

**THE GAY AND LESBIAN AGENDA:**

**JUSTICE,  
EQUALITY,  
AND  
FREEDOM**

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## Abstract

The language of gay and lesbian, or sexual, politics has moved away from the 1970s cry for Liberation and instead now demands 'equality', 'justice', and 'freedom'. In this thesis I explore the definitions of those political ideals offered by contemporary liberalism, particularly the works of John Rawls, Ronald Dworkin, and Joseph Raz. In doing so, I argue that the theoretical frameworks proposed by Rawls and Dworkin cannot justify, or lead to, the changes proposed by activists because: they do not conceptualise sexuality as part of individual identity; they are unable to ensure policies of non-discrimination; and they do not require the state to provide the conditions needed for the development of autonomy and value-pluralism. Raz, however, constructs a framework for political morality which answers these concerns by prioritising an autonomy-based freedom that promotes the conditions needed for autonomy and pluralism. Therefore the Razian framework can act as a strong theoretical argument for the changes demanded by activists such as respect for non-heterosexual identities, non-discrimination policies, and protection from the harm caused by heterosexism.

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## **Conclusion**

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*I envy their public love. I myself have only known it in secret,  
shared it in secret and longed, aw longed to show it--  
to be able to say out loud what they have no need to say at all...*

*Toni Morrison, Jazz*

For their unending support, for their faith in me, and for their sacrifices  
I thank my parents, Billy and Dorothy Wilson.  
Together, they taught me the most important lesson in life, how to love another person.

P.D.

And now I do, absolutely.

## Declaration

A version of chapter two has been published under the title 'Which Equality? Toleration, Difference, or Respect' in J. Bristow and A.R Wilson eds. (1993) *Activating Theory Gay, Lesbian and Bisexual Politics*, (London: Lawrence and Wishart).

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All of the work found in this text is my own original research.

## Introduction

Since for Wittgenstein language games are an indissoluble union between linguistic rules, objective situations and forms of life, tradition is the set of discourses and practices that form us as subjects ... we are able to think of politics as the pursuit of intimations ... the creation of new usages for the key terms of a given tradition, and of their use in new language games that make new forms of life possible. (Mouffe, 1993, p. 17)

If an introduction should map out the steps of the thesis argument, then I would want this chapter, upon completion, to provide such a map. As the structure has become rather familiar to me, I am quite aware that a fresh eye might find the argument, however clearly demarcated, particularly unfamiliar. This unfamiliarity is, I hope, the distinctiveness of this work, though perhaps not for the most obvious reason. The unfamiliarity I refer to here is not that of the first-time reader approaching a new text, or even the uniqueness intended for a doctoral thesis. Instead it is a recognition of the epistemological inconsistencies developing in contemporary gay and lesbian politics, in particular the disconnection between the language used to barter political goods, for example rights and justice, and the difficulty in locating justification for such (ex)changes within the dominant liberal political theories that define that language. Or, more simply, the move away from a socialist-based cry for 'liberation' emanating from the Stonewall riots towards the familiar language of the empowered - equality, justice, and freedom - may be an understandable political strategy but it also signals a much deeper shift in the way in which gay and lesbian activists position their project in mainstream political discourse.

The 1990s have witnessed an increasing acceptance of gay and lesbian issues on the mainstream political agenda, and acceptance has been accompanied by, or has been a result of, activists articulating desired changes in the familiar language of liberalism. The move into the mainstream has sparked a vehement, and sometimes violent, reaction from the New Right who argue that gay and lesbian activists are working from a 'Gay Agenda' which threatens the heterosexual family, infects heterosexuals with HIV, and will lead to a breakdown of society. In light of this move into the mainstream, and the strong opposition it has aroused, I have chosen the title for this work in order to address the possibility of a coherent political agenda and to posit on that agenda the liberal political ideals appealed to by activists. In doing so I want to explore the possibility of finding a framework in liberal political theory that can bring about the promises associated with its language.



## A Simple Matter of Coherency

I am aware that in an attempt to establish coherency, I run the risk of misrepresenting 'the gay and lesbian community'.<sup>1</sup> It may seem a somewhat outrageous claim that this thesis provides a definitive 'Gay Agenda'. Fortunately, that is not my claim here. While it will aim to be a framework for communicating changes we may endorse, that framework will, undoubtedly, be rather uncomfortable for some. However, before we pursue those potential disagreements, allow me to state the assumptions that I *do* make about the Gay and Lesbian Agenda posited here. As a movement for social change, gay and lesbian, or sexual, politics<sup>2</sup> challenges the way in which

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<sup>1</sup>The quotation marks here indicate the continuous debate about the existence of a gay and lesbian community. (See: Simpson, 1994, pp. 30-32; Phelan, 1989, esp. pp. 135-149; Stein, 1993, esp. pp. 205-255; and for a brief survey of the questions around a 'gay community' or 'culture' see Blumenfeld and Raymond, 1993, pp. 362-395.) While the term may denote a culture which has been created by gay men and lesbians and/or a political constituency who involve themselves in sexual politics, I do not believe that it can denote a 'community' in the strictest sense of the word. For example, gay men and lesbians cannot be compared with communities, such as Native Americans, whose identity centres on a claim to a particular land, language, cultural heritage, or set of beliefs. We are in that sense a cross-cultural, cross-community, group. So when the term 'gay and lesbian community' is found in this thesis, it should be interpreted loosely to refer to a late twentieth-century invention which offers support, acceptance, culture, and, most importantly, a sense of belonging, that we cannot often find in overarching heterosexual society.

<sup>2</sup>There is an ongoing tension about the descriptive language used to label the social movement that grew out of the 1969 Stonewall riots. The 'Gay Movement' of that time quickly incorporated the term 'Lesbian' as lesbian feminists in particular began to question their position within this movement. And it is under that gay and lesbian rubric that many activists continue to posit their work. However, the emergence in the 1980s of Queer Politics testified to the various sexual identities which were marginalised under that gay/lesbian lesbian/gay umbrella. (For an interesting discussion on the emergence of queer politics and the hostility it met in the 'gay and lesbian movement' see Thomas, 1993.) Throughout this work I try to use the 'gay and lesbian' label only where it is applicable to the historical movement or it is descriptive of the activists who themselves use this label. At other times, I choose to employ the term 'sexual politics' in order to indicate the diversity of sexual identities

sexuality is constructed, and heterosexuality enforced as a social institution. This challenge to social norms is at least somewhat indicative of a vision of society which is different. Now while any one vision of a different society may not accurately reflect all the possibilities advocated by gay men and lesbians, I would suggest that we as a political movement *do* have some general premises about an alternative framework for society on which we could agree. This is not to say that we have a clear vision of utopia, but simply that we know that the heterosexist, homophobic social context in which we now live is not it. As a result there are, I believe, at least three significant changes which we, as activists in sexual politics, could 'communally' endorse.

First, public policy concerning sexual relationships and parenting, or what is often labelled 'family policy', as well as policy addressing issues of sexuality, sex education, or sexual acts, is most often based upon the assumption that the nuclear family is the only morally sound structure for sexual relationships and parenting. Since the post-war Beveridge Report, the development of welfare policy has idealised this nuclear family as *the* structure of sexual relationships and for raising children (as well as regulating the social role of women as primary care givers).<sup>3</sup> Given the heterosexism inherent in 'family policy' I assume that most gay men and lesbians, and probably others, would advocate decentralising this nuclear family structure from policies concerning parents, children, and families. This is quite

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now participating in a similar contemporary social movement. And, in most cases, this term also denotes the existence of various political movements, for example radicallesbianism, queer politics, conventional lobbying that have emerged as representatives of those oppressed, or marginalised, owing to sexual identity or sexual orientation.

<sup>3</sup>A few of the major legislative reforms which followed from the 1942 Beveridge Report included: the 1945 Family Allowances Act, providing universal benefits for families with two or more children; the 1946 National Insurance Act, extending the scope of unemployment and sickness benefits; the 1948 Children Act, empowering local authority Children Departments to coordinate services for children in need; and the 1948 National Assistance Act, abolishing the duty placed on adult children to maintain their parents. This series established the nuclear family as the standard for social policy. 'The legal change from the extended to the nuclear family came only in 1948 when financial responsibilities were reduced to those of husband and wife and of parents for their children aged under 16' (Cochrane and Muncie 1993, pp. 36-43).

simply a claim that the male/father and female/mother structure is not *necessary*, or not a necessary *good*, for raising healthy children. Furthermore as will be noted in the following chapters, especially since Section 28, this claim resonates with that of activist groups who call for a broader understanding of sexuality in sex education and policy regulating sexual acts. I would claim then that those involved in sexual politics can advocate ridding society of heterosexism, particularly as it manifests itself in 'family policy'.

Second, I assume that when we demand 'equality' we are, at least, referring to equal respect for all sexual orientations. Now this claim might be quite contentious. The growing participation of bisexuals and transsexuals in the 'gay and lesbian movement' has created, or more likely exposed, a tension between 'us' and 'them'. Fortunately, there seem to be signs that that tension is now being addressed, if not lessened, primarily owing to the determination of bisexual activists to expose the internal prejudices of those in the 'gay and lesbian movement'.<sup>4</sup> Despite this tension, and at least in theory, most activists would envision policies which do not discriminate on the basis of sexual orientation, or sexual identity. This assumption plays quite an important role in this critical analysis of contemporary liberalism, since our demands for equality, for justice, or for respect as citizens, rests upon the premise that sexual orientation, or sexual identity, should not be a basis for discrimination.

Finally the assumption of respect for all sexual identities does not entail that, when we raise the 'freedom flag', we are necessarily advocating a society free from all restrictions on sexual behaviour. While sexual identity should not be a basis for discrimination, sexual acts should be regulated. I will address this point more fully later in the thesis but here I want to note that, in general, I do not interpret claims for freedom to entail the freedom to abuse, freedom to force sexual acts upon another, freedom to express physical desires without regard to another's person, wishes, or mental capacity. Admittedly, this is a grey area primarily because moral conservatives have had the political and social power to enforce their interpretation of regulations upon sexual behaviour. Nevertheless, while those involved in sexual politics would endorse a broadening of that interpretation, I do not believe that most would want *all* regulation of sexual acts to be discarded.

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<sup>4</sup>For an idea of the growing literature on the positioning of bisexuality within the 'gay and lesbian movement' see: Hemmings, 1993; Eadie, 1993; George, 1993; A.Wilson, 1992 and Queen, 1992.

These assumptions may appear simplistic to some or, more likely, contentious to others. Nevertheless, I believe we do have some understanding of what a different society might look like, and that we as a movement are actively seeking to make it a reality. Again the fact that we may agree on some ideas about what that alternative society might look like does not necessarily mean that there is one vision, or one utopia, we are working towards.<sup>5</sup> If post-modernism has brought one thing to the sexual politics movement, it has shown us, or reminded us, that the objective truth - or the validity of one vision - is an implement of power wielded in particular by the heterosexual hegemony.<sup>6</sup> However, if we are beginning to learn one thing from our post-modern, or 'de-constructive', experiences it is that the 'house of difference' needs now to be constructed.<sup>7</sup> And that in building that framework we need to be intentional and careful about where, and in whom, we place power. Left solely to social, economic or political forces, that power may be consolidated yet again in the hands of 'a few' - or 'the many' - who wish to marginalise 'the other'. It will be argued here that the framework which supports these changes will respect individual (sexual) identity (regardless of aetiology) protect individual autonomy while fully recognising the formidable role of social and cultural norms as well as the importance of a sense of 'belonging' to a community; and simultaneously be sceptical of state power and hold it responsible for providing the conditions for justice, equality, and freedom. I will comment extensively later on these as this framework will be the basis for this thesis.

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<sup>5</sup>Susan Mendus (1994) offers a significant analysis of utopian feminist in her article 'Strangers in Paradise' where she contrasts the utopian vision based on a socialist revolution with the importance of changing people and society in the process of working towards a utopia.

<sup>6</sup>Obviously the works of Michel Foucault have provided a basis for questioning the validity of discourses on sexuality (esp.1978). Other significant works which have contributed to that debate include Sedgwick, 1991; Butler, 1990; and Weeks, 1977, 1981, 1985.

<sup>7</sup>The 'house of difference' imagery is invoked by A. Lorde in *Zami* where she writes, 'It was a while before we came to realize that our place was the very house of difference rather than the security of any one particular difference' (1984, p. 226). The construction of a political ethics has become new territory for theorists. For example, *Principled Positions* edited by J. Squires brings together a range of theorists to consider the development of a new ethics reflecting the multi-subject positions and, as the subtitle suggests, *The Rediscovery of Value* (1993).

The term 'The Gay Agenda' has been posited by moral conservatives in an attempt to consolidate all of the purported 'evils' of homosexuality into one political *conspiracy* which is set to destroy the nuclear family, social and political stability, and basically 'life as we (heterosexuals) know it'.<sup>8</sup> Alternatively, those supporting legal and social changes to be more inclusive of difference claim, as we will see throughout the following chapters, that they are *simply* arguing for what has been promised to them by the ideals of western democracy - justice, equality, and freedom.<sup>9</sup> With the battle lines drawn, politicians and policy makers swim in a sea of 'valid' information - where sexuality is determined biologically, is immutable, and therefore should not be a reason for discrimination; where homosexuality is a moral choice which the state should *either* avoid addressing because it is a private choice *or* should sanction against in order to ensure social stability; where homosexuality is a disease - morally or psychologically - which can be cured by therapy, and, of course, faith. The aetiology of sexuality has become the focus of political debates about discrimination and social norms/values. It acts as the dividing line between those who believe sexuality should not be grounds for discrimination and those who believe such an admission will radically alter, if not completely undermine, the social values which provide political stability. And each group appeals to differing definitions of justice, equality, and freedom. For some these are the political ideals which should be applicable to all citizens. For others these are political ideals holding us together as a society and should therefore be protected from citizens who wish to stretch them to the breaking point. In the mists (*sic*) of this sexual-political

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<sup>8</sup>Recently the Oregon Citizen's Alliance, sponsors of Measure Nine requiring government funds to present homosexuality as 'abnormal, wrong, unnatural and perverse', focused their campaign on prohibiting 'special rights' for gays and lesbians and attempted to pit 'real' minorities (racial and ethnic) against lesbians and gay men. In addition, they argued that homosexuals were not oppressed but were in fact a privileged group (Radical America, vol.24, no.4, April 1993, p.67). Similar language could be found on most American radio and television stations during the fall of 1992 when many of these amendments appeared on state ballots. Supports of these amendments often used the catch phrase 'Gay Agenda' and 'special rights'.

<sup>9</sup>One of the most forceful of these claims comes from Peter Tatchell, author and OutRage activist, who writes, 'Our embrace of this comprehensive equality strategy would explicitly refute the claim that our demands are concerned with divisive and sectional interests. Instead it would make it abundantly apparent that we are fighting for *everyone's* right to enjoy equality and to be spared discrimination' (1992, p. 240).

discourse, *coherency* of The Gay and Lesbian Agenda is not, as will be discovered in the following chapters, a *simple* matter of justice, equality, or freedom.

In fact, the disconnection between the liberal language employed by activists and the (in)ability of liberal theory to guarantee change denotes fundamental epistemological inconsistencies. As gay and lesbian activists appeal to the intuitive concepts of western liberal democracies, ideals like justice, equality, and freedom become both indictments of current discrimination and proclamations for change. But this language and, more significantly, the theories which define it raise important questions about the ability of those ideals to actually mandate the changes desired. For example, the liberalism which valorises these ideals also rests upon fundamental assumptions such as the division between 'public' and 'private', and state neutrality. Positing familiar ideals as a mandate for change may be strategically beneficial but these fundamental assumptions which underpin them may prove to be, in the least, unhelpful or, ultimately, damning. For example, gay and lesbian activists seem to dance on the public/private divide, arguing at once that sexuality, as an individual choice, is beyond government regulation *and* that, as an identity, the government should ensure that it is not the basis for discrimination. While there may be a strong argument within liberal political theory which could justify the former, given a general principle of government neutrality, the latter is substantially more difficult to prove.

This work looks at these inconsistencies which arise from using a liberal language for strategic political benefits and the difficulty in finding justifications within liberal theory for the changes gay and lesbian activists propose. There are three difficulties in particular which I will consider throughout this work. First contemporary liberal political theory does not *necessarily* conceptualise sexuality as part of individual identity. Because it is not necessarily part of identity, its positioning on the public/private divide, and subsequently justifying non-discrimination policies, is somewhat tenuous. So the second difficulty I will address is the inability of contemporary liberal frameworks to justify policies protecting gay men and lesbians from discrimination. This inability, buttressed by a principle of state neutrality, leads to a third difficulty with liberal political theory. Even if differences of sexuality should be tolerated, or minimally protected as choices of lifestyle, interpretations of neutrality hardly go beyond acknowledging rights of gay men and lesbians to the more radical task of challenging the heterosexual hegemony that endorses social oppression. The state is not required to provide the conditions necessary for autonomy, or, more specifically, the conditions for determining and/or expressing different sexual identities in a predominantly heterosexual society. These

three difficulties characterise the inconsistencies between using liberal language as an appeal to the intuitions familiar in western democracy and connecting that language with contemporary liberal theories in order to justify political change.

However, while the task of this thesis is primarily to address these inconsistencies between the language used by gay and lesbian activists and the liberal theories which define that language, it also indirectly challenges other inconsistencies, or divisions, related to the rise of gay and lesbian studies and, perhaps more significantly, gay and lesbian political theory. The somewhat surprising division between the academic disciplines of gay and lesbian studies and political theory as well as the division between gay and lesbian activism and the traditional project of political theorising are ones which I as a political theorist and as a lesbian activist, both 'in'-side and 'out'-side the academy,<sup>10</sup> have struggled to understand and to bridge. Before embarking on the more substantial debates addressed in this work, I want briefly to look at the development of gay and lesbian studies and gay and lesbian political theory in the academy.

#### Gay and Lesbian Studies, Gay and Lesbian Activism versus Political Theory

While the emergence of gay and lesbian studies in the academy has been welcomed by those academics involved with the contemporary gay and lesbian, or sexual, politics movement, its placement within academic disciplines has been somewhat surreptitious. For example, where a programme has not become a formally accepted route of undergraduate or graduate study, individual proclivities of gay or lesbian (and now bisexual) academics have tended to set the research agenda. As a result, some disciplines, particularly women's studies, psychoanalysis, sociology, and literature, have lent themselves more readily to this new 'alternative' research, while

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<sup>10</sup>I refer here to the important work done by Diana Fuss (1991) exploring the tensions of being both 'in' the academy as a researcher and 'out' as lesbian or gay man. What has been traditionally understood as a division between theory and activism, in light of the growing presence of gay and lesbian studies (and women's studies and African-American studies), has proved to be yet another false dichotomy. Those of us 'out' of the closet, and 'in' the academy, experience the falsehood of that inside/outside binarism on a daily basis. As Fuss notes: 'Any misplaced nostalgia for or romanticization of the outside as a privileged site of radicality immediately gives us away, for in order to idealize the outside we must already be, to some degree, comfortably entrenched on the inside' (1991, p. 5).

work within other disciplines, like political theory, has been slower forthcoming. And so this research is somewhat motivated by the awareness of the disjuncture between the two disciplines which I will argue should be easily, if not fundamentally, linked.

First, the separation between these two disciplines is perhaps most surprising because it is the political motivation of the gay liberation movement which laid the foundation for current academic developments. The Stonewall riots, the identity politics of the Gay Liberation Front, and the more recent varied modes of political activism began to challenge the heterosexual hegemony and, in doing so, they opened the door for gay and lesbian academics to begin questioning social theories and social institutions which had legitimated such heterosexism. So it is gay and lesbian politics which paved the way for gay and lesbian studies. It is striking, then, that one of the last disciplines to incorporate, or to be infiltrated by, gay and lesbian research is that of politics.

Second, this disconnectedness between the disciplines is not indicative of distinctive directions for research. It does not seem an outrageous claim that generally political theory is an exploration for just, or justifiable, structures of government. And while theorising about those structures has not been the explicit motivation of gay and lesbian academics, questions of epistemology and multi-subjectivity do raise significant questions for modernity's understanding justice, or just political institutions.<sup>11</sup> The division between gay and lesbian studies and political theory is then imposed by the academy rather than reflective of clearly separate purposes motivating research. So I would like to acknowledge this division between the two disciplines but in doing so I must admit that, in the time it has taken to complete this work, that gap is beginning to be bridged by gay and lesbian political theorists. A few of the most recent works by gay and lesbian political theorists will be considered in the following chapters. But one thing remains clear: much more work needs to be done in the field as gay and lesbian politics becomes increasingly a part of the mainstream political agenda.

Like the division in the academy between gay and lesbian studies and political theory, the separation between political activism and political theory is also, I believe, falsely imposed and should be challenged. Again there are not clearly separate purposes or motivations for political activism and political theory. While it may be argued that the distinction between activism and theory is that they are *necessarily* different projects - the activist is concerned with practical change and the

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<sup>11</sup>For example see Mouffe, 1988; Young, 1990; and Phillips, 1993.



theorist considers the philosophical implications of change - I would point to the broader motivations behind both political activism and political theory. Both are an attempt to identify structures for government which are just. Eve Kosofsky Sedgwick comments upon this dual role of the activist and the theorist: 'The people I teach lesbian and gay studies to are also the people whom, when I can do it, I do lesbian and gay activism with. I don't think such an arrangement is atypical of people doing politicised scholarship currently' (1993, p. 127). While methodologies may differ, a clear distinction between what is 'theorising' and what is 'activism' is, to say the least, difficult to make. In fact, not only is such a distinction unnecessary, I would hold, overcoming it is indeed necessary.

Perhaps the most obvious link between political theory and political activism is a shared language. The slogans used by gay and lesbian activists are words familiar to contemporary political discourse, for example justice, equality, and freedom. These three words in particular are taken directly from political slogans used by gay and lesbian activists in Britain and America. The focus of the April 1993 March on Washington was a banner claiming that the protest was essentially about 'A Simple Matter of Justice'. Stonewall, the British gay and lesbian lobbying group, rallies around the term 'Equality'. And rainbow rings and pendants, accompanied by the phrase 'Let Freedom Ring', as well as the 'Freedom flag', have recently begun to replace the pink triangle as a popular gay and lesbian cultural expression of difference and need for political acceptance. The language of gay and lesbian activism has re-appropriated these familiar western political terms to call attention to the injustices, the inequalities, and the breaches of basic freedoms, experienced within a heterosexist, homophobic society.

While activists have posited such phrases little time has been spent associating them within a particular structured political ideology. The reason for this may be all too familiar. The rise of the gay liberation movement was often plagued by opposing political ideologies. The identity politics that served to ignite the movement can be seen to have its roots in socialist class-based analysis.<sup>12</sup> Alternatively, second-wave feminism offered lesbians a language to articulate the different oppressions experienced by gay men and by lesbians.<sup>13</sup> Now activism - groups like Stonewall and OutRage - appeals to a diversity of political motivations from libertarianism to post-modernism. Contemporary sexual politics then has not

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<sup>12</sup>For one example see Weeks, 1977. For a contemporary argument along these lines see Evans, 1993. A brief review of this work is provided later in the thesis.

<sup>13</sup>For example, see Johnson, 1973; and Jeffreys, 1990.

been accompanied by ideological cohesion. And while this may both attest to our diversity and lend itself to pluralism within the 'community', it may not be the most productive route for continued political success. By employing this language, are activists implying a cohesive political project, and, if so, does this project intentionally resonate with the theoretical frameworks of liberalism that define that language? Probably not, instead they are more likely using the purchasing power of such language to ensure the changes they endorse. Nevertheless, that language carries with it assumptions about justice, about equality, and about freedom, - ones that may *not* lead to, or facilitate, the best possible outcome for non-heterosexual<sup>14</sup> citizens.

The 1990s have proved to be a time of unprecedented recognition, by both heterosexuals as well as many lesbians, gay men, and bisexuals, of the need for change in laws and social policies regulating sexuality. And the political spotlight has brought with it renewed opposition to our movement. This opposition, most strongly personified by the New Right in America and the Conservative Campaign for Family Values in Britain, has chosen to combat our new visibility and political power by cultivating the belief that gays are conspiring to break down traditional values, and, during the beginning of the AIDS crisis, were threatening heterosexual lives through the spread of disease.<sup>15</sup> The most intriguing cry of 'conspiracy' comes from the American New Right who claim that gay and lesbian activists advocate a 'Gay Agenda' which would give gays 'special' rights. The positing of a coherent 'Gay Agenda' has, therefore, been a project of those who oppose changes in laws which

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<sup>14</sup>I will use this term 'non-heterosexual' throughout this thesis for two reasons. First, the exclusion of a range of sexual identities from the phrase 'gay and lesbian' testifies to the need to recognise that it is not only same-sex relationships that are demonised by heterosexism. Second, the term non-heterosexual problematises the dominant, assumed, sexual identity. It denotes the range of other sexualities which are excluded because they do not adhere to the strict gender and sex roles of heterosexuality. I believe there is much work to be done in problematising this 'norm' rather than focusing solely on, or asserting, 'other' essentialised notions of marginalised sexual identities.

<sup>15</sup>Gayle Rubin (1993) notes that a Moral Majority Report 'featured a picture of a "typical" white family of four wearing surgical masks. The headlines read: "AIDS: HOMOSEXUAL DISEASES THREATEN AMERICAN FAMILIES"'. For a glimpse at the extent of this homophobia see Segrest and Zeskind, 1989.

criminalise or discriminate on the basis of sexual orientation, rather than an actual testament by gay and lesbian activists to a coherent political agenda.

The words chosen by the opposition - 'The Gay Agenda' - suggest both coherency and conspiracy. 'The Gay Agenda' is primarily built upon the assumption of a coherent political project. And while I have argued that there are some general premises upon which I believe most of those involved in sexual politics may be able to agree, the *specific* ideologies of groups as diverse as OutRage, Stonewall, radicalesbians, Conservative Group for Homosexual Equality, Labour Campaign for Lesbian and Gay Rights, etc. hardly indicate a coherent, unitary 'Agenda'. By assuming coherence, the phrase lends itself to identifying a conspiracy where the non-heterosexual 'other' is plotting to undermine, even to threaten the lives of, heterosexuals. Although I do not think it a concern of those positing this phrase, the term 'Gay Agenda' leaves the role of lesbians invisible; perhaps we are not a part of this conspiracy? or perhaps we are not a real threat to (patriarchal) social values? Whatever the invisible role of lesbians, I would argue that neither the coherency, nor the conspiracy, supposed by the New Right has been clearly articulated in contemporary sexual politics. But it could. So in choosing the title of this work, I challenge the opposition's assumptions of coherency, but I also want to affirm that potentiality.

In other words, within such a political climate, the slogans of 'justice', 'equality', and 'freedom' may serve to rally activists around a particular change in law or social policy, but in doing so it implies an ideological coherence which may not be, and historically has not been, a part of our movement. Nevertheless, this implied coherence has been articulated, and demonised, by opponents. We as activists are then left with two options. We can continue to utilise such language while opponents pontificate upon its meaning. Or we can define it ourselves. The process of definition which I refer to here is not simply offering examples of injustice, inequality, or breaches of freedom. Instead, I refer to a definition process which shows exactly *why* such examples are injustices, inequalities, and breaches of freedom. We need a definition of justice, equality, and freedom which clearly links an intuitive, comprehensible understanding of these ideals to those proposed changes in law and social policy. My point is this: historically the 'gay and lesbian movement' has not necessarily been motivated by one ideology; likewise contemporary sexual politics involves a range of political perspectives; nevertheless there are some political and social changes about which we can agree; the language used by activists has indicated that agreement, or coherency, to the opposition who have in turn demonised it. Therefore, if we as activists are going to use such

language, then we, not the right-wing opposition, need to be defining it. If a 'Gay Agenda' is going to be posited in contemporary political discourse, then why let the opposition set it?

So in an attempt to explore the potentiality of a coherent Gay and Lesbian Agenda that can be connected to this political discourse, I will examine a few contemporary liberal political theorists who have informed western political discourse by positing conceptions of justice, equality, and freedom as political ideals. Recent gay and lesbian activism has appealed to those ideals as they appear in political discourse in constructing arguments for change in public policy. This strategy is not unfamiliar to twentieth-century social movements who utilise western political discourse to communicate, and hopefully win support for, the changes they wish to endorse. The quotation from Chantal Mouffe at the beginning of this chapter points out that Wittgenstein's 'language games' can identify the tradition of the Enlightenment as a language game of a particular, western, political community. 'Since for Wittgenstein language games are an indissoluble union between linguistic rules, objective situations and forms of life, tradition is the set of discourses and practices that form us as subjects' (1993, p. 17). This shared tradition, or political discourse, lends itself to the fluidity of ideas between the theorists and activists. However, it also highlights the inconsistencies that arise when activists fail to define clearly the language they use. The language of sexual politics rallies the troops but offers little in terms of ideological direction. And the same language used by political theorists offers ideological structure but is often unreflective of the fundamental differences of subjectivity which can undermine any framework built around justice, or equality. Nevertheless, the shared language of activism and theory can open up new possibilities: as Mouffe proposes, 'we are able to think of politics as the pursuit of intimations ... the creation of new usages for the key terms of a given tradition, and of their use in new language games that make new forms of life possible' (Ibid.). The shared language of the activists and theorists then should oblige both to communication and, in doing so, bring an awareness of new meanings and possibilities to each. This thesis examines this language game of liberal political discourse and asks what assumptions within liberal political theory impede its ability to justify changes in social policy and what reconstruction of basic liberal principles can aid that process. In doing so I will propose a political project and a theoretical framework which can reflect the diversity of sexual identities, and recognise the need for clearly articulating, or redefining, meanings of justice, equality, and freedom to reflect, even require, the fundamental changes activists propose.

### Three in One

There are then at least two motives which necessitate the link between gay and lesbian activism and political theory: the usage of political language and the interpreting of that language by oppositional forces. And so this thesis begins with the words of the activists - justice, equality, and freedom - and posits them as The Gay and Lesbian Agenda. And in doing so, I examine the inconsistencies between the language and the theory, and attempt to forge a connection between our political language and a justifying political ideology. I will consider these claims for justice, equality, and freedom by exploring some of the frameworks within contemporary liberal political theory that centre upon these very concepts. But before I map out the connections which serve as the focus of this work, allow me to make a few comments about the scope of this project. As noted above, this project builds upon divisions between the disciplines of gay and lesbian studies and political theory, and equally upon the artificial distinction between political activism and political theory. In doing so, the scope of this project touches on all three areas. It is a gay and lesbian studies project. It is a political theory project. And it is an activist project. At the risk of becoming repetitious, I will briefly clarify this claim.

First as a gay and lesbian studies project this work builds upon other research in the field in its attempt to make a 'gay and lesbian' critique of political activism and political theory. For example, Eve Kosofsky Sedgwick's reflections upon the *Epistemology of the Closet* will be helpful in considering the relationships between agency and social context in determining sexual identity (1991). In addition, doubts about essentialism which characterises identity politics will be voiced with reference to the work of Gloria Anzaldua, Cherry Smyth, and Helen (charles).<sup>16</sup> However, while gay and lesbian political theorists similarly have begun to address the gap between sexual politics and political theory, the motivation which seemingly underpins their work appears to be somewhat misdirected. For example, two theorists, Shane Phelan and David Evans, forge this gap in interestingly similar ways. And while I will consider their work in detail in the following chapter, here it is sufficient to note that the motivation behind each work seems to be a 'salvaging' project reminiscent of political ideologies which have, often in opposition, informed

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<sup>16</sup>Each of these writers question the essential identity portrayed, or assumed, in the identity politics which marked the 1970s gay and lesbian movement. Approaching the topic from different perspectives, the writers share a concern to articulate the different, and multi-, identities among the 'gay and lesbian' and 'queer' movements. See Anzaldua, 1992; Smyth, 1992; and (charles), 1993.

the gay and lesbian movement from the beginning: lesbian feminism and socialism. Now while I will not question the merits of each of these projects, I will note the distinctiveness of my work. By taking as a starting point the language found in gay and lesbian political discourse, this project becomes less a 'salvaging' of a political ideology, and more of a 'salvaging' of a political movement which is struggling to defend itself against claims made by the New Right and moral conservatives by using a familiar 'empowered' language. What claims are activists making as they employ mainstream political language? What are the implications of those claims? Why have claims for liberation, so prominent at the birth of the movement in the 1970s, been displaced by the more subtle, more appealing (?), claims for equality and justice? The project here, as a gay and lesbian studies project, is motivated by the desire to analyse critically the language used by gay and lesbian activists, discovering implicit definitions, and positing those definitions within liberal theoretical frameworks.

Second, I have chosen to focus this research within contemporary liberal political theory, particularly around the works of John Rawls, Ronald Dworkin and Joseph Raz. This may be considered an unpopular selection, not least because they are white male, presumably heterosexual, liberals. But that is precisely why I have chosen them: they are all considered by the established academy as traditional political theorists. And decidedly more important, each one theorises specifically around the concepts of justice, equality, and freedom. Their gender, centrality in the academy or chosen theoretical focus does not, however, make them a necessary part of the gay and lesbian political discourse. What does make their work important is that it has informed liberal western thinkers, and politicians, for the last twenty or thirty years. And I believe that if we, as a marginalised group, are going to use their 'liberal' language to direct our movement, we should be theorising about how our concerns are, or are not, a part of their 'liberal' ideology. So another of the primary motivations of this project is to analyse contemporary liberal theory critically in order to tease out what the implications of proposed frameworks for justice, equality, and freedom might be for gay and lesbian, or non-heterosexual, citizens.

Third, and not unrelated to the above two points, this piece, as activism, is a work indirectly about power. While this claim will go fairly unsubstantiated, it is an assumed theme throughout the piece. The power enjoyed by the opposition, primarily moral conservatives, is at least in part legitimated by their ability to articulate a Gay Agenda better, more coherently and to a wider audience, than the gay and lesbian, or sexual politics, movement. One way to challenge that power is by showing how the claims made by gay and lesbian activists are not unrelated to

familiar political concepts of western democracies, concepts which are substantially informed by liberal political ideology. And so as a work of activism this project is an attempt to locate a framework within contemporary liberalism which expresses, or even requires, the radical social changes that we as a social movement may wish to make. It is, primarily, an exploration of at least one way we can offer a coherent political ideology that can be communicated to those who may be persuaded to agree, and can reflect, indeed necessitate, radical changes in the way sexuality is social constructed and enforced. So this work is an attempt to construct a bridge between the political language of sexual politics and the familiar concepts of liberal political ideology - justice, equality, and freedom - in order to increase the power of the non-heterosexual minority.<sup>17</sup>

### Constructing the Agenda: Chapter by Chapter

The methodology for this project may also be unfamiliar, at least within present academic trends, for it is not, *or not primarily*, about deconstructing Enlightenment-based 'truths'. But equally, it is not, *or not primarily*, about traditional philosophical arguments which question the morality of homosexual acts; although at different points I engage with both. Instead, this is an attempt to construct a framework for a coherent political ideology which can facilitate the progress of the gay and lesbian movement, or sexual politics, and incorporate radical social and political changes. It is, to say the least, an attempt to offer a point of communication between activists and theorists; a way for each to understand the arguments of the 'other'. However, as noted, this work will only consider frameworks within contemporary liberalism. While this may facilitate a direct link between concepts like justice, equality, and freedom and their relationship to 'sexuality', other questions do remain unanswered. For example, the s/m and pornography debates, which will always be contentious points within debates about sexuality, are not directly examined here. Instead of attempting to find answers, I construct a framework which allows debate but also offers an overarching respect for individuals and protection against harm. The conclusion does advocate a moral hierarchy that will have guidelines, although not mandates, for deciding the 'hard cases'.

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<sup>17</sup>The non-heterosexual minority here is a reference to the perceived heterosexual majority which permeates political discourse about sexuality rather than a concrete assertion that all heterosexuals affirm the legitimacy of heterosexuality, or that those who do not are in a numerical minority.

These guidelines correspond to the difficulties in liberalism which I have briefly identified, and will discuss in detail in the following chapters. The framework within contemporary liberalism that can best address these difficulties is found in *The Morality of Freedom* (1986) by Joseph Raz. As a political ethics, these guidelines, or premises, prioritise concepts of the individual and state that can facilitate the shared concerns of activists I have delineated. The individual is understood to have the capacity to determine her or his own well-being. This conception differs from the rational objective 'chooser' often associated with liberalism in that one's well-being is seen to be a combination of personal desires, communal norms, and a negotiation between the two. The basis then for understanding the individual, and individual well-being or identity in particular, is one of respecting her or his interpretation of well-being. This premise of respect is reflected in the concept of the state which becomes responsible for providing a range of options for the individual to choose from, and/or be exposed to. The state then is responsible for encouraging pluralism. But these guidelines go a bit further in that this responsibility is not tempered by a principle of state neutrality. Instead the state is *required* to actively support a range of options by encouraging experimentation with social norms and education about different ways of life. These guidelines, or concepts of the individual and state, create an ethics of governing that is perfectionist, but is perfectionist in that the moral 'trumps' are autonomy-based freedom and pluralism. Perfectionism is not often acquainted with liberalism, or a friend of gay men and lesbians targeted by the New Right. But I argue that it could be.

I begin this exploration in the following chapter by distinguishing this project both from traditional philosophical inquiry and from two works of gay and lesbian political theory. Historically, philosophical debates about homosexuality have focused solely on the *morality* of homosexual acts and the *enforcement* of public morality. While traditional (straight?) philosophers discuss the enforcement of morality, new gay and lesbian political theorists, because they assume homosexuality as part of individual identity, tend to draw connections between contemporary sexual politics and theoretical frameworks that have historically been advocated by those within the movement - lesbian feminism and socialism. While each of these remains an interesting line of inquiry, this work differs, as noted above, in that it is both trying to draw connections between the language used by activists and a familiar political ideology and to outline a political ethic that facilitates demands heard in sexual politics. The primary argument of this thesis then spans four chapters.



Two chapters examine the language of equality and justice employed by activists and attempt to connect them with theoretical structures which prioritise these concepts. Chapter two begins with a brief survey of literature produced by Stonewall, and comments made by a variety of activists during the age of consent campaign. In this survey, I attempt to locate a definition, or definitions, of the type of equality demanded. This language includes references to legal equality, equal rights, and special needs of gay men and lesbians. With these phrases in mind, I locate similar references within various frameworks of liberal political theory. The bulk of the chapter then considers whether or not these frameworks can include in their definition of equality, some form of equality for gay men and lesbians. It will be argued that although liberal political theory is premised upon 'equal concern and respect for persons', the definition of equality and the framework which is proposed to support it are not specifically able to provide that equal concern and respect for gay men and lesbians.

For example, toleration is understood as a virtue of liberalism in that it allows for the existence of a range of interpretations of the good life. But as the Wolfenden Report (1957), and subsequent Sexual Offences Act (1967), was seen as an act of toleration, the continuing discrimination and homophobia attest to the fact that it did not mean 'equality' or equal respect. In addition, I examine frameworks for rights and for a sensitivity to difference which are similarly unable to ensure equal concern and respect for non-heterosexual citizens. The question then becomes 'Which Equality?': which equality do activists refer to and which equality can best meet the demands made by activists? In answering these questions I briefly note that the Razian framework both begins with a notion of equal respect that includes respect for the diversity of sexualities and requires the state to provide the conditions for developing autonomy, even experimenting with social norms. Although the Razian framework is not detailed greatly in this chapter, as it will be later in the thesis, it serves to re-interpret the demands made by activists; demands which can be understood as a politics of respect. By understanding equality as respect, the conditions of respect, or equal concern and respect, then become more easily articulated as part of the Gay and Lesbian Agenda. In fact, the centrality of respect, the fundamental conditions that are needed for non-heterosexuals to be respected in society, become the criteria by which I evaluate liberal political theory in the remainder of the thesis.

Chapter three takes a slightly different approach in considering discourse on justice. As in the previous chapter, I begin by examining the claims for legal and social justice found in activism. From the banner-waving assertion that policy

changes advocated by activists are 'A Simple Matter of Justice' to the legal strategies proposed in America and Europe, I surmise that emotive claims of injustice, and more specific legal arguments for justice, are invariably connected to the particularities of a given legal system, or interpretation of justice. So rather than surveying a variety of those interpretations, I focus on the one theory of justice which has influenced liberal political theory, if not all contemporary political theory, over the last twenty years: *A Theory of Justice* written by John Rawls. Since the original text of *A Theory of Justice* assumes justice within the family, the Rawlsian framework lends itself to identifying the inherent heterosexism in a society which assumes the nuclear heterosexual family structure as a social institution. By exploring this construction of justice, I demonstrate the injustice of placing this 'family' as a basis for social policy and why decentralising the 'family', the idealised nuclear family, must be a primary goal of sexual politics. The heterosexist justice proposed by Rawls, which influences political discourse, is not only a reflection of the (in)justice non-heterosexual citizens now experience: its centrality to that discourse also highlights why activists and legal strategists need to be clear about what kind of justice, or in the words of Alstair MacIntyre, 'Whose Justice', we are appealing to.

By the conclusion of these two chapters, the relativity of demands for 'equality' and 'justice' will be more than apparent. So the examination of this discourse moves to in another direction. If the definition of such concepts is relative to the various theoretical frameworks found in liberalism, and the resulting position of gay men and lesbians is not *necessarily* one based on respect, I ask what fundamental assumptions within these frameworks contradict the conditions needed for that respect. The following two chapters then focus on two important questions for sexual politics. How is sexuality conceptualised within these frameworks, i.e. is sexuality understood as part of a person's identity? And can these frameworks be stretched to include, or require, respect for those with non-heterosexual identities, i.e. can they empower those with non-heterosexual identities to challenge the heterosexual hegemony?

These two questions are central to debates within liberal political theory. In particular, chapter four considers the debate between the communitarian Michael Sandel and John Rawls. In doing so it highlights the difficulties with the individual, or 'subject', as conceptualised within liberal political theory. It examines the separation made between the individual, as chooser of an identity, and the community, as constitutive of identity. Sandel challenges this notion, which he locates in the works of Rawls, arguing that it misinterprets the constitutive nature of

communal context upon identity. The dichotomy posed in this chapter then is between an individual asking 'Who do I choose to be?' and one who discovers 'Who am I?'. These two distinct ways of conceptualising one's identity prove, however, to be inadequate in describing the process of determining one's sexual identity. Standing at the closet door one asks both questions: Who do I choose to be? (what sexual desires do I want to act upon?) and Who am I? (what identities are associated with these sexual acts in the social context in which I live?) An alternative understanding of individual well-being is found in the Razian framework and it is one which reflects the negotiation process between needs, desires, and social context. The Razian framework provides a concept of the individual whose own sexuality is negotiated between social norms and individual desires. However, while the Razian framework does seem to offer an appealing concept of (multi-)subjectivity, the second question in this part of the investigation clearly sets his work apart from mainstream liberal theory.

In particular, as a perfectionist-based framework, Raz's position differs significantly from the anti-perfectionism, or neutrality-based, premise associated with liberalism. So the final chapter considers the anti-perfectionism found in two frameworks of contemporary liberal theory - Rawlsian justice, and Dworkinian equality - and contrasts them with Razian freedom. While most liberal political theory works upon the assumption of government neutrality concerning individual conceptions of 'the good' or personal morality, Raz does not. I argue that the structures for neutrality are methodologically unable to address the injustices faced by gay men, lesbians, and bisexuals. Generally, I reason that the premise of a neutrality-based argument, that the government should remain neutral among individual conceptions of the moral 'good', either separates substantial individual experiences from the political agenda or fails to take account of those experiences in a pragmatic way by challenging the forces of oppression. Particularly, not only does Rawlsian justice 'veil' the constitutive nature of sexual identity, but his more recent political liberalism removes all socially divisive matters from the political agenda. This leaves those involved in current sexual politics, as well as many other 'minority' groups, without a voice in the political arena. Similarly, Dworkinian equality supposes that such minority groups will be ensured of equal rights, or can make claims for equal rights. However, because he allows the state to listen only to internal preferences, (how I want to live my life) rather than external preferences (how I believe another should live their life), laws which disrespect one's rights cannot be effectively challenged by a minority; in a democracy the majority, and their internal preferences, will be able to legislate social policy. Each of these

neutrality-based arguments, therefore, is shown to be an inadequate framework for *either* ensuring respect for those with non-heterosexual identities or providing avenues to challenge legislated disrespect. In contrast, the Razian framework, because it prioritises the development of autonomy, both *requires* the state to provide the conditions for autonomy and conceives of *legitimate* authority as only that which respects autonomy.

The conclusion of this thesis returns to the divisions between political theory and political activism. One of the benefits of post-modern theories of subject positions and multiplicity of identities is that it has shown the particularities, the fundamental antagonisms, which cannot continue to be ignored by those theorising the political. As Chantal Mouffe's important criticism of Rawlsian political liberalism and similar attempts at universalising the political argues:

To envisage politics as a rational process of negotiation among individuals is to obliterate the whole dimension of power and antagonism - what I call "the political" - and thereby completely miss its nature. It is also to neglect the predominant role of passions as moving forces of human conduct ... the liberal claim that a universal rational consensus could be produced by an undistorted dialogue, and that free public reason could guarantee the impartiality of the state, is only possible at the cost of denying the irreducible antagonistic element present in social relations, and this can have disastrous consequences for the defence of democratic institutions. To negate the political does not make it disappear, it only leads to bewilderment in the face of its manifestations and to impotence in dealing with them. (1993, p. 140)

So, like Mouffe, I argue that if liberal political theory is to have anything to offer the current political discourse in which fundamental differences - not only about conceptions of the good but increasingly about diverse identities - are emerging as central to the positioning of subjects as citizen, it must connect, or more fully incorporate, those diversities with the 'political'. If 'equal concern and respect' is really a priority of liberal philosophers, then the mass movements of disrespect - from the Moral Majority to the face of fascism - cannot be left to the whims of popular opinion while the neutral state concerns itself only with establishing neutral institutions rather than with the effects of this disrespect upon large numbers of the population who have become fragmented by various demeaning labels of 'otherness'. This challenge to liberalism can be, as is argued throughout, somewhat answered by Razian perfectionist political ethics. But it too needs more elaboration on the hard

questions concerning the definition of harm and legitimate authority. So, as a project of political theory, this thesis points the direction for continued discussion, suggesting a few possible avenues that appear to continue to pay homage to the principle of 'equal concern and respect', but also offers guidance for how the political might be a place where difference can be a source not only of antagonism and discussion but of celebration.

The second section of the conclusion reflects upon what this theorising might mean for activism. If equality and justice do not have meaning outside particular philosophical frameworks, can they continue to be utilised to purchase rights or policy changes in the mainstream political arena? Most definitely. If our (historical?) allegiances to now marginalised philosophies like socialism and (lesbian) feminism taught us, as a political movement, one thing, it was that in a new political culture sometimes ideology needs to take a backseat to strategy. Participation, or recognition, in mainstream politics is simply a result of playing the language games inherent to a particular system. For example, where the Bill of Rights may extend rights to non-heterosexual citizens if sexuality is defined as immutable, or biologically determined, then activists will be more likely to emphasise the growing evidence supporting that claim. There is a similar case made for appeals to 'quasi-special' group status, or in the European Courts a 'special' group status. Alternatively, in Britain, where the age of consent, or discrimination in the work place, will remain viable points for possible policy changes, activists will most likely continue to emphasise terms like equality, or in light of the *Citizen's Charter*, citizenship. Nevertheless, participation in these language games may come at a great expense if we do not continue dialogue amongst ourselves about what kind of equality or justice, or citizenship or rights, or freedom, etc. we envision. So this section closes by suggesting ways in which we can continue that dialogue as well as begin to practice, as a 'community' and as a constituency, the respect we demand.

## Chapter One

### Locating Gay and Lesbian Political Philosophy

In the Introduction I stated that the positioning of political theory has been, at least until recently, somewhat separated from the emerging gay and lesbian studies, and even from contemporary gay and lesbian political activism. In this chapter I want to develop that argument a bit more fully by reviewing a couple of debates about homosexuality that have engaged political and moral philosophers in the quest to decide exactly what the relationship between society and sexuality should be. I will not explicitly challenge the arguments made in these debates. Instead I want simply to review how sexuality has been conceptualised within these debates, and how the fundamental assumptions of these arguments are far removed from those of the emerging gay and lesbian political theories.

The assumptions by the moral conservative philosophers here may be unsurprising. However, even the most liberal in these debates fail to get beyond the three difficulties I identified in the Introduction which undermine any appeal to liberal theory, or liberal political language. As noted there, contemporary liberal political theory does not *necessarily* conceptualise sexuality as part of individual identity. Because it is not necessarily part of identity, its positioning on the public/private divide, subsequently acting as a justification for non-discrimination policies, is somewhat tenuous. The second difficulty which will be apparent in these debates is the inability of most contemporary liberal frameworks to justify policies protecting gay men and lesbians from discrimination. This confusion about the aetiology of sexuality, and therefore about whether or not it should receive protection from discrimination, is buttressed by a principle of state neutrality. So even if some theorists allow that differences of sexuality should be tolerated, or minimally protected as choices of lifestyle, anti-perfectionism or principles of state neutrality will not go beyond acknowledging fundamental rights of gay men and lesbians to the more radical task of requiring the state to challenge the heterosexual hegemony that endorses social oppression. These three difficulties characterise the inconsistencies between using liberal language as an appeal to the intuitions familiar in western democracy and connecting that language with contemporary liberal theories in order to justify political change. In this chapter, then, I will look at the way these difficulties within liberal theory manifest themselves in 'traditional' philosophical debate about homosexuality.

The publication of the Wolfenden Report, or *The Report of the Committee on Homosexual Offences and Prostitution*,<sup>1</sup> in Britain in 1957 prompted the ten-year debate between Lord Patrick Devlin and H.L.A. Hart. Likewise, a more contemporary debate between Michael Sandel and Michael Moore found in the 1989 edition of the *California Law Review* was in response to the Supreme Court case which upheld the sodomy laws of Georgia, *Bowers v. Hardwick*.<sup>2</sup> Public political discourse about homosexuality over the last forty years has been informed by the types of arguments found in these exchanges. Each debate focused on questions of enforced public morality and, generally, within each debate philosophical lines are drawn between moral 'conservatives' and 'liberals'. The conservative, or moral conservative, argument tends to endorse the belief either that homosexuality is wrong and therefore should be considered a crime or that decriminalising homosexuality would affect the moral cohesion of society and thereby threaten social stability. The liberal argument tends to hold that sexual acts are not necessarily the business of the government and therefore homosexuality, specifically homosexual acts in private, should not be a criminal offence. While the debates below will explain and flesh out this crude division, allow me to direct this summary of them around two key points.

First, the consistency of these arguments in both debates exemplifies how little philosophical discourse appears to have been affected by the 'sexual revolution' or by feminism. The conservative argument leans towards maintaining tradition, for

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<sup>1</sup>For a review of the history of the Wolfenden Committee see Jeffrey-Poulter, 1991, pp. 28-68; and Grey, 1992, pp. 19-33.

