

## Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada

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### I. INTRODUCTION

Canada has a long and illustrious history of censorship. Since 1867, it would seem that a defining characteristic of Canadian national identity has been to censor, particularly at our borders, to make sure that material that would “deprave and corrupt” was not permitted entry into our country. The censorship of gay and lesbian<sup>1</sup> materials is of a slightly more recent vintage, largely paralleling the rise of the gay and lesbian liberation movement in the 1970s. This is not to say that gay and lesbian themed material was not censored before the 1970s. It was. But the heyday of gay and lesbian censorship follows the emergence of the gay and lesbian liberation movement in the 1970s and 1980s. In this essay, I review this history of censorship, focusing on both customs censorship and criminal obscenity prosecutions. I argue that despite many legal defeats, the censorship of gay and lesbian sexual representations in Canada failed; indeed it failed precisely by its own internal contradictory nature. Censorship controversies, I argue, represent a site of public contestation over legitimate and illegitimate speech, and more specifically, that censorship controversies over sexual speech represent a contestation over sexual normativity. Relying on the new censorship studies literature, I argue that each moment of censorship mobilized resistance, making the story of censorship one of resistance and of redrawing the borders of legitimate sexual speech. By the 2000s, gay and lesbian sexual representations had crossed those borders, and their non-heterosexuality alone was no longer sufficient to cast them as non-normative and censorable.

I further argue that although the intense censorship struggles over gay and lesbian sexual representations have subsided, censorship continues. Non-normative sexualities, such as those with a sadomasochist fetish theme, continue

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1. Throughout this article, I use the term “gay and lesbian”, not LGBT. This is intentional for a number of reasons. First, the early censorship struggles were really about gay and lesbian – not bisexual or transgender representations. Second, and more importantly, the legitimacy that has been acquired for gay and lesbian sexual representations does not equate with legitimacy for transgender representations. Gay men and lesbians have achieved a degree of legitimacy and citizenship that is simply not the case for transgendered persons. The story that I tell here then is a specific story of gay men and lesbians, and I do not want to pretend to be telling a broader story that remains to be told.

to be targeted at our borders. The location of censorship battles has also shifted to a new, more ubiquitous censor – online, social media corporate censorship, from the sexual representation policies of Facebook to Apple’s emerging forms of “i-Censorship”. Gay and lesbian sexual expression still does get caught up in the web of this censorship, as do many forms of sexual expression. Yet in the digital public sphere, the increasing normativity of gay and lesbian sexual expression and the mobilizing nature of censorship create the conditions for censorship failure. It is a site of censorship that is not yet well understood; much of it remains locked in confidential algorithms, allowing what we do see and do not see to remain in a kind of digital closet. But, as I will argue, when the censorship of gay and lesbian sexual expression comes to light, it creates the conditions for its own failure.

## II. RETHINKING CENSORSHIP

In recent years, censorship studies have challenged the traditional view of censorship as the deployment of repressive state power.<sup>2</sup> Scholars, influenced by Foucault and Bordieu, have sought to focus on the productive nature of censorship, seeing it as more diffuse and quotidian. For some, like Michael Holquist, censorship is ubiquitous: “To be for or against censorship as such is to assume a freedom no one has. Censorship *is*.”<sup>3</sup> While others worry that the claim of censorship’s ubiquity flattens important distinctions between types and forms of censorship,<sup>4</sup> they nonetheless welcome the reframing of censorship to include its productive and constitutive capacities.<sup>5</sup>

Yet, this new censorship scholarship presents a challenge to the more traditional terrain of state censorship. As Post describes, how do we “preserve the analytic force of the new scholarship without sacrificing the values and concerns of more traditional accounts. Recognizing always the pervasive, inescapable and productive silencing of expression, can we say anything distinctive about the particular province of what used to define the study of censorship: the ‘direct control’ of expression by the state?”<sup>6</sup> There are, I believe, a number of insights that this new scholarship can bring to this form of state censorship.

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2. See generally Michael Holquist, *Corrupt Originals: The Paradox of Censorship*, 109 PUBL’NS OF THE MODERN LANGUAGE ASS’N, 14 (1994); Robert Post, *Introduction*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION (Robert Post ed., 1998); Richard Burt, *Introduction: The New Censorship*, in THE ADMINISTRATION OF AESTHETICS: CENSORSHIP, POLITICAL CRITICISM AND THE PUBLIC SPHERE xi, xiii (Richard Burt ed., 1994); Sophie Rosenfeld, *Writing the History of Censorship in the Age of Enlightenment*, in POSTMODERNISM AND ENLIGHTENMENT: NEW PERSPECTIVES ON 18TH CENTURY FRENCH INTELLECTUAL HISTORY (Daniel Gordon ed, 2001); HELEN FRESHWATER, TOWARDS A REDEFINITION OF CENSORSHIP in CRITICAL STUDIES: CENSORSHIP & CULTURAL REVOLUTION IN THE MODERN AGE (Beate Muller, ed., 2003).

3. Holquist, *supra* note 2, at 16.

4. Post, *supra* note 2, at 4.

5. See generally FRESHWATER, *supra* note 2 (providing an example of reaction of the academy to the reformulation of the concept of censorship).

6. Post, *supra* note 2, at 4.

First, it refocuses attention to the multiple and contradictory effects of censorship. Holquist himself, for example, a proponent of the “censorship is everywhere” view, describes an important objective of the new scholarship, as seeking “unsentimentally to understand why censors never succeed (or at least never succeed for long) in totally instrumenting their desire to purge.” He highlights the very paradoxical nature of censorship in which each act “is riven in its heart by a fatal division: the prohibition that separates what is banned from what is permitted also fuses them.”<sup>7</sup> Others have similarly sought to highlight this paradoxical nature of censorship. Judith Butler, who is amongst those who have stretched the meaning of censorship, has argued in relation to explicit censorship that “[s]uch regulations introduce the censored speech into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt.”<sup>8</sup> Censorship in effect performs its own contradiction – uttering the very words or images that it says should not be uttered.

Second, and related, this scholarship can help to reframe state censorship as productive rather than simply repressive. As I have argued in my more recent work, censorship “constitutes [a] site of public contestation over legitimate and illegitimate speech.”<sup>9</sup> Rather than operating as a simple state repressive power, censorship operates productively, producing the space for its contestation, and moving the offending speech into it. Butler observes that censorship is, in this way, “also formative of subjects and the legitimate boundaries of speech.”<sup>10</sup> Although arguments about the constitutive nature of censorship can easily extend, as Butler herself does, into the ubiquitous “censorship is everywhere” position, it can also, I believe, be brought to bear on the more traditional terrain of state censorship. State censorship constitutes the very space for the contestation of the speech. In so doing, it produces the conditions its own resistance. Along the lines of Foucault’s critique of the repression hypothesis (though not going so far as his injunction that “we must . . . conceive of sex without the law”<sup>11</sup>), traditional censorship should be reframed as a discursive deployment of power that produces multiple effects, including multiple forms of resistance.

In the past, much of my own work on censorship has focused primarily on the regulatory impulse to censor; on the extent to which state officials pursued

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7. Holquist, *supra* note 2, at 17.

8. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 130 (Maureen MacGrogan ed., 1997). Butler focuses largely on constitutive speech, and censorship in the very acts of speech, constituting subjects in and through what can and cannot be uttered. While most of *Excitable Speech* focuses on these ideas of implicit censorship, she does in passing make these insightful comments on the nature of explicit censorship.

9. BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 47 (Amanda Moran ed., 2007).

10. BUTLER, *supra* note 8, at 132.

11. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* 91 (Robert Hurley trans., Vintage Books 1990) (1978).

repressive censorship policies informed by a particular sexual normativity.<sup>12</sup> My work was an intervention in the censorship battles of the 1990s. I was not self-consciously overstating state repression, nor disavowing Foucault's repression hypothesis critique. But, in the middle of the censorship wars, I was an academic and activist, an aspiring public intellectual, who was arguing against both censorship in general and the censorship of gay and lesbian materials in particular. In this article, I seek to focus instead, in a more Foucauldian-friendly way, on the extent to which this censorship is producing, constituting and mobilizing the sexual subjectivities that challenge it. As an anti-censorship advocate, one perhaps cannot help but inhabit the position of the "[p]rogressive advocate[]" of depression."<sup>13</sup> Yet, I seek to shift my focus, not fully displacing the state, but highlighting instead this censorship as a site of resistance and discursive struggle over sexual normativity.

