On Reconfiguring Autonomy: Problematics of (Homo)Sexual Orientation Discrimination and Privacy
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1. Introduction

1.1 Perils of the (Clapham) Omnibus

In a comprehensive study of anti-discrimination legislation in Australia, Margaret Thornton identifies a particular conceptual weakness of these legislative frameworks in the following terms:

The idea that men and women, Aborigines, recently arrived non-English speaking immigrants and white Australians, the unmarried and the married, the physically impaired and the physically normal, the intellectually impaired and the intellectually normal, the homosexual and the heterosexual, and those with both acceptable and unacceptable religious and political convictions can be subsumed within a corresponding omnibus theory must necessarily be analytically incoherent. (Thornton 1990: 21)

To assume that each of the grounds of discrimination articulated in such omnibus legislation can operate as "a mirror image of the other" necessarily distorts the vastly different lived experiences of the "occupants of the respective grounds" and subsumes the "unique issues of historical and conceptual difference pertaining to each ground" (46). With respect to (homo)sexual orientation discrimination, prime among these unique conceptual difficulties is a paradox of privacy.

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Thornton also notes the particular influence of the discourses of psychiatry in constructing homosexuality in terms of, for example, biological anomaly, mental illness, personality disorder, neurosis, sickness etc (85); the role of AIDS discourse in "stumbl[ing] over" the liberalisation of "contemporary mores regarding sexuality, eroticism and the autonomy of the body which have been central to both women's and gay liberation" (85) such that, in spite of this ostensible liberalisation (indicated by decriminalisation and anti-discrimination legislation) the "state has been able to reassert ... control over sexuality, particularly homosexuality" (86); the role of the state in tacitly condoning discrimination against homosexuals through "inaction regarding general assaults as well as the perpetration of ... violence by the police" (87) and the "overriding universalism of maleness" (83) as a consequence of which lesbian experience is both rendered invisible (as male same-sex orientation becomes the paradigm of (continued...))
Thornton briefly alludes to this as follows:

The proscription of discrimination on the ground of homosexuality is paradoxical in that a very private matter, the expression of a person's sexuality is recognised as having a potentially central role in his or her public life. This privacy dimension has a peculiar poignancy for a gay person, for he or she must 'come out' in order to make an allegation concerning his or her public world. (Thornton 1990: 84)

It is from these points of departure – from the imperative that one attend to the particularities "which cannot be accommodated by the preference for the universal standards of liberal legalism" (Thornton 1990: 46), and from the centrality and complexity of the notion of privacy in understanding the particularity of (homo)sexual orientation discrimination – that this paper proceeds.

1.2 The Siren Song of Comparability

Such an approach cannot be adopted without some measure of ambivalence, however, for it is a further particularity of the discussion of sexual orientation rights that despite "widespread, systemic, and longstanding discrimination" (Heinze 1995: 17) and violent persecution (Heinze 1995: 3-10) the rights of sexual minorities remain largely unknown to the discourses of international human rights\(^2\) (Heinze 1995; Garwake 1997: 69). Against this invisibility, and discursively figured in the argument that sexual orientation rights are frivolous, decadent, offensive, luxurious and so on – simply not fundamental – the appeal to comparability is powerfully seductive, both epistemologically and strategically. In Eric Heinze's words:

Sexual orientation is basic. It counts among the most determinative forces of human personality and social organization. Those facing the entire range of human rights violations due to their actual or imputed sexual orientation rank on a par with those facing racism, sexism, and all other internationally recognized forms of persecution. The rights involved are equally fundamental and equally urgent. Indeed the rights sought – rights of personhood, liberty, equality, conscience, expression

(...continued)

homosexuality) and stigmatised and punished (because as an "autonomous female sexuality" it is seen to destabilise the prevailing gender norms of patriarchal culture) (84-5).

