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Bad Attitude/s on Trial

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The Politics Of The Perverse

[Review of Brenda Cossman, Shannon Bell, Lise Gotell, & Becki L. Ross, *Bad Attitude/s On Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997)]

Bad Attitude/s on Trial presents a "critical analysis of pornography in the context of contemporary Canada,"[1] with a particular focus on the impact of the Supreme Court of Canada's decision in *R.* v. *Butler*,[2] and its reformulation of the basis of obscenity law. The book is co-written by four Canadian academics: Brenda Cossman, Shannon Bell, Lise Gotell, and Becki L. Ross. Each has contributed a separate section of the book, along with an introduction by Cossman and Bell. The result is a vital, theoretically sophisticated addition to the literature on pornography; a vivid documentation of the impact of obscenity law on the lives of lesbians, gay men, and others in Canada; and a scathing and powerful indictment of the complicity of anti-pornography feminists in the maintenance of the heteronormative moral order.

The introduction presents a historical review of the regulation of sexual images in Canada, underscoring the ways in which current developments are continuous with moral discourses of the past. Lise Gotell then looks at the role of the Women's Legal Education and Action Fund (LEAF) in shaping the Supreme Court's discourse in *Butler*. Brenda Cossman focuses specifically on that discourse, and attempts to deconstruct Sopinka J.'s judgment to reveal its underlying sexual conservatism. Becki Ross then interrogates one of the cases which followed the *Butler* decision, *R.* v. *Scythes*,[3] from her vantage point as an expert witness for the defendant. Finally, Shannon Bell examines Canada's so-called child pornography law and the construction of a child porn panic, using interview-based research with alleged "child pornographers" in order to develop a philosophical argument grounded in an ethics of care.

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1. B. Cossman, S. Bell, L. Gotell, & B.L. Ross, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) 3.

2. (1992), 89 D.L.R. (4th) 449 (S.C.C.) [hereinafter *Butler*]. The majority judgment delivered by Sopinka J. forms the basis of the analysis in the book, and in this review. A separate concurring judgment was written by Gonthier J.

3. (16 January 1993), Toronto (Ont. Ct. Prov. Div.) [unreported] [hereinafter *Bad Attitude* trial].

In this review, I begin with a brief review of the *Butler* decision, before considering the main arguments of the book. I then move on to examine the implications of *Bad Attitude/s on Trial* for what I will call a politics of perversion.

Setting The Stage: Butler

In February, 1992 the Supreme Court of Canada in *Butler* unanimously upheld the obscenity provisions of the *Criminal Code* as a constitutionally valid limitation of the right of free expression. Historically, the courts have interpreted obscenity law by focusing on whether the exploitation of sex in the work is "undue." The test for determining the undue exploitation of sex is the community standard of tolerance test—what Canadians would not tolerate other Canadians viewing. Furthermore, the community standard is national in scope and not, for example, that of a subculture, or a particular municipal or provincial community.

Of particular interest is the fact that the Supreme Court seemed to accept many of the arguments that were raised by counsel advocating the feminist anti-pornography position, which was grafted on the undue exploitation of sex standard. That position was advanced by LEAF, one of the intervenors in the case. The issue of undueness thus began to shift in the judgment of Sopinka J., writing for the majority, away from notions of morality and the preservation of the moral fibre of society, and towards human degradation as a justification for regulation. He recognized that material which may be said to exploit sex in a "degrading or dehumanizing manner" would necessarily fail the community standards test, "not because it offends against morals but because it is *perceived* by public opinion to be harmful to society, particularly women."[4] The justification for regulation appeared to be harm. The Court found that harm includes predisposing persons to act in an anti-social manner—a manner which society formally recognizes as incompatible with its proper functioning.[5]

Sopinka J. expanded upon the relationship between representation and harm through a threefold categorization of pornography. He held that: (1)the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex; (2) explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial; (3) explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue

4. *Supra* note 2 at 467 [emphasis added].
5. *Ibid.* at 470.

exploitation of sex unless it employs children in its production.[6] The infringement on the constitutional right of freedom of expression thus is justifiable under the reasonable limits test because the focus is not on moral disapproval but the avoidance of harm to society, which is a pressing and substantial concern. A series of linkages, therefore, implicitly is found between exploitation, degradation, a process of moral desensitization, and social harm. Those assumptions have come to be central to the discourse which has surrounded the regulation of pornography in the post-*Butler* era, and a skepticism about the simplistic connection between representation and reality, and about the possibility of literal readings of representations, informs the argument in *Bad Attitude/s on Trial*.