### III. CENSORSHIP LAWS

I first turn to the laws of censorship. In Canada, there have been multiple sites of state censorship: criminal law, customs law, theatre law, to name the most prominent. In this section, I highlight the legal provisions that have been deployed to censor gay and lesbian materials, thereby setting the legal stage for the subsequent section that focuses on specific gay and lesbian censorship battles.

#### A. Customs Censorship

Since the nineteenth century, customs officials have routinely scrutinized, seized and destroyed printed materials at Canada's borders.<sup>14</sup> The targets changed over the years, from the novels of Zola, de Maupassant and Balzac at the turn of the century, to those of Joyce and Lawrence in the 20s, and to pulp novels in the 50s. There were some gay- and lesbian-themed titles amongst the

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12. See generally BRENDA COSSMAN, *CENSORSHIP AND THE ARTS: LAW, CONTROVERSY, DEBATE, FACTS* (1995) [hereinafter COSSMAN, *CENSORSHIP*] (presenting a historical analysis of censorship in the arts from a legal perspective, and discussing important cases in detail); BRENDA COSSMAN ET AL., *BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION* (1997) [hereinafter COSSMAN ET AL., *BAD ATTITUDE/S*] (critiquing the censorship of sexual others from a legal, cultural, gay, and philosophical standpoint in light of the 1992 Canadian Supreme Court decision of *R. v. Butler*); Brenda Cosman, *Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler*, 36 U. BRIT. COLUM. L. REV. 77 (2003) [hereinafter Cosman, *Disciplining the Unruly*] (arguing that the Canadian Supreme Court has attempted to discipline sexual objects "by constituting these sexual objects within the law and reinforcing the outlaw status of those who continue to insist on the performance of bad sex").

13. Carolyn J. Dean, *The Productive Hypothesis*, 33:3 HIST. & THEORY 271, 271 (1994).

14. See generally CANADA CUSTOMS ACTS, TARIFF AND REGULATIONS (Quebec: Stewart Derbyshire & George Desbarats 1847). Censorship at Canada's borders dates back to 1847 when the Customs Act was enacted, prohibiting the importation of "books and drawings of an immoral or indecent character". In 1859, "paintings and prints" were added to the list of prohibited items. This law was included in legislation passed in the first session of Parliament in 1867, adding "printed papers" and "photographs". The provision remained in effect for almost 120 years.

banned books: Radcliffe Hall's *The Well of Loneliness* made the list in 1928, and Jean Genet's *The Thief's Journal* was added in 1959. Pulp novels with a gay and lesbian theme were also seized in the 50s. But these were relatively isolated events, as there simply was not that much explicitly gay and lesbian literature out there.

That began to change in the 1970s. This period witnessed a broader debate over pornography and censorship. A feminist critique of pornography as constitutive of women's subordination entered the public sphere, while, at the same time, the adult film and print industry proliferated. This pornography was becoming a major target of customs censorship, with increasingly large amounts of material seized at the borders.<sup>15</sup> Gay and lesbian censorship, and its resistance, intensified against the backdrop of these broader social and legal contestations over sexual representations. By the late 1970s, gay and lesbian material came under heavy scrutiny.<sup>16</sup> The timing is not coincidental: the 1970s witnessed the emergence of the gay and lesbian liberation movement, and, with it, the proliferation of gay and lesbian presses, magazines, books, poetry and pornography. As gay and lesbian liberation became more visible, so too did efforts by the government to censor this material, both at our borders and in our courts.

In 1985, the customs law, which allowed the censorship of material that was "immoral or indecent", was found unconstitutional.<sup>17</sup> But the federal government quickly amended the Tariff Act, replacing the words "immoral and indecent" with "obscenity", as defined by the Criminal Code.<sup>18</sup> The federal government also introduced a set of guidelines, the notorious Memorandum D9-1-1, which provided an extensive definition of material that was to be considered obscene. Section 6(a) prohibited the importation into Canada of goods which depicted or described sexual acts that appeared to degrade or dehumanize any of the participants, including "depictions or descriptions of anal penetration."<sup>19</sup> One provision targeted anal sex, prohibiting "depictions or descriptions of anal penetration."<sup>20</sup>

Section 9 of the Memorandum elaborated on the nature of the anal penetration prohibition, rather vividly illustrating the Foucauldian point about

15. See ROBERT CAMPBELL ET AL., *THE REAL WORLDS OF CANADIAN POLITICS: CASES IN PROCESS AND POLICY* 136 (1st ed., 1989) (noting that by 1980, some 35,000 titles were on Canada Custom's index of prohibited materials). Rule 15.

16. Chris Bearchell, *Art, Trash & Titillation: A Consumer's Guide to Lezzy Smut*, *THE BODY POLITIC*, May 1983, at 29, 33 ("[t]he Canadian legal system's record of prosecuting representations of lesbianism is, at least from the cops' perspective, quite impressive . . . the bulk of our own material is still so restricted in its distribution.").

17. *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85, para. 21–28 (Fed. Ct.) (striking down the provisions of the Customs Act prohibiting the importation of "immoral or indecent" materials on the grounds the words were overly vague restriction on the freedom of expression).

18. *Customs Tariff*, S.C. 1987, c.49.

19. Memorandum D9-1-1, 6(a) (Apr. 13, 1987).

20. *Id.*

the productive power of sexual regulation. Section 9(a) provided that materials “intended primarily to provide advice on how the risk of AIDS or other sexually transmitted infections can be minimized” were not prohibited.<sup>21</sup> Section 9(b) provided that “goods which communicate in a rational and unsensational manner information about a sexual activity that is not unlawful and in which the illustrations are not prurient in nature are not to be prohibited. For example, goods which communicate in such a manner information about anal penetration committed in private between a husband and wife or between two consenting adults will be released.”<sup>22</sup> Section 9(c) provided that sex toys and sex aids should be considered to be obscene, and that goods should not be prohibited based on advertisements, including specific products such as “Anal lube”.<sup>23</sup> Section 9(d) provided that representations that “merely suggest that anal penetration is being performed” are not prohibited.<sup>24</sup> Admittedly, it was not only the anal sex provisions that provided detailed elaborations of prohibited sexual representations: the Memorandum as a whole was a remarkable performance of the contradictory nature of censorship: speaking the very forms of illegitimate speech that are not to be spoken.

## B. Criminal Censorship

Censorship of gay and lesbian materials through criminal law is primarily a story of the law of obscenity. The first obscenity provision was introduced in Canada in the first Criminal Code of 1892, in which section 179 prohibited the public sale or exposure of any obscene book or printed matter that tended to corrupt morals.<sup>25</sup> Like the English law on which it was based, the Criminal Code provision did not define obscene or disgusting, but instead left it to the courts. The courts in turn followed the English precedent of *R. v. Hicklin*: whether the material in question tended to “deprave and corrupt those whose minds are open to such immoral influences.”<sup>26</sup> This law remained in place, with few obscenity trials, until 1959, when a new legislative definition of obscenity was introduced into the Criminal Code. Obscenity was defined as any material the “dominant characteristic” of which was “the undue exploitation of sex.”<sup>27</sup> This definition had its first major judicial interpretation by the Supreme Court of Canada in *R. v. Brodie* involving the criminal prosecution of D.H. Lawrence’s novel *Lady Chatterley’s Lover*.<sup>28</sup> Judson J., writing for the majority, held that the question of whether material constituted the “undue exploitation of sex” was to

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21. *Id.* at 9(a).

22. *Id.* at 9(b).

23. *Id.* at 9(c).

24. *Id.* at 9(d).

25. Criminal Code, 1892, 55–56 Vict., c. 29, § 179(b). Section 179(b) also prohibited the public exhibit of any “disgusting object”. *Id.* Section 180 prohibited the use of the mail to post any obscene or immoral materials. Criminal Code, 1892, 55–56 Vict., c. 29, § 180.

26. *R. v. Hicklin* (1868) L.R. 3 Q.B. 360, 371 (Can.).