\(^2\) Heinze notes as evidence of the silence surrounding sexual orientation rights the "absence of any significant mention of sexual minorities in the archives of the human rights organs of the United Nations and in standard writing on human rights, and the discomfort felt by even the most progressive non-governmental organisations" (references omitted, 1995: 17).
and association – are largely identical. ... The goal of rights of sexual orientation is to identify people subject to discrimination, and to establish for them the same rights accorded to people facing other comparable, already recognized forms of discrimination. The goal is not to elevate sexual orientation to special status, but only to assign it a status comparable to race, ethnicity, religion, sex, and other recognized grounds of discrimination. (footnotes omitted, Heinze 1995: 21)

This aspiration is the real achievement of Heinze's study: *Sexual Orientation – a human right: an essay on international human rights law*. Insisting on the derivative quality of sexual orientation rights, Heinze argues that, despite the fact that no international human rights instruments specifically mention discrimination on the basis of sexual orientation, important positive changes can be achieved for sexual minorities through the use of the international human rights regime. This insistence speaks both to, and from within, the dominant liberal theoretical and philosophical underpinnings of human rights discourse, and in this sense Heinze's study is a valuable counter to the invisibility and silence surrounding issues of sexual orientation with which this discourse is marked.

Whilst acknowledging the value of Heinze's study in these terms, Sam Garkawe's review is careful to point out (although without any detailed discussion) that the "sexual liberalism" of such an approach is hotly contested, particularly from the critical perspectives of queer theory and lesbian feminist legal theory (1997: 88). In discussing the history of the gay liberation movement in Australia and the more recent development of queer theory, Wayne Morgan provides a more detailed consideration of what is theoretically at stake in this contest. Morgan describes the agenda of the gay liberation movement as follows:

The gay liberation movement, in my reading, is very aptly named. Its fundamental assumptions are firmly rooted in the Western traditions of liberalism. In effect, it tells us that gay men and lesbians are in fact the 'same as' and therefore equal to their heterosexual counterparts. We, like heterosexuals, are autonomous individuals, who, if free to do so, will choose between proffered alternatives so as to fashion our own 'good life' and thereby create social value. We are individuals who seek to maximise our freedom. Sexuality, in particular, is a matter of personal freedom, a private matter into which the state should not intrude. The fact that the state does intrude and we are discriminated against in all spheres of life is explained by gay liberation theory in a way that could be analogised to a 'perceptual error'. ... [B]ecause the law does not perceive us to be the 'same', we are not treated as equal. (footnotes omitted, Morgan 1995: 27-8)
Such a strategy, Morgan suggests, has achieved very little success and that at the price of "the suppression of diversity within gay and lesbian communities" (29) and the perpetuation of "a particularly restrictive and sanitised picture of gay and lesbian identity" (28) which ultimately legitimises and re-inforces the heterosexism of dominant (legal) culture. The insistence on establishing "sameness" to the heterosexual standard means that in order to achieve social change through the legal system "we must first establish that we deserve its justice by demonstrating our respectability and our sameness to what is ... natural and normal" (28). The oppression of homophobia is thereby sustained through the reduction of "homosexuality" to a unitary category already constructed as the abject other of normative heterosexuality and through the re-inscription of homosexuality as "naturally alien" (29).

The central tenet of Morgan's account of queer (legal) theory is that the power of law is not to be found in "outcomes achieved through legal reform but in law's claim to speak the truth and to disqualify the 'truth' of other knowledges" (37). The failure of gay liberation has been its failure to understand that the power of law is, in Foucauldian terms, discursive and that the "real battle ... lies in contesting the homophobia of law which is just as apparent in law's 'gay friendly' voice (decriminalisation and anti-discrimination discourse) as it ever was in the formal 'gay unfriendly voice' of law in the past" (37). Like Thornton's insistence on the particularities of different grounds of discrimination, Morgan's approach also carries with it an imperative, one which forms a second point of departure for this paper – the epistemological imperative of a deviant subjectivity. Morgan describes this as follows:

The power to expose the partiality of the dominant account and thus destabilise it is generated from this position of the 'deviant'. By centring this deviant subjectivity in our readings of legal texts, we can map the techniques by which homosexuality has been marked as different and pathological and then locate subjective resistances to this homophobia. Note that this type of reading has two purposes. First it allows us to trace the processes by which the law produces deviant subjectivities. But it

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3. This is not to suggest that the discourses of law are singular in this respect. Rather, "[l]aw, as a discourse, resonates with and mutually reinforces other discourses in a way that combines to produces the stereotype of 'homosexuality'" (Wayne Morgan 1995: 8). Legal discourse nonetheless holds a privileged position over other discourses because it purports to speak as one of the primary voices of the liberal state. Law enjoys a particular power because of the institutional, political and moral authority it commands, because of the wealth and resources which are invested in it and because of its ability to directly affect the lives of those who are subjected to its processes. (footnotes omitted, Wayne Morgan 1995: 8-9)
also allows us to 'trace the conditions whereby marginal subjects apprehend possibilities for expression and self-representation in a field of contest'. In other words, it allows us to map the different truth told by sexual deviants about their identities thus disputing law's 'truth'. (1995: 37)

2. Valuable Personal Autonomy: Re-configuring Legitimacy and Privacy

With these imperatives in mind, the particular site in which the deviant reading subjectivity of this paper is located is John Gardner's theory of valuable personal autonomy (Gardner 1989; 1992), which will be briefly outlined in this section 2. More precisely this paper will attempt to trace the tensions between certain particularities of (homo)sexual orientation discrimination and the generality of Gardner's theory. What will become apparent in the course of the brief case analyses presented in section 3 is that the discursive power of the law to produce homosexuality as deviant can operate through such ostensibly liberating notions as self-authorship, self-expression, personal autonomy and choice which are central to Gardner's project.

Gardner's theory of valuable personal autonomy is cast as an attempt to diagnose and correct the inadequacy of contemporary liberal theory, an inadequacy which explains, moreover, why the emancipatory promise of liberalism – the promise of self-authorship – remains elusive. In explaining this failure, Gardner points to two causes: (1) the inadequacy of "the whole conceptual armoury of political liberalism" (1989: 15) in defining its legitimacy doctrines; and (2) an immobilising commitment to privacy.

2.1 Autonomy: Re-configuring Legitimacy

Gardner notes the centrality for liberalism of questions of the appropriate limits of government authority (1989: 1). The two main legitimacy doctrines through which these limits are articulated are the harm principle and the principle of distributive justice. Gardner explains these doctrines as follows:

The harm principle operates, under specified conditions of liability, to implicate individual members of society. Citizens may be held responsible for harms that take place under their control, and may be subjected to enforced treatment ... in light of their personal blameworthiness. By contrast, the injustice of a distribution is attributed to no one but the society as a whole. Although the appropriate response may be to require some or all to contribute ... to the process of redistribution ... disadvantage and its correction are perceived as areas of collective, not individual, responsibility. (1989: 2)
Anti-discrimination and affirmative action measures are something of a limit case for liberal tolerance, for such measures are not readily comprehended within either doctrine. In particular, neither doctrine can easily reconcile the notion of requiring citizens (as opposed to the state itself) not to discriminate against one another, with the liberal commitment to allowing citizens to pursue "their personal preferences and projects" (1989: 3).