Central Themes

The central thesis of the book is that while sexual explicitness is not the official basis for state censorship under the *Butler* test for social harm, the impact of *Butler* has been increased criminal regulation of some types of sexual imagery, namely, "any representations that hint at alternative sexualities:"[7] lesbian and gay; sadomasochistic; or the sexual representation of youth. One of the primary effects of *Butler* has been to provide a cloak of legitimacy for state censorship. Moreover, the Supreme Court's decision is legitimized by its appropriation of feminist anti-pornography discourse, which has been presented "as the singular and universal feminist voice."[8] The authors attempt to problematize that standpoint, highlighting "the complicity of feminist constituencies in the discourse of moral conservatives,"[9] and showing how that discourse has been felt by lesbians and gay men.

Moral conservatism is the primary trope in the history of obscenity law in Canada, and the authors argue that current developments are continuous with the past. The Victorian discourse of sexuality as a dangerous force in need of control was repeated in the climate of 1950s suburban Canada, as pornography, along with prostitution and homosexuality, was set against family values. The 1950s also saw the development of the "undue exploitation of sex" test for obscenity, and the judicial recognition of a national community standard through which "undue exploitation" would be determined.

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6. *Ibid.* at 471.
7. *Supra* note 1 at 4.
8. *Ibid.* at 7.
9. *Ibid.* at 8.

Beginning in the 1970s, a feminist anti-pornography discourse sought to articulate harm towards women as the justification for the legal regulation of pornography, as a means of replacing sexual immorality as the basis for censorship. However, another central theme of *Bad Attitude/s on Trial* is that a "discursive blending"[10] has occurred, in which feminist anti-pornography discourse has been mixed with conservative and religious fundamentalist tropes. That discursive blending is apparent within the *Butler* decision, and its aftermath is evidenced by the actions of customs officials, lower court judges, and the police. As Cossman and Bell argue, "the underlying concerns of contemporary campaigns are all too consistent with the anti-pornography campaigns of the past".[11]

In contrast to anti-pornography feminists, the authors of *Bad Attitude/s on Trial* locate their work within the framework of postmodern feminism, and their focus is on the construction of knowledge, power, and discourses of sexuality.[12] Pornography, like sexuality, proves to be a "site of ambiguity,"[13] of pleasure as well as danger. The meaning of porn, like any representation, "is historically and contextually specific and contingent."[14] The authors reject the claim, explicit within anti-porn discourse, that "the representation is a literal and objective depiction of the underlying sexual act."[15]

Becki Ross develops this argument, deploying the example of lesbian sadomasochism (s/m), which she argues cannot be subjected to a literalist, objective, neutral reading. As she explains, s/m intended for a lesbian reader/viewer, rather than being demeaning and degrading, "exposes the naturalized status of femininity (and masculinity) in ways that disrupt the power of heterosexualizing law;" "opens up spaces between the norms that regulate gender and sexuality;" and "send[s] up or satirize[s] conventional sexual and gender stereotypes."[16] By contrast, "lezzie spreads in mainstream porn"[17] always carry the message that the "male reader is invited to enter and master the scene."[18]

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10. *Ibid.* at 67.
11. *Ibid.* at 21.
12. On postmodern feminist theory, see generally C. Smart, *Feminism and the Power of Law* (London: Routledge, 1995); C. Smart, *Law, Crime and Sexuality* (London: Sage, 1995); M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992).
13. *Supra* note 1 at 22.
14. *Ibid.* at 25.
15. *Ibid.* at 44.
16. *Ibid.* at 159.
17. *Ibid.* at 166.
18. *Ibid.* at 167.

Not only is porn a site of contradiction and complexity, but legal discourse is itself a "complex and contradictory site of engagement" for feminists.[19] Thus, state censorship of porn serves to "inhibit women's sexual agency and power," at the same time that it demonizes "new sexual villains" and subjects them to intensified legal scrutiny.[20]

