, multifaceted discourse about sex discrimination is thus essentialised and crystallised as the juridical, authoritative truth about sex discrimination, with the aforementioned undesirable results that this operation produces as regards the expression and self-definition of sexual minorities.

I strongly support those feminist proposals that, without impinging upon freedom of expression with the result of enforcing and reinforcing some very questionable assumptions about sex, pornography and society, are directed at remedying those circumstances under which sex discrimination (along with the related harms that, according to radical feminists, anti-pornography legislation should prevent) thrives.

The measures suggested include: comparable worth, affirmative action, full employment policies, appropriate welfare measures, enforcement of employment standards in the sex industry, sexual education, repression of discriminatory practices, funding of sexual representations that challenge the messages of mainstream pornography, initiatives to enhance women's and minorities' speech power.[118]

I think that only within a discourse making strong, exclusionary claims to truth it is conceivable: first, to decide to single out those community standards that are at one time consistent with egalitarian values and premised on radical feminist assumptions; second, apply those community standards to sexually explicit material; and third determine accordingly what people can or cannot be exposed to.

In my estimation, public debate about pornography has gained a great deal from radical feminists' participation in it. I do not think that dominance feminism is the ultimate truth, but I do believe it may be *one* of the truths about pornography, whether straight or not.

Another truth specifically about homosexual porn may be the one, developed by queer theorists, that highlights the value of sexually explicit homosexual representation as a site for subversive resignification. The repetition of heterosexual practices and roles in a homosexual context of sexual explicitness would have the effect, according to this theory, of destabilising and challenging sexist and heterosexist ideologies.[119] I find this a

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[118] See *e.g.* V. Burstyn, ed., *supra* note 26.

[119] See *e.g.* S. Bell, "On ne Peut Pas Voir l'Image [The Image Cannot Be Seen]" in B. Cossman, ed., *supra* note 8, 199 at 232-239. "What happens when hetero-gendered codes - dress, gesture, posture, and sexual activity - are reworked in a lesbian frame? What happens when you mime the mime that heterosexuality has written on male and female bodies and you are both female (as takes place in butch/femme role playing)? What happens when you mix the codes (butch and femme) on one female body? When you play with the more and more popular S/M images? What happens when you both play daddy boys or

seducing idea and, as just hinted at, I think there is truth in it - but it is certainly not the ontological truth about homosexual pornography in the context of sexist and heterosexist dominant ideologies. And I would rather not rely on it alone, in order to defend an anti-censorship position about homosexual pornography: first, because it is debatable that lesbian/gay porn could have a great impact on society as a whole, considering that its consumption tends to take place within the homosexual community; and second, because of its apparent consequentialism. Dissociated from a theory about the inherent importance of freedom of expression, in fact, this argument might entail the conclusion that in a society where patriarchy, sexism and heterosexism have been vanquished by, among other things, the subversive re-inscription of heterosexual codes effected by homosexual pornography, we might then possibly dispense with this kind of expression. I would think such a result ultimately undesirable. For, still another truth about pornography is that it is a source of pleasure, and

> it is necessary to move toward something: toward pleasure, agency, self-definition. Feminism must increase women's pleasure and joy, not just decrease our misery. It is difficult for political movements to speak for any extended time to the ambiguities, ambivalences, and complexities that underscore human experience. Yet movements remain vital and vigorous to the extent that they are able to tap this wellspring of human experience. Without it they become dogmatic, dry, compulsive and ineffective.[120]

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boyfriends, imaging gay male pornography? ... What you have here is at the very least a destabilizing of codes:" *ibid.* at 232-3.

[120] K. Abrams, *supra* note 28, at 312; quotation originally contained in C.S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* 2d ed. (Boston: Routledge & K. Paul, 1984) 1 at 24.

CHAPTER II

I: *Queer Little Sisters Go to Court.*

As we have seen, *Butler* constituted the precedent to justify the British Columbia Supreme Court's decision, in the *Little Sisters* case,[121] to uphold the constitutionality of another piece of obscenity legislation,[122] allowing Canadian Customs to seize obscene material at the border.

The decision delivered by the trial judge was appealed twice: to the Court of Appeal for British Columbia, that confirmed the constitutionality of the Customs legislation, and to the Supreme Court of Canada, whose judgement on the case is, at the moment when this chapter is being written, yet to come.

The *Little Sisters* case involved a number of homosexual actors. The plaintiffs included (besides the British Columbia Civil Liberties Association) a gay-owned and lesbian-managed business enterprise ('Little Sisters Book and Art Emporium') and two homosexual men (the owners of the bookstore); among the interveners at the Supreme Court level were a Canadian organisation committed to advancing gays, lesbians and bisexuals' equality at the federal level (EGALE), and the Women Legal Action and Education Fund, that submitted a brief in the drafting of which presumably the views of lesbian members played a major role.

Before the Supreme Court of Canada, the constitutionality of customs legislation involving seizure powers of obscenity was challenged on several bases by lesbian and gay parties. They contended, among other things, that the specificity of pornography in the homosexual context (*i.e.* its value for the purpose of validating sexual minorities' identities, and the absence of its link to gender oppression) requires a different standard of tolerance from the one applied to define obscenity in the case of heterosexual sexually explicit representation; that, owing to pervasive heterosexism in Canadian society,

[121] See *supra* note 18.
[122] See *supra* note 94.

Customs legislation has necessarily a discriminatory impact on gays and lesbians that makes that law unconstitutional on (substantive) equality grounds; and that the legislation is flawed in that it allows (practically) unchecked administrative discretion, which again translates into discriminatory treatment of lesbian and gay material.

In chapter one I addressed the issue of pornography regulation that is based on those understandings that link obscenity to gender oppression/harm to society. I examined the Supreme Court of Canada's acceptance of this rationale to uphold the Canadian criminal law of obscenity. I analysed how this acceptance affected, and is likely to affect, homosexual pornography, and I argued that obscenity laws of the type held constitutional in *Butler* are ultimately undesirable.

The *Little Sisters* case involves one such law, that a number of lesbians and gay men seem to have been determined to combat. The question that I will attempt to give an answer to in this chapter is: how much sense does it make for lesbians and gay men to resort to the discourse of rights and court litigation in order to undo what the law did in matters of obscene expression (as is happening in the *Little Sisters* case)?

This discussion, prompted by the question of how the attacks that have been levelled at the rights discourse from a variety of different perspectives should impact on my case study, will inevitably expand on an analysis of the discourse of rights more in general (especially because sometimes sweeping critiques[123] seem to need confuting not only with reference to specific cases, but by arguing at the same level of abstraction as that at which they are made).[124]

One observation before I proceed.

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[123] General critiques are not lacking, even though there seems to be a consensus, among a number of scholars sympathetic with the struggles conducted by social movements, that the effectiveness of such movements' engaging with litigation to advance their agendas is highly dependant on the types of remedies actually sought (see *e.g.* J. Bakan, *supra* note 52 at 57) and on the contextual specifities of any given case (see *e.g.* M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 92 ff., and D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 37).

[124] Thus, some of the conclusions that I will draw can be read as well as suggestions about whether and how it might be desirable for not only homosexual activists but also other progressive social movements to advance right claims, even in field unrelated to issues of freedom of expression and equality.

I have set out in the introduction my methodological approach, which purports to make use, among other things, of a variety of poststructuralist insights. It should be noted that some of the most powerful critiques to the rights discourse either come from theoretical positions that can be labelled 'Marxist' or are launched from platforms marked themselves with the ambiguous sign of postmodernism/poststructuralism. In dealing with these critiques, a more problematic stance is required than both the dismissive argument of the incommensurability between modernist (such as Marxist) and postmodernist positions (such as those that partly inform my methodology), and the necessary acceptance of all poststructuralist deconstructive assails to the whole of modernity's experience (of which, obviously, the rights discourse is one of the most relevant expressions). This more nuanced way of dealing with the problem may be deemed justified in the light of the 'eclectic' methodological approach that I have indicated in the introduction as the one by me chosen, and for the legitimacy of whose adoption I have already provided reasons.

II: *The Subject of Rights.*

1. General Discussion.

In a poststructuralist perspective, the first difficulty with the idea of social movements employing the discourse of rights arises probably with the problem of the *subject* of rights. A right is unthinkable without a subject that the right can be conceived as an attribute of. A theory of rights, in other words, presupposes an entity *prior to the rights themselves* to which the rights can be logically referred to. In addition, this entity - the individual, *man* (as we shall see later on, literally a man rather than a woman)- tends to be conceived in ontological terms (quite irrespective of the fact that the rights attributed to it are in turn conceived as (*quasi*) ontological realities -such as in seventeenth century narratives about the natural rights of the individual- or in terms of cultural constructions).

This is supposed to raise a variety of problems, in that this unquestioned conception of the individual as an ontological necessity disguises what, in a number of poststructuralist accounts, is conceived as the constructedness of the individual, *i.e.* its being a (contingent) category created by discursive/social practices; one, in addition, and most importantly, that is marked with an oppressive character. The question here is less whether it makes sense at all to invoke the rights of the individual when the individual is not an ontological reality than whether employing the discourse of rights unwittingly and uncritically reproduces and reinstalls the naturalness of the individual; that is, it reifies precisely one among those categories that are most responsible for the oppression that progressive social movements try to oppose.[125]

Foucault, stresses both the constitutedness (as opposed to the metaphysical originality) and the burdensome heritage of the subject:

> The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, comes [*sic*] to be identified and constituted as individuals ... The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation.[126]

Specifically, Foucault's genealogy of the modern individual takes the latter as an effect of particular power/knowledge combinations- the product of the development of disciplinary (and confessional)[127] technologies of power. Foucault's emphasis here is not with juridical power (the power of the Sovereign that interdicts through the law) but with that, according to him, more pervasive and productive type of power whose tendency is

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[125] To be sure, *contemporary* -as distinguished from previous- humanists, in defending the principles of equality, liberty and autonomy of the subject, *i.e.* in defending the subject of rights, tend to recognise the historical constitutedness and contingency (together with the persisting validity) of the ideals of modern humanism as opposed to a pretended metaphysical necessity of theirs: see P. Johnson, *Feminism as a Radical Humanism* (Boulder: Westview, 1994) at 9-15. But in a 'pure' poststructuralist perspective this hardly changes a thing, as the individual stays an oppressive construct even if its constructedness is acknowledged.

[126] M. Foucault, "Two Lectures" in M. Kelly, ed., *Critique and Power - Recasting the Foucault/Habermas Debate* (Cambridge, Massachusets: MIT Press, 1994) at 36.

towards ever-increasing forms of surveillance, discipline and normalisation of people through the production of certain regimes of truth. Schematically, the individual is created when it becomes the object (and therefore is produced as an effect) of those practices of observation, description, interpretation, classification, etc. typical of the human sciences, which historically developed in connection with (and providing a discursive justification for) the institutional application (in prisons, hospitals, schools, welfare agencies of the state, etc.) of techniques of discipline/surveillance.[128]

It seems to me, however, that the negative connotation that the category of the individual assumes in the context of disciplinary power need not mark its juridical deployment by social movements.

If the rights discourse is not used by social movements in such a way that "forces the individual back on himself [*sic*] and ties him [*sic*] to his own identity"[129] -an identity that took shape as a result of disciplinary technologies and their discursive counterpart, *i.e.* the sciences of man- we could reasonably believe that the employment of the rights discourse is not bound to reproduce oppression, but, on the contrary, can be a means to oppose it.

It is true that there are strong connections between the philosophical/juridical idea of self-legislating subjectivity and the individual produced by the human sciences, and therefore utilising the juridical discourse of (the subject of) rights may require some wariness. In fact, it can be argued that the humanist philosophy of individual rights that we inherited from the Enlightenment presupposes a *certain kind* of subjectivity, one that is contiguous to the "knowable man" of the human sciences (much more so that juridical power and disciplinary power tend to colonise each other's domains).[130] The subject/object of the human sciences, actually, emerges as *individuality, soul, conduct, consciousness,*[131] the truth about which can be told by the social scientist who claims to have access to a meaning lying outside power relations. The former, on its part,

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[127] See *supra* note 99.
[128] See H.L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) at 126-83.
[129] M. Foucault, "The Subject and Power" in H.L. Dreyfus and P. Rabinow, *supra* note 128 at 212.
[130] See C. Smart, *supra* note 33 at 4-20.
[131] See H.L. Dreyfus and P. Rabinow, *supra* note 128 at 160.

emphasises the not so different principles of *self-determination, freedom* and *autonomy*, only in connection with which the liberal discourse of rights seems to make sense. It is these principles that constitute that "rhetoric of humanism [rejected by Foucault] on strategic grounds because this rhetoric stands as an integral component of the new disciplinary techniques."[132]

However, if, as I hold, rights and the connected idea of individual autonomy of the subject of rights can be invoked in a way that does not necessarily reproduce the oppressive individualisation effected by the social sciences and disciplinary technologies, that would be an indicator that the juridical subject of (the discourse of) rights cannot be utterly reduced to the individual subject/object of the human sciences. This, in turn, suggests that, although the notion of the juridical subject and that of the knowable man of the human sciences developed *in connection* to each other, the individual produced by the discourse of law/rights and political theory is not the same as the one produced by the manifold discursive rationalisation of disciplinary technologies.

Foucault's point is that the theory of sovereignty/rights is the discursive counterpart of a form of power whose importance has been gradually diminishing. Juridical/repressive power is not the sort of power characterising modern/contemporary societies. The discursive justifications of this sort of power (*i.e.* the theory of sovereignty/individual rights and, to a certain extent, the law itself) are, however, outliving it, because this allows the new mechanisms of (disciplinary) power to operate unnoticed and undisturbed.[133]

By so conceiving the relationship between power and discourses, Foucault could not help distrusting the law and the theories of rights as emancipatory means. But it is Foucault's absolutely privileged emphasis on disciplinary power that necessitates such result.

It seems that Foucault's analysis here leaves us with two types of discourse and one type of power. Power is conceived exclusively (or almost exclusively) in terms of

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[132] See P. Johnson, *supra* note 125 at 14.
[133] See M. Foucault, "Two Lectures" in Kelly, ed., *supra* note 126 at 31-46.

disciplinary/normalising power. The discourses are, instead, the human sciences and the theory of rights and sovereignity. What connects power with *both* discourses is a deceitful intent- that of masking the true mechanisms of power (of course this does not mean that anybody, or anything like a class, was actually out there deliberately orchestrating this whole plot).

On the one hand the theory of rights and sovereignity, by taking as the express object of its analysis power itself, keeps us in the false belief that there exists anything like juridical/repressive power, that that is the only type of power, that we should be concerned about it, but only to a certain extent, as this power can be limited, and therefore rendered legitimate, through rights. On the other hand, the human sciences (unlike a theory of rights) do not take as their mandate an express justification of power (juridical or disciplinary), but surreptitiously justify the application of disciplinary power techniques by characterising them as something different from what they really are: for example, when psychoanalysis claims to reveal the truth about the homosexual, it is in reality creating that category to subject a certain number of people to regulative mechanisms.

Both discourses, then, tend to *mask* the operation of disciplinary power: the law and the theory of rights by making us believe that power is different from disciplinary power, and the human sciences by convincing us that what in truth is nothing else but disciplinary power is something different from power.

Now, this account may well reflect the relationship between disciplinary/normalising power on the one hand and the discourses of the human sciences and that of rights on the other. Yet, I believe that, besides disciplinary technologies, there still are relevant mechanisms of power that can be read according to the juridical/repressive model of operation.

Davina Cooper holds that "[p]ower ... is an explanatory or normative device that highlights and articulates some social relations, decentring others; for instance,

Foucault's ... framework downplays the 'power' of the modern sovereign or state. Where conceptual boundaries are therefore drawn is a political issue."[134]

I take it, to name only the example most relevant to the subject matter of this thesis, that the *legal* treatment in Western democracies of people engaging in what are perceived as same-sex activities or relationships suffices to justify the claim that we have not yet gotten rid of juridical/repressive power.[135]

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[134] D. Cooper, *Power in Struggle* (Buckingham: Open University Press, 1995) at 17-8.

[135] A few examples can be provided to illustrate what I mean. Five states in the United States (Kansas, Arkansas, Texas, Missouri, Oklahoma) have criminal provisions that apply only to same-sex sodomy. While it is true Vermont has recently passed a law (the 2000 "Civil Unions Act") that provides for same sex 'civil unions' the same benefits granted to married heterosexual couples under Vermont law, thirty-three states of the Union prohibit same-sex marriages, and federal legislation (the 1996 "Defense of Marriage Act") denies homosexual couples federal benefits granted to opposite-sex married couples. While the Supreme Court of Canada recognised, in *Egan v Canada* [1995] S.C.J. No.43, that sexual orientation, although not expressly mentioned in the equality clause (s. 15) of the *Canadian Charter of Rights and Freedoms,* is a prohibited ground for discrimination, Canadian lesbians and gay men do not benefit from all the rights that heterosexuals enjoy. In Australia, New South Wales is endowed with comprehensive legislation prohibiting discrimination and vilification on the basis of homosexuality (s. 49ZF-49ZTA of the Anti-discrimination Act 1977), as distinguished from sexual orientation, but the law sets the age of consent for male homosexuals at 18, contrary to heterosexual intercourse that is lawful when the partners are 16 (respectively sect. 78K and 66C of the Crimes Act 1900). Western Australia, on its part, not only sets the age of consent for male homosexual intercourse at 21, while it is 16 for heterosexuals (s. 322A and 3221 respectively of the Criminal Code Act Compilation Act 1913- Schedule 1); it has also no anti-discrimination provisions to protect lesbians and gay men; and, quite obsessively, it excludes that encouragement or promotion of homosexuality can legitimately constitute a public purpose, public policy, or part of primary or secondary education *curricula* (art. 23 of the Law Reform (Decriminalization of Sodomy) Act 1989). In Western Europe, there may be states like the Netherlands, that allow their citizens (both homosexual and heterosexual) to establish registered partnerships that have legal consequences similar to those associated with marriage; besides, article 1 of the Dutch Constitution is understood as extending the principle of non-discrimination to lesbians and gay men, and the General Equal Treatment Act 1994, among other things, prohibits discrimination on the basis of heterosexual or homosexual orientation in housing, employment, access to goods and services, etc. At the same time, however, other Western European countries have less flattering legal provisions. In the U.K., s. 143 of the Criminal Justice and Public Order Act 1994 discriminates between male homosexual and heterosexual intercourse, fixing the age of consent at 18 for the former and 16 for the latter; s. 28 of the Local Government Act 1988 is still forbidding local authorities from promoting homosexuality or educational institutions from teaching its "acceptance ... as a pretended family relationship;" and there is no anti-discrimination legislation in favour of lesbians and gay men. Austria has an infamous provision (art. 209 of the Criminal Code) that discriminates as far as age of consent are concerned, and under which young gay men are imprisoned yearly. In Italy, it is true, homosexuality was no offence even during the fascist period; the age of consent (14, or 13 if the partner is under 16 years of age: art.609 *quarter* of the Criminal Code) is the same irrespective of sexual orientation, and the law does not mention homosexuality in order to single out lesbians and gay men for harsher treatment (nor it seems to have done it in the past). The law does not mention homosexuality (or sexual orientation) at all, for that matter. In practice this means, *inter alia*, that in the equality clause of the Constitution (art. 3), sexual orientation is not a prohibited ground for discrimination; and that homosexual unions are not recognised under the law. See: The International Lesbian and Gay Association *World Legal Survey, online:* ILGA <www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm>

The subject of rights, in Foucault's analysis, is part of those rhetorical devices used to mask the technologies of power that are actually at work. Therefore it is an empty category that tends to be colonised by the subject produced by disciplinary technologies under the false objectivity of the sciences of men. In fact, if the technologies of power behind the discourse of rights turn out to be disciplinary ones, it is reasonable to think that the subject of rights must be the same as the subject that justify the oppressive practices of classification and normalisation of the human sciences.

Still, as I mentioned above, I believe that in Western democracies there still exist, in addition to disciplinary/normalising power, mechanisms of power that can be described within the framework of the juridical/repressive model (i.e that of the Sovereign that says "no")- namely the power of majorities expressed through their elected representatives. The power *behind* theories of sovereignity and rights, in other words, may well be disciplinary; but that does not mean that the juridical/repressive power *that these and related theories take as their* (admittedly, almost without exception, exclusive) *object of analysis* is a fiction.

Claiming that contractarian theories (*i.e.* modern theories of rights and sovereignty) take as the object of their analysis a really existent form of power (*i.e.* juridical power) should not be intended to mean that by so doing they tell a truth that is *outside* power relations. On the contrary, they as well constitute complex regimes of power/knowledge, and as such *produce* their own power-laden truths, rather than discover a truth beyond power. Therefore, the subject of rights that contractarian theories presuppose to justify their narratives, far from being an ontological *a-priori*, is most likely to be a truth effect of these theories, *i.e.* is produced by these theories, and by the law that grants (or recognises the inalienability of) this subject's rights.

The relationship of this construct with the juridical power that constitutes the object of contractarian theories is, I would argue, ambivalent.

On the one hand the subject of rights surreptitiously serves the perpetuation of juridical power by being presented as an ontology prior to that power, that *founds*

Status of U.S. Sodomy Laws, online: ACLU - Lesbian and Gay Rights <http://www.aclu.org/issues/gay/sodomy.html>, and *Equality for Lesbians and Gay Men: A Relevant Issue*

juridical power itself by an act of consent (the social contract). In this sense the relationship of the autonomous subject of rights with juridical power is similar to that of the subject of the human sciences with disciplinary power (for the subject/object of the sciences of men surreptitiously justifies the hold of disciplinary technologies). In this perspective, *behind* the discourse of soverignity/rights of contractarian theories lies not only disciplinary power (see above), but also (at least) juridical power itself.

On the other hand, as a consequence of the *explicit* justificatory task that such theories undertake with regard to juridical power (less cynically: pursuant to the prescriptive result that -at least some of- such theories aim to effect by spelling out for the actors of juridical power the *sine-qua-non* conditions of *legitimate* juridical power), that same subject of rights presupposed by contractarian theories emerges -*i.e.* is produced- as a limit to that power.

If, in terms of its actual emancipatory potential, the credentials of the subject of rights are doubtful when the 'surreptitious,' as I have called it above, justification of juridical (and disciplinary) power is at issue, they recover a degree of trustworthiness when the subject of rights is produced as the ground on which contractarian theories purport to build the limits of an acceptable exercise of juridical power. The desirability of living in a society organised under juridical power, as well as which limitations make this form of power acceptable (both of which questions contractarian theories pretend to provide an objective answer to) are definitely disputable, but the meaning of the subject of rights as a *limit to juridical power* (as opposed to its being a mere justificatory construct for its hold), in the sense of its ability to conceptually justify restraints to repressive power's action, seems less so.

The production of the subject of rights then, taking place in the context of a peculiar power/knowledge regime, is relatively autonomous from the one of the knowable man of the human sciences; which is the same as saying that the subject of rights and that of the sciences of man are not one and the same, and the former, as just suggested, can be

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in the Civil and Social Dialogue (1998), online: ILGA-Europe <www.steff.suite.dk/report.htm>.

expected to have (under given circumstances) actual liberatory potentialities against juridical/repressive power.[136]

Despite its potential for constituting a point around which to articulate strategies of resistance, and its (relative) autonomy from the (oppressiveness of the) subject produced by the human sciences and disciplinary technologies, the subject of rights produced by contractarian theories and by the law might well be burdened with its own share of 'internal' oppressiveness. That is to say, the very discourses that produce the subject of rights, especially considering their ambivalence, can be thought to attach to it some oppressive traits.

The problem here lies with the sort of individuality that the rights model, and the intellectual tradition within which it developed, are thought to promote. The subject of rights, specifically, appears to be too masculine and too western. Schematically, its very identity as *subject* necessarily opposes it to an object, to which the subject relates in the guise of a master; thus identities that do not recognise themselves in this specific relational model (the feminine and/or the non-Western other, depending on the accounts) end up being denied the privileges attached to subjectivity itself. Besides, the subject's being *universal,* and therefore *abstract*, opposes it to what is perceived as specific and embodied; and since in the phallocentric economy of dominant discourse the body is woman, women do not have a place as subject, but only as the subject's other.[137]

These critiques play a vital role in sensitising progressive social movements to the oppressive consequences that an uncritical appropriation of the rights discourse can bring about by reinforcing exclusionary notions of subjecivity. But, to the extent that some of them may draw the conclusion that the subject of rights is inherently flawed and destitute of emancipatory possibilities, they, it seems to me, may foreclose precisely the actualisation of such possibilities while affirming that such foreclosure is effected by the subject of rights itself as a category.

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[136] This seems to have been accepted by the late Foucault himself: see J. Sawicki, *Disciplining Foucault* (New York: Routledge, 1991) at 100-1 and at 124, endnote 11.

[137] Instances of this position are reported in P. Johnson, *supra* note 125 at 5-7, 16-18, and J.P. Butler, *Gender Trouble*, *supra* note 38 at 19-20.

A subject bent on, like the liberal subject of rights, autonomy and "authentic self-realisation"[138] needn't assume, in order to constitute an effective limit to repressive power, imperialist, sexist and exclusionary meanings. Just as the various rights themselves are categories whose meanings constitute an ongoing negotiation, the subject of rights and the values associated with it are sites of struggle worth engaging with:[139] there is nothing in them, it seems to me, that is discursively foreclosed to the valorisation of non-hegemonic experiences and knowledges.

From this perspective, then, the problem, for progressive social movements, appears to be (rather than one of shrinking from the rights discourse altogether) that of trying to *avoid* employing the rights discourse:

> *a)* in such a way that ties the subject of rights to the subject(s) of the sciences of man: that is in such a way that ties one to one's own identity, or, in other words, that promotes the reinforcement of those oppressive categories and groupings that the knowable man produced by the human sciences is by these discourses thought susceptible to be assigned to from time to time (*e.g.*, the category of 'the homosexual'); and
>
> *b)* in such a way as to reproduce and reinstall those hierarchies explicitly or implicitly contained in most contractarian and related theories, and in the law itself -i.e, with synthetic expression, in the liberal discourse of rights (*e.g.* the notion, authoritatively disqualifying other knowledges and experiences, of the Euro-centric/masculine 'life, liberty and the pursuit-of-happiness-as-property' triad being the official version of the "authentic self-realisation" value).