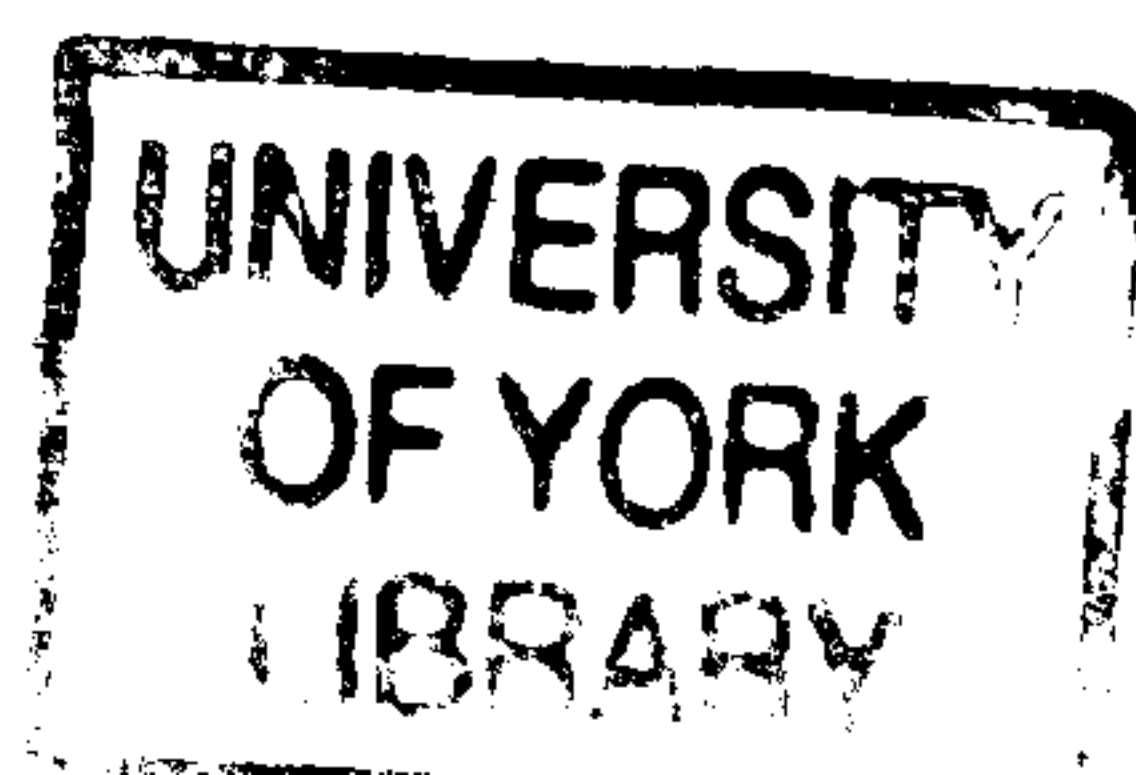
<sup>2</sup>In 1986 the US Supreme Court ruled that there was no 'fundamental right' to engage in homosexual sodomy. A police officer had found Michael Hardwick in the privacy of his bedroom engaging in 'sodomy' with another adult male. The Georgia statute that Hardwick challenged provides that 'a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another' and 'b) A person convicted of the offense shall be punished by imprisonment for not less than one nor more than twenty years'. Hardwick argued that the sodomy law was unconstitutional because it violated his constitutional right to privacy (*Bowers v. Hardwick*, 478 U.S. 186, 188, 1986). Similar sodomy laws, applying both to gay male sex and to lesbian sex, can be found in seventeen states. I am indebted to Paisley Currah (1994) for her enlightening discussion of this case, and the strategy of relying upon immutability arguments to win rights.

example traditional gender roles and the traditional nuclear family structure. The liberal argument works on the basis that government should remain neutral about individual conceptions of the good. This allows a division between public citizen and private individual, a division which some feminists argue simply legitimates public silence and private abuse (Jeffreys, 1990; Phelan, 1989). Second, this consistency itself suggests a pre-set agenda for philosophical discussions of sexuality, an agenda which equates sexuality with *morality* and excludes understanding sexuality as a part of *identity* - either chosen, socially constructed, or biologically determined. These two points correspond to questions central to this thesis. Indeed it is the frustration with arguments that sexuality is conceived of only as a moral choice, and/or that it is a private matter with which the state should not interfere, that motivates this inquiry. Part of what I wish to accomplish by appealing to a Razian notion of perfectionism is to show that neither discussions of sexuality nor of morality have to be structured along these philosophical lines. Instead, sexuality conceived as identity drastically changes the morality debate. And morality, at least in the Razian framework, can be re-constructed, or re-interpreted, to respect autonomy, to include government support for the development of that autonomy, and to necessitate (radical) social change. With this in mind, below I offer a brief summary of the arguments raised in the Devlin-Hart exchange and then in the more recent Sandel-Moore debate.

#### Philosophy in the 1950s: Morality versus Public/Private Divide

The most significant philosophical debate of contemporary history concerning the regulation of homosexuality in Britain began in the late 1950s between Lord Patrick Devlin and H.L.A. Hart. In general, the conservative argument presented by Devlin maintains that since morality is constitutive of society, or acts as social bonds, the state has the authority to protect the social morality, or social moral norms, just as it would protect itself from treason. The traditional liberal argument put forth by Hart, and more recently by Ronald Dworkin, holds that there are certain areas of private morality which are simply not the law's business. The issues Devlin raised were answered by Hart sparking a debate which, as commentator Michael Martin notes, had two main themes: 'whether private homosexual behaviour between consenting adults should be outlawed' and a much larger question of 'whether the law should enforce the positive morality of society' (1987, p. 239).

The debate was prompted by the Wolfenden Committee Report which recommended that 'homosexual behaviour between consenting adults in private





should no longer be a criminal offence' (1957). Generally their findings were based on the argument that 'unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' (Wolfenden Report, 1957, p. 24). Lord Patrick Devlin, who had given evidence at the Committee hearings in favour of law reform, disagreed with these final recommendations because, he argued, they were based on a misinterpretation of the relationship between law and private morality. On the occasion of the Maccabaeian Lecture in Jurisprudence which he delivered in 1958, he outlined his understanding of criminal law and private morality.

In this lecture, entitled 'The Enforcement of Morals',<sup>3</sup> Devlin makes at least three intriguing philosophical arguments. First, in order to address the question 'Has society the right to pass judgement at all on matters of morals?' (1968, p. 7), Devlin defines society as a 'community of ideas' (Ibid., p. 10). Society is 'held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price' (Ibid.). Because morality acts as the bond of society, 'society may use the law to preserve morality in the same way as its existence' (Ibid., p. 11). Likening the threat to public morality to a form of treason, Devlin states that 'there can be no theoretical limits to legislation against immorality' (Ibid., p.14). Continuing this line of argument, Devlin claims that a breakdown in this public morality would lead to disintegration of the society. 'There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions' (Ibid., p. 13).

The second tenet in his argument focuses on the way in which this public morality can be ascertained. And he argues that this public morality can be found in the viewpoint of 'the man in the Clapham omnibus' (Ibid., p. 15). The standards for moral judgements of society are that of the 'reasonable man', the 'man in the jury box', the 'right-minded man' (Ibid.). In Devlin's original lecture, this man was not to be confused with the 'rational man' but instead was 'not expected to reason about

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<sup>3</sup>In the collected lectures and essays entitled *The Enforcement of Morals*, which are the primary source here, the Maccabaeian Lecture is entitled 'Morals and the Criminal Law' (Devlin, 1968).

anything and his judgements may be largely a matter of feeling' (Ibid.). In the preface to this collection, however, Devlin explains that this reasonable man is expected not to hold any 'irrational' beliefs (Ibid., introduction). However, as the criticisms below will show, in both cases Devlin seems to work on an intuitive definition of what is reasonable, rational, or irrational rather than actually defining them.

Finally, Devlin put forth a rather interesting argument about the changes in public morality. Keeping in mind that he gave testimony to the Wolfenden Committee in favour of reform, and that before the Parliamentary vote on the Sexual Offences Act of 1967 he signed a published statement along with other prominent figures supporting the reform, Devlin's rather conservative argument in this lecture does make room for adapting to changes in public morality. While he maintains that 'no society can do without intolerance, indignation, and disgust' as indications that the bounds of toleration have been reached, 'the extent to which society will tolerate - I mean tolerate, not approve - departures from the moral standards varies from generation to generation' (Ibid., p. 18). What is important here is that Devlin distinguishes between the change in the limits of toleration and a change in moral standards. That is why by 11 May 1965 he can sign a letter to *The Times* supporting the decriminalisation of homosexual behaviour (Jeffrey-Poulter, 1991, p. 70). Over the almost ten-year period that the Wolfenden Committee's recommendations entered public discourse, the limits of toleration had changed, society *could* actually tolerate such a change in enforced public morality. But this support is founded on the grounds of moral toleration, not moral approval. He indicates his moral disapproval in the preface of his collection of essays referring to the 'horrific' life of the homosexual. Social toleration may adjust over time but his conservative argument rests upon fundamental moral disapproval of homosexual acts.<sup>4</sup>

Taking these tenants of Devlin's argument into consideration then, we can identify the criticisms that were made by Hart, and later by Dworkin. As noted, the debate between Devlin and Hart continued for almost ten years, but Hart's main criticism is outlined in his final paper on the topic published in 1967, 'Social Solidarity and the Enforcement of Morality'. Hart identifies two distinctive strands of Devlin's argument. The first, which Hart labels the 'disintegration thesis', refers to Devlin's fear of the collapse of society. 'If the bonds were too far relaxed', Devlin argues, 'the members would drift apart' (1968, p. 10). This claim, Hart argues, is

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<sup>4</sup>I address the concept of toleration in relation to liberal political theory in the following chapter.

simply a tautology because of the way in which Devlin defines society. If, as Devlin maintains, 'a society means a community of ideas', then any change in morality would necessitate a change in society. Such a claim, Hart insists, must be taken as an empirical thesis and, therefore, specific criteria for a core morality, as well as criteria for disintegration must be established. Once these criteria are specified, evidence would need to be provided which was relevant to evaluating the disintegration thesis. Hart identifies two types of relevant evidence. 'Crude historical evidence in which societies - not individuals - are the units' could make possible a study as to 'whether their disintegration was preceded by a malignant change in their common morality' (in Martin, 1987, p. 260). Alternatively, evidence from social psychology could be utilised to consider the 'alternatives to the maintenance of a common morality' (Ibid.). Hart continues, adding that one alternative might be a general uniform permissiveness, the other a moral pluralism of 'divergent sum-moralities' (Ibid., pp. 260-261). In his commentary, Martin summarises the point this way: 'Even if one found such a change, a causal connection would have to be shown between it and the disintegration' (1987, p. 268). Casting doubt over whether such evidence could be provided, Hart seems to prove the futility of the disintegration thesis: 'till psychologists and sociologists provide such evidence, supporters of the enforcement of morality would do better to rest their case candidly on the conservative rather than on the disintegration thesis' (Ibid., p. 262).<sup>5</sup>

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<sup>5</sup>In addition to Hart's arguments, Ronald Dworkin has made some interesting comments about Devlin's definitive connection between morality and society (1977, pp. 240-258). If Devlin places such a concept on a conventional view of society, Dworkin argues, it is absurd to hold that every practice that society views as profoundly immoral threatens its survival. Likewise, if Devlin rests his argument on an artificial view of society, 'that a society consists of that particular complex of moral ideals and attitudes which its members happen to hold at a particular moment in time' time", it does not follow that society has a right to preserve its existence by force (Ibid., p. 244). Furthermore, Dworkin calls attention to Devlin's concern that the notion of private morality found in Wolfenden would place a jurisdictional barrier which in time might be threatening to the morality of society. Such a barrier, Dworkin replies, would lead to other important questions. For instance 'when is the danger to society clear and present to justify not merely scrutiny but actions? What more is needed than passionate public disapproval to indicate an actual threat?' (1977, p. 245). These questions, Dworkin points out, Devlin's argument is never

The conservative thesis Hart identifies as the belief that society has a right to enforce its morality by law because the majority has the right to follow their own moral convictions that their moral environment is a thing of value to be defended from change' (in Martin, 1987, p. 249). However, Hart does not address this conservative thesis. For a clear understanding of this criticism, we can look at a more recent argument by Ronald Dworkin. In his book *Taking Rights Seriously*, Dworkin first notes Devlin's belief that if those who have homosexual desires freely indulged them, our social environment would change. Agreeing with this, Dworkin notes that the environment in which people (particularly children) live is determined, among other things, by patterns and relationships formed privately by others. However, he argues, this does, in itself, not give society the right to prohibit homosexual practice. It is not a sufficient claim that immorality is criminal but he insists that, on occasion, it is necessary. How then, Dworkin asks, is the legislator to decide whether homosexual acts are immoral? Summarising Devlin's position, Dworkin surmises that, given that science and religion are no longer credible reference points, the legislator in a democracy has a duty to act on the consensus of the majority (1977, p. 247). Simply put, Devlin assumes that 'society does have a right to protect its central and valued social institutions against conduct which the vast bulk of its members disapproves on moral principle' (Ibid.). Dworkin argues, however, that Devlin misunderstands what it is to disapprove of something on moral grounds. The legislator is trusted to consider the reasoning which informs moral principles. In particular, the legislator must distinguish between positions which merit respect even though they may be wrong, and positions which do not, because they offend some ground rule of moral reasoning (Ibid., p. 249).

Dworkin then turns his attention to outlining the criteria which must be satisfied to show that a position is worthy of such respect by legislators. First, the constituent must produce a reason for the belief. Dworkin delineates four types of reasons which do not count: prejudice, personal emotion, rationalisation, or parroting of another's reasons (Ibid., pp. 249-250). Second, the view must be sincere and consistent. It must also presuppose an abstract position about moral reasoning. And finally the view must be based on reasons and be consistent with theories these reasons presuppose. In short, Dworkin decides, Devlin is using the definition of a moral position in the 'anthropological sense' (Ibid., p. 253). The ordinary man in the

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forced to address. Indeed, Devlin simply maintains that nothing more than passionate public disapproval is necessary to justify interference in private lives: 'the maximum individual freedom consistent with the integrity of society' (Ibid.).

Clapham omnibus may have a moral position which is a mixture of prejudice, rationalisation, personal aversion, or parroting. In such cases the legislator is not bound to follow the directions of the 'ordinary man' or similar constituents. Society does not extend such a privilege to one who follows this invalid form of moral reasoning. The legislator, Dworkin believes, must test the credentials of the moral consensus as well as other arguments in the field. Pinpointing the crucial flaw in Devlin's thesis, Dworkin notes 'what is shocking and wrong is not his idea that the community's morality counts, but his idea of what counts as the community's morality' (Ibid., p. 255).

So two of the tenets in Devlin's argument, that which equates public morality with the bonds of society and that which defines public morality as the belief of the 'reasonable man', are challenged by Hart and Dworkin. The debate sparked by the Wolfenden Report, then, exemplifies the philosophical extremes between conservative and liberal arguments. The conservative line generally tends to give public morality a significant role in determining the extent to which the government can regulate personal morality. Conversely, the liberal argument maintains that there is a realm of private morality about which the government must remain neutral. The significance of this type of conservative understanding of public morality and society can also be seen in the third tenet of Devlin's argument that I have noted here. While Devlin may agree that the kinds of things society will tolerate may change, public morality tends to remain a constant. And this fundamentally conservative belief becomes the reason why public debates about sexuality consistently return to the issue of personal morality. There is a given conservative question within this type of philosophical exchange: 'Is the act moral?' And the moral hierarchy which determines the answer is often focused on enforcing private morality as determined by the public - either as Devlin would argue by the 'reasonable man', or as others, like the New Right, would argue by the dominant moral belief system for example Christianity. So I would reiterate Dworkin's comment: what is wrong with this conservative argument is not that a community's beliefs are important - they are significant in either the social constructionist or essentialist understanding of sexuality - but what is wrong is what the conservative believes to be public morality, that is the 'reasonable' man's private morality. I will argue throughout this work that the moral hierarchy that counts as public/community morality should be something much more like a respect for difference and a commitment to pluralism. But before moving away from this type of philosophical exchange, I would like to note a more recent, but strikingly similar, debate found in the 1989 issue of the *California Law Review*.

## Philosophy in the 1980s: Morality versus Public/Private Divide

This second, more recent, debate I want to consider here also focuses on the enforcement of public morality. In 1986 the US Supreme Court ruled, in a 5-4 decision, to uphold the sodomy law in the state of Georgia. Much of the debate surrounding this case, *Bowers v. Hardwick*, like that around the Wolfenden Report, focused on the enforcement of a public morality. Those supporting the abolition of the law grounded their arguments in the individual's right to privacy, appealing to the liberal argument that there exists a realm of private morality about which the government must remain neutral. And it is this argument with which Michael Sandel takes issue in his article 'Moral Argument and Liberal Toleration: Abortion and Homosexuality' (1989). Although I would not identify Sandel as a 'Conservative', his final comments here resonate with the type of moral conservatism found in the Devlin argument. In particular, he reinforces the communitarian notion that a shared 'first-order' morality should be enforced by the government. Michael Moore, in his article 'Sandelian Antiliberalism', responds to Sandel by maintaining the liberal argument that social cohesion can be maintained without dictating private, or what he calls 'first-order', morality. Instead, Moore supports the liberal understanding of the enforcement of morality which leaves questions of private or 'first-order' morality to individual decision and locates governing principles, and social cohesion, within more general or 'second-order' moral principles like tolerance, pluralism, and autonomy.

Briefly, there are two main tenets in Sandel's argument. Taking as a target the debate concerning the individual's right to privacy, Sandel questions the interpretation of privacy appealed to by the Supreme Court in the *Bowers* case. First he distinguishes two types of privacy rights found in case precedents. One understanding of privacy is found in the *Roe v. Wade* decision, where the Supreme Court upheld a woman's right to terminate her pregnancy (410 U.S. 113, 153, 162 1973 cited in Sandel, 1989, p. 523). The Court held that 'no individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority' (Ibid.). The other interpretation of privacy that Sandel notes is found in *Griswold v. Connecticut*, which concerned legislating against the use of contraceptives because it offended public morality. The Court ruled against the intrusion of law into the 'marital bedroom': 'Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptive? The very idea is repulsive to

the notions of privacy surrounding the marriage relationship' (381 U.S., 1965, pp. 485-486, cited in *Ibid.*, p. 527) Continuing, the Court affirms the social institution of marriage: 'marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred' (*Ibid.*, p. 527). After noting these two interpretations of the right to privacy, Sandel considers the Court's opinion in the *Bowers* case.

Sandel notes that the privacy rights, like those found in *Roe v. Wade* and *Griswold*, protect choices with respect to child rearing, education, family relationships, procreation, marriage, contraception, and abortion. However, in what appears to be a significant shift, the Court's decision in *Bowers v. Hardwick* stated: 'We think it evident that none of the rights announced in those cases bears any resemblance to the constitutional right of the homosexual to engage in acts of sodomy' (cited in *Ibid.*, p. 529). Furthermore, the decision claims that the law 'is constantly based on notions of morality, and if laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed' (*Ibid.*, pp. 529-530). What Sandel notes is that in apparent opposition to the *Griswold* case, where the public morality was not allowed to intrude into the marital bedroom, in the *Bowers* case public morality is allowed to criminalise homosexual acts. He emphasises that both the majority decision and the dissent fail to recognise homosexual intimacy on an equal basis with heterosexual intimacy. In short, he notes that if either opinion had relied on the right to privacy found in *Griswold v. Connecticut*, homosexual intimacy could have been equated with heterosexual marriage as 'intimate to the degree of being sacred' (*Ibid.*, p. 534). Indeed, such an argument had already been utilised as the *Bowers* case moved through the judicial system. For example the U.S. Court of Appeals, ruling in *Hardwick's* favour, cited the *Griswold* decision and suggested that such intimacy could happen in homosexual relationships as well: 'for some, the sexual activity in question here serves the same purpose as the intimacy of marriage' (cited in *Ibid.*, p. 535).

Instead of arguing for the right of privacy found in the *Griswold* case, the dissent opinion appealed to the principle of individual free choice. The dissent argued that the right of privacy in sexual relationships protects 'the freedoms an individual has to choose the form and nature of these intensely personal bonds' (*Ibid.*, p. 534). Therefore, the right to privacy, it is argued, protects homosexual activity no less than other intimate choices. Sandel summarises this dissent opinion: 'people should be free to choose their intimate association for themselves, regardless of virtue or popularity of the practice they choose so long as they do not harm others'

(Ibid.). This type of moral reasoning, which Sandel identifies as voluntarism,<sup>6</sup> places 'homosexual intimacy on a par with obscenity - a base thing that should nonetheless be tolerated so long as it takes place in private' (Ibid., p. 537). Sandel claims that the definition found in the voluntarist dissent can find precedents only in the 'right to privacy' which justifies the ownership of pornography. In choosing a voluntarist framework, the dissent places the claim to privacy found in *Bowers* on a par with the right to own pornography in private. Such an argument draws an analogy between homosexual activity and 'sexual gratification', rather than intimacy.

The result, Sandel concludes, brackets the issue of morality surrounding homosexual activity, in particular sodomy, leaving 'wholly unchallenged the adverse views of homosexuality itself'(Ibid.). In short, by taking these interpretations of the right to privacy as exemplar of the liberal argument for government neutrality in issues of private morality, Sandel is able to argue that the application of this neutrality - in choosing which cases will act as precedents, or lend themselves to a particular interpretation - often involves hidden moral decisions. And as a result the original question surrounding the *Bowers* case, concerning the morality of the act, is left unanswered. The neutrality argument in the dissent does not challenge the view that homosexuality is morally wrong, and this failure results in leaving those views intact. So Sandel is then able to conclude this largely critical piece by asserting that 'the justice or injustice of laws against abortion and homosexual sodomy may have something to do with the morality or immorality of these practices after all' (Ibid., p. 538). In other words, even if one vows to be working from a neutrality principle, in the final decision, first-order public morality will decide the law.<sup>7</sup>

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<sup>6</sup>Sandel defines a voluntarist view as one that holds 'that government should be neutral among conceptions of the good life in order to respect the capacity of persons as free citizens or autonomous agents to choose their conceptions for themselves' (1989, p. 522).

<sup>7</sup>This conclusion supports his own view that the first-order morality of the community should set the guidelines for social interaction. In *Liberalism and the Limits of Justice* Sandel writes that, 'for a society to be a community in this strong sense, community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of participants' plans of life' (1982, p. 173). He concludes that with this strong sense of community 'we can know a good in common that we cannot know alone' (Ibid., p. 183).



Michael Moore responds to this piece by Sandel by defending the way in which Sandel interprets neutrality and applies it in this case. First, he notes that, like the Court's opinion in *Roe v. Wade*, a decision may be derived from a Rawlsian-like minimalist neutrality principle<sup>8</sup> which recognises the appropriate agent for making the decision - the issue may be 'bracketed' from the choice of public or inappropriate agents. 'A legislator might well justify the woman's right to choose for herself (and thus bracket the issue for himself) even though he concedes the fetus is a person harmed by her decision' (Moore, 1989, p. 545). Similarly, Moore continues, the application of the neutrality principle should be connected with the role of the legislator. For example, the legislator brackets an issue in order to facilitate individual choice. So Moore's claim is that neutrality does not allow for a hidden moral agenda but instead tries to leave private moral decisions to the individual. The minimalist then, is concerned with providing a structure which is neutral concerning comprehensive concepts of the good life, by bracketing those issues from the public opinion. This line of thought will prove significant in the following chapters as we consider the way in which the Rawlsian bracketing of divisive issues essentially keeps (non-hetero)sexual politics off the political agenda.

The second of Sandel's points taken up by Moore centres on the claim that the interpretation of privacy rights depends upon 'some measure of agreement that the practices protected are morally permissible' (Sandel cited in *Ibid.*, p. 545). Moore contends that 'what Sandel seems to mean here is that you get social cooperation and peace on issues like homosexuality only if people share a view on the moral merits of homosexuality - for example, the view that it is not immoral' (*Ibid.*). But, Moore notes, this argument is not particularly relevant because social cooperation 'is not the end that justifies granting each of us the legal right to choose' (*Ibid.*, p. 546). Instead, he points out that a Dworkin-like voluntarist neutrality principle stems from a concern about moral rights, such as the right to choose. Sandel's argument that such interpretations of the neutrality, and here of the right to privacy, leave untouched the adverse views of homosexuality itself. However, as Moore states, 'the voluntarist is a metaphysician about morality, holding that moral rights exist independent of whether they serve some conflict-minimising function.'

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<sup>8</sup>Sandel defines the minimalist view as one that believes 'because people inevitably disagree about morality and religion, government should bracket these controversies for the sake of political agreement and social cooperation' (1989, p. 522). Moore then identifies a minimalist as someone like Rawls and a voluntarist as someone such as Dworkin (1989, p. 544).

How well or poorly such rights serve such a function is, for the voluntarist, irrelevant to their existence' (Ibid., p. 548). In other words, the voluntarist is concerned about protecting rights and not necessarily about affecting public opinion. Again this line of thought will be relevant in the following chapters as we examine Dworkin's framework for equal rights and discover that rights cannot in fact be secured without the support of majority public opinion.

In his conclusion, Moore redirects the argument towards the validity of second-order principles, asking 'Why wouldn't social cooperation be achieved?' (Ibid., p. 546). 'A society of sincere liberals', asserts Moore, 'could easily achieve harmony and cooperation without resolving the first-order differences about the morality of practices like abortion and homosexuality, as long as they strongly believed in the rightness of tolerance, pluralism, and autonomy' (Ibid., p. 548). Now, while I will defend a version of this belief in second-order moral principles as a basis for social cohesion, I do want to note one crucial gap in Moore's argument. Because Sandel questions the viability of the liberal project of neutrality, Moore spends his time answering these claims. At no point does he assert why homosexual acts should be in the realm of private morality, or - what will be my argument here - why (homo)sexuality/identity should not be a part of a debate about enforced public morality. In other words, he does not assert a possible liberal argument that homosexuality is a private moral choice which should be respected in the public sphere *nor* does he argue that homosexuality is an identity that should not be criminalised; both arguments which were part of (gay and lesbian) political discourse in the 1980s. Moreover, he does not question the centrality of anti-perfectionism, or the neutrality principle. And it is this premise that will be the focus of chapter five.

The significance of this more recent philosophical exchange is, primarily, its striking similarity to the previous debate almost forty years earlier. In particular, both debates centre on the question of enforcing a first-order public morality. While Devlin argues for the enforcement of the reasonable man's morality in order to guarantee social stability, Sandel continues this line by arguing that any attempt at neutrality will (and should) import a first-order public morality. The liberal tack remains consistent as well. Hart and Dworkin show the difficulties in proving the disintegration thesis and in satisfactorily defining the (first-order) morality of the public/reasonable man. Moore seems to move directly from these premises to defend interpretations of neutrality. And he builds on this, claiming that agreement on second-order moral principles like 'toleration, autonomy, pluralism, etc.', not first-order moral principles, is all that is necessary for social cooperation. Chapter five

explores this liberal argument for neutrality in more detail and, while I will eventually agree with this final claim made by Moore, I argue that, if equal concern and respect is to be a unifying second-order moral principle, it will require a move away from the principle of neutrality. In addition, throughout this thesis I will argue, like Sandel, that appeals to neutrality do carry with them an underpinning notion of the individual that leaves the injustices suffered by non-heterosexuals unquestioned. I will show that if sexuality is conceptualised only in terms of morality, or moral choice, as it is in these traditional philosophical debates, then neither the conservative/communitarian argument nor, more significantly for this work, the liberal/neutrality argument can result in equal concern and respect for non-heterosexual individuals. The alternative, where sexuality is understood as part of identity, opens up routes for justifying this equal concern and respect for non-heterosexuals and for securing the conditions of respect needed to determine one's own well-being, including one's own sexual identity.

### Crossing the Public/Private Divide: A New Morality

While the previous section attempted to show the way in which philosophical exchanges have approached the issue of homosexuality, below I want to contrast these with more recent work done by gay and lesbian political theorists. Perhaps it is strange to contrast these different kinds of theorising. But I do this in order to highlight again the disjuncture between what could be called a more 'traditional' form of philosophical inquiry about homosexuality and the more contemporary gay and lesbian political theory.

In fact, it could be argued, albeit rather crudely, that these are simply two separate projects: one is about fitting the example of homosexuality, as an moral act, into a known philosophical or moral scheme and the other is about exploring how different philosophical frameworks can facilitate a gay and lesbian political movement which takes as a premise that sexuality is part of individual identity. The former, I will argue, needs to reconsider how sexual identity is conceptualised within contemporary discourse, as identity rather than a first-order moral choice. Only then, as the following literature review will show, can a more traditional framework adequately address issues around homosexuality, or more specifically non-heterosexual identity. And as I will argue later in this work, only if sexuality can be understood as a constitutive part of identity can questions raised by moral philosophy be helpful in delineating *sex acts* which are harmful. Three examples of gay and lesbian political theory which I consider here begin to address this

distinction by attempting to re-interpret familiar frameworks in political theory, positing sexual identity as part of personal identity which should be respected by the state. After a brief summary of these, I will show how their arguments differ from the ones in this thesis.

Not until recently have specifically gay and lesbian political theorists emerged on the academic scene. Three of those will be discussed below but, before reviewing their work, there are some interesting comparisons to be made. Of the three, the American writer Shane Phelan is the only one lecturing in a politics department. In fact, she will be the first person in the U.S. to gain academic tenure as a 'lesbian political theorist'. The other two, David Evans and Jeffrey Weeks, lecture in sociology departments. And while each work can be considered significant to the discipline of political theory, their professional placement testifies to the separation, the unfamiliarity, between disciplines. Others are beginning to write in this field; some of their work will be considered in the following chapters.<sup>9</sup> But these three serve as the most significant interventions into sexual political theory in recent years.

The most 'traditional' approach to political theory by a lesbian is found in the innovative work of Shane Phelan. It is 'traditional' in that while it examines an issue at the heart of lesbian feminism - identity politics - it does so in relation to familiar structures of contemporary political theory. In her influential book *Identity Politics* (1989), Phelan explores the frameworks of liberalism, communitarianism, and, to some extent, Marxist socialism. This unique attempt to draw connections between mainstream, or male-stream, political theory and lesbian feminism provides a framework for considering the usefulness of identity politics. Historically identity politics has served as an avenue for establishing a coherent, often essentialist, challenge to the heterosexual hegemony. She locates this essentialist strategy as one which can be seen as a response to the division between the private, or personal, and the public, or communal. She points out that liberalism uses the public/private divide to avoid the power held by a community; power which substantially influences the development of sexuality. 'Liberals and poststructuralists', she writes 'have both stressed the extent to which community is a vehicle of power. This power

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<sup>9</sup>For example: Didi Herman author of *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* 1994, Davina Cooper author of *Sexing the City: Lesbian and Gay Politics within the Activist State* 1994, Paisley Currah's 'Searching for Immutability: Sexuality, Race, and Rights Discourse' in A.R. Wilson 1994 and Vincent Samar's *The Right to Privacy: Gays, Lesbians, and the Constitution* 1991.

operates precisely through the codes that the community endorses, the codes that define identity and action, and it is irremovable from them. Liberalism, however, has too often betrayed its knowledge by conceiving the project of freedom as one of the removal of power (construed as negativity, as repression or prohibition) rather than asking what to do with it' (1989, p. 154). 'Analytic liberalism is, in fact, an attempt to deny diversity by ignoring it, putting it under the benign and useless category of individual utility. Such a liberalism is thoroughly privatised, even as it attempts to conceive of the public realm' (Ibid., p. 155). While liberalism is seen to avoid engaging with the power wielded by the community, communitarians believe that the power of fragmentation, or difference, threatens the stability and commonality of society. So Phelan finds that 'behind communitarianism of both Right and Left lies the belief that power is opposed to love and community ... In contrasting (good) community and (bad) power, communitarians have sought to relocate the grounds of community as a way to oppose power; or, rather, they have opposed power in order to establish community' (Ibid., p. 154).

Phelan's work builds upon this communitarian notion by comparing this need to build community with early lesbian feminist movements and by exploring the subsequent difficulties experienced by that lesbian feminist 'community' which is only beginning to come to terms with vast differences among its members. In her final analysis she argues that 'identity politics must be based, not only on identity, but on an appreciation for politics as the art of living together' (Ibid., p. 170). 'Politics that ignores our identities, that makes them "private", is useless; but non-negotiable identities will enslave us whether they are imposed from within or without' (Ibid.). The significance of Phelan's work, or its relevance to my argument here, is that it is an intervention, simultaneously, into 'traditional' political theory and lesbian politics. She utilises the critical analysis of traditional political theory to identify problems experienced by lesbian feminists and to reformulate a lesbian politics that recognises the diversity of identities and the danger of essentialised communities. This connection, one of the first in this new field, provides a medium for discussion between two distinctively separate disciplines. As an attempt to break down such false divisions, her insights into political theory and sexual politics will be important throughout this work.

Similarly, the British theorist David Evans has recently offered a connection between sexual politics and 'traditional' political theory. In his substantial book *Sexual Citizenship*, Evans confronts the influence of Foucauldian, interactionist, and psychodynamic approaches on sexual politics, providing a materialist criticism of these current debates. Evans argues that Foucault's 'preoccupation with the

*completeness* of power in these "micro-logical aspects" eradicates human agency and "blinds him to the perseverance of traditional forms of domination ... economic, political and cultural" (1993, p. 22, quoting Wolin 1986). And Evans concludes that overall 'Foucault's commitment to a postmodernist vision incorporating a decentred subject as a mere switching centre for immaterial networks of discursive influence, fails because he does not recognise the latter as the "superstructure" generated by the base of late capitalism' (Ibid., p. 24). Similarly, while the symbolic interactionism 'gives us back the "active" though not necessarily "sovereign" subject', Evans continues that it is still 'resiliently detached from hierarchical material relations and associated forms of political and juridical dominance' (Ibid., pp. 31-32). And likewise, he argues that 'no convincing attempt is made by psychodynamic analysis to address relations between spheres of production, distribution and exchange, consumption and the state' (Ibid., p. 34).

At the heart of Evans's work is the belief that developments in the capitalist economy may have led to a widened acceptance of non-procreative sexual relations but that these economy-based freedoms have led to a social backlash of moral censorship. The result is that state policies are 'marked by obfuscation'. 'Indeed a state relatively autonomous of capital or bourgeois influence has responded to the complex integrative demands placed on it by effecting a confusing variety of discursive developments. On the broadest level these consist of a liberalising incorporation of sexual minorities into specified legal rights and freedoms, offset by the mobilisation of core moral values to achieve ideological integration, outside of which these newly legalised sexual citizens emphatically remain' (Ibid., p. 50). Now while Evans takes a different methodological approach from Phelan to this separation between sexual politics and political theory, namely a materialist criticism of dominant sexual politics, this uniqueness of the work is obvious. The focus of the book is 'citizenship', an idea dominating contemporary British political discourse. Owing to the 'political fragmentation of sexual issues' the state can 'legitimately police civil society to ensure that freedoms granted do not contaminate the moral community' but is also 'required to constrain the market's eagerness to exploit these segregated commercial commodity settings' (Ibid., p. 63). As a result sexual citizenship sits in 'moral-legal limbo'. While citizenship commonly denotes access to scarce resources, participation in the distribution and enjoyment of such resources and social membership and participation in society as a whole, Evans argues that "sexual citizenship involves partial, private, and primarily leisure and lifestyle membership". (Ibid., p. 64) His work continues by bringing together debates around 'obligation', which are quite familiar in political theory, with debates about the

'sexual citizenship' of bisexuals, transsexuals, women etc., which dominate much of sexual politics.

Before looking at the third political theorist, I would like to explain how these two works can be seen in relation to this thesis. I would place my research within this new field of 'sexual' political theory because it assumes that homosexuality, or sexuality in general, is a part of an individual's identity rather than a simple first-order moral choice. Also, this research connects that assumption to the familiar frameworks of political theory in order to re-imagine how each might address issues around sexuality. Additionally the works above look to frameworks which are dominant in political theory discourse, communitarianism/feminism and socialism, and, likewise, this thesis considers a third dominant framework, liberalism. However, as mentioned above, I believe the focus of this work is different from the others *because* it looks at liberalism; or rather because it looks at the activists' employment of liberal language and implicit connections to liberal ideology. The work here begins with the political discourse found in gay and lesbian activism, the language of justice, equality, and freedom. And it steps behind that language to examine the theoretical framework that has traditionally informed, defined, that language. In taking this approach, I am not seeking primarily to re-interpret liberalism in order to incorporate a notion of sexual identity, although that may be a part of the examination. Unlike the underpinning theme of the above two, this is not an attempt to 'salvage' a favoured political ideology. Instead, by beginning with the language of the activists, and exploring what that language might mean in the theoretical frameworks which have defined it, I am trying to understand, to redirect, to 'salvage' a political movement that has recently found itself in mainstream politics; and found itself, perhaps intentionally if not thoughtfully, using mainstream political language. This is not to say that the other projects are misdirected. In fact, I would probably agree that much of what was offered to the movement by feminism and socialism has been lost with the recent move towards the mainstream. This project builds upon that concern about where we as a movement are finding ourselves, and where we are going. I hope this research complements the others because it shares that concern.

In fact, it is that similar concern that can be found in the third theorist I wish to consider here. Jeffrey Weeks has been the most notable writer in British sexual politics over the last twenty years. A historian, sociologist, and philosopher, Weeks's vast publication record cannot help but be a strong influence on gay and lesbian politics in Britain. And while his reflections consistently offer understanding of historical events and traditional meanings of sexuality, the theoretical basis for his

politics can be pinpointed only as 'broadly' left-wing. Nevertheless his work, with its subtle awareness of political theory, has become a springboard for the intervention found in this thesis. His comments on identity, community, and sexual politics can be found throughout the following chapters. But here, I have chosen a text which exemplifies the need, the underpinning concern, for theorising the political which can be found in many of his works.

For example, in *Against Nature*, a collection of essays written over the past ten years, the final selection is entitled 'The Value of Difference'. In this essay Weeks notes that as the post-war consensus has crumbled, 'the search for more or less coherent value systems has become rather more fevered' and that 'perhaps most of us just share a vague feeling that things are not quite right' (1991, p. 186). In the face of 'social complexity, cultural diversity and proliferation of identities', we must, he argues, 'learn to live with difference' (Ibid., p. 188). But the two approaches from the left confronting these conflicting differences seem somewhat inadequate. The rights discourse, which finds its strength in the American Constitution, attempts to codify and protect fundamental rights. 'The problem', Weeks argues, 'is that rights do not spring fully armed from nature. They cannot find a justification simply because they are claimed. Rights are products of human association, social organisation, traditions of struggle, and historical definitions of needs and obligations: whatever their claims to universality, they are limited by the philosophical system to which they belong, and the social and political context in which they are asserted' (Ibid., p. 192). It is not that the rights discourse is unhelpful, but, as Weeks notes, 'if we are to take rights seriously we must begin to articulate the sort of rights and the type of political culture we want' (Ibid.). In the following chapters, I engage with rights theory, arguing that it is significantly unable to empower minority groups to actually claim rights in a democratic structure.

The second approach, 'the politics of emancipation ... offers a vision of a totally free society, where everyone's potentiality is fully realised, and a powerful analysis of the constraints on the realisation of human emancipation' (Ibid., p. 192). This approach, Weeks recognises, while inspiring many socialists has been 'reluctant to define the nature of the emancipated society, and has been noticeably blind to questions of nationalism, ethnicity, gender and sexuality' (Ibid., p. 193). This problem, also identified by Phelan, has resulted in the emergence of groups centred on these particular concerns. The result, as experienced by the growth of various activist groups, and political movements, away from the 1970s 'gay and lesbian movement', can be seen as fragmentation, or at least, multiple political perspectives and ideologies. 'The glorious goal has all too often justified dubious means, while



the absence of any detailed exposition of the meaning of emancipation has left us floundering when faced by the reality of conflicting claims to right and justice' (Ibid., p. 193). The utopia promised by the GLF cry for Liberation! has given way to a virtual reality of individual, and often conflicting, demands for rights or justice.

If we recognise diversity, a plurality of truths, what approach can then offer a direction for the future of sexual politics? In his final comments, Weeks notes David Held's 'principle of democratic autonomy': 'This argues that citizens should be free and equal in the determination of the conditions of their own lives, sharing equal rights and obligations, so long as they do not use their freedoms to negate the rights and claims of others. Democratic autonomy implies a respect and tolerance for other people's needs as the guarantee of your own freedom to choose ... The freedom to live your own life in the way you choose must imply an acceptance of other ways of life' (Ibid., p. 195). These principles imply 'the existence of wider political community based on acceptance of diversity and democracy. We may not be able to find indeed we should not seek, a single way of life that would satisfy us all. That does not mean we cannot agree on common political ends: the construction of what can best be described as "a community of communities", to achieve a maximum political unity without denying difference' (Ibid.).

Such an ending to a rather sociological collection is both surprising and directive. Although it expresses a discomfort with both the present political climate and realities of socialist utopia, it is surprising in that it does not blindly head down the post-modern path and instead turns (backwards?) to (liberal?) principles like autonomy.<sup>10</sup> It is directive in that it challenges sexual politics to 'rethink the question of difference at both the individual and collective level' (Ibid., p. 196). Such a rethink is also the finale at the close of the title essay, 'Against Nature', where, after some innovative comments on identity and politics, or identity politics, Weeks concludes that 'I do want to insist that we can only fully understand our needs and desires when we grasp the personal and collective responses that shape our sexualities. Understanding where we came from seems to me the starting point for

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<sup>10</sup>Weeks has recently contributed to a collection entitled *Principled Positions* and in his essay there, 'Rediscovering Values' he argues that 'we need to clarify our values, in their multiplicity and plurality' (1993, p. 190). In particular we need to build upon 'the need positively to support and encourage diversity in the interests of human development as a whole' and to recognise the 'cluster of values (democracy, affirmation of rights, protection of minorities) which act as guarantees of moral pluralism' (Ibid., p. 208).

thinking about both the politics and ethics of sexuality, and where we want to go' (Ibid., p. 99). And although Weeks stylishly refuses to detail such an ethics, the implications is that the sketching of a political culture which incorporates the diversity of sexual identities will involve debates around sexual ethics. And perhaps we, those diverse sexual identities, should spend time discussing that ethics and its place in our politics. Indeed, this thesis is one such attempt at an ethical (sexual) politics.

### Forward

Defining the Gay and Lesbian Agenda is perhaps an impossible task. After all, the diverse, often conflicting ideologies that have informed our political movement over the last twenty-five years have offered conflicting goals, conflicting agendas. The history of that process is all too familiar.<sup>11</sup> But there has been one noticeable change within the last few years: we have moved into the mainstream. It may be due to an increase in political activism, or the impact of the 'Pink Pound', or perhaps, as Devlin would argue, the limits of social toleration have expanded. But regardless of the mitigating factors, we are beginning to have an impact upon government, upon social values, and ultimately upon social policy. It is notable, to say the least, that in conjunction with this change in political positioning our language has also changed. The 'Liberation!' cry of the Gay Liberation Front is rarely heard.

Now we speak of justice, equality and, once in a while, freedom; a language that is, itself, that of the mainstream. So the following two chapters explore the possible meanings of equality and justice: a language that is ever-mindful that we are no longer on the political margins, and an examination of how the ideology underpinned by that language may, or may not, make possible the radical social changes we envision. Given the difficulties inherent in liberalism, as located in the above review of central debates about homosexuality, an examination of possible definitions of that language will not be enough. Consequently, chapters four and five will seek to identify a liberal framework which can be seen to conceptualise sexuality as part of identity and one which *requires* the state to challenge a social hegemony that limits autonomy. I will argue that the Razian framework which outlines a perfectionist political ethic can answer the concerns on both accounts. However, his perfectionist framework must be seen to offer only a guideline for

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<sup>11</sup>For a small variety of historical perspectives see Weeks, 1977, 1985; Grey, 1992; Jeffery-Poulter, 1991, Jeffreys, 1990, Brighton Ourstory, 1992.

political ethics rather than a substantive social morality. Nevertheless it does provide a theoretical justification for both strategically employing liberal language and defining it so that it expresses the fundamental changes activists endorse. So in the next few chapters I will argue that if we do not want to be assimilated into the 'heterosexual other's' interpretation of that language - into 'their' justice, 'their' equality, 'their' freedom - we need to offer a clear definition of 'our' justice, 'our' equality, 'our' freedom; and ultimately 'our' Agenda.

## Chapter Two

### Which Equality? Toleration, Difference or Respect?

A broad-based legislative strategy for equal rights would involve the formulation of a comprehensive equality agenda which integrates diverse equal opportunities commitments within a unified policy framework, based on the concept of full and universal citizenship and geared to the realisation of equal rights for all people. (Tatchell, 1992, p. 240).

Early in 1994, for the first time in twenty-five years, the British Parliament addressed the issue of lowering the age of consent for homosexual sex, twenty-one, to that equal with heterosexual sex, sixteen.<sup>1</sup> Since the Sexual Offences Act of 1967 set a higher age of consent for male homosexual sex, activists had targeted this inequality as a primary focus for campaign efforts. With the announcement that Parliament would be considering the age of consent in late 1993 or early 1994, Stonewall had stepped up lobbying around this issue. Unfortunately, Parliament opted for a 'compromise' which reduced the age of consent for homosexuals to eighteen.<sup>2</sup> However, this may not be the final word on the matter since Stonewall have backed three young men who were to challenge this 'violation of human rights' in the European Court of Human Rights later in the year. This is, of course, only one of many issues tackled by Stonewall.<sup>3</sup> But, perhaps because it directly challenges the provisions of the Sexual Offences Act, it is the one issue which has lent itself to masses of public attention and endless political debate.

So it is in this discourse on the age of consent that we can begin to get an idea of exactly what the demand for 'equality' might mean as defined by gay and lesbian activists. Following a brief look at definitions offered by activists, this chapter will attempt to locate similar understandings of equality within various frameworks of liberal political theory. In particular, I will consider four

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<sup>1</sup>Edwina Currie, MP, proposed an amendment to the Criminal Justice Bill, which read 'The age of consent of sexual acts shall be the same for men as for women, and whether the acts are heterosexual or homosexual' (21 February, 1994).

<sup>2</sup>For a detailed account of this campaign see Smith, 1994 and Palmer, 1994.

<sup>3</sup>Other issues targeted by Stonewall include anti-discrimination, partnership rights, lesbian and gay parenting, employment rights, sex education, fostering and adoption rights and the right to be a member of the armed forces. See Stonewall briefings on each issue.

interpretations of equality: as toleration, as equal rights, as a sensitivity to difference, and as respect. The conclusion will argue that the precursor for demanding equality for non-heterosexual citizens is the need for respect and, if respect can be understood as a premise to equality, demands for equal rights and sensitivity to difference can follow.

### Equality Now !

In an information pamphlet on the age of consent, entitled 'The Case for Change', Stonewall director Angela Mason writes, 'In 1967 homosexuality was made semi-legal. The price of this reform was what is now the highest age of consent for gay men in Europe. In 1967 homosexuality could only be tolerated if it was hidden away. It was something to be ashamed of. Reforming the criminal law will not only challenge discrimination, it will help redefine the public status of homosexuality. It will be a part of the process which enables lesbians and gay men to take our place within society' (September 1993). There are at least two interesting points Mason is making here. First, she is simply noting that gay and lesbian activists are well aware that the 1967 reforms were an act of toleration. They were not public acceptance, nor were they equality. This begins to define exactly what kind of equality is *not* referred to by gay and lesbian activists: an equality which only *tolerates* difference in sexual orientation. The second point is more indicative of the type of equality she envisions: an equality which 'redefine[s] the public status of homosexuality' and 'enables lesbians and gay men to take our place within society'. One can assume here that she believes 'our place in society' is one of equality rather than tolerated inequality, or legislated discrimination. Indeed she offers further explanation, stating that the current law 'justifies our second class status' and 'legitimizes prejudice towards all lesbians and gay men'. Here the definition of equality becomes a bit more clear. Achieving an equal age of consent, Mason argues, will no longer legitimate the discrimination and prejudice currently experienced in British society. And no doubt this motivation to combat discrimination and prejudice inspired their official logo: 'Stonewall, working for lesbian and gay equality'. But what, specifically, does this equality entail? If toleration is not the answer, what - exactly - is?

In the early stages of Stonewall, they produced a 'Homosexual Equality Bill' that laid out, in a single piece of legislation, the changes needed to remove inequalities in sexual offences behaviour, to end discrimination on the basis of sexual orientation and to recognise homosexual partnerships legally. While this

proposed 'bill' still acts as a theme piece for current campaigns, in an interview with Anya Palmer, research director of Stonewall, she stated that there was little feasibility of pursuing legislative change in this broad way (interview March 1993). Instead similar changes could be pursued through a number of smaller challenges within on-going legislative initiatives. Remarking on this 'bill', Peter Tatchell writes that while it is a 'concrete and valuable legislative agenda', it has its 'weaknesses'. First, rather than a radical equality agenda for all, it merely ensures 'that homosexuals are treated equally with heterosexuals ... In other words, it seeks equality on heterosexual terms'. Second, it does not consider all possible aspects of the law such as 'child custody, political asylum, obscenity regulations, and donor insemination' (Tatchell, 1992, pp. 238-239).<sup>4</sup> So while this 'bill' set out a clear direction and legislative agenda for the new lobbying group, they are now utilising a more successful strategy of challenging inequality and discrimination as it appears in Parliamentary legislation. They continue to refer to 'equality' in position briefings; however its definition is more difficult to pinpoint than the proposed legislative agenda found in the 'Equality Bill'.

This lack of clarity can be seen in more recent Stonewall briefings which entail various references to the kind of equality they wish to achieve. For example, in the 'Case for Change' pamphlet, readers are reminded that lesbian and gay rights were recently recognised at the United Nations Human Rights Conference in Vienna and so the case for change in the age of consent must be contextualised within this larger movement where 'the rights of lesbians and gay men' are seen as 'an inseparable part of all human rights'. So, here the writer has linked equality with 'rights', particularly rights of lesbians and gay men. Now while this claim is, to say the least, interesting given the lack of a British Bill of Rights or similar legislation, it may be an appeal to the *ideal* of rights, or a reference to the rights delineated by the European Courts. But readers are not told. Nevertheless, equality is discursively

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<sup>4</sup>Tatchell goes on to argue that what is needed to ensure equality is a Bill of Rights, an Anti-Discrimination Act, and a Department for Equal Opportunities. This contextualises equality for gay men and lesbians within a wider framework for equality 'for all' and is therefore an interesting line of strategy. However while these might lead to social and political equality, they would be substantial changes to the current legislative practices found in Britain. The feasibility of gay and lesbian activism leading to such radical changes in the British Parliamentary system is, to say the least, questionable. So I will not explicitly discuss his proposal in this chapter although I will return to it in the conclusion (Tatchell, 1992, pp. 237-247).

linked to some sort of rights claims. It is in another 'General Information Note' that Stonewall has further explained this rights claim. In a section entitled 'Our viewpoint', it is simply stated that 'lesbians and gays should enjoy the same rights as heterosexuals' and that 'equal rights for lesbians and gays implies a major change in law and attitudes'. This leads to the objectives of 'equal rights under the law' and 'non-discriminatory public attitudes to homosexuality', which would include, for example, 'partnership rights'.