In her analysis of LEAF's intervention in *Butler*, Lise Gotell critiques LEAF's claim that it "sought to disrupt the dominant moral-conservative underpinnings of obscenity regulation in favour of an approach emphasizing sexual equality and the 'harmful' effects of pornography for women."[21] Gotell shows how this division between harm and morality is false. LEAF, along with other anti-pornography feminists, has constructed its claims on the moral high ground, "constituting its own claims about sexual representation as 'true,' as 'good,' and as the expression of the best interests of the 'disempowered.' "[22] LEAF's factum in *Butler*, Gotell convincingly demonstrates, is remarkably similar to the arguments made by the various attorneys-general, and even those of religious conservatives. Central to all of the anti-porn discourses is the construction of sexuality as dangerous and threatening to the social structure. In this way, *all* anti-porn discourses make foundational claims to certainty—to "Truth"—which come to be embraced particularly fervently in times of rapid change, and economic and social anxiety. This construction is consistent with broader currents in Western thought, in which sexuality is viewed as "an explosive libidinal force."[23] Such foundational claims to Truth are privileged within legal discourse because of law's own claim to speak an objective Truth. As a consequence, there is a "strategic compatibility of feminist foundationalism and law,"[24] which was manifested in the Supreme Court's reasoning in *Butler*. The underlying assumption in anti-porn discourse is that "the depiction of sexual practices that lie outside of majoritarian norms constitutes a threat to the community."[25] In this way, "moral concerns about decency, immorality, abnormal sex, and family decline" can be discursively blended with "newer concerns about sexual violence, the degradation of women, and gender harm."[26] Law is a force for certainty and objectivity in a time of instability, in which sexuality threatens to go out of control.

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19. *Ibid.* at 29.
20. *Ibid.* at 31.
21. *Ibid.* at 49.
22. *Ibid.* at 51.
23. *Ibid.* at 57.
24. *Ibid.* at 52.
25. *Ibid.* at 84.
26. *Ibid.* at 86.

Gotell contextualizes the currrent hegemony of anti-porn discourse in terms of a number of social and political developments. The interpretation of the "sexual revolution" as a cause of social decline, dominant constructions of HIV/AIDS, and the post-Keynesian economic discourses of restraint, constraint, and caution, all help to explain why anti-porn discourse has proven so successful in its current guise.[27] It has served to "produce a panic around pornography that renders the expression of sexual power, pleasure, and agency increasingly unintelligible."[28] Another key factor is the climate of backlash against feminism. It is ironic that anti-porn feminism achieved a hegemonic position in such a climate, but this can be explained by the desire for the recreation of unity within the feminist movement. Moreover, the appropriation of feminist anti-porn discourse by conservatives has provided a means for the right wing to modernize its rhetoric, while still connecting to a law-and-order agenda, in which "criminalization becomes a preferred policy response to social anxiety" (another dominant discourse in the 1990s).[29]

Because of all of these factors, opponents of *Butler* are placed in a defensive, marginalized position. In large part, this is because anti-censorship claims, to the extent that they avoid a straightforward liberal, civil libertarian position, are left with a discourse which emphasizes contingency, hypotheticals, and the contradictions which are inherent in representation.[30] Furthermore, as Gotell shows, anti-censorship discourse "is necessarily forced into questioning law's own image of itself as 'objective' ".[31] That is, central to the argument is the way in which the administration of obscenity law is necessarily "subjective, arbitrary, or discriminatory."[32] By contrast, LEAF's claims are presented as "unified, authoritative, and universal," a standpoint which is privileged within legal discourse.[33] Anti-censorship arguments are trivialized, in part because "the assertion that pornography has no essence, no 'Truth' to be discerned by the judiciary, represented a firm denial of law's power"—of its claim to be able to discern the Truth of a representation.[34] Anti-porn discourses (of all varieties) make the claim that the Truth of a representation is apparent on its face, and can be determined by the judiciary "as

27. *Ibid.* at 57.
28. *Ibid.* at 60.
29. *Ibid.* at 69.
30. *Ibid.* at 72-73.
31. *Ibid.* at 73.
32. *Ibid.*
33. *Ibid.*
34. *Ibid.* at 79.

if it were a purely formulaic exercise."[35] Underlying such an argument is the claim that "law is a sphere of logic and rationality, divorced from politics and bias" and, in this way, legal objectivity is reified.[36] It is no wonder that these arguments are privileged within legal discourse.