27. Criminal Code, R.S.C. 1985, c. C-46, s. 163(8).

28. *See generally* *R. v. Brodie* [1962] S.C.R. 681 (Can.).

be determined by the community standards test<sup>29</sup>

The criminal definition of obscenity remains unchanged, contained now in section 163(8) of the Criminal Code.<sup>30</sup> There were several failed attempts to amend the provisions in the 1980s: Bill C-114 in 1986 and Bill C-54 in 1987 both sought to toughen obscenity provisions, but were both defeated.<sup>31</sup> It was at this time that some of the feminist critique – of obscenity as degrading and dehumanizing towards women – began to enter the legal discourse. Although Bill C-54 was defeated, the language was picked up by the Supreme Court in *R. v. Towne Cinema* (1985).<sup>32</sup>

In 1992, the Supreme Court again rewrote the test for obscenity in *R. v. Butler*.<sup>33</sup> According to the Court, pornography could be classified into three categories: (1) sex with violence, (2) sex without violence but that is degrading and dehumanizing and (3) sex without violence, that is not degrading and dehumanizing and does not involve children.<sup>34</sup> The Court held that material in the first category will almost always be held to be the undue exploitation of sex; material in the second category will be held to be obscene, if it is found to cause harm, such as harm towards women; materials in the third category will not generally be held to be obscene.<sup>35</sup> The classification of materials will continue to be done by the community standards test<sup>36</sup>, and the final step will be a determination of whether the materials have any artistic merit.<sup>37</sup>

Many feminists heralded the decision as upholding women's equality, while civil libertarians, artists and many gay men and lesbians denounced it, predicting instead that it would be used against sexual minorities. As the story of gay and lesbian censorship and resistance below demonstrates, the latter group was right. Many critics argued that the heterosexual focus of the analysis of pornography in *Butler* – men watching heterosexual pornography causing harm towards women – should have made it of questionable relevance to gay and lesbian representations.<sup>38</sup> The courts disagreed, and the *Butler* test came to be used against gay and lesbian representations, in both the criminal and the

29. *Id.* at para. 54.

30. Criminal Code, R.S.C. 1985, c. C-46, s. 163(8).

31. Bill C-114, An Act to Amend the Criminal Code and the Customs Tariff, 1st. Sess., 33d Parl., 1984-1985. Bill C-54, An Act to Amend the Criminal Code and other Acts in consequence therefor, 2d Sess., 33d Parl., 1986-1987.

32. *R. v. Towne Cinema* [1985] 1 S.C.R. 494, 494 (Can.).

33. *R. v. Butler*, [1992] 1 S.C.R. 452, 455 (Can.). *R. v. Butler* was a constitutional challenge to section 163(8) of the Criminal Code, on the basis that it violated the right to freedom of expression in section 2(b) of the Charter. The Supreme Court began by reviewing and revising the test for obscenity under section 163(8). It then proceeded to uphold the provision, concluding that although it was a violation of freedom of expression, it was a reasonable limit within the meaning of section 1 of the Charter. In particular, the Court focused on the harm of pornography, namely the harm that pornography does to women, as justifying the violation of freedom of expression.

34. *Id.* at para. 59. (Can.).

35. *Id.* at para. 62.

36. *Id.* at para. 136–37.

37. *Id.* at para. 113.

38. COSSMAN ET AL., *BAD ATTITUDE/S*, *supra* note 12.

customs context. The contested question, over and again, was whether a particular representation was “degrading and dehumanizing.”

#### IV. THE CENSORSHIP WARS

Both the criminal and customs censorship laws were deployed against gay and lesbian publications. Beginning in the 1970s, alongside the rise of the gay and lesbian movement and the proliferation of gay and lesbian publications, police and customs officials sought to censor these publications on the basis of obscenity. The major gay and lesbian censorship battles were fought by leading gay and lesbian organizations: *The Body Politic*, Glad Day Bookstore and Little Sister’s Bookstore. As I will argue, each act of government censorship created the conditions of its own failure by producing the space for its contestation, and moving the offending speech into it. Censorship mobilized resistance: as government officials tried to draw lines around legitimate speech through customs and criminal censorship laws, these institutions fought back. They mobilized support and broader resistance within the gay and lesbian community. The legal record is mixed: they seem to have lost as many cases as they won. But, to the extent that these censorship battles are viewed as discursive contestations over the legitimate speech, the gay and lesbian anti-censorship actors succeeded in redrawing the lines of public discourse and legitimate sexual representation. Gay and lesbian sexual representations were brought across the lines, into the realm of good (or at least legitimate) sex.

##### A. *The Body Politic*

Nothing highlights the political prosecution of an emerging gay and lesbian movement better than the criminal prosecutions of *The Body Politic*, founded in 1971 and described as Canada’s gay newspaper of record. *The Body Politic* (“*TBP*”) office was raided by police on December 30, 1977. On January 5, 1978, *TBP*’s officers, Ken Popert, Ed Jackson, and Gerald Hannon were charged under sections 159 and 164 of the Criminal Code with “possession of obscene material for distribution” and “use of the mails or the purpose of transmitting indecent, immoral or scurrilous materials” in relation to Gerald Hannon’s, “Men Loving Boys Loving Men” article.<sup>39</sup> The charges against *TBP* immediately became a site of protest and resistance, as gay and lesbian activists organized protests and set up legal defense funds.<sup>40</sup> Jane Rule began writing for *TBP*.<sup>41</sup> More mainstream figures also came to *TBP*’s defense: the newly elected Mayor of Toronto, John Sewell, attended a Free the Press rally for *TBP*, where he made a speech calling for the protection of gay and lesbian rights; June Callwood agreed to testify for

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39. EDWARD JACKSON & STAN PERSKY, *FLAUNTING IT!: A DECADE OF GAY JOURNALISM FROM THE BODY POLITIC; AN ANTHOLOGY* 138 (1982).

40. TOM WARNER, *NEVER GOING BACK: A HISTORY OF QUEER ACTIVISM IN CANADA* 109 (2002).

41. See Jane Rule, *Teaching Sexuality*, *THE BODY POLITIC*, June 30, 1979 available at [xtra.ca/public/viewstory.aspx?AFF\\_TYPE=1&STORY\\_ID=3979&PUB\\_TEMPLATE\\_ID=1](http://xtra.ca/public/viewstory.aspx?AFF_TYPE=1&STORY_ID=3979&PUB_TEMPLATE_ID=1). (announcing that Jane Rule would be writing a column in the bio that ran with one of her articles)



their defense.<sup>42</sup>

The *Body Politic* trial began in January 1979, and they were acquitted on February 14, 1979.<sup>43</sup> Judge Sydney Harris found the *TBP* to be “a serious journal of news and opinion,” and that the government had failed to establish that the article was obscene.<sup>44</sup> Attorney General Roy McMurtry appealed, and, in 1980, the county court set aside the acquittal and ordered a new trial.<sup>45</sup> *TBP* appealed the county court ruling, but the Ontario Court of Appeal upheld the decision setting aside the *TBP* acquittal.<sup>46</sup> *TBP* sought leave to appeal to the Supreme Court of Canada, but was refused.<sup>47</sup> On November 24, 1981, a new summons was served on Popert, Jackson and Hannon. Just weeks before they went back to trial in May 1982, the Toronto morality squad raided their offices again, and on May 12, all nine members of *TBP* collective were charged with publishing obscene material, this time for an article about fisting entitled “Lust with a Very Proper Stranger”.<sup>48</sup> While the Hannon article had been a highly provocative and controversial one about intergenerational sex, the second set of charges helped confirm that the charges were an attempt at censoring gay sexual speech.

*The Body Politic* was acquitted on both charges. The second trial of “Men Loving Boys” resulted in a second acquittal in June 1982.<sup>49</sup> The Court held that although the article advocated pedophilia, the advocacy alone did not make it immoral or indecent within the meaning of section 159.<sup>50</sup> On November 1, all nine members of the collective went to trial on “Lust with a Very Proper Stranger” article. All nine were acquitted on the same day.<sup>51</sup> The acquittal was not appealed.

These were costly, protracted legal affairs. Moreover, they were directed at the major gay and lesbian newspaper in Canada, a newspaper that was at the forefront of the burgeoning gay and lesbian liberation movement. Presses and bookstores, bars and bathhouses were proliferating, and so was their surveillance. It was a moment in time that saw gay bath houses and bars raided and charged, culminating in the infamous Toronto bathhouse raids on February 5, 1981, when close to 300 men were arrested at four bathhouses.<sup>52</sup> *The Body Politic* was hardly a neutral observer, but a participant of this movement, bearing witness to the violence done that night, mobilizing the outpouring of political

42. Rick Bébout, *Promiscuous Affections: A Life in the Bar, 1969-2000* (June 17, 2003), <http://www.rbebout.com/bar/intro.htm>.