More to the point, a Stonewall briefing dated September 1990 spells out exactly 'The Legislation Needed To Tackle Inequality'. 'On the basis of equal rights to those currently enjoyed by heterosexuals, the following would be required; the initial three sections would for the first time enshrine the concept of equal rights for lesbians and gay men in law'. The three sections are the Criminal law i.e. equal age of consent, abolishing the offences of buggery and gross indecency to be replaced by penalties for non-consensual sexual acts, and homosexual acts in the armed forces; the Anti-discrimination law i.e. discrimination on the grounds of sexual orientation would be forbidden in the provision of goods, facilities and services as well as employment; and the Domestic Partnership law i.e. legally recognised lesbian and gay partnerships. So legal and legislative changes which would end criminalisation and discrimination, and would provide for homosexual partnerships similarly to heterosexual partnerships/marriages, are what is needed to 'for the first time enshrine the concept of equal rights for lesbians and gay men in law'. The rights rhetoric does not mean rights in the constitutional sense of legislatively protected status or action, but refers to those legislative, or even social policy, changes which would 'equalise' homosexuality with heterosexuality.

With that much of the definition of equality established, there is a third objective noted in the 'General Information' briefing. In addition to 'equal rights' and 'non-discriminatory public attitudes', the other objective demands 'public, private and voluntary sector provision of services which are sensitive to the needs of lesbians and gay men and do not discriminate on the basis of sexuality'. Now this demand for sensitivity would, it seems, mandate that lesbians and gay men were to receive special consideration by the public, private and voluntary sector. And it is here that equality becomes something more than a reference to legislative change ending criminalisation and discrimination and offering partnership status to homosexual relationships. Rather than equality with heterosexuals, this interpretation of equality is one which involves granting a special status to the needs of lesbians and gay men. The 'sensitivity' requirement is underpinned by the assumption that, in the current social context, gay men and lesbians have needs that are not being met by those

sectors. In other words, there are specific gay and lesbian 'needs' which can be identified by, or at least communicated to, the public, private, and voluntary sectors.

This point is akin to claims made by activists in the U.S. and in the European courts which argue that, because of the oppression experienced by gay men and lesbians, they should be given a 'special status' which would not only legally protect them from discrimination but would also require governing bodies to be sensitive to the unique position of homosexuals within a predominantly heterosexual society.<sup>5</sup> One justification for this can be found in the politics of difference which has grown up around particular constituencies in the U.S. and Europe such as racial minorities, women, and children of illegal aliens. But one does not necessarily have to look to America or the rest of Europe to find claims about specific, different, needs. In the age of consent debate many supporters argued that a change in the law would enable groups to meet the specific needs of safe sex education for young gay men. 'The Case for Change' argues that 'we have no doubt that the greatest barrier to more effective safer sex education for young gay men is the criminal law as it now stands'. In addition the pamphlet quotes the *British Medical Journal*: 'Health promotion for all men who have sex with men is important, but safe sex information aimed at young homosexual men needs special emphasis' (vol. 306, February 1993). Of course, Stonewall are not the only ones making this claim about the special needs of young gay men. Edward King, author of *Safety in Numbers*, stated in a recent article in *Him* that the 'special risk' 'should not be understood as meaning that younger men are at greater risk from HIV compared to older men - just that they are clearly at different risk' (*Him*, issue 74, 1993). He contributes this risk to the lack of relevant sex education in schools quoting statistics that show that young gay men do not use condoms. So the sensitivity to the needs of young gay men necessarily means recognising that they have 'special' or 'different' needs, different needs which are not being addressed by the educational establishment because of the current high age of consent.

It is interesting to note how these claims about the *different* needs of young gay men informed mainstream political discourse on the age of consent issue. For example, during the Parliamentary debate, Neil Kinnock stated, 'The new clause will help to protect young men. It would provide them with a basic legal framework for making vital decisions about themselves without the danger of criminality ... The new clause is ... also about encouraging respect for those who are different - one of

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<sup>5</sup>This type of rights claim will be briefly addressed below but for a more detailed discussion of this movement in the U.S. see Currah, 1994; and Waaldjick, 1993.



the basic tests of our democracy' (quoted in *Gay Times*, March 1994, p. 7). Here not only are the specific needs cited, but at the very heart of the quotation is the suggestion that the age of consent debate is about respecting those who are different i.e. homosexual. It may seem that the argument made by Stonewall, that young gay men have specific educational needs that could be met by lowering the age of consent, has affected political discourse. But the interpretation of 'this particular group has special needs' became, in the Parliamentary debate, 'homosexuals have different needs'. This highlights the difficulty of articulating the needs of a distinct group of gay men, or lesbians, without indicating that homosexuals, as an essentialised group, i.e. as homosexuals, have different needs. This may seem like a fine distinction, and it will be discussed in more detail below; however the ambiguity in Stonewall's objective requiring a 'sensitivity to the needs of lesbians and gay men' can lead to the assumption that all lesbians and gay men, *as homosexuals*, share specific needs rather than a testament to the diversity of needs that some gay men and lesbians have. Without that clarification, the definition of equality grows, then, from de-criminalisation, non-discrimination, and heterosexual-like partnerships to creating a special category of 'gay and lesbian needs' indicating, perhaps essential, difference.

Equality as defined by Stonewall then has three key tenets: equal rights, non-discriminatory public attitudes, and a sensitivity to the needs of lesbians and gay men. Given this interpretation of equality demanded by activists, I want to contrast it with the kinds of equality proposed by contemporary liberal theorists. There will be a number of similarities. But my concern here is not those similarities; for it is unsurprising that the terminology and ideas found in liberalism, which have become familiar discourse in most western democracies, are appropriated for use in contemporary gay and lesbian activism. Instead, as set out in the previous chapters, I want to focus on the disjuncture between this language and the types of theories which define this language. Broadly, my concern is twofold. First, what other assumptions are a part of these theories which may not resonate with the kinds of equality defined above? Second, what difficulties are inherent within these theoretical structures which would impede the achievement of equality envisioned by activists?

### Defining Equality

Identifying concepts of equality within contemporary liberalism leads me to consider both past legislation and dominant liberal theories which offer a glimpse of the shape

'equality' has taken in the past and the shape it could take in the future. While toleration manifested in the Sexual Offences Act (1967) was to placate those who desired change, it simple teased us, drawing us out of the closet, on to the streets. But in offering a private space for male homosexual desire, it aroused a more public desire for change. This desire, both collectively and individually, gave gay men and lesbians a public identity. And with this solidarity activists began to hammer away at the shackles of inhibition, those laws and social norms that had kept silent their sexual desire for so long. Our desire became our identity, our identity became our politics. Yet as this desire for change became public, activists became increasingly aware that it was not one monolithic desire, or identity, but many. The revolution, inspired by the GLF, came to be not about 'change' but changes. And now, in the struggle to create and identify this 'equality', activists continue to struggle to be sensitive to the diversity of needs, the diverse desires. As the above arguments show, activists are now trying to appeal to an equality that recognises those specific needs, that acknowledges the variety of sexual identities: as young gay men, as lesbian mothers, as members of the armed services, etc. And so my task in this chapter is to locate an understanding of equality which not only leads to legislative change but offers a fundamental respect to those with different sexualities and different needs.

I will begin by considering the impact of liberal toleration, and its inherent inability to provide a foundation for equality. I will then turn from a focus on tolerant legislation to the popular equal rights discourse and to a politics of difference, both of which can be construed as an attempt to secure a special status, or special considerations, for those oppressed owing to sexual orientation. But both rights theory and the politics of difference can leave minorities unable to effectively challenge the inequalities they experience. For example, rights discourse often assumes that such a group (an essentialised group) has the power to forcefully make a public claim to those rights. Similarly, while the politics of difference seeks to empower oppressed groups, it is underpinned by the need to posit an essentialised group identity which is not reflective of the diversity of the group itself. And so, finally, I return to the fundamental lesson that we, as a liberation movement, have learned: despite our differences, in fact because of them, we have learned that respect must be accompanied by recognition of the variety of sexual identities. The conclusion posits a framework for respect that activists can build upon when demanding the conditions needed for equality.

One way to understand the concept of equality within contemporary liberal political discourse is to trace it to the more general idea that people have the capacity

for autonomous choice and should have the right to express that autonomy. This idea has been traditionally linked to the commitment to toleration, and diversity, found in the writings of John Stuart Mill. 'Over himself,' writes Mill in *On Liberty*, 'over his own body and mind, the individual is sovereign' (Mill, in Warnock, 1962, p. 135). 'Liberalism', as Mendus defines, 'thus begins from a premise of individual diversity: each person has his own unique conception of what makes life worth living and is entitled to pursue that conception to the best of his ability' (Mendus, 1989, p. 75). And it is this fundamental notion of individual autonomy which has become, for contemporary liberal theorists such as John Rawls, the justification for toleration of difference. Many argue that by showing toleration for the diversity of values, morals, or as often labelled 'concepts of the good', the government is showing respect for individuals to choose their own way of life. In fact, Mendus links the liberal commitment to toleration directly to the Millian principle of liberty; 'Mill's defence of toleration is standardly regarded as *the* characteristically liberal defence' (Mendus, 1989, p. 69). And while the Millian framework is not the focus of this critical analysis of contemporary liberalism, the underpinning assumption of autonomy, and the subsequent argument for toleration, is, as Joseph Raz notes, 'the one argument which is not shared by non-liberals, and which displays the spirit of the liberal approach to politics' (Raz, 1988, p. 155).<sup>6</sup> This autonomy-based liberalism then attempts to treat people as equals by tolerating their difference.

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<sup>6</sup>Now while toleration based on autonomy may be the specifically liberal virtue, again difficulties arise in trying to define exactly what is, and is not, to be tolerated. The problem, as referred to by Mendus in her analysis of Mill, is that this commitment to toleration based on autonomy sometimes rests upon a concept of human nature that requires a 'doctrine of progress and perfectibility' (Mendus, 1989, p. 64). In other words, if liberals are to be committed to the autonomy of individuals, it could be logically assumed that they wish to promote this autonomy through pro-active government policy. But, the problem with such policies is that they, by necessity, involve making substantive decisions about the good life. This argument that much of contemporary liberalism does endorse some radical social, economic and political goals is also made by Will Kymlicka (1990, pp. 85-90, esp. n. 9). So the debate becomes focused on the role of the government, i.e. the best way a government can respect individual autonomy. I will address the connection between autonomy and perfectionism in the discussion of state neutrality in chapter five.

Another formulation of liberal principles, however, suggests that equality can be based upon the fact that citizens should be treated as equals without relying upon an explicit conceptions of the autonomous individual. One example of this equality-based liberalism can be found in the framework for equality proposed by Ronald Dworkin. Rather than justifying liberal principles of equality with reference to autonomy, Dworkin argues that equality itself should be the primary principle in liberalism (1983b). In his book entitled *A Matter of Principle* he asserts that the state should treat people as equals. 'This form of liberalism insists that government must treat people as equals in the following sense. It must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth' (1985, p. 205). This principle of equal concern and respect then dictates that the government should not be seen to favour one conception of the good over another. Similarly to this type of equality argument, liberal feminist Iris Marion Young proposes a politics of difference which argues that treating people as equals requires a sensitivity to the different needs of particular groups.

So it is with these two approaches to liberal principles, autonomy-based toleration and equality-based respect, that I begin my exploration of contemporary liberal ideology. In short, I will focus on the very question these two approaches raise: Which equality? First I will explore the kinds of arguments for equal concern and respect that can be found within contemporary liberal ideology. In doing so, I will make a few comments about why, I believe, many of them to fall short of the notion of equality we, as gay men and lesbians, might wish to see achieved in society. Finally, I will return to the fundamental notion of equal concern and respect and ask what, given this notion of equality, are the conditions needed for that equal respect?

### To Tolerate

Perhaps the most notable facade of equality in contemporary British history is the Sexual Offences Act of 1967. Decriminalising sex, in private, between men, over twenty-one, this Act was seen at the time by supporters as a realisation, if only partial, of legal equality. For the majority of men, no longer were male homosexual acts criminal. But even as the ten-year battle to implement the Wolfenden Report ended, heterosexual and homosexual supporters of the Act quickly warned that it was not a mandate for equality but 'an act of toleration'. Such toleration is both in theory and in practice an accommodating minimum, and can be seen only as a

substitute for equality. And while liberal political theorists may pronounce the social value of toleration, the experience of those tolerated is not, as learned in the 1980s, that of equality.

In his reflections on liberal political theory, Will Kymlicka observes that 'tolerance is considered a cardinal liberal virtue, throughout the whole tradition' (1991, p. 9). Indeed, since Locke addressed the idea of religious toleration in 'Letter Concerning Toleration' in 1689, this ideal has held prime importance in conceptualising the relations between individuals who espouse different concepts of 'the good'. And as noted above, the recognition of individual autonomy and diversity found in the Millian tradition is most often the fundamental liberal argument for toleration.<sup>7</sup> Toleration of another's existence or actions is held by liberal political theorists to be virtuous in that it respects individual choice. For example, Joseph Raz defines toleration as follows:

the curbing of an activity likely to be unwelcome to its recipient or of an inclination so to act which is in itself morally valuable and which is based on a dislike or an antagonism towards that person or a feature of his life, reflecting a judgement that these represent limitations or deficiencies in him, in order to let that person have his way or in order for him to gain or keep some advantage. (1986, p. 402)

In this instance, then, toleration is what stops one from acting on the basis of dislike for another's existence or choice of lifestyle. It is a virtue because it restrains action which would show 'disrespect' for another's choice or identity. One interpretation of toleration then is simply 'to put up with' different conceptions of the good, or the intolerable.

Another definition can be found in more contemporary liberal theory. Toleration here is defined as 'non-prescriptive morality'. This definition is accompanied by a distinction between public morality and private morality. For example, John Rawls firmly bases his proposed *Theory of Justice* in the tradition of autonomy-based toleration. A just institutions would 'enable human beings to express their nature as free and equal moral person' (1972, p. 513). 'Knowing the inherent stability of a just constitution,' writes Rawls, 'members of a well-ordered society have the confidence to limit the freedom of the intolerant only in the special cases when it is necessary for preserving equal liberty itself' (Ibid., p. 220). However, in his more recent writings on 'political liberalism', Rawls criticises

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<sup>7</sup>For a discussion of the different interpretations of toleration by Locke and Mill see Mendus, 1989, esp. pp. 22-68.

traditional liberalism for endorsing a comprehensive moral doctrine, and in doing so he proposes that the political arena should be free of conflicting concepts of the good so that 'questions of political justice can be discussed on the same basis by all citizens, whatever their social position, or more particular aims and interests, or their religious, philosophical or moral views' (1987, p. 6). Thus his 'political liberalism' shows toleration by dividing the public, or political, from the private in order to create an overlapping consensus about the system of justice. On the one hand this move appears to be the extreme of toleration, every debatable moral question is left up to the individual. In their commentary on Rawls, Chanderan Kukathas and Philip Pettit explain that his version of liberalism 'stresses the importance of toleration, and argues that the polity should be governed by principles which do not themselves presuppose that some particular form of the good life is best' (1990, p. 140). But on the other hand, if conflicting moral doctrines are removed from the political agenda, claims of disrespect due to one's conception of the good life cannot be made in that political system of justice. While I will return to this argument later in the thesis, here it is enough to note that the toleration conceptualised by Rawls actually divides the public and the private in such a way as to limit the kinds of claims to equal concern and respect that can be a part of the political agenda.

So in this reflection upon legislation and liberal theory I have identified two concepts of toleration: either 'putting up with' someone or some action found repugnant or as simply 'non-prescriptive morality'. Both limit the public identity of lesbians and gay men and limit public activism. While toleration as a virtue might challenge the homophobe and the bi-phobe to 'put up with' gays, lesbians, or bisexuals, is this enough? In her important critical analysis of liberalism, Susan Mendus proposes that the concept of toleration itself is quite problematic:

the circumstances of toleration are circumstances in which there is diversity coupled with disapproval, dislike, or disgust, and where the tolerator has the power to influence the tolerated. In cases where toleration involves more than mere dislike, and has moral force, a paradox arises, which involves explaining how the tolerator might think it good to tolerate that which is morally wrong. In other words, we need to show how we can consistently claim both that toleration is a virtue in individuals and a good in society, and that (strong) toleration necessarily and conceptually involves reference to things believed to be morally disreputable, or evil. (1990, p. 20)

Toleration, in other words, necessarily rests on a bed of disapproval. And it is this underlying theme which separates it from any notion of equality. With a history so

dominated by social, political, and moral outrage at the very mention of homosexuality, toleration cannot be welcomed as a virtue of liberal character as much as a warning of eventual unrest. Mendus's words pinpoint that fear which informs the power relation between the tolerated and the tolerator. Toleration has limits. When those limits are reached the tolerator has the power to criminalise and punish the tolerated.

One of the most significant examples of toleration, both 'putting up with the morally repugnant' and 'non-prescriptive morality', is the Wolfenden Report and subsequent interpretations of the Sexual Offences Act. For example, the Wolfenden Report argues that 'unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' (Wolfenden Report, 1957). As discussed in the previous chapter, this type of reasoning provided for legal change, or more toleration, but did so by placing a division between the public and the private. The outcome was a toleration which partially decriminalised homosexuality in private but warned against it flaunting a public face. In fact the Wolfenden Report warned that 'It is important that the limited modification of the law which we propose should not be interpreted as an indication that the law can be indifferent to other forms of homosexual behaviour, or as a general licence to adult homosexuals to behave as they please' (Wolfenden Report, cited in Weeks, 1981, p. 243). This division between public and private, therefore, limited the kinds of action that could take place in public space. Weeks notes that the law was restrictive from the start. 'It applied only to England and Wales, by-passing Scotland and Northern Ireland. It did not apply to the merchant navy, nor to the armed forces. It tightened up the law with regard to offences with "minors" and to male importuning. And it absurdly restricted the meaning of "private": for the sake of the Act, "public" was defined as meaning not only a public lavatory but anywhere where a third person was likely to be present. Nor, as a late judicial ruling made clear, was homosexuality as such legalised' (1977, p. 176). Such a division between the public and private was seen by the Wolfenden Committee to be in line with the Millian tradition of toleration and it can now be seen as a possible example of the Rawlsian understanding of private morality. However what may have been mistaken for toleration grounded in 'non-prescriptive morality' proved to be a matter of 'putting up with the morally repugnant' as the limits of toleration were reached in the 1980s.

Since the 1967 Sexual Offences Act, homosexuals have been standing at the limits of toleration. After all, homosexuals had been warned not to go too far.

Indeed, Lord Devlin had argued in 1967 that it was merely an act of toleration which protected homosexuals and that legislation was not a stamp of approval (in Kennedy, 1987, p. 7). Lord Arran, himself a supporter of the Act, asked homosexuals to 'comfort themselves quietly and with dignity and to eschew any form of ostentatious behaviour or public flaunting' (in Benton, 1988, p. 14). But the 1960s and 1970s were hardly a time for expressing sexual desire in private, or remaining safely in the closet. The 1970s gay guide listed over two hundred gay venues in the United Kingdom; the first Gay Pride march was held in London on 1 July 1972; and the first out lesbian Member of Parliament, Maureen Colquhoun, publicly identified herself in the autumn of 1977 (Jeffery-Poulter, 1991, pp. 97, 106, 136). However, while the 1970s saw an increase in local council funding for support services for lesbians and gay men, the tables were turned with the financial cutbacks of the 1980s and the impact of the moralistic New Right. The AIDS crisis was intensified by the damning backlash not only from the New Right but from most government officials, and legitimated by the medical community. Lesbians and gay men became the targets for moral outrage and the scapegoats for social problems and failing political ideologies. Sensing a threat to the traditional nuclear family, and probably the stability of heterosexuality itself, supporters of the now infamous Section 28 of the Local Government Act<sup>8</sup> wanted to ensure that public money would not be used to 'promote homosexuality' or promote 'pretended families'. The widespread support for this Conservative-initiated bill simply became the voice of those who believed homosexuals had stepped beyond the limits of toleration. It was believed that homosexuals had broken some sort of unwritten agreement that homosexuality would be tolerated only if family values were affirmed. And church officials argued that 'as a result they've got the backlash they asked for' (in Benton, 1988, p. 14). The

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<sup>8</sup>Section 28 of the Local Government Act 1988:

Part 1 - A Local Authority shall not:

- a) Intentionally promote homosexuality or publish material with the intention of promoting homosexuality,
- b) Promote the teaching in any maintained school of the acceptability of homosexuality as pretended family relationship.

Part 2 - Nothing in subsection 1 above shall be taken to prohibit the doing of anything for the purpose of treating or preventing disease.

Part 3 - In any proceedings in connection with the application of this section a court shall draw such inferences as to the intention of the local authority as may reasonably be drawn from the evidence before it.



bed of disapproval had become increasingly irritated, if not volatile, and the tolerator had no option but to act.

So can toleration be a virtue? Perhaps it is a virtue of the privileged. But to the oppressed it is experienced as a hidden untrustworthy vice. Toleration is untrustworthy because it is accompanied by predetermined limits of what does and does not constitute acceptable action. Once these moral limits are violated, toleration lapses into moral prescription and legal alienation. As a prescription for social interaction, toleration is essentially based on the tolerator's willingness to 'put up with', or to hide, what she or he finds morally repulsive. Only those with a particular morality, and in this case a particular sexuality, will ever be tolerated. Toleration, in both theory and practice, is about retaining/restraining power, not respect or equality.

### To Identify, To Differentiate

In this section I want to focus on the notions of identity and difference. More specifically, I want to explore the notion of group identity based on difference. Keeping in mind the rights discourse that permeates Stonewall's objectives, it will be important to contextualise those within the dominant rights theory. And I will do this in three phases. I want to note two themes often found in rights claims: a notion of essential group identity and an assumed group power to make the claims heard. In order to identify these themes here I will first examine the communal face that much of gay and lesbian activism is assumed, by mainstream politics, to have. Second, a brief look at Ronald Dworkin's work, which prioritises equality, will expose at least a few difficulties in making rights claims within a heterosexist environment. Similarly, in the politics of difference, as outlined by Iris Marion Young, we can pinpoint the underlying problem of claiming an essentialised group identity based on difference. This will then lead to a fuller understanding of what is required for those with differing sexual identities to receive equal concern and respect.

By the beginning of the 1990s lesbian and gay activists in Britain had emerged as an engaging power on the political scene. Groups like the Homosexual Law Reform Society (HLRS), the Campaign for Homosexual Equality (CHE), and the Gay Liberation Front (GLF) had given gay and lesbian politics a public identity. As Ken Plummer notes, 'probably the central achievement of the lesbian and gay movement has been the creation of a strong, public identity around which political communities and programmes of change have evolved' (1992, p. 23).

That very monolithic identity, however, impeded the popularity and continued success of such groups. New organisations emerged which testified to the diversity of sexual identities. ACT-UP, formed in 1989, confronted head-on government and public agencies to fight the spread of AIDS and support those living with HIV. OutRage, established in 1990, offered a space for a range of sexual identities to participate in confrontational challenges to heterosexist/homophobic authorities. And Stonewall, set up in 1989, provided a consistent voice questioning every legislative authoritarian move. The need for change was taken into the streets, into Parliament, and into the face of inequality. But unlike the earlier 'identity politics', the activism emerging in the 1990s not only expressed a desire for change, it also began to reflect the different sexual identities within this 'community'. In addition, the formation of the above mentioned groups signalled different understandings of activism. The revolutionary ideas characterising early activism manifested itself in new organisations which called for the complete overthrow, or perhaps deconstruction, of existing oppressive social structures. This could be realised only through an 'in your face' activism which presents a confrontational challenge to the oppressors. For others, 'revolution' became a form of change that involved altering oppressive legislation and social norms. And this type of change was seen to be possible only through traditional modes of negotiation with those in power. The growth of activism in the 1990s, however, was not the first indication of differing political ideologies, goals, or strategies. In fact, very similar arguments about the kinds of tactics which would make change possible have been around at least since the Wolfenden reforms.<sup>9</sup> The new development within these current groups is their, at least oral, commitment to recognise the diverse sexual identities and oppressions amongst gay men and lesbians.

But even in the recognition of that diversity many of the new activist groups appeal to some notion of a political constituency or a 'gay community'. For example, in a recent *Gay Times* survey nineteen prominent gay and lesbian activists were asked the question 'Is there such a thing as a gay community?'. Angela Mason commented that 'if there isn't a community or a constituency it would be very hard to achieve political change' (Simpson, 1994, p. 31). In the same article, Steve Cook, OutRage activist, responded: 'Yes. All of us huddle for warmth behind the notion of gay community when our common interests are threatened from "outside"' (Ibid., p. 30). And even if some respondents believed that no gay community exist, the

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<sup>9</sup>For an enlightening recollection of those early debates about activism see Grey, 1992.

researcher notes the timeliness of such questioning: 'One of the more curious developments of the Mad Serial-Killer Summer of 1993 was the sudden adoption by both the police and the straight media the concept of "the gay community"' (Ibid.).<sup>10</sup> So there is to some extent a belief that gay men (and lesbians) form a 'community'; although it may be, as the leading activists remark, that it is a community set in contrast to the heterosexual 'other' or a constituency of those seeking political change.

This assumption of some sort of unifying factor can be found in the language of activists - even those activists who recognise the diversity of our actual lives. As Peter Tatchell's response to the *Gay Times* survey indicates: 'Yes. As with all communities the lesbian and gay community contains within it differences and conflicts. No community is a single, undifferentiated, homogenous mass. All are diverse and sometimes contradictory. But despite all the differences between lesbians and gay people we have three things in common: 1) sexual and emotional attraction to people of the same sex, 2) experience of discrimination because of homosexuality, and 3) a shared interest in the eradication of homophobia' (Ibid., p. 32). While I have proposed similar unifying factors in the Introduction, there are difficulties in linking those to rights discourse. Continuing from the above quotation, Mason argues that there is 'a new maturity and a greater willingness to recognise differences between us as well as what unites us - which I think is a civil rights agenda' (Ibid.). The problem I am trying to locate here is not around the debatable existence of a gay and lesbian 'community', but rather about relying on a notion of that community, or essential homosexual identity, in order to make 'rights' claims.

For example, in the U.S., where rights claims are made with specific connections to the Bill of Rights, there is an increasingly popular activists' strategy to rely upon some essential notion of homosexuality in order to secure rights for lesbians and gay men. Generally these claims fall into three categories.<sup>11</sup> First, in the *Bowers v. Hardwick* case, lawyers for Hardwick argued that homosexuals have a *right to privacy* that protects their choice of sexual partners. This rights claim made a direct appeal to the right the privacy in order to ensure the right to private choice about lifestyle. But underpinning such a claim is the belief that homosexuality is a

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<sup>10</sup>During the summer of 1993, five gay men were murdered in London by a 'mad serial killer'. See report in *Gay Times*, February 1994, pp. 28-30.

<sup>11</sup>For a full discussion of U.S. activists' strategies and rights discourse see Currah, 1994.

'chosen lifestyle' rather than a biological or socially constructed sexual identity. Similarly the second category of rights claims, which argue for equal protection and the right to participate in the political process, rests upon an essentialising identity. And the third kind of rights claim made in the U.S. is that homosexuals should be deemed a 'suspect' or 'quasi-suspect' class, which would align homosexual identity with racial identity and gender identity. And thereby grant it similar protections: 'all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny' (Justice Black, *Korematsu v. United States*, 323 U.S. 214 1944). So in the U.S. where rights must be claimed within a specific constitutional framework, activists need to rely upon some essentialized notion of homosexuality. It is important to note that they have been, so far, unable to convince the courts either that that identity legitimately exists or that it warrants rights protection. Claiming this essential homosexual identity then has not led to empowerment significant enough to facilitate legislative change.

There are then two difficulties I locate around the rights discourse. First, the structure of rights claims assumes that those making such claims have the political power to secure those rights adequately. Second, often rights claims are possible only in conjunction with a belief in an essential homosexual identity or an essentialised group identity for homosexuals. These make rights discourse, to say the least, problematic.

Below I will briefly look at the works of one of the most predominant liberal rights theorists, Ronald Dworkin.<sup>12</sup> The structure which he proposes for claiming rights exemplifies the theoretical difficulties of justifying rights claims made by a minority. In addition, I will consider the writings of Iris Marion Young. Although she is not generally understood as a rights theorist, the arguments she makes for a politics of difference are similar because they highlight the pitfalls of assuming an essentialised group identity. Following on from this discussion I will examine an alternative understanding of difference proposed by Susan Moller Okin which focuses on articulating a specificity of need. And it is in this structure that I believe activists in sexual politics can best make a claim for the desired equal concern and respect.

In his seminal text *Taking Rights Seriously*, Dworkin considers the kinds of preferences which should count in political decision making. In doing so he

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<sup>12</sup>I consider Dworkin's theoretical structure in a more detailed analysis later in the thesis.

distinguishes between external preferences for 'the assignment of goods and opportunities to others' and personal, or internal, preferences for 'his own enjoyment of some goods or opportunities' (1977, pp. 234-238). Since it is his fundamental concern to prioritise equal concern and respect, he argues that only those internal personal preferences should count in political decision-making. Robert Plant summarises the two reasons for this distinction: 'The first is that to count external preferences is to indulge in a form of *double counting* in the sense that my own personal preferences and my external preferences are counted. The second is that to count my external preferences given that they relate to you and your goods and opportunities, is not to treat you an object of equal concern and respect because *my* judgement about *your* goods is being weighed along with yours - this is inherently paternalist' (1991, p. 119). One of the examples Dworkin relies upon to show why counting external preferences could lead to policies which disrespect individuals is that of racism (Ibid., pp. 237-238). If the majority of the population is racist, then the policies they approve, like segregation, will not treat racial minorities as equals. In other words, only those beliefs about how I should live my life should be taken into account by legislators, not those opinions I have about how someone else's life should be conducted. Therefore only those internal, or personal, preferences should count in decision-making in order to ensure equal concern and respect for everyone.

Plant criticises that this formal procedure to ensure equality may not have that desired effect. By ruling out all external preferences Dworkin eliminates even the altruistic. In fact, Plant points out that in a society where the homosexual minority is subject to discriminatory law, and governments could only count internal preferences, then 'it is difficult to see how the law in a liberal society which discounted external preferences on procedural grounds would ever be reformed' (Ibid., p. 121). Now while *in theory* Dworkin may argue that the existence of repressive laws is illegitimate because it antecedently counted (homophobic) external preferences, *in practice* - when one is subjected to those laws - there is no avenue for challenging the majority. With the minorities' internal preferences outnumbered, so are their rights claims. And herein lies the central problem with rights theory. Unless there is specific provision for minority claims to be heard and to carry some power, within a repressive context, the theory fails to deliver the promises of equality.

Underpinning this difficulty in empowering the minority is the inherent relativity of rights claims. Jeffrey Weeks identifies this in his collection of essays entitled *Against Nature*: 'The problem is that rights do not spring fully armed from nature. They cannot find a justification simply because they are claimed. Rights are

products of human association, social organisation, traditions of struggle, and historical definitions of needs and obligations: whatever their claims to universality, they are limited by the philosophical system to which they belong, and the social and political context in which they are asserted' (1991, p. 192). Rights claims, then, are dependent upon the political context, and in a democracy that translates into limited power for minority, and/or oppressed, groups. Therefore in a democratic system, especially one where rights are not secured constitutionally, the minority will have little power to make those claims a reality.

Perhaps this distinction can be made more clear by considering two approaches to group identity found in the politics of difference. First the need for an essentialized group identity underpins the politics of difference espoused in *Justice and the Politics of Difference* by Iris Marion Young. In her pioneering study of the politics of difference, Young contrasts an ideal of assimilation - or what might be called transcendence of group difference - with an egalitarian politics of difference. 'The assimilationist ideal', she writes, "assumes that equal social status for all persons requires treating everyone according to the same principles, rules and standards. A politics of difference argues, on the other hand, that equality as the participation and inclusion of all groups sometimes requires different treatment for oppressed or disadvantaged groups'. (1990, pp. 157-158) She points out that "traditional politics that excludes or devalues some persons on account of their group attributes assumes an essentialist meaning of difference". (Ibid.) Alternatively, the egalitarian politics of difference espoused by Young reflects "difference more fluidly and relationally as the product of social processes'. (Ibid., p. 157) While this politics of difference still recognises equality as the participation and inclusion of all groups, it also acknowledges that sometimes these groups require different treatment because of the wide variety of oppression experienced in diverse social, cultural, and economic conditions. Young notes that increased urbanisation and the extension of equal formal rights to underrepresented groups, such as women, and racial and ethnic minorities, has not led to the assimilation of groups into a particular (stable) form of western, white, male-dominated, able, heterosexual culture. 'Attachment to specific traditions, practices, language, and other culturally specific forms is a crucial aspect of social existence. People do not usually give up their social group identifications, even when they are oppressed'. (Ibid., p. 163)

The second difficulty that can be identified in rights discourse, as noted above, is the assumption of an essentialised group identity, for example a essential notion of homosexual identity or of a gay and lesbian 'community'. In other words,

even if the minority had the power needed for rights claims, such claims often rest upon an essential identity of those making the claims. As this is the case in the U.S., it is becoming increasingly so in Britain with leading activists referring to 'rights for lesbians and gay men' and 'equal rights'. In fact, following the age of consent vote, an article in *The Pink Paper* written by Peter Tatchell specifically called upon 'our community to stand together united, proud and defiant' in order to 'tell MPs that the campaign for lesbian and gay human rights continues stronger than ever' (11 March 1994, p. 14). But does that unity exist 'on the ground'? For example, there were a number of lesbians who did not wish to support the age of consent campaign because 'it had nothing to do with them'. Similarly, campaigns around Operation Spanner, where fifteen gay men were arrested for consensual s/m sex, were not supported by lesbian feminists who argue that s/m sex represents oppression and abuse. So even if leading activists (need to) appeal to a 'community', there remain serious doubts about the extent to which those 'constituents' can actually agree about the specific rights they wish to claim. While there may be some rights that gay men and lesbians, or non-heterosexuals, wish to claim, there also exist a number of 'rights' - the right to own pornography, the right to privacy justifying s/m sex or abuse, even the right to an equal age of consent - about which there will be serious disagreement. Another difficulty with rights claims then is that they often rest upon a notion of essentialised group identity and in making those claims distinctions need to be drawn carefully between an essential identity and specific needs.

Perhaps this distinction can be made more clear by considering two approaches to group identity found in the politics of difference. First, the need for an essentialised group identity underpins the politics of difference espoused in *Justice and the Politics of Difference* by Iris Marion Young (1990). In her pioneering study of the politics of difference, Young contrasts an ideal of assimilation - or what might be called transcendence of group difference - with an egalitarian politics of difference. 'The assimilationist ideal', she writes, 'assumes that equal social status for all persons requires treating everyone according to the same principles, rules and standards. A politics of difference argues, on the other hand, that equality as the participation and inclusion of all groups sometimes requires different treatment for oppressed or disadvantaged groups' (1990, pp. 157-158). She points out that 'traditional politics that excludes or devalues some persons on account of their group attributes assumes an essentialist meaning of difference' (Ibid.). Alternatively, the egalitarian politics of difference espoused by Young reflects 'difference more fluidly and relationally as the product of social processes' (Ibid., p. 157). While this politics of difference still recognises equality as the

participation and inclusion of all groups, it also acknowledges that sometimes these groups require different treatment because of the wide variety of oppression experienced in diverse social, cultural, and economic conditions. Young notes that increased urbanisation and the extension of equal formal rights to underrepresented groups, such as women, and racial and ethnic minorities, has not led to the assimilation of groups into a particular (stable) form of western, white, male-dominated, able, heterosexual culture. 'Attachment to specific traditions, practices, language, and other culturally specific forms is a crucial aspect of social existence. People do not usually give up their social group identifications, even when they are oppressed' (Ibid. ).

Set in opposition to assimilationist policies, Young's notion of recognised group difference, in which groups define themselves, may sound quite appealing to those groups whose identity has historically been essentialised by mainstream society. In fact, Young's distinction between a group defining itself and being defined by the oppressor does hint at the possibility of group empowerment. It also suggests that public or legislative recognition of difference on the group's own terms may be achievable. But can this be equality? I may be overly sceptical but the idea of an egalitarian society which reflects every group's difference is very hard to imagine. Maybe I am wrong, maybe I am just not imaginative enough. Utopias are not necessarily beyond imagination, but they are often beyond what can be seen as the realism of practical possibilities. In fact, Young herself foresees the difficulties of realising this utopia. In light of this, she points the direction for public policy. She argues that 'a democratic public could provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged' (Ibid., p. 184). This account of a democratic public would be supported by institutional structures and public resources supporting:

- (1) self-organisation of group members so that they achieve collective empowerment and reflective understanding of their collective experience and interests in the context of the society;
- (2) group analysis and group generation of policy proposals in institutionalised context where decision makers are obliged to show that their deliberations have taken group perspectives into consideration; and
- (3) group veto power regarding specific policies that affect a group directly, such as reproductive rights policy for women, or land use policy for Indian reservations. (Ibid., p. 184)



She continues to flesh out this framework, and in the final chapter readers are told that an example of this society of egalitarian difference can actually be found in the contemporary city. It is in the city that a variety of social groups both interact and have a separate identity - or, in Young's words, where difference is more 'fluidly and relationally' the 'product of social processes' (Ibid., p. 157).

But is a city really an example of egalitarian difference? If there is one thing most cities are known for, it is the sectioning off of areas for particular cultural groups or classes - 'China Town', 'suburbia', and 'the other side of the tracks'. This may appear to some as a neutral or chosen geographical identity for a group, but arguably it can be seen to reflect simply the ghettoisation of deviant groups who are not accepted into, or cannot afford, the more affluent neighbourhoods. Young's view of the city as the embodiment of positive social group interaction fails to question the overarching social and economic structure which itself separates groups through borders such as poverty and racism. Moreover, reasons for membership of those separately defined groups differ, and 'community' boundaries are often not clearly delineated. For example, it may be difficult for an individual of a particular ethnic minority to feel a part of a predominantly white, British neighbourhood, even if they share similar economic, educational, and class status. Young may be right to question assimilationist understandings of difference, but the impact of that project alone can only be minimal because it fails to question the deeper structural divisions of society. Although her somewhat courteous recognition that groups need to define themselves - for the purposes of empowerment, access to services, and so on - she fails to provide the analytic tools needed to question the structural prejudices that shape and define the internal boundaries that section off parts of the city from one another - or those that limit the kinds of definitions available for groups to claim.

The second difficulty I find with Young's politics of difference stems precisely from the way in which she believes groups must define themselves. Young explains that 'in the objectifying ideologies of racism, sexism, anti-Semitism, and homophobia, only the oppressed and excluded groups are defined as different. Whereas the privileged groups are marked with an essence, malleable subjectivity, the excluded groups are marked with an essence, imprisoned in a given set of possibilities' (Ibid., p. 170). She observes that this understanding of difference means 'absolute otherness'. And she continues:

the group marked as different has no common nature with the normal or neutral ones. The categorical opposition of groups essentializes them, repressing the differences within groups. In this way the definition of difference as exclusion and opposition actually denies

difference. This essentializing categorization also denies difference in that its universalising norms preclude recognising and affirming a group's specificity in its own terms. (Ibid., p. 170)

While Young's aversion to this type of essentialising difference highlights the need for a group-determined identity, she fails to consider the possible inability of some groups to offer a coherent account of exactly who they are. And, consequently, her conception of a politics of difference results in a group's 'identity crisis'.

Throughout her work, Young routinely lists social groups like women, people of colour, ethnic minorities, and lesbians and gay men, as if they were entirely coherent for and in themselves (1990, pp. 36, 196-197). One of her key words is 'affinity', which serves to establish a sense of belonging. She defines a social group as 'a collective of people who have affinity with one another because of a set of practises or way of life they differentiate themselves from or are differentiated by at least one other group according to these cultural forms' (Ibid., p. 186). Elsewhere she states: 'Groups ... constitute individuals. A person's particular sense of history, affinity, and separateness, even the person's mode of reasoning, evaluating, and expressing feeling, are constituted partly by here or his group affinities' (Ibid., p. 45). Given her emphasis on 'affinity', I am not sure why she posits lesbians and gay men as a cohesive social group. In the first case, gay men and lesbians may form an 'affinity' group of some sort. The differences within the lesbian, gay and bisexual 'community' - and the quotation marks are necessary here - may be loosely held together by a shared oppression experienced in heterosexist society, as noted above and in the Introduction. But in light of the second definition, is that affinity enough to constitute us as a 'group'? Do we all share the same 'way of life' or 'mode of reasoning'? The fundamental tensions that arose in the early days of activism between gay men and lesbian separatists undoubtedly prove that we do not, and do not wish to, share a 'way of life'. More recently, similar tensions can be seen between lesbians around the censorship debate.<sup>13</sup> Lesbians - from radical separatists to 'sexperts' - are increasingly aware that 'sisterhood' does not mean, if it ever did, a shared 'way of life'. Gay men and lesbians may fall broadly under the category of people who desire the same sex but the acting out of that desire, the choice to act or not, the way in which we perceive that act as defining one's self, even the motivation of that desire are all different for each individual. We - non-heterosexuals - may differentiate ourselves from the heterosexual cultural forms which inform a

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<sup>13</sup>For more information on this debate see Segal and McIntosh, 1992; Assiter and Carol, 1993; and Stein, 1993.

heterosexual way of 'reasoning, evaluating, and expressing feeling'. But do we offer a coherent alternative for a homosexual - or bisexual - way of doing these things? Surely it is that coherence that we are working against.

Furthermore, the inability of groups to determine this type of coherent identity causes theoretical difficulties for Young's ambitious politics of difference. The main problem here hinges on the (in)ability of a social group to identify itself by coherently expressing those shared 'ways of life'. Those groups unable to do so are thereby unable to move toward practical changes. The theoretical complications which result can be seen by contrasting Young's work with that of another liberal feminist, Susan Moller Okin. In her study of justice and the family in liberal political theory, *Justice, Gender and the Family*, Okin uses a form of the 'difference' argument to make a stronger case for women's equality. Like Young, Okin spends the last chapter of her book offering examples of this difference-based equality (1989, pp. 170-186). The scope of her argument, however, encompasses only the oppression faced by women and, in particular, career women as part of a heterosexual family. By limiting her scope, Okin is able to find enough commonalities between these women to present a powerful argument for special legislation which meets their economic and child care needs.

Young, by contrast, simply throws her net too wide, largely because she is careful to include most oppressed groups within contemporary society as if they had coherence in their group-defined identity. But her theoretical model obscures the fact that these groups are oppressed for different reasons and in different ways. Furthermore, given her definition of a social group, those reasons do not always offer enough commonalities for *an* identity, especially in terms of the 'lesbian and gay community'. Young's politics of difference is torn between two conflicting demands. On the one hand, she wishes to reject essentialist categories that dominant forces use to otherwise subordinated groups. And, on the other, she realises the need for group commonalities, which become essentialist categories generated by the group for itself. Those of us challenging the inequalities we experience because of our sexual identity certainly need, like Young, to reject the former, but are increasingly incapable of establishing the latter, and probably do not wish to do so. Indeed it is this sort of conflated 'identity politics' that activism in the 1990s seems to be moving away from. Young's politics of difference, then, proves difficult to translate into a practical framework and any attempt seems to be underpinned by some notion of essentialism - one that is identity-determined either by the oppressor or by the group itself. It is this dichotomy that needs to be readdressed in contemporary activism. One cannot both appeal to equal rights based on an essentialised identity and, at the

same time, reject notions of an essential identity. In other words, if activists argue that there is a 'lesbian and gay community' which deserves 'rights' then they will be forced to identify that community. There is, however, an alternative way of expressing the specific changes that might lead to an equality, one which does not utilise a notion of rights based on essential group identity. Instead, as we have seen in the age of consent campaign, activists can argue that, according to the requirements of equal concern and respect, social policy should address the specific needs of a particular group, for instance young gay men's need for safe sex education. While this is just one example, the theoretical justification for this approach can be found in Okin.

The conception of difference found in Okin's work, by comparison, requires activists to clarify a specificity of need - exactly what do we need to change? For her, the economic dependence of women could be overcome by sufficient arrangements for child care, and by re-evaluating care roles within the heterosexual family which would enable women to participate in the work force more easily. Working women with children, then, could unite around this specific need and work towards change. This approach to changes in social policy, or even rights claims, could be a useful strategy for gay and lesbian activists.

So then, if we as a lesbian and gay, or non-heterosexual, 'community', or 'constituency', can identify needs which unite us, then we can have a clear 'political agenda'. But if we are unable to do so, can we as a 'community' support the diversity of specific needs that may exist? For example, can lesbians work for a change in the age of consent laws which, at present, affect only gay men? Can gay men support campaigns around breast and cervical cancer in the way lesbians support the AIDS campaign? If our desire for change is motivated by different needs, can we, as a 'community' support every change that is needed? Even if a few activists can coherently express specific desired changes, can those desires be claimed by the 'community'? Or do our different desires for change unavoidably stem from different, and often conflicting, oppression? These questions are not new - indeed, their history is intertwined with the birth of our liberation movement itself. The division between lesbian separatists and gay men has been a constant source of conflict and pain, as well as dialogue. And while time may have made us familiar with that division, it has served also to make us aware of other divisions. So if our non-heterosexuality spurs us on towards change, will the differences among and between ourselves frustrate that activism? Possibly. But not necessarily. Perhaps it could even be argued that if fragmentation to the point of complete ineffectiveness was a necessary outcome of our fundamental differences, the split between lesbian

separatists and gay men at the beginning of the liberation movement would have thwarted any possibility of social change. Fortunately, that was not the case. Nor does that seem to be the case now. The age of consent may not have been actively supported by every lesbian, but the financial contributions to Stonewall soared and there was an unprecedented number of supporters - not only young gay men but older gay men, heterosexual men and women, and even lesbians - who attended rallies and volunteered their time to the campaign. So it seems that it is possible, if not probable, that our future achievements will be grounded upon a respect for our differences - the diversity of specific needs found in the gay and lesbian 'community'.<sup>14</sup>

If we can draw a connection then between the kind of equality referred to by activists and the theoretical framework set out by Okin, we can begin to identify, and to articulate to those in power, the 'specificity of needs' that can serve as goals for change. However, in doing so, and if we are to be successful, this strategy must be accompanied by a respect for the diversity within the 'community' itself. And so below I want to return to a fundamental aim of liberalism - equal concern and respect for individuals - in order to clarify what such respect might entail given the diversity of sexual identities and the diversity of needs that arise in the heterosexist social context. In doing so I want to focus on one question: what is an equality that rests upon a politics of respect?

### To Respect

In the above section, I examined the difficulties that arise from defining equality with reference to rights. The need to identify the group demanding equal rights often leads to a essentialised notion of 'a group identity'. And given the diversity of sexual identities and manifestations of oppression, finding that one identity not only may be difficult but could undermine the success of the movement for change itself. However, that is not the only definition of equality found in activists' language. As noted, the 'Case for Change' brochure published by Stonewall expressly notes that the higher age of consent prohibits young gay men from receiving safe sex education. By using this type of argument, Stonewall are able to specify exactly

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<sup>14</sup>I am indebted to Shane Phelan's comments in her forthcoming book *Getting Specific* where she argues that, given the diversity of needs, activists should be specific about those needs and then form coalitions to work towards realising changes in social policy. See Phelan, 1995; and 1994.

what is needed, why, and whom it will benefit. In specifying this need, their argument is similar to that made above by Okin. Her work is significant because she simply notes the kinds of policy changes that would enable equal concern and respect, or in her words 'justice'.<sup>15</sup> What we are left with then is an interesting strategy for activists; one which can move away from the difficulties associated with rights claims and can pinpoint exact policy changes by identifying a specific need.

In this exploration of what a desired equality might look like, I want to sketch an outline for respect. And although it is just a sketch, it is, I believe, a prerequisite for challenging the current oppressive social structures. In the above section I noted that two motivations behind liberalism's proposed structures for ensuring equality, were the recognition of individual diversity stemming from the individual's ability to choose her or his own conception of the good and the need to show equal concern and respect. The commitment to recognising this capacity for autonomy can be found in both traditional liberal writings like Mill - 'Over himself, over his own body and mind, the individual is sovereign' (Mill, in Warnock, 1962, p. 135) - and in contemporary theorists like Rawls - 'enable human beings to express their nature as free and equal moral person' (1972, p. 513). Similarly the commitment to equal concern and respect can be found in Dworkin's belief that the state should treat people as equals.

However, as briefly noted above, theorists tend to differ about the exact structure which could best recognise this capacity for autonomy or show respect. Generally, they tend to agree that autonomy is best served or respect best shown through government policies which are anti-perfectionist or neutral. Now, while I will address the liberal concept both of the individual and of neutrality later in the thesis, I would propose here that, given the possible and varied interpretations of equality, the way to ensure such 'equal concern and respect' for those with diverse sexual identities rests upon at least four conditions for respect. As a conclusion to this chapter, this outline for respect builds upon both the disrespect shown at the hands of legislators and the ideal of equality articulated in the activists' language and located in some of the theoretical structures discussed. It is simply a proposed sketch, one which will be more fully developed as the thesis continues. Nevertheless it should act as a basic framework for the kind of equality based on respect that can be found in the language of activists and one which informs this exploration of liberal theories.

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<sup>15</sup>I discuss her concept of justice more extensively in the following chapter.

First, if we understand sexuality to be intertwined with our identity or 'well-being'<sup>16</sup> it is important to respect each person's own interpretation of her or his particular desires as they relate to her or his own sexual identity. In other words, if sexuality is important to my own understanding of who I am, then I should give similar respect to another person's understanding of who she or he is. Raz makes a comparable argument in which he explains that a person's understanding of her or his well-being depends upon one's ability to make sense of her or his own life and of the surrounding social forms. Well-being, according to this definition, consists of comprehensive goals which play a conscious role in one's life, like ambitions, commitments, relationships, and so on (1986, pp. 290-291). So the idea here is simply a respect for the ways that other people will interpret their own life and surroundings differently. Each individual will interpret - understand or negotiate - biological needs, socially constructed norms, and personal choices differently. And that interpretation might include a sexual identity which is important to their own well-being.