Gotell's analysis is given a concrete reality in Becki Ross's exploration of the *Bad Attitude* trial, from her perspective as expert witness.[37] She contrasts her treatment by Paris J. and Crown counsel, with the way in which the expert witness for the Crown, American psychologist Neil Malamuth (the darling of anti-porn feminists) was constructed.[38] Ross's experience confirms Gotell's claim that foundational truths are privileged within legal discourse. While Malamuth was perceived as an objective, value-free scientist who made definitive judgments about lesbian s/m, Ross was constructed as biased, subjective, and value-laden when she attempted "to explicate and contextualize the specificities, nuances, and complexities of lesbian s/m fantasy, alongside the sociopolitical meanings it engenders within lesbian s/m culture."[39]

Gotell's interrogation of LEAF's factum reveals how its argument is consistent with other anti-porn discourses. It relies upon a belief in the potential objectivity of law; draws upon discourses of sexual danger and on a negative view of sexual expression; constructs women as passive "victims"; and locates its own position on the moral high ground of authoritative Truth.[40] In this way, LEAF "marginalizes other feminist voices who speak from outside the boundaries of legal discourse,"[41] for it "advances an absolute and definitive conception of pornography as the very embodiment of gendered harm."[42] Any challenges to LEAF's claim to Truth are met by the retort that one is "denying the realities of those less privileged women for whom LEAF claims to speak."[43] In this way, the *Butler* factum becomes "unassailable, placed above the push and pull of

35. *Ibid.* at 83.
36. *Ibid.*
37. *Bad Attitude*, a lesbian sex magazine, was seized by police from Toronto's Glad Day Bookshop two months after the *Butler* decision. The owner of Glad Day, John Scythes, was convicted of possession and sale of obscene material, contrary to s. 163 of the Criminal Code, after a five day trial. Engaging in an academic analysis of the dynamics of a criminal trial, after having participated in it as an expert witness, might well strike some as difficult and problematic. It certainly raises methodological issues which the author might well have addressed more explicitly.
38. *Supra* note 1 at 157-158.
39. *Ibid.* at 153.
40. *Ibid.* at 87.
41. *Ibid.* at 88.
42. *Ibid.* at 90.
43. *Ibid.* at 93.

feminist contestation," because it is True.[44] Moreover, the (naive) assumption is that "feminists can insert their concerns into law and law itself would be recast in this process."[45]

Brenda Cossman picks up the story with a deconstructive reading of the text of the *Butler* decision. She argues that *Butler* represents a change in obscenity law at the level of language alone. The discourse of harm to women is a form of "sexual morality in drag," for an underlying moral conservatism informs the judgment.[46] Thus, contrary to the claims of anti-porn feminists, the targeting of lesbian and gay representations in the wake of *Butler* is not a misreading of the judgment, but an accurate implementation of its underlying message. Embedded in the reasons of Sopinka J., Cossman argues, are a series of distinctions which are central to Western thought: mind/body, intellectual/physical, emotional/sensual. For the Supreme Court, "bad sex" (the representation of which is censorable pornography) constitutes undue exploitation. It is sex which places its subjects "in positions of subordination, servile submission or humiliation."[47] Good sex, the representation of which is not pornographic, is "sex with more": sex which transcends the physical, the body, the sensual.[48] "Art" is not "pornography", for art "appeals to more than our physical nature".[49] The art/porn distinction thus is firmly entrenched. This point would later be confirmed in the *Bad Attitude* trial, when counsel's attempts to introduce evidence of changing community standards were rejected by the Court. Madonna's *Sex*, for example, was not taken as representative of the mainstream acceptance of s/m. Rather, its "embeddedness in the legitimizing discourses of high art and fashion photography"[50] ensured that it could be distinguished, for art isn't porn, and porn certainly isn't art. So too, magazines such as *Vogue*, which also toy with s/m imagery, are irrelevant, for fashion discourse isn't porn either. In a remarkable passage, Paris J. apparently stated that *Vogue* "was a *fashion magazine*, one his daughters read at home."[51] The heterosexual presumptions are clear.

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44. *Ibid.* at 99.
45. *Ibid.* at 97.
46. *Ibid.* at 108.
47. *Ibid.* at 111.
48. *Ibid.* at 112.
49. *Ibid.*
50. *Ibid.* at 171.
51. *Ibid.* at 169.

Cossman forcefully argues that the construction of a line between good and bad sex is based on "an underlying conservative sexual morality," in which community standards, which presume an essential and monolithic shared sexual morality, govern.[52] Thus, as Sopinka J. recognized in *Butler*, what has altered is simply the community's understanding of porn's harms and, one might add, of good and bad sex. Good sex, and good representations, are those which affirm women's agency through an appeal to the intellectual rather than the base. Cossman concludes that within *Butler*, sex "is bad unless it can be made good by transcending its corporeal nature."[53] As a consequence, sex is located firmly outside the political process, and on the periphery of the values which underpin the freedom of expression guarantee in the *Charter of Rights and Freedoms*. The basis of legal regulation—community standards—reinforces this construction, for "community standards only make sense in relation to a prevailing, and generally accepted, understanding of sexual morality, in which some sex is good and some sex is not."[54]