Moreover these are incompatible doctrines for they entail different, indeed antagonistic, modes of government response, each requiring "its own appropriate structure of legal rules and a distinct set of social institutions, and this to the exclusion of other possibilities" (1989: 12). This is particularly problematic when particular social practices involve both elements of individual harm and distributive injustice. Government action premised on either one of the doctrines will seem to be unacceptable when viewed from the perspective of the other doctrine:

[S]ince the moderate liberal theory of distributive justice treats it as an end-state principle, and the moderate view of the harm principle associates it with past harmful actions and state responses to culpability, there is no point at which the two principles could be said to be joined ... [A]n application of the liberal harm principle will be incoherent and arbitrary from the perspective of liberal distributive justice, because it will look to past behaviour; meanwhile redistribution will not cohere with the harm principle because it will look only to the justice of end states, ignoring how they came about. (1989: 16)

The discontinuity of these two principles is less a conflict within the liberal tradition than indicative of the general conceptual inadequacy and intransigence of liberal thinking. Unable to attend to the significance for its legitimacy doctrines of the continuity of culture, contemporary liberalism merely seeks to extend the conceptual coverage of either the harm principle or distributive justice rather than understanding that the complexity of "our actual culture and history" calls for the "emergence of a new principle" (1989: 17).

This diagnostic intervention made, Gardner then tries to generate a new principle which will overcome these difficulties. Drawing on Joseph Raz, the corrective Gardner proposes is the notion of valuable autonomy:

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4. For example, voluntary affirmative action programmes might be understood to respond to a redistributive imperative. Where, however, the programme is designed to address an employer's own past discriminatory practices such a programme might appear to be justified under a notion of harm corresponding to individual responsibility and personal blameworthiness.
For Raz, our liberal culture fosters a particular ideal of autonomous agency, and we can view the legitimacy of the state as depending primarily on its pursuit if that ideal. We can therefore identify a single legitimacy doctrine within our culture, which associates the state with the protection and promotion of a particular conception of valuable freedom. Instead of proposing the two conventional doctrines ... Raz advocates a single and continuous principle ..., 'a perfectionist doctrine which holds the state to be duty-bound to promote the good life. It stops at coercion and manipulation only where their use would not promote the ability of people to have a good life but frustrate or diminish it'. (references omitted, 1989: 17-18).

For Gardner, this "unitary ideal of autonomy" (1989: 18) offers, crucially, a more expansive understanding of the legitimacy of government action, now understood to include not only a negative duty to protect individual liberty (non-interference) but also, and more importantly, a positive duty (extending almost to coercion and manipulation) to promote the good life. The state, thus, is authorised both to protect and promote the circumstances required for the development of valuable autonomy so that the liberal ideal of self-authorship and flourishing can be achieved. This requires the state to "foster a public culture which enables people to take pride in their identity as members of ... groups" (1989: 18) and to create an environment in which individuals have "an adequate range of options and the opportunities to choose them" (1989:19). The state's positive duty to promote the ideal of the autonomous self as "an agent who finds his autonomy defined by his commitments and his participation as much as by his gradually emerging individuality" (1989: 19) allows it openly to provide and prefer the kinds of institutional arrangements - those based on competitive pluralism and mutual toleration – that are most in accordance with this ideal.

This in no way detracts, Gardner argues, from the centrality in liberal philosophy of individual autonomy. Indeed, it is the full realisation of that objective because it is concerned not with a limited, individualistic autonomy, degenerating into "unfettered personal choice" (1989:21). Rather, autonomy is understood as "participative", involving "obligations of mutual life enhancement" (1989: 19). Moreover, on Gardner's reading of Raz, this conception of autonomy "is already defined in our existing cultural institutions, and is part of our shared heritage" (1989: 21). It is a creature of the pluralistic and tolerant culture we already understand ourselves, collectively, to be.