The second, and closely related, point involves respecting the individual's acting on her or his interpretation of desire - in other words, respecting the action that results from one's individual interpretation of personal well-being. This general idea is quite straightforward, since it means that, if I am going to respect a person's interpretation of her or his sexual identity, I should generally respect the way she or

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<sup>16</sup>Raz defines well-being in this way: '...while there is no denying the importance of the biologically determined wants for the well-being. Much depends on his other goals, on whether he wants to be friends with someone, or to distance himself from another, to go camping in summer, to acquire a local reputation for hard-headedness, etc.

'Some of these goals a person may have adopted deliberately, some he may have chosen. Others he may have drifted into, grown up with, never realised that anyone can fail to have them, etc. It makes no difference from our point of view which is which. What matters is that they are his relationships, ambitions, commitments, and the like. Since they are his goals he guides his actions towards them, they colour his perception of his environment and of the world at large, and they play a large part in his emotional responses and in his imaginative musings. They play, in other words, a conscious role in his life. They are not merely unknown forces, the existence of which is deduced or postulated by psychologists or social scientists because of their predictive value' (1986, pp. 290-291). This concept will be discussed further in the following chapter.

he acts upon that interpretation. Now this view by no means necessitates that I respect every possible action that might be taken. Raz provides a concept of harm that is at least a starting point for regulating such action. The prevention of harm includes 'harm to anyone (himself included) as the only justifiable ground for coercive interference with a person' (Ibid., p. 413). While male-stream political theory has introduced the divide between 'private harm', which has legitimated many forms of private abuse, and 'public harm', which has failed to question many forms of social oppression, this divide and its interpretation are not the only possible interpretation of harm, or even a partially acceptable one. In fact, Raz's work strikes at the heart of this public private division. For Raz, harm includes not only physical harm but also coercion, manipulation, and even socially harmful attitudes such as racism. (Ibid., pp. 319-320). Moreover, harm at the hands of society or government involves, according to Raz, 'depriving a person of opportunities or of the ability to use them is a way of causing him harm ... harm to a person may consist... in frustrating his pursuit of the projects and relationships he has set upon' (Ibid., p. 413). Now, while I would not accept this brief sketch as complete or wholly acceptable, it does represent a rather interesting interpretation of harm that, when fleshed out, could offer some practical guidelines for respecting more sexual acts and sexual identities than are currently recognised in heterosexist society.

My third point is that respect for some one must include an awareness of the conditions needed for that individual to realise her or his well-being. While the harm principle may offer general rules for social interaction, the conditions needed for well-being require positive action, or as mentioned earlier a pro-active social policy. For example these conditions might include anti-discrimination legislation, or parity between contractual negotiations for heterosexual marriages and homosexual partnerships. But, like the aforementioned notion of harm, this would not be the only possible interpretation. It could include a more radical restructuring of the social institutions which support, maintain, and reproduce hegemonic conceptualisations of sexuality. Equality based on respect is then a responsibility of the state.

Fourth, and finally, respect must be aware of the power differentials which enable some to fulfil their well-being while oppressing others. Given the above framework and the difficulties located in rights discourse, respect must be consistent with empowerment. The power needed to interpret one's own well-being - and, for the argument here, one's sexual identity - must be encouraged rather than accompanied by stringent social codes of prescriptive sexuality. Again, Raz notes the importance of pluralism and a range of options available in a society and the



freedom to experiment - even to transgress - social norms. The idea that personal well-being may be understood in the light of social norms is, Raz explains, 'to be consistent with experimentation' (Ibid., p. 309). Elsewhere he adds that people can, by developing their own 'variations and combinations, transcend the social form' (Ibid., pp. 312-313). This final tenet of respect should ensure that individuals have the power to experiment with, and even transcend, social norms.

So if this sketch of a politics of respect becomes a precursor to equality, what might be considered as practical objectives? Besides the respect which should exist among the lesbian and gay, or non-heterosexual, 'community', this framework can be used to identify specific changes needed in society. Because of the shared experience of disrespect in heterosexist society, all of us *can* advocate certain changes. In her rather poignant, if not directive, criticism of the liberal state, Shane Phelan articulates the debilitating disrespect we have all experienced:

Lack of protection against social and economic harassment demonstrated, not that the liberal state is failing to live up to its standards, but that its standards leave huge loopholes in the most intimate, most defining areas of our lives. The cost to people of growing up hearing that they or others like them are sick, warped, in need of a good fuck, or otherwise defective, is a cost that can be seen only when one makes the judgement that these things are not true.

(1989, p. 18)

In order to eliminate the disrespect at the hands of prejudice, and indeed to have any hope of equality, we must focus on at least three ways in which sexual identity can be shown 'equal concern and respect'. First, non-discrimination laws must include sexual identity and be supported by education and monitoring structures for hearing grievances and punishing those offenders. Second, because of the historical categorisation of homosexual as mentally or physically 'ill' or 'deviant', legal institutions should be made particularly sensitive to claims of 'disrespect' at the hands of the medical community. And third, if sexual identity can be seen to be intertwined with a person's understanding of her or his own well-being, options for making choices about that identity must be supported by the government as a valid social form. In other words, the nuclear family can no longer remain the central criterion for policies regulating sexual relationships or parenting. As Raz states, in terms of the options available within society, it is 'clearly not number but variety [that] matters'. For example, he notes that 'a choice between hundreds of identical and identically situated houses is no choice, compared with a choice between a town flat and a suburban house' (1986, p. 375). Likewise, I would argue that choice

between accepted heterosexual social forms is not variety. It is not respect as I have outlined above. And, what is particularly relevant to this essay, it is not the equality, the equal concern and respect, desired by activists and idealised in liberal theory.

### To Be Equal

So if respect for the different experiences among us is a prerequisite for equality, are we any closer to defining that equality? As I have shown in this chapter, equality cannot be the result of toleration. The very definition of toleration rests on disapproval. And this disapproval is indicative of a power relationship which is experienced not as equality but only as hidden disgust and inequality. Likewise, rights discourse can fail to offer the empowerment needed for a minority to challenge forcefully majority-enforced discrimination. The politics of difference espoused by Young offers groups the power to define themselves rather than being characterised, or caricatured, by the cultural (heterosexual) norm. But the essentialism required by this group-defined identity is simply no longer a goal of a lesbian, gay, and bisexual 'community' which is learning to accept fundamental internal differences. So we are left with one notion of difference which offers a strategy for empowerment; articulating specific needs of particular groups within the 'community' to achieve the precise policy changes which would meet those needs. But in utilising this strategy, and in order to avoid fragmentation, we must insist upon respect for that diversity, both amongst our 'community' and within the surrounding social structure.

Equality, Raz argues, can only be a quantifying term which is associated with a particular 'sphere of application' (Ibid., p. 225). He notes that 'pure concern for equality may be expected to be separate from the independent recognition of the value of the matter in question (hunger, for example). It may be expected to serve as an independent source of value'. But instead, he continues, equality itself rests on other valued principles: 'Equality is said to matter where it affects what is valued for independent reasons; it matters only because what is to be distributed is valuable for independent reasons. Principles of equality always depend on other principles determining the value to the benefits which the egalitarian principles regulate' (Ibid., p. 240). In other words, Raz is arguing that you cannot hold up equality as an independent ideal. Rather, equality must always be seen in relations to other political values. We cannot therefore posit equality. We are, instead, obliged to ask: Which equality?

If we understand equality as a quantifying term, it must be accompanied by a coherent list of valued benefits to be distributed equally. Without an accompanying principle, equality is left to the interpretation of those in power. And those in power may assume that equality means 'with them' rather than respect for diversity. For example, perhaps we need to learn from the difficulties faced by women which resulted from an 'add women and stir' approach to altering the patriarchal system. Surely we desire more than to be equal with heterosexuals - or to be considered as heterosexuals with 'alternative' private lives. Our struggle for liberation has not been a struggle for a conforming equality. It has been a struggle in which we as a community, and as individuals, have grappled with difference. And the equality which satisfies us must not reflect monolithic, repressive heterosexual values but instead must respect the variety which results from our differences.

In the following chapters, I will continue to explore the language of activists in relation to contemporary liberal political theory. And at each stage it will be helpful to keep in mind this outline for respect which gives claims for equality substance. The next chapter focuses on the activists call for 'justice', placing it in the context of John Rawls's construction of a system of justice. As the most influential liberal theory of justice for over twenty years, it will be interesting to see exactly what kind of justice might be on offer for gay men, lesbians, and those with differing sexual identities. The final two chapters move beyond this linguistic connection, to examine the assumptions found in contemporary liberal theory about the individual's relationship to the community and the state's responsibility to ensure equal concern and respect. And, as indicated in the final remarks on respect, the last chapter brings together discussions of Raz's work on freedom, autonomy, and state responsibility. Again, it will be important to keep in mind the connection made here between claims for equality and the need for respect.

## Chapter Three

### A Simple Matter of Justice?

In March 1993 close to a hundred thousand supporters of sexual politics, or the 'gay and lesbian movement', converged on Washington, D.C. to protest discrimination against based on sexual orientation. The live television coverage in America broadcast the events of the day, including a panoramic view of the diversity of gay men, lesbians, bisexuals, transsexuals, etc. taking part in the march and rally. And while many individuals, or small groups, carried banners signifying their particular identity or political protest, one banner stood out among the rest. Indeed it became the central prop for the enormous stage upon which celebrities and 'Very Important Gays & Lesbians' announced their support for change. Its words encapsulated the political motivation for the march, if not for the whole American sexual politics movement. The reason for protest, the central message to those in power and to the heterosexual public, was that change in policies relating to sexual orientation was 'A Simple Matter Of Justice'.

This message was carried across the Atlantic, and by the time of the June Pride march in London Stonewall had printed leaflets explaining their work, emblazoned with the call to action: 'A simple matter of justice'. After telling stories of injustice, for example gay men and lesbians who had been victims of attacks, harassed as members of the armed services, or denied the right to settle with their partners in Britain, Angela Mason noted in the leaflet the campaigns undertaken by Stonewall, concluding that 'by supporting Stonewall you help speed up these changes. It is a simple matter of justice and together we can make the difference. Support our work and become a Friend of Stonewall'. In fact this was not the first time the demand for 'justice' had been made by Stonewall. Another leaflet soliciting financial contributions was entitled 'Legal Equality and Social Justice ... Join the Friends of Stonewall and Help Us Make It Happen'. And, the mission statement of 'working for equality' is often accompanied by the clarification 'legal equality and social justice'.

Claims for justice, like those for equality, may simply be direct appeals to mainstream western ideals of what should be ensured by the state. Indeed, it is perhaps more strategic to note, as Mason does, the various injustices which have victimised gay men and lesbians; particularly if one is wanting to arouse emotions enough to secure financial support. But in highlighting 'injustice' one implicitly appeals to an overarching notion of justice. If something is seen as unjust, the assumption is that there is a specific criteria of 'just', or justice. The more blatant Americans directly assert this; it is 'A simple matter of *justice*'. So this chapter will

look at this claim for justice. But, unlike the previous chapter, it will not survey the various theoretical frameworks in search of a definition which corresponds to activists' claims. Instead, I want to examine how this claim might be seen in relation to, or interpreted according to, the one theory that has influenced contemporary liberal thought more than any other: John Rawls's *A Theory of Justice*. The centrality of this theory, this justice, reflects the kind of interpretation of justice which has captured the attention of political theorists for the past twenty years. The amount of debate it has sparked testifies to its intuitive appeal for liberal theorists, and to its intuitive assumptions which have been attacked by its critics. And so this chapter engages with this theory of justice, and in the familiar words of Alastair MacIntyre, asks 'Whose Justice?'.<sup>1</sup>

### Family Justice

As noted in the previous chapter, contemporary liberalism can be said to be concerned with showing equal concern and respect for individuals. Rawls himself prioritises similar concepts of equal liberty and self-respect (1972, pp. 195-257, 440-446). However closer examination revealed that, in an effort to show equal concern and respect, liberal theory may leave unchallenged (owing to anti-perfectionism or prioritising state neutrality) the traditional assumptions or historical characterisations of western culture, even those which prove to be oppressive and isolating for individuals who do not represent accepted social roles. I will continue that line of argument here by demonstrating how Rawlsian justice is undermined by the 'intuitions' he gleans from western democracies which simply re-establish existing social oppressions. Heterosexism is one case in point. Below I will consider the criticisms of feminist theorists such as Carole Pateman who question the gender of the liberal individual. Similarly gay and lesbian critics must search for their identity within the concept of the individual found in liberalism. And there is one assumption about the liberal individual found particularly in Rawls's work which limits the extent to which gay men and lesbians can identify with his theory of justice. Rawls's theory can be contextualised within, and builds upon, the western democratic culture, influenced by Judeo-Christian norms, which historically idealises the heterosexual nuclear family. Although the gender-roles within this

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<sup>1</sup>MacIntyre's communitarian critique of Rawls's theory of justice is not the specific framework for the examination here; nevertheless, the title of that work does depict the need to question any essential notion of justice (1988, *Whose Justice?, Which Rationality?*).

family structure have been the topic of feminist critiques of Rawls, the assumption of this heterosexual family structure itself actually marginalises, or completely ignores, the concerns of lesbians and gay men, separating those concerns from a heterosexual, or family, justice.<sup>2</sup>

In the previous chapter I noted that one demand made by activists is that same-sex relationships should be considered legally equal to that of heterosexual marriages. It was argued, however, that the general theoretical frameworks for equality rest upon varied interpretations of 'equality', some of which actually limit the equal concern and respect shown to gay men and lesbians. In a similar fashion this chapter notes the relativity of claims for 'justice' by examining Rawls's theory of social justice for heterosexist assumptions. In doing so, it rests quite heavily on critical examinations by feminist writers, particularly that of Susan Moller Okin in her important text *Justice, Gender, and the Family*. She and other feminist critics have produced reams of accusations of 'typical liberal' sexism against Rawls, to which he has indirectly responded by including sex behind the veil of ignorance.<sup>3</sup> Nevertheless, he has not addressed his assumption of the nuclear family as a basic institution of society. The critique offered here investigates this tie with the heterosexual family structure, suggesting that it limits the extent to which Rawls's theory of social justice can act as a framework for justice for gay men, lesbians, or those with a non-heterosexual identity. In particular this chapter will consider the methodology of the original position as described in *A Theory of Justice*. Obviously Rawls has 'reinterpreted' his theory since its publication in 1972, and his more recent formulation of 'political liberalism' will be discussed in detail in the following chapters. However, because many of the fundamental assumptions that still haunt his work are explicitly articulated in his original theory, I have chosen here to focus primarily on that work.

During this investigation it is important to keep in mind Rawls's understanding of his task. In *A Theory of Justice*, Rawls outlines the fundamental

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<sup>2</sup>A few examples of what I refer to in this chapter as 'family politics' are the Back to Basics campaign emphasising conservative morality, recent efforts to blame single mothers for the rise in crime and juvenile delinquency, the Child Support Act requiring delinquent fathers to pay child support regardless of the mother's wishes, and of course Section 28 of the Local Government Act which labelled gay and lesbian families as 'pretended families'.

<sup>3</sup>For example, Rawls now includes 'sex' as a contingency hidden behind the veil of ignorance ('Fairness to Goodness', 1975, p. 537) and in his most recent work has avoided gendered language.

principles of a just society. His methodology, including the original position and conditions governing its parties, is designed to produce principles of justice, based upon shared intuitions about justice, which are agreeable to a range of people with different conceptions of the good. 'Justice as fairness' is proposed by Rawls to be a viable alternative to other philosophical traditions, in particular utilitarianism. His task is not to correct the injustices of our contemporary society (Pettit, 1980, p. 151). Indeed such an endeavour would require an in-depth assessment of numerous issues against a pre-determined criteria of justice. Instead Rawls focuses on establishing such criteria - what is justice and how is it best determined? However, it would be naive to think that Rawls himself does not begin with a preconceived notion of what form this justice will finally take. In fact he makes no pretences about this: 'We want to define the original position so that we get the desired solution' (1972, p. 141). Rawls wishes to create a methodology which will produce principles of justice intuitively acceptable in a contemporary diverse society but he admittedly knows his 'desired solution'.

The way in which Rawls believes principles of justice can best be defined is by eliminating the particularities that set people apart. In creating a hypothetical space in which individuals can consider the best way 'to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages', they must be free from their belief systems that would predetermine, or affect their notion of justice (1972, p. 61). So in this 'original position', that hypothetical space, members are placed behind a 'veil of ignorance' which nullifies 'the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their on advantage' (Ibid., p. 136). 'This ensures', Rawls notes elsewhere, 'that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain' (Ibid., p. 12). Mulhall and Swift offer these comments about the purpose of the veil of ignorance: 'The intuition being captured here is that which links fairness to ignorance. If I don't know which of the five pieces of cake that I am cutting I am going to end up with, then it makes sense for me to cut the pieces fairly. Similarly, if people don't know who they are going to be, then it will make sense for them to choose fair or just principles to regulate their society' (1992, p. 3). So the original position is established by Rawls as a space in which individuals are ignorant of their particular contingencies in order to ensure that the principles of justice chosen are fair; thus he claims the result is 'justice as fairness'.

The result, according to Rawls, is two principles of justice: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all' and 'Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity' (1972, p. 302). The first principle has lexical priority to the second so that, as Mulhall and Swift explain, 'there can be no trade-offs between those liberties and the other forms of advantage that come under the second principle' (1992, p. 8). Furthermore, within the second principle, the principle of fair equality of opportunity, (b), has priority over the just savings principle, or what is labelled the difference principle, (a). These principles of justice are to ensure the fair distribution of what Rawls defines as 'primary goods'. 'These primary social goods, to give them in broad categories, are rights and liberties, opportunities and powers, income and wealth' (1972, p. 92). Interestingly, he considers "a sense of one's own worth" as a primary good and devotes an entire section of *A Theory of Justice* to the importance of self-respect in which he confirms that 'parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect' (Ibid., p. 440). I will return to this point later as I consider this emphasis on self-respect in relation to the requirements of respect noted in the previous chapter.

Finally Rawls states that, for reasons of stability, the principles of justice must be agreed upon unanimously (Ibid., p. 122). Rawls reasons that, once behind the veil of ignorance, the parties can consider alternative concepts of justice and unanimous agreement will be reached. 'To begin with, it is clear that since the differences among the parties are unknown to them, and everyone is equally rational and *similarly situated*, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached' (Ibid., p. 139, italics added). This requirement of unanimity plays an important role in locating the heterosexism inherent in this theory of justice since members are 'similarly situated' and required to agree upon the basic institutions and concepts of justice. Below, I will consider in more detail how the implications of this methodology, and most significantly this system of justice, fails to provide a framework for self-respect, and is instead a heterosexual, or family, justice.

As noted above, Rawls is aware of the desired solution, or the principles of justice he wishes this methodology to legitimate. Critics often point out that, if Rawls designed his methodology to reach desired solutions, he will obviously



incorporate his own conception of justice, which will stem from his own cultural and historical perspective, as well as assumptions which are typically found in liberal theory.<sup>4</sup> And here I want to consider how these assumptions, specifically that of the heterosexual family, affect his sense of justice. I suggest that the assumptions found in Rawls's work are reflective of the heterosexism found in contemporary western democratic culture. The parties of the original position have a specific task: to consider alternative understandings of justice under set conditions and determine which ones are most likely to provide the best distribution of primary goods. Two points can be made about the cultural and historical relativity of the resulting justice. First, Rawls states in 'Kantian Constructivism' that his theory is relative to western democratic culture. 'We are not trying to find a conception of justice suitable for all societies ... [but for] ... the just form of basic institutions within a democratic society under modern conditions' (1980, p. 518). Placing his methodology within the democratic system of the modern society *historically* contextualises the knowledge of the parties in the original position.<sup>5</sup>

Second, in *A Theory of Justice* Rawls acknowledges some of the 'traditional concepts of justice' which are among the alternatives for the parties (1972, p. 122). Among these are a range of interpretations of utilitarianism and perfectionism. Members of the original position also know 'general facts about human society'. 'They understand political affairs and the principles of economic theory; they know the basis of social organisation and the laws of human psychology' (Ibid., p. 137). They are aware of the realities, the political agenda, outside the original position, but do not know their positioning within that social and political context. So this limited

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<sup>4</sup> Ronald Dworkin notes that, 'the critics conclude that the fundamental assumptions of Rawls' theory must, therefore, be the assumptions of classical liberalism, however they define these, and that the original position, which appears to animate the theory, must somehow be an embodiment of these assumptions' (in Daniels, 1975, p. 52). For an example of these assumptions, particularly the concept of the person as 'chooser', see *Whose Justice? Which Rationality* MacIntyre, 1988; *Liberalism and the Limits of Justice*, Sandel, 1982; and *The Sexual Contract*, Pateman, 1988.

<sup>5</sup>This clarification was to dispel criticisms that his theory of justice was a universalist, ahistorical notion of justice. It was not his intention, he has argued in 'Kantian Constructivism', to provide a comprehensive notion of justice but instead to highlight the intuitions about justice latent in the American democratic culture (1980, esp. p. 518).

knowledge sets the historical and political context for the alternatives available to the parties.

It is not difficult to connect the alternatives available within this historical and political context with assumptions made about sexual relationships. In her book *The Sexual Contract*, Carole Pateman specifically notes that the history of the contract theory, appealed to by Rawls, carries with it particular notions of marriage. 'The contractual conception of marriage presupposes the idea of the individual as owner. The marriage contract establishes legitimate access to sexual property in the person' (1988, p. 168).<sup>6</sup> The family with its implications about the division of labour, role of women, 'private' justice, and ownership of wife and children is a strong part of western democratic traditional concepts of justice (Brittan and Maynard, 1984, pp. 143-152). Therefore this historical and political context carries with it assumptions about family structure as the model for sexual relationships. The gender division supported by the traditional concept of marriage permeates our culture and brings with it 'natural' assumptions of heterosexuality.

Rawls not only fails to address this cultural heterosexism but builds upon it via the family as an example of a just institution. Early in *A Theory of Justice* he recognises the fundamental importance of the family, citing as a 'major social institution ... the monogamous family' (1972, p. 7). This monogamous family is also a biological one where the man or head of the household is concerned with the 'continuation of his line' (Ibid., p. 525). Moreover, the family is the space for moral development (Ibid., pp. 490-496). This moral development includes acquiring a sense of justice by forming attachments in accordance with the social institution of the family (Ibid., pp. 490-491). And it is through these attachments that individuals learn that the family is a social arrangement which is 'just and publicly known by all to be just'.<sup>7</sup> Rawls blatantly overlooks the difficulties within this 'social institution'

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<sup>6</sup> For Pateman's discussion of the history of the marriage contract see *The Sexual Contract*, 1988, esp. pp. 154-188.

<sup>7</sup> Rawls notes three psychological laws: 'First law: given that family institutions are just, and that the parents love the child and manifestly express their love by caring for his good, then the child, recognising their evident love of him, comes to love them. Second law: given that a person's capacity for fellow feeling has been realised by acquiring attachments in accordance with the first law, and given that a social arrangement is just and publicly known by all to be just, then this person develops ties of friendly feeling and trust towards others in the association as they with evident intention comply with their duties and obligations, and live up to the ideals of their station. Third law: given that a person's capacity for fellow feeling

where women and children are often treated as property. He simply assumes that 'family institutions are just' (Ibid., p. 490). In addition, by ignoring alternative family-structures, Rawls fails to distance himself from the assumption of heterosexuality. In making such a claim about the family as an example of a just institution, Rawls limits the historical and cultural knowledge of the members to that of a particular heterosexual, heterosexist, context. And it will be argued here that this failure to address heterosexism lessens its effectiveness as a theory of justice rendering it unable to grant justice to gay and lesbian, or non-heterosexual, citizens.

It is important to note here that feminist critics such as Okin challenge this assumption of the family as well as the implied 'male' theory of justice.<sup>8</sup> Although their comments address the conflict between traditional notions of justice and the injustices experienced within the family structure, it is not the exact direction chosen for this critique. This distinction between 'women's' struggle against sexism and the struggle of gay men and lesbians against heterosexism is exemplified in the debate around the family. Traditional understandings of the division of labour, women's economic dependency, and women as primary child-minders limit the extent to which women can determine their own lifestyles. The effects of the traditional family on women have proved overwhelmingly oppressive. While feminists point out the injustices of gender division in the traditional family structure, gay men and lesbians are simply unable to identify with this heterosexual family model. This is not to say that homosexuals are against the idea of family. Indeed at the forefront of legislative debate are gay and lesbian parental rights, for example custody law reform, artificial insemination, recognition of same-sex partnerships. But agreeing with *a* notion of *family* does not involve accepting *the* traditional family structure inherent in western democratic culture, that is husband, wife and children - with or without the gender-structure. Therefore, a political theory which is in search of the 'shared intuitions' about justice must either explicitly reject this traditional idea of family as a shared intuition or be seen to embrace it. And Rawls leaves little doubt about his affiliation with the traditional heterosexual family structure.

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has been realised by his forming attachments in accordance with the first two laws, and given that a society's institutions are just and are publicly known by all to be just, then this person acquires the corresponding sense of justice as he recognises that he and those for whom he cares are the beneficiaries of these arrangements' (1972, pp. 490-491).

<sup>8</sup>For examples see Okin, 1987 and 1989; Kearns, 1983; Pateman, 1988, esp. pp. 39-49.

Elizabeth Fox-Genovese in her book *Feminism without Illusions* summarises that 'cultural representations of sexuality and sexual identity are themselves abstractions from specific social and political relations' (1991, p. 238). By placing social and historical contextual limits on the parties of the original position, Rawls assumes the institutionalisation of the family structure. This not only traps him into a 'traditional mode of thinking that life within the family and relations between the sexes' are beyond the subject of a theory of social justice (Okin, 1987, p. 47) but also traps him into traditional assumptions about heterosexuality and *proper* structures for sexual relationships. The family is understood in the alternatives available to the parties of the original position as a major social institution. And owing to requirements of unanimity in the original position, it determines the structure of family relationships within the resulting well-ordered society. So as feminists have criticised Rawls for assuming justice *within* the family, I want to investigate his assumption *of* the family.

As noted, this chapter investigates Rawls's assumptions of heterosexuality via the family structure. In order to find firm ground I will ask three rather familiar questions about his methodology: 'Who are the members of the original position?', 'What do they know about their society?' and 'What alternatives are available to them?'<sup>9</sup> After considering each question, the resulting justice will prove to be based on the heterosexual family which will be quite problematic for non-heterosexual citizens in the well-ordered society. Three alternatives seem to be available for those in the original position. First, given that heterosexuality is the accepted form of sexual relationships, parties might 'play the odds', or gamble that in the resulting society they will find themselves in agreement with the heterosexual family structure. Second, given Rawls's concern for social stability, parties might decide to enforce the heterosexual family-structure as ideal, denying that diverse sexual identities should be considered among the basic liberties. Alternatively, given the difference principle, people in a 'well-ordered society' might be able to express different sexual identities, but they would become second-class citizens, denied the privileges granted to the heterosexual family as a social institution. After considering each question, and Rawls's apparent heterosexism, I will suggest a new direction for this examination of contemporary liberal political theory as a possible justification for the 'equality', 'justice', and 'freedom' demanded by activists.

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<sup>9</sup>Similar questions are asked in Pettit, 1980, p.149; Hare in Daniels, 1975, p. 95; Okin in Shanley and Pateman, 1991, pp. 181-187.

## Heterosexist Members of the Original Position

First consider the question 'Who are the parties in the original position?' Perhaps the best place to begin is by noting what they do *not* know about themselves. The veil of ignorance places members on equal ground by denying knowledge of 'special contingencies'. These contingencies Rawls initially outlines in *A Theory of Justice*: 'They do not know how the various alternatives will affect their own particular case ... no one knows his place in society ... nor ... his conception of the good.. the parties do not know the particular circumstances of their own society... its economic or political situation, or the level of civilisation and culture' (1972, p. 137). Rawls extends this list in his article 'Fairness to Goodness' to include 'Our social position and class, our *sex* and race should not influence deliberations made from a moral point of view' (1975, p. 537, italics added). It would be fair to say that Rawls's intention is to deny members knowledge about their individual lives which would bias their deliberations in the original position.

Although parties in the original position are unaware of these special contingencies, Rawls does give some evidence about who they are. These indications can be identified in two respects. First, the terminology chosen by Rawls in *Theory of Justice* refers to 'he' and 'father', leaving little doubt of the parties' sex. Okin comments on this usage of generic male terms:

'Men', 'mankind', 'he' and 'his' are interspersed with non-sexist terms of reference such as 'individual' and 'moral person'. Examples of intergenerational concern are worded in terms of 'fathers' and 'sons', and the difference principle is said to correspond to 'the principle of fraternity'. This linguistic usage would perhaps be less significant if it were not for the fact that Rawls is self-consciously a member of a long tradition of moral and political philosophy that has used in its arguments either such supposedly generic masculine terms, or even more inclusive terms of reference ... only to exclude women from the scope of the conclusions reached. ('Justice & Gender, 1987, p. 45)

But even if we grant Rawls linguistic lenience, his second indication returns us again to a male dominated structure.

The imagery chosen by Rawls depicts the traditional patriarchal family structure. As noted above, the monogamous family is regarded as 'a major social institution' (1971, p. 7). Promoting this image of the nuclear family he delineates the roles within the family structure: 'a good wife and husband' (Ibid., p. 468). His just savings principle rests on the assumption of the father setting aside savings for the son. Again Rawls fails to distance himself from cultural assumptions about male

heads of family. Deborah Kearns comments that 'He refers to the family as "characterised by a definite hierarchy, in which each member has certain rights and duties" (1971:467). He never questions why this should be so. Family structure does not seem to be an issue' (1983, p. 38). It is not an issue for Rawls because he has already assumed that the traditional patriarchal family is just.

Pateman keenly points out this assumption of the patriarchal family structure: *Before* ignorance of 'particular facts' is postulated, Rawls has already claimed that parties have 'descendants' (for whom they are concerned), and Rawls states that he will generally view the parties as 'heads of families'. He merely takes it for granted that he can, at one and the same time, postulate disembodied parties devoid of all substantive characteristics, and assume that sexual difference exists, sexual intercourse takes place, children are born and families formed. Rawls' participants in the original contract are, simultaneously, mere reasoning entities, and 'heads of families', or men who represent their wives. (1991, p. 43, italics added)

The importance of Pateman's observation is the point at which parties are aware of family ties. The historical and political context set by Rawls carries with it implications about family structure. Simply avoiding gendered language does not combat the cultural understanding of what it means to be a part of a family. Furthermore, adding sex to his list of hidden contingencies does not grant automatic equality for women. This 'add women and stir' approach to political theory simply intensifies the tensions between gender-neutral terminology and rigid gender-structured 'social institutions'. The family structure assumed in the original position gives every indication that members participate in a gendered heterosexual family structure.

Still one might be tempted to extend the veil of ignorance to deny knowledge of sexual orientation. Although Rawls has not explicitly included sexual orientation, Morris Kaplan *does* claim that sexual orientation is included behind the veil of ignorance: 'Although rational agents in Rawls' original position are ignorant of their moral and social particularities, including religious beliefs, gender, social class, sexual orientation, etc....' (1991, p. 208). Kaplan offers no reference to Rawls justifying this assumption. Indeed such an embellishment of Rawls's 'etc.' is quite problematic for his gay critique of Rawls's theory. Not only does Kaplan risk putting words in Rawls's mouth, he does so without reference to Rawls's understanding of the primacy of the nuclear family. It simply seems inconsistent with Rawls's theory to claim that while members are participants, even 'heads' of heterosexual families, they may be unaware of their sexual orientation. Indeed, if Rawls had wanted sexual

orientation to be unknown, it seems logical that he would have designed his original position to avoid the assumption of the heterosexual family structure.

Another question might arise concerning knowledge of non-heterosexual sexual desires. After all one may be a head of a heterosexual family and still have desires for same-sex relations. Kaplan notes that we know members will have 'sexual desires and emotional needs' (1991, p. 208). He continues by implying that this knowledge can be linked to an acceptance of sexual freedoms. Again this argument seems to jump from the realm of the possible to that of the hopeful. If the members are aware that they will have sexual desires, the only structure in which they express such desire is pre-determined by Rawls: the heterosexual family. Okin points out that 'since those in the original position are the heads or representatives of families, they are *not in a position to determine questions of justice within the family*' (1991, p. 185).<sup>10</sup> Building upon this criticism, I would argue that because they are participants in a heterosexual relationship, or forced by rules of unanimity to agree with the heterosexual family structure, they are not in a position to determine a structure for meeting sexual desires or emotional needs - or establishing a justice - for non-heterosexuals. Rawls not only assumes justice *within* the family but wholly endorses the monogamous heterosexual family and in doing so dictates the socially acceptable structure for expressing sexual desires.

Still the possibility remains that a member of the original position may be a participant in the heterosexual family and have non-heterosexual desires. Jane English has noted that 'if only for biological reasons, this [the original position] includes members of at least two generations; typically three or four generations coexist' (1977, p. 98). If this is the case, then it is possible that not all members are heads of a heterosexual family. Perhaps some are twenty years old and single. However, because the unanimous adoption of the principles of justice depends upon persons with the same type moral development, and because the primary place of moral development is the traditional nuclear family, we can reason that the single members are products of a heterosexual family *and* agree that it should remain the primary place for moral development and sexual relationships. The members of the original position are, therefore, either currently involved in a heterosexual marriage or are a product of the moral development of a heterosexual marriage. In other words, the parties in the original position are either in a heterosexual marriage, heterosexual and single, or they are not heterosexual but unanimously agree that the

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<sup>10</sup>Okin notes a similar argument made by Jane English where she states: 'By making the parties in the original position heads of families rather than individuals, Rawls makes the family opaque to claims of justice' (1977, p. 95).

heterosexual marriage/family is the best structure for sexual relationships. Or, in Rawls's own words, 'everyone is equally rational and *similarly situated*, each is convinced by the same arguments'; each knows the heterosexual family to be just' (Ibid., p. 139). While the heterosexual family structure does not rule out the possibility of same-sex desire, it does deny the development of different sexual identities which can be expressed outside the heterosexual family. So in this heterosexist original position non-heterosexuals are forced to choose principles of justice within a pre-determined heterosexist context which denies both the possibility of different sexual identities and a justice applicable to those with different sexual identities.

So what is Rawls's reason for identifying parties as heads of families? The key appears to be the biological link needed for his savings principle.<sup>11</sup> There are at least two implications of Rawls's understanding of this biological link. First, it should be reiterated that the male terminology and imagery of the patriarchal family leave lesbian mothers unable to identify with members of the original position. Second, English notes that the dual link between one generation and the next requires that 'unless every adult and every child belonged to some such "family" group, they do not figure into the savings principle' (1977, p. 96). Rawls believes it to be 'more realistic' to assume parents are not disinterested in their children's welfare (Rawls, 1985, p.170) Kearns points out that 'the idea that the family is the place for affection and natural sentiment is institutionalised. Other relationships are presumed to be those of self-interest' (1983, p. 37). And similarly, English argues that the assumption of mutual disinterest is unrealistic because people often do care about others (1977, p. 93). Arguably one case is that of non-biological homosexual parents.

Rawls utilises the veil of ignorance to deny knowledge of special contingencies in order to avoid biased deliberations in the original position. But his assumption of the heterosexual family structure creates an uneasy tension between accepting this social institution and the possibility of structures for expressing different sexual identities. Whether or not the members of the original position are heterosexual, they, like Rawls, believe the nuclear family to be a just social institution and the place for moral development. Since Rawls pre-determines the just role of the heterosexual family, the members must agree, unanimously, that the heterosexual family is the just structure for sexual relationships. While they may be

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<sup>11</sup>English makes a strong argument that the savings principle does not necessitate references to a biological family (1977, pp. 96-103).



unaware of their particular contingencies - even their own sexual desires - they are nevertheless heterosexual.

### Heterosexual Society

The motive behind the methodology of the original position and the veil of ignorance was to arrange basic social institutions in order to assign rights and duties and the appropriate division of social advantages for a well-ordered society (1972, pp. 4-10). In the well-ordered society, people will have access to the primary goods according to the principles of justice. In 'Kantian Constructivism in Moral Theory', Rawls explains that his task is not to articulate an epistemological conception of justice, that, instead, 'what justifies a conception of justice is not it being true to an order antecedent and given to us, but is congruence with a deeper understanding of ourselves and our aspirations, and our realisation that, given our history and the tradition embedded in our public life, it is the most reasonable doctrine for us' (1980, p. 519). So, as Mouffe comments, this clarification distinguishes between the epistemological project and interprets this concept of public justice as a 'practical social task' (1993, p. 43). In building upon shared intuitions about justice, Rawls is trying to express a sense of fairness that can then act as the basis for social unity. So the members of the original position know the traditions, history, and kinds of aspirations that characterise the modern democracy. And this awareness of social context should lead them to principles of justice which guarantee the basic primary goods such as liberty and equality regardless of their position within society. However, while this guarantee may sound like an appealing goal for a theory of justice, the members' knowledge of that social context is overridden by the pre-determined belief in the nuclear family as a basic social institution.

Therefore in addressing the second question, 'What facts do the parties know about their society?' we already have some idea of their knowledge about society. As noted above, Rawls states in *A Theory of Justice* that 'It is taken for granted, however that they know the general facts about human society. They understand political affairs and principles of economic theory; they know the basis of social organisation and the laws of human psychology' (1972, p. 137). Although he offers no detailed explanation about these 'general facts', the historical context does provide some indication of the laws operating in the society, particularly the primacy of the nuclear family. He suggests different sex-related roles for the 'wife' and 'husband' or

'daughter' and 'son' (1972, p. 468).<sup>12</sup> And, as noted, it is this family which is to be the primary influence for moral development. Rawls explicitly states as the second principle of moral psychology that 'a person's capacity for fellow feeling has been realised by acquiring attachments in accordance with the first law' - the first law beginning with 'family institutions are just' (1972, p. 490).

What follows from this understanding of moral development is Rawls's apparent intention to continue this heterosexual structure in the well-ordered society. Rawls's affiliation with the heterosexual family structure as *the* primary influence of moral development has serious (dangerous) implications for alternative models of social organisation. It is not difficult to accept that the parties would be aware of the uncertainties about the aetiology of sexuality. This knowledge in the form of various psychological, sociological and biological explanations would be considered part of the 'general facts' available to the parties of the original position. Wolff offers a particularly interesting critique of Rawls's assumption of knowledge of laws of human psychology in relation to '*understanding*' the homosexual (1977, pp. 119-132, esp. pp. 129-132). He argues that the ambiguity surrounding the cause of homosexuality could lead to two possible reactions: either that of fear leading to rejection or that of uncertainty leading to restricted acceptance.

These two possibilities will be discussed in more detail below, but here I want to note that while the members may be aware of the diverse explanations of same-sex desire, and that they too might have such desires, they are also 'programmed' to accept the centrality of the heterosexual family. So although they may understand the possibility of same-sex desire, the premises that 'family institutions are just' and that 'the family is *the* place for moral development' require them to agree, unanimously, that the well-ordered society should prioritise the nuclear family as a basic social institution. What they know about their society is that it is, and will continue to be, heterosexist. This knowledge creates an uneasy tension then between the resulting heterosexism and the methodological purpose of the original position, that is to articulate our shared intuitions about justice in a space free from our particular conceptions of the good life. The options available to the members choosing principles of justice are somewhat limited, and greatly unappealing for those claiming that securing gay and lesbian human rights, or in Rawls's words 'primary goods', is a simple matter of justice.

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<sup>12</sup>A discussion of this point can also be found in Kearns, 1983, p. 40; and Okin, 1987, p. 51.

## Heterosexist Alternatives

The original question, 'Who are the parties?' led to fairly specific answers about their sexual orientation or about their belief in the heterosexual family as the social institution for sexual relationships. In addition, the second question, 'What do they know about their society?' also clearly indicated the overriding acceptance of heterosexuality as a social norm which was important to unanimity about the principles of justice. Parties know that general laws, or academic disciplines, offer no proven coherent causal explanation for homosexuality. But they also know that they affirm the heterosexual family structure. This monogamous biological heterosexual family determines children's moral development and therefore provides the basis for agreeing upon justice. Given this knowledge, 'What real alternatives are available for determining a just society in which diverse sexual identities may exist?' In this section I will suggest that Rawls leaves three alternatives. First, knowing that gay men and lesbians do exist, the parties could play the odds, or gamble, that they will not have same-sex desires and hope that the concerns of gay men and lesbians will not effect them directly. Second, knowing the centrality of the heterosexual family in maintaining social stability, they could choose to enforce this relationship structure or 'social institution'. Third, knowing the diversity of individual conceptions of the good, and accepting the possibility that they may have same-sex desires, they could interpret justice as fairness to guarantee basic primary goods which might include the freedom to express different sexual desires if not engage in different familial structures. Each of these I consider in detail below.

First, Rawls insists that the veil of ignorance hides individual contingencies that might otherwise be the source of biased choice. He goes a step further to ensure that members do not even know what the probabilities of the different outcomes might be. By invoking what he refers to as the 'principle of insufficient reason' he assigns equal probabilities to outcomes due to an absence of evidence or information (1972, p. 168). So the parties have an equal chance of being male or female; from different cultural or racial groups. Rawls admits that there are 'assumptions about society that, if they were sound, would allow the parties to arrive at objective estimates of equal probability' (Ibid., pp. 169-170). In addition, to avoid 'guessing games' and to ensure rational assessment of the alternatives for justice, Rawls suggests a 'thicker' veil of ignorance which denies parties knowledge of 'characteristic aversion(s)' to risk (Ibid., p. 172). Members of the original position do not have evidence of the likelihood of their special contingencies - including whether or not they are 'riskers'. It is his intention then that members do not 'play the odds' when establishing the principles of justice.

Given this lack of knowledge, playing the odds is beyond the capability of the parties - in most cases. However, in the case of sexuality the parties *are* aware of the odds. They know that they are part of a heterosexual family or at least agree to its structure for sexual relationships. In contrast to class, sex, or race, the parties are given strong beliefs about the heterosexual monogamous family. Playing the odds simply amounts to consistently expressing characteristics attributed to them by Rawls. The cards are stacked in the parties' favour for the 'desired solution', that is the heterosexual family as the basic institution for sexual relationships. So, despite Rawls's intentions, members do know that regardless of their desires they will agree on the centrality of the heterosexual family - *particularly in providing for the moral development of children*. In this case the 'odds' are not a gamble, they are a certainty. The well-ordered society that results from the principles of justice will be heterosexist. The question then comes down to how heterosexist the society will be.

With this first 'option' settled, and in the knowledge that the well-ordered society will be based on heterosexism, two alternatives remain. First, the parties in the original position may agree that the heterosexual family should be enforced as a basic social institution. Because they unanimously agree that the social institution of the heterosexual family is the key influence in moral development, they may feel compelled to recognise its importance in social tradition and in providing social unity. Their task, as Rawls stated in the Tanner lecture, is to 'assess the traditional alternatives in accordance with how well they generate a publicly recognised sense of justice when the basic structure is known to satisfy the corresponding principles. In doing this they view the developed capacity for a sense of justice' (1987b, p. 31). This developed capacity for a sense of justice serves as a criterion to judge the 'stability' of the alternative schemes of justice.

The opening paragraph of 'The Idea of an Overlapping Consensus' shows the importance Rawls places on stability. 'In a constitutional democracy one of its most important aims is presenting a political conception of justice that can not only provide a shared public basis for the justification of political and social institutions but also helps ensure stability from one generation to the next' (1987c, p. 1). The parties' acceptance of the heterosexual family structure and their directive to ensure stability could lead them to establish the heterosexual family as a part of the 'basic structure' of social and political institutions or *enforce conformity* by prohibiting non-heterosexual identities, sexual acts, or relationships altogether. 'It is an important feature of a conception of justice that it should generate its own support. That is, its principles should be such that when they are embodied in the basic structure of society men tend to acquire the corresponding sense of justice. Given the principles of moral learning, men develop a desire to act in accordance with its

principles. In this case a conception of justice is stable' (1972, p. 138). With the heterosexual family as the place of moral development, enforcing it as the social structure for sexual relationships would ensure this continuity and stability.

It might be argued that such a conservative interpretation of the centrality of the family is in opposition to the provision of primary goods intended by Rawls. So another alternative available to the parties in the original position could be grounded in an interpretation of the basic liberties which would include sexual freedoms, for instance freedom to establish different family structures. The two principles of justice buttressed by the basic liberties is in fact the most appealing interpretation, at least for this critic, of social justice within a well-ordered society. Rawls does acknowledge that his concept of 'fair-value' of liberties refers to the actual worth of a liberty to a citizen. The worth of a liberty or its 'usefulness' is determined not by an individual but in relation to the primary goods (1987b, p. 40). So the difference principle, therefore, could secure a certain level of liberty for the least advantaged, in this case the non-heterosexual citizen.

When this [difference] principle is satisfied, however, this lesser worth of liberty is compensated for in this sense: the all-purpose means available to the least advantaged members of society to achieve their ends would be even less were social and economic inequalities, as measured by the index of primary goods, different from what they are. The *basic structure of society* is arranged so that it maximises the primary goods available to the least advantaged. (1987b, p. 41, italics added)

The outcome of an interpretation of basic liberties that grants freedom to express one's own sexual identity, guarantees the least-advantaged, in this case those with non-heterosexual identities, maximum freedoms compared to alternative theories of justice available in western democratic culture. So, those with different sexual identities in a well-ordered society would be guaranteed the maximum level of liberty that is beneficial to them. However, and this is key to understanding the limits of Rawlsian liberty, they are allowed only the maximum liberty that can be granted within a pre-determined heterosexist society. Rawls's difference principle, which guaranteed maximum freedom, is limited because it is relative to the historical and political constraints he places on the original position. It is limited because Rawls himself creates these principles of justice out of his own understanding of the social context, and that understanding is based on the centrality of the heterosexual family.

In addition, Rawls's more recent 'political liberalism', which is discussed in greater detail in the following chapters, guarantees citizens a 'roughly equal' fair-

value of political liberties. The worth of political liberties, 'whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions'(1987b, p. 42). Every person *qua citizen* should have the equal opportunity to hold public office and participate in the political system. However, this assurance fails for gay and lesbian citizens in at least two ways. First, this guaranteed fair-value of political liberties is 'roughly equal' to representation in the original position. Unfortunately, as discussed above, a diversity of sexual identities is impossible to find among heterosexual heads of families in the original position. The result is that those whose concerns are not represented in the heterosexist original position, are unable to participate in the political system of the well-ordered society. The political liberties of gay and lesbian citizens are 'roughly equal' to their representation in the original position; and, in the words of a recent Stonewall campaign, gay men and lesbian are 'less equal than others'.

Second, the underpinning concern about equal access to the political system is ultimately an issue of power. Norman Daniels rather pointedly comments that an egalitarian political system must address the inequalities of wealth and power (1975, pp. 279-281). In a similar light, I would add that Rawls's concern for fair opportunity to hold public office or participate in political decisions is weakened, if not completely sabotaged, because he gives priority to the heterosexual family as the basic social institution for developing a sense of justice. The imbalance of power which historically favours the heterosexual majority must be re-addressed to empower gay men, lesbians, bisexuals, transsexuals, etc. seeking equality and justice. In addition, it is difficult to see how the injustices, or inequalities, experienced by gay men and lesbians in Rawls's well-ordered society could be resolved since the power needed for such resolution lies with the heterosexist parties in the original position.

In summary then, the methodology of the original position fails to provide principles of justice which extend to those with non-heterosexual identities. This failure is due to its reliance upon the heterosexual family as a basic social institution, as the place for moral development, and as the source of understanding principles of justice. If the heterosexual family is at the heart of the theory of justice which has informed western political thought and political systems for the last twenty years, it is not surprising that the kind of 'justice' gay men and lesbians experience is tainted by heterosexism. It may be, as the activists have claimed, 'A Simple Matter of Justice'. But the dominant interpretation of justice, in theory as well as practice, is not a justice which includes gay men and lesbians. It is 'a simple matter of heterosexist justice' that our concerns continue to be overridden by the centrality of

the heterosexual family. And while Rawls has reinterpreted his theory in the past few years, it will be argued in the following two chapters that it never moves away from this underpinning heterosexism. It continues to build its political agenda around those issues which can be advocated by the majority, leaving those issues that 'set us at odds with one another' in the private sphere of personal choice, their advocates unempowered, and gay men and lesbians out of the embrace of a more protective justice.

### Self-Respect

The main point I wish to make here is that because Rawls assumes the nuclear family the resulting theory of justice is not reflective of, or sensitive to, the concerns of those with different conceptions of family, and of sexual relationships. This point is akin to that made by other groups who demand that justice should be inclusive of their different needs and applicable regardless of their positioning in society. The tension that arises between the need to respect difference and the need for social unity feeds much of contemporary philosophical debate. And most often the target of the criticisms levelled at liberal political theorists concerns a concept of the individual, or individualism. While some of the questions in that debate will be the topic of the following chapter, here I want to make a few observations about the individual found in Rawls's original position and the inclusion of self-respect as a primary good. Pateman strikes at the heart of assumptions found in individualism, particularly the individual found in the original position:

The individual as owner is separated from a body that is of one sex or the other ... The 'individual' is constructed from a male body so that his identity is always masculine. The individual is also a unitary figure; a being of the other sex can only be a modification of the individual, not a distinctive being, or his unity and masculine identity is endangered. (1988, p. 223)

She does not stand alone as we have seen in the above debates other feminists have challenged liberalism's assumption that the (male) 'individual' is representative of all persons. Indeed if one does not find a point of identification with the characters of a theory it is difficult to take its conclusions seriously. Liberalism using the image of the 'male', and in the Rawlsian case heterosexual, individual is often dismissed by those looking for, or being sensitive to, *different* images. This need for different images, or re-imagining liberal political principles, will set the agenda for the rest of this thesis.

However, before moving toward that discussion, I want to recall the conditions of respect outlined in the previous chapter in order to offer a summary assessment of the Rawlsian framework. As pointed out in the introduction to this chapter, Rawls is well aware of his 'desired solution' before he designs his methodology. 'We want to define the original position so that we get the desired solution' (1972, p. 141). The Rawlsian project could be conceived of in this way: in order for society to be free of injustices based on individual contingencies, the methodology must deny/hide knowledge of them. With this, it is easy to see the key role of the veil of ignorance. In the hypothetical original position, parties choosing principles of justice must not be aware of their individual contingencies. 'Somehow we must nullify the affects of special contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage' (1972, p. 136). The underpinning notion here is that basic institutions should be free from prejudices based on individual contingencies, in order to provide a basis for justice and self-respect.