Compelling evidence for Cossman's deconstructive reading can be found in subsequent case law interpreting *Butler*, in which the distinction between morality and harm collapses. In *Glad Day Books* v. *Canada*, gay male sex becomes *per se* degrading and dehumanizing, and therefore obscene.[55] Equally blatant is the reasoning in the *Bad Attitude* trial. In his judgment, Paris J. ruled that the description of a lesbian s/m fantasy is degrading (and therefore obscene), despite the explicit presence of consent, through the technique of "heteroswitching." That is, because the test for community standards is supposedly neutral to sexual orientation, Paris J. substituted a man for the lesbian "top" (rather than the "bottom," of course). Had this been a heterosexual representation, he then reasoned, it would have been obscene. Thus, the standard is explicitly grounded in heterosexual assumptions, and the specificity of lesbian s/m cultural practices, as is so often the case, can be erased completely.

Becki Ross paints a vivid and disturbing picture of her treatment at the hands of Paris J. and Crown counsel in the *Bad Attitude* trial. I was left in complete agreement with her conclusion: "when I string these occasions of punishment and humiliation together, I find ineluctable, ironic confirmation of the trial itself as ritualized s/m theatre."[56] Ross's experi-

52. *Ibid.* at 116.
53. *Ibid.* at 123.
54. *Ibid.* at 127.
55. (14 July 1992), Toronto (Ont. Ct. Gen. Div.) [unreported].
56. *Supra* note 1 at 174.

ence confirms Cossman's analysis of *Butler* down to the ground. Women are constructed as objects in need of the protection offered by the law. Judicial attitudes underscore how the representation of lesbianism threatens "their sense of masculine prowess in part through obstructing their ability to enter and control the pornographic scene. Indeed, portrayals of sexually self-sufficient lesbians may shake heterosexual men's sense of entitlement to power over women in general."[57]

But Ross also demonstrates that while legal discourse may be powerful, it is not all powerful. Resistance occurs at several sites, and the irony of the current climate of censorship is that it fuels queer cultural workers to resist the dominant discourses through a new spate of queer culture, which problematizes the art/sex, high/low dichotomies. Another irony in attempts by the state to censor lesbian and gay imagery is that the act of censorship can serve to bring representations into broader, public culture. While this may seem small comfort, the growth of queer culture underscores that hegemonies are never without points of weakness and resistance.

Shannon Bell's contribution focuses on a closely related issue: Canada's so-called "child porn laws." She demonstrates how "youth" and "child" come to be completely collapsed in a law which makes illegal the representation of sex with someone under eighteen years, despite the fact that the age of consent is fourteen.[58] So too, the exchange of money in Canada now makes an otherwise legal sex act with a youth illegal.[59]

Bell uses the events surrounding the construction of a child porn panic in London, Ontario, and an interview with street hustler and pornmaker Matthew McGowan (who was unsuccessfully prosecuted under the law), to underscore hypocrisy. She finds that the laws primarily target gay street youth, whose experiences making porn are firmly discounted by discourses of expertise, which insist on a narrative of coercion and victimization.[60] The question of why so many queer kids end up on the streets seems never to be asked within these discourses, thereby demonstrating "the straight mind's insistence that youth are directly harmed by the sexual involvement itself rather than by the social and cultural contextualization of this sexual involvement."[61]

Listening to the voices of gay street youth, s/m'ers, queer pornmakers, and others, is central to Bell's philosophical position. She advocates an ethics centred on "radical democracy," which involves "the activity of

57. *Ibid.* at 180.
58. *Ibid.* at 202.
59. *Ibid.* at 216.
60. *Ibid.* at 209-211.
61. *Ibid.* at 230.

listening, listening to all, all the way. Radical democracy is listening to all others and all parts of the self."[62] This position is grounded both in Foucauldian theory, and postmodernism more generally, in its ethical rejection of grand narratives. Indeed, this is the core of the ethical position of all the authors: that feminist anti-porn discourse has become a grand narrative which has silenced, demeaned, and trivialized other experiences and interpretations of sex and sexual representation, particularly those emanating from marginalized sexual communities. The *injustice* of that discourse flows from Bell's precept that "a society is just if no one game dominates the other games and becomes a grand narrative."[63] Displacing the grand narrative of anti-porn feminism is the task which the authors set for themselves.