43. *R. v. Pink Triangle Press* (1979), 45 C.C.C. 2d 385 (Can. Ont. Ct. J.).

44. *Id.* at para 9.

45. *R. v. Pink Triangle Press*, (1980), 51 C.C.C. 2d 485, 506 (Can. Ont. Ct. J.).

46. *Popert v. R.*, (1981), 58 C.C.C. 2d 505 (Can. Ont. Sup. Ct.).

47. *Popert v. The Queen*, [1981] 2 S.C.R. xi (Can.).

48. *See* Bébout, *supra* note 42.

49. JACKSON & PERSKY, *supra* note 39, at 147.

50. *Id.*

51. WARNER, *supra* note 40, at 116–17.

52. Nicki Thomas, *Thirty years after the bathhouse raids*, THESTAR.COM (Feb. 4, 2001), [http://www.thestar.com/news/gta/2011/02/04/thirty\\_years\\_after\\_the\\_bathhouse\\_raids.html](http://www.thestar.com/news/gta/2011/02/04/thirty_years_after_the_bathhouse_raids.html).

and legal resistance that followed.<sup>53</sup>

The prosecution of *TBP*, like the bathhouse raids, served to mobilize the gay and lesbian community, as well as its allies. The bathhouse raids were a defining moment in gay activism in Canada, politicizing and mobilizing a community like never before.<sup>54</sup> *TBP* became the major political voice of the emerging gay and lesbian rights movement. In many ways, *TBP* cut its political teeth on the obscenity charges: the members of the collective organized protests, raised money, engaged lawyers, and used the newspaper to do so. By the time of the bathhouse raids, *TBP* was, despite its size, best placed to initially lead the resistance. *The Body Politic* won. But the censorship of gay and lesbian material, particularly of sexual representations, was just beginning. Much of the targeting shifted to bookstores, with a particularly heavy hand to be played by Canadian Customs.

## B. Glad Day Bookstore

Glad Day Bookstore in Toronto, another hub of gay and lesbian organizing, devoted much time, energy and money to resisting censorship. Over the years, Glad Day took on a broad array of censors: customs, criminal, and the film review board. Like other gay and lesbian bookstores across the country, shipments of gay and lesbian material were routinely seized en route to the store.<sup>55</sup> Several times, Glad Day challenged these seizures in Court.<sup>56</sup> Several times, they lost.<sup>57</sup> In 1977, *Loving Man* and *Men Loving Men* were both seized by Canada Customs en route to Glad Day and deemed to be “immoral and indecent.”<sup>58</sup> Again and again, books were seized en route to the bookstore. Glad Day appealed some to court.<sup>59</sup> In a 1992 case, an Ontario Court upheld the seizures, finding each and every gay magazine, story and comic to be obscene.<sup>60</sup> The reasoning was a journey in pretty unsubtle homophobia, where the mere representation of gay sex was “degrading and dehumanizing” according to the *Butler* test.<sup>61</sup> The Court described each publication in two or three paragraphs, with one paragraph describing the nature of the representation and the second paragraph concluding with virtually no analysis that the representation was

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53. Ken Popert, *Our Communities Remade*, DAILY XTRA (Mar. 3, 2011, 7:00PM), [xtra.ca/public/National/Our\\_communities\\_remade-9830.aspx](http://xtra.ca/public/National/Our_communities_remade-9830.aspx).

54. *Id.* (“[stating ‘T]hese events transformed the gay and lesbian communities in this city. Toronto became one of just four cities in the world where gays and lesbians have risen up and physically confronted the authority of the state in the streets.’”).

55. Paul Trollope, *Customs Bans Five Gay Titles But Who Gets to Keep the Books?*, in *LESBIAN AND GAY LIBERATION IN CANADA: A SELECTED ANNOTATED CHRONOLOGY, 1976-1981* (Donald W. McLeod ed., 1982).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Glad Day Bookshop v. Deputy Minister of Nat’l Revenue (Customs & Excise)*, 1992 CarswellOnt 2665, para. 1 (Can. Ont. Ct. J.) (WL).

60. *Id.*

61. *Id.*

degrading, violated community standards, and constitute the undue exploitation of sex.<sup>62</sup> To the extent that the Court gave any reason for why the material is degrading, it was the absence “of real human relationship.”<sup>63</sup> For example, on *Spartan’s Quest*, Hayes J. concludes “[i]t is a sexual encounter without any real meaningful human relationship.”<sup>64</sup> About *Advocate Men*, a magazine with explicit representations of oral and anal sex, the Court stated that “[t]he description and activities are degrading and without any human dimension. The dominant characteristic is the undue exploitation of sex.”<sup>65</sup> While the Court stopped short of saying that it was the gayness that made the sex degrading, focusing instead on the absence of meaningful emotional relationships, it seemed as if no gay sexual representation could pass the test of good sex.

That same year, *Glad Day* came under criminal scrutiny. In April 1992, six weeks after the Supreme Court of Canada’s decision in *Butler*, the Toronto police seized the magazine *Bad Attitude*, a magazine of lesbian erotic fiction, and charged the store and its owner, with obscenity. The trial focused primarily on the fictional articles containing accounts of lesbian sadomasochist sex. The Court found the material to be obscene.<sup>66</sup> “This material flashes every light and blows every whistle of obscenity. Enjoyable sex after subordination by bondage and physical abuse at the hands of a total stranger.”<sup>67</sup> The Court insisted it had nothing to do with sexual orientation, saying that if one of the women was replaced with a man, everyone would agree the material would present a risk of harm (defined in obscenity law as harm towards women).<sup>68</sup> This move, which I have described as “heteroswitching”, was a remarkable attempt to erase the specificity of lesbian representations and simply insist that these materials were obscene.<sup>69</sup> *Glad Day* was guilty as charged. Despite the Court’s attempted insistence that sexual orientation had nothing to do with it, it was more than a little bit apparent that heterosexual pornography was rarely if ever being criminally prosecuted.

Indeed, the case came to represent a kind of high water mark of the problems with the test for obscenity post-*Butler*: it could and would be used against sexually marginal communities. *Glad Day* may have lost, yet there are ways in which the broader meaning of the case is one in which *Glad Day*, and lesbian sexual representations, may have won. It became its own cause célèbre of the censorship of gay and lesbian materials. Again and again, the case was given as an example of the ways in which the arbitrary *Butler* test for obscenity was subject to discriminatory interpretation against sexual minorities.

62. See generally *Glad Day Bookshop*, 1992 CarswellOnt 2665.

63. *Id.* at para. 77.

64. *Id.* at para. 81.

65. *Id.* at para. 104.

66. *R. v. Scythes*, [1993] O.J. No. 537 (Prov. Div.) (QL).

67. *Id.*

68. *Id.* at para. 9. Paris, J. stated that “If I replaced the aggressor in this article with a man there would be very few people in the community who would not recognize the potential for harm. The fact that the aggressor is a female is irrelevant because the potential for harm remains.”

69. COSSMAN ET AL., *BAD ATTITUDE/S*, *supra* note 12, at 127.

Glad Day launched yet another challenge to state censorship, this time, to film and video classification. Glad Day was charged with selling a gay porn video, *Descent*, which had not been reviewed by the Ontario Film Review Board.<sup>70</sup> Glad Day then challenged the provisions of the *Theatres Act* that required film and video classification.<sup>71</sup> In *R v. Glad Day Bookshops* (2004), Glad Day won, but it was also the end of the road: the challenge had cost more than \$100,000 and the energy stores of the small bookstore were exhausted.<sup>72</sup>

### C. Little Sister's Bookstore

Little Sister's Bookstore first tried to challenge the targeting of gay and lesbian materials by Canada Customs following the seizure of *The Advocate*, the gay news magazine, in 1987. They appealed the seizure, and brought a challenge to the constitutionality of customs censorship. However, in 1988, two weeks before the trial, Canada Customs did an about-face, and decided that the magazines were not obscene. They had, however, already destroyed the copies. Moreover, Little Sister's had lost its opportunity to challenge the constitutionality of the law and practice of custom censorship.