As mentioned briefly above, Rawls devotes a section of *A Theory of Justice* to explaining why self-respect should be considered a primary good provided by the principles of justice. He defines self-respect as having two aspects: 'it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfil one's intentions' (1972, p. 440). Continuing, he adds that 'it is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them' (Ibid.). Later in his article 'The Basic Structure as Subject', Rawls states: 'an important assumption of my book *A Theory of Justice* is that the basic structure of society is the primary subject of justice' (1977, p. 159). This basic structure provides the basis for self-respect. 'Self-respect depends upon and is encouraged by certain public features of basic social institutions, how they work together and how people who accept these arrangements are expected to (and normally do) regard and treat one another. These features of basic institutions and ... ways of conduct are the social basis for self-respect' (1982, p. 33). From this we can reason that self-respect is regarded by Rawls, and subsequently by the members of the original position, as a primary good which should be ensured for all those within the well-ordered society.

Elsewhere, Rawls notes the significance of the basic structure: it 'secures the background conditions against which the actions of individuals and associations take place' (1977, p. 160). It is this background or social system which often 'shapes the desires and aspirations of its members'. Rawls recognises that difference, or



pluralism, is a fact of contemporary culture, therefore, the basic structure should not be biased so as to undermine one's self-respect which includes one's 'conviction that his conception of his good, his plan of life, is worth carrying out' (Ibid., p. 440). Joseph Beatty points out the importance Rawls places on this notion of self-respect and self-determination. 'It is precisely because Rawls is aware of the broader socio-cultural dimensions of self-determination that the notion of choice of principles governing our social arrangements looms so large in his thought. Only, then, if free, rational individuals choose the principles which propel their socio-cultural arrangements can they genuinely be said to determine themselves' (1983, p. 489). But does the Rawlsian framework really show respect for difference, particularly those with different sexual identities?

And it is here that the tension between recognising difference and establishing social unity reaches a critical point. While Rawls wants to ensure self-respect for people with a range of conceptions of the good or life plans, the individual conceived of by Rawls does not represent that diversity. As noted, Kearns has argued that 'Rawls never comments on whether the contracting parties know their sex. He makes the usual misguided assumption that it will not matter' (1983, p. 37). Now the obvious reaction to such criticism is to state explicitly that sex is hidden behind the veil, which Rawls does in 'Fairness to Goodness'. However, is this enough? By answering the criticism about difference or 'contingencies' in this way, Rawls is trapped into constantly revising or 'thickening' the veil in order to take on board previously unconsidered forms of difference. In fact, it not only traps Rawls into such a cycle, but other writers have attempted similar revisions. One example considered in the previous chapter, is Iris Marion Young, who argues that once sex is included behind the veil of ignorance a new interpretation of justice could radically alter the sex roles within the well-ordered society. And in this chapter we saw that Kaplan believes the veil could hide knowledge of sexual orientation. However, this attempt does not have the same possible impact as that of feminist writers because the heterosexual family is assumed as the social institution for sexual relationships. It is the place where the father, as the head of the household, is concerned with the continuation of his line; where the sex-related roles are described as father, mother, son, and daughter; where moral development about justice takes place. The difficulty with simply thickening the veil of ignorance is that it does not address these fundamental assumptions - heterosexual hegemony - of western culture. And 'fixing' the animation of the theory actually raises theoretical inconsistencies. The result is that because a diverse range of sexual identities or family structures is not realised within the original position, and subsequently the well-ordered society, the Rawlsian framework cannot provide respect for non-

heterosexual citizens. In other words, since the heterosexual family is a basic social institution, that is, part of that basic structure, those not buying into this social norm will be second-class citizens and cannot be guaranteed the primary good of self-respect.

### Conclusion

This chapter began by observing the language used by activists, in particular the claim that sexual politics, or the gay and lesbian movement, was about 'A Simple Matter of Justice'. The difficulty with employing such phrases is that they can be misinterpreted. As was argued in the previous chapter, claims for equality are not about a monolithic 'like them' equality. Similarly, the argument here is that claims for justice cannot be references to a heterosexual justice which denies, or demonises, non-heterosexual identities. Indeed, that may very well be the 'justice' gay men and lesbians are recipients, or victims, of now. For example, Section 28 of the Local Government Act (1988) states that local governments can not promote homosexuality or recognise 'pretended' family relationships between partners of the same sex. Although the reasons for this legislation echo the beliefs of moral conservatism rather than the tolerance associated with liberalism, the fact that this Act was passed, that it received substantial Parliamentary and public support, does reflect a kind of justice that could be associated with the Rawlsian framework. A Rawlsian liberal could argue that because homosexuality is no longer a crime, the state is showing tolerance for this life plan, or even 'lifestyle'. Furthermore, given the centrality of the nuclear family in British society, the Act simply reflects the beliefs of those who, quite rationally, hold that the state should not be seen to 'promote' any concept of the good, particularly one which could undermine the social 'consensus' about the family. While there may be objectionable premises within this reasoning, for instance that offences such as gross indecency actually do continue to criminalise homosexuality, the similarity of this reasoning with the kind of heterosexist justice found in the Rawlsian framework is striking. So, as I have argued throughout this work, it is necessary for activists who employ the familiar language of western political discourse to be careful to articulate its meaning. The 'justice' demanded by activists surely goes beyond the heterosexist justice that can be found in the Rawlsian framework.

Elizabeth Fox-Genovese suggests that 'the central problem in the feminist critique of individualism lies in the difficulty of re-imagining the collectivity - society as a whole - in such a way as to take account of women's legitimate needs. There can be no doubt that many, if not most, of our laws and institutions, including

our vision of justice, have been constructed on the basis of men's experience' (1991, p. 243). In the same light, I would add that those laws and institutions, that vision of justice, have been constructed on the basis of the heterosexual experience. A justice that assumes 'the heterosexual family' cannot be justice which reflects the experience of diverse sexual identities. And the 're-imagining' referred to by Fox-Genovese must reconsider, or perhaps more radically challenge, this basic assumption of the nuclear family. Devlin's argument discussed in chapter one was that decriminalising homosexuality would lead to the breakdown of the family, and result in the decline of society. Similarly, the New Right, in the form of the Conservative Campaign for Family Values in Britain, believes that by recognising gay and lesbian families, even by prohibiting discrimination on the basis of sexual orientation, the social stability of the (heterosexual) family will be threatened. If this heterosexual family is at the root of contemporary 'justice', and it is at least the basic institution of Rawlsian justice, then re-imagining justice must begin with the decentralising the heterosexual family in social policy. I am not referring here to a radical utopian theory of society that emerges from an 'essential' gay and lesbian perspective akin to radical feminism. Instead I would argue that this radical re-imagining challenges those fundamental assumptions within liberal theory that result in our continued marginalisation. And in doing so, we can offer a new image, a new understanding, of what it means to show equal concern and respect.

Decentralising the nuclear family in social policy has become a primary task for lesbian and gay activists. For example, Stonewall have targeted this assumption in a number of their campaigns, primarily in the areas of fostering and adoption. An attempt by the Department of Health to include in its adoptions guidelines the phrase that 'gay rights have no place in questions about fostering and adoption' was thwarted by Stonewall activists. Additionally in their recent survey concerning discrimination in the work place, Stonewall noted several areas where gay and lesbian employees were not given 'equal pay for equal work' because their partners did not receive the same benefits as the spouses of heterosexual employees. But not only activist groups are having an impact on this issue. Recently a lesbian couple in Manchester were made joint legal parents of a child, normally a privilege granted only to step-parents in a heterosexual marriage. The High Court ruling was sought by the couple who wanted to ensure parental rights for the non-biological mother. Another inspiring protest against heterosexism recently was taken by a gay employee of the British Broadcasting Corporation who filed a formal complaint after being denied 'honeymoon' leave following a commitment ceremony, a company 'perk' readily given to heterosexual 'newly wed' employees. His complaint initially led to a change in the policy to be more inclusive of gay and lesbian couples. However,

following accusations that the publicly funded BBC was supporting this immoral lifestyle, the policy of linking bonuses to the marriage ceremony came under review. This kind of collective and individual challenge to the assumed heterosexual family must continue if lesbians and gay men, and their families, are to be acknowledged by the legislative system; if they are to be included in a 'just' society.

So part of that re-imagining has already begun as individuals and activist groups challenge the heterosexism in social policy. However, in that process the language that has been chosen to communicate the changes needed is, as we have seen in these past three chapters, underpinned by assumptions about who deserves equality and justice - those with immutable identities and those with chosen (moral) lifestyles - and to what extent the state can provide the conditions needed for justice or equality - a neutral state can justify failing to secure justice or equality for all by separating public and private morality. In the Introduction I identified these underpinning assumptions as creating three difficulties in employing liberal language, and implicitly appealing to liberal theory. First, the concept of the individual most often associated with liberalism does not necessarily understand sexuality as part of identity. Second, and because of this, it is unable to justify non-discrimination policies which include sexual orientation/identity. These two concerns will be the focus of the following two chapters. The next chapter will consider the concept of the individual associated with the Rawlsian framework by reviewing the philosophical debate between Rawls and Michael Sandel. In doing so it will explore the tension between the individual as an objective chooser of a life plan and the individual as socially constituted by the roles and values of a given community. The discussion will highlight both the need to recognise agency, or the ability to interpret one's own well-being, and the need to appreciate that choices are made within, and often determined by, a social context. The falsity of this dichotomy - objective chooser or discovered identity - can be challenged significantly by exposing the tension between the two experienced by those at the closet door.

The second tenet of liberalism that I examine in chapter five is the belief that only a neutral state, or an anti-perfectionist state, can show equal concern and respect for its citizens. While this doctrine of neutrality may be intended to be protection against moral totalitarianism, the effects of neutrality may actually undermine the primary concern for equality and respect. In particular, I will suggest two instances where liberal political theorists have proposed frameworks for social organisation which leave non-heterosexuals marginalised, and subjected to the moral opinions of the majority. First, the most recent works of Rawls in which he outlines a 'political liberalism' attempt to establish a political community by taking 'the most divisive

matters off the political agenda' (1989, p. 255). This separation between the political and the personal leaves at the mercy of the democratic majority those who are oppressed because of their 'personal' lives. Second, the framework for claiming rights proposed by Dworkin fails to empower individuals whose 'disadvantage', in this case their sexual identity, is seen as a choice. Rejecting state neutrality or anti-perfectionism may seem like a rejection of fundamental liberal principles. However, the third difficulty with employing liberal language is that, since most contemporary liberal theorists argue that the neutral state can best show equal concern and respect for individuals, they are unable to assert that the state has a *responsibility* to provide the conditions needed for identity development and pluralism. Therefore, I will argue that what is needed is a framework which (1) conceptualises sexuality as part of identity, regardless of aetiology; (2) prioritises non-discrimination and pluralism; and (3) requires a pro-active state which is responsible for creating conditions for autonomy-based freedom. In answer to these concerns I will argue that the Razian notion of well-being and his unique understanding of perfectionism actually provide a promising avenue for re-imagining liberal political ideals such as equality, justice, and autonomy-based freedom. Perfectionism may seem a strange bedfellow for those who so often are victims of moral conservatism. However, in the case of the Razian framework perfectionism is a kind of political ethic rather than a conservative moral prescription. And it can therefore act as a framework for ensuring the conditions needed for determining one's own well-being and for social pluralism. It is not a morality of prescription but a framework for a morality of freedom.

## Chapter Four

### Identity and Social Context

The previous chapters located some inconsistencies between strategically employing 'liberal' language and the limitations within theoretical frameworks of contemporary liberal theory. In this chapter and the next, I will focus on two fundamental concepts in contemporary liberalism. The discussion may seem quite similar as it will continue to examine connections between sexual identity and the state. However, instead of contrasting the language of activists with the definitions found in liberal theory, it has now become necessary to go behind those language games in order to question why contemporary liberal theory may simply be unable to justify the changes demanded by gay and lesbian activists. One of the reasons I have briefly mentioned is the reliance on the principle of neutrality to ensure equal concern and respect for individuals. I will return to that point in the following chapter. Here I want to focus on another reason why mainstream liberalism cannot incorporate the concerns of gay and lesbian, or non-heterosexual, citizens. As noted in the previous chapter, the concept of the individual associated with liberalism portrays the individual as a detached rational chooser and, like the member of the original position, able to consider questions of justice detached from particularities of race, sex, 'etc.'. Mulhall and Swift comment that this kind of criticism focuses on 'a conception of the person as antecedently individuated or unencumbered, a conception that allows no room for the possibility that the attachments that individuals develop to their chosen ends, values, conceptions of the good and communities might become a constitutive part of their identity' (1992, p.158).

This 'unencumbered self' is set in contrast to the individual whose identity is defined by her or his attachments to the surrounding community; whose identity is discovered in the roles she or he plays in the social matrix. These two opposing conceptions of the self, and the subsequent theories about the role of community in governing the individual, can be most readily seen in the debate between communitarian Michael Sandel and John Rawls. However, before detailing their philosophical positions, it is important to note that while the Sandel-Rawls debate can be seen to characterise broad oppositional categories of communitarianism and individualism it does not necessary follow that Sandel denounces all notions of agency or that Rawls incorporates no concept of community. The division between these two is instead about the emphasis given to agency and community. The fundamental difference between the two frameworks then is not the lack of a concept of community, but the amount of power given to a particular community. In other words. as Shane Phelan notes, 'in contrasting (good) community and (bad) power,

communitarians have sought to relocate the grounds of community as a way to oppose power; or, rather, they have opposed power in order to establish community' (1989, p. 154). She continues by keenly locating the difficulties liberalism seems to have with notions of community:

In contrast, liberals and poststructuralists have both stressed the extent to which community is a vehicle of power. This power operated precisely through the codes that the community endorses, the codes that define identity and action, and it is irremovable from them. Liberalism, however, has too often betrayed its knowledge by conceiving the project of freedom as one of the removal of power (construed as negativity, as repression or prohibition) rather than asking what to do with it. Behind the liberal suspicion hides the older ideal of a community that does not need government, that rests upon common understandings. Liberalism simply acknowledges that that community is no longer sufficiently coherent to govern; since the Reformation, we have become keenly aware that the price of total unity (at least among white Christians) is bloodshed, and that this is unacceptable. Thus liberals constrict the relevant area of community, but they do not question the core of the idea itself. (Ibid.)

So what we find in the communitarian-liberal debate, particularly that between Sandel and Rawls, is the struggle to acknowledge and to describe adequately the power of community. Sandel argues that the constitutive nature of community upon individual identity gives the community an important role in determining and maintaining that communal morality through legislation, or in his words 'the politics of the common good'. Will Kymlicka comments that:

This common good, rather than adjusting itself to the pattern of people's preferences, provides a standard by which those preferences are evaluated. The community's way of life forms the basis for a public ranking of conceptions of the good, and the weight given to an individual's preferences depends on how much she conforms or contributes to its common good. The public pursuit of the shared ends which define the community's way of life is not, therefore, constrained by the requirement of neutrality. It takes precedence over the claim of individuals to the resources and liberties needed to pursue their own conceptions of the good. A communitarian state can and should encourage people to adopt conceptions of the good that

conform to the community's way of life, while discouraging conceptions of the good that conflict with it. (1990, p. 206)

Alternatively, the Rawlsian framework limits the power of moral community(ies) by constructing the 'political community' which has the power to determine justice *because* it is detached from comprehensive concepts of the good and represents only those public concerns about which there is an overlapping consensus.

The significance of the Rawls-Sandel debate then is that it does, broadly, present oppositional categories of the individual and community because they grant differing amounts of power to the moral community. Rawls tries to minimize the power of those with a comprehensive concept of the good in order to avoid imposing constraints which would determine individual identity or violate individual autonomy. Sandel maintains that communities can, and should, perpetuate themselves by influencing individual concepts of the good (1984b). However, the debate is also significant because it highlights the very point made by Phelan; that liberals need to begin to question that core idea of community; and, I would add, more specifically the power of the community to influence individual identity. Again, this is why activists appealing to liberal language need to define it in relation to a liberal ideology which can adequately describe, and then take account of, the power of communities to determine, or at least influence, sexual identity. In Rawls's attempt to minimize the impact of comprehensive ideas of the good upon public concerns of justice, he assumes a (partial) concept of the self, *qua citizen*, which can separate the political from the non-political. In contrast, Sandel argues against such a separation, equating the identity of the individual with those possible identities available within the community. Again these two concepts of the individual set up opposing categories either where communal experiences are separated from individual judgement or where they determine it.

The discussion in this chapter highlights the inadequacy of understanding the relationship between the individual and community as an either/or source for individual identity, and specifically for sexual identity. In Rawls, identity is left up to the individual to determine, or is bracketed, but, in protecting this individual autonomy, he removes from the political agenda the (oppressive) social matrix that affects that identity. As a result, this framework denies the importance of heterosexual social context in labelling 'deviant' sexual identity. Sandel, conversely, leaves the individual to discover identity within defined communal roles. This framework limits the roles available to those defined by society and does not appear able to encourage 'experimentation' or redefinition of social roles. These alternative understandings of identity, and by implication sexual identity, will be set in contrast



to the experience of the 'coming out of the closet' where the non-heterosexual must choose to express her or his sexual identity in a context of social roles which demonise that identity. I will argue in this chapter that the binarism between a chosen identity and an identity constituted by a community simply cannot describe the 'deviant' and 'experimental' nature of the relationship between social context and sexual identity.

In discussing the Sandel-Rawls debate, I will assert that the theoretical frameworks which inform our understanding of the relationship between the individual and the surrounding communities should be able to describe adequately the intimate connections which give influence to sexual identity. Additionally, I will argue that those connections cannot be either simplified, as in Sandel's constitutive community, or avoided, as in Rawls's political community, for the sake of theoretical coherency. In short, I will show that the alternative frameworks posed by Rawls and Sandel, representing two opposing conceptions of the individual, fail because they cannot incorporate the experience of determining sexual identity within the binarism of 'private sexual identity' and 'identity defined by a community'. This chapter will proceed then through three stages. The first will consider the Rawlsian notion of individual *qua citizen* found in his 'political liberalism' and then I will note the criticisms made by Sandel, including the contrasting view of the constitutive community. Keeping in mind the difficulties arising within these two approaches, the final section will begin to look at the Razian framework, which can more adequately capture the intricate relationship between the individual, community, and state.

### Just Political Community

In this section I want to look at a couple of interesting shifts in Rawls's theory which, when contrasted with the history and politics of the gay and lesbian movement, have rather unappealing implications for the future of sexual politics. Before discussing those shifts, it is important to remember that Rawls believes the individual, or the moral person, to have 'the *capacity* for an effective sense of justice' and 'the *capacity* to form to revise, and traditionally to pursue a conception of the good' (1980, p. 525, italics added). In many ways this capacity for what can be described as autonomy serves as a key to understanding Rawlsian political liberalism. First, as noted before, the anti-perfectionism espoused by Rawls arises from the need to protect this capacity for autonomy, or choice, from state influence. Additionally, it inspires the framework for a political community in which the members are able to set aside their

particularities in order to participate in a fair system of justice. For example, Kymlicka has compared the Rawlsian subject with the Kantian self, where 'the self is prior to its socially given roles and relationships, and is free only if it is capable of holding these features of its social situation at a distance and judging them according to the dictates of reason' (1990, p. 207). Now while Rawls himself does not claim to hold such a comprehensive doctrine of the self, the members of the Rawlsian political community do have a similar ability to set aside 'non-political' considerations, such as individual conceptions of the good (1987, pp. 2-5). Stephen Mulhall and Adam Swift comment that this understanding of the 'person *qua* citizen' 'applies only to the person insofar as she is an inhabitant of the public political realm and not to any other aspect of her life' (1992, p. 207). So Rawls presents two tenets for conceptualising the individual: the capacity for autonomy or choice, and the ability to see oneself in the political community as a 'political' citizen without 'non-political' considerations.

Given this concept of the individual, the most significant shift, or clarification, Rawls has made since *A Theory of Justice* delineates the scope of justice as fairness. In particular, he claims that 'justice' is not universal. 'I should like to avoid', Rawls writes, 'claims to universal truths' (1985, p. 223). On the surface, Rawls's words, here in 'Justice as Fairness', can be seen as a disclaimer about the universal intent found in *A Theory of Justice*. The article continues by stating explicitly that 'justice as fairness is intended as a political conception of justice ... framed to apply to what I have called the "basic structure" of modern constitutional democracy' (Ibid., p. 224). On one level this is a claim that justice as fairness is relevant for a particular society. In a well-known passage in 'Kantian Constructivism' he writes that 'we are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstance ... we look to ourselves and to our future, and reflect upon our disputes since, let's say, the Declaration of Independence. How far the conclusions we reach are of interest in a wider context is a separate question' (1980, p. 518). Far from being universal, or a justice for all, the framework for justice is relevant for American society.

Yet on another level, Rawls's claim goes beyond the socio-historical contextualising. It becomes a statement about the scope of justice itself. From the full title of 'Justice as Fairness: Political not Metaphysical', Rawls indicates that justice as fairness is not a metaphysical or comprehensive doctrine but an interpretation of public political culture. And within the political culture of a constitutional democracy, justice should be 'independent of controversial

philosophical and religious doctrines' (1985, p. 223). So the Rawlsian framework is 'not intended as the application of a general moral conception to the basic structure of society' (Ibid., p. 225). Instead it simply highlights what it means to be a part of a democratic political system. In short, those who have experienced a given political system/society will agree upon a structure of basic institutions for government.

This political liberalism, as detailed in 'The Idea of an Overlapping Consensus', holds that although morality and experience in a modern society are diverse, the political domain is the one in which an overlapping consensus on justice can be affirmed by opposing metaphysical doctrines (1987, pp. 1-2). Later, in 'The Domain of the Political and Overlapping Consensus', he specifies that the political domain 'is distinct from the associational, which is voluntary in ways that the political is not; it is also distinct from the personal and familial, which are affectional domains, again in ways the political is not' (1989, p. 242). Now it is this shift to a specifically *political* concept of justice that I wish to question.

While Rawls's conception of the individual may be broadly in line with traditional liberal ideas about autonomy, his methodology implies a strong doubt about the extent of a non-political communal experience of American society. So his focus on the political as the point at which conflicting doctrines can agree is a search for social stability by constructing a political community around familiar political institutions. In other words, the argument seems to be that (1) individuals should determine their own conception of the good life generally free from state-prescribed morality, (2) justice is not universal but works within a particular political culture, (3) given the diversity of opposing moral, philosophical, or religious doctrines, an overlapping consensus, which is crucial for stability, can only be found within the political domain. Rawls essentially, therefore, posits a political domain where constituents of a particular political system, who agree on basic institutions, form a community.

This shift to applying justice as fairness to only the political community raises a number of questions. For example, does this 'overlapping consensus' exclude anyone from the political community? Does morality, or a comprehensive doctrine of the good, ever leak into the political community? If so, whose morality? In searching for answers to these questions, what we find is a familiar distinction between the public/political citizen and the private individual. Furthermore, this public/private divide, buttressed by the democratic structures of government, places limits upon the kinds of comprehensive doctrines that become a part of the political agenda. The result is that the notion of a political community is both removed from

(some) individual experiences and is therefore unable to reflect the relationship between the personal experience and the politics of heterosexism.

Allow me to explain more fully. To begin with we noted that, by denying the universality of justice and in specifying the source for the overlapping consensus, Rawls methodologically creates a political community whose commonality is the belief in a particular system of political institutions. A conception of political justice allows for 'a diversity of doctrines' and is intended for a democratic society, drawing 'solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and public tradition of their interpretation' (1985, p. 225). So, generally, as long as a citizen believes in the American political institutions she or he can be a member of the political community. In fact Rawls wants to ensure that membership is based upon that belief rather than any comprehensive moral belief. The political community, therefore, is constructed as a special domain where moral differences are not relevant to membership.

Taking the political as a special domain, let us say that a political conception formulating its basic values is a 'free-standing' view. It is a view for the basic structure that formulates its values independent of non-political values and of any specific relationship to them. Thus a political conception does not deny that there are other values that apply to the associational, the personal, and the familial; nor does it say that the political is entirely separate from those values. But our aim is to specify the special domain of the political in such a way that its main institutions can gain the support of an overlapping consensus. (1989, p. 242)

This 'special domain' of the political acts as the place in which every individual *qua citizen*, regardless of their private conception of the good life, affirms the basic institutions of the public political culture, that is constitutional democracy. It is the bottom line; the point at which citizens, here Americans, all agree to the rights and liberties delineated in the Constitution.

The rule of law then is underwritten by 'first, the recognition by politically engaged citizens of the dual role of the basic rights and liberties; and second it being the case that the main interpretations of those constitutional essentials take the most divisive matters off the political agenda and specify the central range of significance of the basic liberties in roughly the same way' (Ibid., p. 255). Although Rawls seems to believe it should be, he does not claim that the political is *entirely* separate from the personal or even that the interpretations of rights and liberties are separate from legislative or judicial opinion (Ibid., p. 254). However, he does state clearly that

issues about the good life, personal morality, or those 'most divisive matters' are to be taken off the political agenda. Thus the rule of law brackets certain moral issues away from the jurisdiction of the political community.

However, as noted in chapter one, bracketing does not necessarily take all controversial issues off the political agenda. Some issues may be bracketed, and some, on which the majority is in agreement, may be re-enforced.<sup>1</sup> They may remain on the political agenda, or periodically reappear like Section 28 or the age of consent 'compromise' in Britain or the Colorado Amendment Two or the numerous judicial challenges to sodomy laws in the U. S.<sup>2</sup> Bracketing simply gives the state a reason to not act, particularly on issues around morality, or sexual identity, as we have seen the two are often conflated by many liberal theorists. For example, Rawls explains that, if personal morality creeps into the political decisions of legislators or judges, the citizens have a mechanism for registering disapproval, the vote. But, as he is quick to point out, in a democracy, the majority rules. 'A persistent majority, or an enduring alliance of strong enough interests, can make of the Constitution what it wants' (1989, p. 255). The line between exactly how much personal morality can creep into the political domain is determined by the majority. Therefore, while the constructed political community *should* be free of moral division, it is for the majority to decide which moral opinions will, or will not, be admitted into this special domain. Likewise, because membership in this political community is contingent upon agreement with the basic institutions of American democracy, the power in the community, via the vote, is in the hands of the majority.

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<sup>1</sup>For example see Sandel's (1989) comments concerning the differing interpretations of privacy found in *Griswold* and *Hardwick*.

<sup>2</sup>In November 1992, Colorado passed 'Amendment Two' which read: 'No Protected status based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be in all respects self-executing' (cited in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993). For commentary on this amendment and challenges to sodomy laws see Currah, 1994.

My argument is not dissimilar to that made by Mulhall and Swift as they consider the response Rawls has offered to those questioning this distinction between the political and the non-political. In 'The Domain of the Political and Overlapping Consensus' Rawls contends that when one here he considers the church wishes to impose a particular comprehensive notion of the good by the use of political power, 'the appropriate reply is to say that the conclusion is unreasonable: it proposes to use the public's political power - a power in which citizens have an equal share - to enforce a view affecting constitutional essentials about which citizens as reasonable persons, given the burdens of reason, are bound to differ uncompromisingly in judgement' (1989, p. 243). Or, as Mulhall and Swift note, he is simply pointing out to those wanting to impose a comprehensive doctrine that those who disagree may be doing so reasonably, and as a consequence it would be unreasonable to impose the doctrine on them. But this sounds as if he is claiming that disagreement is inevitable. Mulhall and Swift argue that his points:

amount to the claim that disagreement about conceptions of the good can be (and perhaps is often likely to be) reasonable; but this is not equivalent to the claim that such disagreement could never be overcome, that there could never be such a thing as reasonable agreement about such matters: to say that disagreement is to be expected is not to say that it is inevitable. (1992, pp. 223-224)

And they continue that his choice of opponents in this example, the church, simplifies that claim of inevitability:

for it is a lot more plausible to claim that rational social agreement will never be established on the question of God's existence and nature than to matters as the value of heterosexual marriage or the immorality of abortion, pornography and sado-masochism. It does not, for example, seem wildly implausible to imagine a society that acknowledges the goods of a well-ordered anti-perfectionist liberal polity, but that comes to an agreement, based upon rational but perfectionist considerations, on the immorality of sado-masochistic practices, and resolves to sacrifice the autonomy of its citizens in this specific respect for the sake of discouraging people from choosing such a way of life; indeed, this might even be a description of contemporary British society. (1992, p. 224)

Indeed. Neither is it implausible to imagine a (British) society which comes to a rational agreement that homosexuality should be discouraged, or even criminalised.

It is perhaps unsurprising, then, that the Rawlsian political community, which *can* act as the voice of the moral majority, is an unappealing construction of the relationship between politics, community and the individual. First the 'special' label and definition given to the political domain removes the personal - voluntary or affectional - domains from the political. Sexuality, for example as sex, gender, sexual orientation, desire, etc., the most intimate of voluntary or affectional associations, should be separated from political discourse. Second, the distinction between political and metaphysical is intended to remove the most divisive matters from the political agenda. Sexual politics, in both the well-ordered society of *A Theory of Justice* and the new 'political liberalism' can penetrate the political domain only as the (heterosexual) majority allows - becoming the heterosexual politics or the (more familiar) family policy or heterosexism or homophobia. In the final analysis, the political community as constructed by Rawls requires those participating as citizens set aside their non-political concerns, but if agreement is found on those non-political goods, the majority can enforce their beliefs.

In summary, then I cannot help but ask 'Is this political community just?' Obviously, Rawls believes it is. According to 'The Idea of an Overlapping Consensus' his criterion for claiming this as a 'just' theory is that it is publicly justifiable:

Now one reason for focusing directly on a political conception for the basic structure is that, as a practical political matter, no general and comprehensive view can provide a publicly acceptable basis for a political conception of justice. The social and historical conditions of modern democratic regimes have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and in the growth of constitutional government and of large industrial market economies. These conditions profoundly affect the requirements of a workable conception of justice: among other things, such a conception must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short 'conceptions of the good') affirmed by the citizens of democratic societies. (1987, p. 4)

Mulhall and Swift summarise this point that 'the understanding of society as a fair scheme of co-operation between free and equal citizens, an ideal latent in the public political culture and with implications only for the just organisation of the basic

structure, is something that can be justified to all members of society despite the fact of pluralism; despite the fact that they will be committed to conflicting and incommensurable conceptions of the good' (1992, p. 183). So the political liberalism espoused by Rawls projects a framework on to the relationships between the individual, the community, and the state which separates different and opposing experiences or moralities from the selectively constructed 'political community'. The relationship between the individual and this constructed political community, in which she or he engages politically with others, is based on a (democratic) denial of minority experience or moral opinion. Additionally, the relationship between the individual and the state, both as a basic institution and as an actor in the political community, is based on avoidance of divisive - particularly the personal - matters. The concept of community found here is based on exclusion of the 'other' - those who either do not agree with the basic political institutions or do not adhere to the (moral) opinion as legislated by the majority. The exclusionary aspect of community is not necessarily surprising. In fact, the specificity of the communal experience is that which often defines community. But the Rawlsian construction of a political community seems intuitively false. Is the 'just political community' really to be a place where those in agreement on comprehensive goals can enforce them without concern for the effects on the minority? Or is it where individuals are denied a powerful voice *only* because their conceptions of the good life are not comparable to the majority opinion?

The key question then becomes one of desirability. Again, as Mulhall and Swift note:

Rawls' anti-perfectionism entails a sharp separation between the political and the personal in the lives of every citizen; it is a requirement of citizenship in a Rawlsian society that each individual, when thinking about justice, should suspend or bracket the moral or religious beliefs that may give her life its integrity and meaning, in favour of a restricted and distinct understanding of herself as citizen ... The demands of justice, the requirements of the conception of the person as citizen, must come before the claims of those comprehensive perfectionist doctrines with which they must simultaneously and schizophrenically be held. (1992, p. 209)

The thinness of the Rawlsian political community fails to capture the diversity of the political experience: the way in which those basic institutions are experienced differently according to gender, class, race, sexuality. In fact this is a similar, and crucial, claim against Rawls's original position made in the previous chapter, and



one that continues to have force in this more recent move to divide the political community from personal interpretations of the good life.

There are then two points which demonstrate how the non-heterosexual citizen is positioned within the Rawlsian framework of political liberalism. First, although Rawls understands individuals to have the capacity for autonomy - to be able to choose their own conceptions of the good - the individual *qua citizen* cannot bring those conceptions into the political realm. Second, although the Rawlsian framework can be said to be based on toleration for different conceptions of moral goods, this separation between the political and the non-political, coupled with the requirements of democracy where the majority becomes the instrument of power, actually sets up a framework where the majority can enforce its rationally held moral beliefs. For as Mulhall and Swift note there may be a realm of morality which is not considered not rational or prejudicial such as 'the value of heterosexual marriage'. Given these two understandings of Rawlsian political liberalism, the positioning of gay and lesbian, or non-heterosexual, citizens becomes quite clear. First, in theory, their non-political beliefs - ones that concern the voluntary associations or affections - are not to be a part of the political agenda. Second, in democratic practice, they are subject to the morality of the majority. If that majority agrees upon the centrality of the heterosexual family to social stability, or the value of a heterosexual relationship, the status of non-heterosexuals can be only that of 'second-class citizen' - subject to the morality of the 'other', the heterosexist moral majority. Non-heterosexual citizens are unable to participate in - to have an effective voice in - the system of justice to which they are subjected.

As noted in chapter two, Angela Mason believes this is where gay men and lesbians find themselves in British society today, as second-class citizens. And it is because of a continued second-class status that gay and lesbian sexual identity - non-heterosexual identities - cannot be separated from gay and lesbian, or sexual, politics. Sexual politics, as practised by the heterosexual majority in 'family politics', cannot continue to subject its version of morality upon non-heterosexual citizens. The individual *qua citizen* found in Rawlsian political liberalism then does not adequately, or at least not favourably, reflect the intimate relationship between the individual determining her or his sexual identity, experience within a heterosexual society/community, and the heterosexist state that results from the Rawlsian political community of overlapping (majority) consensus.

## Individual as Community

Perhaps a clearer picture of the difficulties within Rawlsian liberalism can be painted by focusing on a few criticisms made by communitarian Michael Sandel. While most of these comments are targeted at *A Theory of Justice* rather than the clarified 'political liberalism', they do show the extent to which Sandel believes that the community constitutes individual identity. Quite simply, Sandel criticises the way in which Rawls posits a separation between the individual and the community. Instead he argues for a strong interpretation of community where citizens conceive of their identity 'as defined to some extent by the community of which they are a part' and where 'community describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity' (1982, p. 150). In many ways Sandel's concerns are quite familiar. Social constructionist accounts of the individual, as well as second-wave feminist accounts of the personal as the political, have offered tools with which to challenge the Enlightenment concept of the objective individual reflecting upon the external social structures.<sup>3</sup> It is this individual which Sandel equates with the Rawlsian rational 'disembodied' subject who carefully considers the alternatives before making choices which signify self-definition.<sup>4</sup> Sandel targets this conception of the self which, he believes, underpins Rawls's quest for principles of justice.

'For justice to be primary', Sandel writes, 'certain things must be true of us. We must be creatures of a certain kind, related to human circumstance in a certain way. In particular, we must stand to our circumstances always at a certain distance,

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<sup>3</sup>For example see: Kitzinger, 1987; Gilligan, 1982; Fuss, 1989 esp. pp. 97-112; Okin, 1990; and Pateman, 1988.

<sup>4</sup>Rawls now argues that his theory does not presume a comprehensive conception of the 'self'. However, as Mulhall and Swift argue, his position actually does lead to a 'partially' comprehensive conception of the self, and this is a difficult position to defend (1992, pp. 206-212). The individual partially constituted as 'citizen' reflects a moral belief about how one *should* conceive of the citizen. So Rawls maintains both that citizens should be conceived of in a certain way and that such comprehensive moral views should be separate from the political (Ibid., p. 208). 'The demands of justice, the requirements of the conception of the person as citizen, must come before the claims of those comprehensive perfectionist doctrines with which they must simultaneously and schizophrenically be held' (Ibid., p. 209).

conditioned to be sure, but part of us always antecedent to any conditions. Only in this can we view ourselves as subjects as well as objects of experience, as agents and not just instruments of the purposes we pursue. Deontological liberalism supposes that we can, indeed must, understand ourselves as independent in this sense' (1982, pp. 10-11). Sandel identifies Rawls as a deontological liberal because he believes individuals to be capable of choosing their own interests, values, and conceptions of the good - so long as, Sandel argues, 'they can be cast as the interests of a subject individuated in advance and given prior to its ends, so long, that is, as they describe the objects I seek rather than the subject I am' (1982, pp. 61-62). This places one's identity 'beyond the reach of experience' (Ibid.). Therefore, he argues, 'no commitment could grip me so deeply that I could not understand myself without it. No transformation of life purposes and plans could be so unsettling as to disrupt the contours of my identity. No project could be so essential that turning away from it would call into question the person I am' (Ibid., p. 62). He continues by pointing to Rawls's own words 'given my independence from the values I have, I can always stand apart from them; my public identity as a moral person "is not affected by changes over time" (Rawls 1980: 544-5) in my conception of the good' (1982, p. 62).

Sandel argues that this conception of the individual as an 'antecedently individuated self' actually undermines *any* notion of community found in Rawls. Distinguishing two conceptions of community, Sandel writes that an instrumental notion of community assumes the self-interested motivation of the agents, evoking 'the image of a "private society", where individuals regard social arrangements as a necessary burden and cooperate only for the sake of pursuing their private ends' (Ibid., p. 148). But, he continues, Rawls's notion differs from this in that the 'participants have certain "shared final ends" and regard the scheme of co-operation as a good in itself' and 'their interests are not uniformly antagonistic but in some cases complementary and overlapping' (1982, p. 148). So the Rawlsian political community benefits from social co-operation but is also held together by 'ties of sentiment'(Rawls, 1972, p. 178). Contrasting these two ideas of community - the instrumental and the political - Sandel notes that 'where community on the first account is wholly *external* to the aims and interests of the individual who comprise it, community on Rawls' view is partly *internal* to the subjects, in that it reaches the feelings and sentiments of those engaged in a co-operative scheme' (1989, p. 149).

However, like the concept of the individual, here that of the community also fails to capture the intimate, or determining, nature of the relationship between the individual and community. 'For while Rawls allows that the good of community can

be internal to the extent of engaging the aims and values of the self, it cannot be so thoroughgoing as to reach beyond the motivations to the subject of motivations. The good of community cannot reach *that* far, for to do so would be to violate the priority of the self over its ends, to deny its antecedent individuation, to reverse the priority of plurality over unity, and to allow the good a hand in the constitution of the self, which on Rawls' view is reserved to the concept of the right' (Sandel, 1982, p. 149). The Rawlsian political community may share final ends or sentiments but those only include an overlapping consensus about basic institutions. The members must always consider the (public, communal) right as prior to their understanding of the good. One is a member not because the ties of the community are deeply connected to one's identity but because one agrees, under particular circumstances, to set that identity aside and to act according to principles of justice or 'the right'.<sup>5</sup>

Sandel proposes an alternative understanding of community. This theory of community would resemble Rawls's in that it would be manifest in the aims and values of the participants - 'but would be different from Rawls' conception in that community would describe not just a *feeling* but a mode of self-understanding partly constitutive of the agent's identity' (1982, p. 150). Here the community is not something one participates in after setting one's identity aside, but actually determines one's identity. In this 'constitutive conception', members are to some extent defined by the community. As Sandel notes, the community 'describes not just what they *have* as fellow citizen but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity' (Ibid.).

This notion of the constitutive community is based on a conception of the individual which is very different from the disembodied subject associated with Rawls. The community is not, according to Sandel, a place where individuals

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<sup>5</sup>In 'The Priority of Right and Ideas of the Good' Rawls claims that the state must refrain from acting upon any comprehensive notion of the good because it would undermine the rights people have to pursue their own conceptions of the good. However the separation between the right and the good are not that clear as he admits that his theory of justice contains a 'thin theory of the good'. This thin theory of the good, he argues, is based not on a comprehensive doctrine of the good but upon publicly justifiable political goods found in a particular political culture. But as I have noted in the previous section this false split between the political community and a moral community simply serves, in a democracy, to enforce the morality of the majority (Rawls, 1988).

*choose* their identity, but instead where they *discover* their identity situated in, defined by, the community. Now while Sandel proposes a possible degree of reflection about one's identity discovered in the community, because he denies the antecedent subject, or self prior to its ends, this reflection is limited to little more than a discovery of the variety of connections with, or definitions or identity within, a community. Identity, then, is not a matter of choice, but a matter of discovery; a discovery which takes place within a given community, for example within particular culture, within particular understandings of sexuality.

The dichotomy at work here in these criticisms of Rawls can be more clearly seen in a rather interesting observation by Sandel:

Where the subject is regarded as prior to its ends, self-knowledge is not a possibility in this sense, for the bounds it would define are taken as given in advance, unreflectively, by the principle of antecedent individuation. The bounds of the self are fixed and within them all is transparent. The relevant moral question is not 'Who am I?' (for the answer to this question is given in advance) but rather 'What ends shall I choose?' and this is a question addressed to the will. For the self whose identity is constituted in the light of ends already before it, agency consists less in summoning the will than in seeking self-understanding. The relevant question is not what ends to choose, for my problem is precisely that the answer to this question is already given but rather who I am, how I am to discern in the clutter of possible ends what is me from what is mine. Here the bounds of the self are not fixtures but possibilities, their contours no longer self-evident but at least partly unformed. (1982, pp. 58-59)

Sandel's depiction here of the intensity of the relationship between the community and individual identity is, almost, all-consuming. For example, this question 'Who am I?' is buttressed by the belief that the possible answers to that question are to be found in the attachments one has with the surrounding community. Kymlicka notes that on Sandel's argument 'communal aims and values are not just affirmed by the members of the community, but define their identity' (1989, p. 53). The values of a community define identity by giving meaning to the attachments discovered between ourselves and others. For Sandel, attachments define identity, unlike the Rawlsian individual with a pre-existing independent self choosing ends which cannot ultimately alter the essence of the pre-existing self. In fact, Sandel explicitly denies that we can 'regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists

partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are - as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic' (1982, p. 179). Continuing, Sandel describes the intensity of the attachments/relationships we have with those in the community: 'allegiances such as these are more than values I happen to have or aims I "espouse at any given time". They go beyond the obligations I voluntarily incur and the "natural duties" I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am' (1982, p. 179).

But has Sandel gone a bit too far? Is identity always discovered? Does the community always offer an 'attachment' - or a definition - which adequately expresses who I am? The point here is that while Sandel captures a connection between the individual and the community lacking in Rawls, his notion also seems inadequate. For example, in her lesbian feminist critique of the communitarian self, Phelan accuses communitarian theorists of overlooking 'the fact that many humans today can only locate a tradition and a community by denying themselves a language, a spouse, or otherwise hiding themselves' (1989, p. 146). If I am to discover who I am - only within a particular (limited) context of a community - then the parts of my self that do not correspond to that context will be need to be denied, or hidden. In fact this is often the case for gay men and lesbians wanting to remain a part of a biological familial community. In order to avoid rejection, they hide themselves, their sexual identity: they go into the 'closet'. But surely the existence of such 'community-scenarios' where parts of the self must be hidden does not, as Sandel seems to be saying, make them *the* nature of community. If a notion of community is one of *shared* experiences, then this version seems to suggest little diversity and, probably, much denial.

Likewise, Sandel's conception of the individual, dependent upon the community for identity, leaves little room for independent, or experimental, sources for identity, such as desires, re-appropriation of given social roles, etc. For example, sociologist Ken Plummer notes that in British culture homosexuality is a 'stigma label'. 'To be called a "homosexual" is to be degraded, denounced, devalued or treated as different. It may well mean shame, ostracism, discrimination, exclusion or physical attack. It may simply mean that one becomes an "interesting curiosity of permissiveness". But always, in this culture, the costs of being known as a homosexual must be high' (1974. p. 175). Not only do such labels limit the kinds of

roles available to 'the homosexual' but, as Phelan comments, 'the cost to people of growing up hearing that they or others like them are sick, warped, in need of a good fuck or otherwise defective, is a cost that can be seen only when one makes the judgement that these things are not true' (1989, p. 18). It is the limited role of the homosexual<sup>6</sup> that sparked the 'Glad to be Gay' pride politics in the 1970s and that continues to be challenged by a queer politics which affirms the diversity of sexual identities.<sup>7</sup> So the Sandelian 'community which constitutes identity' would appear to leave non-heterosexuals defined in communal terms rather than empowering them to assert different, and more positive, sexual identities.

In summary then, the dichotomy proposed by Sandel clearly distinguishes two opposing conceptions of the individual, one who asked 'Who am I?' and one who asked 'Who do I choose to be?'. And while it may be a caricature of the debate between communitarians and traditional Enlightenment rational choice theorists, the binarism does highlight a difficulty in capturing the intimate relationship between individual sexual identity and the surrounding community. I am tempted to generalise that most people, unless facing a personal crisis, do not consciously ask themselves either one or the other of these questions. But I would argue, more emphatically, that those facing a personal crisis about their sexual identity do ask themselves, consciously or subconsciously, both. Standing at the closet door, one asks both 'Who am I?' and 'What do I choose to be?'. And so below I will explore in more detail this process of negotiating a sexual identity in that communal and personal context.

### Negotiating the Closet Door

Rawls and Sandel offer two differing notions of the relationship between the individual and community. For Rawls the individual, however (privately) embedded in a 'good', can as (public) citizen consider questions of justice detached from particular comprehensive ideas of the good. And, regardless of the impact of the comprehensive doctrines of the good with which the political community stands in agreement, the political agenda should remain free from 'divisive matters', or as argued, matters that are not agreed upon by the majority. Sandel challenges any such separation between the individual and the community by arguing that the ends which give the self meaning cannot be understood outside the context which gives them

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<sup>6</sup>For more on the sociology of sexuality see Plummer, 1981 esp. McIntosh, pp. 30-44.

<sup>7</sup>For example see: Plummer, 1992; Stein, 1993; Smyth, 1992.

meaning. The binarism presented then between 'Who am I?' (where 'I' is discovered only in the communal context) and 'What do I choose to be?' (where 'I' represents a chosen identity) signifies the philosophical dilemma presented by carrying either the liberal rational choice or the communitarian social constructionist thesis to their extreme. It is at this point where the exploration of sexual identity within the liberalism-communitarian debate becomes central.

For just a moment I want to emphasise the uniqueness of this binarism when applied to the process of determining sexual identity within a heterosexist society. That uniqueness can be contributed to one factor: the closet. Standing at the closet door is the point in the lives of gay men and lesbians, that the most personal and intimate of desires, which can only be known to the self, confront and are confronted by a society which is so heterosexist and homophobic that those desires either have no label which can define that part of the self or offer labels which are so extensively demonised that such definition equals self-hatred.<sup>8</sup> The closet door may work first to hide one's own desires from oneself. One can become so convinced that non-heterosexual sexual desires are wrong or do not exist that a 'nice' social label is used to identify them: best friends, mentor, sister, etc. Although this may not be particular to everyone's experience, there is a point, at least one point, at which a gay man or lesbian realises that one's sexual desires do not match the social norms. So the process of coming out to oneself is a constant (re)discovery of one's sexual identity, always asking 'Who am I?' - What are these desires? What implications do they have for my social status, my family commitments, my religious beliefs? All of which are, in Sandelian terms, an exploration of self in relation to my attachments to surrounding communities, in relations to those 'communal aims and values' which define ones identity (Kymlicka, 1989, p. 53).

But equally, the process of coming out to others is a question of 'What do I choose to be?'. And this can work on a number of levels. It may be a constant opening and closing of the closet door depending upon the situation - out at home, in at work, out to parents, in to siblings, etc. For a lesbian, it may be a political choice, a radical statement against a patriarchal - male-dominated, male-centred - society where women are to be dependent upon men. It may be a choice not to be politically involved at all, but to live an 'open' life quietly. Or it could be an unconscious 'choice' to maintain a straight life while having secret gay or lesbian sexual encounters. So, because the closet door can be closed, sexual identity can be hidden, a person is able to choose to identify as a gay man, lesbian, 'non-heterosexual' - or, if

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<sup>8</sup> See Plummer, 1981; Hencken, 1985, pp. 53-63.



needed, as a heterosexual. Agency may not be a factor in determining sexual desire, but it is in determining sexual identity.

In her powerful exploration of the hetero/homo binarism, *Epistemology of the Closet*, Eve Kosofsky Sedgwick considers the significance of coming out. Her thesis proclaims the closet as 'the defining structure for gay oppression in this century' (1991, p. 171). 'Even at an individual level,' writes Sedgwick, 'there are remarkably few of even the most openly gay people who are not deliberately in the closet with someone personally or economically or institutionally important to them' (1991, pp. 67-68). She continues, 'the gay closet is not a feature only of the lives of gay people. But for many gay people it is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence' (1991, p. 68). So the closet door, where desire and social norms intersect, is the point at which the individual chooses, either through speech or silence, a sexual identity. Silence, for one in the closet, serves as the ultimate choice to assume - and the assumption is often on the part of the heterosexual listener - the approved heterosexual identity. In fact, as Sedgwick points out, the act of identification may not be a traditional 'speech act', as the ACT-UP T-shirt slogan states: 'I am out, therefore I am' (1991, p. 4). The image of the closet then captures the uniqueness in determining *sexual* identity. The (non-heterosexual) sexual desire, hidden away from communal labels, can be identified only through a deliberate act to expose, either by the closeted individual or through 'outing' of those in the closet. And while such exposure often invites ridicule upon the one in the closet, the positioning of oneself at the closet door offers a different perspective from which to evaluate social norms. In other words, awareness of the closet door signifies a knowledge of the social matrix surrounding sexual identity and one who asks 'Who am I?'. Likewise, the very existence of closet door, the possibility to hide sexual desires, signifies the ability to detach, to ask 'Who do I choose to be?'.

The importance of the closet, then, to theorising sexual identity cannot be understated. And its centrality in the determining of identity brings a new perspective to the Rawls-Sandel debate. The intersection of self and community cannot be only about choice, since that choice to hide sexual identity (or not) is made within a social, predominantly heterosexist, context. Additionally, it cannot be just about discovering a self only in relation to the communal norms, for one may not be content to be labelled 'deviant', or even 'in need of a good fuck'. With the overwhelming presence of the closet door, sexual identity is about constant

definition of oneself, silently or through a speech act, either according to the social labels on offer - het=good, homo=bad - or creating, even re-appropriating, an identity which redefines one's sexuality: gay, queer, radicalesbian. I would argue that sexual identity then is a result of negotiating, constantly, between one's own biological/emotional (even political) needs and desires and the socio-cultural norms. A negotiation which is compounded by the fluid boundary between the two. It is a negotiation in that the individual is always aware of negative social factors and may choose to try to avoid social demonisation. Equally, it is a negotiation because part of the process of determining sexual identity includes seeking out, building, a safe space where one feels acceptance and, perhaps, from which one can challenge the heterosexual hegemony. And this negotiation process continually testifies to the extent, and necessity, of agency, or autonomy.