Perverting Politics

Bad Attitude/s on Trial makes for compelling reading. Bringing four writers together to create a coherent whole is no easy task, and the authors have blended their different interests and disciplines admirably. Importantly, the style reflects their queer sensibility in relation to academic discourse. While the book is clearly a major contribution to political and legal theory, it also seeks to problematize the binary of academia and queer political activism. Thus, although the authors illuminate the serious issues raised by the censorship of queer images, they also manage to queer the genre of academic writing through the techniques of irreverence, humour, and camp. They "send up" the straight world at the same time that they participate within its discourse. For example, in contrasting the censorship of *Bad Attitude* to how Madonna's *Sex* entered Canada, Ross notes that "the safe passage of *Sex* across the U.S./Canada border was eased by the twin lubricants of money and power; the publishers of *Bad Attitude* had no such 'luck'."[64] While this style may cause discomfort to some readers, in the same way that the use of the term "queer" to describe an academic discourse often does, that is part of the exercise. With time, those readers may find that their discomfort lessens, without the need for intellectual lubrication.

On a more substantive level, the authors faced a conundrum. Their contention is that pornography is a site of contradiction, and that any narrative which seeks to explain the Truth of a representation inevitably

62. *Ibid.* at 213.
63. *Ibid.* at 214.
64. *Ibid.* at 171.

will be inadequate and partial. The critique of anti-pornography feminism lies in the way in which its claims to foundational Truth (which are privileged within Truth seeking legal discourse) have erased the diverse meanings and responses to pornography, especially those generated within alternative sexual communities. Moreover, those communities are demonized through the underlying sexual morality of Canadian obscenity law, as filtered through anti-porn feminism. However, it is difficult, as the authors acknowledge, to write and speak from the standpoint of contradiction, partiality, and nuance, especially within academic discourse, which, like law, generally privileges those with a claim to universal Truth. In other words, how do you answer one grand narrative without building up another? It is all too easy to respond to the claim that all porn is bad with the argument that all porn is good. At some points in *Bad Attitude/s on Trial*, this slippage begins to occur, although the authors claim to be skeptical of the possibility of there being a Grand Truth for any representation.[65] However, given the hegemonic position which anti-pornography feminism has occupied in the last several years, it seems to me that this rhetorical move—a form of strategic essentialism—is justifiable politically.[66] In her chapter, Lise Gotell calls for a reinvention within feminism of "an appreciation of debate, of wars of position, of respectful conversation and heated argument."[67] While anti-porn feminism clearly has silenced many voices, it is important that anti-censorship discourse avoids the same pitfalls if it is to cultivate respectful conversations between fair-minded people who agree to differ.

This brings me to a broader issue, namely, the political and theoretical agenda advocated in *Bad Attitude/s on Trial*. There are several elements to this agenda. Cossman and Bell suggest that our focus should shift away from criminalization and towards working practices and labour standards for those engaged in the production of pornography, and for other sex

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65. The possibility of constructing a regulatory regime based on the content of *any* representation thus must be open to question. This point is one which the authors try to avoid addressing explicitly, but which needs to be confronted by those skeptical both of the existence of a singular, literal Truth to representation, and of the ability of the state to interpret and regulate visual representations in a multicultural and pluralistic society.

66. I do not claim the high ground in this regard, for some of my own work engages in precisely this form of argument with respect to gay male porn. See C.F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) 55-90. Moreover, having been the subject of quite personalized attack within feminist anti-porn discourse (a non-consensual form of s/m ritual), I fully appreciate how academic discourse often forces the writer to respond to one grand narrative with an opposing Truth claim. See C.N. Kendall, "'Real Dominant, Real Fun!': Gay Male Pornography and the Pursuit of Masculinity" (1993) 57 Sask. L. Rev. 21.

67. *Supra* note 1 at 101.

workers.[68] Cossman rightly recognizes that "morality" is inherent in the way in which the law confronts sexuality, but her argument is that we need to construct a new sexual morality centred upon respect and consent.[69] Some have argued that queer theory too readily embraces liberal principles of consent as the basis for an agenda of social change.[70] But Cossman's point is that within heteronormative legal discourse, queer consent is ignored, disbelieved and, if recognized, it is assumed to intensify the human degradation of "bad sex." While consent may be foundational to liberal theory, legal liberalism has failed to take consent seriously when it comes to queer sexualities.