[138] This term runs throughout P. Johnson, *supra* note 125.
[139] See also J. Sawicki, *supra* note 136 at 100-1.

2. Application to the Case-Study.

Can rights-employing strategies used by lesbians and gay men with reference to the issues of homosexual pornography translate the course of action suggested above into practice?

In cases such as the one debated in *Little Sisters*, the state, irrespective of its declared intentions, is acting according to the repressive model of power: that is, it is saying 'no' to gay men and lesbians who are willing to exercise their freedom of expression as far as obscene material is concerned. In this case, that is, homosexuals find themselves precisely in one of those situations in which they are occupying the position of the subject constituted by the discourse of rights: a subject that responds with its rights against the state's injunctions, posing itself and its rights as a *limit* to juridical power.

If the exercise of state power is negatively evaluated under the circumstances of the specific case (as is in the present discussion, pursuant to the observations made in chapter one), then the subject of rights can be thought to promise liberatory possibilities from an unjust exercise of authority.

Still, for the subject not to be the bearer of unwanted oppressive *disciplinary* consequences, it seems that, in making its claims, the subject should avoid conceptualising itself by making use of categories that, in our case, reinstall the naturalness of the binary opposition homosexual/heterosexual, which *a)* is today a constitutive element of the binary economy of sex and gender, heavily implicated in sex/gender/sexual orientation discrimination, [140] and *b)* relies on subjective identities (the homosexual as opposed to the heterosexual) whose doubtful value is suggested by their own genealogy.[141] In a queer/poststructuralist perspective, that is, we might suggest that if the right claim could be advanced without drawing rigid distinctions between homosexual and heterosexual, then we might contribute to the deconstruction of these constraining identities.

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[140] See J.P. *Butler, Gender Trouble, supra* note 38 at 1-34.
[141] See note 35 and accompanying text.

Canada's present state of obscenity laws is, on its face, sexual orientation neutral. It does not draw distinctions between heterosexual and homosexual pornography. Still, the legislation is not neutral in terms of its impact: as the British Columbia Supreme Court recognised in *Little Sisters,* gay and lesbian material is disproportionately scrutinised. Actually, the BC Supreme Court affirmed that the discriminatory impact was a consequence of the *administration* of customs legislation, rather than of the legislation itself, and that appropriate training provided to customs officials would eliminate any shortcomings of the present administrative system.[142] The plaintiffs, as well as the interveners EGALE and LEAF, contended instead, by appealing the decision to the Court of Appeal for B.C. and subsequently to the Supreme Court if Canada, that it is the legislation itself that is flawed, and that inevitably produces a discriminatory impact.[143]

At any rate, the fact remains that the opposition 'homosexuality/heterosexuality' is reinforced as an effect of the law even though the law does not mention it expressly. Customs legislation provides thus an opportunity for reinstalling the matrix of compulsory heterosexuality. This is true in two senses.

First, in the sense of the law's substantially allowing officers' discretion to bestow a differential treatment on gay porn, pursuant to its having formally enabled at all state agencies to scrutinise pornographic material (of every type).[144]

Second, in the sense that if homosexual pornography has the potential for disrupting the naturalness of gender roles through its parodic redeployment of straight

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[142] See *supra* note 94-7 and accompanying text.

[143] See the *Appellants' Factum, supra* note 101; LEAF *Factum, supra* note 47; and EGALE *Factum, supra* note 100.

[144] See also EGALE *Factum, supra* note 100: "[§ 26:] The impugned legislation's differential treatment of lesbians, gays, and bisexuals has a discriminatory impact on our communities. The systematic detention and seizure of homo-erotic imagery and text stigmatizes our sexualities as "obscene" per se. This constitutes an affront to our dignity. It perpetuates and promotes the unfair societal characterization of lesbians, gays, and bisexuals as oversexed individuals, whose sexual practices are degrading and dehumanizing. Thus the Customs Legislation discriminates against us in a substantive sense, contrary to the purposes of s. 15 of the Charter (which include promoting respect for human dignity and eliminating such social ills as stereotyping and prejudice)."

themes, restrictions (in addition, disproportionate restrictions) to its availability facilitate the hegemony of the binarism of sex/gender/desire.[145]

For lesbians and gay men, one solution to the problem of state censorship with regard to their pornographic material would be to ask for a 'double standard,' which would exempt their sexually explicit expression from the operation of obscenity law.

In the *Little Sisters* trial, one of the remedies requested by the plaintiffs did precisely this: the Supreme Court was requested to read down Customs legislation in so far as it applied to gay and lesbian obscene materials. The motives for this request were either the discriminatory impact of customs legislation (that practically allows officials to disproportionately limit lesbian and gay free speech rights), or the adduced lack of a pressing and substantial legislative objective (premised on the supposed harmlessness/value of gay and lesbian pornographic material). In this perspective, *Butler*'s community standards test for evaluating whether the dominant characteristic of the material is the undue exploitation of sex would go on working only for heterosexual porn, that could still be seized at the border.

The desirability of this strategy, however, is questionable. It is true that it would arguably meet the second among the conditions (listed at the end of the previous section) that it might be appropriate to think progressive social movements' *critical* engagement with the discourse of rights should meet. In fact, the reinforcement of those hegemonic cultural values typically associated with the subject of rights would not appear to follow in a linear fashion from this way of employing the right discourse, to the extent that the autonomy and 'authentic self-realisation' that lesbians and gay men pursue by affirming their right to equality and freedom of pornographic expression is not only different from, but has also the potential for questioning the naturalness of the traditionally masculine version of those values.

But would this strategy meet the requirement of not contributing to the normalisation of the individual effected by tying her to her own identity (here, as

[145] See, for an analogous argument, LEAF *Factum, supra* note 47: "[§ 24:] LGBT materials ...may challenge sexism, compulsory heterosexuality and the dominant, heterosexist sexual representations which often portray "normal" heterosexuality as men dominating women and women enjoying pain and degradation."

explained, homosexuality)? If the Court granted the remedy requested, a positive effect would result by allowing the circulation of material challenging the heterosexual matrix; but the remedy would itself help sustain that matrix in one of two ways.

First, where the Court accepted the argument of the harmlessness of lesbian and gay porn, it would end up drawing an a-priori, rigid distinction between all heterosexual pornography and all homosexual sexually explicit representation. I have already underscored in chapter one the essentialism of those positions that thus categorise sex speech. This essentialism, if translated into law by a pronouncement of the Supreme Court in the *Little Sisters* case, would end up naturalising and radicalising the distinctiveness of homosexuality.

Second, where the Court accepted instead the argument that customs legislation unjustifiably impacts on gays and lesbians' rights in a disproportionate way (i.e the legislation is discriminatory), the Law's subjecting homosexual and heterosexual pornography to different standards (even if this choice were not necessarily motivated by essentialist notions about the value of different types of pornography) would to some extent, by virtue of its drawing the distinction homo/hetero, still discursively contribute to reinstalling the otherness of homosexuality.

The legal strategy of asking for a differential treatment for homosexual pornography would, in neither case, meet the requirement, above posed, of deploying the rights discourse so as to avoid the subject of rights being re-inscribed in those identities that are part of the system of that subject's oppression (even when they are re-elaborated). There is an alternative, however.

For the reasons I have laid down in chapter one, I believe that systems regulating obscenity on grounds as those espoused in *Butler* are undesirable. The Law, in singling out what would otherwise be Radical Feminism's *valuable contribution* to the complex discourse about sex discrimination, creates an official truth about pornography, while suppressing sex expression itself, in a manner that falls hardly short of a presumption of infallibility. The public is thus deprived of the material *whose merit a democratic system would require the public itself to asses*. Sex essentialism and sexual correctness are reinforced as a consequence of the Law's censorial move. Besides, as we have seen,

homosexual pornography, although different from straight sex representation, is complicated enough to make it undesirable to officially sanction its 'innocence' and harmlessness by exempting it from regulation while maintaining censorship of straight porn (which in turn is not simple enough to make it desirable that its harmfulness be officially sanctioned through criminalisation).

This means that queer actors, when trying, as in the *Little Sisters* trial, to advance their right to produce and enjoy pornography, might find it preferable to ask the Court to remove the piece of obscenity legislation at issue altogether (thus affecting the circulation of straight porn as well). A remedy granted pursuant this critical deployment of court litigation would be one of 'first best' in terms of its arguably avoiding reinstalling the oppressive dichotomy 'homo/hetero' in a threefold sense:

a) we would do away with the discriminatory practices of state officers (and judges);
b) we would do away with the backfiring strategy of the double standard;
c) we would contribute to the disruption of the hegemony of presumptive heterosexuality and gender binarism by lifting the shackles from the subversive recodification of sexual identities and gender roles effected by lesbian/gay porn.

In the *Little Sisters* trial, the plaintiffs' aforementioned request that the law should be read down was a remedy sought only in addition or alternatively to the *striking down of the impugned regime*. This latter remedy, if granted by the Court, would be more desirable in that it is likely to contribute, unlike the former, to the destabilisation of 'hetero-normativeness' in *all* the three senses listed above (a+b+c).

As regards the reasons submitted by the plaintiffs in order to obtain this remedy, their choice to argue also that "the Customs Legislation is ... unconstitutional insofar as gay and lesbian ... material is concerned given the extreme imbalance between the deleterious effect of the Customs Legislation on such material and the Customs

Legislation's negligible, if any, salutary effect"[146] can be considered more hazardous than one that had focused exclusively on the argument that "there is a sufficient nexus between the Customs Legislation and the detention and prohibition of non-obscene expression."[147] In fact, in raising the issue of the differences between homosexuality and heterosexuality, this choice provides the Law with an occasion to discursively reinstall the suite of oppressive features associated with the former category, (re)producing an authoritative, essentialising truth about lesbians and gay men.[148]

III: *The Entitlement Model.*

1. General Discussion.

Another critique moved against the rights discourse (tightly connected and overlapping, although not utterly identifiable, with the just discussed problem of the *subject* of rights) is the one that objects to it for its Western biases in being centred around an entitlement model directly derived from the notion of private ownership of goods. For example, Mary E. Turpel argues that, according to John Locke,

> people enter into "civil society" for the central, and negatively conceived, purpose of protecting their interest or claim to private property against random attack from other persons.
> The idea of the absolute right to property, as an exclusive zone of ownership, capable of being transmitted through the family ... is arguably the cornerstone of the idea of rights in Anglo-American law. Rights are

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[146] *Appellants' Factum, supra,* note 101 at § 156.
[147] *Ibid.*
[148] Consider, for example, the following statements of the trial judge, especially in connection to each other: "The Little Sisters store carries a wide variety of materials, mostly catering to *homosexual tastes,*" and "The *defining characteristic of homosexuals* –the element that distinguishes them from *everyone else* in society- is their *sexuality*. *Naturally*, their art and literature are extensively concerned with this *central* characteristic of their humanity. As attested by several of the plaintiffs' witnesses, erotica produced for heterosexual audiences performs largely an entertainment function, but homosexual erotica is *far more important* to homosexuals. ... [S]exual test 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* and for whom such representations play a relatively marginal role in art and literature:" (emphasis added) *Little Sisters, supra* note 18 respectively at 514 and 522.

> seen as a special zone of exclusion where the individual is protected against harm from others. Obviously, this is a highly individualistic and negative concept of social life based on the fear of attack on one's "private" sphere. It provides something of a basis, however, for all ideas about rights – the idea that there is a zone of absolute individual rights where the individual can do what she chooses ... [and, a]s Roberto Unger has suggested[,] ... avoid any tangle to claims to mutual responsibility.[149]

While Turpel is making these statements in the context of an article underscoring the ways in which Canada's legal system disqualifies the knowledges/experiences of Aboriginal peoples, her position seems to be paradigmatic of a stance that takes issues with the entitlement model at a more general level.[150]

My attitude towards this strain of criticism is similar to the one I assumed with regard to the objections to the subject of rights. I believe critiques of the entitlement model are valuable as anti-hegemonic strategies, *i.e.* for the purpose of de-centring the western legal experience and allowing us to realise "that there are more secrets, more possible freedoms, and more inventions in our future than we can imagine in humanism."[151] But I have some problems when the baby of human rights is thrown away with the bath water of cultural hegemony. Neither the historical origins nor the logic of the discourse of rights precludes, in my opinion, an openness of the entitlement model to progressive deployments by social movements.

Turpel is correct in saying that Locke's theory is that human beings associate in order to preserve their property. She fails to specify, however, that 'property,' in Locke's terminology, encompasses "life, liberty and estate,"[152] and specifically that Locke made "life, liberty, health, and indolency of body" precede "the possession of outward things" in the list of the "civil interests" that men seek to advance when they constitute what he

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[149] M.E. Turpel, "Aboriginal Peoples and the Canadian Charter" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery Publications, 1991) 503 at 509.

[150] For example, Locke's "*highly individualistic* and *negative* concept of social life" appears generally opposed to a more appealing model of "*mutual* responsibilities" (emphasis added): *ibid.*

[151] M. Foucault, quoted in J. Sawicki, *supra* note 136 at 124, endnote 11. Quotation originally contained in "Truth, Power, Self: An interview with Michel Foucault" in L.H. Martin, H. Gutman and P. Hutton, eds., *Technologies of the Self* (Amherst: University of Massachussets Press, 1988) at 15.

[152] See J. Locke, *Second Treatise of Government,* s. 87, online: Columbia University <www.ilt.columbia.edu/academic/digitexts/locke/second/locke2nd.txt> (available in paper format, new ed. corr. and rev. (London: Blackwell, 1956)).

calls the "Commonwealth."[153] This, as well as the failure to refer to the context (seventeenth century England) in which Locke's entitlement model originated practically obscures the ability of that model to provide effective protection from *abuses of power on the part of public authorities.*[154] This is not to suggest that the whole of Locke's theory of rights is flawless, or that it is in keep with the more egalitarian sensitivity of our day and age, or that it constitutes an appropriate model to deal with all of today's, or even seventeenth century's, social needs (it could be argued, for example, that the subject of rights, as envisaged by Locke, appears at stages to suffer precisely from that serious complex of 'westernness' and masculinity mentioned in the previous section). I am simply taking issues with those positions that discredit the entitlement model by referring back to what are believed to be its origins (which I would argue are testimony at least as much to the merits of the entitlement model as to the flaws of Locke's version of it), seemingly suggesting that this model is not open to possible progressive redeployments or that it is inherently inapt to satisfy a number of human needs that go beyond the mere enjoyment of one's private property or autonomous will.

In fact, some thought should be put to the opposition 'responsibilities model v. entitlements/rights model' in the first place. The binarism is misconceived to the extent that it erases the inter-subjective dimension of any exercise of rights. Thus, the rights/entitlement model is seen as one in which individuals are somewhat surrounded by a sphere in which their autonomy can do, wholly undisturbed, what it pleases, while the responsibility model is presented as one in which individuals always regulate their actions on the basis of the consequences that may ensue on the community.[155] Still, the

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[153] J. Locke, *A Letter Concerning Toleration, supra* note 16.

[154] In *A Letter Concerning Toleration*, for example, Locke discusses his theory of rights with reference to the issue of freedom of religion, disrespect for which had caused bloodshed in England and elsewhere in Europe since the previous century; similarly, Locke's model, in so far as it applied to such interests as life and liberty, provided strong grounds for limiting public authorities' arbitrary and oppressive practices, the solid reality of which, in seventeenth century Britain, is arguably proven by the need felt by Parliament to enact, precisely in that period, such laws as the *Habeas Corpus Act 1679.* In these circumstances, it appears likely that Locke's (and subsequent) appeals to the recognisance of individual civil interests against state interference had somewhat more noble motivations than the mere egotistical desire to be free from mutual responsibilities.

[155] "From nearly every non-Western culture comes the argument that its members do not define themselves in the first place as autonomous individuals, but instead experience themselves as having an "ascribed status" as members of a larger group or community, such as family, tribe, class, nation, or other group ...

idea, proper of the entitlement model, of a sphere in which "[e]very man [*sic*] ... has the supreme and absolute authority of judging for himself," does not make the individual free from claims to mutual responsibilities, as this idea is perpetually troubled by what we can call the 'harm principle', *i.e.* the condition that "nobody else ... can receive any prejudice from his conduct."[156] Of course "prejudice", and "conduct" and even "nobody else" are terms open to multiple interpretations and constitute sites of definitional struggles: but then the same is true for 'responsibility,' so it is disputable that the entitlement model and the responsibility model are truly radically alternative discursive options.[157]

I would contend that the responsibility model points to something different from the entitlement model only in those contexts where the meaning of responsibility is relatively uncontested. In a comparatively small community, with a closely knit social order, where people all tend to share the very same values, where there is a finite number of types of social roles to be assumed and activities to engage in, and where, as it were,

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The concept of rights itself is argued to be characteristic of a society that thinks in terms of atomized individuals and abstract ideas. Many non-Westerners are wary of the adversarialism inherent in rights talk. Rather than rights, they stress obligations and reciprocal responsibilities:" E. Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19.1 H R Q 136 at 145-6.

[156] Locke J., *A Letter Concerning Toleration, supra* note 16. In this sense I would contend that it cannot be assumed that the rights model, even in Locke's formulation, is based on anything like an unqualified 'supremacy' of the autonomous individual (where 'supremacy' stands for "the state of being supreme [i.e. highest] in authority, power, rank or importance:" D. Thompson, ed., *The Oxford Modern English Dictionary* (Oxford: Oxford University Press, 1996)). Also, consider how it is common to talk of entitlements and responsibilities as complementary notions. See *e.g.* S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974) at 17: "The . . . rule of law system . . . encourages us to break down social problems in the *responsibilities* and *entitlements* established under law."

[157] See also G. Binion "Human Rights: A Feminist Perspective" (1995) 17.3 H R Q 509. At 524-5 Binion argues: "One of the most interesting aspects of the debates within feminist jurisprudence is the question of whether rights analysis, domestically or internationally, is useful. Gilligan first highlighted this question effectively in her findings that (US) women were more prone to see themselves within a web of community to which they had responsibilities, rather than in contradistinction to a society against which they had rights; the latter was a more characteristic male model ... If this approach of "responsibility" were applied to the human rights arena, it might be significant in allowing a broader and more open range of action with respect to human rights issues. Key elements of such an approach would be a concern with impact rather than intent by powerful social actors, governmental and otherwise. It would similarly reconceptualize human rights as human needs and would measure the acceptability of the status quo by the extent to which human needs are being met." However, at 525 she pojnts out as well that "[t]hese ideas are not entirely new; if one scans international "human rights" documents of the past half century there is much language that speaks to "rights" in the kind of positivistic and material language that not only transcends the politically procedural, but also transcends the nation state in addressing human needs." This seems to

every element falls into place, a focus on responsibilities may be apt to make the system work according to relatively invariable rules of conduct that determine the behaviour of the community's members in every conceivable situation. This, however, does not seem to be the situation characterising contemporary western societies, nor was the case in Locke's own time and place. It is probably the longing for a utopian state in which their own notion of responsibility were universally recognised as the only official version of society's morals that, in the West, makes the responsibility model generally very appealing also to custodians of traditional morality.

2. Application to the Case Study.

In situations analogous to the one of my case study, recourse to an alternative responsibility model might be of little help, if not ultimately undesirable. This is arguably shown by the role played respectively by right claims (the entitlement model) and responsibility arguments in the *Butler* decision.

An emphasis on wide notions of responsibility, conceived, in the sense just described, in opposition to a model of rights/entitlements, seems to suit arguments supporting pornography regulation on the basis of conservative morality. Consider, for example, the following statements made by a captain of the Salvation Army of Canada, and apply them to the idea of the right to produce/enjoy pornography:

"I don't like the word "rights" because it implies that I can take something away from you. I prefer privileges and responsibilities ... When we put it in the context of rights, we start to get into a battle between you and me about what I can do, and what you can do, as opposed to what the society we live in permits us to do."[158]

Here the responsibilities that should inform everybody's action would be those codified in moral rules of conduct on which a supposed societal consensus pre-exists. In this view these moral rules, arguably, should become indistinguishable from legal rules.

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suggest that opposing the rights framework and the responsibility framework in the guise of alternative models begs some questions.

However, the Court in *Butler* was working within a discourse of rights -specifically those guaranteed in the *Charter*- and not one that prioritised responsibilities at the exclusion of rights. I suggested in the previous section that within the (modern) discourse of rights, notions of responsibility are still relevant, and they take the form of the harm principle, which reflects the inter-subjective dimension of any exercise of rights. Still, responsibilities, in the framework of the liberal discourse of rights, rather than merely codifying pre-existent social relations, become, ideally, open to negotiation (although, admittedly, in practice that may not always be the case). The harm principle, then becomes a contested site for interpretation. There is some general understanding, however, that not absolutely anything may become 'harm' for the purposes of establishing legal responsibilities. This stems from the recognition that rights and the harm principle constitute a useful organising discourse in societies where people are likely to subscribe to a variety of different values. This circumstance (namely, diversity of values) involves both the necessity that responsibilities be open to renegotiation and, at the same time, that there must be some shared experience on the basis of which harm can receive a meaning. Consequently, such harms as physical harm -universally experienced as painful- can easily translate into legal rules imposing reciprocal responsibilities. Other kinds of harms, more contested (or for remedying which there are no agreed-upon responsibilities) become a basis to impose legal responsibilities only when some discourse becomes prevalent (as happens when with a different political force taking up the government of the country a shift in economic or environmental or sexual policy occurs). Other harms still tend to circulate into society unrestricted by the law but checked by other, more circumscribed, social discourses. This tends to happen probably when the harms are *highly* contested; or when their circulation is tolerated by the law to the extent that recognising such harm would entail the imposition of a responsibility that would not merely limit, but eliminate another person's or group of persons' rights; or when circulation may be tolerated because the harm is not generally perceived as serious enough when compared to the competing interest upon which recognisance of the harm at issue would impact.

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[158] Statement reported in D. Herman, *supra* note 123 at 58.

While -as shown by the statements, reported above, of the Salvation Army captain- the responsibility model lends itself to justifying pornography regulation on the ground of conservative morality, dealing with the discourse of rights made it less easy for the Court in *Butler* to accept the regulation of pornography on such a basis. This is because the Court must have felt that considerations about obscenity regulation for the protection of public morality/sexual propriety can ultimately be reduced to the protection of offended sensitivities:[159] but, as we have seen in the introduction, legal liberalism, which is reflected in the *Charter* discourse of *rights*, makes it *difficult* (although, conceivably not impossible) to accept that offended sensibilities amount to 'harm' for the purpose of limiting freedom of expression.[160] In this sense the discourse of rights worked, in *Butler,* so as to limit imposition of responsibilities not to offend the prudish, as the Court felt it would have been very laborious to justify such responsibilities within the framework of that discourse.

Still, the *Charter* discourse of rights lent itself to valorise responsibilities exactly to the extent that they could be squarely cast in the form of the harm principle. Radical feminism offered precisely a way to speak of the consequences of pornography production/consumption in terms of harm rather than offended sensibilities. Thus radical feminist rhetoric was appropriated by the Law, interested in exploiting the regulative possibilities of the former.

We already know, however, that appropriation of radical feminism was not an easy operation at all stages: even if dominance feminism describes certain consequences of pornography that -as opposed to offended sensitivities- can be easily called harmful, it

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[159] This is obvious for the *Miller* standard of American obscenity laws (see *supra* note 73 and accompanying text), but it seems true also for the British test for obscenity, established in *R.* v. *Hicklin* (1868), L.R. 3 Q.B. 360 (Q.B.), and formerly adopted by Canadian courts as well. Under *Hicklin* restrictions on obscenity were justified because pornography was believed to have a tendency to *deprave* and *corrupt* those in whose hand it might happen to fall. This standard has to do with notions of moral 'degeneration' that once might conceivably have been perceived as connected with the disintegration of society. In this day and age, however, saying that we want to protect the consumers of pornogaphy from moral depravation sounds like a quick way to signify that we want to protect the persons concerned with the moral corruption of their weak fellow beings from being offended by what they perceive, precisely, as moral degeneration.

[160] Judith Butler underlines that "it appears that there is no language specific to the problem of lingusitc injury, which is, as it were, forced to draw its vocabulary from physical injury:" J.P. Butler, *Excitable*

was far from settled that pornography should bring about those consequences at all. In other words, it appeared difficult to negotiate rules of conduct, able to conform to the harm principle, regarding the citizens' relationship to pornography, as the presence of harm in the first place was, to many, counterintuitive, and, furthermore, the authority of the discourse of the Social Sciences could not be directly exploited by the Law because of the former inconclusiveness in relation to the harms produced by pornography.[161]

Still, the Court must have thought that pornography *needed* regulation, in one way or another. So what did the judicial discourse in *Butler* do?

The Court justified the rules of conduct codified in *Butler* by using, as we have seen in chapter one, principles of constitutional adjudication that worked in such a way as to legitimise the legislature's apprehension of harm- namely, the implication according to which 'low value speech' + 'controversial issues' → 'deference to Parliament.' This operation could be seen as still consistent with the discourse of rights, as it may suggest that the rules of conduct set out in s.163 are those codifying responsibilities whose meaning has been *negotiated* by the representatives of the people (Parliament) in accordance with the harm principle (entitlements/rights model), rather than those translating into law a supposed pre-existing societal consensus about pornography (responsibilities model). But is this really the case?

The Court was supposed to use the entitlement model and the harm principle, in so far as it was working within a framework, and by virtue, of a discourse of rights. Still I would suggest that the Court's reasoning, in regarding deference to Parliament as decisive for settling the problem it was dealing with, relied heavily on having previously compounded the rights model with the logic of the responsibility model. When the Court, at a previous stage, had emphasised the relevance of the community standards test,[162] it was suggesting that the criminalization of obscene material was possible precisely thanks to identifiable standards of *the community as a whole* capable of deciding what sexually explicit expression exploits sex unduly. In doing so, the judicial discourse had fictively

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Speech (New York: Routledge, 1997) at 4. This might suggest that discourse is unable to convincingly sustain that emotional/psychological offence is, unambiguously, 'harm.'