This negotiation process is severely limited, or altogether denied, in the Sandelian framework. Even if, as Sandel argues, individuals are only partially defined by communal norms, those norms do limit choices to only those available within the community. The Sandelian agent simply does not have enough agency or autonomy - the ability to reflect upon those options available within society - needed to transcend, to challenge fundamentally, those norms. 'We cannot', Sandel claims, 'regard ourselves as independent in this way' (1982, p. 179). If then the concept of the individual found in Sandel does not reflect the negotiation process inherent in coming out of the closet, can the Rawlsian framework offer a better alternative? Well, yes and no. Rawls does understand that individuals make choices about their lives within a particular social framework. So the negotiation process is a part of his conception of the individual. What Rawls does not incorporate into his framework is that people also make choices about *justice* within a particular social framework - with full knowledge of and loyalties to comprehensive concepts of the good. In order for Rawlsian individuals to decide issues of public justice they must consider themselves as citizens - detached from metaphysical claims about the good. So the difficulty here changes from a concern about the capacity for individual autonomy to a concern about the scope of those abilities. The scope of the individual *qua citizen* found in Rawlsian political liberalism 'applies only to the person insofar as she is an inhabitant of the public political realm and not to any other aspect of her life' (Mulhall and Swift, 1992, p. 207). Justice and sexuality become entirely separated by the public/private divide.

As an alternative to Sandel, the outcome is much the same. As noted above, even if one has the ability to choose a different sexual identity - to choose outside the social norms - this ability is undermined by the theoretical constraint that such

challenges to social morality cannot, or should not, affect public justice. Indeed, they should be removed from the 'political agenda'. Furthermore if public justice reinforces the heterosexism which deters other choices of sexual identity, determining sexual identity is not then an autonomous choice but one that is always made in the shadow of heterosexism, in the shadow of the closet. Put rather simply, if a theory claims that individuals have the ability to be autonomous, and that government should protect that ability, should not government also provide for it? If autonomy is a virtue of liberal political theory, why then would a theorist devise a system which allows overt manipulation - via the democratic majority - of choice about something as intimate as sexual identity? The overriding concern for Rawls is to protect that autonomy through the anti-perfectionist state. But once the personal, the sexual, is completely removed from the political, the effects of socialisation, or assimilation, can no longer be a question of justice. The process of negotiation can take place on an individual level, but not on a public level. Social norms may be challenged by individuals determining their own conceptions of the good, but not by citizens determining justice.

While this discussion has argued that the process of negotiating a sexual identity takes place within a heterosexist social context, there are at least three general points which have surfaced. First, as Sandel has noted, the liberalism which assumes that individuals can determine their conceptions of the good, and their identity, detached from communal norms posits an understanding of the individual which is impossible, and therefore an unrealistic theoretical representation of individual identity as intimately connected with the social norms. So in our exploration of liberalism we need to find a theoretical framework which conceptualises identity within a social matrix. Second, I have argued that in particular sexual identity, because it can be hidden in the closet, is influenced by the deviant, or even criminal, labels found in society. So agency is also key to conceptualising the individual, particularly agency in determining - negotiating - sexual identity. This does not necessarily mean that it must understand sexual identity only as a choice. Finally, because of the closet - the possibility of hiding sexual identity - a conception of the individual must include the *capacity* to choose to determine, to reveal, even to experiment with, sexual identity. The remainder of this chapter will consider one particular liberal theorist who does conceptualise the individual in this way. But before moving on to addressing that notion, I want to highlight a third point which has surfaced in this discussion, and has been an underpinning theme throughout this work.

There has been an assumption on my part that activists want to change current heterosexist policies and that in using the language of liberalism they are appealing to mainstream reasoning in order to facilitate that goal. Furthermore, it has been my assumption that such an appeal could be connected to a theoretical framework within liberalism that would justify at least most of those changes. What we have discovered so far is that while equality and justice for gay men and lesbians might be incorporated into some of the theories considered, it then becomes subject to the difficulties within the theory itself. For example, one could continue to make rights claims for gay men and lesbians but, in theory if not in practice, those claims are subjected to the difficulties of empowering minority groups and/or essentialising their identity. So what this exploration thus far is moving towards is a theoretical framework which not only justifies but *requires* the changes desired by activists. And, more specifically, one which *actively* supports the diversity of sexual identities, and *requires* justifiable legislative changes regardless of political power of those making the claims. This assumption, or interpretation, of what a desired theoretical framework might look like does not actually resonate with much of liberal political theory since it is often based upon a commitment to anti-perfectionism, or state neutrality. This is an assumption then which questions a fundamental interpretation of the anti-perfectionist liberal project. And it is to that question that I address the following chapter. Particularly, I will consider the neutrality principle and the anti-perfectionism found in the theories of Rawls and Dworkin, contrasting it with the unique 'liberal' theory of Joseph Raz who endorses a political ethics for the perfectionist state. The Razian understanding of the relationship between the individual and the community requires the state to provide a range of options in order to support individual autonomy. This breaks down the public/private divide and encourages public questioning of monolithic social norms which limit individual choice. However, before moving on to addressing the anti-perfectionist/perfectionist debate, I want to conclude this chapter by noting the way in which the Razian conception of the individual can break down the binarism found in the Rawls-Sandel debate.

### Negotiating Well-Being

As noted, the proposed notion of individual identity, specifically of sexual identity, would need to both contextualise the process of identification and recognise the agency involved in determining (or at least in revealing) sexual identity. Such an alternative can be found within the Razian framework. While Raz does not

explicitly include sexual identity as part of his concept of well-being, the argument I will make here is that the Razian framework - and specifically the framework for understanding well-being - can be legitimately interpreted to incorporate a notion of sexual identity. It is one which offers a unique understanding of the relationship between the individual and community/society that resonates with the negotiation process experienced at the closet door.<sup>9</sup> There are two tenets of his theory which support this process. The first stems directly from his understanding of what constitutes individual well-being. It is, I believe, possible to include in this concept of well-being a notion of sexual identity, determined by the individual but in relation to communal values and norms. Second, while the significance of communal norms to determining identity is affirmed, it is not the primary determining factor nor a restriction upon individual experimentation.

In addressing the first tenet, I want to focus on the question: how does sexuality fit into the Razian notion of well-being and can this framework incorporate the various sexual identities emerging in popular culture?. It is important to note that well-being hinges upon how the individual evaluates her or his successful pursuit of goals. Well-being 'captures one crucial evaluation of a person's life: how good or successful is it from his point of view? (1986, p. 289). The value, from the person's own point of view, then depends to a large extent on goals acquired throughout life. These goals are commitments to 'projects, relationships, and causes which affects the kind of life that is for them worth living' (1982, p. 112). Such goals contribute to well-being because 'they are what matters to him' (1986, p. 292). Goals may arise from biological needs. Generally speaking, Raz notes that 'a person

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<sup>9</sup>I use the term 'determining' here not in reference to the aetiology of sexuality but in reference to the process of negotiating the closet door as discussed in the previous section. In other words, this is not a reference to an objective individual choosing a sexual identity from a range of options available but instead it is an understanding of an individual who negotiates her or his sexual desires and needs amongst the social roles defined in society by either identifying with them or re-appropriating them to have a more positive meaning. It is a process of understanding one's sexual desires in relation to the social norms, and but not just resigning oneself to those norms. In addition it can mean challenging those social norms through experimentation and re-definition. As will be discussed in the rest of this chapter and in the following chapter, if a state can be made responsible for providing the conditions needed for autonomy, then the individual can negotiate sexual identity - desires and roles - more freely amongst a range of options or social norms.

is better off when well fed, in moderate temperature, with sufficient sensory stimulation, in good health, etc., whether he adopts these as his goals or not' (Ibid., p. 290). Additionally, goals may be deliberately chosen, or a person may have 'drifted into, grown up with, never realised that anyone can fail to have them, etc.' (Ibid., p. 291). This picture of an individual whose goals, and therefore well-being, depend on biological needs, personal choice, and/or socially acquired/constructed values, is quite a stark contrast to the objective rational individual often associated with liberalism. In fact Raz adamantly points out that this notion of well-being is quite subjective (Ibid., p. 299). Success in life is judged from the agent's point of view as intrinsically valuable rather than as instrumentally valuable to others (Ibid.). Projects, relationships, goals - subjectively acquired as well as rationally chosen - are intimately connected to well-being. However, the goals must play 'a conscious role' in the person's life, as Raz stipulates, 'they are not merely unknown forces, the existence of which is deduced or postulated by psychologists or social scientists because of their predictive value' (Ibid., p. 291). Given this definition of well-being, it is possible to see how Raz's framework may be able to incorporate a different concept of sexuality which goes beyond the private moral choice.

Sexual identity can be interpreted to be a comprehensive goal, if it can be seen to be so intertwined with well-being that one's life would not have value without it. Although sexual identity may not normally be understood as a 'goal' to be achieved, for any who are oppressed, discriminated against, or victimised because of their sexual identity, it is often a conscious fact, an asserted visible identity, and sometimes a political or religious effort. Understanding oneself as a sexual being and finding a comfortable mode of expression for that are a part of a life that most deal with on some level; either as a contemplated deviant choice or an immediate reaction to aroused desire, or both. Conceptualised in this way, sexual identity becomes intertwined with well-being. And the flexibility of how goals are acquired actually makes possible a variety of routes to negotiating sexual identity.

For example, familiar to discussions on sexuality is the attempt to trace the 'cause' of sexuality, homosexuality in particular. Much ink has been split in the nature versus nurture debate.<sup>10</sup> And the conclusion often depends upon current political and medical discourse, if not simply upon individual opinion. Mary McIntosh probably put it best; 'the failure of research to answer the question has not

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<sup>10</sup>For a brief overview of this debate see Blumenfeld and Raymond, 1993, pp. 115-46. For a detailed argument for biologically determined sexuality see Levay, 1993. And an argument for socially constructed sexuality can be found in Kitzinger, 1987.

been due to lack of scientific rigour or to any inadequacy of the available evidence; it results rather from the fact that the wrong question has been asked. One might as well try to trace the aetiology of "committee chairmanship" or "Seventh Day Adventism" as of "homosexuality" (1981, p. 31). The scientific rigour is even supported by some gay and lesbian activists. For example, this is often used as a political tactic: if sexuality can be shown to be biologically determined, then social equality can be pursued in the form of non-discrimination similar to other recognised minorities (Currah, 1994). This is precisely the argument supported by the Homosexual Law Reform Society because it was determined to aid the political developments of the time (McIntosh, 1981, p. 45). Again, McIntosh makes a rather interesting point about the need for homosexuals to affirm biological determinacy: 'just as the rigid categorisation deters people from drifting into deviancy, so it appears to foreclose on the possibility of drifting back into normality and thus removes the element of anxious choice' (Ibid., p. 32). 'Deviancy', then, she continues, is justified as appropriate behaviour as a member of the 'homosexual category' and is legitimated without rejecting the norms of the society (Ibid., pp. 32-33). Nevertheless, since the understanding of well-being proposed by Raz includes biological needs, as sexual identities become a conscious need or goal they also become constitutive of well-being. So, regardless of academic or personal assessment of a 'biological cause', one can be assured that a biologically determined goal, like sexual identity, can be conceptualised as an important part of personal well-being within the Razian framework.

Equally, if sexuality is 'nurture' or is a goal that, in Raz's words, is 'drifted into, grown up with, never realised that anyone can fail to have them, etc.', it is also constitutive of well-being (1986, p. 291). This understanding of constitutive goals is interesting for two reasons. First it is set in contrast to the notion of the rational autonomous chooser. Instead, those goals which are seen to be socially constructed are incorporated into the concept of well-being. This is not to deny that the individual needs to be conscious of the goal, but simply to say that objective rational choice is not necessary for determining well-being. This point leads to a second interesting interpretation of Raz. If one grows up in a completely heterosexual society and assumes a heterosexual identity, then that identity is constitutive of their well-being in itself or as accompanied by other valued goals, like the nuclear family. Likewise if one grows up in a 'mixed' society, even if it is riddled with prejudice, and assumes a non-heterosexual sexual identity, that identity is equally constitutive of their well-being. As a way in which persons acquire goals, Raz's account may seem intuitively correct: these are the values of the culture in which one grew up.

However it may also appear to ignore, like Sandel, the critical evaluation of those social norms and thereby re-enforce the prevalent power relations. Instead, as discussed below, the Razian framework provides for both those goals one values because of cultural identification, and those chosen in defiance of social norms. Raz states that well-being includes goals which are 'inevitably based on socially existing forms [but] is meant to be consistent with experimentation, and with variations on a common theme and the like. It is no more possible to delimit in advance the range of deviations which still count as based on a social form than it is to delimit the possible relations between the literal and the metaphorical use of an expression' (1986, p. 309).

Radical feminism or queer politics are just such 'experimentations'. Arguing that the only feminist solution is to withdraw from sexual involvement with men, political lesbians make a choice to avoid colluding with patriarchy by identifying emotionally and politically with other women but not necessarily engaging in sexual activity with women.<sup>11</sup> Lesbianism, in this case, is a political choice, a reaction against male social power and gender structures. This notion of choosing a sexual identity has been and remains one of the most contentious in current discourse on sexualities. Like the political lesbian who asserted superiority over straight feminists, radical, or queer, theorists of the 1990s are affirming the political, or social revolutionary, strategy of 'performative identities'.<sup>12</sup> Performative identities or 'practices of parody', as Judith Butler proposes, 'can serve to reengage and reconsolidate the very distinction between a privileged and naturalized gender configuration and one that appears as derived, phantasmatic, and mimetic - a failed copy, as it were' (1990, p. 146). She does not understand this performance as a choice but rather as an ongoing discursive practice in which 'the task is not whether to repeat, but how to repeat or, indeed, to repeat and through a radical proliferation of gender, to *displace* the very gender norms that enable the repetition itself' (Ibid., p. 148). It is quite likely, or in fact certain, that Butler herself would disapprove of an attempt to incorporate her radicalism into a liberal framework. But this perversion itself is not meant to weaken either the radical or the liberal thesis, instead, it is quite simply to show an overlap, to recognise a connection between the

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<sup>11</sup>See Leeds Revolutionary Feminist Group, 1981; or for a general discussion see Bryson, 1992, pp. 213-215.

<sup>12</sup>Note that the comparison here is not the political projects of radical feminist and post-modern performative identities. Instead, the similarity is in the claim that a chosen or performed sexuality has politically revolutionary potential.



way sexuality can be conceptualised as constitutive of the (in)essential subject. Indeed the 'trouble' caused by displacing the hetero-homo binary can empower those who have been historically marginalised by it and are now refusing labels by asserting diverse sexualities. It is an experimentation with existing conceptions of gender and sexuality, and the 'trouble' it causes creates new social forms which are then options for understanding well-being.

Therefore, because the concept of well-being found in the Razian framework includes goals which are biologically determined, socially constructed, and chosen in relation to, or in defiance of, communal norms, it can be seen to reflect the intimate nature of the relationship between individual desire and social norms that characterize the process of negotiating sexual identity. Particularly for those who have been oppressed owing to their non-heterosexual identity, the process of identification is one which is a 'goal' that 'plays a conscious role in his life', includes 'relationships', are important 'from his point of view' and can be seen as 'a desire to join in a loving relationship' (Raz, 1986, pp. 291, 289, 307). So although Raz does not explicitly include sexuality as part of well-being, the concept itself can incorporate the negotiation process of sexual identity. It is not an conception of the individual as detached from surrounding social norms. It is a notion which is proving to be at least more amenable to contemporary sexual theorising than the above 'Who am I?' versus 'Who do I choose to be?' dichotomy.

I mentioned at the start of this section that there were two tenets of the Razian framework which support this process. The first stemmed directly from his understanding of what constitutes individual well-being. And above I argued that it is possible to include in his concept of well-being a notion of sexual identity, determined by the individual but in relation to communal values and norms. The second tenet I will address briefly here and in greater detail in the following chapter. While the significant role of communal norms in affecting the process of determining well-being is a central part of the Razian framework, it is not the primary determining factor nor a restriction upon individual experimentation. And this is what sets the Razian understanding of community apart from the constitutive community found in Sandel's work.

The flexibility of the Razian framework for interpreting the concept of well-being, as shown above, results in a diversity among the valued goals each person may acquire in any given society. Well-being is the value given to certain goals as a result of individual recognition and negotiation of biological needs, cultural norms, and personal choice. While each one experiences these differently and acquires different valued goals, the setting for that experience is shared by the community of

individuals. Therefore Raz explains that all goals valued by individual have a common source. 'Individuals define the contours of their own lives by drawing on the communal pool of values' (1986, p. 318). This communal pool may appear to be a contentious addition to the Razian framework but is actually an interesting conceptualisation of social norms which strikes a balance between individuality and community.

Raz explains that goals which constitute personal well-being all spring from a pool of social forms. These social forms include 'shared beliefs, folklore, high culture, collectively shared metaphors and imagination, and so on' (Ibid., p. 311). Continuing, he adds that 'all these [goals] are derived from the common culture, from the shared social forms, and though they receive the individual stamp of each person, their foundation in shared social forms is continuing and lasting. Just as the eye continues to guide the hand all the way to its target, and is not limited to determining its original trajectory, so our continued awareness of the common culture continuously nourishes and directs our behaviour in pursuit of our goals' (Ibid., p. 312).

This depiction of social forms as a communal 'pool' of valued completes this particularly distinctive concept of the individual agent. This common culture or communal pool of values is not to be understood to undermine individual well-being - 'what is important to him'. In acquiring valued or comprehensive goals, the person may be motivated by biological or cultural concerns or by personal choice. Understood as a process which takes place throughout life, the valued goals may change or be reprioritised depending upon individual experience of society. As this on-going process takes place, the individual may experience new biological needs, may encounter different social forms, or may develop new opinions which lead to different choices of goals. So the process of determining well-being, or judging the success or failure of one's own life goals, is an ongoing negotiation or adjustment which intertwines experience and social forms. Further more the immersion of the individual experience in this communal pool of values becomes a singular, but diverse, source for the values acquired by all individuals in the community. This process could be quite conventional but could also be encouraged to be quite radical.

Well-being is, according to the Razian framework, the totality of the individual's experience of biological needs, of cultural norms, and of personal desires and choices given these needs and norms. Well-being then marks certain goals as important to the individual because they are the result of individual recognition and negotiation of biological needs, culture, and personal choice. And while each person has different experiences and acquires different goals, the setting -

the context - for that experience is shared by a community of individuals.

'Individuals', Raz notes, 'define the contours of their own lives by drawing on the communal pool of values' (1986, p. 318). And this communal pool includes shared beliefs, folklore, high culture, collectively shared metaphors and imagination. Here Razian theory offers an alternative to the questions 'Who am I?'/ 'What do I choose?'. The process of negotiating individual identity within the communal pool more adequately reflects the process of negotiating sexual identity at the closet door. The individual determining well-being acknowledges her or his own desires but does so within a social context. And then she or he has the choice to conform either to the social norms or to challenge those norms.

There is another difference between the Razian communal pool of values and the Sandelian notion of community determined identity. Raz argues that for one to be autonomous, for autonomy to be a possibility, that there must be a range of options available. The choice in the Razian community cannot be between het=good and homo=bad. If the individual is to be to some extent capable of autonomy, then the community must support a range of options as good. And where those options do not yet exist, individuals should be free to create new ones. For example Raz acknowledges that there are societies where homosexual relationships are not recognised. 'In many countries a homosexual can cohabit with, but cannot be married to his homosexual partner, since to be married is to partake of a socially (and legally) recognised and regulated type of relationship. Homosexuals cannot do that if their society does not recognise and regulate a pattern of relationship which could apply to them. They can imitate some other recognised relationship. But essentially they have to develop their relations as they go along, and do not have the option of benefiting from existing social frameworks' (Ibid., pp. 205-206). And in such a case, it can be reasoned from the Razian argument that the range of options should be extended to include such an option in the social framework. 'In a society where such opportunities exist [homosexual marriages] and make it possible for individuals to have an autonomous life, their existence is intrinsically valuable' (Ibid.). The communal pool of values then does not refer to a stagnant pool but to one which is 'consistent with experimentation'.<sup>13</sup> The Razian communal pool of values is unlike the Sandelian constitutive community because it explicitly affirms changing social forms and a pluralism of values.

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<sup>13</sup>It is interesting to note that in connection with this comment on experimentation while he does not mention homosexuality, Raz does explicitly refer to the various forms of marriage and sexual pursuits (1986, p. 309).

So it has been argued above that the concept of well-being found in the Razian framework answers the questions about sexual identity raised in the discussion of the Sandel-Rawls debate. It is possible to include in this concept of well-being a notion of sexual identity, determined by the individual but in relation to communal values and norms. In addition, while the significance of communal norms to determining identity is affirmed, it is not the primary determining factor nor a restriction upon individual experimentation. However, in discussing this notion of well-being it has become obvious that Raz supports a strong notion of pluralism where a range of options are available in social norms. And it is this connection between pluralism and the need for a range of options that leads us towards an examination of the anti-perfectionist base of liberal political theory.

### Providing the Conditions for Autonomy

The question of diversity and its effect on social stability is, as we have seen through this work, a central feature of liberal political theory. For example, Rawls constructs the 'political community' because he believes pluralism to be a fact of western culture. Thus he argues that it is only through the shared intuitions about basic structures that a overlapping consensus can be reached and a 'political community' formed out of a morally diverse society. In addition, Rawls believes that the best way the government can respect the individual's capacity for autonomy is to leave questions concerning conceptions of the good to the individual, or that the right has priority over the good. And, as will be the subject of the following chapter, this division between public and private is firmly grounded in a principle of state neutrality concerning conceptions of the good. However, in the above discussion, it was noted that Raz believes this approach to rest upon an understanding of the individual as only self-interested rather than an individual whose goals, or well-being, encompasses a range of interests that are not just self-directed (1986, pp. 294-299). In this broader notion of well-being, Raz also build upon a conception of the individual with a capacity for autonomy. But, quite simply, Raz believes that this capacity for autonomy can only be understood in relation to the conditions for autonomy. In other words, an autonomous life is one which is 'to a considerable extent his own creation' (Ibid., p. 408). This requires the conditions for autonomy, i.e. mental and physical abilities and the availability of an adequate range of options (Ibid.). And so, if autonomy is to be central to liberal theory, the conditions for autonomy should be supported. 'Valuing autonomy leads to the endorsement of moral pluralism' (Ibid., p. 399). As a result, Raz maintains that 'personal freedom,

when understood as presupposing value-pluralism and as expressing itself in personal autonomy, can and should be promoted by political action'. I will argue in the following chapter that this framework for understanding freedom meets the criteria for respect as outlined in chapter one. The Razian framework is able to incorporate a notion of sexual identity as a part of individual well-being. Value-pluralism hinges upon respect for an individual's own interpretation of that well-being and protection against discrimination. And autonomy-based freedom endorses a version of perfectionism which protects individuals from harm - including harm caused by state and social oppression - while requiring the state to support the conditions needed for the development of autonomy and pluralism.

## Chapter Five

### Perfect Freedom

In the first chapter I reviewed two philosophical debates concerning the enforcement of public morality. The liberal position in those debates was built around the belief that the state should not impose a comprehensive concept of the good, or morality of society, upon individuals. This principle of state neutrality was to respect individuals' capacity for autonomy and/or to show them equal concern and respect. In chapters two and three I argued that the ideals of equality and justice appealed to by activists could be undermined by the definitions of those terms in relation to fundamental assumptions within contemporary liberal frameworks. First, because sexual orientation is not understood as part of individual identity but as a moral, and therefore private, choice, equality and justice does not have to be extended to non-heterosexual citizens. They may be tolerated, or they may make rights claims, but they remain subjected to the majority belief that homosexuality is an (im)moral. Second, justice as conceived by Rawls rests upon the assumption that one of the basic social institutions of western society is - and should remain - the heterosexual nuclear family. Non-heterosexual citizens therefore are again subject to, at best, laws which centralise the heterosexual family as the place for moral development or, at worst, laws which build social stability by criminalising non-heterosexual identities and/or relationships.

The previous chapter argued that the individual *qua citizen* in Rawlsian 'political liberalism' is unable to challenge social oppression effectively on issues about which the majority agree, particularly those agreed upon rationally, like the value of the heterosexual marriage. The picture of the liberal individual painted by Sandel was of an objective rational chooser who determined identity by asking 'Who do I choose to be?'. Sandel criticised this conception, maintaining that individuals are constituted by the roles defined in a community and that these roles should be enforced in order to protect the 'communal good'. The individual discovers her or her identity relation to these community-defined roles by asking 'Who am I?'. This 'Who do I choose to be?'/ 'Who am I?' dichotomy was seen to break down at the closet door as those whose sexual identity was demonised in society asked both questions in the process of identification. The Razian framework was proposed as an alternative conception of the individual whose well-being is negotiated between biological needs, social norms, and personal choices. This individual has the agency needed to ask 'Who do I choose to be?' but does so fully mired in a communal pool of values which offers options for the question 'Who am I?'. Raz prioritises a notion of autonomy by reasoning that, if it is to be valued in political theory, then it must

also be supported by a range of available options from which the individual can choose or experiment. It is this balanced conception of the individual which offered an alternative way of understanding sexual identity in relation to well-being. And one which seems to resonate with the diverse effects on sexual identification such as biological needs, personal and political choice, and social values.

In this final chapter I will prove how the Razian framework can meet the requirements of respect outlined in chapter two. But in doing so, I will first discuss how the Razian framework is not a typical liberal theory based upon state neutrality or anti-perfectionism. Instead it is an interpretation of autonomy-based freedom which holds that the state is responsible for providing the conditions needed for autonomy. This freedom can be seen to answer the difficulties noted in the Introduction that arise from employing a liberal language that, as defined by contemporary liberalism, may not lead to substantial changes for non-heterosexual citizens. First, the Razian concept of well-being can be legitimately extended to include sexual identity. Second, and because of this and the value Raz places on autonomy, sexual identity can be protected from discrimination. Finally, the Razian interpretation of perfectionist principles does not lead to a monolithic conservative morality imposed upon citizens but is a political ethic which is sceptical of state power while *requiring* the state to provide conditions for autonomy and pluralism. This Razian framework then provides an interpretation of liberal ideals which can be seen to resonate with, and justify, the central changes in social policy demanded by the gay and lesbian activists and outlined in the Introduction as the gay and lesbian agenda: ridding society of heterosexism would include decentralising the heterosexual family in social policy and providing options for understanding and developing different sexual identities such as sex education, recognised same-sex relationships, and parenting; respecting a range of sexual identities through non-discrimination and social pluralism; and establishing guidelines for continued discussion about the regulation of harmful sex acts. Again, Raz himself does not address these issues explicitly, so my argument here is about employing the Razian framework which, I believe, can be seen to offer a way of interpreting liberal ideals appealed to by activists without the fatal assumptions that render most of contemporary liberal theory incapable of delivering such demands.

This final chapter then completes the exploration of contemporary liberalism by focusing on at least three theories which prioritise the ideals evoked by gay and lesbian activists: justice, equality, and freedom. In particular, I wish to explore the general frameworks and methodology by simply questioning whether they can lead to the policy changes proposed by activists. Although most of these frameworks do

not explicitly consider gay and lesbian, or non-heterosexual, citizens the relationship between the state and public morality found in these structures should give an indication as to how it can address the concerns of gay and lesbian, or sexual, citizens. As we work through these frameworks it might be helpful to keep in mind a couple of questions now familiar in this examination: How is sexuality understood by each, for example as a private moral choice or as a significant part of individual identity? and, perhaps more importantly, What are the responsibilities of the state towards those with gay, lesbians or bisexual identities? Both questions reflect the discussion of identity and community power in the previous chapter, but here they become more pointed as this chapter directly contrasts three frameworks found in liberal political theory which purport to uphold the 'liberal' ideals of autonomy or equal respect by emphasising justice, equality, or freedom.

The frameworks considered here focus our attention on the anti-perfectionist base of contemporary liberal philosophy. As a core tenet of liberalism, it is important to examine its centrality in order to see why a Razian framework of perfectionism can require the changes activists endorse. In general, this anti-perfectionism stems from the belief that governments should remain neutral among competing conceptions of the good life, or in other words neutral about teleological understandings of individual morality. There are, however, differing interpretations of, or justifications for, this neutrality and therefore different reasons why each falls short of ensuring the conditions for autonomy or equal concern and respect. For example, classical utilitarians adopt a form of agent-neutrality. This is based upon the belief that agents are capable of making moral decisions and, as long as those decisions promote happiness and pleasure, the government should leave them up to the individual. However, this attempt to treat all agents as equals - or agent-neutrality - is undermined by the requirement for the moral decisions to produce happiness. This principle of utility, that an action should produce the greatest amount of happiness for the greatest number, focuses on the consequences of actions. If the consequences of an action produce the greatest happiness for the greatest number, the effects upon the minority can be discounted. Within this framework, if the majority experiences happiness then prejudices - racism, homophobia, etc. - may go unchecked.

This is in fact one of the criticisms of classical utilitarianism that motivated much of contemporary liberal theory. For example, two theorists considered below, John Rawls and Ronald Dworkin, provide examples of anti-perfectionism which interpret neutrality differently. Both approaches will be familiar from the Sandel-Moore debate in chapter one. The Rawlsian project works upon the assumption that,



because people disagree about morality, the government should 'bracket' moral decisions about the 'good life' and thereby ensure political and social co-operation. So he attempts to leave moral decisions to individuals while providing a minimum basis for justice - a minimum justice for all, including the minority. However, as we have seen in the previous chapters, his methodology for accessing that justice requires a detachment from 'particularities' that separate people, such as race, sex, religious beliefs, etc. This separation from both morality and identity removes these divisive issues from the political agenda, a move which is, as we have seen, at least questionable for those who have been victims of injustices because of such invisibility. Another anti-perfectionist approach considered here is the work of Dworkin, who claims that governments should be neutral among competing conceptions of the good life because this shows respect for individuals as equal moral agents. But again the framework he establishes may lead to respect, or it may not. In brief, the argument made here will demonstrate that the process by which someone negotiates this respect is dependent upon at least three factors: a particular understanding of the development of sexual identity/sexuality; the government recognising that respect is due under a particular set of laws; and/or the individual proving why respect is due.

This chapter, then, is very much an exploration, a stretching of familiar liberal approaches, like classical utilitarianism, Rawlsian constructivism, and Dworkinian rights-based voluntarism. While the primary focus is the anti-perfectionism within each, it is not unaccompanied by questions of how each might respond to the sexual identities evolving in popular culture and what the resulting moral boundaries might be. In short, what are the results of the anti-perfectionist approach? While each might hold that moral decisions about the good life should be left up to the individual, as has been discovered throughout this work, a familiar tendency in liberal political theory is to divide morality between the public and the private. In other words, the case is made to structure the rules which govern interaction, moral rules, along a hierarchical framework which designates some moral rules as 'public' concern and some a matter of the personal or 'private' concern. By invoking this public/private divide, some personal interactions are placed beyond the governing arm of the public. But the placing of that public/private divider is quite contentious. And as a result, what may be interpreted as a private moral choice, like sexuality, actually throws up a number of questions about the extent of that anti-perfectionism, particularly when it forces its way on to the public political agenda.

As seen in the two debates in chapter one, homosexual acts are understood by some liberal theorists to be only a matter of private, personal morality. But what happens when that moral choice refuses to stay in the 'private'? For example, the major argument for the Sexual Offences Act of 1967 was that there are some moral choices that are simply not the business of the government. It was hoped that after the Act, this difficult issue would be removed from the political agenda. Instead, the gay and lesbian movement of the late 1960 and early 1970s brought homosexuals out into the streets flaunting their new-found pride. Gay men and lesbians asserted that their private identity made them publicly invisible, and what was required to combat this was a 'public' pride. And as this 'private' action is increasingly a part of the mainstream public political agenda, those endorsing a liberalism based on anti-perfectionism may have different responses. They can re-affirm that homosexual acts are private moral decisions and should be bracketed (ignored) by the government. One example of this could be found in the unwillingness of some politicians to include discussions of homosexuality in sex education material, for example the belief that one should teach only procreative sex and what people do in private is not an educational concern. Alternatively, they can argue that anti-perfectionism does not justify discrimination based on sexual orientation, for example in employment and housing. However, while this belief might protect the individual from discrimination, it might not include equating a homosexual relationship with a heterosexual one, as in 'family' social policy.<sup>1</sup> So it will be argued here that if anti-perfectionist theorists understand homosexual acts as a private moral choice there are no guarantees that necessitate either governmental responsiveness to political demands of justice made by non-heterosexual citizens or respect as moral equals. Therefore if a framework for activists' demands is to be found in liberal political theory it must be one which does more than the principle of state neutrality or anti-perfectionism will allow. It must require the state to support the autonomy of individuals by providing a range of options that reflect a pluralistic society.

The task here then has two objectives. First, I will attempt to identify how sexuality might be considered within each framework: as a private moral choice or as a part of individual identity. Second, given this interpretation of sexuality, I question how the state as conceptualised within each framework could respond to the needs and concerns of its non-heterosexual citizens. In the final analysis I will consider an alternative to these anti-perfectionist theories. As we have seen in the

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<sup>1</sup>Indeed this is the argument made by Sandel, 1989 and discussed in chapter one.

previous chapter, Raz's understanding of well-being balances individual desires and social context in a way that reflects the process of determining sexual identity. In addition, what will be of interest here is that Razian perfectionism provides rules for governing which *require* responsiveness to the need for a range of options from which to determine one's own well-being. Before considering the Razian framework, however, below I begin this exploration with an overview of some traditional approaches to sexual morality and political theory in order to set the context for the more contemporary work of Rawls and Dworkin.

### A Very Liberal Tradition

In this section I want to take a brief foray into traditional political philosophy which provides the background for much of contemporary liberalism. By doing so, I want to prove that the traditional approaches to conceptions of autonomy do not necessarily lead to a negative view of homosexuality. So neither the tradition of liberal autonomy nor (as we have seen in the liberal defences offered in chapter one) the intentions found in contemporary liberal theory, justify discrimination based on sexual orientation. What does seem to render contemporary liberalism incapable of effectively addressing this concern is its insistence upon state neutrality or anti-perfectionism. But, before moving on to that discussion, I want first to consider the positioning of homosexuality within the traditions of utilitarianism found in Mill and Bentham and the Kantian categorical imperative. Michael Ruse considers what past philosophers have had to say about homosexuality (1984). Pointing out two central themes of modern philosophical thought, he writes:

On the one hand, there are those philosophers who feel that the supreme principles of morality must be one which centres on the individual; that is morality must begin with individual rights and justice. Perhaps, the greatest system of all in this vein was produced by the eighteenth-century German philosopher Immanuel Kant. In contrast, we have the group philosophies. The best known of these is utilitarianism, a system in which principles of morality centre on the need to maximise benefits for the entire group. Interestingly, both Kant and one of the founders of utilitarianism, Jeremy Bentham, had things to say about homosexual behaviour. More interesting yet, they came to diametrically opposed conclusions. (Ibid., p. 374)

Ruse goes on to explain that Kant believed that homosexuality is a 'crimina carnis: an abuse of one's sexuality', violating the moral code and human nature (Ibid., p.

374). Homosexuality, Kant argued, goes against the Categorical Imperative - to treat people as ends in themselves and not as a means - because it is 'contrary to the ends of humanity; for the end of humanity in respect of sexuality is to preserve the species without debasing the person; but in this instance [homosexual acts] the species is not being preserved ... but the person is set aside, the self is degraded below the level of the animals, and humanity is dishonoured' (Kant cited in Ibid., p. 374). This condemnation is unsurprising given Kant's religious beliefs. In fact, as Susan Mendus has argued, Kant actually had a problem understanding sex - heterosexual or homosexual - as anything but using another as a means to one's own ends, that is sexual pleasure. (in Kennedy and Mendus, 1987, pp. 30-33). However, Ruse argues that, if we disregard Kant's own religious bias about sex, there is nothing within the Categorical Imperative *itself* that explicitly rules out a sexual relationship *if* partners are treated as ends in themselves rather than as means to selfish sexual pleasure. And this could equally be applied to heterosexual and homosexual sex. So Ruse claims that, unlike Kant himself, the Kantian philosopher could accept the morality of a homosexual relationship on that basis.<sup>2</sup>

Continuing, Ruse notes that Jeremy Bentham wrote two essays on homosexuality, using the same language as Kant, referring to homosexuality as an abomination and unnatural. Nevertheless, starting from utilitarian premises of maximising pleasure and happiness, Bentham reached the opposite conclusion. The thought here is that if homosexual activity brings one pleasure, and is not harming others, it is morally acceptable. 'Indeed, if your tastes point you that way,' writes Ruse, 'you should indulge in homosexual activity, because you thereby promote happiness' (Ibid., p. 375). While Bentham made no distinction between various pleasures or happinesses, John Stuart Mill, taking up the mantle of utilitarianism, argued that pleasures needed to be ranked and those most desirable were intellectual pursuits. Although Millian utilitarians might find it a bit more difficult to accept the ease with which Bentham endorses homosexual pleasures, Ruse argues that a 'Mill-type utilitarian would think that activity within a loving relationship, whether heterosexual or homosexual, was a good thing and ought to be promoted' (Ibid., p. 383). Therefore, Ruse concludes, 'although religion is *prima facie* hostile to homosexuality (and probably truly hostile), there is nothing in these standard philosophical theories of moral behaviour that outrightly condemns homosexual activity. Both Kantians and utilitarians can and should approve of homosexual activity *per se*' (Ibid., p. 386).

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<sup>2</sup>A similar argument is made by Nuttall, 1993.

So contemporary liberal theorists writing in these traditions would have good reason to argue a similar case. And, as will be discovered below, generally they do argue that homosexual acts are a moral choice which should be left to individual decision. It should be left up to the individual either because it does not cause pain in the Bentham/Millian framework or because it does not necessarily treat people as a means rather than an end in themselves. However, the difficulty with this approach to sexuality is the assumption that generally private morality - in this case sexuality - should not be otherwise regulated. History attests to the fact that homosexuality has been socially and legally regulated. So the belief that it is a private moral choice does not necessitate, even in theory, the supportive conditions for making that choice. Instead, by interpreting sexuality as a private moral choice the theorist attempts to place it beyond the government's jurisdiction. This was the argument used by the Wolfenden Committee; homosexuality was a matter that was not the business of the government. But in the time since Wolfenden, many gay men and lesbians have been subjected to abuse, harassment, and discrimination, without the protection of the state, or, as in the case of Section 28, endorsed by the state.

Gay and lesbian activists have begun making the case that sexuality is not a moral choice but is a biological, political, or socially constructed identity. Now this claim, that sexuality is part of individual identity rather than a moral choice, makes very different demands upon the state. In the least, this would necessitate the decriminalising of homosexual sex on the ground that the state should respect individual sexual identities in the same way as it does race and gender identities. And more extensively, it could be grounds for anti-discrimination legislation, recognition of gay and lesbian families and equal consideration of homosexuality in sex education programmes. These claims are not unfamiliar in contemporary sexual politics. The difficulty with these claims is that, while they are made in the political language of equality, justice, and freedom, they are inconsistent with the definitions and fundamental assumptions found in liberal political theory. This is, as I have proposed earlier, because sexuality both traditionally and in contemporary philosophical debates is understood as a moral choice and because principles of state neutrality therefore cannot guarantee equality, justice, or freedom for those making that moral choice. Such a connection between liberal language and liberal theory then requires a political theory which understands sexuality as part of individual identity and obliges the state to support conditions needed for the development of that identity. Before making a case for the Razian framework, which I believe can do both, below I consider the anti-perfectionist basis of liberal theory and argue that it has inherent difficulties in meeting this criteria.

### Classical Utilitarianism

Although classical utilitarianism can hardly be placed among popular liberal rights-based theories, the failure of its fundamental assumptions do provide a backdrop for examining more contemporary writings on justice and equality. Since it approached moral thought from a humanistic, rather than religious, perspective, classical utilitarianism set an appealing standard by which to judge action. Mill distinguished Bentham's utilitarianism from other moral philosophies, stating 'that the morality of actions depends on the consequences which they tend to produce is the doctrine of rational persons of all schools; that the good or evil of those consequences is measured solely by pleasure or pain, is all of the doctrine of the school of utility, which is peculiar to it' (in Leavis, 1980, p. 92). Thus the consequentialist underpinning of utilitarianism requires evidence that an action is either morally good, because it promotes pleasure and happiness, or that it is morally wrong, because it leads to pain or bad consequences. In his extensive commentary on contemporary liberalism, Will Kymlicka observes that, 'at its best, utilitarianism is a strong weapon against prejudice and superstition, providing a standard and a procedure that challenge those who claim authority over us in the name of morality' (1990, p. 11). He explains that 'utilitarianism's two attractions, then, are that it conforms to our intuition that human well-being matters, and to our intuition that moral rules must be tested for their consequences on human well-being' (Ibid.). Continuing, he writes that, given this, 'if human welfare is the good which morality is concerned with, then surely the morally best act is the one which maximises human welfare, giving equal weight to each person's welfare' (Ibid.). The governing body, therefore, acts in accordance with agent-neutrality - it treats each person's welfare equally - as long as the action conforms to the principle of utility - it produces pleasure and avoids pain.

However, it is this requirement of utility that actually violates what it means to treat people as equals. For example, Kymlicka notes that 'utilitarianism is interpreting equal consideration in terms of the aggregation of pre-existing preferences, whatever they are for, even if they invade the rights of commitments of others' (Ibid., p. 42). The sole criterion for judging action is the principle of utility. Therefore if a system maximises utility - produces the greatest happiness for the greatest number - but includes prejudices or violates the rights of minorities, it is still a valid, or good, system. More pointedly, if the heterosexist system provides the greatest happiness for the majority, then there is little avenue for recourse left to the homosexual, or sexual, minority.

Joseph Raz points out that such agent-neutrality - treating all agents as the 'same' - has been the subject of at least two criticisms: the need for a formula to calculate utility or to judge one person's pleasure against another, and the impossibility of that project altogether, or the incommensurability of diverse pleasures. First, in calculating utility, the utilitarian must balance the good of one person against that of another. In other words, utilitarianism needs a way in which to judge between different moral choices, for example homophobia versus homosexuality. Or it will, as Kymlicka notes, violate what it means to treat people as equals (1990, pp. 35-47). John Rawls argues in *A Theory of Justice* that a theory of fair shares, which would make such calculation possible, is lacking in utilitarianism (1972, pp. 28-30). The intention of maximising utility must be accompanied by a formula for determining the trade-offs between individual requirements for happiness. Indeed, if Mill's variation of Bentham's utilitarianism is any indication of what a formula for utility might encompass, the pleasures of the body, including homosexual acts, would be quickly traded for pleasures of the mind (in Warnock 1962, pp. 259-260).

The second criticism questions the possibility of providing such a formula. The recognition that individual concerns are diverse, often even incommensurable, undermines any type of utility calculation (Rawls, 1972, p. 26). Raz points out that this argument is made also by Bernard Williams, who holds that an agent's own projects are central to his life and therefore,

it is absurd to demand of such a man, when the sums come in from the utility network ... that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his actions in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus in the most literal sense an attack on his integrity. (Smart and Williams, 1973, pp 116-117)

Raz interprets Williams to mean that a theorist needs a 'correct perspective of the relationship between one's own projects and the moral requirements which arise independently of them' (1986, p. 286). Continuing, Raz adds, 'consequentialism is

wrong not because it is rigoristic, but because it misperceives the relationship between morality and integrity' (Ibid.).

Thus the utilitarianism characterised by Raz both lacks a theory of fair shares or utility-determining formula *and* disregards the distinctiveness of personal identity and individual concerns for happiness. In other words, because the process focuses on determining utility, agent-neutrality - treating people as equals - becomes secondary. As long as the requirement for utility is met, those not benefiting from the system have no guarantee of justice or rights; such claims become irrelevant.

This brief summary of classical utilitarianism then sets the context for contemporary liberal philosophy. Theorists began to consider what theory of fair shares could be developed that took account of the distinctiveness, or separateness, of persons, and how to ensure at least a minimum level of justice or equality. Raz marks this shift as one from 'agent-neutrality' to 'agent-relativity' or as recognising the distinctiveness of agents claims (1986, p. 285). And below I consider two contemporary theorists who offer alternative frameworks for liberalism which address the problems identified in utilitarianism. First, Rawls attempted to construct a theory of justice which would ensure a minimum level of justice and include a formula for redistribution, namely the difference principle. Dissatisfied with the Rawlsian distribution scheme, Dworkin produced an 'ambition-sensitive' scheme which would respect the moral equality of persons by mitigating the effects of arbitrary disadvantages while noting individual responsibility for choices. In both of these frameworks, the anti-perfectionism moves away from the agent-neutrality which disregarded effects of the utility requirement. Instead, because each attempts to be sensitive to the separateness of persons and provide considerations of justice and equality, the neutrality endorsed is a state-neutrality. This is a more familiar understanding of the neutrality associated with liberalism - that the state should remain neutral among competing conceptions of the good life. As we will see, each justifies this neutrality differently. Nevertheless, the shift to state-neutrality is significant in that it will limit the kinds of responses the state can make to its non-heterosexual citizens. Before clarifying this claim, I will briefly sketch the tenets of the Rawlsian and Dworkinian frameworks.

### Rawlsian Justice

As the primary source for the above criticisms of classical utilitarianism, John Rawls writes, 'the striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals any



more than it matters, except indirectly, how one man distributes his satisfactions over time' (1972, p. 26). Additionally he observes that decisions of utility are simply a matter of efficient administration 'conflating all persons into one through the imaginative acts of the impartial sympathetic spectator' (Ibid., p. 27). More pointedly, 'utilitarianism does not take seriously the distinction between persons' (Ibid.). Kymlicka summarises the transition from this utilitarianism, writing that 'on inspection, utilitarianism often violates our sense of what it is to treat people as equals, especially in its lack of a theory of fair shares. This was Rawls's motivation for developing a conception of justice that provides a systematic alternative to utilitarianism' (1990, p. 84). Before questioning his success at meeting these two concerns, that is fair redistribution and sensitivity to separateness of persons, it will be helpful to have a brief reminder of a few basic Rawlsian structures.

The Rawlsian project sought to secure justice in society which would provide for 'basic liberties', such as the right to vote, to be eligible for public office, free speech and assembly, right to own property etc., and to do this by establishing a redistribution scheme which minimised social and economic inequalities. In the debate noted in chapter one, Sandel described this minimalist approach as a pragmatic view that 'because people inevitably disagree about morality and religion, government should bracket these controversies for the sake of political agreement and social co-operation' (1989, p. 522). Indeed this encapsulates the purpose of the 'original position' in which people, free from their individual preferences, might work out principles for governing society which would provide the highest minimum benefit for each member. The 'original position' is the hypothetical structure in which agents choose principles of justice from behind a veil of ignorance which nullifies 'the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage' (1972, p. 136). For example, included behind the veil of ignorance are knowledge of one's race, class, and sex.<sup>3</sup> The outcome, as theorised by Rawls, results in two principles of justice which are arranged according to 'lexical priority':

First Principle - each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Second Principle - social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices

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<sup>3</sup>Rawls included sex behind the veil of ignorance in his article 'Fairness to Goodness' (1975, p. 537) and in his most recent work has avoided gendered language.

and positions open to all under conditions of fair equality of opportunity. (Ibid., pp. 302-303)

These principles set out a redistribution scheme which Rawls believes will ensure that 'the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society' (Ibid., p. 75). Establishing a system of fair shares, this 'difference principle' moved away from agent-neutrality by attempting to account for the disadvantages resulting from social and economic inequalities.<sup>4</sup> As will be noted below, this difference principle is questioned on at least two accounts, namely its failure to provide for natural disadvantages and to reflect inequalities that result from different choices.<sup>5</sup> However, since these criticisms set the context for Dworkin's work, before moving on to them allow me to note how the Rawlsian framework might incorporate issues around sexuality.

The previous two chapters considered the Rawlsian framework in more detail, especially in relation to the limit of government responsiveness to the needs of its sexual citizens. Two points can be recalled which are relevant to the discussion here. First, Carole Pateman has argued in *The Sexual Contract* that the original position, by denying knowledge of particularity, assumes a monolithic representation of society which is male and, like all contract, theory, leaves unquestioned the sexual oppression experienced by women (1988, esp. p. 43). In contrast to this analysis of Rawls, Susan Moller Okin argues that because Rawls now includes knowledge of sex behind the veil of ignorance, the framework provides a method for radically questioning sexual roles within in the family (Okin, 1989). However, because both criticisms are concerned with discovering the effects the Rawlsian justice has upon women, or sex roles, they fail to question the heterosexism that is inherent in Rawls's assumption of the heterosexual family. As was argued previously, this heterosexism within the original position can lead only to interpretations of justice that are themselves heterosexist. The result is a 'just' society which is either tolerant, heterosexist, homophobic, or a combination of all three.

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<sup>4</sup>This argument, of course, assumes that social and economic inequalities are unfair. It is an assumption that has been questioned by libertarian theorists like Nozick.(1974, esp. pp. 90-95). However, because the inquiry here is concerned with the internal logic of the Rawlsian framework and how it can address issues around sexuality, I work with that assumption in mind as well.

<sup>5</sup>For a brief discussion of these see Kymlicka, 1990, pp. 70-77.

A second, and not unrelated, point focuses on the methodology of the original position which seeks to highlight shared intuitions about justice via the veil of ignorance. In the original position, agents are detached from the knowledge of their difference, or distinctiveness. And in this respect, the Rawlsian project can be seen to be at odds with a feminist project which highlights the significance, and inter-relationship, of one's personal experience and the overarching political structure. In fact, second-wave feminists who claim 'the personal is the political' believe that one's personal life is so affected by the overarching power structures in society that it would be impossible to separate the personal lived experience from those power structures.<sup>6</sup> And as a result, the (revised) Rawlsian attempt to construct a political community does so by explicitly denying personal difference, or divisive comprehensive notions of the good, a place on the political agenda.

Given these two criticisms, we can see the difficulties this anti-perfectionist framework would have when addressing issues around sexuality. First, while Rawls does not indicate whether he understands sexuality as a moral choice or as an identity, his methodology makes this question irrelevant. Regardless of whether sexuality is a moral choice or an identity, in order to be a member of the original position one would have to deny knowledge of that difference - either that different morality or that different identity. In other words, the Rawlsian methodology claims that the way to understand justice is by distancing oneself from particularity, in this case sexuality. One is asked to disregard one's sexual difference so that one can understand justice. Non-heterosexuality, understood as a particularity, is left in the private sphere and cannot be a part of the public agenda for justice - a notion completely unacceptable to those who have fought for public visibility and public sexual identities. Surely at least one point of 'coming out' is to expose injustices which exist because the system of justice has remained blind to - detached from - our personal lived experience.