The authors also call for a reinvigoration of coalition politics around queer sex issues. Becki Ross is most explicit in her advocacy of this agenda:

> lesbians, gays, bisexuals, and friends need to pursue alliances with all communities who have experienced histories of intimidation—for example, coalitions amongst Black, Asian, and First Nation communities and communities of sex-trade workers, the disabled, and AIDS activists. Ambitiously, we need to persuade queers and queer-positive supporters that state sexual regulation has an impact on all of our sexualities, not just on those of perverts.[71]

However, I fear that this call for the ongoing construction of a "chain of equivalence"[72] between social groups which have experienced intimidation will be very difficult to achieve. It is hardly surprising that many communities of colour are reluctant to embrace a queer agenda, and many lesbians and gays of colour experience alienation from their communities (matched by their experience of alienation from racially coded lesbian and gay subcultures).[73] In part, this is explainable by the way in which dominant culture demands "respectability" of "minority" groups, as a prerequisite to the (unfulfilled) promise of social acceptance. Constructing alliances, while a noble aim, is no easy task.

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68. *Ibid.* at 44. I have made a similar argument in Stychin, *supra* note 66 at 74.
69. *Supra* note 1 at 144.
70. See, *e.g.*, S. Burgess, "Book Review: *Law's Desire: Sexuality and the Limits of Justice*" (*supra* note 66) (1997) 7 Law & Pol. Bk. Rev. 183 at 185 [online publication].
71. *Supra* note 1 at 192.
72. E. Laclau & C. Mouffe, *Hegemony & Socialist Strategy* (London: Verso, 1985) 144.
73. See, *e.g.*, C. Petersen, "Envisioning a Lesbian Equality Jurisprudence" in D. Herman & C. Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995) 118; M. Eaton, "Homosexual Unmodified: Speculations on Law's Discourse, Race, and the Construction of Sexual Identity" in Herman & Stychin, eds., *ibid.* at 46; G. Conerly, "The Politics of Black Lesbian, Gay, and Bisexual Identity" in B. Beemyn & M. Eliason, eds., *Queer Studies* (New York: New York University Press, 1996) 133.

Moreover, the yearning for mainstream respectability ensures that the goal of unity within gay and lesbian communities around state censorship will be equally difficult to realize. As the authors acknowledge, anti-porn feminist theory has many proponents in positions of relative power, including within the lesbian legal academic community.[74] Furthermore, for many lesbians and gays, mainstream respectability *seems* increasingly attainable in contemporary Canada (provided that they respect the public/private distinction, as it is constituted by the heterosexual order). The granting of *Charter* equality rights on the basis of "sexual orientation," in combination with statutory human rights guarantees (however narrowly they may be defined), is implicitly premised on the normalization of lesbians and gays, and this is increasingly embraced within sexual identity politics. Rather than standing up for a radical sex politics, many lesbians (and many more gay men) seem "wedded" (pun very much intended) to a conservative, normalizing, "vanilla" agenda, in which distance is maintained between "good gays" and queer outlaws who seek to pervert the public sphere.[75] As Shannon Bell perceptively describes, the need to construct an "other" is ever present amongst gays and lesbians: "identity/difference is duplicated inside the category homosexual to produce an internal dichotomy: virtuous homosexual/pervert."[76] Becki Ross experienced this dichotomy during the *Bad Attitude* trial. The Crown Counsel strategically separated the "lesbian community" (holders of rights) from the readers of *Bad Attitude*, who were constituted as part of an s/m community ("whose rights are, thankfully, not protected by the *Canadian Charter of Rights and Freedoms*").[77] I suspect that many gay men and lesbians would wholeheartedly concur with his assessment.

At the same time, one welcome impact of the current climate of censorship is an increasingly strong bond between some lesbians and gay men, especially within s/m communities. As both find themselves

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74. See, *e.g.*, A. Scales, "Avoiding Constitutional Depression: Bad Attitudes and the Fate of *Butler*" (1994) 7 Can. J. of Women & Law 349; R. Auchmuty, "Last in, First Out: Lesbian and Gay Legal Studies" (1997) 5 Feminist Legal Studies 235 at 248-252.

75. See, *e.g.*, M. Kirk & H. Madsen, *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the '90s* (New York: Penguin, 1989); B. Bawer, *A Place at the Table: The Gay Individual in American Society* (New York: Poseidon Press, 1993); A. Sullivan, *Virtually Normal* (New York: Picador, 1995).

76. *Supra* note 1 at 205. See also R. Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory" (1994) 19 Signs 975. This issue is the frequent subject of heated debate in the lesbian and gay communities; see C. Crain, "Pleasure Principles" Lingua Franca (October 1997) 26. Of course, it might well be argued that sex radicals engage in the "othering" of the "good gays."