[161] See *Butler, supra* note 1 at 502.

[162] See *Butler, supra* note 1 at 483-5.

presented the community as sharing an understanding, a consensus about pornography, that was truly only limited to its radical feminist elements.[163] Of course, the Law's telling the community that the community itself believed pornography to be harmful, was (and it still is) in actuality the imposition of a norm (after all isn't that what the law is supposed to do?), in particular one enjoining the community that they *should* believe that pornography is harmful. Still, it is arguably by relying on this previously constructed fiction of a societal consensus about the harmfulness of pornography that the argument of deference to Parliament can be taken as decisive.

In fact, that argument, alone, would have still left open the question of the basis on which Parliament had a reasonable apprehension of harm, as only such an apprehension would have allowed the legislature to negotiate rules of responsibility governing individual conduct relating to harmful pornographic material (s.163). But the argument of adopting a deferential attitude towards legislative choices was able to become conclusive to the extent that it benefited from the echo of a previously expounded notion of a pre-existing societal consensus about the harms of pornography (and therefore about which conduct it is responsible to take in relation to it). If such consensus was fictively introduced, it was possible to see the legislature, in its position of representative of the people, as translating the shared understandings of the community into law, and to do that un-problematically (for, the consensus fictively being presented as one of the community as a whole, there was no minority view to take into account).

This operation, through which the Court practically injects the logic of the responsibility model into the entitlement model, is yet another of those rhetorical devices/universalising gestures that allow the judicial discourse of *Butler* to successfully exploit the regulative possibilities of radical feminism.

If this account makes sense, models centred on responsibility would, at least in the context of western societies, appear peculiarly apt to help the Law reach precisely those results that lesbians and gay men, when they engage with court litigation in cases such as *Little Sisters,* are interested in challenging.

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[163] See *supra* note 111 and accompanying text.

IV: *The Flexibility of Rights.*

Rights are also considered problematic in that there can be clashes of different rights (which means the 'right' right will not always win over the wrong one), and there can be rights appropriated by the powerful.[164]

However, the flexibility of rights, in terms of their comparative openness to successful deployments by different actors, needn't be seen as a negative feature.

In the case study I am dealing with, there is substantial disagreement on the question of whether, and the extent to which, pornography should be regulated. Considering the divisions existing among and within progressive social movements over what can be called a progressive achievement, if it is true that different, possibly competing, claims can be voiced employing the discourse of rights, rights talk provides us with an opportunity to debate, both in and outside the courtroom, the protection/privileging of any given interest.

While the discourse of rights, in *Butler,* provided an opportunity to transfuse into law the egalitarian concerns of radical feminists (as well as the interests of the *aficionados* of conservative sexual morality, who had reason to approve the substantial results brought about, if not the motivations of, the decision), *Little Sisters* tells a different story. With the various perspectives taken by the plaintiffs and by the interveners LEAF and EGALE, *Little Sisters* shows how rights claims on an issue related to that decided in *Butler* can potentially support perceptions of the social good that differ considerably from orthodox radical feminist views. Courtrooms, on their part, may offer a forum for debating such perceptions.

The owners of the 'Little Sisters Book and Art Emporium' and the BCCLA espoused the view that

> [§ 156:] the Court should simply strike down the impugned provisions of the Customs Legislation ... [pursuant to the] submission that there is a sufficient nexus between the Customs Legislation and the detention and prohibition of non-obscene expression. Such infringements have no possible justification under section 1 of the Charter. "Reading down" is not

[164] See C. Smart, *supra* note 33 at 145-6, 153-9; and J. Bakan, *supra* note 52 at 87-100.

necessary in this case, although the Customs Legislation is, a fortiori, unconstitutional insofar as gay and lesbian and textual material is concerned given the extreme imbalance between the deleterious effect of the Customs Legislation on such material and the Customs Legislation's negligible, if any, salutary effect. The alternative remedy of "reading down", however, will need to be considered if the Court concludes that the infringement of non-obscene expression is not, in any way, caused by the Customs Legislation. However in that case, the objective of the Legislation would still not be pressing and compelling especially where gay and lesbian material and/or textual material is at issue. The Customs Legislation, having failed the first branch of the Oakes test (and indeed other branches as well) must therefore be read down so as not to apply to gay and lesbian and/or textual material. Likewise the Customs Legislation should, at a minimum, be read down if it is ruled to violate section 15 of the Charter.[165]

EGALE's main points seem to have been that

[§ 11:] the Customs Legislation fails to take account of our disadvantaged position as lesbians, gays, and bisexuals in a heterosexist society. It consequently has the following disparate and adverse effects on our communities: (i) its deleterious effects are more severe for us than for the majority heterosexual population; (ii) it results in the detention and seizure of a disproportionately large quantity of homo-erotic imagery and text; and (iii) it has a greater "chill" effect on freedom of expression in our communities than in society at large ... [§ 40:] The Butler analysis of the harmful effects of mainstream pornography is so embedded in a heterosexual context that it does nothing to elucidate the effects of lesbian, gay, and bisexual pornography. There is no sound basis to assume that the harm perceived to be caused by mainstream pornography is also caused by lesbian, gay, and bisexual pornography.[166]

LEAF submitted, among other things, that

[§ 28:] while the harms-based equality approach to obscenity law articulated by this Court in Butler must remain the cornerstone of obscenity law, a more constitutionally sensitive analysis of obscenity law is now required ... [§ 31: M]aterials which appear to eroticize exploitation or subordination or which appear to entrench discriminatory stereotypes based upon, for example, sex, sexual orientation, race, disability or age are much more likely to be harmful. However, it is only upon a critical and thorough examination of the impugned materials in light of the evidence

[165] *Appellants' Factum, supra* note 101.
[166] EGALE *Factum, supra* note 100.

> presented on harm that the principles in Butler can be applied in a constitutionally sensitive and appropriate manner ... [§ 2: T]he Customs Tariff ... denies the constitutional equality and expression rights of lesbians and other disadvantaged groups. This regime is unconstitutional because it fails to provide mechanisms to guard against misuses of the censoring power and it is wholly unsuited to making the factual and legal determinations, including the constitutional equality analysis, which should be required before any materials are found to be "obscene" and, as such, prohibited.[167]

The contentions of LEAF seem also to point towards an enhanced intra and inter-group dialogue within Canada's feminist movement. The absolute valorisation of an orthodox radical feminist position that characterised LEAF's stance in *Butler* seems to have given way, in *Little Sisters*, to a more nuanced perspective that attempts to take into account, and compound, a wider range of feminist views. In particular, it seems that the potential that the rights discourse presented for re-negotiating, in the *Little Sisters* trial, the operativeness of s.163(8) as it had been defined in *Butler* offered an opportunity to heighten feminists' sensitivity to the problem of the marginalisation of many lesbian voices.

In this sense, if the *Little Sisters* trial is in any way instructive, then that seems to be in the sense that the flexibility of rights can be potentially beneficial to lesbians and gay men fighting for equality of concern and for their freedom not to be silenced *either* by the state *or* private actors, *in* and *outside* the courtroom, *inside* and *outside* the formations of the civil society.

As regards specifically conservative forces' appropriation of the rights discourse, a few brief observations may suffice.

Davina Cooper speaks, from a post-Foucauldian perspective, of four dimensions of power: ideology, force, discipline, and resources. She defines the fourth mode of power as one which "works through its ability to create a material advantage that can be both acquired and deployed, for instance, legal rights."[168]

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[167] LEAF *Factum, supra* note 47.
[168] D. Cooper, *supra* note 134 at 22.

Once rights are thus understood as resources, the fact that they can be appropriated for different ends, and even to serve conservative agendas, appears less scandalous, much more so that it is not clear how frameworks that can be conceived as alternative to the rights model could eschew being used by regressive movements. It can be argued that the responsibility model, above discussed, proves precisely this.

In the previous section I have contended that the only way to conceptualise the responsibilities model in such a way as to make it a true alternative to the rights discourse is to conceive the former as one that takes pre-existing obligations (*i.e.* responsibilities) as given and binding: for where obligations become open to debate and re-negotiation the responsibilities model is indistinguishable from the entitlements/rights model, that focuses precisely on the continuous re-definition of the limits to exercising rights. In the context of Western societies, as we have seen, emphasis on a thus conceived responsibility model proves particularly serviceable to conservative ends when obscene expression is at stake, as this model can easily justify the enactment of laws restricting pornography on the basis of public morality/sexual propriety considerations.

From this perspective, although rights can be appropriated for regressive ends, it seems clear that in western societies lesbians and gay men's recourse to the entitlement model is not necessarily the least promising strategy to support their claims to self- and sex expression.

V: *The Rigidity of Rights: the Constraints of Liberal Ideology.*

1. Atomism.

From a Marxist perspective, rights have also been the object of a critique not so much because of their being a purely discursive projection of liberal capitalism and as such inherently flawed, but rather because of the constraints that liberal ideology puts on the discourse of rights, which, in itself, would otherwise be well amenable to actually progressive re-configurations and deployments.

Joel Bakan, if I understand him correctly, argues that constitutional litigation in Canada is ideologically shaped by the liberal tenets of anti-statism and atomism,[169] which impede the actualisation of the emancipatory (non-liberal) potentialities of the discourse of rights.[170] Bakan holds that the greatest ideological constraint is atomism,[171] which would prevent truly progressive advancements even if we could possibly overcome the obstacle of anti-statism.[172]

Atomism, as he defines it, conceptualises life's complex realities in rights-bearer/duty-holder relationships. As a consequence, "[p]ower relations and social conditions beyond the rights/duty dyad are irrelevant; disputes are considered and resolved by adjusting the relationship between the two disputants."[173] This means that, in particular, "[e]quality rights claims are thus unable to get at the causes of inequality and other social ills; they deal only with discrete symptoms leaving underlying social structures untouched."[174]

In sum, rights could hypothetically be used to promote actual progressive change; but in actuality they can do little to advance progressive social movements' agendas because they are colonised by liberal ideology, especially through atomism, that limits the concerns of rights to the symptoms rather than the causes of injustice.

Should this analysis dishearten gay men and lesbians seeking to achieve greater expressive freedom and avoid discriminatory treatment? I think it should not, in so far as, it seems to me, the argument that rights are atomistic, in that they deal with discrete symptoms rather than underlying causes, cannot be un-problematically applied outside a framework that draws distinctions that are roughly analogous to the Marxist notion of 'infrastructure/superstructure', where 'infrastructure' ≅ cause and 'superstructure' ≅ 'symptom'.

Cause/symptom arguments can be valuable to the extent that they alert us against the risk of taking change for granted just because we have scored a victory in the courts.

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[169] See J. Bakan, *supra* note 52 at 47 ff.
[170] See *ibid.* at 60.
[171] See *ibid.* at 51.
[172] See *ibid.* at 48, 51, 54.
[173] *Ibid.* at 47.
[174] *Ibid.* at 51.

Still, they can also be seen as somewhat too suggestive of "the "theory" of the weakest link: a local attack is supposed to have a sense and legitimacy only when directed towards the element which, when broken, will permit the total rupture of the chain: local action then, but which by the choice of its emplacement will act radically on the whole."[175]

Applied to litigation, in order to deny its potential for contributing to bring about progressive change, this theory at best underestimates the empowering effects that may follow from a successful rights claim, and at worst seems to downplay the meaning of over-determination. As Cooper highlights: "[I]f there is no primary determinant, if social life is overdetermined by the constant articulation and rearticulation of different elements, the effects of political strategy are both ... complex and uncertain."[176]

This seems to suggest that we should be heedful of the *caveat* not to let down our guard (after the successful outcome of a case) not so much because of the idea that in the courts we can deal only with symptoms, but rather because we recognise that inequality, as the product of social and discursive practices, is structured on a number of intersecting and mutually conditioning levels; that, moreover, it is often difficult, if not impossible, precisely to isolate the *determining causes*, as opposed to the *determined symptoms*, of inequality; and that therefore a strategy that recognises the need to work on several levels is probably the most promising.[177]

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[175] M. Foucault, "Power and Strategies: an Interview with Michel Foucault conducted by the *Revoltes Logiques Collective*" (J.B Borreil, G. Fraisse, J. Ranciere, P. Saint-Germain, M. Souletie, P. Vauday, P. Vermeren) in M. Morris and P. Patton, eds., *Michel Foucault: Power, Truth, Strategy* (Sydney: Feral, 1979) at 57.

[176] D. Cooper, *supra* note 134 at 132.

[177] Even accepting the distinction cause/symptom, besides, the characterisation of atomism as a constraint of liberal ideology that makes the rights framework end up dealing only with symptoms fails to convince me. Let me consider an example. Let us suppose, counterfactually, that anti-statism/anti-collectivism were no longer a problem in Canadian society, and courts could therefore impose duties directly on private actors. We would be left with atomism, *i.e.* a framework according to which social relations are read when the rights discourse is employed to amend those relations. Would this framework alone be sufficient to prevent the changing, for example, of the economic infrastructure based on private ownership of the means of production? Couldn't we say: "All the members of Canadian society are entitled to the right of economic equality, and therefore all those who possess the means of production have a duty to transfer their ownership to the state"? Surely this atomistic framework of rights-bearers/duty-holders does not look like a hindrance to, but rather like the means to conceptualise, a change that, far from dealing merely with symptoms, would affect the actual background relations of class domination (granted, I might be missing something here, but if I am, I am not sure what that is). This makes me wonder whether it is not the case that atomism is not a *constraint* imposed by liberal ideology on an otherwise more flexible rights discourse, but rather a pretty neutral -and, actually, occasionally enabling- structural element of the rights discourse.

These observations seem to fit the case of lesbians and gay men's legal battles to affirm their freedom of sexually explicit expression and their right to equal treatment peculiarly well.

From the point of view of freedom of expression, one of the causes limiting in Canada the availability of existing lesbian and gay pornography is the very existence of the customs legislation. This does not mean, obviously, that there are no other causes for gay men's and/or lesbians' less than full enjoyment of freedom of speech, whether sexually explicit or not (*e.g.*, social prejudice that silences homosexuals or drives much of their expression 'underground,' and lack of pay equity for women that makes lesbians - whether single or not- disproportionately likely to lack the resources to engage in meaningful freedom of expression activities). It means, however, that striking or reading down the customs legislation would effectively remove *one* of the obstacles to lesbians' and gay men's freedom of speech.

Besides, even accepting that discriminatory obscenity laws as the customs legislation are the legal projection, and therefore a symptom, of an unjust (heterosexist) order that, if rectified at a more profound level, would bring about the disappearance of such unjust laws, that does not exclude that repeal (or modification) of those laws can be precisely one of the causes of the rectification of that system, in at least three senses.

First, as we have seen, an enhanced circulation of gay and lesbian material can contribute to the displacement of both sex binarism and the matrix of compulsory heterosexuality.

Second, if it is true that law as a discourse has a powerful potential for disqualifying other knowledges,[178] the general appreciation of some sort of courts' sensitivity for the rights of lesbians and gay men may be thought to contribute, however to a small extent, to change for the best attitudes towards the homosexual 'other.'[179]

Third, pornography can be 'bracing' for the sense of agency of lesbians and gay men, which is crucial in their struggle for equality:

> [§ 6:]Sexually explicit lesbian, gay, and bisexual materials not only render homo- and bi-sexual desire visible (in a society in which heterosexual

[178] See C. Smart, *supra* note 33 at 4-20.
[179] See also D. Herman, *supra* note 123 at 4, 19.

> desire is omnipresent and overwhelming), they also enable us to claim and exercise agency over how our sexualities get constructed, defined, depicted, described, and represented. This is particularly important for lesbians and bisexual women, whose sexualities are often appropriated, distorted, and packaged for heterosexual male consumption in mainstream pornography ... [§ 9:] All forms of sexual representation are part of an inherently political discourse about such fundamental issues as identity,humanity, passion, power, control, vulnerability, trust, respect, intimacy, and, of course, sexuality. Lesbian, gay, and bisexual materials make an important contribution to that discourse. They thereby operate as a socializing force, provoking informed discussion among lesbians, gays, and bisexuals, through which we create networks, forge social and political ties, and develop vibrant communities.[180]

The complex way in which equality and freedom intersect in the case of lesbians' and gay men's pornographic expression seems to suggest that there is no single/simple cause for injustice, that a rigid distinction between determined symptoms and determining causes is somewhat misconceived, and that the statement that rights are fit to deal merely with the symptoms, rather than the causes of injustice, might be reformulated to the effect that rights strategies and court litigation, if deployed in isolation and outside a set of integrated strategies, are likely to yield only partial results.

2. Antistatism.

Anti-statism is the lack of trust in public authorities, which makes the *Canadian Charter* a means to check their, rather than private actors,' action (although, *e.g.*, in discrimination cases, private actors' acts can be reached indirectly by subjecting to Charter review human rights legislation that regards them). Besides, anti-statism prevents the courts from imposing positive duties on the government to redress social inequalities (although, when the government has chosen on its own initiative to provide a benefit, the courts can oblige it not to do it in a discriminatory fashion).[181]

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[180] EGALE *Factum, supra* note 100.
[181] See J. Bakan, *supra* note 52 at 47-48.

Bakan characterises anti-statism as ideological in that it is "anchored in historical forces and institutions."[182] This would seem to imply the corollary of its inevitability until the capitalist infrastructure is itself subjected to a radical change.

What does this analysis of antistatism as a tenet of liberal ideology investing the rights discourse tell us about the likelihood of success and the significance of gays and lesbians' litigation in freedom of expression cases involving obscenity, and particularly, lesbian and gay pornography?

2(a). Antistatism and Judges

It would seem that a consistent antistatist ideology influencing adjudicators in obscenity cases should favour the cause of lesbians' and gay men's freedom of sexually explicit expression and equality, at least in the sense of allowing them to achieve the short term result of having such laws as the customs legislation removed (with the aforementioned connected beneficial consequences potentially ensuing from such removal).

There are two reasons that account for the fact that anti-statism here needn't be seen as detrimental to progressive achievements (as is instead generally the case in Bakan's analysis). First, as I have tried to show in the previous and present chapter, an anti-censorship position regarding obscenity has at the very least no less reasonable a claim to be called 'progressive' than a pro-censorship, radical feminist one. Second, an 'antistatist' decision here, given the controversial nature of the type of expression at issue, would be likely to mean simply that the judge endorsed the view that "[c]ivil rights and liberties are essential components of a just society, and with the increasing influence of conservative ideas in mainstream politics, we should not take for granted protection from arbitrary, capricious, and discriminatory state action".[183]

The problem, of course, is that nothing like an anti-statist ideology seems to have played a major role in neither *Butler* nor the *Little Sisters* case.

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[182] See *ibid.* at 60.
[183] *Ibid.* at 56.

The only bit of *Butler* that, in an otherwise overwhelmingly pro-'state action' decision, seems to express antistatist concerns is the point at which Sopinka J. reminds us that private consumption of obscenity is not actionable under s.163[184] (and even there, the Court does that to *justify* state censorship). As to *Little Sisters,* the trial judge's view that it behoved himself -at the same time as censoring the arbitrary, biased application of the legislation- to specify that customs (*i.e.* state) officers are "intelligent, *conscientious* public servants *endeavouring* to perform a *complex* and *difficult* task in *adverse* circumstances" (emphasis added)[185] reflects the loyalty of an insider to its organisation which, in the circumstances of the case, is all but insulting.

How come antistatism, as an ideological constraint supposed -by virtue of its being ideological- to almost necessarily close in upon the rights discourse, fails to inform this discourse when obscenity is at stake?

This peculiar relationship between antistatism and obscenity still fits Bakan's analysis, as at some other junctures he underscores the fact that dominant ideology is not a uniform whole, and can therefore give birth to "competing, even contradictory positions"[186] (elsewhere he highlights the appeal of social-democratic values to Canadian political culture ever since Worl War II).[187]

Some elaboration on Bakan's understandings of ideology might suggest that when he seems to refer to an ultimately unchangeable (as long as the infrastructure is left intact) anti-statist dominant ideology he has chiefly in mind, considering the centrality of the institution of private property in his reflection, precisely that form of anti-statism that finds substance in positions decrying publicly driven economies and the abolition of private property. When, on the other hand, he is speaking of dominant ideology as possibly contradictory, he is allowing for judges hatching either some sort of 'anti-statism' that is not necessarily undesirable (considered that the risk of arbitrary state action is a

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[184] *Butler, supra* note 1 at 507.
[185] *Little Sisters, supra* note 18 at 554.
[186] J. Bakan, *supra* note 52 at 113.
[187] See *ibid.* at 98-9.

reality) or one that is not unambiguous, to the point even of anti-statism giving way to quite an opposite feeling.[188]

Taking thus notice of the non-responsiveness of Canadian courts to anti-state ideologies in obscenity provisions suggests that, at least in the foreseeable future, there is little likelihood that *Butler* will be reversed. As regards specifically the *Little Sisters* case, the Supreme Court pro-'state regulation' stance makes it conceivably difficult for it to accept arguments that underline the harmlessness of gay and lesbian pornography, and therefore imply the suggestion of deregulating it for absence of pressing and substantial legislative objective. On the other hand, it is not unconceivable for the Court to strike or read down the legislation on the basis of its unjustifiably disproportionate impact on gay and lesbian pornography, or on the basis of the legislation's potential for reaching non-obscene expression. But the Court's sympathy for state regulation of obscenity suggests that the justices would thus strike or read down the customs legislation only to the extent that they were reassured that the legislature would be ready to re-enact some other

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[188] In fact, it may be true that ideologies are given birth in connection with given social relations that they are supposed to, and help, serve: but this does not mean that dominant discourse leaves no space for opposition *within its own terms*. By this I do not mean that the system allows a certain degree of opposition to be effected through the system's language only because the system is ready to reabsorb the anti-hegemonic episode at the same time as leaving the self-serving and false impression that opposition and change through the system's language are a reality- as if a certain degree of opposition to the system is already organic to, in that it is organised within and by, the system. My contention is in fact the stronger claim that the system, organised along axes of class, gender, and race inequality, is far from being a perfect machine, a homogeneous whole that contrives to make relations of domination always, in the last resort, be affirmed through its own language. As the case of antistatism shows, dominant ideologies are not un-problematically self-consistent and crystallised. Ideologies are rather self-contradictory, and they intersect with one another, and while constraining the strategic choices of progressive social movements they also enable them. Besides, not only is it the case that the complexity of the system is reflected in ambiguities and contradictions in the system language, (see J. Bakan, *supra* note 52 at 113) –*i.e.* dominant ideology- but also it is sensible to believe that appropriation of the system language by oppositional forces does not leave the language itself intact and unchanged. Surely, as Herman affirms, "[t]here is ... no reason why progressive social movements necessarily rearticulate rights in such a way as to challenge status-quo social relations," (D. Herman, *supra* note 123 at 65) but then neither the reverse can be assumed (nor does she assume it, for that matter). Stressing that the *liberal* framework of the discourse of rights is not subject -as the very polysemic nature of the term "liberal" suggets- to an inescapable *liberal*, in the sense of non-progressive, ideology -like a consistent anti-statism, or, in the field of anti-discrimination laws, the minority paradigm (for which see *infra* in the text of this chapter, section V(3))- is meant to support the contention that, even in our present time and place, rights, if employed critically and especially in conjunction with other strategies for change, need not be seen as incapable of achieving (admittedly: in some contexts more than in others: see D. Herman, *ibid.* at 51) valuable results for social movements, that can go beyond their utility merely as mobilising tools (for the notion of rights as tools for political mobilisation, see S.A. Scheingold, *supra* note 157 at 131 ff.; and D. Herman, *ibid.* at 48-9).

customs obscenity laws not reproducing the shortcomings of the impugned regime; or, at a minimum, that there still are obscenity provisions in the criminal code which can be used by the state to control obscene material that, in the absence of any customs legislation, would end up crossing the border undisturbed.

2(b). Antistatism and Anti-Censorship Claims.

In specifically discussing the negative effects of antistatist ideology on litigation about freedom of expression issues, Bakan affirms that the

> social constraints on people's capacity to communicate effectively ... are obscured by the emphasis on censorship in freedom-of-expression discourse. People are wrongly presumed to have freedom of expression in the absence of censorship, or at least that seems to be the implication of anti-censorship positions.[189]

To illustrate his point, he refers explicitly to the *Little Sisters* case, contending that

> this case can only very minimally enhance the communicative power of lesbians and gays. It focuses narrowly on a discrete set of governmental restrictions on expression and does not touch the institutionalized exclusion of lesbian and gay knowledge ... Nor does it contemplate the power of homophobia to restrict, though discrimination and violence, the expression of lesbian and gay identity ... While I fully support the Little Sisters Bookstore ... the intense focus of the anti-censorship movement on discrete state restrictions on freedom of expression effectively masks, or at least de-emphasizes wider repressive processes.[190]

In many cases, therefore, the problem with anti-statism may be less that of one's being sceptical about the wisdom of public authorities than that of one's loosing sight of the oppressive relations among privates.[191]

In my view, the sort of anti-statism which supposedly animates gay and lesbian anti-censorship claims is not of any truly dangerous type: there is little likelihood that lesbian and gay anti-censorship activists, whose life experience contemplates a fair share

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[189] J. Bakan, *supra* note 52 at 70-1.
[190] *Ibid.* at 71.

of homophobic social intercourse, and who have to put up daily with presumptions of heterosexuality, will overlook the oppressive relations that characterise their everyday life in civil society and ascribe to the state the source of their evils. At the same time, some of them will nurture anti-state feelings (in the form of misgivings about the wisdom of state officers) that are probably healthy and justified to the extent that they derive from experiencing discrimination at the end of public authorities.