The second question noted at the beginning of this chapter was how this framework might respond to the concerns of sexual citizens. As noted in chapter three, the assumption of the heterosexual nuclear family within *A Theory of Justice* limits the kinds of responses a 'just' system of government can make to non-heterosexual citizens. While Rawls maintains that because people disagree about morality the state should remain neutral among competing conceptions of the good life, the assumption of the heterosexual family imports values about sexual

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<sup>6</sup>For a brief discussion of this criticism in relation to both Rawls and Okin see Bryson, 1992, esp. pp. 175-180.

relationships into the Rawlsian system of justice. Given the valued place of the heterosexual family, that is as a social institution, Rawlsian justice is incapable of ensuring state *neutrality* on issues around sexuality. Furthermore, the required detachment from one's lived experience, in separating concerns of justice and concerns of sexuality, removes sexuality from the political agenda and is able to deny claims for a minimal level of justice for non-heterosexual citizens.

In summary, Rawls separates justice from comprehensive concepts of the good in order to ensure that 'persons are left free to determine their good' (1972, p. 448). This 'priority of the right' over the good is, Rawls claims, an 'essential element' in his political liberalism (1988, p. 251).<sup>7</sup> He explains that 'its general meaning is that although to be acceptable a political conception of justice must leave adequate room for forms of life citizens can affirm, the ideas of the good it draws upon must fit within the limits drawn - the space allowed - by the political conception itself' (Ibid., p. 252). While the good may show the point of life, 'justice draws the limit' (Ibid.). This separation between justice based on the right and comprehensive concepts of the good establishes a state that is (or at least should be) neutral among competing conceptions of the good. Political liberalism proposes to interpret 'constitutional essentials', that is rights and liberties, in order to remove the 'most divisive matters off the political agenda' and to specify the 'central range' of liberties in 'roughly the same way' (1989, p. 255). Justice, then, determines the limit of rights and liberties, without pre-supposing a comprehensive doctrine of the good, by removing divisive matters from discussions of rights and liberties. Now it could be argued that this approach is similar to that espoused by the creators of the United Nations since it rests upon the (fatal) assumption that there will be some 'overlapping consensus' and the reality is that the diversity of perspectives often undermines the process of determining justice. And here what is important is that Rawls assumes that one thing Americans can agree upon is the centrality of the nuclear family structure. *If* that was the case historically, it is certainly not now. Nevertheless, according to Rawls's political liberalism, the majority can impose its moral beliefs and 'can make the Constitutions what it wants' (1989, p. 255). The result is that sexuality, understood as an immutable identity, cannot influence the decisions made in the original position because the heterosexual marriage is established as a basic structure of society. And, once in the well-ordered society, non-heterosexuals cannot bring onto the political agenda their concerns about equal

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<sup>7</sup>For a full explanation of the priority of the right over ideas of the good see Rawls, 1988.

rights or liberties. So, while the neutral state should show respect by not imposing a conception of the good, Rawlsian justice actually does impose a concept of the good, that is the heterosexual nuclear family, and by doing so fails to show respect for non-heterosexual citizens.

### Dworkinian Equality

The second anti-perfectionist approach considered here rests upon a different interpretation of neutrality. Ronald Dworkin argues that moral scepticism should not be the basis for state neutrality. Using homosexuality as an example, Dworkin states that 'liberalism conceived as a position of neutrality cannot rely on an egalitarian defence. It cannot appeal to equality as a reason why government should not prefer heterosexuality to homosexuality, for example, because it holds that treating people as equals is the result rather than the ground of moral neutrality' (1983a, p. 47). Instead of prioritising neutrality, if liberalism can be shown to prioritise equality then it would have a clear moral basis which was sensitive to diversity.<sup>8</sup> So, within Dworkin's framework, states should remain neutral among competing conceptions of the good life *because that follows from* treating people with equal concern and respect. This voluntarist approach, as noted by Sandel, maintains that 'the government should be neutral among conceptions of the good life in order to respect the capacity of persons as free citizens or autonomous agents to choose their conceptions for themselves' (1989, p. 522).

Given this approach to neutrality, Dworkin criticises the Rawlsian redistribution scheme because it does not account for the different choices and circumstances from which people choose to develop their life and therefore does not treat people with equal concern and respect. Kymlicka explains, 'treating people with equal concern requires that people pay for the costs of their own choices ... It is unjust if people are disadvantaged by inequalities in their circumstances, but it is equally unjust for me to demand that someone else pay for the costs of my choices' (1990, p. 75). Dworkin, then, sets out to construct a redistribution scheme which is both ambition-sensitive and compensates for natural disadvantages. The best method for this, he argues, is the structure of the market-place.<sup>9</sup> Agents have an

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<sup>8</sup>For a clear summary of Dworkin's position see Plant, 1991, pp. 110-122.

<sup>9</sup>If people start with equal amounts of wealth, and have roughly equal levels of raw skill, then a market allocation would ensure that no one could properly complain that he had less than others over his whole life. He could have had the same as they if he

equal amount of buying power and bid on bundles of goods; this bidding process reflects their own priorities and choices (1981, pp. 242-300). This hypothetical system then would be sensitive to the different ambitions of individuals. Kymlicka explains that, if the auction works, 'each person will prefer their own bundle of goods to anyone else's' (1990, p. 77). Dworkin claims that this 'envy test' meets the requirements of an ambition-sensitive distribution scheme because it reflects the different choices, ambitions, values of each particular person. So it answers the first concern with the Rawlsian redistribution scheme, that it was not ambition-sensitive.

However, Dworkin notes that, while the market-place may reflect differing preferences or ambitions, it is set within a context which is laden with unequal conditions, such as unequal distribution of wealth, unequal privileges/abilities like race or physical disabilities. Now Dworkin makes a fine distinction between ambitions/tastes, which should be left up to the market forces, and circumstances, which should be insured against. 'The distinction required by equality of resources is the distinction between those beliefs and attitudes that define what a successful life would be like, which the ideal assigns to the person, and those features of body or mind or personality that provide means or impediments to that success, which the ideal assigns to the person's circumstances' (1981, p. 303). So, in addition, Dworkin establishes an insurance scheme which will compensate those who suffer a natural disadvantage with money taken from the stock of social resources before the auction process (1981, pp. 296-300). But, as this insurance scheme is set up before the hypothetical market exchange, Dworkin notes that in the real world a tax system can possibly approximate such redistribution (1981, pp. 312-314).

He goes on to note that, in the real world, determining this insurance scheme/tax system is much more difficult. First, there is no real way of measuring people's relative advantages and disadvantages because natural talents may or may not be developed by the individual. Alternatively, one without such talent, originally, may work hard at developing the lacking skills. The second difficulty is that the plan to redistribute because of disadvantage of a natural talent does not take on board that what is considered a disadvantage may be dependent upon changing social values or a particular time, for example, those socially constructed circumstances which privilege one group over another (Kymlicka notes race, class,

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had made the decision to consume, save or work that they did' (cited in Plant, 1991, p. 114, as Dworkin, 1983c, p. 31). (I have check this quotation and was unable to locate it in the original text.)

and sex, 1990, p. 82). In the final analysis, Dworkin hopes that the tax system can provide a balance between distribution that is sensitive to people's ambitions and insurances for those deserving because of disadvantageous circumstances.

Within this Dworkinian framework for equality, we find a possible understanding of sexuality. Like Rawls, Dworkin does not explicitly state whether he believes sexuality to be a matter of morality or a part of individual identity. However, as we will discover, neither interpretation fares well within the Dworkinian framework. First, if sexuality is a moral choice then it would fit into the above market-place scenario as an 'ambition'. And within this system, ambitions/goals/choices are rewarded according to the taste of the market. In other words, Dworkin claims that the market will reflect preferences or choices and those wishing to succeed by market standards will make the relevant choices to do so. Under this definition, then, those choosing a deviant sexuality will simply be subjected to the market forces, and subsequently may see little 'success'. And at least once he notes that sexual appetite may be seen as a 'preference' or 'taste' (1981, pp. 302-303). If sexuality is seen as a chosen preference, then it will be left up to the market-place of values - at present one which is heterosexist - rather than be recognised by the state as a disadvantage.<sup>10</sup>

However, there might be another interpretation of sexuality which may be more compatible with the equal concern and respect Dworkin intends for individuals. If sexuality is seen as a part of individual identity, it could be equated with the 'circumstances' which the distribution scheme would take in to consideration. Again, there are a number of difficulties with this interpretation. First, Dworkin consistently refers to circumstances with which people are born, such as physical or mental handicap, *inherited wealth*. My worry here is twofold. There is simply not enough evidence, at this stage, to prove that sexuality is *always* biologically determined. Therefore, if one is not born with this disadvantaged sexuality, does one have claims for redistribution of respect in a heterosexist society? And here the worry intensifies. If in some cases sexuality is not a biologically determined identity, and able to claim this respect, can those who 'develop' this disadvantage make the same claim? For example, if sexuality is, for some, a socially constructed identity, is that disadvantage to be respected? If not,

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<sup>10</sup>Interestingly, this might explain the current impact of the Pink Pound and gay and lesbian culture in the contemporary 'value' market-place. But the tastes of the market are ever-changing and current popularity does not itself ensure rights for sexual citizens.

how do we distinguish between the two - biologically or socially constructed - sexualities?<sup>11</sup> This argument is akin to Dworkin's concern above that there is no way in the real world of measuring disadvantages because they may be subject to differing levels of development. The scheme would have to incorporate a flexible time scale to judge the discrepancies between advantages and disadvantages. In other words, claims for this redistributed respect would have to set a particular time at which sexual identity had to be established. While this may mean something as simple as setting an age of consent, it could mean that those identifying their sexuality after a set time/age would not be entitled to such respect.

On the other hand, if claims for this redistribution of respect in a heterosexist society can be understood as a 'circumstance', how do we go about claiming that respect? If we assume that Dworkin would understand sexuality as part of individual identity that should be respected by the state (regardless of aetiology), then what within his framework ensures that respect? This question returns us to considerations of how the state might respond to the needs of its gay, lesbian, and bisexual citizens. Also this line of inquiry captures the inherent difficulty with Dworkin's understanding of 'rights'. In other words, if gay, lesbian, and bisexual citizens have the right to equal concern and respect, how can those rights be claimed?

Dworkin argues that in order for rights claims to be decided, two dimensions for judging those claims have to be considered: the dimensions of fit and political morality.

The dimension of fit supposes that one political theory is *pro tanto* a better justification than another if, roughly speaking, someone who held that theory would, in its service, enact more of what is settled than would someone who held the other ... The second dimension - the dimension of political morality - supposes that, if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have. (1985, p. 143)

This criteria, then, establishes how rights claims should be decided. First, justifications must appeal to a theory that is consistent with past case law, or

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<sup>11</sup>The third alternative, that sexuality is a political choice, because it is still a choice, returns sexuality to the ambition definition above, subjecting it to the forces of the market.



incorporates and explains court precedents. In addition, justifications must be able to 'capture the rights that people in fact have', or they must be in line with the kinds of rights that already exist.

This criterion may seem rather straightforward. In fact according to Sandel's argument, that was summarised in chapter one. Sodomy laws could be deemed unconstitutional if the right to privacy was given the interpretation found in *Griswold v. Connecticut*. So justifications may exist that are consistent with court precedents. And it can be argued that these resonate with the kinds of rights that people already enjoy.<sup>12</sup> While that may work in right to privacy arguments, as we have seen, those are generally understood to be about private morality rather than identity. Arguments from the standpoint that sexuality is a part of individual identity would have to run along completely different lines. For example, in the first case, respect for this different identity would need to 'fit' into minority rights case law: non-discrimination on the grounds of race, and sex etc. And, in the second case, arguments would have to show that such respect resonates with the current understanding of rights that already exist, for example that sexual identity was like race or sex identity. An attempt to make a similar argument is now happening in the U.S. where the activists are supporting local and State level court cases on the grounds that discrimination on the basis of sexual orientation is similar to race and sex discrimination.<sup>13</sup> The difficulty in this argument is proving that sexuality is biologically based, is a 'circumstance' into which one is born. And it is interesting that in the U.S. gay and lesbian activists are much quicker than their British counterparts to endorse biologically determined sexual identity over arguments for socially constructed or politically chosen sexual identity.

Nevertheless, the question of responsibility remains. Within this framework for claiming rights it is up to the individual or group to make such claims and to justify them with reference to a particular theory of rights. It is, therefore, not a necessary conclusion of the premise of 'equal concern and respect' but one that remains to be proved. And that proof must come, not from the political theory or the state, but from the gay, lesbian, or bisexual citizen claiming a right to respect. In making such claims, as noted in chapter two, Dworkin explains that there are certain claims, certain preferences which *count* in this justification and some which do not. In other words, there are two kinds of preferences which should affect politics. Internal preferences are those preferences that matter to the individual herself or

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<sup>12</sup>This is in fact the line of argument taken by Samar, 1991.

<sup>13</sup>For a more complete analysis of this strategy see Currah, 1994.

himself and are separate from external preferences which determine what someone else should value. Dworkin holds that if governments are to treat individuals with equal concern and respect they can only value, listen to, the internal preferences. This distinction should, then, rule out external preferences like homophobia or heterosexism because they concern how someone else should live their life. But as Raymond Plant notes that such a distinction is not always helpful. For example, in a society where homosexual acts are prohibited, if we agree that 'ruling out external preferences of any sort both altruistic or hostile, then if homosexuals ... were in a small minority, and government could only count internal preferences, then since the reform of the law would only be an internal preference for [the homosexual minority], it is difficult to see how the law in a liberal society which discounted external preferences on procedural grounds would ever be reformed' (1991, pp. 120-121).

Plant quickly notes that Dworkin's response would probably be that the law was itself illegitimate because it involved 'antecedently counted external preferences on the part of those who wished to prohibit homosexuality' (Ibid.). Now while that might be Dworkin's counter-argument, I am not sure that it does much practical work. The fact that the law should not exist in the first place may be a valid theoretical response but it does little towards claiming how the law should be changed now. Dworkin may be right to argue that individuals are due equal concern and respect, but because his framework distinguishes between 'ambition' and 'circumstance', it does not necessarily follow that respect is due regardless of sexual identity. And if it is, then it is up to the claimant to make such a case, a task which is proving quite difficult, at least in a rights-based but heterosexist American political environment. As Kymlicka comments, 'the ideals of liberal equality are compelling, but they require reforms that are more extensive than Rawls or Dworkin have explicitly allowed. Neither has challenged the 'civilisation of productivity' whose maintenance has involved the perpetuation and often exaggeration of entrenched inequalities of race, class, and gender' (1990, p. 87). This difficulty with Dworkin resonates with a criticism made by Connolly that 'the commitment to liberal principles is increasingly matched by the disengagement from practical issues ... this principled liberalism is neither at home in the civilisation of productivity nor prepared to challenge its hegemony' (1984, p. 234).

These points are interesting because they highlight the reasons why the Dworkinian framework cannot guarantee equality. If sexuality is interpreted as a moral choice, or as a political choice, it is likely that any success at ensuring equality would be left to the mechanics of the market system. Alternatively, if sexuality is

understood as a part of individual identity, given Dworkin's insurance scheme based on circumstances of birth, it would have to be proved to be biologically determined before equal respect could be claimed. And finally, the responsibility for claiming respect is on the shoulders of the non-heterosexual minority rather than an explicit right necessarily following from the premise of equality.

In summary then neither of the anti-perfectionist frameworks considered here adequately addresses the two questions posed at the beginning of this inquiry. While neither explicitly states how sexuality is to be understood, as a moral choice or as a part of individual identity, they offer little theoretical argument for state intervention in ensuring justice or equality for non-heterosexual citizens. Now there are at least two criticisms which could be made about the way the argument has been constructed here. It could be said that I have misrepresented the way in which both theorists conceptualise the individual. However, while each considers the individual to have a some sort of identity, whether sex, race, culture, or moral, the fundamental assertion of anti-perfectionism, or neutrality, necessarily involves either a complete or partial discounting of that identity on a public/state level. The Rawlsian framework explicitly separates individual differences, or individual identity, from the public/political agenda for justice. And while the Dworkinian framework prioritises equal respect for that identity, because it is not buttressed by a clear notion of sexual identity, any claims for that respect must be made by the individual rather than necessarily following from the theory itself.

A second criticism could be that I have simply asked the wrong question. In other words, it is not the intention of an anti-perfectionist theory to delineate state responses to controversial issues such as homosexuality. But I think that is the exact point I am trying to make. If the state is to remain neutral, based on the fact of either moral pluralism or equal respect, it has little path for action to ensure either justice or equality in the way gay and lesbian activists hope. What is the result, both theoretically and in practice, is that it falls upon those wanting justice to be done, or respect to be given, to make those arguments - and to make those arguments strong enough, loud enough, for a 'neutral' state to be compelled to act.

What we are left with then is the need, as activists, to locate arguments for action with a very different idea of government responsibility. If we want to make changes, perhaps we need to be arguing not for a right to privacy - a right to private moral lives - but firstly for the right to determine our own identity and secondly for the state's responsibility to ensure the range of options for us to do so. Unlike the anti-perfectionist approach, such a framework will need to have an understanding of individual identity that adequately represents the development, or negotiation, of

sexual identity, for example as biological, socially constructed, or politically chosen. And it will need to conceptualise the state so that the development of that individual identity is prioritised, and even supported. Keeping these requirements in mind, below I return to the Razian framework which seems to do both but also raises different questions about the relationship between the individual and state authority.

### Razian Freedom

To return for a moment to the problems created by utilitarianism's agent-neutrality, Williams stated that

it is absurd to demand of such a man, when the sums come in from the utility network...that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his actions in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus in the most literal sense an attack on his integrity. (1973, pp. 116-117)

Raz argues that, although Williams's statement is generally interpreted as an argument for agent-relativity, or specificity of persons, it can be seen to teach a different lesson. 'It points to a problem that cannot be solved except by radically revising one's notions of morality and of personal interest in a way which denies that they represent two separately comprehensible points of view' (1986, p. 315).

Continuing, he explains, 'both the popular and the philosophically fashionable pictures of human beings accept an asymmetry between people's concern for their own interest and their concern to do what is morally right. Somehow their concern for their own interest is secure and natural. Sometimes it is held to be a conceptual truth that people are motivated to pursue their own interest. Their willingness to do the moral thing is more precarious. It is the result of socialisation which harnesses their self-interested instinct. Or, if morality is held to be, or to be served by, a natural inclination, it is thought of as a weaker force, easily overwhelmed by one's self-serving instincts' (Ibid.). In order to resolve this conflict between self-interest and morality, elaborate systems are constructed to prioritise moral actions.

These systems, or moral doctrines, provide a hierarchy of values or, as Moore pointed out, this morality is 'a hierarchically organised set of reasons' justifying

political and social institutions (1989, p. 549). The process of creating a moral doctrine that incorporates the agent's interest within morality uses this set of reasons to justify its proposed compromise between self-interest and morality, and/or show in what situations one has priority over the other (1986, p. 314). At the heart of this dilemma, Raz argues, is a misconceived idea which fails to distinguish self-interest from well-being. Self-interest may, by definition, support the necessity of conflict, and therefore a complex hierarchical moral system. But well-being, as defined by Raz, encompasses a much larger notion, one that includes self-interest but also incorporates a realistic depiction of those projects and relationships which are important to the individual and are often the motivation behind actions. This final section of this chapter will show that the difference recognized between these two notions and the resulting perfectionist framework translates into a significantly different, if not progressive, conceptualisation of sexual identity and state authority not generally associated with contemporary liberalism.

### *Self-interest or Well-being*

Raz outlines four major differences between self-interest and well-being. First, while both are sensitive to biological needs and desires, self-interest is largely seen as a biological notion because it is necessarily adversely affected by frustration of biological needs or shortening of life. On the other hand, well-being is not necessarily reduced by either, if either occurs as a by-product of pursuing a valued or comprehensive goal. For example, if one suffers deprivation while providing medical help, then the sacrifice of biological needs does not hinder but enables one to fulfil a goal as a carer. Second, success or failure in the pursuit of a goal is, in itself, the major determinant of our well-being. As noted in the previous chapter, Raz explains that one of the defining factors of well-being is the 'crucial evaluation of a person's life: how good or successful is it from his point of view?' (1986, p. 289). Therefore the notion of well-being depends on the success or failure of a range of goals, beyond biological needs, which the individual values. Alternatively, self-interest is 'indifferent to the fortunes of many other pursuits' (Ibid., p. 297). The rough dividing line between the two, offered by Raz, is that 'self-interest is what remains after subtracting from the wider notion of well-being success in those projects whose value (in the eye of the person in question) is their contribution to the well-being of others' (Ibid.). Third, because people value goals and care about their success, failure reflects adversely on their well-being, that is on the success of their life, 'even if they neither know nor could be expected to know the failure'. (Ibid., p.

298). Self-interest is not affected by such factors. 'It is sensitive to a person's satisfaction with his own life. But not to whether that satisfaction or its absence is justified' (Ibid.). Simply put, the success of a person's life is so intertwined with valued goals that failure, unforeseen or justified, is still experienced as failure in life. Fourth, well-being depends on the value of one's goals and pursuits. The reason for choosing a goal is that one believes it to be a valuable, worthwhile activity. Raz adds, that 'perhaps but not necessarily because of its value to others' (Ibid., p. 299). Although this claim may sound quite contentious, Raz quickly adds that what is meant in this case by 'value' is quite subjective. 'It indicates the success of a person's life from his point of view, i.e. its intrinsic value rather than its instrumental value to others' (Ibid.). Given these distinctions between self-interest and well-being, Raz concludes that 'their well-being, and not their self-interest, matters most both morally and to people themselves' (Ibid., p. 317).

### *Diverse Communal Pool of Values*

The previous chapter detailed the connections between well-being and social forms. But it might be helpful to recount briefly a few basic points made there. First, well-being hinges on how the individual evaluates her or his successful pursuit of goals. Well-being 'captures one crucial evaluation of a person's life: how good or successful is it from *his point of view*?' (Ibid., p. 289, italics added). Second, people may come to have their comprehensive goals which constitute well-being via a number of sources. They may be based on biological needs, appropriated social norms, or created/chosen deviations of social forms. The flexibility of the Razian framework for interpreting the concept of well-being, as noted, results in a diversity among the valued goals each person may acquire in any given society. For the anti-perfectionist approaches, this diversity was supposed to necessitate conflict, which could be handled best by a neutral governing body, operating which prioritised concepts of justice and equality. However, for Raz, and this is the third tenet in well-being, the goals which constitute personal well-being all find their source in a pool of social forms. These social forms include 'shared beliefs, folklore, high culture, collectively shared metaphors and imagination, and so on' (Ibid., p. 311). He adds that all these (goals) are derived from the common culture, from the shared social forms, and, though they receive the individual stamp of each person, their foundation in shared social forms is continuing and lasting. Because individuals' goals spring from a communal pool of values, or the social forms available within society, conflict is not a necessary result.

Keeping in mind that the defining factor of well-being is that 'it is what matters most to the person', Raz is not arguing that existence as a social form necessitates, or even indicates value. Likewise he is not insisting that a person values all social forms. Instead it is simply a claim about the origins of goals. He states explicitly that this is 'not a conventionalist thesis' (Ibid., p. 310). 'It does not claim that whatever is practised with social approval is for that reason valuable. It says that the comprehensive goals a person finds valuable are based on social forms, whether or not these are socially approved social forms' (Ibid., p. 310). What Raz is advocating here is, arguably, something closer to transgression than conventionalism. Raz points out that 'the thesis that comprehensive goals are inevitably based on socially existing forms is meant to be consistent with experimentation, and with variations on a common theme and the like' (Ibid., p. 309). The nature of this framework recognises the need to question social forms and experiment with new formulas for interaction. Moreover, the current debate around the politics of transgression<sup>14</sup> seems to be presupposed by Raz. 'It is not that a person cannot, through the development of his own variations and combinations, transcend the social form. People can, and sometimes do, do this, but inevitably in such cases the distance they have travelled away from the shared forms is, in these cases, the most significant aspect of their situation. It more than anything else then determines the significance of their situation and its possibilities for those people' (Ibid., pp. 312-313).

In another passage he notes the shift in society from pre-arranged marriages to the free choice of partners and comments: 'the change to marriage as a self-chosen partnership increased personal autonomy. But it did so not by superimposing an external ideal of free choice on an otherwise unchanged relationship. It did so by substituting a relationship which allows much greater room for individual choice in determining the character of the relationship for one which restricted its scope' (Ibid., p. 392). Continuing, he writes:

More recent changes and tendencies in many countries legitimate not only choice of partner in marriage, but also choice whether to marry at all, cohabit without marriage, etc. These changes are uncertain and incomplete. Some tendencies, e.g. to communal families, or open

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<sup>14</sup>I have briefly mentioned the work of Judith Butler (1992) as advocating a politics which questions, or causes 'trouble' for, gender roles by performing a mixture of them at once. For more debate about this politics of transgression see E. Wilson, 1993; and Hemmings, 1993.

marriages, may wither away. Others, e.g. homosexual families, may be here to stay. It is too early to have a clear view of the consequences of these developments. But one thing can be said with certainty. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and bonding itself is much more easily and commonly dissoluble. (Ibid., p. 393)

Raz here is not necessarily lamenting the day that the monogamous heterosexual family disappears. What he is acknowledging is that social forms are adapted to meet the needs of individuals. Furthermore, while that process takes place over time, it is still a radical alteration of social forms. But his entire thesis is based upon the need to ensure the conditions of autonomy, so that, like the change from pre-arranged marriages, other social forms of relationships may increase individual choice and autonomy. The similarity between Raz's notion of transcending social forms and recent observations made by Elizabeth Wilson are quite striking. Relying on a Foucaulian model, she writes that transgression is a 'process of continuously shifting boundaries, the boundaries of acceptable behaviour' (1993, p. 110). So far then this radicalism of the Razian framework appears to encompass a diversity of sexual identities without the anti-perfectionist moral, or public, constraints. Yet what about the seemingly inevitable conflict resulting from this diversity?

### *Morality of Freedom*

Raz maintains that variation does not necessarily lead to conflict. He argues that 'we have reason to think that conflicts between morality and the agent's well-being, albeit inevitable, are only accidental and occasional,' because the communal pool of values provides the same source of values for the individual as well as the community (1986, p. 318). Building on the belief that 'individuals define the contours of their own lives by drawing on the communal pool of values', Raz goes on to explain: 'These will, in well-ordered societies, contribute indiscriminately both to their self-interest and to other aspects of their well-being. They also define the field of moral values. There is but one source for morality and for personal well-being' (1986, pp. 318-319). Continuing, he notes that 'given that the well-being of



the agent is in the successful pursuit of valuable goals, and that value depends on social forms, it is of the essence of value that it contributes to the constitution of the agent's personal well-being just as much as it defines moral objectives. The source of value is one for the individual and the community' (Ibid., p. 318). If then this communal pool of values is shared by members of the community and it provides the source of the kinds of values which can define well-being, conflict becomes less a necessity of diversity and more 'endemic' (Ibid., p. 318).

Again, Raz explains:

that individuals inevitably derive the goals by which they constitute their lives from the stock of social forms available to them, and the feasible variations on it. If those social forms are morally valid, if they enshrine sound moral conceptions, then it is easy for people generally to find themselves with, and to choose for themselves, goals which lead to a rough coincidence in their own lives of moral and personal concerns. In their careers, personal relations and other interest they will be engaged in activities which serve themselves and others at the same time. By being teachers, production workers, drivers, public servants, loyal friends and family people, loyal to their communities, nature loving, and so on, they will be pursuing their own goals, enhancing their own well-being, and also serving their communities, and generally living in a morally worthy way'.

(Ibid., p. 319)

Now this statement appears to import a number of assumptions about 'morality' that may seem rather contentious. For example, the phrase 'if those social forms are morally valid' refers quite obviously to an overarching moral system. Additionally the words 'generally living in a morally worthy way' hint at a prescriptive morality for individual lives. What then does this imported morality look like and, more importantly, what are its hidden assumption?

Raz offers only one clear example of this morality. Conflicts arise, he proposes, between morality and personal well-being where the social forms available in society are 'morally wicked' - like 'when a young person grows up in an area where membership in a racist group is the social norm' (Ibid., pp. 319-320). Raz acknowledges that such conflicts can and often do arise, even though they are neither conceptual nor natural necessities. And, when either conflicts of reason which affect only the well-being of the agent or conflicts between the well-being of agents occur, the only guidance for resolution is the communal pool of values. Continuing, he writes, 'there is nothing here to imply that there is always one correct resolution to

conflicts of reasons. Where there is no resolution, or where more than one resolution is correct, different people may act differently while none acts against reason' (Ibid., p. 320). Conflicts then become a matter of negotiation rather than, as in the anti-perfectionist accounts, a matter of reasoned moral law. There are a number of questions that surround the type of perfectionism found in the Razian framework. The following section will attempt to address at least a few of them.

First, and related to the point above, do his references to morally valid social forms necessarily entail a restrictive, or conservative, morality? In order to understand the moral hierarchy that exist in this framework, I must re-emphasise the primary role of autonomy. Neither the society nor the government should enforce a particular, limited morality. Raz conceives of value-pluralism which recognises the need for a range of morally acceptable options. He identifies that the perfectionist approach may conjure up images of Big Brother but argues that, in this case, 'nothing could be further from the truth'. 'One needs constant reminders', he adds, 'that the fact that the state *considers* anything to be valuable or valueless is no reason for anything' (1986, p. 412). Furthermore, 'the autonomy-based doctrine of freedom rests primarily on the importance of autonomy and value-pluralism. Autonomy means that a good life is a life which is a free creation. Value-pluralism means that there will be a multiplicity of valuable options to choose from, and favourable conditions of choice' (Ibid.). He summarises that 'if autonomy is an ideal then we are committed to such a view of morality: valuing autonomy leads to the endorsement of moral pluralism' (Ibid., p. 399). Chantal Mouffe comments that 'contrary to Rawls, who believes that pluralism requires the rejection of perfectionism, Raz sees a necessary link between the kind of perfectionism to which he is committed and the existence of pluralism' (1993, p. 137). 'This allows him', she continues, 'to conceive pluralism not merely as a "fact" that we have grudgingly to accept, but as something to be celebrated and valued because it is the condition for personal autonomy' (Ibid.).

Given this understanding of value-pluralism, could non-heterosexual identities be among the options available in society? As noted, Raz appears to implicitly import a morality which condemns some actions as 'morally wicked' or 'morally repugnant'. Whether heard from a pulpit or an academic text these statements send immediate question to mind about precisely what actions are being referred to. History has shown that moral disgust toward homosexual action has led to legal sanction. Because the sensitivity to such phrases does not go unfounded, I would not wish to skip over them lightly. Indeed, Raz simply does not explicitly say that homosexuality, or any sexual deviancy, is morally repugnant. Therefore, I am

left to glean from other statements what he might mean exactly. As noted above, the only example he offers is racism as a social norm which is morally wicked. It could be theorised then that sexism or even heterosexism is equally as morally wicked. In fact, this interpretation is not without basis. Keeping in mind that well-being depends upon the goals which matter to the individual, and autonomy depends upon a range of options, the creation or re-interpretation of intimate relationships between members of the same - sex has not gone unnoticed by Raz. In fact, he appears to believe that those societies in which homosexual marriages are recognised provide more opportunity for autonomy. 'In a society where such opportunities exist and make it possible for individuals to have an autonomous life, their existence is intrinsically valuable' (1986, p. 206). So it is the availability of this option is not necessarily seen as an abomination or as morally repugnant, but instead as an opportunity for autonomy to develop.

What then are the guidelines for this perfectionist approach? In the final chapters of *The Morality of Freedom*, Raz outlines the perfectionist principles which motivate his thesis. Unlike neutrality-based theories, Raz's emphasis on well-being establishes individual autonomy as a fundamental principle which should be protected by a version of the Millian harm principle. Specifically, he states 'personal freedom, when understood as presupposing value-pluralism and as expressing itself in personal autonomy, should be promoted by political action' (Ibid., p. 367). Before exploring what this harm principle might include, it is important to clarify more fully what Raz means by autonomy. Generally, as quite a familiar term in liberal political theory, autonomy is taken to mean that people should make their own, life, control to some degree their own destiny through decisions made throughout life (Ibid., p. 369). Yet Raz notes that this general notion can overlook the fact that it is the conditions in which a person acts that often determines autonomy. So Raz argues that autonomy should be concerned with how one's life came to be, in other words what the conditions for autonomy were.

Raz identifies three basic conditions for autonomy: appropriate mental abilities, an adequate range of options, and independence (Ibid., p. 372). Mental abilities would include, generally, a minimum rationality, the ability to comprehend the means required to realise goals, the mental faculties necessary to plan action, etc. The criteria of adequacy of options include several factors. Raz is clear that it is 'not number but variety' that matters. Choice between identical options is no choice at all. The test for variety is whether there are sufficient options for self-realisation or the development to their full extent of all, or all of the valued capacities a person possesses (Ibid., p. 375). Additionally the options should include projects,

relationship with 'long term pervasive consequences as well as short term options of little consequence, and a fair spread in between' (Ibid., p. 374). And finally, the choice of options should not be dominated by the need to protect the life one has. Following on from this is the requirement of independence. The choice between options should be free from coercion and manipulation. Raz notes that 'the natural fact that coercion and manipulation reduce options or distort normal processes of decision and the formation of preferences has become the basis of a social convention loading them with meaning regardless of their actual consequences' (Ibid., p. 378)' Therefore coercion, except in the cases of harm discussed below, undermines the principle of autonomy. The conditions of autonomy support a case for strong pluralism. Raz summarises that 'the existence of certain social forms is a contingent matter likely to frustrate any attempt at comprehensive ranking from any point of view, and making the existence of any underlying unifying concern most unlikely' (Ibid., p. 398). This endorsement for pluralism clearly grows out of the motivating concern for well-being and the resulting requirement to provide the conditions for autonomy.

Given this primary concern for autonomy and pluralism, Raz employs a version of the Millian harm principle to ensure autonomy and pluralism. The significant connection between harm and autonomy is the general thought that 'respect for autonomy of others largely consists in securing for them adequate options, i.e. opportunities and the ability to use them'. If adequate options are not available, the individual suffers harm; their autonomy is restricted. Alongside bodily injury which reduces a person's ability to act, Raz delineates at least three ways of causing harm: depriving a person of opportunities, denying a person the use or value of her or his own property, and frustrating the pursuit of projects and relationships. 'Roughly speaking, one harms another when one's action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being' (Ibid., p. 414). This perfectionist approach not only requires that the government should protect persons from harm but that it too should avoid harming persons.

The harm principle as commonly understood 'regards the aim and function of the principle as being to curtail the freedom of governments to enforce morality' (Ibid., p. 415). But Raz proposes a different interpretation of it in which the harm principle is about 'the proper way to enforce morality'. Keeping in mind that his intention in *The Morality of Freedom* is to provide a 'morality which governs political action', the harm principle is 'derivable from a morality which regards personal autonomy as an essential ingredient of the good life, and regards the

principle of autonomy, which imposes duties on people to secure for all the conditions of autonomy, as one of the most important moral principles' (Ibid., pp. 3, 415). As a theory about ethical, or moral, political action, Raz's framework places duties on the state to provide the conditions of autonomy. And it is in this requirement that the uniqueness of the Razian framework becomes beneficial to activists in sexual politics wanting the state to make policy changes. The state is required to support, to ensure, the conditions for autonomy. Raz clarifies the three main features of the autonomy-based doctrine of freedom:

*First*, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. *Second*, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy. *Third*, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others. (Ibid., p. 425)

The government then has an obligation to 'create an environment providing individuals with an adequate range of options and the opportunities to choose them' (Ibid., p. 418). He continues that 'it follows that a government whose responsibility is to promote the autonomy of its citizens is entitled to redistribute resources, to provide public goods and to engage in the provision of other services on a compulsory basis, provided its laws merely reflect and make concrete autonomy-based duties of its citizens' (Ibid. p. 417). Before considering what might be included in the conditions for autonomy particularly in relation to sexual identity, I want to note the distinction Raz makes between justified and unjustified coercion, or manipulation, by the government. While raising taxes, or supporting various options, may seem like an enforcement of a conventional moral system, Raz's understanding of the morality which governments should be supporting is based on autonomy. He writes, 'a government which subsidises certain activities, rewards their pursuit, and advertises their availability encourages those activities without using coercion' (Ibid., p. 417). Coercion and manipulation 'interferes with their autonomy' (Ibid., p. 420). And the government can be justified in using such measures only in order to prevent harm or to support the development of autonomy. Raz summarises: 'there are two main restrictions on the perfectionist, if you like the paternalistic, policies. First, the perfectionist policies must be compatible with respect for autonomy. They must, therefore, be confined to the creation of the

conditions of autonomy. Second, they must respect the limitation on the use of coercion that is imposed by the harm principle, as well as the analogous restrictions on manipulation' (Ibid., p. 423). So while the state is a perfectionist state and can use coercion and manipulation to support a range of social forms, it cannot support only one interpretation of morality, or of a moral social form. It must use its power to create the conditions for autonomy; to ensure that a range of acceptable options are available within society. If it does not, it is violating the harm principle.

The autonomy-based doctrine of freedom then requires the government to 'take positive action to enhance the freedom of their subjects'. Given this mandate, and the fact that heterosexuality is the only acceptable option in our society, the state would be required to develop and support other options. This could include a variety of legislative changes. At the very least it would include de-criminalisation, and anti-discrimination laws. In addition, because lack of knowledge of options restricts one's autonomy, it could be argued that the state should provide educational material, positive public images and 'promotion' of non-heterosexual identities, especially in rural or conservative areas where options are likely to be most limited. Needless to say this is a rather radical notion of perfectionism, and, I would add, a rather different concept of government support for sexual politics than has been historically the case.

### *The Route to Freedom*

To return then to the questions which were central to this chapter, we can see why the Razian framework offers both a concept of the individual which includes sexual identity as part of well-being and a notion of government that is required to provide the conditions of autonomy. However, one other concern has been noted in the discussions of the anti-perfectionist frameworks. That is, while theories of government, or how governments should conduct themselves, provide an ideal scenario of how a government should be based on 'justice' or 'equality' or (autonomy-based) 'freedom', what avenues are provided for questioning current, real, systems that do not measure up to these ideals? For example, it was argued that the Rawlsian framework does not provide such an avenue because it removes divisive matters from the political agenda. Additionally, the framework established by Dworkin assumes that minority's claiming equal rights have power. But this power is limited because only those internal preferences should be considered by the state and as a minority in a democratic system these preferences will be subject to the majority's internal preferences. What we find in the Razian framework is that the mandate to

ensure the conditions of autonomy, in theory, requires the government to provide a range of options which could include non-heterosexual identities. However, what if the government simply is not fulfilling that mandate? What avenues for action are available to individuals or groups which want, or need, that option to be supported? In short, how does one challenge the authority of a state not supporting those options?

For an answer to this question we need to briefly consider Raz's definition of authority, or justified authority. In his essay, 'Authority and Justification', Raz writes that a 'comprehensive view of the nature and role of legitimate authority ... [is that] ... their role and primary normal function is to serve the governed' (1990, p. 131). Given this general mandate 'to serve', Raz notes that there need to be limits to governmental authority. In *The Morality of Freedom* he examines one kind of limitation:

Clearly, some immoralities may be of a kind that no government has authority to commit. There may, in other words, be general limits to the authority of governments, limits restricting governmental powers over any of their subjects. The rest of this book is, in part, an exploration of one kind of such general limits. It examines the possibility that there are general restrictions on the authority of political institutions designed to protect individual liberty. But whether or not one can establish the existence of general limits to the authority of governments, the normal justification thesis invites a piece-meal approach to the question of the authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people. (1986, pp. 79-80)

This interpretation of authority then lends itself to questioning, even on an individual level, the authority of governments in the area of individual liberties. In his book *The Authority of Law*, he notes the difference between respecting a just system and an unjust system. Although he does not explicitly define in this book what is a just, or unjust, system, he does state that one has no *moral* obligation to respect the law or to obey it. That is not to say that one will not be punished for not obeying the law, but it simply places a divider between the law and morality (1979,

p. 260). In fact he continues by noting that civil disobedience<sup>15</sup> is sometimes justified. While he does not believe there is a separate 'right to civil disobedience',<sup>16</sup> he argues that in a liberal state where one has a right to political participation, it is sometimes right to engage in civil disobedience in order to get one's beliefs heard, or endorsed. While he does not delineate exact situations where civil disobedience is justified, he states that civil disobedience is justified if it is for a 'just' cause. In these texts there are at least two areas where 'just' causes are mentioned. First, civil disobedience may be right when protesting a violation of human rights; one concrete example is the policies of the South African government. In addition, from his writings in *The Morality of Freedom* and the mandate 'to serve', one can glean that another 'just' cause would be when a government is not providing the options necessary for the development of autonomy.

These two examples, the only two examples provided, are actually quite central to the claims made by gay and lesbian activists. As noted in chapter two, Stonewall quite often refer to the criminalisation of, and discrimination against, gay men and lesbians as a violation of 'human rights'. And this is a line of argument now being used by activists in Europe who insist that the European Bill of Rights could, and should, include sexual orientation in the list of categories of people protected from discrimination.<sup>17</sup> If one can make this interpretation of 'human rights', in countries where legislation and policies violate this 'human right' then one method of protest endorsed by the Razian system would be that of civil disobedience. This argument is made stronger by the second example. In countries where non-heterosexual identities are discriminated against, or perhaps more pointedly where 'promotion' of homosexual options by a governmental body is a crime, as in Britain with Section 28, governments are failing to provide a range of acceptable options

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<sup>15</sup>Raz defines civil disobedience as a 'politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or public policy' (1979, p. 263). Generally, he believes that these actions should be non-violent as violence causes direct harm and is likely to antagonise potential allies (Ibid., p. 267).

<sup>16</sup>Raz makes a distinction between a separate 'right to civil disobedience' and the 'right to political participation' which could lead to justified civil disobedience where it is morally the right thing to do. For a detailed discussion see 1979, pp. 262-275.

<sup>17</sup>For a thorough discussion of see Tatchell, 1992 ; and Waaldjik and Clapham, 1993.



for the development of autonomy, and civil disobedience protesting against this injustice should be supported.

I note this particular form of protest because it has raised significant debate among gay and lesbian activists. Following the announcement of the 'don't ask, don't tell' policy adopted by the American government to address the issue of 'gays in the military', disappointed gay and lesbian activists who had supported the Clinton campaign, and been promised positive changes in government policy, unanimously asked 'Why?' Why had Clinton turned his back on the very cause he promised to support? Tanya Domi of the National Gay and Lesbian Task Force says that 'White House officials' simply believed that public opinion would not support such a change. While this is not necessarily surprising, the 'unofficial' recommendation made by the same 'officials' was surprisingly clear: 'Now is the time for civil disobedience'. This was a completely different strategy than had been endorsed by Task Force, but the level of disappointment, the depth of betrayal, led many, including Tanya Domi, to protest on the White House steps for weeks afterwards.<sup>18</sup> The question that permeates strategy in America and, following the recent 'compromise' over the age of consent, that in Britain is 'What next? What will it take to make the public, and those in power, realise this discrimination and violation of human rights?'

It is believed by some that public protests rarely do any good, and frequently do harm, to the movement. Instead, it is argued, calm, rational discussion with those in power is the proper, and most fruitful, avenue for change. And I think to a large extent Raz's emphasis on non-violence and negotiation between those whose comprehensive goals conflict would support such a perspective. However, there is the belief by some that those in power listen only when the public - either a vocal minority or the majority - insists that they should listen, and act. The public protest then brings the issues to the forefront of the political agenda. And I would add that there is at least some significance to the argument that a public protest gives a larger number of people the opportunity to act, to register disapproval, than a small, often elitist, group quietly lobbying in the name of 'the community'. What we find then in the Razian framework is an endorsement for this avenue of protest, albeit under particular conditions of injustice and non-violence. The difference between this and the other two frameworks is that it both invites those divisive matters on to the

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<sup>18</sup>Tanya Domi recalled this incident and reflected upon the 'gays in the military' campaign at the American Political Science Association annual conference in Washington, D.C., September 1993.

political agenda and it allows for internal and external preferences to be voiced in the public discussion of those matters. But the Razian framework goes one step more. It conceptualises government, or moral governmental action, primarily around autonomy-based freedom; governments are *required* to support the conditions of autonomy, including providing a range of options for developing one's own well-being.

### Conclusion

The conclusion of this chapter brings to an end the analysis of contemporary liberal frameworks endorsing 'justice', 'equality' and 'freedom'. I believe the arguments found in these four chapters reflect the need to consider carefully the implications of a philosophical framework before employing its language. And I have reasoned that the Razian framework, because it includes a notion of individual well-being which can easily incorporate sexual identity, and because its perfectionist aim requires political action to ensure autonomy-based freedom, can serve as a strong justification for (most of) the political changes sought by gay and lesbian activists. In the Conclusion I want to return to the politics of respect and compare the Razian framework with the conditions for respect noted previously. In addition, and perhaps more importantly, I want to begin to look ahead to the various directions open to gay and lesbian activists, and what can be learned by those involved in sexual politics from the Razian framework and the politics of respect.

## **The Gay and Lesbian Agenda**

### **A Conclusion**

In this final chapter I want to reiterate the questions which have run throughout this work and, in doing so, to look again at the ways in which the Razian framework can, to a large extent, connect the language used by activists with conceptions of the individual and the state that require the government to provide the conditions needed for negotiating sexual identity and for a pluralistic society. In the Introduction I raised the concern that the language which has accompanied, or has facilitated, the movement of gay and lesbian, or sexual, politics into the mainstream is the familiar discourse of justice, equality, and freedom. This concern is not, as I will discuss below, about the ethics of employing the best political strategy. Obviously this language has the potential to purchase certain political goods in western democracy. Instead it is about the need for activists to be explicit in articulating exactly what kind of justice, equality and freedom is needed. And this is because most of contemporary liberal theory does not conceptualise the individual and the state in such a way as to justify, or require, the kinds of changes desired. In other words, I argued that there are epistemological inconsistencies in using this language which is defined by theories which do not necessitate changes in policy to combat heterosexism in society. In particular, there are three difficulties with placing gay and lesbian, or sexual, politics into a liberal theory framework.

First, it is the assumption of gay and lesbian activists, and probably most who have struggled to come to terms with their sexuality in a heterosexist social context, that sexual 'orientation' - sexuality, sexual identity - is a factor in individual identity, for some even a central factor in understanding their identity. And this assumption is not connected to one explanation of the development of sexuality. It is considered a part of identity regardless of aetiological explanations. This assumption simply does not resonate with the way in which individual sexuality is conceptualised in most liberal theory. For example, the first chapter reviewed how sexuality has been conceived of by philosophers as a moral choice. Although the two debates considered - Devlin/Hart and Sandel/Moore - were separated by thirty years, the general arguments of the moral 'conservatives' and 'liberals' changed little. In both sexuality was assumed to be a moral choice about the good life: either one which had the potential to threaten social stability or one which, perhaps nevertheless, should be left in private, that is 'not the business of the government'. Given the fact that this kind of debate typifies traditional philosophical questions about homosexuality, I have set out in this thesis to locate a framework which could incorporate sexual identity as part of individual identity, regardless of aetiology.

The second difficulty with locating a framework in contemporary liberalism which could justify the kinds of policy changes demanded follows directly from this conception of sexuality as a moral choice. Liberal theorists generally are able to justify non-discrimination policies based on race or sex because they are understood as an immutable part of individual identity and because those immutable identities are, in western society, marginalised or discriminated against. They are in Dworkin's words 'circumstances of birth'. Sexual orientation however, has been conceptualised as a moral choice and therefore a 'private' matter - a 'choice' which the state cannot easily protect - particularly in a society in which the majority values the heterosexual family, and/or is heterosexist. Therefore liberal political theorists who understand sexuality to be a moral choice cannot necessarily justify non-discrimination on the basis of sexual orientation.

The underpinning reason for this leads to the third difficulty with a liberal political framework for sexual politics. As we have seen, contemporary liberalism rests upon the belief that the state can show respect only for individuals' capacity for autonomy or treat them as moral equals by remaining neutral among competing conceptions of the good. In short, the state cannot justify non-discrimination policies for private moral choices, particularly if the majority believes those choices to be immoral. Moreover, and this is quite significant for the future of sexual politics, liberal political theory cannot justify state intervention to combat heterosexist social attitudes or make non-heterosexuality a viable 'option'. The neutral state cannot endorse pro-active policies which provide for sex education about non-heterosexual identities, or recognise same - sex partnerships, or, in a rather familiar phrase, 'promote homosexuality'.

This work then set out to explore the language found in much of contemporary sexual politics by identifying some of liberalism's theoretical systems which have given that language meaning in western political discourse. In doing so, chapters two and three attempted to identify what activists meant when using the terms 'equality' or 'justice' by exploring the definitions found in the works of Dworkin, Okin, and Young, and most predominantly, Rawls. The findings showed that the definitions of these familiar terms were at least somewhat dependent upon the theorists overall understanding of government, individual autonomy, and normative role of society. So, the examination moved beyond the terminology to the fundamental assumptions about the individual and the state found in contemporary liberalism. In particular, the two tenets that seemed most relevant to this project were the relationship between the individual and community in determining individual identity and the belief that an anti-perfectionist state could best ensure individual autonomy and/or show respect. By focusing on these two areas, I argued

that the project often associated with liberalism - which divides the public and the private, which limits the extent of government interference with individual moral choices, which insists that a perfectionist state would violate individual autonomy - is itself limited by the moral norms of the majority, and becomes incapable of justifying, or requiring, government intervention to provide the conditions for autonomy, particularly the conditions needed for negotiating sexual identity.

At the conclusion of chapters four and five, I proposed that at least one liberal theorist, Joseph Raz, avoids these pitfalls. The Razian framework offers a flexible conceptualisation of individual well-being which can incorporate sexual identity, as well as requiring government support to secure the conditions for autonomy and pluralism. This reconstruction of liberal ideals enable the Razian framework to meet the conditions of respect outlined in the first chapter, and necessitated by the Gay and Lesbian Agenda. But before discussing in more detail those conditions of respect, below I will briefly review the thesis argument as it progressed through each chapter.

### Theorising the Language of Equality and Justice

'Stonewall, working for gay and lesbian equality' proclaims the banner seen at Pride, at various fund-raisers, at rallies in Trafalgar Square, on the letterhead, indeed at every opportunity to convey their message, their mission, to the heterosexual public and the gay and lesbian community. But those in attendance at a recent tea-dance fund-raiser for the group where Very Important Gay Men & Lesbians were looming above the (non-VIG&Ls) crowd in a reserved space guarded by a rather muscular man, and positioned just under this proclamation for equality, could not help but wonder exactly what kind of 'equality' Stonewall was working toward. Surely those who had been a part of the socialist based GLF movement could recognise this shift in 'comradeship'. Perhaps not, as many of that generation were enjoying themselves in the secluded VIG&L privacy of their own making. Nevertheless, this juxtaposition of equality and segregation quietly testified to the new age of gay and lesbian activism, now a mainstream movement buying into, or re-appropriating, mainstream political language, and even, it seems, the necessary divisions it imports. And it is with this image in mind that I was compelled to explore that language used by activists in an attempt to connect it with the mainstream contemporary liberalism. The outcome of that exploration showed the similarities between references to, 'equal rights', 'special needs of lesbians and gay men', and the theoretical frameworks which can be seen to give them meaning within a particular political system. However, in examining those frameworks it became increasingly obvious that

equality is actually a relative concept. The feeling of confusion about exactly which equality Stonewall proclaimed at the tea-dance, grew even greater as the theoretical systems were found to entail assumptions about essential identities, the power of minority groups, and even essential 'difference'.