In 1990, Little Sister's tried again, bringing a constitutional challenge to Canadian Customs' right to censor materials. It argued that the law violated freedom of expression in section 2(b) of the Charter and that the practice of customs officials discriminated against gay and lesbian writers, readers and distributors, in violation of section 15 of the Charter.<sup>73</sup> The trial was postponed several times, but the case was eventually heard in the fall of 1994. Justice Smith of the British Columbia Supreme Court held, in January 1996, that the Customs Tariff did not violate the Charter.<sup>74</sup> However, the Court ruled that the practices of Canada Customs did in fact discriminate against gay and lesbian Canadians.<sup>75</sup> The factual record detailed the extent of this targeted censorship of gay and lesbian titles, en route to gay and lesbian bookstores.<sup>76</sup> The majority of the British Columbia Court of Appeal dismissed the appeal, holding that neither the law nor practice of Canada Customs was unconstitutional.<sup>77</sup> In the view of the majority, the material is censored because it was obscene, not because it was homosexual.<sup>78</sup>

Little Sister's appealed to the Supreme Court of Canada, where it was joined

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70. *R. v. Glad Day Bookshop Inc.* (2004) 239 D.L.R. 4th 119.

71. *Id.*

72. Katie Rook, *Gay Bookshop Gives Up the Fight*, THE GLOBE AND THE MAIL (Toronto), Jan. 25, 2005, at A10, available at <http://www.theglobeandmail.com/news/national/gay-bookshop-gives-up-the-fight/article974623/>.

73. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

74. *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [1996] 134 D.L.R. 4th 293 (Can. B.C. Sup. Ct.).

75. *Id.*

76. *Id.*

77. *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [1998] 160 D.L.R. 4th 385, para. 121–22 (Can. B.C.C.A.).

78. *Id.*

by EGALE, the Women's Legal Education and Action Fund, PEN Canada, the Canadian Civil Liberties Association, and the Canadian Conference for the Arts, which each intervened in support of the constitutional challenge. In 2000, the Supreme Court agreed with the trial court: the law was perfectly constitutional, but Canada Customs had unfairly targeted gay and lesbian materials.<sup>79</sup> But, the Court then pulled its punch: it gave no remedy. Canada Customs claimed to have made lots of changes to its administration in the intervening time. In the absence of more evidence, the Court was not prepared to conclude that the changes were inadequate.<sup>80</sup> The Court told Little Sister's that they could always launch another action if necessary. After 15 years, and a court record that Canada Customs had engaged in overzealous, targeted discrimination against gay and lesbian materials, Little Sister's was told to just trust Canada Customs. If they did not change their ways, the little bookstore could bring a third legal action.

The targeting continued. In 2002, Little Sister's filed a third case against Canada Customs for the seizure of two collections of gay adult comics. This time, the bookstore tried to do so through a special procedure that would force the government to pay its costs in advance. In 2007, the Supreme Court rejected their request.<sup>81</sup> Little Sister's lost, and this time, no funding meant no challenge. Little Sister's waved the white flag, in the face of ongoing harassment and discrimination.

The legal story is a mixed to negative one: Canada Customs has in fact targeted gay and lesbian representations, discriminated against gay and lesbian Canadians, and they should stop. However, the legislation itself was upheld, no remedy was provided, and, despite ongoing targeting, Little Sister's gave up in the face of exorbitant legal costs. Nevertheless, the legal results do not tell the whole story; indeed, it may not tell anything close to the important impact of Little Sister's challenge to customs censorship. Beginning with the trial and continuing up to the Supreme Court challenge, Little Sister's mobilized much of the gay and lesbian community in support of its legal case.<sup>82</sup> The gay and lesbian press, as well as significant dimensions of the mainstream press, covered the case in great detail.<sup>83</sup> The trial was a cause célèbre, with an extraordinary parade of

79. *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.).

80. *Id.* at para. 157–58.

81. *Little Sisters Book & Art Emporium v. Canada (Comm'r of Customs & Revenue Agency)*, [2007] 1 S.C.R. 38, 42 (Can.).

82. Fundraisers abounded, including benefit readings and screenings in Toronto, Vancouver, Guelph, and San Francisco. JANINE FULLER & STUART BLACKLEY, *RESTRICTED ENTRY: CENSORSHIP ON TRIAL* 38 (Nancy Pollak ed., 1995). In 1994, Janine and three friends went on a multi-city tour to raise money and awareness for the battle. *Id.* at 33–34. Perhaps the most inventive fundraiser was organized by American publisher Cleis Press, which produced an anthology of material seized but eventually cleared for entry into Canada called *Forbidden Passages: Writings Banned In Canada*. Ironically, Canadian printers initially refused to print it. *Printer Refuses Job for Lesbian Bookstore*, *TORONTO STAR*, Sept. 20, 1995, at D5.

83. See Editorial, *Did Readers Ever Ask for a Better Border Patrol?*, *EDMONTON J.*, Oct. 14, 1994, at A14; Editorial, *More Order at the Border*, *THE GLOBE & MAIL*, Jan. 24, 1996, at A14; George Jones, Editorial, *Canada Customs Shouldn't be Calling Shots on What We Read*, *THE VANCOUVER PROVINCE*,

prominent writers, artists, and academics as witnesses on behalf of Little Sister's.<sup>84</sup>

Little Sister's challenge to the practices of Canada Customs brought these often-invisible practices into the public sphere. What once occurred behind the closed doors of customs officials seizing and destroying materials with little to no publicity was now made glaringly public. The challenge exemplifies not only the mobilizing power of censorship, but also the extent to which state censorship can constitute the very space for the contestation of the speech. The attempt to keep the materials off stage actually "introduced the censored speech into public discourse,"<sup>85</sup> and produced these gay and lesbian representations as the subject of public contestation. Little Sister's challenge made the courtroom, and the broader public sphere where this censorship was debated, a space to contest the very idea that these gay and lesbian representations were illegitimate. They instead argued that the homosexual representations reflected an entirely normative sexuality.

#### D. The Legacy of Dissent and Censorship

In 2005, Glad Day gave up the fight against censorship,<sup>86</sup> and in 2007, Little Sister's also threw in the towel.<sup>87</sup> If the legal battles are measured exclusively in terms of the legal outcomes, it is at best a mixed record. Canada Customs retained the power to censor and the arbitrary laws of community standards remained in place. But another story can be told about the decision to stop fighting. Much of the discursive battle was over, even as gay and lesbian sexual representations had been reconstituted; they were now firmly on the side of legitimate sex. The ways in which gay and lesbian sexual representation had been successfully redefined and legitimated meant that it was becoming more difficult to argue that such representations were in and of themselves degrading or dehumanizing. After two decades of contestations, "community standards" had indeed changed. Gay and lesbian resistance to censorship shifted the boundaries of sexual normativity. In the 1970s, it was still entirely plausible for government officials to censor speech because it was gay or lesbian; by the time Glad Day and Little Sister's gave up in the 2000s, gay and lesbian speech – political and sexual, text and image – had crossed the line to legitimate speech. Discursively, the challenges had succeeded in establishing the legitimacy of gay

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Mar. 16, 2000, at A38; Don Mills, Editorial, *Tolerant Canada, Intolerant Customs*, NAT'L POST, Dec. 16, 2000, at A21.). Initially, mainstream media outlets were relatively silent about Little Sisters, although editorials have largely supported the bookstore over the years.

84. Testimony at trial included prominent writers like Pierre Burton, Jane Rule, Nino Ricci and Pat Calafia; and academics, including Gary Kinsman, Becki Ross, Carol Vance and Bart Testa. Heather E. Cameron, *Queer Experts at the Little Sisters Trial: An Interview with Janine Fuller*, 16 CANADIAN WOMAN STUDIES, no. 2, 1996, at 80, 81–82. Rule 16.5.

85. BUTLER, *supra* note 8, at 130.

86. Rook, *supra* note 72.

87. Marcus McCann "Little Sisters Declares Defeat in the Wake of 7-2 Supreme Court Ruling" January 18, 2007. Xtra. <http://dailyxtra.com/canada/news/little-sisters-declares-defeat-in-the-wake-7-2-supreme-court-ruling?market=210>

and lesbian sexual representations. Gay and lesbian sexual representations could no longer be publically admonished simply because of its non-heterosexual content.