Besides, while I suggest, for the reasons already expounded in the previous section, that the positive effects (for gays and lesbians expression/equality) following a constitutional challenge against obscenity legislation needn't be seen as limited to the removal of the repressive state action, I also note that the plaintiffs' and the interveners' factums in the *Little Sisters* trial did not fail to bring to the fore precisely the marginalisation of lesbian and gay voices in society at large (and the extent to which state censorship contributes to it):

> [§ 4:]To the extent that our sexualities are acknowledged in mainstream advertising, literature, visual art, or other media, the representations are usually inaccurate and/or pejorative. The dominant cultural discourse on sexuality privileges certain (heterocentric) conceptions, descriptions, and depictions of sexual identity and reality, while marginalizing others. The unequivocal message conveyed by mainstream cultural representations is that heterosexuality is the (almost universal) norm, and our lesbian, gay, and bisexual sexualities are unnatural, deviant, and perverse ... [§ 10:] Since all forms of lesbian, gay, and bisexual literature are essential to the health and vibrancy of our communities, and since much of that literature is not readily available in mainstream bookstores and libraries, the bookstores that specialize in publications produced by and for lesbians, gays, and bisexuals effectively operate as indispensable community resource centres and gathering places. In addition to selling periodicals and books, they display and circulate free literature, post notices and disseminate information about community organizations and meetings, and host and distribute tickets for social and cultural events. Unfortunately, there are only a handful of such bookstores in Canada. They are all small independent businesses with limited financial resources.[192]

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[191] See *ibid.* at 47, 71.

[192] EGALE *Factum, supra* note 100.

It could be argued, admittedly, that the actors in the *Little Sisters* trial might have gone further, demanding direct state intervention to promote marginalised queer views, rather than limiting themselves to asking for the removal of state limitations on the expression of those views. It is not clear, however, whether failing to ask for positive state action was here the consequence of suspicion of state power on the part of appellants and interveners rather than, perhaps, a strategic choice of theirs motivated by the consideration that, *e.g.*, the time was premature, or the circumstances of the case were inadequate, to sustain such a request.

3. Equality Claims and the Minority Paradigm.

Didi Herman states:

"Legal liberalism ... assumes a series of truths: society is pluralistic, there are majorities and minorities, true democracy necessitates the protection of minorities from the tyranny of majorities and true minorities share characteristics that differentiate them from the majority norm."[193]

The presently hegemonic "minority paradigm" is said to be part of this ideology.[194] According to it, individuals are encoded in categories defined by a shared characteristic of the members of the group, -*e.g.*: sexual orientation- that makes them stand out as 'others' against the assumed, and therefore unquestioned, background norm - *e.g.*: straightness, itself a category relying on such taken for granted truths as the dichotomous nature of sex and the continuity between sex and desire.[195]

In discussing equality clauses proscribing discrimination of minorities, Herman highlights how the minority paradigm can be unsatisfactory or counterproductive. In particular, equality rights for lesbians and gay men granted on the basis of their belonging to a sexual minority *conceived as other than an assumed heterosexual norm* at best leave untouched, at worst contribute to depoliticising, and therefore reproduce, the problem of

[193] D. Herman, *supra* note 123 at 38.
[194] *Ibid.* at 38, 43.

gender roles and compulsory heterosexuality- *i.e.* the very underlying causes of discrimination against queers. Discrimination, then, turns out to be dealt with only in a limiting, hardly effective, and even counter-productive way.[196]

For the sake of clarity, it can be noted right now that it is possible to conceive equality claims framed in a way that avoids reproducing the problematic notions lying at the heart of the equality paradigm. In particular, lesbians and gay men can attempt to communicate that their right not to be discriminated against does not stem from their being human beings just as worthy as heterosexuals, but by explicitly raising the issue that the distinction homo/hetero and the opposition male/female are, for a variety of purposes, misconceived in the first place (this will require, in certain cases, not merely asking for the extension of a 'heterosexual' right to lesbians and gay men, but rather for a restructuring of the right itself, that in some cases, for example, might have been framed around the model of the nuclear heterosexual family).

Towards the end of this section I will get back to the issue of raising equality claims that do not depend on the minority paradigm, mentioning how one such claim was made precisely in the *Little Sisters* trial. Now I wish to deal with other ways in which the risks posed by the minority paradigm can be eschewed in deploying rights.

It seems fair to say that equality considerations are a major reason motivating lesbians and gay men when they engage with constitutional litigation to challenge an action that affects them in their capacity as gays, lesbians, homosexuals, women and/or men engaging in same-sex relationship or sexual activities, etc. The *Little Sisters* trial, as we know, is no exception, nor would any other instance of gays and lesbians' litigation relating to obscenity laws be likely to be destitute of an equality component.

As we have seen above, according to Herman's analysis, the minority paradigm is an element of liberal ideology, and as such hegemonic. This should mean that every time an equality issue is raised by lesbians and/or gay men, the problems associated with the paradigm are disproportionately likely to be involved.

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[195] See *ibid.* at 38, 44.
[196] See *ibid.* at 32-53.

Yet, the minority paradigm -and its problems- needn't become relevant every time gays and lesbians engage with constitutional litigation relating to obscenity laws, however much an equality issue may be actually implicated in the constitutional challenge. In particular, the risks created by the paradigm needn't have been directly involved in the *Little Sisters* trial.

Where possible, lesbians and gay men can in fact make a claim that, while still capable of achieving the desired result, avoids raising the equality issue altogether, so that, in being denied an occasion to make use of the paradigm, the Law is not provided with an occasion to reinstall the naturalness of heterosexuality and sex/gender binarism.

In the *Little Sisters* trial, for example, the appellants might have chosen to challenge the Customs Legislation *only* on the ground that it constituted a system of prior restraints, that non-obscene expression was inevitably caught into its net, etc.

It would appear that here the problem is very much like the one analysed in the section about the subject of rights, in which it was suggested that it might be desirable to avoid entrusting the Law with a chance to 'elaborate' on homosexuality at all. I would suggest, in fact, that the problem is *the same*.

This observation is important, in that, by contradicting (as I will immediately try to explain) the statement that the minority paradigm is an element of the liberal discourse of rights, explains in which sense the paradigm is hegemonic (rather than quasi-necessarily implicated) when rights talk is undertaken by social actors. Clarification on this point is important in turn because it may highlight the extent to which, when gays and lesbians raise an equality claim (in general or) to counter the effects of obscenity laws (as they did in *Little Sisters*), their critical use of the rights discourse may fail to backfire under the respect of the Law's discursively reinstalling the otherness of homosexuality.

I would contend that the minority paradigm, rather than being an element of the legal liberalism of the discourse of rights, is produced at the intersection between different discourses. As far as lesbians and gay men are concerned, I would argue that the discourse with which liberal legalism intersects is precisely that of the human sciences,[197]

[197] Herman does not ignore –in fact deals extensively with- the relationships between the legal discourse and the one of the sciences of man in court cases involving lesbian and gay equality issues, (see *ibid.* at

that is mainly responsible for intervening to *define* the 'homosexual minority,' *i.e.* to construct it precisely as a minority, and producing reasons to explain and justify its minority status. In this sense, the minority paradigm is better conceived as *a discursively composite* justificatory framework that today tends to underlie Law's granting of equality rights to certain social groups.

This conception of the minority paradigm would seem to better fit a non-essentialising notion of liberal theory, that, it seems to me, is very ambiguous as regards the way in which differences should be tolerated,[198] to the point of making it scarcely possible for one to find a hegemonic liberal position that privileges the understandings codified in the minority paradigm. This means that if there is a specific way in which equality/toleration *tends* to be promoted within the liberal discourse of rights, –namely the idea, consistent with the equality paradigm, that the (*e.g.* homosexual) 'other' should be tolerated precisely as other (than the unquestioned (*e.g.*heterosexual) norm)- that should be ascribed to the relative indeterminacy of liberal theories, that has been making possible the Law's appropriation, while operating within the framework of liberal

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128-44) but she does not extend her analysis of such relationships to the issue of the construction of the minority paradigm itself.

[198] A great deal of liberal rhetoric about rights and minorities, in effect, is precisely about the value of diversity, not only (a) for its own sake -which is already, I would argue, a step beyond the unproblematic acceptance of the 'normality' of the general norm- but also (b) for its role, in a utilitarian perspective, in facilitating progress and better forms of social life to take hold on society. As to (a), see *e.g.* S.H. Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge, Mass.: Harvard University Press, 1990) where the meaning of the author's wish for a 'whitmanesque' America that celebrates dissent is probably best illustrated by the words of the very poet he alludes to: "Piety and conformity to them that like, / Peace, obesity, allegiance, to them that like, / I am he who tauntingly compels men, women, nations, / Crying, Leap from your seats and contend for your lives! / I am he who walks the States with a barb'd tongue, questioning every one I meet, / *Who are you that wanted only to be told what you knew before? / Who are you that wanted only a book to join you in your nonsense?*" (emphasis added): W. Whitman, *By Blue Ontario's Shore, vv. 32-8 (1881) Leaves of Grass*. As regards (b) see *e.g.* J.S. Mill, *On Liberty* with *The Subjection of Women* and *Chapters on Socialism* (Cambridge: Cambridge University Press, 1989): "Why ...should tolerance, as far as the publc sentiment is concerned, extend only to tastes and modes of life which extort acquiescence by the multitude of their adherents? ... [T]he man, and still more the woman, who can be accused either of doing 'what nobody does', or of not doing 'what everybody does', is the subject of as much depreciatory remark as if he or she had committed some grave moral delinquency" (68). "[F]orgetting that the unlikeness of one person to another is generally the first thing which draws the attention of either to the imperfection of his own type, and the superiority of another, or the possibility, by combining the avantages of both, of producing something better than either" (71). Consider, for another example, the rhetoric of the "*melting* pot."

legalism, of identity notions produced, for instance, by the discourses and practices of the sciences of man.[199]

I have suggested that in the *Little Sisters* trial the appellants might have chosen not to raise the equality issue so as to avoid the Court's likely utilisation of the minority paradigm. But (besides there being cases, obviously, in which, in order to achieve their ends, social movements cannot help raising the question of equality), there can be strategic reasons that militate in favour of pursuing an end involving an equality issue precisely by raising that issue, even where it would have been hypothetically possible to achieve the end avoiding making the equality claim.

In the *Little Sisters* trial the choice of gay and lesbian legal actors to raise equality arguments in order to accomplish an end hypothetically achievable by making merely freedom of expression claims may suggest the plaintiffs and the interveners' believing such equality arguments to be more appealing than free speech ones to the Supreme Court of Canada; alternatively, raising both free speech and equality issues might have been meant as an extra safe-guard, in case the Court should reject general freedom of expression arguments. Even the idea that the Court's recognition of an equality claim would send out a message against sexual orientation discrimination, and therefore the wish to exploit the Law's power to disqualify other knowledges, may have played a role.

It is, however, precisely reliance on this of Law's powers that is hazardous for lesbians and gay men raising an equality claim, as the discursive authority of the Law would, to some extent, reinstall oppression where it recognised (or rejected) the equality claim on the basis of the questionable assumptions of the minority paradigm.

Lesbians and gay men who make equality arguments (either because they have no choice or because they decide to do so) face the difficult situation of either casting the

[199] The Law may also be thought to draw on itself, on its precedents, in a sense to cite itself, when it makes use of the minority paradigm as described by Herman, in so far as the Law has been contributing to the construction of homosexuality after appropriating this category as it was created in the context of the sciences of men (no need to underline that here the Law cannot be reduced to the discourse of rights, to the extent that it combines liberal theories /ideologies about rights with other knowledges).

clam in the form of the minority paradigm, or taking their chances in terms of making it look less intelligible or less appealing to those before whom the claim is raised.[200]

Still, lesbians and gay men who want to convey oppositional meanings about themselves do not face this difficulty only when they employ the discourse of rights, *i.e.* inside the courtrooms, precisely because the problems associated with the minority paradigm do not stem from the discourse of rights, but rather, as we have seen, from how homosexuality has been discursively constructed in society after the sciences of men firstly created 'the homosexual.' To the extent that homosexuality, thus understood, is part of dominant ideology, every strategy for change that runs counter this common sense notions will be resisted, and the more oppositional (queer) the meaning, the harder the struggle. If dominant ideology is pervasive, each and every effort of social movement to install a new regime of truth is bound to be met with resistance at some (most?) stages.[201]

It should be underlined, however, that it is precisely to the extent that the minority paradigm is conceptualised as non-integral to the liberal discourse of rights itself (or to some hegemonic version of liberal ideology necessarily investing it), that it is possible to prefigure deployments of the right to equality that are not doomed to bring about quasi necessarily the utilisation of the paradigm itself.[202]

In the *Little Sisters* case, LEAF's attempt to convey non-common sense meanings that challenge the matrix of compulsory heterosexuality is exceedingly noteworthy:

> [§ 24:] The equality rights of heterosexual women are also affected by the targeting of LGBT materials. These materials benefit heterosexual women because they may challenge sexism, *compulsory heterosexuality* and the dominant, heterosexist sexual representations which often portray "normal" heterosexuality as men dominating women and women enjoying pain and degradation (emphasis added).[203]

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[200] Precisely with reference to a case involving equality for lesbians and gay men, *i.e.* the passing of the sexual orientation amendment to Ontario's Human Rights Code, Herman laments that gay and lesbian groups advocating enactment of the amendment were induced to employ a dubiously useful "low-key argumentation." See D. Herman, *supra* note 123 at 32-53; quotation at 35.

[201] For a convincing account, see J. Bakan, *supra* note 52 at 68-70.

[202] In analysing how to use rights, it is important to highlight the disciplinary dimension of power and the discursive constructions that seem to pertain to it. By doing so we will be less likely to overlook both the emancipatory possibilities of the specifically liberal discourse of rights, and how disciplinary power may be supposed to intervene to limit the liberatory potential of the discourse of rights *as well as* that of conceivable alternative discourses/sites.

[203] LEAF *Factum, supra* note 47.

By making this submission, LEAF is working to undermine the minority paradigm that tends to sustain recognisance of equality claims for homosexuals, introducing in the courtroom notions capable to redefine the meaning of those claims.

CHAPTER III

I: *Premise:Pornography and Hate Speech.*

As we have seen in the introduction, since the powerful insight provided by radical feminist discourse about sexually explicit representation, there has been a tendency to assimilate obscene to hateful speech among commentators adopting either the hate/sex speech regulation position or the pro-free speech stance. The former have highlighted the way in which pornography can be considered a sub-category of hate speech because of the sexist messages it conveys; the latter have stated that precisely the political character –however obnoxious- of both hate speech and pornography should make them immune from regulation.

Chapter one and two considered the relationship between equality-centred anti-pornography legislation and lesbians' and gay men's concerns for their own sexually explicit representation. In this chapter I turn to the issue of hate speech, again -after some more general considerations- with an eye to the homosexual context, and specifically the case of hate speech directed at lesbians and gay men.

Some jurisdictions are already endowed with anti-vilification laws, or hate propaganda laws that forbid dissemination of hatred and bigotry also in cases where this is motivated by sexual orientation (or specifically homosexuality).[204] These hate

[204] For example, the *Canadian Human Rights Act* S.C. 1976-77, c. 33, s13(1) provides: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," and among such grounds there is sexual orientation. In New South Wales, it is unlawful to publicly incite "hatred towards, serious contempt for, severe ridicule of, a person or a group of persons on the ground of the homosexuality of the person or members of the group, and it is a criminal offence to do it by means which include threats (or incitement to threats) of physical harm towards the person or group at issue or their property (*Anti-Discrimination Act* 1977 (NSW) s. 49ZT and 49ZTA): see D. Marr, *supra* note 10 at 15-16. In the Netherlands, it is a criminal offence to publicly express discriminatory remarks, encourage discrimination, or incite to hatred, discrimination, violence against a group of persons, on the basis of sexual orientation (art.137c-f of the Dutch Penal Code): see *The International Lesbian And Gay Association World Legal Survey- Country: Netherlands,* online: ILGA <www.ilga.org/Information/legal_survey/Europe/Netherlands.htm>.

propaganda laws present different features, to the extent that they can provide for criminal or civil remedies; also, in so far as they are differently worded, it seems that the speech activities covered by the relevant provisions might differ from country to country. They all raise similar issues, however, to the extent that they pose a limit to freedom of expression which is generally understood as falling short of the clear and present danger test. These general issues will constitute the object of my analysis, while a detailed analysis of particular national legislations regarding hate propaganda against lesbians and gay men is beyond the scope of this chapter.

I want to argue at the outset that there is a fundamental difference between hate speech and pornography, that, in a sense, may be seen as making the former a more problematic phenomenon to deal with than the latter for people who think of themselves and their commitments as progressive.

As we know, in the case of pornography there is, among and within progressive social movements, a lack of agreement about the meaning and merits of the pornographic genre itself. If, in particular, we take notice of the range of opinions that not only dissociate pornography from discrimination and inequality, but also directly link pornography to equality,[205] a pro-censorship stance as regards obscene material in order to promote equality values loses much of its credit.

As to hate speech, this may be thought to have, so to speak, an *indirect* value, to the extent that protecting it should establish a precedent that could be used, at a future stage, to protect the political dissent of disadvantaged/unpopular minorities that the mainstream would be willing to silence. Besides, to the extent that the line between political dissent and hateful speech can sometimes be thin, (depending, arguably, on how widely hate speech is defined) protection of hate speech would avoid creating a so-called chilling effect on the legitimate and valuable (in terms of democratic commitments) expression of such dissent. Finally, hate speech may contribute to the vitality of opinions emphasising egalitarianism, in so far as such opinions are cogently re-affirmed pursuant

to the challenge levelled at them by hateful speech. It can also be argued (albeit, perhaps, less persuasively) that expression of hate speech may serve as a safety valve for enraged bigots whose frustration may otherwise lead them to commit acts of violence.

However, when, rather than the *indirect value* of the expression of hatred, we consider the meaning and the *inherent* merits of hate speech, there seems to be no dispute about either the hideousness of the former or the unredeemed character of the latter. This seems to be the case not only in constitutional discourse and public authorities' official positions but also at the level of progressive social movements' invariable evaluation, and even society's *general* perception, of hate speech. This univocal, strong condemnation seems often to constrain the problem of how to react legally to the dissemination of hate within the boundaries of the inescapable opposition 'freedom of expression v. equality.' For people who are strongly committed to both values the problem may become almost intractable.

Surely, as we know from the introduction, when freedom of expression is involved, there may be reasonable grounds to hold, *as a point of departure*, a position that is prejudiced in favour of uninhibited public debate. A bias towards freedom of expression makes a lot of sense owing to the 'special status' that is thought to pertain to the value of freedom of expression in democratic societies. This special status appears to have been formally recognised both by the Supreme Court of Canada (in its intentionally *wide and liberal* interpretation of the freedom of expression guarantee, whose limitations are justified 'belatedly' under the "Guarantee of Rights and Freedoms" clause)[206] and in

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[205] For various interpretations of pornographic material that view it as not inimical to the idea of women's equality and may actually think of sexually explicit representation as a *genre* validating gender equality, see also the account given in N. Strossen, *supra* note 15 at 141-78.

[206] In Canada the constitutional guarantee of freedom of expression ensures everybody's "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication:" *Canadian Charter of Rights and Freedoms*, s. 2(b), *supra* note 55; while the "Guarantee of Rights and Freedoms" clause states that "[t]he 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:" *Canadian Charter of Rights and Freedoms*, s. 1, *ibid.* S. 2(b) is interpreted in such a way as to ensure constitutional protection to speech irrespective of the content of the communication, while s. 1 is used to consider constitutionally admissible what under s. 2(b) may have been qualified as an infringement of freedom of expression. S.S. Anand, "Beyond *Keegstra*: The Constitutionality of the Wilful Promotion of Hatred Revisited" (1998) 9.2 N.J.C.L. 117 at 120-2, to the contention that the Supreme Court's almost absolute interpretation of s. 2(b) betrays the Court's own previous adoption of the so-called 'purposive approach' in determining the scope of a *Charter*'s right,

American First Amendment jurisprudence (that is very radical in its adopting an approach that takes free speech limits as a finite, low number of exceptions to the general rule of unfettered freedom of expression).

Although starting from the same proposition that a strong freedom of speech principle is essential to democracy, Canada and the United States, as we know from the introduction, were able to reach, as regards the regulation of hate speech, diverging conclusions. If we consider this circumstance, it is arguable that, in debating hate speech regulation, assuming a position that is mindful of the need not to encroach upon free speech more than necessary is a somewhat safe starting point.

It is true that when odious speech acts such as the dissemination of hate are at issue, emphasising the foremost importance of freedom of expression can be too easily mistaken for, and I believe can actually lead to, downplaying the value of equality. This happens when, in order to oppose those positions upholding hate speech regulation, classic civil libertarian arguments (however valid) are made at the same time as avoiding joining issue on the contention that hate speech and discrimination are related phenomena. Hate speech thus ends up being treated as any other kind of unpopular expression, without paying attention to the context of racism, (hetero)sexism and other forms of bigotry.[207]

Nevertheless, the fact remains that freedom of expression *is* generally of utmost relevance, and it is scarcely witty for advocates of hate speech regulation to discount this relevance. I want to begin my discussion about hate speech precisely by reminding, selectively, a few general free speech rationales and traditional free speech theory categories, which should convey a sense of what freedom of expression is all about. I choose to do this in the somewhat unconventional way of considering those arguments

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replies that in the case of freedom of expression the purposive approach, far from calling for a balancing of freedom of speech with other *Charter* values, requires precisely that *all content* be covered by s. 2(b), "because the purpose of the entrenchment of the freedom of expression was to ensure that everyone could express themselves no matter how unpopular and distasteful such expression seemed" (122).

[207] For what I read as an example of this sort of approach see F. Haiman, "Nazis in Skokie: Anatomy of the Heckler's Veto" in T.L. Tedford, J.J. Makay, and D.L. Jamison, eds., *Perspectives on Freedom of Speech-Selected Essays from the Journals of the Speech Communication Association* (Carbondale: Southern Illinois University Press, 1987) at 216-225.

that attempt to justify hate speech restrictions by rejecting too easily, or ignoring rather uncritically, even the *general* validity of free speech rationales and categories.

In other words, in what follows I will engage in a critique of arguments that seem to me to unsuccessfully make little of freedom of expression in order to justify hate speech regulation. This is intended as a way to defend general free speech principles rather than discrediting *a priori* hate speech regulation itself for, as I will explain in section III, there are indeed more convincing ways to argue in favour of restricting the hateful expression of prejudice.

II: *Supporting Hate Speech Regulation by Attempting to Discredit General Free Speech Principles.*

The strain of arguments that I criticise affirms, for example, that

> the argument that a commitment to the democratic system of government requires an unqualified and preeminent commitment to free speech is *simply false* ... It relies on the proposition ... that governments, once in possession of power, ... will revert back to the autocratic powers of their eighteenth-century predecessors ... The reality is that speech issues raised by hate propaganda today are entirely different than [sic] speech issues that faced fledgling democracies in the seventeenth and eighteenth centuries. In the context of western democracies in the twentieth century, this argument is overplayed (emphasis added).[208]

A criticism framed in this way seems to deny the continuing validity of the free speech rationale known as the 'argument from democracy'. The validity of the rationale is presented as highly contextual: the argument from democracy was appropriate in the eighteenth century, but this is no longer the case in the twentieth and twenty-first centuries and the changed circumstances of western democracies. I would argue that such an account seems at least to run counter historical reality.

The legitimacy of alive and kicking *seventeenth and eighteenth* century seditious libel laws (proscribing the expression of criticism of the government) was little disputed in that period: a government's prerogative to censor political dissent, *per se,* did not seem

to offend many sensitivities.[209] In fact American free speech jurisprudence (*i.e.* the one that is maybe the most notable in developing a theory protective of *political* speech, which is seen as vital to democratic self-government) as well as the correlative increased appreciation of the function of the free speech guarantee as largely the democratic one of protecting political dissent are mainly a *twentieth century* phenomenon that started precisely as a response to *twentieth century's* governmental suppression of what by any standard should be considered political (in particular communist) speech.[210]

Denying protection to hate speech by indirectly questioning *today*'s practical relevance of a general free speech rationale as the argument from democracy[211] does not

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[208] K. Mahoney, *supra* note 11 at 796.

[209] For example Locke -the champion of individual rights in the seventeenth century- contended that "[t]hose who are seditious ... ought to be punished:" Locke, *A Letter Concerning Toleration*, *supra* note 16; Blackstone -the ultimate authority in English legal scholarship- in the eighteenth century explained that, as long as prior restraints on freedom of expression were not imposed, it was legitimate to punish, after the speech had been uttered, "blasphemous, immoral, treasonable, schismatical, seditious or scandalous libel," where, for the speech to be seditious, a finding that it had a "bad tendency of lowering the public esteem of the Government or disturbing the peace" was sufficient: Blackstone, *Commentaries in the Law of England* quoted in L.W. Levy, "Liberty and the First Amendment: 1790-1800" in K.L. Hall, ed., *Civil Liberties in American History,* vol. I (New York: Garland, 1987) 593 at 594 in footnote 6; finally the Sedition Act enacted by the American Congress in 1798 (although short lived) seems to have raised controversy under the respect of its violating the First Amendment more in terms of its transgressing the limits posed by this constitutional principle to the competence of the *Federal* Legislature (as opposed to the national Parliaments) rather than in the substantial sense of this principle's prescribing an (almost) absolute protection of (political) speech: see W. Berns, "Freedom of the Press and the Alien and Sedition Laws: a Reappraisal" in K.L.Hall, ed., *ibid.* 104.

[210] The clear and present danger test was first formulated in *Schenck* v. *United States,* 249 U.S. 211 (1919), and it does not seem to have been originally conceived as a particularly protective standard: the conviction of Schenck that the test then allowed would not have been justified by an application of the test as later 're-interpreted' by Justice Holmes in his dissent in *Abrams* v. *United States* 250 U.S. 616 (1919), where for the first time the clear and present danger standard assumed a civil libertarian meaning. See also H.L. Gates Jr., "Critical Race Theory and the First Amendment" in H.L. Gates Jr. et al., *supra* note 15, 17 at 21: "Indeed, the notion that the First Amendment has been a historical mainstay of American liberty is a paradigm instance of invented tradition. To begin with, the First Amendment was not conceived as protecting the free speech of citizens until 1931. Before then, the Court took the amendment at its word: "Congress shall make no law..." Congress couldn't; but states and municipalities could do what they liked. Given this background, it shouldn't surprise us that even once the Supreme Court recognized freedom of expression as a right held by citizens, the interpretation of its scope remained quite narrow ... until after World War II, when the Warren Court gradually ushered in a more generous vision of civil liberties. So the expansive First Amendment, that people either celebrate or bemoan is really only a few decades old."