More specifically, chapter two considered the types of social equality found in contemporary liberalism such as toleration, equal rights, and the politics of difference. The first, toleration, was noted to have deep roots in the liberal traditions of both Locke and Mill. And even the more contemporary theory of John Rawls affirmed the centrality of toleration as the liberal virtue. Angela Mason noted the Sexual Offences Act of 1967 was this 'toleration', not the desired 'equality'. Toleration is underpinned, it was argued, by disapproval and, more importantly, by the power to punish the tolerated. The second general interpretation of equality focused on the notion of rights. Ronald Dworkin, who argues that equality should be the guiding principle for liberalism, proposes a system of rights that attempts to secure equal concern and respect. His method, which distinguishes between internal and external preferences, requires the governing body to only take into account internal preferences when deciding public policy. As Plant commented, this discounts even the altruistic external preferences, and the result is that those minority internal preferences are not empowered and may be subjected to the majority. For example, if a current law criminalises homosexual activity, it will be difficult in a democracy, for a homosexual minority to challenge that law effectively if the external preferences of non-homosexuals, who also believe the law should be changed, are discounted. While Dworkin could be understood in chapter one to be arguing against the enforcement of public morality criminalising homosexuality, his methodology does not necessarily offer empowerment for the homosexual minority to challenge the heterosexual hegemony.

Another interpretation of equality was located in the politics of difference espoused by Iris Marion Young. In her attempt to find a system that is sensitive to the need of the different groups within contemporary western culture, she advocates an understanding of group identity which rejects assimilationist methods of amalgamating difference into one cultural identity or essentialist notions which posit difference as an essentialised 'other'. Instead she proposes that groups define their own identity and that on that basis their claims for equality or justice be assessed. This process of self-identified group identity was seen to offer empowerment to the group in that it challenged stereotypes and obligated authorities to take this identity, and subsequent needs, into consideration when enacting legislation affecting that group. However, I argued that the understanding of group-defined identity did not necessarily avoid the difficulties associated with essentialism. Particularly in the

case of the 'gay and lesbian community' to which she refers, this group identity requires an understanding of essential homosexual identity that is, at least, questionable if not, probably, unrealistic. So it was concluded that in her attempt to emphasise difference, Young throws her net too wide, failing to take into consideration the economic, social, and even fundamental political, differences within the 'gay and lesbian community'. This system for securing equality, then, actually would require the very essentialist identity that the gay and lesbian movement has been trying to distance itself from for the past ten years.

An alternative politics of difference proposed by Susan Moller Okin did however, provide a way of conceptualising difference that overcame the difficulties of essentialism. The framework proposed by Okin required those wanting change to articulate a specific need and the policies which would meet that need. Her example recognised that career women with children have specific child care needs that should be met by public policy changes. Building on that example, I argued that this avenue for change could prove to be important for gay and lesbian activists. And I noted that Stonewall used a similar argument in the age of consent campaign by highlighting the special needs of young gay men to have access to safe sex education. In addition I warned that identifying specific needs should be done carefully, since the heterosexual public might misinterpret that need as denoting an essential homosexual difference. Nevertheless, this survey of interpretations of equality found in contemporary liberalism served to prove at least two points. First, in using the language of equality to make claims about rights or changes in public policy, activists must be deliberate in defining that equality. Second, in that definition process, activists must be careful to articulate a specific need and policy change so as not to perpetuate the assumption of an essential homosexual identity... Below I want to briefly recall the argument made in chapter three concerning demands for justice.

'A Simple Matter of Justice' proclaimed the banner at the march on Washington D.C. where over a million supporters of the gay and lesbian, or sexual, politics movement registered their disapproval of social and political heterosexism. But justice, like equality, is relevant to particular theoretical definitions or judicial systems. So, while this may be an emotive appeal which is strategically beneficial, again activists need to be careful to locate this justice within a favourable theoretical framework. Otherwise 'justice' can take on a number of interpretations, the most likely of which is that of a 'heterosexual justice'. For example chapter three explored one interpretation of 'heterosexual justice' found in the early writings of John Rawls.

Instead of surveying various theoretical interpretations of justice the methodology of this chapter focused on what is probably the most influential text in

contemporary liberal philosophy, *A Theory of Justice* by John Rawls. While changes, or clarifications, that Rawls has made to his theory were discussed briefly here, and in more detail in later chapters, the general outline of the original position, its construction and possible results, were the central feature of this chapter. In fact, the argument itself is not dissimilar from the feminist criticisms made by Carol Pateman, and Susan Moller Okin. *Justice Gender and the Family*, Okin's work that suggested the strategy of specifying needs of particular groups and the policies to meet those needs, served as the primary source for questioning the assumption of the family found in Rawls' original position.

In general, the examination proved that a system of justice, even one that is intentionally constructed to be neutral among competing conceptions of the good life, can import assumptions from the social context which then become a normative justice, requiring some conceptions of the good to be legally labelled deviant, or even criminal. In particular, the Rawlsian framework was intended to establish principles of justice which were free from the individual contingencies that lead to division. Inside the original position, where such differences were to be hidden behind a veil of ignorance, parties could set out these principles which would then govern the well-ordered society, once the veil of ignorance was removed. However, because Rawls assumes the heterosexual nuclear family as a source for justice and as a basic institution in society, the heterosexual family is set as the norm in the well-ordered society. Those in the original position - before justice is defined - are either participants in a heterosexual family or, because it is a basic institution, agree that it is the proper structure for sexual relationships and for moral development. Premised on this idea of the heterosexual family, justice takes a heterosexist or even homophobic quality as it is applied outside the original position.

It was argued that there were three possible outcomes in the well-ordered society. First, the parties in the original position might assume that, although the family is a basic institution, there are diverse sexual identities. So they may 'play the odds' hoping that they benefit in the resulting society. But this is not an option comparable to the original position since Rawls established the family as a basic institution, and therefore pre-programmed the members of the original position to believe that the heterosexual family as the only just institution for sexual relationships. The outcome is that all other sexual relationships in the well-ordered society cannot be recognised in this system of justice. Second, given Rawls's recent emphasis on stability, the parties may decide that stability requires enforcing the heterosexual family as the only option for sexual relationships. This outcome would be even more strict as other sexual relationships could be criminalised. The third, and most optimistic, outcome is that the members believe that individual liberty



should be a priority in the well-ordered society. And as a result they might assure those with different sexual identities that, in accordance with the difference principle, 'the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantage members of society' (1972, p. 75). In other words, those with different sexual identities would be assured the maximum amount of liberty *within a heterosexist society*. The conclusion, then, was that all three outcomes would lead to policies that leave non-heterosexuals unrecognised in the system of justice, criminalised non-heterosexual identities or, at best, ensure 'private' liberty while the public space, the society, remains based on heterosexism.

This chapter then served to exemplify the difficulties with employing a familiar political language without articulating a specific meaning. It could be argued that the justice to which gay men and lesbians have been subjected - the invisibility, the criminalisation, the toleration - are in fact 'a simple matter of Rawlsian justice'. There is, then, a danger in not specifying 'whose justice', or what principles of justice, form the basis for the activists' claim. Again the difficulty lies in the relativity of claims for justice and equality. Since these concepts are only given meaning within a particular theoretical context, chapters four and five looked beyond these particularities to identify fundamental assumptions found in much of contemporary liberalism which may undermine the demands of gay and lesbian, or sexual, politics.

### Individualism and the Neutral State

Since the language of justice and equality is relative to the various systems of thought within liberalism, those systems lead to very different kinds of 'justice' and 'equality' for non-heterosexual citizens. The language of liberalism cannot therefore, straightforwardly necessitate the changes demanded by activists. Employing this language as a vehicle for transporting political goods to marginalised gay and lesbian citizens, actually raises three epistemological inconsistencies between the political strategy and justified demands for change. First because liberalism does not necessarily conceptualise sexuality as part of individual identity, and specifically as an immutable identity, non-heterosexual citizens are banished to the 'private' world of moral choice and invisible in the 'public' interpretation of non-discrimination or acceptance. Second, and following from this point, it is difficult to find justification for non-discrimination policies within liberalism, unless sexuality can be proven to be an immutable identity. Finally, even if differences of sexuality should be tolerated, or minimally protected moral choices, contemporary liberal frameworks

cannot require the radical questioning of heterosexism. The neutral or anti-perfectionist state cannot 'violate' autonomy by requiring respect for the 'moral choice'. It cannot call into question the social structures which govern private morality and, as long as sexuality is conceived of as a moral choice, it cannot challenge effectively the heterosexual hegemony. These inconsistencies can be most readily seen by examining two fundamental assumptions associated with the contemporary liberal frameworks considered above: the way individual identity is conceptualised and the justification for the neutral, or anti-perfectionist, state. Chapters four and five explored these two assumptions arguing that the Razian framework can be a viable alternative.

As we discovered in chapter one, sexuality has been traditionally understood in political theory as a moral choice rather than as part of an individual's identity. So chapter three focused on the concept of the individual often associated with liberalism and the criticisms made by communitarian Michael Sandel concerning the way in which that concept is seen to separate the individual from the surrounding social context. The debate was characterised by examining one significant point made by Sandel. Identity, he argued, was more a question of 'Who am I?' - where 'I' is discovered in the community - than a question of 'What do I choose to be?' - where 'I' is a (an objective) choice. This dichotomy posed by Sandel was seen to breakdown when applied to the notion of sexual identity. In particular, it was argued that at the closet door those who deliberate about their sexual identity ask both 'Who am I?' - what are my desires and needs - and 'What do I choose to be?' - what are the social, economic, familial implications of non-heterosexuality. The Razian framework, it was argued, is an alternative to this either/or choice. As will be discussed in more detail below, it provides a concept of the individual which addresses both the importance of social context and the centrality of autonomously determined well-being.

There is then one liberal framework which conceptualises the individual in such a way that sexuality can be seen as part of one's identity, or well-being, rather than a moral choice. However, the Razian framework rejects another of the fundamental assumptions found in liberalism, namely the need for a neutral state or a doctrine of anti-perfectionism. Raz theorises that if autonomy is to be central to liberalism, then the state must be required to provide the conditions for autonomy. The final chapter then explored this assumption that the neutral or anti-perfectionist state could ensure the condition of autonomy and/or respect.

Chapter two located the concept of equality within liberalism's fundamental belief in individual autonomy and the need to construct a system of government which provided 'equal concern and respect' for individuals. The final chapter

returned to that commitment to equal concern and respect. I argued that liberal theorists tend to believe that the best way to protect autonomy is by limiting government interference into individual private lives. According to the Rawlsian framework, equal concern and respect could be ensured by constructing a system of justice which limited, or in his later works eliminated, the impact of individual conceptions of the good on the political system. By separating individual conceptions of the good from political justice, the constructed framework could be seen as neutral among competing moral doctrines, thereby respecting individual moral autonomy. Alternatively, Dworkin proposed that equal concern and respect could be secured by providing basic rights. The state should be anti-perfectionist by disregarding external preferences, and valuing only internal preferences of those making rights claims. Similarly, in Young's system, assimilationist policies should give way to ones which recognise only the group-identity as interpreted by that particular group. The government remains anti-perfectionist because it does not impose an identity but instead responds to the identity defined by the group itself. And although the framework constructed by Okin does offer an interesting strategy for identifying specific policy changes needed, it does so by assuming that the arch median point associated with the Rawlsian original position could, and should, lead to an anti-perfectionist state. In each case then, the assumption of the neutral or anti-perfectionist state left those wanting change with few avenues by which to challenge the heterosexual majority and little, or no, power with which to do so.

Again this chapter concluded by considering how the Razian framework overcomes, or avoids, similar difficulties by requiring the state to provide the conditions of autonomy. Autonomy, according to Raz, is not a choice between good or bad options, but requires a number of options which are seen as acceptable. The state then should ensure that a variety of options are available within society. It was reasoned then that because the choice between heterosexual = good and non-heterosexual = bad, does not reflect the conditions of autonomy, the Razian perfectionist state would be obligated to support other sexual identities as valid choices, or goals, expressing one's own interpretation of her or his well-being. In order to define how the Razian framework can be seen to offer an appealing reconstruction of liberal ideals such as autonomy, pluralism, and freedom, I will assess it below according to the conditions needed for respect outlined in chapter two.

## The Politics of Respect

In the Introduction I outlined three changes in current social policy upon which, I believe, many activists in the gay and lesbian , or sexual, politics movement could agree. Briefly they included ridding society of heterosexism, respecting the diversity of sexual identities, and regulating harmful sex acts. As a result I proposed a politics of respect which would ensure acceptance for a diversity of sexual identities and conditions for individual autonomy particularly in reference to sexuality. This proposal rests upon the assumptions that the social and legal changes demanded by activists reflected a desire for freedom to determine one's individual sexual identity and for state action to end social and legal discrimination. The radical changes in policy that this would involve would require a pro-active state, one which recognised that autonomy necessitated a variety of available options, and one which provided one protection from those who want to restrict the kinds of socially acceptable sexual identities to heterosexuality. These conditions of respect can be seen to be provided for by the Razian framework. It is able to do so precisely because it answers the inconsistencies outlined above. The Razian framework conceptualises individual identity in a way that can be seen to include sexuality irrespective of theories of aetiology. It can therefore justify non-discrimination policies. But it also goes beyond this by requiring the state to provide the conditions needed for determining a range of sexualities. Below I assess the Razian framework according to the conditions needed for respect; particularly respect for sexual identities, respect as a social institution, respect for the harm principle, and respect as a requirement of legitimate state authority.

### *Respecting sexual identity*

The vast amount of literature devoted to the aetiology of sexual identity proves at least one thing: sexual identity can be said to be the result of a range of factors. Perhaps the most interesting theory is that posed by Simon LeVay who studied male twins, where at least one of them was homosexual, and found what appears to be a genetic explanation for homosexual identity.(1993) The impact of this discovery is startling as it has been used both by gay and lesbian activists who assert that homosexual identity, like that of race or sex, should be protected against discrimination and by activists on the far-right who propose that genetic engineering could rid society of sexual deviants. But while this 'gay gene' has stirred up both political opponents, similar studies argue that such a simple explanation may not be the end of the story. For example, researcher at Boston University School of

Medicine found that while gay men were more likely than heterosexual men to have a gay brother, there was not a higher incidence of lesbian sisters for gay men (Blumenfeld and Raymond, 1993, p. 123).

The difficulty with these genetic studies is that in addition to genes, families have similar environmental factors: parental attitudes, religion, school environment, etc.(Ibid.) So while the search continues for a biological explanation, social scientists argue that sexuality is socially constructed. From the Freudian interpretation of homosexuality as abnormal object-choice, contemporary psychoanalysts attempt to build upon, and revise, Freudian theory to account for homosexuality in both men and women. In addition, social constructionists argue that sexuality is developed due to environmental factors; studies pinpoint everything from too close, or too distant, relationships with either parent, sexual taboos within the family unit, to the cultural and historic relativity of sexual labels like 'homosexual', 'gay', and 'lesbian'.<sup>1</sup>

In total, these explanations for sexual identity serve to produce, and to legitimate, an individual's understanding of her or his own sexuality. As individuals who are labelled by society, and often by ourselves, as different or deviant we create stories which satisfy our need to understand our sexual identity.<sup>2</sup> And the stories created reflect both the diversity of scientific and theoretical explanations as well as the importance of interpreting ones own desires and sexual identity within a particular social context. Given this range of literature about the aetiology of sexual identity, and the disagreement among both researchers and gay and lesbian individuals, it would appear that activists might envision a society where the source of sexual identity was less important than the acceptance of diversity in that sexual identity. Indeed it was this assumption on the part of activists in gay and lesbian, or sexual, politics that sexuality is a part of individual identity regardless of the diverse aetiological justification, or legitimating personal stories, that highlighted the need for a political theory which also conceptualised sexuality in this way.

But the need for respect should not only be demanded from the heterosexual society. In a similar fashion, this need for acceptance of diversity can be seen to be emerging within sexual politics itself. The identity politics of the 1970s failed to

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<sup>1</sup>For a general discussion of the range of aetiological theories see Blumenfeld and Raymond, 1993 pp. 115-148 .

<sup>2</sup>The argument that scientific or sociological 'proof' aided individuals in re-writing their own stories, their own understanding of their sexuality, was recently made by Jackie Stacey at the British Sociological Association conference, Preston, March 1994.

reflect the diversity of sexual, and political, identities among gay men and lesbians. The recognition of difference which developed in the 1980s, through the works of black feminists writers such as bell hooks, enabled many of those who had been marginalised by the white gay male, and white lesbian feminist, movement(s) to claim their space within sexual politics. As a result, political activism in the 1990s began to struggle with the diversity of sexual identity. Not only did activists begin to welcome contributions to the movement by Black gay men and lesbians such as Perry Watkins and Audre Lourde, but activism itself took on a new kind of politics intentionally expressing diversity. The emergence of Queer politics signified both the theoretical development of a post-modern deconstruction of monolithic identity and the need to visually challenge the essentialism of associated with 'gay and lesbian community'. While debates around sexual identities such as butch/femme and sado-masochism had plagued the earlier stages of the sexual politics movement, queer politics embraced the diversity and fluidity of sexuality. Transgender, bisexual, and 'queer' identities became a part of the constituency of those challenging the heterosexual norm. However, this development has not been without much conflict and continued invisibility of marginalised groups. Indeed the presence of these identities has made many very uncomfortable. As Clare Hemmings argues, the bisexual in the 'gay and lesbian' community, or as a participant in sexual politics, is often seen as a *double agent* appearing to be a part of one camp but strongly identified with another (1993, p.129). So the developments within activism itself testifies to the need for respect, the need to respect the diversity of sexual identities amongst ourselves, just as we insist upon that respect from the heterosexual society.

It is with this assumption of sexual identity as a part of individual identity - and the recognition of the diversity of identities - that activists propose social and political change. The Razian framework offers a conception of individual well-being which can be seen to resonate with these assumptions. The definition of well-being can be found in a passage that is by now familiar:

... while there is no denying the importance of the biologically determined wants for the well-being. Much depends on his other goals, on whether he wants to be friends with someone, or to distance himself from another, to go camping in summer, to acquire a local reputation for hard-headedness, etc.

Some of these goals a person may have adopted deliberately, some he may have chosen. Others he may have drifted into, grown up with, never realised that anyone can fail to have them, etc. It makes no difference from our point of view which is which. What matters is that they are his relationships, ambitions, commitments,

and the like. Since they are his goals he guides his actions towards them, they colour his perception of his environment and of the world at large, and they play a large part in his emotional responses and in his imaginative musings. They play, in other words, a conscious role in his life. They are not merely unknown forces, the existence of which is deduced or postulated by psychologists or social scientists because of their predictive value. (1986, pp. 290-291)

This passage, it has been argued previously, can be seen to incorporate sexual identity. And in making this connection between well-being and sexual identity, I am not proposing any particular aetiology of sexuality. Instead I am trying to capture the very disagreement about that aetiology, and, more importantly, the knowledge of many that sexual identity, regardless of aetiology, is a significant part of individual identity. For in terms of understanding ones own sexual identity, it is, to say the least, difficult to pinpoint any one explanation which would sufficiently describe every one persons experience of that process. Additionally, by interpreting sexual identity as part of well-being, I am not necessarily defining sexual identity strictly as a goal. For example, not everyone consciously defines themselves as heterosexual; they simply are and have never felt the need, in a heterosexist society, to consciously affirm, or explore, their sexual identity. However, for those who are consciously aware of the diversity of sexuality, and may have had to make some conscious choices about how they will act upon their desires and whether or not that will be a public identity, coming to understand sexual identity is at least a struggle, if not a goal. Another interesting point that Raz makes about well-being is that it is 'what *matters* to him', that is to the individual. Obviously, these goals are chosen in a social context, or what Raz labels a 'communal pool of values'. But well-being is fundamentally about autonomy; - not autonomy in the sense of objective rational choice, but quite simply what *matters* to the individual. Well-being is determined by the individual within a social context, or embellishing upon Raz's description, negotiated while swimming in that communal pool of values. It is what matters to individuals conscious of their own desires and of the values/options available in society. Since well-being is interpreted by the individual and is prioritised within the Razian framework, he requires the state to provide the conditions of autonomy. This condition of respect for sexual identity as interpreted by the individual cannot be seen only to resonate with the Razian framework but serves as a basis for it to meet the other conditions of respect.

### *Respect as a social institution*

Given the diversity in both the aetiological research and the identities present in sexual politics, one of the conditions I proposed for a politics of respect was an acceptance of the individuals own interpretation of their sexual identity. And as it was argued above, the Razian framework meets that conditions. Related to that conception of sexual identity is a policy-oriented claim that this respect would need to be reflected in legislation dealing with sexuality. If one can be said to be respecting an identity, then they would accept logically the actions which signify or define that identity. For example, it would seem disingenuous for a government to say that it respects homosexual identity, or that is a private individual moral choice, while criminalising homosexual activity. It is disingenuous, or even unjust, but it is also reality in Britain for those homosexual men under 18, or for gay and lesbian parents trying to secure custody of their children. So the outline for a politics of respect would include respect for the activity which expresses that sexual identity. In terms of policy changes, this would include many of the campaigns already undertaken by Stonewall and OutRage, such as protection against discrimination, decriminalisation, recognising non-heterosexual families and same-sex partnerships.

So how can the Razian framework justify this respect? While autonomy is central to the Razian concept of the individual, as noted above, the individual is not seen to make choices outside a social context but is seen to determine well-being within a 'communal pool of values'. In defining well-being, Raz states that 'well-being depends to a large extent on success in socially defined and determined pursuits and activities' (1986 p. 309). It is important to be clear exactly what he is, and is not, claiming here. Generally, he is simply arguing that the goals which define well-being will be based upon what is familiar to the individual in a specific social context. The source of individual goals is those 'forms of behaviour which are in fact widely practised in his society' (Ibid. p. 308). What he is arguing is not that because these social forms are practised is sufficient reason to adopt them as a goal. Nor is he arguing that only those social forms which are socially approved should become individual goals. In the following rather lengthy passage Raz explains the connection between available social forms and comprehensive goals which define well-being:

A comprehensive goal may be based on a social form in being a simple instance of it. An ordinary conventional marriage in our society can be used to illustrate what marriage is like. It exemplifies a widely shared social form, while being also an instance of a comprehensive goal of the people whose marriage it is, and who want



it to be (or remain) a success. Many marriages, perhaps all, are not that conventional. They are based on a shared perception of a social form while deviating from it in some respects. They are deviations on a common theme, and they can typically be that because the social form itself recognises the existence of variations, or even their importance. A couple may evolve an 'open' marriage even though this form is unknown to their society. But an open marriage is a relation combining elements of a conventional marriage and of a sexual pursuit which is kept free of emotional involvement. It is a combination of elements of two socially recognisable forms. The thesis that comprehensive goals are inevitably based on socially existing forms is meant to be consistent with experimentation, and with variations on a common theme and the like. It is no more possible to delimit in advance the range of deviations which still count as based on a social form than it is to delimit the possible relations between the literal and the metaphorical use of an expression. (1986, p. 309)

Articulating the connection between social forms and well-being, Raz writes, 'the thesis that comprehensive goals are inevitably based on socially existing forms is meant to be consistent with experimentation, and with variations on a common theme and the like' (Ibid.). Social forms are adapted to meet individual needs. Experimentation then is a part of the Razian understanding of the relationship between individual well-being and social forms. It is not disingenuous, I believe, to surmise that within this framework, a same-sex, transgender, or bisexual relationship would be seen as anything more than a 'variation on a common theme'. The role then of social forms is to provide options for determining one's goals or well-being. But those options can be experimented with and in doing so one can even 'transcend' social forms. This claim then, far from being similar to the conservative or communitarian thesis that social institutions like the family should not be 'perverted', actually encourages individual interpretation of social forms to meet one's own desired goals.

However, there is a second distinction about this connection between well-being and social forms. Raz does not claim that goals are chosen in a 'rational objective state' but one where the individual is reacting to situations, to relationships, to learned patterns of behaviour. The goals we value, our well-being, are a result of a mixture of our awareness of common culture, of expectations about friendships or relationships, of semi-automatic responses. Again, this is not a claim about predictability or conventional socially approved choices. It is an analysis of the role

that social norms - socially approved social forms - play in individuals reasoning. Raz's understanding of the decision making process acknowledges that sometimes social norms act can as 'exclusionary reasons' (1975, p. 75) Social norms can influence the individual's decision making process, consciously or unconsciously, to the extent that she or he regards a social norm as mandatory, that is as a reason which excludes all other reasons for a particular action. The role of social norms in the decision making process, in this case, becomes an exclusionary justification 'despite those other reasons even though on the particular occasion concerned they do not override them (Ibid.). The point here is not that all social norms *should* be exclusionary reasons, but that, given the decision making process and the intensity of social norms - the often unconscious acceptance of them - social norms *can* play the role of exclusionary reason. This is recognition of the fact that the relationship between individual well-being, or comprehensive goals, and social forms, including socially approved forms is such that objectivity is not possible.

The importance of noting the role of social norms in the decision making process is to underscore the priority given to autonomy and freedom. Given that social norms can affect reasoning in this way, the need for protecting individual freedom becomes quite clear. Individuals must be able to experiment with social forms, and the society and state must ensure that that experimentation is encouraged rather than enforcing a set of social norms as exclusionary reasons for action. Social norms, as historically and culturally specific, should not squelch autonomy. They should not become restrictions upon individual experimentation. In fact, Raz argues that the validity of social norms depends directly upon the individual's endorsement of that norm either as a first-order reason for action or as an exclusionary reason. In other words, validity is linked to the individual's approval of the norm by incorporating it into his or her notion of well-being as a reason for action. The concepts of well-being and autonomy - what matters to the individual - require a range of socially acceptable options. Because social norms can limit the process of negotiating that well-being, the only way to respect autonomy is to provide the conditions for autonomy. Respect then should be a social institution requiring a range of options for negotiation well-being and, more significantly, respecting the re-appropriation of social norms as individual experiment with social norms and create new ones. In line with the conditions of respect outlined previously, the Razian framework dictates that respect include a social and political commitment to providing the option needed for pluralism of values and identities - a pluralism of well-beings.

## *Respect, not harm*

Raz begins his discussion of harm by noting that in *On Liberty* Mill argued that the only justification for the state to use its coercive power is to prevent harm (1986, p. 400). Building upon that, Raz defines the harm principle as regarding 'the prevention of harm to anyone (himself included) as the only justifiable ground for coercive interference with a person' (Ibid., p. 412-413). However the harm principle, as a historical artefact of political theory, is not a self-evident basis for state action. For example, Mendus highlights the difficulty surrounding various interpretations of 'harm': 'either "harm" is construed so narrowly that it fails to justify restriction of actions which we would certainly wish to restrict, or it is construed so widely that it may be used to justify endless interference and almost unlimited legislative powers' (1989, p. 123). This confusion over the definition of 'harm' has plagued debates about pornography and s/m sex. As we have seen, Raz does not enter into these debates. Instead he attempts to build a framework for discussion which sets out autonomy-based freedom as the moral basis for understanding harm. In doing so, his primary concern is to delineate broad categories of harm that includes harm to individual autonomy done by the state.

Raz outlines three types of harm. First, a person is harmed when she or he is deprived 'of opportunities or the ability to use them' (Ibid., p. 413). This would include denying a person the use or the value of her or his property because it diminishes her or his opportunities. Second, Raz states that 'injury to the person reduces his ability to act in ways which he may desire' (Ibid.). Third, one can harm a person by 'frustrating his pursuit of the projects and relationships he has set upon' (Ibid.). These categories incorporate emotional and physical harm. Raz also notes that harm has a forward looking aspect which would include diminishing one's prospects or affecting adversely one's possibilities (Ibid., p. 414). This notion of harm is closely linked with that of well-being:

Roughly speaking, one harms another when one's action makes the other person worse off than he was, or is entitled to be, in a way which affects his future well-being. So much is a matter of meaning. But this makes much turn on the notion of individual well-being. It gives concrete content to the principle. (Ibid.)

As we have seen, Raz understands the state to be responsible for ensuring the conditions needed for autonomy and pluralism. And his interpretation of the harm principle is connected to the perfectionist state also. Where the neutral, or anti-perfectionist state, will need to rely upon a 'rational' interpretation of harm - one which often imports a moral doctrine - the Razian state is, itself, based upon a moral

doctrine of autonomy-based freedom. His interpretation of the harm principle offers a 'proper way to enforce morality' by making the state responsible for promoting autonomy and pluralism (Ibid., p. 415). This has two implications for the harm principle. First, the state has the right to secure the finances necessary to provide a range of options and this 'taxation' is not causing harm but is preventing harm to another's autonomy. 'Autonomy-based duties, in conformity with the harm principle, require the use of public power to promote the conditions of autonomy, to secure an adequate range of options for the population' (Ibid., p.418). Second, in promoting options, the state has a responsibility to respect the independence of individuals to determine their own well-being. Coercion is justified only as a prevention of harm, but not as a prevention of individual choices. 'The availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy. Undesirable as those conditions are they may not be curbed by coercion' (Ibid., p.419). Coercion and manipulation by the state can be 'justified only to prevent harm', that is to diminish one's autonomy (Ibid., p. 420). So, although the Razian state is a perfectionist state, this understanding of the harm principle limits moral paternalism by prioritising respect for autonomy and imposing a harm principle which requires the state to provide the conditions for autonomy.

This definition of the harm principle levels the playing field for those participating in the political process to determine which policies are best for promoting autonomy. For example, if the state can enforce only the moral doctrine of autonomy-based freedom then it cannot threaten those with unpopular moral values with coercion, such as discrimination. In short, it cannot, unlike the Rawlsian state, remove from the political agenda the diverse conceptions of the good. All those, and only those, who respect autonomy are welcome to debate a range of values publicly - with the assurance that the state can enforce only policies that respect autonomy.

Keeping in mind Raz's intention in writing *A Morality of Freedom* was to provide a theory of political morality, or of the morality which governs political action, his reinterpretation of the Millian-type harm principle acts as a guide for action taken by a perfectionist state. Mouffe summarises the Razian harm principle in the following way: 'this principle refers to the way the state has an obligation to respect certain limits in the promotion of its ideals' (1993, p. 126). So, while harm includes harmful acts committed between individuals, the distinctiveness of the Razian framework is that it also refers to the harm done by the state by not promoting the conditions for autonomy. Again this reinterpretation of the harm principle is unsurprising given that Raz is trying to outline the moral system which should guide political action. In doing so, he has acknowledged that governments

cause harm by limiting support for autonomy - and subsequently, governments can be regulated by the harm principle. Since Raz is primarily concerned with reinterpreting harm with reference to autonomy-based freedom, his main target is the harm caused by the state by using coercion to limit the options available in society and by not actively providing for an adequate range of options to support the conditions for autonomy.

Nevertheless, I will note below that this interpretation could provide guidelines for those more familiar debates about what actually causes harm. For example, while Raz includes in the definition of harm as harm to another or to oneself he also notes that harm is about 'injury or reduced ability to act in a way desired'. Obviously one cannot extract an entire moral position from this phrase but I would argue that it could provide a starting point for distinguishing between rape, as injury against one's desires, and consensual s/m sex, as injury to fulfil one's desires. Although this line of inquiry is not my focus here, it is nevertheless an interesting philosophical pursuit and it testifies again to the experimental and radical potential in this theoretical framework.

### *Required Respect*

In this final section I want to focus on the rule of the state in the Razian framework. I noted in chapter two that the final tenets of respect addressed the power need to challenge discrimination based on sexual orientation and pervasive heterosexism. It has been argued extensively in chapter four that the notion of individual identity based on self defined well-being can be seen to incorporate a range of aetiological explanations for sexual identity. As well-being is defined by what matters to the individual, the Razian concept of individual identity is not dependent solely upon proof that sexuality is an immutable characteristic. Instead the power to interpret sexual identity is in the hands of the individual who negotiates biological needs, values, desires and social norms. This concept of the individual provides at least a more empowered sexual subject who understands sexuality within a social context.

And, while this social context may be limiting, it should be reflective of experimentation and creating new options. But one's power to determine one's sexuality is often eclipsed by the invading power to the state to control sexuality - homosexuality in particular - and enforce heterosexuality. So the avenues for questioning the power of the state is central to marginalised groups desiring change. Raz himself is sceptical of state power and has conceptualised the perfectionist state so that the requirements of respect for autonomy and pluralism continually act as a basis for questioning state action. If the state violates these requirements by enacting

iniquitous laws, Raz claims that 'sometimes it will be right to engage in civil disobedience to protest against them or against bad public policies' (1979, p. 273). One avenue for protest then is civil disobedience where it is used 'as a measure of last resort after all other means have failed to obtain one's desired goal'; it is 'non-violent'; perpetrators submit to 'prosecution and punishment'; it is to 'publicise certain wrongs and to convince the public and the authorities of the justice of one's claims'; and it is not 'used to intimidate or coerce' (Ibid., p. 269). Disagreement, diversity is welcomed by Raz in the political arena (unlike Rawls) and citizens can attempt to convince others, particularly the state, of their understanding of their internal and external preferences (unlike Dworkin). The Razian framework, therefore, is consistent with expression of autonomy and moral pluralism and requires the state to support the same.

### Unanswered Questions

I have argued that the Razian framework, unlike that proposed by Rawls and Dworkin, does establish the conditions of respect as central features for conceptualising individual identity and for a political ethics of autonomy-based freedom. There are however, a number of philosophical questions which Raz simply leaves unanswered. In this section I want to identify three substantial areas where a great deal of further inquiry is needed. Each of these I have discussed at different point in the thesis, but here I want to make a few comments about why I believe that while they are significant to the full development of a Razian political theory they do not necessarily undermine the potential for that development nor the relevance of the conceptualisations of the individual and the state to gay and lesbian, or sexual, politics. Specifically the three areas that cause the most concern centre around the perfectionist base of the theory, including the lack of definition given to such phrases as 'morally repugnant options', the familiar debate about what constitutes harm, and the possibility that the 'range of adequate options' might not include a range of sexual identities.

First the one question mark that looms largest over Razian theory is, quite frankly, 'What is a liberal theorist doing in the perfectionist camp?'. Chapter five detailed the argument made by Raz that respect for the individual's well-being, and/or autonomy, necessitated a state which provided the conditions for that autonomy to develop. The state then is required to enact policies creating an adequate range of options from which the individual can define their well-being, and to protect individuals from harm, where harm is defined primarily by inadequate provision of opportunities or the ability to use those opportunities. It is this

approach to perfectionism that, I have argued, can legitimate changes in policy which support non-heterosexual citizens, for example non-discrimination based on sexual orientation, recognition of same-sex relationships, and education about a range of sexual identities. Although we have previously considered this point, it is worth re-examining the quotation in which Raz summarises the main features of autonomy-based doctrine of freedom:

First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others. (1986, p. 425)

However, there are specific phrases in *The Morality of Freedom* that cause not a little concern that Razian perfectionism imports a hidden moral agenda. Following the above passage, Raz recalls the limits of this doctrine of freedom:

First, it does not protect nor does it require any individual option. It merely requires the availability of an adequate range of options. We saw that this lends the principle a somewhat conservative aspect. No specific new options have a claim to be admitted. The adequacy of the range is all that matters, and any change should be gradual in order to protect 'vested interests'. Secondly, the principle does not protect morally repugnant activities or forms of life. In other respects the principle is a strong one. It requires positively encouraging the flourishing of a plurality of incompatible and competing pursuits, projects and relationships. (Ibid.)

What exactly is a 'morally repugnant' activity? And what is this 'conservative aspect'? In discussing this dilemma, I noted that Raz simply does not provide the reader with a definitive answer to these questions. There are only two points that offer an indication of what this seemingly overarching morality might be. First, Raz notes that well-being is somewhat dependent upon the social forms available within society and that some of those forms may not be 'morally sound'. The result is that well-being based on these morally unsound social forms may trap people in 'immoral ways' (Ibid., p. 319). Raz offers only one example of a 'morally wicked' social forms; 'the main source of deviation between morality and a person's concern for his own well-being arises where the social forms available to him in his society are

morally wicked, as when a young person grows up in an area where membership in a racist groups is the social norm' (Ibid., p. 319-20). I argued that one could stretch this example to include homophobic social norms as morally wicked. While I believe this is a valid extension of the Razian framework, I also know that what is considered 'morally wicked' is too often left to popular opinion or the beliefs of government officials and the judiciary. So, if Raz does not elaborate upon these references to morality, how can we be sure that such definitions are not left to popular opinion or state interpretation?

The desire for Raz to clarify these terms persist but I do not think they lend themselves to unfavourable interpretations, particularly in relation to the autonomy of non-heterosexual citizens. And this assertion finds justification in the primary aspects of the theory itself. Aware of the criticisms against the conservative potential of perfectionism, Raz comments upon the paternalistic nature of the perfectionist state.

It conjures images of the state playing big brother forcing or manipulating people to do what it considers good for them against their will. Nothing could be further from the truth. First, one needs constant reminders that the fact that the state considers anything to be valuable or valueless is no reason for anything. Only its being valuable or valueless is a reason. If it is likely that the government will not judge such matters correctly then it has no authority to judge them at all. Secondly, the autonomy-based doctrine of freedom rests primarily on the importance of autonomy and value-pluralism. Autonomy means that a good life is a life which is a free creation. Value-pluralism means that there will be a multiplicity of valuable options to choose from, and favourable conditions of choice. The resulting doctrine of freedom provides and protects those options and conditions. (Ibid., p. 412)

In fact Raz takes great care interpreting the harm principle to include 'depriving a person of opportunities or of the ability to use them' and 'frustrating his pursuit of the projects and relationships he has set upon' (Ibid., p. 413). The perfectionist state does impose a morality. But it is not a restrictive morality which limits the kinds of lives, or understandings of well-being, to a few options; or in the case of sexuality, one option of heterosexuality. Instead the state enforces a morality which is solely based upon respect for individuals' well-being:

Respect for persons requires concern for their well-being. It calls for a proper perception of the importance of agency reason. This means a conception of well-being assigning a central role to the agent's own



activities in shaping his well-being. An autonomy-based morality is not only consistent with these precepts, it goes further in demanding that people should be allowed freely to create their own lives. This is not only consistent with perfectionism. It requires it. It calls for the creation of conditions of valuable autonomy through the pursuit of perfectionist policies. (Ibid., p. 426)

It is Raz's intention therefore that perfectionism lead not to moral conservatism but to value-pluralism because that is the only way the state can show respect for individual well-being. So while questions may remain about what Raz himself believes to be 'morally repugnant', the Razian framework of autonomy-based freedom establishes moral repugnance as that which deprives one of opportunities or frustrates the pursuit of projects and relationships important to individual well-being.

The lack of specificity of meaning also leads to questions concerning the interpretation of harm. Raz does note the ambiguity surrounding the definition of harm: 'It is clear that supporters of the harm principle are also concerned with the prevention of offence and pain. It is not clear whether they extend it to encompass all forms of hurting or adversely affecting people' (Ibid., p. 414). And, as noted, Raz himself fails to clarify every case which he believes may or may not cause harm. Nevertheless, again we can glean some guidelines for definition from the general framework supporting autonomy. 'Roughly speaking,' Raz continues, 'one harms another when one's action makes the other person worse off than he was, or is entitled to be, in away which affects his future well-being' (Ibid.). But how might this broad definition be relevant to discussion concerning sexuality? First, I have argued that the state harms gay and lesbian, or non-heterosexual, citizens by not providing for an adequate range of options for determining well-being, particularly sexual identity. I return to this point below. Second, it could be argued from this general definition that sexual abuse in the form of rape, or sex with those not of a rational age or nature, causes harm because it not only involves physical and emotional harm, but also because it affects the future well-being of the individual. Additionally, since Raz does not appear to have the same affiliation with the heterosexual family as Rawls, it could be reasoned that this definition of harm applies regardless of the traditional understanding of wife and children as property, thereby applying the definition of harm without respect for a public/private divide. Finally, I want to note that the emphasis on well-being as defined by the individual could lead to a rather interesting understanding of s/m sex as not causing harm. Raz states that 'injury to the person reduces his ability to act in ways which he may desire' (Ibid., p. 413). Now while there is a strong case that s/m sex could affect the future well-being of the individual or that it causes physical and emotional injury, there

does seem to be a door open here to make the argument that if one decides to participate in s/m sex, then the injury incurred is actually enabling her or his ability to act in ways which she or he may desire.

Obviously this final case stands in need of further inquiry. Yet one point can be clearly understood. Raz does not provide a definition of harm, or of moral repugnance, simply because that is not his central concern. Those moral debates will continue, and indeed the Razian framework provides ample justification for a society of value-pluralism that would enable those debates to continue. But what is most important, and, it seem, of immediate concern for Raz is to ensure that the state respect the individual's interpretation of well-being by providing the conditions of autonomy and in doing so that it recognise the significant role of value-pluralism in both respecting diverse communities and different individuals.

This leads to a final area that may need further philosophical inquiry. It could be said that since Raz acknowledges that the state does not have to provide for all options, or that it has to provide for morally repugnant ones, how can one be sure that he would advocate state support for a range of sexual identities? In the above sections, I needed to distinguish between what Raz himself might or might not delineate as harm or moral repugnance and the guidelines that could be found in the Razian framework. That is not necessarily the case here. While he does not state explicitly that homosexuality should be an option provided for by the state, he does acknowledge that homosexual relationships are being created as social forms and that these are intrinsically valuable because they contribute to the well-being of those individuals. In a passage that acknowledges the role of social forms as limiting the options available in society, Raz writes:

One cannot have an option to be a barrister, a surgeon, or a psychiatrist in a society where those professions, and the institutions their existence presupposes, do not exist. While this will be readily acknowledged, it is sometimes overlooked that the same is true of the options of being an architect or of getting married. It is true that one need not live in a society at all to design buildings regularly, or to cohabit with another person. But doing so is not the same as being an architect or being married. An architect is one who belongs to a socially recognised profession. In many countries a homosexual can cohabit with, but cannot be married to his homosexual partner, since to be married is to partake of a socially (and legally) recognised and regulated type of relationship. Homosexuals cannot do that if their society does not recognise and regulate a pattern of relationship which could apply to them. They can imitate some other recognised

relationship. But essentially they have to develop their relations as they go along, and do not have the option of benefiting from existing social frameworks.

At least some of the social conditions which constitute such options are collective goods. The existence of a society with a legal profession or with recognised homosexual marriages is a collective good, for the distribution of its benefits is not voluntarily controlled by anyone other than the potential beneficiary. In a society where such opportunities exist and make it possible for individuals to have an autonomous life, their existence is intrinsically valuable. (1986, pp. 205-206)

So in this case, Raz does state explicitly that the existence of this option is intrinsically valuable as a collective good since it provides the conditions needed for the development of well-being. Unsurprisingly then, the Razian framework supports this position. Outlining the criteria of the adequacy of options Raz states: 'They should include options with long term pervasive consequences as well as short term options of little consequence, and a fair spread in between. We should be able both to choose long term commitments or projects and to develop lasting relationships and be able to develop and pursue them by means which we choose from time to time. It is intolerable that we should have no influence over the choice of our occupation or of our friends' (Ibid., p. 374). Later he clarifies that autonomy and value-pluralism depend upon the adequacy of the range of options: 'If all the choices in life are like the choice between two identical-looking cherries from a fruit bowl, then that life is not autonomous' (Ibid., p. 398). He continues by emphasising that the range of options must not only be between one which is considered morally good and another which is not but that 'the options must include a variety of morally acceptable options'. This is the very heart of the value-pluralism necessary for autonomy. (Ibid.) It is therefore reasonable to assume that Raz, and the Razian framework, would support the 'option' of homosexuality and that value-pluralism would necessitate a range of 'options' for determining one's well-being, particularly sexual identity.

### An Agenda for the Future

I began this thesis by stating that the movement of gay and lesbian activism onto the mainstream political agenda has been accompanied by, or a result of, a change in the language activists use in making demands. The revolutionary cry for liberation has been replaced by rational arguments for rights, justice, or most often in Britain,

equality. Yet while this language may indicate the maturing of the sexual politics movement it may also, and probably most likely, signals the acknowledgement that in a western democratic culture political goods can be purchased only by bargaining in the native tongue of a liberal democracy. And such a strategy has proven to be rather successful in the past few years. The age of consent has been lowered in Britain, many businesses now include 'sexual orientation' in their equal opportunities policies, and recently a judge in Manchester granted legal recognition, similar to that of an step-parent, to a non-biological lesbian parent.

This thesis then is not accusing activists of not making progress, or that the progress being made is necessarily in the wrong direction. Instead it is concerned that in using this language little thought has been given to the way in which liberal political theorists actually define concepts such as equality and justice. And the definitions found in contemporary liberal theory are positioned within frameworks which do not necessarily justify, or lead to, the kinds of changes activists demand. For example, as we have seen in chapter three, appeals to justice may be interpreted as a 'heterosexual justice' which marginalises or criminalises non-heterosexual identities. These kinds of difficulties arise as a result of at least three epistemological inconsistencies. First, liberal political philosophers tend to conceptualise sexuality as a private moral choice rather than as part of individual identity. Since identity is predominantly defined by immutable characteristics, it proves difficult to justify rights claims. Second, the frameworks for ensuring equal concern and respect, because they are based on a principle of state neutrality, are not able to easily justify non-discrimination policies. Dworkin's approach leaves claims for respect to be decided by the internal preferences of the majority and Rawl's political liberalism allows the majority to enforce its moral beliefs without recourse for the minority. Third, the neutral, or anti-perfectionist, state cannot actively promote the conditions needed for autonomy. Therefore the options available in society are limited by the morality of the majority with the state either re-enforcing that morality or failing to provide for moral pluralism. I have argued that, in meeting the criteria of respect, Raz answers these inconsistencies by (1) offering a concept of well-being that can incorporate sexuality regardless of aetiology; (2) interpreting harm so that diverse understandings of well-being cannot be grounds for discrimination; (3) positing autonomy-based freedom as a moral doctrine for political action that requires the state to secure the conditions for autonomy and pluralism.

This Razian autonomy-based freedom can make two significant contributions to gay and lesbian, or sexual, politics. First, it offers a framework for theorising the demands of the Gay and Lesbian Agenda outlined in the introduction. It requires: a

range of options for interpreting well-being which could provide a direct challenge to 'family policy' and/or 'heterosexual justice'; a prioritising of respect for the individual's understanding of her or his own well-being, including sexuality; a notion of harm which includes harm caused by the state by not providing the conditions for autonomy and pluralism. Second, because the Razian framework prioritises autonomy and pluralism, it makes room for those wishing to participate in the political process regardless of their particularity, or difference. As long as autonomy is respected, pluralism is not only welcome, but should be promoted as a cultural and political ideal. The sexual politics movement, therefore, should likewise be based on a respect for autonomy and pluralism.

At a recent conference, I presented a version of chapter two of this thesis and tried to explain that the equality that was being demanded needed to be articulated carefully. Angela Mason, director of Stonewall, commented, 'Yes, but isn't that what we are already doing?'. And, my response is, quite simply, yes and no. 'We' may be conversing more with those in power, and some demands are beginning to be heard. But I am ever-mindful of that 'we'. For example, it is the policy of Stonewall to address only those issues which concern 'gays and lesbians' - sometimes this includes 'bisexuals', sometimes it does not. They are not, as a matter of policy, concerned with issues which can be seen to overlap with other interest groups, for example class or race. Both Stonewall and OutRage have been accused of being 'exclusionary' - Stonewall as a middle-class predominantly white group and OutRage as a gay men's group. Whether or not this is the case, and I do not think it is necessarily their intention, the accusation does hit at one of the most significant issues in sexual politics.

'We' are a community of difference. And often one that, in our attempt to challenge the face of heterosexism, fail to see our own faces of racism, classism, bi-phobia, etc. Gloria Anzaldua reflects upon the term lesbian in this way: 'I think of lesbians as predominantly white and middle-class women and a segment of women of color who acquired the term through osmosis much the same as Chicanas and Latinas assimilated the word "Hispanic". When a "lesbian" names me the same as her she subsumes me under her category. I am of her group but not as an equal, not as a whole person - my color erased, my class ignored. Soy una puta mala, a phrase coined by Ariban, a tejena tortillera. "Lesbian" doesn't name anything in my homeland' (1991, pp. 249-250). And Clare Hemmings notes the demonisation of bisexuals as 'double agents' within the 'gay and lesbian movement' stating that 'to insist on a definition of bisexuality, as some lesbians and gay men have done, denies the way in which bisexuality already has been, and is, shaping the discourse of sexual politics and theory' (1993, p. 118). The Razian framework prioritises the

need to listen to individuals as they define themselves, and to accept that pluralism, to respect it, even to promote it.

Sexual politics is, in this way, suffering from the same ailments as the whole of contemporary politics. The mobility of people and cultures has led not to an assimilationist melting pot or to a pluralist ideal society, but instead to a world of the 'moral majority' and 'ethnic cleansing'. Weeks captures the immediacy of current politics: 'on the one hand we have a call to respect absolutely the rights of a specific community to organise its own way of life, regardless of the traditions of the wider community as a whole ... on the other hand, there is a sort of despair of the challenge of diversity' (1991, pp. 193-194). Elsewhere he argues that this necessitates two principles for contemporary politics: 'the need positively to support and encourage diversity in the interests of human development as a whole' and to recognise a 'cluster of values (democracy, affirmation of rights, protection of minorities) which act as guarantees of moral pluralism' (1993, p. 208). Continuing he adds that:

It involves *recognition*, that other people's ways of life are our concern, even if we do not live them ourselves. It suggests a common concern with protecting and enhancing the lives of others, without violating the other's negative freedom, the freedom from interference. It also means one should be free to choose between different values, different identities and communities. (Ibid.)

It is this recognition, this concern, this respect, that is offered in the Razian framework more than any other in contemporary liberal theory. Furthermore, since Raz believes that 'personal freedom, when understood as presupposing value-pluralism and as expressing itself in personal autonomy, can and should be promoted by political action', the perfectionist framework not only justifies the extension of political goods to non-heterosexual citizens, it requires such an extension. It is a freedom which goes beyond the cry for Liberation, towards an understanding of the political and social structures required to make freedom more than a political ideal, but a guarantee of the conditions of respect for autonomy and pluralism. That is not just a Gay and Lesbian Agenda but a political agenda for all.

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