#### V. CENSORING AFTER THE CENSORSHIP WARS

Today, we hear less about censorship of gay and lesbian materials at our borders or in our courts. Law enforcement has moved to newer pastures, with far more attention being directed to child pornography. With the pervasiveness of pornography on the Internet, the idea of censoring gay and lesbian sexually explicit materials may seem like a relic of the late twentieth century. But censorship of gay and lesbian materials has not entirely gone away; rather, it may be more accurate to argue that it has become more complicated and ambiguous.

Despite the history of dissent, the Canadian Border Services Agency, as it is now called, still sees fit to stop gay titles; gay fetish materials are frequently detained.<sup>88</sup> They have detained films with gay themes on the way to gay film festivals, including a PG-rated gay film about adoption entitled *Patrick, Age 1.5* en route to Ottawa's Inside Out film festival.<sup>89</sup> They seize personal computers because they contain gay porn.<sup>90</sup>

For censorship to produce the conditions of its own failure, the act of censorship must actually come to light. When the Canada Border Services Agency detained *Patrick, Age 1.5*, a PG-rated film, the film festival quickly brought this censorship into the public sphere, CBSA quickly found itself on the defensive, and it tried to blame the delay on the courier.<sup>91</sup> In Parliament, members of the Opposition called for a Canada Border Services Watchdog to try to prevent this kind of arbitrary action.<sup>92</sup> The failed attempt at censorship here is a testament to the success of gay and lesbian resistance—the video's gayness could no longer justify censorship.

However, much censorship continues to operate beneath the radar of publicity. In the case of personal computers seized due to gay pornography,

88. See Brent Creelman "Canadian Border Services Ban Lucas Fetish Flicks" Xtra, February 11, 2009. <http://dailyxtra.com/canada/news/canadian-border-officials-ban-lucas-fetish-flicks>. The Canadian Border Services publishes a quarterly List of Admissible and Prohibited Titles. While a detailed analysis of these lists is beyond the scope of this article, a review of the lists illustrates that fetish material is frequently amongst the prohibited titles. See for example Quarterly List of Admissible and Prohibited Titles, July to September 2011. <http://www.gomorrahy.com/cbsa-piu-q3-11.pdf>

89. Marcus McCann, *Border Agency Denies Wrongdoing in Gay Film Censorship Flap*, DAILY XTRA (Nov. 23, 2009, 7:00PM), <http://dailyxtra.com/ottawa/news/border-agency-denies-wrongdoing-in-gay-film-censorship-flap>.

90. Marcus McCann, *Canadian Border Agents Seize Gay Couple's Laptop*, DAILY XTRA (Aug. 6, 2008), [xtra.ca/public/National/Canadian\\_border\\_agents\\_seize\\_gay\\_couples\\_laptop-5243.aspx](http://xtra.ca/public/National/Canadian_border_agents_seize_gay_couples_laptop-5243.aspx).

91. McCann, *supra* note 89,

92. Dale Smith, *Opposition Calls for Border Agency Watchdog*, DAILY XTRA (Dec. 17, 2012) [xtra.ca/public/National/Opposition\\_calls\\_for\\_border\\_agency\\_watchdog-8034.aspx](http://xtra.ca/public/National/Opposition_calls_for_border_agency_watchdog-8034.aspx).

often the individuals involved do not want the publicity.<sup>93</sup> Despite the increased legitimacy of gay and lesbian sexual representations, sexual shame has not disappeared, and individuals may well prefer to walk away from their computers than become a sexual cause célèbre. Similarly, many titles that are seized never actually come to light. If the importer does not challenge the detention and there is no media attention, then the ongoing border censorship remains in the shadows. Furthermore, many of the titles that are now detained involve fetish materials.<sup>94</sup> Gay and lesbian sexual representations that include non-normative sex, fetish, watersports, intergenerational, incest, continue to be censored.<sup>95</sup> Gay and lesbian sexual representations may have attained a degree of normativity, but to the extent that these representations challenge other boundaries between “good” and “bad” sex, they remain tainted. Also, given the continuing non-normativity of these other forms of sexuality, these cases of censorship do not tend to mobilize the gay and lesbian communities en masse.

Battles over sexual normativity still occur. Given the stunning success of the book *Fifty Shades of Grey*<sup>96</sup>, the norms around sadomasochism may be shifting. But, harder-core fetish material, coupled with gay rather than grey, is still enough to raise the censor’s ire.<sup>97</sup> Moreover, unlike in the earlier days of gay and lesbian resistance to censorship, there is no longer a politicized grass roots movement mobilized to contest the censorship. Multiple shifts in gay and lesbian activism and a degree of political complacency that accompanied the achievement of formal equality rights have left those concerned with the censorship of gay and lesbian fetish material rather more isolated.

## VI. I-CENSOR: THE NEW WORLD OF ON-LINE CENSORSHIP

The gay and lesbian public sphere, once constituted by gay and lesbian bookstores, newspapers, cafes, bars, publishing houses and magazines, has changed. Small independent bookstores, including gay and lesbian ones, have

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93. Marcus, McCann, *Travelling with porn? Think again: Busts on the rise as CBSA gets bolder*, DAILY XTRA (July 3, 2007), [xtra.ca/public/Ottawa/Travelling\\_with\\_porn\\_Think\\_again-3249.aspx](http://xtra.ca/public/Ottawa/Travelling_with_porn_Think_again-3249.aspx) (quoting *supra* notes 87 & 90). Jim Deva of Little Sisters told *Xtra* that many gays and lesbians simply abandon their laptops when questioned at the border, out of fear of being placed on a no-fly list. McCann, *supra* note 87

94. See note 88.

95. *Id.*

96. E.L. James trilogy FIFTY SHADES OF GREY, FIFTY SHADES DARKER and FIFTY SHADES FREED have sold over 70 million copies worldwide. Jenny Hendrix. *Random House sees ‘Fifty Shades’ of profit, thanks to E.L. James,,* LOS ANGELES TIMES. (Mar. 27, 2013 8:31AM), <http://www.latimes.com/features/books/jacketcopy/la-et-jc-fifty-shades-random-house-profit-20130327,0,3016437.story#axzz2ixhHlYpL>. It also set the record for the fastest selling book of all time. Paul Bentley, *Fifty Shades of Grey outstrips Harry Potter to become fastest selling paperback of all time*, DAILY MAIL (June 18, 2012, 7:02 AM), <http://www.dailymail.co.uk/news/article-2160862/Fifty-Shades-Of-Grey-book-outstrips-Harry-Potter-fastest-selling-paperback-time.html>.

97. Brent Creelman, *More Gay Porn Banned by Canada Border Agency*, DAILY XTRA (Dec. 17, 2009, 7:00 PM), <http://dailyxtra.com/canada/news/gay-porn-banned-canadas-border-agency?page=1&market=206>



increasingly closed their doors<sup>98</sup>, as Indigo and Amazon increasingly captured the market. The arrival of e-books and e-readers similarly has further transformed the landscape, where individuals no longer need to go to a bookstore to buy a book: purchasing gay and lesbian materials has been to a significant extent been privatized, and the gay and lesbian public sphere has been increasingly digitalized. Like the proliferation of digitalized public spheres more generally, we communicate our ideas on Facebook and Twitter, download our iTunes apps, search for everything we need on Google, and text on our smart phones. Political debates and movements are forged and mobilized using these technologies and social networks. LGBT expression, sexual and otherwise, has proliferated, making government censorship of gay pornography, at least in North America, seem like a relic of the twentieth century.

The digitalized public sphere is a space that is both libertarian and regulated. Speech proliferates and information goes free, while governments and corporations seek to regulate, commodify and profit. While counter-publics of endless varieties proliferate, a defining feature of so much of the digital public sphere is that it isn't public – these social networks and search engines and technologies that drive them are all privately owned. Google, Apple and Facebook do not legally owe us freedom of expression. Some social media actors are more committed than others to open access, open source and principles of free expression.<sup>99</sup> But, it is up to the social media actors themselves to decide where they lie on the libertarian/paternalism spectrum of the Internet.