[211] To show the continuing validity of the argument from democracy, as far as the U.S.A. are concerned, we can also think of how such an argument is in the way of the always lively attempts to introduce flag-burning statutory offences, or, more recently, a constitutional amendment to the same effect. Martha Minow found "disturbing [the] historical junction at which some of us urged greater response to hate incidents on college campuses, to pornography, to depictions of violence, and to experiences of harassment that some would defend as speech, just at the same time that others urged amending the Constitution to ban

appear, thus, a very promising strategy to convince ourselves of the soundness of a pro-hate speech laws position.[212]

Neither, in my view, does a critique of the validity of the 'argument from truth,' where one shows to have an issue with this free speech rationale not merely as regards the specific problem of hate speech, but more in general to show the theoretical inadequacy of the argument itself, of which the weakness in hate speech cases appears as merely one manifestation. In order to discredit the argument from truth in this way, it seems necessary to give a seventeenth version of it that nobody, nowadays, advances anymore.

When this free speech rationale is conceived as "[t]he view that the truth will always win out in a marketplace of ideas," it seems easy to conclude that the argument "is, at best, naive, and at worst, dangerous,"[213] both in hate speech cases and generally speaking.

For the sake of making an argument against the freedom to disseminate hate, the argument from truth is presented, in oversimplified and almost caricatural terms, as one that conceives truth as some fixed entity waiting out there for us to reveal it, and the process that is directed to such a discovery as one temporarily limited, *i.e.* one with a beginning and an end, the end coinciding with the necessary act of discovery. This

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flag burning and restricting public funding for the arts if they offend. The brutal repression of the Chinese student protests at Tienanmen Square accentuated the difficulties of attacking first Amendment analysis of American college campuses:" M. Minow, (1990) 11 "Speaking and Writing against Hate" Cardozo Law Review 1393 at 1403.

[212] However, an extremely narrow (to the point of its appearing, to put it mildly, arbitrary) definition of political speech, which would substantially leave unprotected such speech as the one at issue in *Abrams*, might possibly accommodate a contention that the need to protect political dissent is no more felt in this day and age. This may be the way in which Mahoney's contentions should be interpreted. If political speech is reduced to "discussion of public issues and free elections" alone -where the latter is taken to give an example of what only can be legitimately conceived as a 'public issue'- which would leave out, among other things, "even ineffectual talk about violent overthrow of democratic institutions" (K. Mahoney, *supra* note 11 at 796) then it might be that a free speech principle meant to protect political speech would be of little practical relevance today, as it is true that political speech advocating suppression of universal franchise nowadays probably is either non-existent or passes utterly unnoticed. Of course such a narrowly defined notion of political speech would leave unprotected, to name just one, the works of Karl Marx.

[213] *Ibid.* at 799. It should be noted that the author begins by affirming that "the general proposition that open discussion advances the pursuit of truth cannot be questioned," (*ibid.* at 798), although this statement is immediately qualified, and practically made empty, by the Professor's subsequent remarks (*e.g.*: " If one looks at other areas of social life where the primary objective is the pursuit of truth, the marketplace of ideas is not the model used:" *ibid.* at 799).

caricaturised account ignores the contemporary meaning of the argument from truth, which has a lot to do with the construction of truth to which the polity democratically participates in an ongoing process, and little to do with the idea of ultimate, unchangeable truths that after a limited period of time magically come to the fore in conditions of unfettered public debate.

For our purposes, a more appropriate criticism of the rationale in question would sensibly concentrate on trying to target the viability of the just illustrated notion of the argument from truth in hate speech cases, rather than launching wide-ranging attacks against a scare-crow version of the argument itself.[214]

Another general criticism to free speech theory raised with a view to making, indirectly, a more specific argument against the freedom to disseminate hate regards the notion of the so-called marketplace of ideas:

"[T]he free market analogy remains flawed because it assumes equal, unhindered access ...; modern methods of mass media have altered drastically the concept of equal communication."[215]

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[214] In what looks like an attempt to demonstrate the non-episodical inadequacy of the argument from truth, Mahoney refers to two other cases: pornography and criminal procedure. The Professor's discussion of the case of pornographic expression, however, suffers from several of the weaknesses typical of radical feminist treatments of the issue: pornography is reduced to a homogeneous body, this body is further found liable to a single univocal interpretation, alternative readings of the complexity of pornography's message are discounted, –or rather erased- and a linear, causal relationship is arbitrarily established between pornography and real life violence, which can be premised only in simplistic notions of the sameness of fantasy and action and on debatable notions of false consciousness ("the messages in pornography ... *is* [sic] *replicated* in real life statistics which also are increasing [sic] at a very rapid rate" (emphasis added): *ibid.*). All this for the sake of concluding, in terms that impress me as a whit too pessimistic, that "[t]he competing idea, that women as human beings are equal to men and children must be protected and treated with dignity and respect, is not emerging from the marketplace of ideas *in any significant way*" (emphasis added): *ibid.* The case of the criminal procedure rules that allow the exclusion of "speech that is inflammatory or highly emotive" is presented as another piece of evidence that shows how in "areas of social life where the primary objective is the pursuit of truth, the marketplace of ideas is not the model used" because free "speech can undermine the truth:" *ibid.* Leaving aside other considerations, the point is unconvincing in that the criminal procedure rules referred to seem very akin to the clear and present danger test, which no advocate of the 'free market of ideas' dreams of dispensing with. Highly emotive and inflammatory statements will, if likely to affect the views of the adjudicator, by definition translate into violent action: for being forcibly deprived of one's liberty or one's money is an act of force and is the *inevitable* consequence of a guilty verdict, and that verdict (or an enhanced penalty) can easily be delivered as a consequence of the adjudicator's being unfairly influenced by inflammatory and highly emotive speech.

[215] *Ibid.* at 800-1.

Although general considerations about the problem of access to the free market of ideas seem to me ingenious where they are meant to highlight the necessity to maximise the opportunities of subjugated voices to be heard, and where they advocate measures against concentration of media corporate power, also in this case the strategy of relying on general critiques of free speech theory to support hate speech regulation seem to yield little persuasive success.

Fortunately, comparatively few opportunities seem to be open in mass media such as television and cinema for hate-mongers to wilfully promote hate. This is not to say that sexism, racism, and heterosexism do not subtly pervade movies and TV programs. But such expressions of bigotry as those that can be proscribed under hate speech laws would seem to have little airing in these media anyway. On the contrary, it has been documented that the formidable communicative opportunities provided by the Internet, that substantially allow the employment of new effective, inexpensive, far-reaching communication techniques by individuals and groups with lesser access to traditional media, pose a threat precisely in terms of facilitating the dissemination of hate.[216]

The rather disconcerting conclusion is that unequal access to the (traditional) media seems to stand, in a certain sense, in hate propaganda's way, while the progressive result of enhanced access to a new means of communication (the Internet) seems to be in its service.

It could be argued that hate speech in the media is not prevalent precisely because hate speech laws exist to prohibit its broadcasting. I believe, however, that the insignificant presence of hate speech, as well as the diffusion of more subtly biased speech, in the traditional media has a lot to do with the fact that such media tend to be the voice of mainstream society- a voice that, albeit generally opposed to the dissemination of *hate*, is still prejudiced in a number of less conspicuous ways. The Internet, instead, is an inexpensive means of communication, and does not present problems in terms of so called 'scarcity' (viz. the limited number of frequencies): as such, it can be used by virtually anybody who has access to a computer connected to it. In this sense the Internet

[216] See *e.g.* C. Fogo-Schensul, "More than a River in Egypt: Holocaust Denial, the Internet and International Freedom of Expression Norms" (1997/1998) 33 Gonzaga Law Review 241.

appears a more democratic means of communication, where unpopular views are more easily transmitted, accessed and, possibly, advertised.

The fact that among these unpopular views there are also the horrific ones of hate-mongers poses peculiar and very complex problems regarding the regulation of speech in the specific context of the Internet (that cannot be explored in this work); on the other hand, it seems to suggest that while critiques about the role of mass-media in the marketplace of ideas are valuable when speaking about the need to effectively democratise such market in principle, by themselves they do not provide simple answers to the problem of how and why we can stop hate speech from poisoning our society.

It seems that critiques to the notion of the free market of ideas can be appropriately invoked when, instead, they consider precisely how hate speech affects the functioning of such market, as is the case with arguments about the silencing effect that hate speech has on its victims. Section III-WII of this chapter, in elaborating on the notion of the harmfulness of hate speech, will deal precisely with the way in which hate speech can be said to subordinate, and with the extent to which this subordination translates specifically in an impaired exercise of democratic rights on the part of minorities- first of all, that of freedom of expression.

The clear and present danger test, another typical element of free speech theory where advocacy of illegal action or of the use of violence is concerned, has also come under attack. The most consistently civil libertarian formulation of the test is the one delivered in the United States by the Warren Court, in 1969:

"[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[217]

In the mind of its critics, the idea seems to be that if this test is discredited as inadequate or its use as inconsistent, then we might want to dispense with it altogether and therefore with its application in hate speech cases. For this purpose, a comparison is

drawn between such instances of illegal conduct as, for example, the criminal offence of threat on the one hand and the clear and present danger test on the other. The fact that legal provisions against the former are considered a legitimate form of state regulation irrespective of their inconsistency with the latter is then taken as evidence that the rationale underlying the clear and present danger test is arbitrary.[218]

To perform this operation, however, the clear and present danger test has to be recast in the new form of (or misunderstood as) a requirement that words be *never* punished, unless perhaps when illegal *action* has actually followed as their consequence;[219] furthermore, the differences between the act of threatening and that of advocating must be erased (or overlooked);[220] lastly, a blind eye must be turned to (or blur one's appreciation of) the kindred spirit of the clear and present danger test and current notions of threats consistent with freedom of speech theory.[221]

Once again, it seems that one's conviction that hate propaganda should be outlawed had better rest on grounds which are different from the supposedly flawed character of freedom of expression doctrine in general.

Similarly doomed appear some authors' attempts to legitimise hate speech regulation by countering such free speech theory tenets as the one that freedom of expression is an invaluable friend of minorities. Such a strategy is self-defeating, to the extent that the arguments made to bring the desired result into effect, ironically, prove precisely what they are meant to deny:

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[217] *Brandenburg* v. *Ohio*, *supra* note 23 at 447.

[218] See K. Mahoney, *supra* note 11 at 802.

[219] "In the hate propaganda context, ... [the clear and present danger test] assumes that words are only a prelude to action and cannot be prohibited because they are not "acts:"" *ibid.* at 801.

[220] "[T]he test does not explain why other laws which limit speech, such as laws prohibiting bribery, treason, blackmail, conspiracy, forms of verbal harassment, threatening, and price-fixing, are not questioned:" *ibid.* at 801-2.

[221] A 'true' threat should be, the U.S. Court of Appeals for the Second Circuit affirmed in *United States v. Kelner,* 534 F.2d 1020, at 1027, "on its face and in the circumstances in which it is made ... so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." It is hard work to speculate on how the concept of threat could be defined in terms which were more consistent with the rationale (and even the formulation) of the clear and present danger test.

> Martin Luther King, Jr., and others did use speeches and other symbolic acts to kindle America's conscience. But as often as not, they found the First Amendment (*as then understood*) did not protect them from arrest and conviction. Their speech was seen as too forceful, too disruptive. To be sure, their convictions would sometimes be reversed on appeal, many years later. But the First Amendment, *as then understood,* served more as an obstacle than a friend. Why does this happen? ... When new stories deviate too drastically from those that form our current understanding, we denounce them as false and dangerous (emphasis added).[222]

Seldom have I read more cogent reasons to support *current* (as distinguished from older) First Amendment doctrine: the principle that non content-neutral speech regulation needs to meet the strictest standard of review; the rule that only when speech creates a clear and present danger (in the terms defined in *Brandenburg* v. *Ohio)* of violence can apprehension of disruption interfere with freedom of expression; the idea that any other standard is likely to be selectively applied by adjudicators; the view, finally, that *current* First Amendment theory is the progressive result of a struggle fought over time, and that we should not be too hasty to dismiss its value for minorities.

III: *Matsuda's Approach to Racist Hate Speech.*

I have suggested before that there is another order of arguments that can, in my view, be better invoked to rationalise one's sense that hate speech is not deserving of the protection of free speech guarantees. As the best example of this level of argumentation I will take the perspective adopted by Mari J. Matsuda in her milestone article "Public Response to Racist Speech: Considering the Victim's Story."[223]

This position avoids discounting the value of free speech theory: actually, it takes freedom of expression principles very seriously, but then looks for reasons to exempt hate speech from the general operation of those principles. Accordingly, the more contextual the approach of such a position, the better arguments it will be able to make for

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[222] R. Delgado & J. Stefancic, *supra* note 11 at 102.
[223] See *supra* note 11.

overcoming the scepticism of a perspective biased towards freedom of speech.[224] That is probably why Matsuda concentrates her analysis on the problem of racist speech rather than hate speech more generally.

Adopting the victim's perspective, Matsuda highlights the peculiar pervasiveness of racism, its *structural* presence as a *practice of subordination* effected through the implementation of several *techniques*, one of which is precisely racist speech. Racist speech, *put into a context of historical racial subordination*, negatively affects minority members' ability to enjoy equality by undermining both their own sense, and dominant group members' perception, of their equal worth.[225]

Matsuda holds that it is the teachings of our own *historical experience* that should make us see the difference between hate speech promoting racial hatred as a means of subordinating minorities, and other forms of speech that are controversial (like Marxism), or offensive and demeaning, but not connected to hierarchical conditions of subordination (we could think, *e.g.*, of racist speech against dominant groups or blasphemous speech attacking Christianity). In Matsuda's words:

> What is argued here ... is that we accept certain principles as the shared historical legacy of the world community. Racial supremacy is one of the ideas we have collectively and internationally considered and rejected. As

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[224] It should be noted that, besides those positions that seemingly heavily discount the value of free speech doctrine, and those that take it seriously, there are positions that seem to be in between. These positions, while holding that general free speech theory arguments do not work (or mean much) in the specific case of hate(/sex) speech, appear to have an ambivalent relationship with freedom of expression orthodoxy more in general: see *e.g.* R. Delgado & J. Stefancic, *supra* note 11. These authors, for example, may be deemed to hold views not *altogether* condemnatory of free speech principles: "First Amendment theory will need revision to deal with issues lying at its farthest reaches. ... Conventional First Amendment doctrine is most helpful in connection with small, clearly bounded disputes. ... Speech is less able, however, to deal with systemic social ills:" *ibid.* at 70-1. A qualified, rather than 'strong,' rejection of general free speech principles might possibly be reflected also in their proposal to remedy the harms brought about by hate speech by relying on principles of content- and viewpoint-neutrality, and which seek for the most to be couched in familiar terms that exploit (disputed and problematic, some of them doubtfully constitutional, but still traditional rather than new, breakthrough) American exceptions to freedom of expression (that is: intentional infliction of emotional distress, group libel, harassment and fighting words). On the other hand, at other junctures they affirm that freedom of expression legitimises the status quo -*ibid* at 43- and that "the history of the First Amendment, as well as the current landscape of judicial exceptions, shows that it is far more valuable to the majority than to the minority, more useful for confining change than propelling it:" *ibid.* at 103. This can be characterised as a strong (rather than qualified) claim against freedom of expression theory, and I have already dealt with it in the text.

[225] M.J. Matsuda, *supra* note 11 at 2326-41.

> an idea connected to continuing racism and degradation of minority groups, it causes real harms to its victims.[226]

The particular relevance of this position to the way in which I have chosen to deal with the problem of hate speech in this chapter is that, it seems to me, its main focus is on the competing values of freedom of expression and equality. Let me explain in which sense I believe this is so.

This approach takes, as we have just seen, freedom of speech very seriously. This seems to entail a faith in general utilitarian arguments about the desirability of the adoption of the free speech principle in a democratic society: argument from truth, individual self-realisation, and democracy. It seems to me that accepting the validity of all these three arguments involves assuming a pragmatic stance that rejects the primacy of what I see as a static view of society and politics that places (the government above the citizens and) a privileged emphasis on social harmony/public order considerations. Discussions about hate speech laws may revolve precisely about this sort of considerations. Free speech doctrine is not indifferent to these values; but it places them in perspective by accepting a dynamic view of society negotiating its own self- definition.

A commitment to the principles of democratic self-government and the related one of a polity's (and its members') self-definition through the construction of truth constitutes not only the very basis of the adoption of the free expression principle, but also, necessarily, of the definition of a limited and clearly bounded scope for legitimate state enforcement of order and social harmony. This is why free speech doctrine incorporates principles, such as the clear and present danger test, that are already meant to deal (among other things) with the issue of speech related with inter-group violent/unlawful action. In this perspective, the government intervenes to censor speech and ensure order only where the dynamics of group interaction are likely to degenerate from the level of (even heated, disrespectful) discussion to that of force.

To say, instead, in general terms, that the proper role of government, when freedom of expression is at issue, is "to maintain social harmony in the society" by

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[226] *Ibid.* at 2361.

"marking [in situations of group conflict] where one set of *claims* legitimately begins and the other fades away"[227] seems to me a way of legitimising government's pre-emption of the political debate, in such a way that contradicts the principles of self-government/definition: the state becomes entitled to decide not only what can or cannot be granted (*i.e.* what claim can be legitimately satisfied) but also what can or cannot be claimed at all (*i.e.* what claim can be legitimately made) because such a decision is thought to promote good relations among different groups (social harmony *per se* becomes, thus, the ultimate aim)![228]

Taking seriously the soundness of a robust free speech principle -free expression commitments being seen as coextensive with a democratic system of self-government/definition- seems to require, instead, that public order/social harmony concerns be resolved within a framework that allows freedom of expression exigencies to prevail unless in those situations where *serious* disruption is *directly* at stake. Free speech doctrine cannot, on the contrary, be compatible with stronger social harmony/order claims that are capable of being used precisely in such a way as to stop or seriously impair the ongoing process by which a society governs itself through negotiating its self-definition.

Making an argument against hate speech at the same time as strongly professing one's commitment to freedom of expression, therefore, seems to me to shift the emphasis away from ambiguous public order/social harmony (re-)considerations,[229] towards more

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[227] K. Mahoney, *supra* note 11 at 797.

[228] Notions of 'social harmony' seem to me also to connect a little too easily with ideas of suppression of merely offensive -as opposed to harmful- speech and conduct.

[229] I speak of *re*-considerations because, as illustrated in the text, I believe that a balance between freedom of expression and those limited notions of social harmony the consideration of which is compatible with – and indeed integral part of- the principle of self-government/definition have *already* taken place, appropriately, under the clear and present danger test. I talk of these re-consideration as *ambiguous* because, when freedom of expression is concerned, limiting it for the sake of guaranteeing social harmony means, every time this is thought to be appropriately done by applying standards that fall short of the clear and present danger test, that we are actually empowering the government of the day with the highly delicate choice of deciding which categories of expression are inimical to social harmony by, among other ways, 'discovering' (with the aid of the human sciences, which more than other disciplines have been shown to produce their own power-laden truths: see *e.g.* H.L. Dreyfus and P. Rabinow, *supra* note 128 at 126-83) dubious causal connections between certain types of speech and (from non-ideal to) violent forms of social interaction.

desirable substantive equality concerns.[230] We have seen, in fact, that in Prof. Matsuda's perspective racist hate speech should be outlawed because it is a technique to maintain a state of historical subordination. Surely, this does not mean that the problem of violence is absent from Matsuda's analysis:

"Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse."[231]

However, the above passage, once considered in correlation with Matsuda's exempting racial minorities' hate speech from regulation, seems to suggest that violence is not the centre of her analysis.

I am not suggesting that if race-motivated violence had been Matsuda's substantial focus, she would have extended regulation of hate speech also to minorities' racist utterances on the basis of the reasoning that if hate speech and violence are related, violence against dominant group members shows that minorities' hate speech is in need of regulation, too. On the contrary, I believe that in Matsuda's analysis violence of subordinated groups against dominant ones is not related to the hate speech of minorities in such a way as is arguably the case when at issue are dominant groups' violence and hate speech against minorities. This is precisely because both racist speech and racist violence against minorities are conceived by Matsuda as a technique of subordination.

Thus, my contention that Matsuda's choice to proscribe only dominant groups' hate speech shows that she is not concerned so much with violence *per se* as with the wider problem of subordination stems from the observation that, even when connections between speech and violence become relevant in her analysis, that is always from the perspective of both of them ultimately being functional to subordination/inequality, that remains the centre of her theory.

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[230] This way of proceeding, therefore, is also more consonant with the angle under which I have chosen to see the problem of hate speech, that I have introduced as posing a dilemma in terms of the values of freedom of expression and *equality* (rather than social harmony).

[231] M.J. Matsuda, *supra* note 11 at 2357.

The difference between this position and the 'social harmony' approach can be illustrated in the following way. According to the former position, intergroup speech not creating a clear and present danger of violent/illegal action could not be suppressed where the groups involved were both 'dominant;' while, if one of the groups were subordinated, the dominant group's speech could be suppressed even in the absence of a clear and present danger of unlawful action. According to the latter approach, instead, inter-group speech involving every type of groups could be limited every time the speech -even in the absence of a clear and present danger- could be thought, by the government of the day, to be inimical to 'social harmony.'

I would argue that Matsuda's substantive equality-centred approach -besides being preferable, as just seen, to the 'social harmony' one- is also more in accord with the choice of taking seriously free speech doctrine than are hate speech provisions drafted in neutral terms (*i.e.* that do not differentiate between hate propaganda directed against historically oppressed groups and hate speech against dominant groups).[232] The choice to proscribe *all* hate speech (as opposed to outlawing only its sub-category that targets minorities) is in fact more suspect under the aspect of the harm principle.

Proscription of hateful speech acts directed against dominant groups are meant to address either too remote a harm (*i.e.* inter-group violence, in the perspective of public order/social harmony concerns, already appropriately considered under the clear and present danger test, see above) or no harm at all: feelings of diminution experienced by members of dominant groups may be deemed to be short lived and relatively easily re-absorbable with the aid of the reassuring messages of dominant discourses, so that dominant groups' equal ability to function in the process of democratic self-government

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[232] Neutrality here could be intended as *viewpoint*-neutrality. It is worth emphasising, besides, that Matsuda's approach is, to start with, not *content*-neutral either. In fact, as already mentioned in the text, she singles out *racist* speech among other forms of hate speech and conceives it as a category unworthy of First Amendment protection, arguing that "[t]he alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine .... This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value laden approach that will better preserve free speech:" *ibid* at 2357. One can extend this reasoning also to Matsuda's choice of dispensing with viewpoint-neutrality as well (*i.e.* her choice not to proscribe all forms of racist speech, but only that directed against minorities).

and self-definition is not compromised;[233] there not existing structural discrimination against members of dominant groups, it can even be argued that such feelings of diminution could have no relevance at all, under the aspect of contributing to discrimination.[234]

As suggested above, on the contrary, a perspective on hate speech that conceives it as a technique of subordination/discrimination -*i.e.* that focuses on substantial equality concerns and (therefore) on speech targeting racial *minorities*- appears, *prima facie,* more compatible with otherwise strongly held civil libertarian views about freedom of expression. This is because, from such a perspective, hate speech regulation attempts to avoid some kind of harm that might be seen as consistent with free speech doctrine. I will expand on this point, trying to explore the conditions under which hate speech can become harmful in this very specific sense.

Having chosen as my point of departure Matsuda's contextual approach, for the first part of the following analysis I will juxtapose a consideration of racist hate speech to the treatment of my specific case study-namely, homophobic hate speech. In particular, having taken the view that Matsuda's approach makes, to date, the most compelling case for hate speech regulation, I will examine the extent to which homophobic hate speech might be characterised as producing a sort of harm that justifies legal regulation. Although my analysis of homophobic hate speech stems from a consideration of

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[233] In other words, the silencing effect of hate speech does not seem to be an issue when hate speech is directed towards dominant groups. However, for a critique of 'silencing effect' arguments in general, (*i.e.* even in the context of hate speech targeting minorities) see T. Heinrichs, "Censorship as Free Speech! Free Expression values and the Logic of Silencing in *R.* v. *Keegstra*" (1998) 36 Alberta Law Review 835.

[234] In this perspective, the fact that countries endowed with hate speech laws tend, like Canada, Britain or Italy, to have neutrally drafted provisions might be deemed to point towards a somewhat debile commitment to free speech principles: a category of speech (*i.e.* all hateful speech no matter whether connected to discrimination or not) is denied protection, rather than because of its being actually harmful, owing to its offensiveness. As civil libertarians point out, neutrally drafted hate speech laws seem to lend themselves to be enforced in ways that can hardly be defined 'progressive,' to the point of stifling legitimate political protest: see *e.g.* N. Strossen, "Regulating Racist Speech on Campus" in H.L. Gates Jr. et al., *supra* note 15, 181 at 225-7. The enactment of non viewpoint-neutral hate speech provisions might be deemed to constitute an effective response to those objections to hate speech regulation that rest on the argument of public officials' arbitrary enforcement of hate propaganda laws (although an important problem arises in turn, which is that of deciding who is and who is not a dominant group).

Matsuda's arguments, I do not purport to, and will not, make any recommendation with regard to racist hate speech.

What I will do is *elaborate* on Matsuda's contentions, having no pretence that she should endorse mine.