Gardner concludes that this is a useful corrective to recent liberal thought for whilst one of the strengths of liberalism is its responsiveness to the development of social practice, this cannot be fully achieved in the absence of a thorough re-configuring (as opposed to merely extending) of its legitimacy doctrines. In this perspective, the two methods of enforcement of anti-discrimination legislation (in
direct discrimination, the harm principle and in indirect discrimination, distributive justice) have a single objective, namely:

the enhancement of the valuable autonomy of citizens and the implementation of the ideals of their shared culture. That culture is, on Raz's interpretation, one of competitive pluralism and mutual toleration; but also one of participation and unavoidable commitment. ... The law of discrimination sits comfortably in this non-individualistic theory of autonomy, according to which the state has its own project of providing the conditions of valuable flourishing for its citizens. ... [P]rohibiting both sorts of discrimination is merely a ... straightforward example of the state's legitimate role. (1989: 22)

2.2 Autonomy: Re-configuring Privacy

In another context, Gardner (1992) again attempts to theorise the problem of determining the legitimate scope of state action, on this occasion through an investigation of the notion of privacy. In the liberal understanding of social life as divided into three distinct spheres – the state, the market and the family – the proper role of government is confined to the state sphere. Economic and personal relationships and activities belonging to the other two spheres will be regarded as "private" – that is, self-sufficient and self-justifying, regulated by the internal norms of individual choice according to preference, removed from public scrutiny – and hence, beyond the reach of state intervention. The difficulty that this poses for liberalism's promise of emancipation "from pervasive hierarchical structures" (1992:148) is that "there are no institutional channels through which liberal citizens can call into question the long-established patterns of domination which are internal to such activities" (1992: 149). This amounts, in effect, to a privatisation of dominance and subordination through which "[l]iberal political principles disable themselves from reaching into two-thirds of the social world" (1992: 149).

Rather than this largely disabling notion of privacy, Gardner imagines that the principle of valuable personal autonomy requires that the limit of state intervention should be placed not around the "private" sphere, but around those "peculiarly direction-sensitive relationships" and activities that are most closely associated with spontaneity and self-expression (1992: 153). Some relationships that are traditionally understood as lying within the private or domestic sphere would fall within this definition – marriage, co-habitation and procreation, for example (1992: 155) – but this is not because these activities belong in the private sphere. Rather, it is but because such relationships are peculiarly direction-sensitive – that is, they are particularly likely to be damaged or distorted if directed from the outside.

Anti-discrimination measures are important (indeed, are part of the state's legitimate project) because of the role they play in enhancing personal autonomy by opening up valuable options – "it is impossible to lead a fulfilling life without
personal autonomy, and people do not enjoy personal autonomy unless, among other things, they can choose the path of their lives from among a reasonably wide range of valuable options" (1992: 154). However, it is implicit in the notion of a range of valuable options that some of the valuable options that one must have the opportunity to pursue must involve social forms that are not "hedged about with rules and regulations," but proceed, rather, from "spontaneity and self-expression" (1992: 154). Thus:

Legal regulation of race and gender discrimination, in the context of certain activities and relationships may do serious institutional harm, depleting or skewing society's general stock of autonomy-enhancing social forms, leaving too little space for truly spontaneous and self-expressive activities and relationships, destroying more personal autonomy than it creates. (1992: 155)

Notwithstanding that there are some social forms that, in principle, should not be regulated, the state may intervene where such relationships have become grossly deformed by some "autonomy-damaging corruption" (1992: 157).

One difficulty that adheres to this approach is that direction-sensitive relationships may corrupt personal autonomy in their paradigmatic, and not only their deformed, versions. Indeed Gardner notes that the prevailing man-woman and parent-child relationships within the structure of the patriarchal family tend "to close off whole classes of valuable options for women, which [they] generally do[not do for men]" (1992: 158). Although one might undertake a utilitarian calculation – the existing forms of these relationships may create more personal autonomy than they destroy and regulating them may destroy more personal autonomy than it creates – this calculation will not recognise that "as things stand, women typically get the raw end of the deal" (1992: 158). Gardner is insistent that these direction-sensitive relationships are not to be directly regulated but insists nonetheless that anti-discrimination law still holds out the promise of liberation:

[I]n this case it does not do so by directly regulating the relationship in which the domination is primarily situated. Instead the immediate strategy is to adjust other relationships and activities, both in particular instances and at the level of their supporting social forms, so as to open up a more adequate range of options to women living in patriarchal families. (1992: 158)