Consider the controversy that swirled around Apple in November 2010, as it first approved and then removed a new application, the Manhattan Declaration.<sup>100</sup> The Manhattan Declaration, the text of which is included in the application, speaks in defense of “the sanctity of life”, “traditional marriage” and “religious liberty,” according to its creators.<sup>101</sup> The Declaration issues “a clarion call to the Church to take a stand on three vital issues.”<sup>102</sup> The application, approved for sale at iTunes, was immediately denounced as anti-gay, and

98. Oscar Raymundo, *The Last Chapter: A Look at LGBT Bookstores Around the World*, QUEERTY (Jan. 6, 2012), <http://www.queerty.com/the-last-chapter-a-look-at-lgbt-bookstores-around-the-world-20120106/> (chronicling the closure of gay bookstores in Ontario, New York, and Washington, D.C., and lamenting the struggle against Web retailers).

99. See e.g. Nilay Patel, *Tweets of Rage: Does Free Speech Exist on the Internet*, THE VERGE (Dec. 4, 2012), <http://www.theverge.com/2012/12/4/3726440/tweets-of-rage-free-speech-on-the-internet> (arguing that “the future of free speech might have more to do with corporate censorship than the First Amendment); The Electronic Frontier Foundation, *About EFF*, ELECTRONIC FRONTIER FOUNDATION (accessed Oct. 28, 2013), <https://www.eff.org/> (stating the organization’s goal to be the tracking of Internet free speech, privacy, innovation and consumer interest).

100. See THE MANHATTAN DECLARATION, <http://manhattandeclaration.org/#0> (last visited Oct. 27, 2013).

101. *Id.* The original app spoke “in defense of the sanctity of life, traditional marriage, and religious liberty. It issues a clarion call to Christians to adhere firmly to their convictions in these three areas.” The App is no longer available but the original language is cited in Angela Dallara, *Apple rejects homophobic iphone app for the second time*, GLAAD (Dec. 29, 2010), <http://www.glaad.org/2010/12/29/apple-rejects-homophobic-iphone-app-for-the-second-time/>.

102. *Id.*

thousands signed petitions to demand that Apple remove the application.<sup>103</sup> Apple conceded.

As with debates around LGBT hate speech more generally, there is a deeper question operating: should LGBT communities be advocating censorship, when they, and other non-normative sexualities, have so frequently been at the receiving end of that censorship? This is hardly the first time that some within the LGBT communities have argued in favour of censorship. Indeed, while some within the LGBT community have fought censorship, others clamoured for more of it. Lesbian anti-pornography activists in the 70s and 80s sought stronger censorship laws.<sup>104</sup> Some gay activists disrupted the filming and showings of the 1980 film *Cruising*.<sup>105</sup> The 1980s saw debates with *The Body Politic* about whether to accept classified ads that had racial or s/m messages.<sup>106</sup> More recently, many gay and lesbian activists urged the denial of visas to Jamaican dancehall musicians,<sup>107</sup> and back the controversial use of human rights hate speech provisions against homophobic speech.<sup>108</sup> The Manhattan Declaration controversy is simply another instantiation of this kind of anti-homophobic speech activism, but this time, within the realm of social media.

The decision to remove the Manhattan Declaration app needs to be seen against the backdrop of a company only too willing to sanitize its digital world. Apple has a notoriously strict policy for approving new apps, with a high degree of sex negativity. Apple specifies in its Software Development Kit (SDK) that “[a]pplications must not contain any obscene, pornographic, offensive or defamatory content or materials of any kind (text, graphics, images, photographs, etc.), or other content or materials that in Apple’s reasonable

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103. Suzanne Choney, *Apple Pulls anti-gay App from App Store*, NBC NEWS (Nov. 30, 2010, 2:21 PM), <http://www.nbcnews.com/technology/apple-pulls-anti-gay-app-app-store-126167>; See Dallara, *supra* note 101.

104. A strain of anti-pornography feminism which originated in the United States quickly became part of the landscape in Canada. After anti-porn feminists firebombed three Red Hot Video outlets in Vancouver in 1982, *TBP* aligned itself with the porn stores, provoking a storm of protest from some of its readers, including 58 that endorsed a letter condemning *TBP* in July 1983. David S. Churchill, *Personal Ad Politics: Race, Sexuality and Power at The Body Politic*, 8:2 LEFT HISTORY 114, 114 (2003).

105. Scott Tucker, *Sex, death, and free speech: The fight to stop Friedkin’s Cruising*, in *Flaunting It!*, *supra* note 39, at 197.

106. Churchill, *supra* note 104, at 114.

107. Richard Burnett, *Three Dollar Bill: The Unmagnificent Seven*, THE HOUR (Sept. 27, 2007), [hour.ca/2007/09/27/the-unmagnificent-seven](http://hour.ca/2007/09/27/the-unmagnificent-seven).

108. See *Saskatchewan Human Rights Comm’n v. Whatcott*, 2013 S.C.C. 11 (Can.). Whatcott, a social conservative who distributed anti-gay pamphlets was found by the Saskatchewan Human Rights Commission to have violated the human rights of four complainants because the pamphlets promoted hatred on the basis of sexual orientation; the conservative distributor was ordered to pay a \$17,500 fine. On appeal, the Saskatchewan Court of Appeal overturned the Human Rights Commission, holding that Whatcott’s pamphlets were protected as free speech. In November 2011, the appeal was heard by the Supreme Court of Canada. The case has raised the controversy around hate speech and whether it should be included within human codes in particular, and whether it should be regulated more generally, or whether it ought to be protected as free, if distasteful, speech. In February 27, 2013, the Supreme Court allowed the appeal in part, holding that the provision was constitutional, but that the flyers in question did not violate it.

judgment may be found objectionable by iPhone or iPod touch users.”<sup>109</sup> Former CEO Steve Jobs unapologetically defended the policy, stating “we do believe we have a moral responsibility to keep porn off the iPhone.”<sup>110</sup> In February 2010, Apple began removing apps with “overtly sexual content.”<sup>111</sup> Apps with gay content have had a bumpy road with Apple. Apps, seeking the Apple platform, often follow suit. In April 2010, *Grindr*, the popular app to find other gay men in the area, tightened its terms of service, and outlined a list of prohibitions for profile pictures: no underwear showing, no sexually explicit or overly suggestive photos, no nudity covered by clothing.<sup>112</sup> Further, it is not only images, but text that is also proscribed.<sup>113</sup> The prohibited list is, not unlike the Memorandum D9-1-1, a remarkable explanation of the sexual activity it prohibits. Ironically, an app specifically intended to facilitate sexual encounters has been sexually sanitized.

The owner of Jack’d reported that his app was removed for sale in October 2010.<sup>114</sup> When he contacted the Apple Apps Review team, he was told his App

109. *iPhone SDK Agreement Section 3.3.12*, APPLE INC., [www.wired.com/images\\_blogs/gadgetlab/files/iphone-sdk-agreement.pdf](http://www.wired.com/images_blogs/gadgetlab/files/iphone-sdk-agreement.pdf) (last visited August 28, 2013). Similarly, in its online “Adding New Apps” guide, Apple highlights: “Important: Apps must not contain any obscene, pornographic, offensive or defamatory content or materials of any kind (text, graphics, images, photographs, etc.), or other content or materials that in Apple’s reasonable judgement (*sic*) may be found objectionable.” *iTunes Connect Developer Guide*, APPLE INC., [developer.apple.com/library/ios/#documentation/LanguagesUtilities/Conceptual/iTunesConnect\\_Guide/8\\_AddingNewApps/AddingNewApps.html](http://developer.apple.com/library/ios/#documentation/LanguagesUtilities/Conceptual/iTunesConnect_Guide/8_AddingNewApps/AddingNewApps.html) (last visited Aug. 28, 2013).

110. Brian X. Chen, *Want Porn? Buy an Android Phone, Steve Jobs Says*, WIRED (Apr. 20, 2010), <http://wired.com/gadgetlab/2010/04/steve-jobs-porn/>.

111. Brian X. Chen, *Apple Removes Porn Apps From App Store*, WIRED (Feb. 9, 2010, 7:00 PM), <http://www.wired.com/gadgetlab/2010/02/iphone-porn/>.