IV: *Hate Speech as Illocution.*

1. Locution, Illocution, Perlocution.

To say that speech causes harm is to say that speech has an ability to do something. This ability "to do things with words" can be investigated under the framework of analysis developed in speech act theory,[235] where the concept of performativity of speech was developed, intended as the ability of "a word not only to name, but also ... to perform what it names."[236]

When a hate-monger issues a hateful speech act regarding a racial minority, or a racial minority member, it is not only the case that we understand the locutionary meaning of what he says.[237] It is also the case that normally the *illocutionary* "uptake"[238] is secured, the 'force' of the utterance being *understood*, and, by virtue of being

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[235] See J.L. Austin, *How to Do Things with Words* (London: Oxford University Press, 1962). Judith P. Butler, in *Excitable Speech*, *supra* note 160, creatively applies, among other things, speech act theory notions to the case of hate speech; at page 18 she reads specifically Matsuda's work in the light of Austin's concepts. My analysis is largely independent of this book, as I had not read *Excitable Speech* before or while writing the main points I make in this chapter- although I had read in another book -namely, A. Parker and E. Kosofski Sedgwick, eds., *Performativity and Performance* (New York: Routledge, 1995)- the essay taking up page 42-69 of *Excitable Speech*, i.e. "Burning Acts- Injurious Speech."

[236] J.P. Butler, "Burning Acts- Injurious Speech" in A. Parker and E. Kosofski Sedgwick, eds., *supra* note 235, 197 at 197.

[237] Understanding the locutionary meaning of a hate speech act means that, *e.g.*, if a hate-monger says: '—(offensive expression for an identifiable racial group) are beasts,' we understand that by '—' he refers to *that* identifiable racial group, by 'beasts' he means brutes as opposed to human beings, and that the predicate 'are' is used to equate '—' with 'beasts.' As far as illocutionary results (see *infra*) are concerned, it is precisely -and obviously- *what is said* that allows (among other things) the result to take place: "An effect must be achieved on the audience if the illocutionary act is to be carried out. ... Generally the effect amounts to bringing about the understanding of the *meaning and of the force of the locution*:" J.L. Austin, *supra* note 235 at 115-6

[238] See J.L. Austin, *supra* note 235 at 116.

understood, established, even if the hearer does not think that what the speaker uttered about that racial group is true or right.

The illocutionary force of an utterance is such that it allows, in Judith Butler's words, "the name [to] perform ... *itself,* and in the course of that performing become ... a thing done," as opposed to the perlocutionary way of doing things with words, where words and things (*i.e.* perlocutionary effects) remain distinct (see *infra*).[239]

Every speech act, besides being a 'locutionary act' (*i.e.* a doing in the intuitive and obvious sense in which saying something is a specific type of action just as, *e.g.*, eating or sleeping are)[240] is also always an illocutionary act, because the illocutionary aspect of a speech act is, in a simple sense, the way in which that utterance is used;[241] however, we can better understand the force of the illocutionary component of an utterance by making specific reference to a *performative* speech act. This is because when the utterance is performative or, in Habermas's preferable terminology, "regulative,"[242] "we attend as much as possible to the illocutionary force of the utterance,"[243] or, in Habermas's words, "we thematize the relations into which speaker and hearer enter."[244]

Let us consider a passage from Austin's *How to do Things with Words,* and the example of performative utterance contained therein:

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[239] J.P. Butler, "Burning Acts- Injurious Speech" in A. Parker and E. Kosofski Sedgwick, eds., *supra* note 235, 197 at 197-8.

[240] "[T]o say something is in the full and normal sense to do something- which includes the utterance of certain noises, the utterance of certain words in a certain construction, and the utterance of them ... with a certain sense and with a certain reference:" J.L. Austin, *supra* note 235 at 94.

[241] The illocutionary dimension of a locutionary act "determine[s] in what way we are using the locution. ... It makes a great difference whether we are advising, or merely suggesting, or actually ordering .... [T]he performance of an act in this new and second sense ... [is] the performance of an 'illocutionary' act, *i.e.* the performance of an act *in* saying something as opposed to performance of an act *of* saying something:" J.L. Austin, *supra* note 235 at 98-9.

[242] I consider this terminology preferable because it makes clear that not only regulative but all types of speech acts have an illocutionary component, and as such a performative function, intended as the ability to do things with words precisely in the sense in which illocutionary acts can do that.

[243] J.L. Austin, *supra* note 235 at 145.

[244] See J. Habermas, *Communication and the Evolution of Society* (Boston: Beacon Press, 1979) at 53. Habermas's way to put it emphasises how defining the illocutionary aspect of an utterance (be it regulative or not) as the way in which the utterance is used (*e.g.* to state, advise, warn, confess) points precisely to the relationship that a given way of using the utterance establishes between speaker and hearer (see also J. Habermas *ibid.* at 40-4).

> The illocutionary act 'takes effect' in certain ways, as distinguished from producing consequences in the sense of bringing about state of affairs in the 'normal' way, *i.e.* changes in the natural course of events. Thus 'I name this ship the *Queen Elizabeth*' has the effect of naming or christening the ship; then certain subsequent acts such as referring to it as the *Generalissimo Stalin* will be out of order.[245]

Provided certain conditions obtain, (so-called conditions for the happiness or felicity of performatives: that there exist a procedure for the act, that the procedure be performed completely and correctly, etc.)[246] in uttering the formula that mentions the name of the ship, that name becomes the ship's name.

It is important to distinguish illocutionary from perlocutionary results, *i.e.* "consequential effects upon the feelings, thoughts or actions of the audience"[247] (in this sense, that is in producing perlocutionary effects, a speech act becomes the performance of a deed in a way that is easily understandable as 'productive').

If the conditions for the felicity of the performative are met, the illocutionary result will take place quite independently of the perlocutionary effects that *may or may not follow* from a speech act. In the example provided above, it does not really matter that all the hearers present at the ship's christening are, *despite the fact that they understood the meaning and the force of the locution,*[248] unpersuaded and will refer to the ship in the future as the *Generalissimo Stalin:* the ship's name will still be the *Queen Elizabeth.*

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[245] J.L. Austin, *supra* note 235 at 116.

[246] See *ibid.* at 12-52.

[247] *Ibid.* at 101. "Saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention or purpose of producing them; and we may then say, thinking of this, that the speaker has performed an act in the nomenclature of which reference is made either (C. *a*), only obliquely, or even (C. *b*), not at all, to the performance of the locutionary ... act. We shall call the performance of an act of this kind the performance of a *perlocutionary* act or *perlocution.* ...
(E[xample] 1)
Act (A) or Locution
He said to me 'Shoot her!' meaning by 'shoot' shoot and referring by 'her' to *her.* ...
Act (C. *a*) or Perlocution
He persuaded me to shoot her.
Act (C. *b*)
He got me to (or made me, &c.) shoot her:" *ibid.*

[248] See *ibid.* at 116.

2. Illocutionary Force (Institutionally Bound and Institutionally Unbound Speech Acts).

Habermas distinguishes between institutionally unbound and institutionally bound speech acts (such as the one in the example of the ship, provided above), "where specific institutions are always involved."[249] The latter are said to "draw their power to coordinate interactions", *i.e.* their illocutionary success, "directly from the social force .... of norms,"[250] while the former acquire such an authority thanks to the implicit offer made by the speaker to vindicate (or redeem, *i.e.* provide grounds for) the validity claims that are, again implicitly, raised at the moment when the speech is uttered. These validity claims are the claim to the truth of the propositional content of the speech act, the claim to the truthfulness (sincerity) of what the speaker expresses with her speech act, and the claim to the rightfulness of the norms that the speaker implicitly invokes to justify the interpersonal relationship established between speaker and hearer through the illocutionary component of the speech act.[251] These three different validity claims are implicitly raised, according to Habermas, in *every speech act directed to reaching understanding*, but they are differently thematized depending on the nature of the speech act at issue.

When a *regulative* speech act is performed, in particular, the speaker emphasises, although implicitly, the claim to the rightfulness of the norms underlying the speaker-hearer relationship that she intends to bring about with the illocutionary component of her utterance, *i.e.*, for example, with using her words to warn rather than to confess or promise any thing. Regulative speech acts, indeed, are precisely those where the illocutionary component of an utterance is highlighted.[252]

Institutionally bound speech acts, *e.g.* naming a ship, are instances of regulative utterances. This is arguably shown, among other things, by their deriving from *norms* the authority to bring about the result of enacting what they name (for what are norms if not

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[249] J. Habermas, *Communication and the Evolution of Society, supra* note 244 at 38.
[250] J. Habermas, *The Theory of Communicative Action, vol. 1* (Boston: Beacon Press, 1984) at 296.
[251] See *supra* note 244.
[252] See J. Habermas, *The Theory of Communicative Action, vol. 1, supra* note 250 at 295-309.

devices to justify given interpersonal relations?). We might think that in the case of institutionally bound speech acts this (implicit or explicit) pointing to norms is sufficient to secure the illocutionary result (provided no infelicity makes the act unhappy): as long as the norm is not repealed or otherwise deprived of its legitimate force it will provide the authority for performing what the utterance names. Thus, in the utterance 'I proclaim the name of this ship to be the *Queen Elizabeth*,' the norm that underlies the 'I proclaim' formula and that gives the speaker the authority to name the ship while subjecting the hearers to that authority does not need, in order to bring about the illocutionary result of the ship's name being *Queen Elizabeth,* of nothing else besides the felicity of the performance (the first condition of felicity is precisely that "[t]here must exist an accepted conventional procedure having a certain conventional effect:"[253] which is the same as saying that there must exist a norm authorizing, among other things, the speaker to perform the utterance and, in doing so, achieve the illocutionary result).

Regulative speech acts that are institutionally unbound, on the contrary, point to interpersonal norms that do not have the force that the link with specific institutions would lend them. Therefore, for the illocutionary result to take place, the interpersonal relation described in the illocutionary component of a regulative speech act must be justified by norms (implicitly invoked) *whose rightfulness the speaker implicitly offers to provide a ground for.* The implicit validity claim thus raised allows institutionally unbound, regulative speech acts to perform their illocutionary result.[254] In both cases it is the reference to norms that makes the illocutionary result take place in a *conventional* (*i.e.* normal, regulated, stylised) way at the same time as the locution is uttered.

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[253] J.L. Austin, *supra* note 235 at 14.

[254] This result can be described precisely as the enactment of that interpersonal relationship described in the illocutionary formula of the utterance; similarly, in the case of institutionally bound speech acts, the illocutionary result that a ship's name is *Queen Elizabeth* can also be described, emphasising the interpersonal relation between speaker and hearers, as the fact of *hearers'* being bound to calling the ship *Queen Elizabeth* owing to their *being subject to the legitimate authority of the speaker* who christened the ship.

2(a). The Illocutionary Force of Racist Hate Speech Acts.

The problem in describing how racist hate speech acts can secure an illocutionary result, *i.e.* how they can enact what they name, is that they hardly fit into this framework.

On the one hand, they are not (at least recognisably and legitimately) bound to anything like an institution, and therefore cannot derive the authority to perform what they name by referring to norms whose force is guaranteed by their being tied to such an institution. On the other hand, although a racial slur, for example, seems to often share the outward characteristics of an institutionally unbounded, regulative speech act, it is hardly describable as an *utterance oriented to reaching understanding* [255] (only for which Habermas developed his doctrine, exposed above, about the universal validity claims); much more so that the racist speaker, with any likelihood, will subjectively desire the realisation of given perlocutionary effects (*e.g.* changes in beliefs, thoughts, feelings of the audience), and any perlocutionary *aim*, in Habermas's view, makes the utterance an act of "linguistically mediated strategic action,"[256] as opposed to an act oriented towards reaching understanding.[257]

It is possible, however, to further complicate the composite account I have just given of speech act theory by incorporating in it some poststructuralist insight.

Even if they are not bound to any specific institution, it is arguable that racist (and other) speech acts can, like institutionally bound speech acts, draw the authority to secure illocutionary results -*i.e.* to enact what they name- from the *social force* of norms and conventions. In other words, there is no need for the speaker to implicitly offer grounds to

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[255] A regulative speech act oriented to reaching understanding is an utterance acceptable on the basis of a *rationally testable* validity claim, raised implicitly by the speaker, about the rightfulness of the norms implicitly invoked to justify the enactment of the interpersonal relationship that is the illocutionary aim of the utterance.

[256] J. Habermas, *The Theory of Communicative Action, vol. 1, supra* note 250 at 295.

[257] Those racist speech acts that might be possibly considered immune from perlocutionary aims (in which, in other words, a serious offer to vindicate the validity claims raised in the utterance is recognisable) would not be criminalised by Matsuda. I agree that "[t]he case of the dead wrong social scientist," as she appropriately calls it, (see M.J. Matsuda, *supra* note 11 at 2364-5) might be thought to reasonably escape regulation: in fact, when the speech act is directed to reaching understanding, it is possible to make the validity claims raised with the utterance become the object of serious theoretical argumentation -see J. Habermas, *Communication and the Evolution of Society, supra* note 244 at 63-4.

redeem the validity claim which only a speech act of hers directed to reaching understanding would thematize.

In fact, couldn't it be possible to dislodge the dichotomy institutionally bound/institutionally unbound speech acts by referring to the Foucauldian notion of power/knowledge regimes? Suggesting, as Foucault does, power not being only (and, according to him, not even mainly) juridical allows one to bear in mind a more fluid notion of power. Severing power from its juridical dimension can be seen as loosening up its ties with juridical and quasi juridical norms, *i.e.* norms connected to some sort of official institution.

It is the peculiar character of these (institutionally bound) norms, as we have seen, that they have a force which does not depend on the fact that person who invokes them make implicitly an offer to redeem their rightfulness. But if the dimensions of power are not exhausted in the juridical one, if power is relational and not concentrated in (or possessed by) any particular institution,[258] couldn't we think of norms that have a *de facto* force (*i.e.* a force that need not rely on the implicit offer to redeem their rightfulness) even if they are not bound to any juridical or quasi-juridical institution, and, indeed, to any institution at all?

Considering that power, in a poststructuralist perspective, can be seen as 'acting' through discourse, and that through discourse truth effects are installed, isn't it the case, since the truths thus produced are power-laden, that these 'truths' can be considered 'normative', rather than objective? And isn't it the case, furthermore, that normative truths have the status of 'true' norms, that is, of norms that, to be binding, do not need the speaker who is implicitly invoking them to make an implicit offer to vindicate the rightfulness of these norms?

If this is so, the following question is: do appropriate 'true' norms, *i.e.* norms with a special social force, exist that secure the illocutionary result of enacting what racist hate speech acts (institutionally unbound utterances not directed to reaching understanding) name?

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[258] See *e.g.* M. Foucault, "The Subject and Power" in H.L. Dreyfus and P. Rabinow, *supra* note 128 at 208-226 (see especially p. 219-226).

'True' norms, as we have just suggested, are produced -in the form of normative (authoritative, rather than objective) truths- by discourse, as discourse is coextensive with power. Does a recognisable, conspicuous discourse about Blackness, Indianness, Asianness, etc. exist?

The answer seems to be affirmative,[259] and it is a discourse not localised in any particular institution, but that crosses transversally a number of sites, disciplines and institutions.[260] The structural presence of racism, in this sense, can be intended as the discursively produced normative truths about minorities. The double structure of these normative truths, or true norms, allows them to be invoked to ensure the illocutionary success of a racist hate speech act both when this assumes the character of a regulative utterance and when it appears as a *constative* speech act.

The following passage from Habermas's essay "What is Universal Pragmatics" clarifies the distinction between constative and regulative speech acts:

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[259] See *e.g.* R. Delgado & J. Stefancic, *supra* note 11 at 72-82.

[260] See *e.g.* M.J. Matsuda, *supra* note 11 at 2331-5. The fact that this discourse will be found in connection with certain institutions does not mean that the speech acts pointing to the 'true' norms produced by such a discourse become institutionally bound: for the 'true' norms towards which hateful speech acts point and that give these acts their illocutionary force will nowadays not themselves be, generally, the correct outcome of the regulated process through which a legitimate institution produces its official norms (although historically they have often been- see *e.g.* I.B. McKenna, "Canada's Hate Propaganda Laws- A Critique" (1994) 26 Ottawa Law Review 159, especially at 163-7; for a present exception think, *e.g.*, of the constitutional provision about Canadian bilingualism, s. 16 of the *Charter*, that indirectly but officially devalues Aboriginal People's languages). For example, if we consider a judicial body, the discourse about Blackness that will be found in connection with this institution will often not tally with legal norms and judge made law, but will be found in obiter dicta, cursory remarks, specific use of language, and at most find an inexplicit, ambiguous expression in the official (as opposed to the discursive, 'true') norms produced by the judicial institution (for an analysis of how the decision in *R.A.V. v City of St. Paul* adds in this way to the discourse about American Blackness, see J.P. Butler, "Burning Acts- Injurious Speech" in A. Parker and E. Kosofski Sedgwick, eds., *supra* note 235, 197 at 212-14; for the way in which Indiannes is discursively constructed by judicial institutions see M. Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 *Social and Legal Studies* 451). Of course this does not mean that the 'true' norms produced by the discourse about Blackness issued by a judicial body will not take on an aura of 'legitimacy,' *i.e.* acquire their special force, precisely through exploiting the power of judicial institutions to disqualify non-legal knowledges. It is debatable whether hateful speech acts themselves add to the discourse about racial minorities that in turn produces the 'true' norms indirectly referred to by the racist hateful utterances to secure their illocutionary result. Apart from the logical problems of circularity that an affirmative answer would yield, I am inclined to believe that the power that hate-mongers succeed in exercising is relatively inconspicuous, so that their speech acts do not have the *authority* of being self-referential and precisely for that reason need rely on norms produced by a superior order of discourse.

> In the cognitive use of language, with the help of constative speech acts, we thematize the propositional content of an utterance; in the interactive use of language, with the help of *regulative* speech acts, we thematize the kind of interpersonal relation established. The difference in thematization results from stressing one of the validity claims universally inhabiting speech, [*i.e.*, as we have already seen, the claim to the truth of what is said, the claim to the truthfulness of what the speaker expresses with the speech act, and the claim to the rightfulness of the norms implicitly invoked with the illocutionary component of the utterance] that is, from the fact that in the cognitive use of language we raise truth claims for propositions and in the interactive use of language we claim ... the validity of a normative context for interpersonal relations [the ones established, in particular, with the way in which we use our utterance, *i.e.* to warn, to promise, to bet, to proclaim, etc.)][261].

This distinction is drawn by Habermas in the context of speech acts directed to reaching understanding.

We have already seen that hateful utterances are scarcely amenable to be defined as speech acts oriented to reaching understanding, and therefore their illocutionary success to bring about what they name must rest on something else than the implicit offer to provide grounds for the validity claims invoked at the same time as the utterance is issued. We have also seen that in the case of institutionally bound (regulative) speech acts their illocutionary force is secured by pointing to norms whose force is, so to speak, *de facto* (*i.e.* whose rightfulness the speaker does not have to implicitly offer to vindicate, the link with the institution being enough to make the norm binding). I have further suggested that there are other norms that have a similar *de facto* force, which they do not derive from the juridical (or *quasi*-juridical) power of institutions, but rather from the power of social discourses. I have argued that such a powerful and 'normo-genic' discourse exists precisely about racial minorities. I have concluded that it is precisely by referring to such *norms* that *regulative* racist hate speech acts (which are institutionally unbounded) can secure illocutionary success.

I now contend that *constative racist hate speech acts* (that, to the extent that they are racist and hateful, are not oriented to reaching understanding, and thus cannot be

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[261] J. Habermas, *Communication and the Evolution of Society, supra* note 244 at 55.

illocutionarily effective by implicitly offering to provide rational grounds for the validity claim to truth they raise) can likewise draw their illocutionary force by pointing to truths whose authority is (not rationally based but) *de facto.* These *truths are the same norms* that regulative speech acts rely on to ensure illocutionary effectiveness. I have in fact above referred to the effects of the productivity of (power through) discourse as to *truths* that, being power-laden, become *normative* (rather than objective) truths; and that, by virtue of their being normative truths, are, at the same time, *'true' norms.*

In their capacity as (true) *norms*, such discursive effects are implicitly invoked by *regulative* racist hate speech acts; under their aspect of (normative) *truths*, they are implicitly called for in order to authorise *constative* racist hate speech acts.

2(a)(1). Racist Hate Speech Acts Addressing Victimised Hearers.

When a racial slur is uttered, it can assume the form of a regulative speech act. Made fully explicit, such a speech utterance would have the meaning of

'*I name you* a — (racial slur),'

or, even more clearly,

'I hereby proclaim that you are a — (racial slur).'

This use of language thematizes the relationship (here one of subordination) between speaker and hearer. The illocutionary effect in this case is precisely the enactment of such a relationship.

The speaker's aim to bring about such a relationship of subordination is made clear in the formula 'I hereby proclaim,' (*i.e.* the illocutionary component of the utterance, although the aim would be perfectly clear even in the absence of an explicit performative verb) that emphasises the position of authority that the speaker assumes. This authority of the speaker to degrade the addressee derives from the *de facto*, common sense, irrational force of those (implicitly invoked) norms produced by discourses about racial minorities

that codify the appropriateness of hierarchical relationships between races considered of different worth.[262]

Besides constituting the propositional content of a regulative speech act, the same racial slur could be used in a constative speech act, which, in its fully explicit form, would look like:

'*I state that* you are a — (racial slur).'

The propositional (rather than the illocutionary) component of the utterance is here brought to the fore, so that the focus is on the truth of what is stated (rather than on the relationship between interlocutors).

The illocutionary force of the utterance (the ability of the speech act to perform what it names) does not result here from the fact that the propositional content of the statement (another person's inferior worth because of her racial group membership) contains, as happens with utterances oriented to reaching understanding, an implicit offer undertaken by the speaker to provide grounds for the truth claim raised in it. Rather such a force is secured by the fact that the truth of the message of inferiority conveyed is derived from its consonance with the 'truths' produced by discourses about racial minorities, that construct a social subject of inferior worth on the basis of its group membership.

In practice, a racial slur is likely to have at the same time a regulative as well as a constative dimension. It follows that the final illocutionary result will be both the establishment (or rather re-installation) of a relationship of subordination in which the speaker has the authority to degrade the addressee (: illocutionary success of the regulative dimension of the utterance), and the enactment of the propositional content of the utterance, *i.e.* the addressee being tied to a social identity of inferior worth (: illocutionary success of the constative dimension of the utterance).

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[262] That is why a racial slur pronounced by a member of the same minority group would never have the same illocutionary effect as one in which the speaker and the addressee met the normative requirement of belonging, respectively, to a dominant and a subordinated group (in Austin's terms this intra-group utterance of a racial epithet would not allow the illocutionary result of subordination to take place because a 'misapplication,' *i.e.* a particular type of infelicity, would have occurred: see J.L. Austin, *supra* note 235 at 14-8. "[T]he particular persons ... must be appropriate for the invocation of the particular procedure invoked:" *ibid.* at 15). In this sense it is possible to argue that racial epithets used in an intra-group context have the potential, rather, for troubling the norm of inter-group hierarchies.

The latter result, in particular, will ensue even if that social identity is not a 'valid' one for the addressee or in the estimation of a non-racist spectator, so that the speaker's perlocutionary aim of convincing the addressee and the spectator of the addressee's inferior worth is not achieved. But how could the victim of the speech act, if the hearers reject the speaker's message, be said to be tied to a social identity of inferior worth?

Familiarity of both the addressee and the spectator with the 'truths' produced by discourses about racial minority groups would, in such a case, work like the hearers' knowledge of the existence of the rules allowing the officer to name the ship the *'Queen Elizabeth'* in our previous example. The hearers might decide, for political reasons, that those rules are not legitimate (*i.e.* that they are not valid) because, for example, they are the expression of western will to power. They might, therefore, subsequently refer to the ship as the *Generalissimo Stalin.* The ship's name however, in a certain sense, would still be the *Queen Elizabeth,* precisely because those norms that the officer followed in christening the ship *do exist and have a certain force,* of which the hearers, furthermore, are aware.

2(a)(2). Racist Hate Speech Acts Addressing non-Victimised Hearers.

It should be underlined that the illocutionary success will generally be secured also when the hearers of the speech act are dominant group members, *i.e.*, not, at the same time, also the victims of the racist utterance. A couple of examples will be helpful to illustrate this.

Let us take the case of a hate speech act in the form of a *warn* (regulative utterance) against the dangers supposedly created by a racial minority group. An audience of white people would obviously understand the meaning of the words employed by the speaker (locutionary aspect of the utterance). The utterance, however, would take effect also at the illocutionary level: even if the whites listening to the warn made their mind to reject it as unfounded, even if they were not alerted by the warn, *i.e.* even if the perlocutionary aim of the speaker failed, the audience would still have no problems in understanding the speech act as a *warn*. The 'force' of the locution, the way in which it

was meant to be used, would still not be incommensurable with the discourses *constituting* the subjects in the audience. The (illocutionary) force of the locution could not possibly be lost, or misunderstood, because the regulative utterance, (in the form of a warn) and, therefore, the (this time, arguably, not hierarchical) interpersonal relationship established through it between speaker and hearer (in which the former appears to have a 'right' to warn the audience) would implicitly point to, and find justification in, those norms of intra-group solidarity that are, when a dominant group of whites is the addressee, the other side of those same norms of inter-group hostility and subordination produced by discourses about the racialised other.

Likewise, hateful *statements* (*i.e.* constative speech acts) blaming on a minority group, say, certain historical plights would, even if an audience were unpersuaded by the arguments made, (*i.e.* even if the perlocutionary aim of the speaker went amiss) still be illocutionarily successful (provided the conditions of felicity were met, of course). That is, the audience would find a way to relate to the statement in a way that *goes beyond a simple understanding of the locutionary meaning of the propositional content of the utterance.*

For example, a statement such as 'Jews love flowers' could secure an illocutionary uptake because, as an act directed to reaching understanding, it implicitly contains the speaker's offer to vindicate the claim to truth made with delivering the constative speech act. On the contrary, despite its clear locutionary meaning, a statement affirming 'Jewish people have orange wings' would not secure any illocutionary uptake in the hearer because its force would not be understood: there not being any recognisable implicit offer to provide grounds for the truth claim raised in the speech act, the hearers would fail to perceive the statement as such and would rather think of it as something like raving.

This recognisable implicit offer to redeem the truth claim made with the statement would arguably be lacking also in a hateful utterance to the effect that an international Jewish conspiracy is responsible for global economic difficulties. Such an utterance, however, would 'click,' as a *statement*, (irrespective of the fact that the speaker does not achieve its perlocutionary aim of convincing the audience) for the simple reason that the

audience is already conversant with the subtext of discursively produced, normative racist 'truths' regarding the supposed relation of Jews with money.