77. *Supra* note 1 at 175.

marginalized, especially by élites within the lesbian and gay movements, these queers have discovered that they have more in common than they previously thought. In this regard, new alliances serve to resist a lesbian separatist politics, as well as some gay male attempts at incorporation within the patriarchal system.[78] It might be argued that this alliance should extend beyond same-sex queers, to embrace perversion amongst the heterosexually identified.[79] This may be an important dimension to a politics of perversion, although it too has its limitations. On the one hand, many cross-gender perverts now find their spaces subjected to intense regulation, at least in the United Kingdom, in a way which closely resembles the ongoing surveillance of other queer spaces.[80] But, on the other, the specificity of same-gender queer practices also must be considered. As Elizabeth Wilson argues, cross-gender perversion is sometimes (but certainly not always) read within dominant culture, not as a dangerous sexuality out of control, but as harmless kinkiness.[81] Provided that the public/private dichotomy is respected, consensual cross-gender sexuality between (two) adults is constructed rather differently than same-sex perversion.[82]

Although all of these alliances are important and should be fostered, I read the agenda offered in *Bad Attitude/s on Trial* as centred on the disruption of the public/private dichotomy; a strategy which has been advanced by other queer theorists.[83] For many, the new closet is inhabited

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78. See generally P.L. Duncan, "Identity, Power, and Difference: Negotiating Conflict in an S/M Dyke Community" in Beemyn & Eliason, *supra* note 73 at 87.

79. The identity categories lesbian, gay, bisexual, and straight can come to be rendered increasingly unstable and contradictory when the focus is on s/m. I would argue that part of its importance as a site of resistance to heteronormativity is the potential of s/m, in some moments, to resist the constraints of these categories; i.e. to queer them. My use of the term "perversion," in this context, refers to sexual *acts* (as opposed to *identities*) which are socially constructed within heteronormative culture as outside the bounds of respectability. While same-sex sexual activity historically has been interpreted within dominant culture as perverse, my argument here is that the relationship between acts, identities, social respectability, and perversion, arguably is becoming increasingly ambiguous.

80. See T. Hoople, "Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation" (1996) 11 Can. J. L. & Soc. 177 at 189-190, fn. 36.

81. E. Wilson, "Is Transgression Transgressive?" in J. Bristow & A.R. Wilson, eds., *Activating Theory: Lesbian, Gay, Bisexual Politics* (London: Lawrence & Wishart, 1993) 107 at 113.

82. On the construction of gay male sadomasochism, see Stychin, *supra* note 66 at 117-139 (analyzing the reasoning of the House of Lords in the gay male s/m case of *R.* v. *Brown*, [1993] 2 W.L.R. 556). By contrast, see the Court of Appeal's treatment of extreme heterosexual s/m between a married couple: *R.* v. *Wilson*, [1996] 3 W.L.R. 125.

83. See, *e.g.*, L. Berlant & E. Freeman, "Queer Nationality" in M. Warner, ed., *Fear of a Queer Planet* (Minneapolis: University of Minnesota Press, 1993) 193.

by the perverts in the gay and lesbian communities; and while a darkroom can be a highly pleasurable space, it is nice to have the option to "come out" within the broader community. But acceptance there, let alone within dominant culture, is hard to find. One of the great ironies of feminist anti-porn discourse is its insistence (chanted like a mantra) that lesbians and gays who practice s/m are simply appropriating the values of masculinity and patriarchy.[84] But queer s/m'ers find that heteropatriarchal culture, far from embracing them as new recruits, is ready to bash verbally and physically at the sight of leather and a crewcut. As the authors convincingly argue, those attitudes are understandable because of the contradictory relationship between queer s/m practices, and the codes of masculinity and femininity. The cultural appropriation of those codes does not signify their unthinking adoption, but serves to problematize the construction of fixed and static gender roles within a heteronormative order.

Legal discourse never achieves total closure. The spaces, gaps, and contradictions are always open to exploitation by queers on the street, in "performance," in the courts, and in the academy. *Bad Attitude/s on Trial* is one act of resistance. It is a major contribution and undoubtedly will prove to be a central text on the contested terrain of pornography. It should be read by everyone with an interest in freedom of expression, queer politics, and feminist theory.

84. See, *e.g.*, Scales, *supra* note 74; Kendall, *supra* note 66. For a forceful critique of this feminist anti-s/m argument, see Hoople, *supra* note 80.