112. *Grindr Profile Guidelines*, GRINDR LLC (last visited Aug. 18, 2013), <http://grindr.com/profile-guidelines>. The guidelines contain a very comprehensive list of prohibitions, most of which are of a sexual nature:

- No sexually explicit, revealing, or overly suggestive photos of any kind.
- No nudity or physically revealing clothing of any kind.
- No skin showing below the hip bones.
- No exposed undergarments of any kind visible in the photo.
- No image used to advertise services, goods, events, websites, or apps.
- No profanity, vulgar language or curse words layered on your photo.
- No images that display bodily fluids of any kind.
- No images of firearms, weapons, drugs or drug paraphernalia.
- No copyrighted pictures or illustrations.
- No images of any non-Grindr users, including celebrities.
- No impersonating another user / person.
- No photos that contain sex props and sex toys, or any sexually suggestive object.

113. *Id.* The guidelines state “No sexually explicit or overly suggestive text. No profanity or curse words, including abbreviations, masking and fill-ins.”

114. Sebastien Page, *Is Apple Starting to Censor the Word “Gay” in the App Store?*, IDOWNLOADBLOG (Nov. 1, 2010), <http://www.idownloadblog.com/2010/11/01/is-apple-starting-to-censor-the-word-gay-in-the-app-store/>.

had to provide a reporting function for sexually explicit material.<sup>115</sup> As he tried to edit his app's management page on the Apple website, he received the following warning message: "The following is not recommended for use in this field: gay. Your app may be rejected if you use this term."<sup>116</sup>

This kind of censorship abounds in the I-sphere. In fact, Apple has made a few stunning gaffes that quickly became Internet memes. For example, Apple requested that an app developer remove some of the panels in the graphic novel version of *Ulysses*, entitled *Ulysses Seen*, because they were too sexually explicit.<sup>117</sup> The irony of censoring a graphic novel based on James Joyce's *Ulysses* seemed only to have been missed by the nameless programmer who made the original decision. *Ulysses* represents not only one of the great books of twentieth century, but also one of its great trials. In *United States vs. One Book Called Ulysses*, both the trial court and the Second Circuit Court of Appeal held that the book was not ultimately obscene because it did not promote lust.<sup>118</sup> Admittedly, this was a graphic version representation, and accordingly, there were pictures. The offending image was a cartoon representation of a Goddess with her breasts exposed.<sup>119</sup> The censorship request quickly became a laughing stock online.<sup>120</sup> In an email, Apple admitted "We made a mistake" and encouraged both developers to resubmit their apps.<sup>121</sup> On the gay and lesbian front, Apple made a similar gaffe in banning a graphic novel version of Oscar Wilde's play *The Importance of Being Earnest* because of two men kissing.<sup>122</sup> This too quickly became an Internet meme, and it was a decision that was quickly overturned.<sup>123</sup>

Censorship of sexual materials in the I-sphere is highly contradictory. While some major social media actors like Apple and Facebook continue to try to sexually sanitize their digitalized public spheres, their attempts at censoring gay and lesbian speech, to the extent that these acts of censorship become public, quickly mobilize opposition and result in reversal. Censorship can be seen, on

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115. *Id.*

116. *Id.*

117. Eddie Fitzmaurice, *Nude 'Ulysses' too rude for Apple*, THE INDEPENDENT (June 15, 2010), [independent.ie/national-news/nude-ulysses-too-rude-for-apple-2220672.html](http://independent.ie/national-news/nude-ulysses-too-rude-for-apple-2220672.html).

118. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706 (2d Cir. 1934).

119. The censored image of *Ulysses Seen* can be accessed:  
<http://www.gizmodo.com.au/2010/06/the-latest-examples-of-apples-editorial-censorship/>.

120. See e.g. Cathy Hayes, *Nude comic book of James Joyce's "Ulysses" published in time for Bloomsday*, IRISH CENTRAL (June 16, 2010), <http://www.irishcentral.com/news/Nude-comic-book-of-James-Joyces-Ulysses-published-in-time-for-Bloomsday-96477039.html>; Alison Flood, *Comic book publisher wins battle over nudity in iPad Ulysses*, THE GUARDIAN (June 16, 2010), <http://www.theguardian.com/books/2010/jun/16/ulysses-graphic-novel-apple-ipad> for examples of the wide reporting of the censorship of the *Nude Ulysses*, often with a tongue-in-cheek tone.

121. Michael Cavanaugh, *The Plump Irony: Come Bloomsday, Apple Admits Mistake over 'Ulysses' App*, THE WASHINGTON POST (June 16, 2010, 6:15 AM), [http://voices.washingtonpost.com/comic-riffs/2010/06/the\\_plump\\_irony\\_come\\_bloomsday.html](http://voices.washingtonpost.com/comic-riffs/2010/06/the_plump_irony_come_bloomsday.html).

122. Chris Griffith & AP, *Apple Fazed by Gay Kissing App*, THE AUSTRALIAN (June 17, 2010, 12:00 AM), <http://www.theaustralian.com.au/australian-it/apple-flustered-by-gay-kissing/story-e6frgaxk-1225880583748>.

123. *Id.*

the one hand, to again perform its own failure; even more so now that gay and lesbian sexual speech has to a large extent achieved a degree of sexual normativity. On the other hand, the nature of much of the regulation is such that speech is not stated and then removed, but preempted from coming into utterance. It is perhaps somewhat more akin to the implicit censorship of the new censorship scholarship, and can perhaps be productively analyzed through its lens. Attention will need to be directed to the multiple ways in which the private actors of the I-sphere limit, restrict and foreclose sexual representations. At the same time, my own interest is in maintaining a distinction between censorship as the act of a sovereign, and censorship as the ubiquitous act of interlocutory speech. Tracking the new censorship in the I-sphere should retain at least some of its focus on 'authoritarian' control, however diffuse or privatized, on what reaches the 'public' sphere.

## VII. CONCLUSION

The battles over the censorship of gay and lesbian sexual representations track the struggles for gay and lesbian citizenship.<sup>124</sup> In its earliest days, censorship of gay and lesbian speech was a demarcation of illegitimacy, indeed, even criminality of gay and lesbian sexuality. Gay men and lesbians were defined by this sexual difference, this sexual deviance, and censorship was but one of the state's mechanism for constituting and regulating this difference. As the gay and lesbian liberation movement gained momentum in the 1970s, demanding the legitimacy of gay and lesbian subjects, so too did state resistance, sometimes in the form of attempts at censorship. State resistance of course took many other forms: refusal to grant rights to non-discrimination, or recognize same sex relationships. But the censorship battles had a particularly sexual character: these became battles not only over the legitimacy of the gay or lesbian citizen, but over the legitimacy of the explicitly sexual gay and lesbian citizen. These were not sexually sanitized battles, as many alleged of the subsequent struggles for relationship recognition and marriage became. Rather, these were battles being fought explicitly on the terrain of sex: on shifting the boundaries between legitimate and illegitimate sex. Indeed, the history of censorship can be retold as first and foremost a history of resistance; it was precisely because of the emergence of the gay and lesbian sexual liberation movement, along with its books, magazines, films, that the state sought, ultimately unsuccessfully, to shut it down. Gay men and lesbians were engaged in a discursive battle to reconstitute their subjectivity and sexuality, from outlaw to citizen. State censorship became one of the terrains on which this subjectivity was contested and reconstituted. The success of these battles, or perhaps better described as the partial success of these battles, given that censorship has not disappeared, lay in the very paradox of censorship containing the conditions of its own failure.

The boundaries of sexual normativity have been redrawn but eliminated. There are many other dimensions of sexual nonnormativity that can vanquish claims to legitimate citizenship: from fetish to commercial sex, from polygamous

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124. COSSMAN, *supra* note 9, at 25–26.

to public sex. Sexual difference remains intensely contested, in legal and non-legal forums. From ongoing debates over the legitimacy of polygamy and sex work, to the censorship of fetish materials, the law continues to be deployed to shore up the rather diffuse boundaries between legitimate and illegitimate sex. As a scholar interested in the question of law's role in constituting and regulating sexuality, and a "progressive advocate of derepression", I am interested in the lessons we might glean from this history of gay and lesbian resistance to censorship. Censorship helped to mobilize a social movement which then contested the censorship. How censorship and its resistance will continue to play out in the I-sphere is a question that remains as yet unanswerable. There is some indication that it may follow the familiar censor-resist-repeat pattern of earlier censorship. Yet there are also counter-indications of the unique power of social media and its corporate actors to censor in ways that never come to light, and therefore, never become the subject of resistance. Either way, anti-censorship gay and lesbian activists and academics will need to remain vigilant to both old and new challenges to sexual representations.