Even here, it might be noted, the performativity of the utterance at the illocutionary level is independent of the realisation of the perlocutionary aim of the speaker: even if the speaker fails to convince the audience, at the same time as the latter rejects the *validity* of the implicitly invoked norm (truth), its *existence* ends up being acknowledged (and maybe indirectly affirmed). In this way a social identity of inferior worth is attached to Jews even if the audience rightly disallows its validity.

2(b). The Illocutionary Force of Homophobic Hate Speech.

In the article cited above Matsuda chose not to extend her analysis to "anti-gay and anti-lesbian hate speech ... because of ... the different way in which sex operates as a locus of oppression."[263]

In the framework for analysis adopted here, there are indeed differences between the way in which racist hate speech and hateful speech directed against gay men and lesbians operates. In particular, I would suggest that the illocutionary force of hate speech acts directed against lesbians and gay men is only partly derived, as in the case of racist hate speech acts, from the true norms/normative truths that are discursively produced about sexuality, homosexuality, compulsory heterosexuality, and the continuity among sex, gender and desire. Much of this force, on the contrary, comes from the Law itself, as an *institutionally bound* discourse.

On the one hand the Law produces normative truths/true norms, for example through the elaborations effected by judicial discourse on homosexuality, as happens when the Law extends equality rights to lesbians and gay men on the basis of the minority paradigm analysed in the previous chapter. In these cases, the naturalness of heterosexuality is discursively produced both as a (true) norm and as a (normative) truth by the Law (alone and in combination with a range of other social discourses). These truths/norms, in turn, sustain the illocutionary force of homophobic speech acts, both

[263] M.J. Matsuda, *supra* note 11 at 2320.

regulative and constative, both addressed to victimised and non-victimised hearers, in much the same way as described above with reference to racist utterances. Just apply, for instance, what argued in subsection 2(a)(1) and 2(a)(2) respectively to a homophobic insult and to a hateful warn/statement associating gay men with AIDS and disease.

On the other hand, unlike hateful utterances directed at racial minorities, homophobic hate speech acts are, *in a certain sense*, institutionally bound speech acts. This, possibly, makes homophobic hate speech acts even more successful at the illocutionary level.

The Law, in its institutional dimension, produces legal norms (statutory and case law). These norms need not be produced as normative truths, as it is generally recognised that they should be valid in their capacity as norms (provided, among other things, that their production follows a certain procedure and emanates from certain social formations).[264]

Distinctions here are subtle, but can be retained at least in so far as they can be taken as an explanatory device to justify the claim that the Law generally, that is not only when it is acting as institution (*i.e.*enacting *legal* norms) but also when it is operating 'only' as social discourse (*i.e.* producing normative truths/'true' norms), has, as it were, a privileged potential for disqualifying other knowledges. In this sense, I would suggest that normative truths produced by the Law as a social discourse benefit from their contiguity with legal rules enacted by the Law as an institution (or an institutionally bound discourse), and it is precisely this that allows the Law to be peculiarly powerful among other social discourses.

At any rate, in our societies legal rules, whether expressly or not, exclude lesbians and gay men from the enjoyment of equal rights in a range of situations in social life.[265] Homophobic hateful utterances thus can derive their illocutionary force, and as such, their power to subordinate (both by attaching to their victims social identities of inferior worth and by enacting asymmetrical interlocutory/interpersonal relationships), not only by

[264] The condition put in bracket seems to suggest that ultimately the force of legal norms depends less on institutions than on discourse: in democracies, legal norms do not borrow their force from a democratic institution, it is rather the democratic institution, as a discursive construct, that borrows force from discourse (about democracy, social contract theories, etc.) and lends it to legal rules.

seeking justification in true norms/normative truths that are produced by social discourses about homosexuality (of which the Law, when not operating strictly as an institution, is one), but also by pointing to official, *institutional*, legal norms that discriminate against lesbians and gay men. Granted, legal norms tend not to invest expressly and formally specific citizens with the power to speak homophobic hate. They do this, however, by indirection, to the extent that in many countries the subject of equal rights is heterosexual (although this is not true in the same degree everywhere: as regards North-America, for example, the role of the Law in thus contributing to the subordination of lesbians and gay men can be thought to be, generally, much more marked in the United States than in Canada, whose laws provide considerable protection to gay men and lesbians).

Thus, for instance, legal norms preventing lesbians and gay men from adopting provide the normative background against which the illocutionary success of hate speech acts identifying homosexuals with child abusers can be secured.

V: *Subordination as Harm.*

I have above identified subordination/discrimination/inequality as the hate speech-related harm concern for which may justify free speech restrictions. I have as well explained in what way a special kind of subordination is effected through hate speech acts (at the illocutionary level). The question is, is this kind of subordination a type of harm that may be taken to justify hate speech restrictions?

Robert C. Post characterises the harm identified by Prof. Matsuda as a "harm to identifiable groups" that "locks in the oppression of already marginalized [minorities,]" rather than "harm to individuals" or "harm to the marketplace of ideas."[266] This might suggest that it is precisely the sort of subordination effected by hateful utterances at the illocutionary level that is, in Matsuda's analysis, harmful to the extent of justifying hate speech regulation.

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[265] See *supra* note 135.

[266] R.C. Post "Racist Speech, Democracy and the First Amendment" in H.L. Gates Jr. et al., *supra* note 15, 115 at 119.

Similarly, Judith Butler observes that

> [i]n Mari Matsuda's formulation ... speech does not merely reflect a relation of social domination; speech *enacts* domination, becoming the vehicle through which that social structure is reinstated. According to this illocutionary model, hate speech *constitutes* its addressee at the moment of its utterance; it doesn't describe an injury or produce one as a consequence; it is, in the very speaking of such speech, the performance of the injury itself, where the injury is understood as social subordination.[267]

It has to be admitted, however, that the kind of subordination performed by homophobic (and racist) hate speech acts at the illocutionary level, as I have described it above, would be a somewhat tenuous basis on which to ground an exception to the principle of freedom of expression. If, according to Matsuda's illocutionary model, hate speech, as Butler puts it, *constitutes* the subject who is the target of hate, it is also true that, as far as the construction of the subject is concerned, that is not the end of the matter. Powerful counter-discourses exist in society that can, in some way, undo what hate speech does: the constitution of the (homosexual, gay, lesbian, queer) subject is never completed at a certain stage, as the subject is the very possibility of resignification.[268] Any illocutionary effect secured by a hateful speech utterance should not be seen, in this sense, as being permanent, inescapable, and un-problematically established.

Also, it should be noted that the illocutionary way of creating subordination as I have described it above is distinguished from a way of producing subordination at the unconscious (as opposed to the rational) level. *Convincing* an audience of something, either by way of rational persuasion or *unconscious* influence, seems to be a consequence that rather falls within the category of perlocutionary effects, introduced in section IV (1) of this chapter. The illocutionary way of subordinating is not an unconscious as opposed to rational manner of convincing an audience, it is rather a mechanism according to which, when a hateful speech act is uttered, certain subjects (first of all the interlocutors) end up inhabiting certain (hierarchical) social positions and/or recognising the existence of certain social norms/'truths' because, and at the same time as, the speech act is

[267] See J.P. Butler, *Excitable Speech, supra* note 160 at 18 (see the observation made in note 235).

understood as being used in the way in which it is used and as endowed with the meaning that is attached to it by the speaker. In other words, acknowledging that hateful speech acts ordinarily produce an illocutionary result is not the same as saying that they ordinarily operate so as to bring about subordination at an unconscious level.

It follows that the argument that wants to exclude hate speech from the realm of protected expression on the basis of its operating at the level of emotions/unconscious convictions and its failing to contribute to rational democratic discourse would not seem to be relevant here. Remember also that I have above explained that hateful speech acts are not acts directed to reaching rational understanding; that I have condemned both the meaning and disavowed any *inherent* merit of such acts; and that I have already regarded as settled that the value of hate speech is merely *indirect* in terms of its contribution to rational democratic discourse. However, because of the value attached to a robust principle of freedom of expression that tolerates the fewest possible exceptions, none of these features of hate speech have led me to argue that they are a sufficient reason to exclude in principle such speech from the realm of protected expression- although I accept that, should hate speech be considered worth of restriction on some other basis (e.g. when it takes place in specific contexts) these features could be legitimately invoked to make the argument for regulation stronger.

I have in this section suggested that the kind of subordination produced by homophobic hate speech at the illocutionary level does not seem to justify, per se, regulation. On the other hand, Matsuda does not stop her analysis at the stage of the illocutionary model. In fact, she describes specific effects of hate speech[269] that cannot be understood by resorting to the illocutionary way of enacting subordination. This requires an analysis that considers the relationships among the three hate speech-related harms mentioned above, namely: 1) the group-based harm of (illocutionary) subordination; 2) the harm to individuals (which, as we will see, has a perlocutionary dimension); and 3) the harm to the marketplace of ideas, that can be expanded to include, besides the silencing effect of hate speech that impairs minorities' participation in the process of self-

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[268] See *supra* note 108.

[269] See also J.P. Butler, *Excitable Speech, supra* note 160 at 75.

government/definition, (to serve which the notion of the marketplace of ideas is established) minorities' generally impaired enjoyment of the equal privileges of democratic citizenship.

VI: *Hate Speech as Perlocution.*

Matsuda herself gives an account of how the individual victims of racist speech experience emotional distress, while even well-meaning dominant groups members end up, to some extent, internalising racist beliefs.[270] In the framework for analysis developed by speech act theory, the effects, as described by Matsuda, produced by racist utterances *at the individual level*, in both the victims and other listeners of such utterances, can be regarded as falling into the category of so-called perlocutionary effects.[271]

Change in feelings, beliefs, thoughts, attitudes etc. are a normal consequence of any speech act. The fact that perlocutionary effects of some sort will *normally* follow a speech act does not mean, however, that *given* perlocutionary consequences will, normally, predictably ensue pursuant to a given type of locution (such as a sexual preference-based hateful utterance): "Into the description of perlocutions ... there enter results that go beyond the meaning of what is said and thus beyond what an addressee could directly understand."[272]

Of course *what is said* will generally be relevant to identify the specific perlocutionary effects that ensue in any given speech situation: but this is no more true of *what is said* than of any other contextual factor that characterises the speech situation. This means that perlocutionary (as opposed to other- namely, illocutionary) "effects are not connected with speech acts only in a conventional way."[273]

I have contended that the most convincing ground on which to proscribe hate speech is the harm done to the equality of a class of people. Hate speech, in this sense, becomes a legitimate target of regulation to the extent that it appreciably contributes to

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[270] M.J. Matsuda, *supra* note 11 at 2335-41.
[271] See section IV (1) in this chapter.
[272] J. Habermas, *The Theory of Communicative Action, vol. 1, supra* note 250 at 290.
[273] *Ibid.* at 292.

group subordination, where subordination, however, must be something more than that effected at the illocutionary level, and specifically mean the impaired enjoyment of minorities of their rights of democratic citizenship.

It would appear that, since the decision at issue here is whether to proscribe an entire category of speech merely on the basis of *what is said,* it should be established that what is said produces subordination-related perlocutionary effects on a conventional (regular) basis.

We have just seen, however, that given the variability of the contextual speech situation, the production of specific perlocutionary effects (as opposed to the production of perlocutionary effects of some sort) is not a normal consequence of a speech act.

But isn't hate speech, in some way, 'peculiar'? Couldn't we say that when homophobic hate speech is at issue, the connection between the locutionary act (*i.e. what is said*) and the specific perlocutionary effects that allegedly make such utterances harmful is rendered in some way almost 'conventional' (*i.e.* customary, stylised, so that if those effects failed, in a particular case, to take place, such a case could be considered 'out of order'[274]) by the pervasive context of heterosexism within which the hateful speech act takes place? If structural homophobia and practices of gender subordination are the most significant element that characterises the several possible settings where a heterosexist utterance can be performed when a heterosexist utterance is actually performed, (as Matsuda's account seems to suggest with regard to the case of racism)[275] then it might be plausible to speak of homophobic hate speech as *conventionally* producing *on its victims* some specific perlocutionary effects. In short, only if the subtext of discriminatory (hetero)sexist practices and discourses is considered to be, ordinarily, the most powerful contextual factor of the speech situation, can a hateful homophobic utterance produce certain victim-specific perlocutionary effects in a *quasi* conventional way.

The problem is that this way of looking at homophobia as something which is almost all-pervasive and endowed with a seemingly unrivalled power risks

[274] I borrow this expression from Austin (J.L. Austin, *supra* note 235 at 116) who uses it with reference to *illocutionary* effects, which, as we have seen, are indeed (as opposed to perlocutionary effects) always *conventionally* linked to what is said, provided the conditions for the felicity of the utterances are satisfied (see J. Habermas, *The Theory of Communicative Action, vol. 1, supra* note 250 at 291-2).

conceptualising it in such a way as to make it look akin to, and therefore open to the criticism that can be levelled at, a radical feminist notion of 'patriarchy' (meant as phenomenom of almost titanic dimensions and a-contextual, transversal validity).

Still, what if it were the very locutionary content[276] and the ordinarily occurring illocutionary success of a homophobic hate utterance that had the power to suddenly and graphically evoke, and highlight, (*i.e.* give special significance to) precisely that subtext of heterosexist discourses and practices that might, at other times, be only latently present in the site where the utterance in question were issued?

Once this subtext were thought to be 'activated' by the hateful speech act itself, (*i.e.* once the victim is reminded, through words that have a far too understandable *locutionary meaning* and *illocutionary force*, that for more or less vast segments of society her social identity is one of inferior worth and how this translates in a history of inequality) it could be argued that this subtext of heterosexism would, almost inevitably, bear on (*i.e.* become an important contextual element of) the speech situation, so as to ordinarily (*i.e.* quasi conventionally) produce on the victim some specific kind of perlocutionary effects. In particular I would argue that hate speech, as a perlocution, may be thought to ordinarily bring about some degree of *emotional distress* in the victims.

But then this is probably well settled.

It is important to distinguish now between this perlocutionary effect produced on the *victim* of the utterance and those that will result on non-victimised hearers.

Of course it would seem that discrimination is directly linked quite as much to certain perlocutionary effects that hate speech has on those hearers that are at the same time the target of its hideous attacks, as is to other perlocutionary effects that it *may* have on non-victimised hearers. But the way in which also dominant group members, when they constitute the audience of a hate speech act, perceive it as an act of subordination, and the way in which, therefore, the locutionary meaning and illocutionary success of the

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[275] See M.J. Matsuda, *supra* note 11 at 2331-5.

[276] The locutionary content of a racist hate speech act will employ " language that is, and is intended as, persecutorial, hateful, and degrading" - *ibid.* at 2358- and will convey a message of racial inferiority directed against a historically oppressed group: see *ibid.* at 2356-9.

utterance throw, here as well, structural homophobia into the speech situation do not justify, in this case, the conclusion that certain specific perlocutionary effects will be produced *quasi* conventionally on the audience.

It is obvious, in fact, that perceiving (at the illocutionary level) the speech act as an act of subordination could precisely have the effect of making a well-meaning audience feel indignant towards the hate-monger, and produce in it feelings of solidarity with the victims of the speech.[277] When the audience of a homophobic hate speech act is not, at the same time, its victimised target, therefore, we cannot talk of *conventionality* in the production of specific perlocutionary effects.[278] It follows that, to begin with, arguments for the general, a-contextual proscription of hate speech should not focus on the effects such speech has on non-victimised hearers.

In fact, if we cannot talk of hate speech as ordinarily producing specific harmful (*i.e.* subordination-related) attitudinal changes in non-victimised hearers, it would seem that there are no strong grounds to proscribe hate speech on the basis of the *possible* production of certain attitudinal changes on a subset of non-victimised hearers, with the exception outlined below. It can be argued that, given that the harm to be avoided through the regulation of speech is here the subordination of a *class* of people, the production of perlocutionary effects on non-victimised hearers should take place, in order for it to be

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[277] Matsuda affirms that however much we oppose the racist hate message, "the next time we sit next to one of "those people" the dirt message, the sex message, is triggered [*because we have been presented with it over and over again*]. We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us:" *ibid.* at 2340. Accepting that also homophobic hate speech acts can *conventionally* influence non-victimised hearers at the perlocutionary level in this way (this is the only sort of perlocutionary effects that could be conventionally found both on bigoted and well-meaning dominant group members), it seems to me that this influence alone could not be said to ordinarily interfere (at least not significantly) with sexual minorities' enjoyment of their rights of equal citizenship. In a note relative to this passage, reporting one experience of hers Matsuda explains how, in a situation in which she was relating to a racial minority member, "[o]nly after setting aside the hate message could ... [she] move to ... [her] own thoughts:" *ibid.* at 2340. This, more optimistically, means that after setting aside the hate message she *was able* to move to her own thoughts, and suggests that perlocutionary effects can, in well-meaning dominant group members, be undone at least to the extent of preventing these hearers of the hate message (whether racist or homophobic) to translate such effects into a practice of *discrimination.*

[278] Some legal consequences could immediately be drawn from this. For example, the appropriateness of a defence that allowed hate speech acts to escape criminalisation when they took place privately and the hearers were not, at the same time, the victimised targets of the hateful utterances. Section 319(2) of the Criminal Code of Canada (see *supra* note 7) provides for the punishment of "[e]very one who, by communicating statements, *other than in private conversation,* wilfully promotes hatred against any identifiable group" (emphasis added).

significantly related to group subordination, on something which is more than what could be deemed to be an episodical basis, and on a larger scale than one involving a numerically limited subset of non-victimised hearers.

Referring to the effects produced by hate speech on non-victimised hearers will still make sense, however, in situations where, owing to the context in which the speech act takes place, there is apprehension of a clear and present danger that such hearers will enact, as a consequence of being the audience of the speech act, that sort of unlawful conduct that the law directly prohibits and that the speech act advocates. For our purposes, the unlawful conduct that would generally be relevant would be either violent or discriminatory. Every time the circumstances indicated, in a manner analogous to that outlined by the Warren Court in the aforementioned version of the clear and present danger test, that certain speech acts would be related to violence and/or acts of discrimination on the part of a non-victimised audience of the utterance, there would be no reason why such speech acts should escape proscription. While a clear and present danger of violence will perhaps be easier to establish when certain hateful words are uttered in certain circumstances to a certain audience, it cannot be excluded that on certain occasions certain hateful utterances will produce a clear and present danger of *discriminatory,* as distinguished from violent, acts, and to this extent expression of such utterances can be justifiably prohibited.

What concluded in this section about hate speech and non-victimised hearers leaves the question of the relation between subordination and the perlocutionary effects that can be deemed to be produced *ordinarily* on the victims of hate speech. I will concentrate on this question in section VIII.

VII: *Intermediate Reflections: Pornography and Hate Speech.*

The foregoing discussion highlights another difference between hate speech and pornography regulation: equality-oriented justifications for pornography regulation tend to focus precisely on the perlocutionary effects that this type of expression has on the

non-victimised hearers of the message, (*i.e.* men, at one time the consumers of pornography and the perpetrators of violence and discrimination against women).

This argument, however, would not be decisive *per se*, in order to discredit equality-centred pornography regulation; if anything, it would be an argument to support it. Arguably, the consumers of pornography would not make use of the material if they thought it aversive: in other words, the audience of pornographic messages can be distinguished from that of hate speech acts because it ordinarily welcomes, and seeks what pornography has to tell. This suggests that, if pornography could be equated to hate speech, its consumers would generally occupy the positions of those non-victimised hearers of the hate message on which specifically harmful perlocutionary effects *are ordinarily* produced. This would mean, in turn, that the insight according to which arguments for hate speech regulation should, if at all, focus on the harmful perlocutionary effects produced on the victims of the speech rather than on the non-victimised hearers would have no bearing on pornography. Therefore it could be said that pornography regulation could be thought –contrary to hate speech- to appropriately focus on the harmful perlocutionary effects produced on non victimised-hearers, as in the case of pornography such effects could be believed to take place on a conventional basis.

Another element, however, complicates the picture. What makes all the difference between pornography and hate speech is, as I already suggested, the uncertainty about what pornography has to say.

I would argue that, as regards hate speech, it is relatively undisputed that the message that it conveys is one of hatred. Surely this is not true in absolute terms (it much depends on how widely hate speech is defined). It is true, however, if we do not understand hate speech as coinciding with all prejudiced speech, but rather only with the most hideous bigoted expressions. This is precisely the approach I have taken where I chose to concentrate on Matsuda's model of hate speech regulation that, taking freedom of expression seriously, aims at proscribing only the most serious expressions of racial bigotry.[279] Admittedly, even in Matsuda's approach (and similar ones, *e.g.* as regards the realm of homophobic hate speech) there will still be hard cases, where it is not clear and

undisputed whether or not a certain speech act is hateful in the sense that justifies regulation.

Even accepting this, however, it seems clear that there is, at the very least, a *greater* degree of controversy about whether the messages conveyed by pornography are actually about (hetero)sexist hate or not, and this is even truer when homosexual pornography is considered. This ambiguity and contradictoriness of the pornographic message makes it a less suitable object for regulation, irrespective of the surrounding context of (hetero)sexism in which pornographic speech acts are spread.

In fact, if *conventional* production of arguably harmful perlocutionary effects is (for the purposes of analysing hate speech directed against subordinated groups) a function of the illocutionary success of an utterance, which is in turn a function of the locution, it follows that, in order for it to be harmful like a subcategory of hate speech, what pornography says should be unambiguously identifiable as conveying a univocally determinable meaning.

As we already know, that pornographic material is apt to convey one such meaning is precisely what radical feminists, consistently, argue; but it is also what a range of other feminists strongly contest.

VII: *The Harmfulness of Hate Speech. Remedies*.

I will now turn to the consideration of what I indicated as the conventionally occurring perlocutionary consequence of hate speech, *i.e.* the emotional distress experienced by the victimised hearers of the utterance. Could we say that this perlocutionary result, by itself, is harmful in such a way as to justify speech regulation?

Although undeniably injurious, emotional distress is not itself the harm that justifies speech restriction. The harm that is capable of doing so is rather the compromised ability of minorities to exercise their rights of full democratic citizenship: in other words, the harm is subordination. This is what the perspective so far adopted entails: if at issue were the protection of hurt feelings and psychological/emotional

[279] See *supra* note 276 and *infra* note 284.

distress *per se,* there would be no point in limiting to minorities the protection from hateful utterances. As Bakan underlines, "[t]he purpose of these measures is not to protect groups from mere offence, and it is not limited to protecting individuals from being intentionally injured by speech. Rather, it includes the promotion of values that lie at the core of freedom of expression itself."[280]

Like violence, therefore, emotional distress becomes relevant as a reason to limit hate speech only to the extent that it is found to be linked with subordination.

Intuitively it would seem that if homophobic hate speech impacts on lesbians' and gay men's exercise of their rights, it can do that precisely by passing through these perlocutionary effects (emotional distress) that take place at the individual level on a regular (quasi conventional) basis when the hearers of the utterance are the victims of homophobic speech. If we accept this, the problem would be that of conceptualising how such perlocutionary effects incapacitate generally speaking the members of that group from being full citizens, and, in particular, from exercising their free speech rights (so-called silencing effect of hate speech).

Alternatively, other perlocutionary effects that are directly harmful should be shown to take place on a quasi conventional basis on the victims of the hateful utterance following a hate speech act: such effects would be precisely those attitudinal changes that induce gay men and lesbians not to exercise their rights as equals.

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[280] J. Bakan, *supra* note 52 at 74 (Bakan is making these comments with specific reference to university codes that are generally viewed as serving, in the context of campuses, a function analogous to the one that hate speech laws are understood as having in society at large; for the peculiar problem of bigoted speech on campus, see *e.g.* "Forum: Freedom of Speech in the University Context" (1995) 44 U.N.B.L.J. 47; for the even more peculiar problem of insensitive speech in the classroom, see P.J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991) at 80-97). Taking the emotional injuries produced by hate speech alone as a sufficient reason for speech suppression is unacceptable because (of the still valid classic civil libertarian observation that) this would allow sweeping censorship measures to interfere with free expression every time anybody experienced offence as a consequence of being the hearer of a speech act. *Contra, it* could be argued that only emotionally harmful speech directed against certain (namely, disadvantaged/subordinated) groups should be prohibited. But then, which reasons could be advanced, to defend such a position, that would not, at the same time, make the stance that takes subordination itself as the harm to avoid appear more consistent? Thinking of the harm produced by hate speech in the terms I have explained in the text is thus an attempt to justify hate speech regulation on the basis of an acceptable rationale- one compatible with taking free expression doctrine seriously.

However, thus establishing, in either of these two ways, an unproblematic connection between homophobic speech that is specifically hateful and the impaired ability of lesbians and gay men to exercise their rights as equal citizens is not simple.

This is partly because the extent to which a collective gay and lesbian voice and political consciousness have been effectively 'silenced' is open to debate in the first place. In the marketplace of ideas queer expression, surely, has been ostracised, marginalised, ghettoised and essentialised, but these and similar attempts have been definitely less than successful, at least in countries were lesbians and gay men, although not endowed with the equal rights granted to others, are not positively per/prosecuted.

It would seem, in fact, that subordination does not work in a simple way. The notion of 'intersectionality' suggests that gay men and lesbians, like the rest of society, are not a homogeneous group, and subjected to the same sort of discrimination and the same degree of silencing practices by virtue of their being homosexuals. Race and gender meet sexual preference and fast around bodies, intersecting with class relations, to create peculiar experiences of *discrimination* and *empowerment*. Similarly, the same discourses that silence and constrain us in certain contexts incite us to speak up in others. To this extent the silenced minority of gays and lesbians has been less than silent.

There is no point, however, either in disavowing that participation on equal terms in the process of society's self-definition does not seem to have graced lesbians and gay men, or in denying that lesbians and gay men are silenced, if not as a group, then at least as individual histories. Nevertheless, it seems reductive to blame homophobic hate speech any more than other social/discursive practices for this less than full enjoyment of equal rights: it is indeed doubtful that gay men and lesbians are silenced more by homophobic hate speech, than by a variety of other causes.

While, as I have suggested in section VI in this chapter, a 'privileged' relation may be deemed to exist between hateful homophobic speech and emotional distress of some sort, it is less clear that an *elective* relation may be found to exist between the latter and changes in attitudes that more directly impact on gays' and lesbians' exercise of rights (or directly between such attitudinal changes -that can be characterised, for this purpose, as another specific kind of perlocutionary effects- and homophobic hate speech). This is

not to deny that such relations exist, but I cannot bring myself to believe that they are any more significant (if anything I would contend that they are less so) than, say, those existing between these perlocutionary effects impacting on lesbians' and gays' exercise of democratic rights (such as freedom of expression) and instances of *non-hateful* homophobic speech. We might think, just to name a few, about mildly homophobic talk and presumptive heterosexuality talk in everyday social interaction, compulsory heterosexuality talk aired in the context of a queer's family, ignorant talk, religious pitying, marginalisation of gays and lesbians' experiences in mainstream culture, medicalisation and pathologisation of homosexuality, and the Law's expressions of lack of concern for -or downright discrimination against, or substantial endorsement of privates' discrimination against- homosexuals.

Thus, hate speech would appear to be only one of the techniques through which lesbians and gay men are made unequal, and probably not the crucial one. The way in which by suppressing homophobic hate speech, without more, sexual minorities' role in society's self-government and definition would be made greater and their speech would end up being expressed and circulated any more significantly than is at present is not really clear. The experience of countries endowed with hate speech laws seems to prove that bigotry does not need hate speech to thrive.

Hate speech laws are attractive for progressive people, as they appeal to somewhat intuitive notions of justice. Prejudice, when it assumes hateful tones, sounds so immediately, totally wrong and hideous that there does not seem to be any point in letting people spew it. When I was first exposed to the American civil libertarian approach to hate speech, I admit it being hard for me to instinctively applaud its 'wisdom.' As Matsuda points out, "[a]ccepting this extreme commitment to [freedom of expression] is neither easy, nor natural. It is a concept one must learn."[281]

I have a feeling that hate speech laws against homosexuals can be politically sold with comparative ease also to people generally subscribing to the values of dominant ideology. A lot of people who subscribe to dominant values, conceivably, take it for

granted that it is wrong to vilify and propagandise hate, no matter on what ground (a lot of people believe 'radical' political opposition is wrong, too: which sort of tells something about what the principle of freedom of expression is all about). At the same time a lot of these people would rather not have gay instructors teaching to their children, are ambivalent as regards public display of affection on the part of homosexuals, as well as extending to people engaging in same-sex relationships the same benefits enjoyed by heterosexual couples; and are quite positive about considering it out of the question that adoption rights for lesbians and gay men are a bad thing. This is not surprising- in some way these attitudes simply reflect a somewhat 'popularised' version of the minority paradigm: while the philosophy underlying the minority paradigm is 'equal rights yes, but *they* are different,' people's common sense would seem to go something like 'equal rights yes, but not all of them.'

This again casts some doubts on the conviction that it is hate speech that most significantly hinders lesbians and gay men from enjoying full equality.

Carol Smart, with regard to the problem of sexist representation, argues:

"It is ... the case that if we direct ourselves to the problem of the extension of the pornographic genre [*i.e.* advertising, soap operas, romantic novels, etc.] rather than pornographic material as such, then the law as a possible remedy appears less and less useful."[282]

Smart however, is speaking about gender inequality, and specifies at another juncture that "Law may remain oppressive to women, but the form it takes is no longer the denial of formal rights which are preserved for men," and that "it was important, as a first step, that these privileges were removed."[283]

To paraphrase Smart, I would suggest that if we direct ourselves to the problem of the extension of the homophobic genre rather than homophobic hate speech as such, then censorship as a possible remedy appears less and less useful. At the same time, since the Law remains oppressive to lesbians and gay men, denying them formal rights which are

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[281] M.J. Matsuda, *supra* note 11 at 2350.
[282] C. Smart, *supra* note 33 at 136.

preserved for heterosexuals, it is important, as a first step, that these privileges are removed.

Homophobia needs to be seriously addressed at different levels. A great deal of lesbians' and gay men's inability to exercise their rights as equal citizens depends not only on their not having the practical possibility, but also on their being officially denied the theoretical chance -*i.e.* the formal permission- to exercise equal rights. In a number of western countries the subject of a range of rights is, as we have seen, heterosexual.

Thus one wonders whether, for example, the symbolic value of obtaining formal equal rights for lesbians and gay men would (by exploiting the Law's potential, as a powerful discourse, to de-authorise understandings that conflict with it) have a greater impact on homophobic attitudes related to gays' and lesbians' impaired participation in the process of society's self-definition than any hate propaganda law, which might be taken as doing little more than merely codifying understandings already prevalent in society at large (namely, that *hatred*, be it racist, homophobic or what not, is wrong).[284]

Even so, it seems clear that achievement of equal rights would not be a sufficient measure, on the practical level. History would suggest that civil rights struggles reduce the oppression of bigotry, but do not eliminate it. For example, hate speech would not lose its power to injure just because gay men and lesbians have obtained a greater degree of equality through being granted equal rights: even if homophobic hate speech acts could not count anymore on institutionally bound norms to secure their harmful effects, they could still rely on those normative truths produced by other (institutionally unbound) authoritative social discourses.

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[283] *Ibid.* at 139.

[284] Since I adopted Matsuda's approach, that takes freedom of speech seriously, I am here limiting my observations to homophobic hate speech laws that would not appear obviously irreconcilable with a robust freedom of expression principle. Such laws, in the context of racist speech, would focus on the following elements: "In order to distinguish the worst, paradigm example of racist speech hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here: / 1. The message is of racial inferiority; / 2. The message is directed against a historically oppressed group; / 3. The message is persecutorial, hateful and degrading. ... Under these narrowing elements, arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutorial language remains protected. Hateful verbal attacks upon dominant-group members by victims is permissible. These kinds of speech are offensive, but they are ... best subjected to the marketplace of ideas ... [T]he range of private remedies -including counter-speech social approbation, boycott, and persuasion - should apply:" M.J. Matsuda, *supra* note 11 at 2358.

To overcome the difficulties posed by the insufficiency of addressing homophobia by merely relying on granting equality of rights to lesbians and gay men, I believe that another measure is indispensable- which, at the same time, would (contrary to homophobic hate speech regulation) avoid making problematic exceptions to the free expression principle.[285] This measure would involve the state's *seriously* undertaking an educational program directly aimed at promoting equality for gays and lesbians (as well as other minorities), implemented, *inter alia*, through the school system.[286]

It does not seem that, by taking an unambiguous stand in terms of promoting one (admittedly, political) idea over others, the state would here be doing anything constitutionally scandalous, in terms of contravening the philosophical foundations of freedom of expression. As I envisage it below, I would even argue that this way of addressing the harms of homophobia would, indeed, seem to be the most consistent with free speech values.

Consider that to the extent that a substantial degree of equality is necessary for ensuring society's self-government, it could be argued that equality stands on an equal footing with freedom of expression. Both the principle of equality and freedom of

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[285] Slippery slope arguments are sometimes characterised as the discursive projection of neoconservatives' antipathy for the government, -see *e.g.* R. Delgado & J. Stefancic, *supra* note 11 at 118- or of the half-blind scepticism in the state's wisdom typical of socially privileged civil libertarians -see *e.g.* A. Scales, "Feminist Legal Method: Not so Scary" (1992) 2 U.C.L.A. Women's Law Journal 1 at 19, note 65. Although the slippery slope metaphor can be deployed (as probably any other legal argument) to serve conservative ends, its current validity seems to me to be proven by the way in which considerations meant supposedly to discredit such validity have to be framed by their proponents: "Indeed, the experiences of Canada, Denmark, France, Germany, and the Netherlands ... imply that limited regulation of hate speech does not *invariably* [!], *or even* [!!] *frequently,* weaken the respect accorded free speech:" (emphasis added) R. Delgado & J. Stefancic, *ibid.* at 125.

[286] For an example of this approach in the field of racism, consider that "Iceland has a compulsory social studies curriculum dealing with hate and discrimination which continues from first to ninth grades in school. The curriculum is very detailed. Iceland claims that its curriculum produces a person who, at the age of 10, is acquainted with various customs and habits of others and realizes how unfamiliarity with these customs leads to prejudice and conflict:" J. Magnet , "Hate Propaganda in Canada" in W.J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* (Oxford: Clarendon Press, 1994) 223 at 227. For similar experiences that directly relate to the problem of homophobia, consider that "[t]here are [at least] two Australian programs focused on homophobia ... [E]ducators in the US have been developing anti-homophobic educational strategies for several years now ... An important finding of [a] study [evaluating the effectiveness of short anti-homophobic courses in schools] is that it *is* possible to reduce anti-homosexual bigotry through educational interventions ... However, the positive effects were less for male students, and some of the positive effects lasted less for male students:" M. Flood, "Homophobia and Masculinities among Young Men (Lessons in Becoming a Straight Man)" (1997), online: O'Connell Education Centre <http://online.anu.edu.au/~a112465/homophobia.html>

expression belong, in this sense, to a superior, as it were, order of rules, that makes the very process of society's self-definition possible at all.

Consider further that precisely because both equality and free speech are so paramount in that they are instrumental to democratic self-definition, the state would be justified in adopting a 'partisan' stance towards the value of equality, actively promoting it through the educational system, *at the same time as it should recognise an almost absolute right to freedom of expression, that would leave hate propaganda unregulated.* In fact, I would argue that it would be precisely the state's leaving freedom of speech untouched, in terms of not attaching any negative sanction to expression that, without more, even hatefully contests the value the state would actively promote (equality), that would legitimise the state's support for this value.

Such a strong commitment to freedom of expression, so as to cover even hate speech, would show that the state's concern is not that of pre-empting the debate about societal self-definition, but merely that of ensuring the implementation of those circumstances where society's self-definition becomes possible at all.[287] In other words, precisely the contradictoriness of both positively promoting equality at the educational level and leaving hate speech unregulated would show how the state's interest is merely the 'neutral' one of creating the conditions for democratic self-definition,[288] and not that of enforcing, by putting itself above the citizens, an official morality.

Thus, there would be no risk that this would constitute a precedent for the government of the day to indoctrinate the citizens with its contingent political views: for the state to legitimately promote a value in educational institutions, it would have to show

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[287] Besides, the state already attempts to ensure every citizen's equal rights through anti-discrimination laws, and it could be said that promotion of the value of equality at the educational level would be just another way of doing that.

[288] Of course the state's concern here is 'neutral' only to the extent that there is general agreement about the fact that democratic self-definition (a political value itself) is the ultimate prescriptive principle, in the sense that no valuable alternative seems to have been offered yet. To the extent that democratic self-definition, through freedom of expression and the degree of equality necessary to make it meaningful, is the only means, to my knowledge, that allows everybody to promote their own political values, the principle of democratic self-government and those of equality and freedom of expression can be said to belong to a superior order of constitutional rules that could appropriately be considered immutable.

that, like freedom of expression and equality, that principle belongs to superior order rules that make democratic *self-definition* possible in the first place.[289]

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[289] Especially where such a system were chosen instead of the option of *criminalizing* homophobic hate speech, it might be thought to do away with a number of problems (too often overlooked, and that even here can be only hinted at) that the use of the criminal law entails when used to outlaw hate speech (let alone other general problems associated with it: consider, *e.g.*, that in a Nietzschean-inspired poststructuralist perspective the subject -here, the speaker of the hateful utterance- is a construction that is belatedly instituted only to legitimise, through the fictitious concept of accountability, a will to punish: see *e.g.* J.P. Butler, *Burning Acts- Injurious Speech, supra* note 235, 197 at 206). For example, respect for the principle of the presumption of innocence (a safeguard against authorities' abuse of power that seems hardly dispensable with) requires the doer of a criminal act to have a guilty mind as regards the harm that its act produced. This means that the speaker must want not only to throw the victim into the state of emotional distress/intellectual prostration/oppositional mood that a hate speech act can be plausibly thought to be aimed at bringing about (in other words: the perlocutionary effects of the speech act must tally with or be contained within the speaker's perlocutionary aim); the speaker must also know that these conditions will impair the victim's ability to fully exercise its rights of equal democratic citizenship. Although such knowledge will be present at (maybe most) times, it cannot assumed that is the case at all times, and in these cases conviction should not follow. When criminalisation of hate speech is the remedy, there are also other serious problems that arise with reference to the presumption of innocence, to the extent that this requires a certain distribution of the onus of proof. Would, when a homophobic slur was uttered in a face to face encounter, the Crown have to prove how, *e.g.*, the emotional distress the victim experienced impacted in general on its ability to function as a full citizen? Or how the homophobic utterance had a silencing effect? Or how it impacted on the specific exercise of a democratic right? And when a homophobic utterance was issued to the general public, in relation to who (which victims) should the Crown prove what, if anything? In this last case all the victimless crime controversy (here, of course the victim, rather than absent, is collective) would get involved. Such questions, which may be thought to be not insurmountable, nevertheless deserve close scrutiny: any deviation from liberal criminal law tenets, considering the invaluable protective power of such principles, should itself be principled in turn to avoid watering down such power. Of course, it could be said that the law, for example both in Canada and the Unites States, already allows for such limitations of speech where, as in the case of defamation, the object that the law seeks to protect from speech is conceived as some sort of interest in 'fair social interaction:' the idea being that everybody should be able to function, socially, as they deserve, *i.e.* free from the shadow that their and other people's awareness of their reputation being blemished would cast on their interpersonal/social relationships. Moreover, in both countries, such limitations, at least in theory, can also be of a criminal nature. In defamation cases, subject to certain limitations, remedies are granted for the protection of this interest on the mere basis that words of a certain type will harm (or are proven to harm) one's reputation, and the law, presumably, assumes that this will translate into some sort of unfair social intercourse. I do not want to suggest, here, that libel is a model that could appropriately be used to inform the regulation of hate speech (the focus of defamation law upon the truth or falsity of the statements made, *e.g.*, does not seem to translate into a terribly appropriate standard in the context of hate speech cases); nor that, the law already employing criminal measures to deal with a situation that may be viewed as problematic in terms of the principles of a progressive criminal law system, we should not be too concerned about respect of these principles in proposing yet another such dubious use of criminal remedies. My point is rather to note that hate speech laws are not isolated in raising the sort of problems I have mentioned as regards the nature of the interests the law seeks to protect in limiting speech in certain cases (ability of the victims of speech to 'function', socially, free from unfair and undeserved hardships) and the assumptions that the law can make about the connections existing between given state of minds (in the victims or in others) and impairment of such interests. Reflection on these issues is particularly complex and important when both freedom of expression and the criminal law are concerned, for the former poses problems in terms of slippery slope risks and chilling effect, while the latter, considering the nature of its sanctions and its amenability to authorities' abuse, requires the selection of the objects of its

I have suggested that a system to combat homophobia which was centred on educational measures would seem to be not only, as I tried to argue in the foregoing, consistent with free speech values, but also a necessary supplement, at the practical level, to battles for lesbians and gay men's equality of rights, to the extent that, obviously, the power of these battles to overcome homophobia is limited. I would contend that such a system would be more effective on a practical level than also the proscription of hate speech.

The idea is quite simple: if the harms related to hate speech and that would provide a reason for hate speech suppression are equally, if not even more, connected with a range of other arguably non-hateful, albeit homophobic, discursive and social practices, then it is plausible to see education as a more comprehensive, far-reaching remedy to address the problems posed *also* by these other practices. Besides, even admitting, *arguendo*, these harms being concentrated in specifically hateful (rather than other) homophobic utterances, it seems clear that the educational function of a criminal sanction attached to hate speech would be outdone by that of a system that *actively* and directly promotes equality for gays and lesbians.

Besides, in this framework homophobic hate speech that amounted (either to threats or) to advocacy of violent/unlawful (*e.g.* discriminatory) action, directed to inciting or producing, and likely to produce or incite, such action (clear and present danger test) would still be, and should be, punishable. Similarly, hateful homophobic utterances that became, by virtue of their being repeatedly delivered over time to an unwelcoming listener, harassing could be thought to appropriately undergo restriction: the element of repetition, while arguably making more severe for the listener the injurious power of speech, and significantly impacting on her individual capacity to effectively exercise her right to freedom of expression, would at the same time make the speech of the hate-monger less significant in terms of 'marketplace of ideas' and self-fulfilment

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protection to be in some way principled, especially when such objects are not in some way empirically measurable and the relation between the acts on which the criminal provision impacts and the harm affecting these objects is, in some sense, a 'mediated' one.

values (to the extent that the message has already been aired).[290] Also other specific contexts would seem to justify discrete instances of hate speech restrictions. For example when speech of instructors in the classroom (and, arguably, outside: see *Ross* v. *New Brunswick School district no. 15)*[291] is in question, regulation of hate speech seems to be mandated by the government's obligation to provide discrimination-free educational environments.[292]

Finally, besides being respectful of free speech doctrine and, conceivably, practically more effective than the alternative of censoring hate speech, a remedy centred on educational programmes would appear desirable also from an ethical point of view.

Both criminalisation of hate speech, and -although to a lesser extent- other (non-criminal) measures that are directed at deterring expressions of bigotry by attaching to them negative sanctions enact a type of discipline that conveys a scarcely flattering image of the society that chooses to thus address the harms produced by hate speech. An analogous observation applies, it seems to me, to the implementation of 'private' measures that the civil society may apply in the absence of official responses to hate speech. I am thinking, for example, of the John Rocker affair of December 1999.[293] Feeling the need to make, and actually making, somebody spewing hateful remarks

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[290] Especially in enclosed spaces such as campuses and workplaces, the fact that the message was directed to many, and not only to the unwelcoming listener, would not make it legitimate, to the extent that speakers do not ordinarily need, in order for their free expression to be significantly furthered, to discuss their bigotry in the presence of the unwilling listener. By analogy, posters whose message a worker wanted to convey to all co-workers could be legitimately removed to the extent that by definition the hate message would be persistently delivered, and would thus harass, the unwilling listener (while the poster could be showed privately to other co-workers, if, *e.g.*, attached to the walls of the hate-monger's living-room). See, *contra,* E. Volokh, "Freedom of Speech and Workplace Harassment" (1992) 39 UCLA L. Rev. 1791 (who, however, admits restriction for 'fighting words').

[291] [1996] 1 S.C.R. 825, aff'g [1991] N.B.H.R.B.I.D. No. 1 (sub nom *Attis* v. *New Brunswick (School District 15)*).

[292] In these cases, however, anti-discrimination laws such as Canadian Human Rights Codes, rather than the criminal law, would seem to be an appropriate response: see S.S. Anand, *supra,* note 206 at 125-7 and 145-6. Consider also that criminalisation (as distinguished from milder, more flexible disciplinary measures) might be thought to have, as far as hate speech is concerned, a strong deterring function on such people as instructors, judges, state officers. Still, for practical purposes, it is often vital for a minority group member to be aware of the strongly bigoted views of somebody occupying that position, and with whom the minority group member might happen to interact (*e.g.* to have proof of having been discriminatorily treated).

[293] American baseball player John Rocker (Atlanta Braves) made, in the course of an interview to 'Sports Illustrated,' among others, homophobic comments. The statements justly raised the indignation of a

undergo a psychological analysis[294] seems to point precisely to a worrisome grip, on our societies, of the paradigm type of normalising technologies of power.[295]

Contrast these remedies to one in which the state made it clear that education on the subject of homophobic prejudice is prompted by the *belief* that bigotry and ignorance interfere with everybody's enjoyment of the rights of democratic citizenship. The state would not have an undisclosed perlocutionary aim (namely, that of stopping hate speech at every cost, even if the linguistic means employed involved techniques different from rational argumentation) which would fatally transform its speech acts in unacceptable linguistically mediated strategic action- *i.e.*, in our specific case, indoctrination.

In fact, imagine the state assuming an attitude directed, to use Habermas's terminology, to reaching understanding, in the sense of its making serious implicit offers to redeem the validity claims it would be raising. In this view, it would be the state's attempt to engage in *communicative action* with the citizens that not only would legitimise its action, but that would also create the conditions for the success of that action, supposedly bringing about a rational agreement between interlocutors and accordingly the decision, on the part of the citizens, to undertake the obligation not to disseminate or support homophobia.

But how can we square this idyllic picture with the poststructuralist insight that reveals that every position is political, that there is no knowledge outside power? Aren't these notions of 'pure' rationality, of ideal communicative action that remains untainted from strategic purposes, in reality nothing but discipline in disguise?

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number of individuals and groups, and the developments of the story were followed and aired, among others, by the CNN for a comparatively long period of time.

[294] Major League Baseball required the player to undergo psychological testing. If the player had refused apparently he would have faced disciplinary sanctions.

[295] Besides, in a Foucauldian perspective that opposes modern and contemporary societies' advancement towards ever increasing systems of discipline and surveillance, referring to the authority of the human sciences may be seen, generally speaking and especially if (as happened in the case at issue) the story receives wide publicity, to add unnecessarily to the authority of the discourses produced in the context of the 'psy' professions, unwittingly empowering them -more than they already are currently- to define what is 'normal' and what is not. Note also that in a 'traditional' perspective that believes that personal responsibility counts, making a hate-monger symbolically undergo a psychological analysis belittles precisely the element of personal responsibility, suggesting that to be a bigot one needs to be mentally disturbed at some level.

Of course trying to get people not to disseminate hate is necessarily an attempt at disciplining them -whether that is reached through the human sciences or by other means- and the whole point, when responses to homophobic speech are discussed, is precisely that of disciplining hate-mongers/homophobes.

As Cooper remarks, however, "discipline does not have to be conceptualized solely as a way of maintaining domination or oppression. This being the case, a key strategic issue becomes how we shift to more symmetrical forms of discipline rather than how (and whether) we can eradicate discipline altogether."[296]

This suggests that if the state's trying to defeat bigotry through education -*i.e.* employing the classic remedy of more speech- could not be characterised as the triumph of pure rationality, at least it would seem to constitute precisely a shift towards more symmetrical forms of discipline.[297]

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[296] D. Cooper, *supra* note 134 at 22.

[297] The suggestions I made above need elaboration. Complex but, I believe, not insurmountable problems arise as regards what precisely the state should teach. The problems connected with the minority paradigm (a regressive version of which, as I have suggested above, is already dominant in society, and compatible with mildly homophobic attitudes) would arise to the extent that the state limited itself to teaching 'traditional' notions of equality and respect without engaging in a discussion regarding the matrix of compulsory heterosexuality and the problematic nature of common sense understandings of gender roles (this might be taken to require entrusting gays and lesbians with the task of conveying notions challenging common sense notions of sex/gender/desire). The greatest problem of all would be, however, which political force would be willing to put such an educational program into practice, and how long-lived any such attempt would be. For example, for an account analysing the difficulties met by local authorities trying to promote positive notions of homosexuality in the U.K. in the 80's, (an experience leading to the enactment of the infamous s. 28 (see *supra* note 135)) see D. Cooper, *Sexing the City* (London: Rivers Oram Press, 1994).

CHAPTER IV

I: *Concluding Remarks.*

In western countries pornographic expression tends to be restricted on a basis (i.e. public morality) that seemingly makes such free speech restrictions very little justifiable. Radical feminists, in Canada, have succeeded in introducing a somewhat better ground on which sexually explicit expression should, if at all, be regulated- one that assimilates pornography to hate speech.

By taking into account the Canadian experience, and specifically considering the impact of equality-centred anti-pornography measures on gay and lesbian sexually explicit representation, however, I have here taken the view that when the Law limits sex expression on the basis of the most powerful rationale currently advanced to justify pornography regulation, *i.e.* precisely that which assimilates pornography to hate speech, it necessarily ends up making strong and arbitrary claims to truth, that are premised on doubtful assumptions, silence alternative knowledges, subjugate outsiders' experiences, and contribute to the creation of oppressive social identities. I have thus advised against the desirability of defending censorship of pornography on the basis of egalitarian concerns, and I have consequently attempted to spell out to what extent, and some of the conditions under which, engagement with court litigation and the deployment of the discourse of rights can be promising strategies for lesbians and gay men who wish to rid themselves of such obscenity laws.

While establishing a relationship between pornography and inequality seems very problematic, hate speech is more evidently linked to discrimination. Hate speech laws are widely accepted among western countries as the standard way of dealing with the problem of the dissemination of hate. Anti-vilification legislation on the basis of sexual orientation is more and more becoming an issue facing contemporary legislatures.

By considering the role that homophobic hate speech, compared to other social/discursive practices, plays in perpetuating inequality for lesbians and gay men, I have suggested that legal provisions that attempt to proscribe hate speech are the easiest but also, taken on their own, a largely ineffective way of responding to homophobia. Hate speech laws thus bear a presumption of being an unnecessary burden on freedom of expression, a liberty that minorities have a vested interest in keeping as intact as possible.

I have argued that what is required against the power of homophobia and bigotry is a more radical measure, focusing on education, that will actively promote equality values. I have further expressed the view that this remedy appears to be consistent with free speech doctrine precisely to the extent that hate speech will, setting apart some specific cases, escape regulation.

Both in arguing in favour of gays' and lesbians' engagement with court litigation in order to affirm their claim to freedom of sexually explicit expression, and in suggesting that a preliminary necessary step to combat homophobia is having gays and lesbians recognised as equal, full citizens, I have implied that in a society where the liberal discourse of rights is hegemonic, it may make sense to speak that language in those areas where departures from such a discourse characterise the system, and where adoption of that discourse would be likely to have emancipatory consequences (it is ironic that institutions drop that discourse precisely where consistently upholding it would be useful for gays' and lesbians' equality).

It may well be that by deploying the Law to affirm self-expression and counter discrimination lesbians and gay men contribute to legitimising the system. If such deployment is critical, however, there is no reason why such legitimisation should be a legitimisation of the *status quo*. It is maybe the case that the system itself changes in the process, that it is resignified by our practices, that it gets queered: it may be that the system turns out to be legitimised because, ultimately, it *becomes* more legitimate.

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