Thus, while the scope of anti-discrimination measures is not over-extended into direction-sensitive relationships, its responsiveness to the internal dynamics of such relationships is enhanced. It is through this indirect "promotional effect" (1992: 162), through guiding the "alteration of the future value structure of society" (1989: 19), Gardner argues, that fundamental, systemic power imbalances can be addressed.
2.3 Pluralism and the Impotence of Law

Gardner's theory is largely developed in the context of gender discrimination and, to a lesser extent, race discrimination. As will be apparent from the preceding discussion, Gardner remains fully convinced of the capacity of liberalism to meaningfully address questions of patriarchal power. He is somewhat more equivocal in relation to the dynamics of racism, but at no point are gender and race discrimination considered as anything less than the very paradigmatic instance of the role of anti-discrimination measures in securing the ideal of personal autonomy. This question will be pursued in the following section which will examine the difficulties posed for Gardner's approach by some of the particularities relating to (homo)sexual orientation discrimination. Before proceeding to this question, brief consideration will be given to two other problematic features of Gardner's theory.

Firstly, one cannot but be struck by Gardner's peculiarly contradictory understanding(s) of the role and efficacy of law in liberal society. On the one hand, he is clearly sceptical about the value of law as an instrument able to produce change – the failure of the liberal political tradition to deliver on its liberating promise is a result of the "impotence of law tout court" (1992: 168). And yet, Gardner is utterly committed to the idea that legal intervention can effectively alter the future value structure of society as a whole. From the perspective of the ideal of valuable personal autonomy, the law is, paradoxically, both impotent and powerful, "a blunt tool, which destroys more readily that it creates" (1992: 168) and the mechanism through which liberal society "makes carefully targeted strikes" (1992: 167) in the spheres of the market and the family.

Secondly, Gardner seems to have no way to account for the very clear disjuncture between the premises of the autonomy doctrine – that mutual tolerance and competitive pluralism is immanent in our shared cultural understandings, that the ideal of autonomy is the "repository of shared cultural values" (1992: 21), that our collective imagination is pluralistic – and his own recognition that prevailing forms of the social relations most closely associated with personal autonomy are marked not by pluralism, but by dominance and subordination.

3. Of Manly Diversions and Lesbian Mothers

The final section of this paper will focus on two concepts that are of particular significance to Gardner's project – privacy and choice. More precisely, it will

5. Here, Gardner suggests as a possible limit case that there may be a need to accommodate the autonomy-damaging power structures entailed in the ethnic customs and traditions of sub-cultures "in which personal autonomy is not an essential component of the good life" (1992: 163).
proceed by analysing three cases that are nicely illustrative of the particularities raised by these concepts considered in the context of (homo)sexual discrimination, particularities which are not articulable – or only incoherently so – in Gardner's idiom of valuable personal autonomy. The first of these cases, *Bowers v Hardwick*, involved an unsuccessful constitutional challenge to state criminal anti-sodomy law. The second case, *R v Brown*, involved an unsuccessful attempt by a number of participants in sado-masochistic activities, criminally prosecuted for assaults against other participants, to raise, as a defence, the consent of the "victims" of the assaults. The final case, *QFG & GK v JM*, concerned an unsuccessful discrimination complaint brought by a lesbian woman who was denied access to a donor insemination programme on the basis that as she was involved in an exclusive lesbian relationship, she did not fall within the medical definition of infertility. Key themes which this analysis will attempt to draw out are that:

1. Contrary to Gardner's presupposition that the fetishisation of "the private" that characterizes much contemporary liberal theory disables state intervention into that sphere, it has been difficult, in the context of homosexual sexual-affective orientation and conduct, to exclude intrusive surveillance and regulation by the institutions of the public sphere; and

2. Gardner's understanding of autonomy as a function of the ability to choose the path of one's life from among an adequate range of valuable options is not easily reconciled with the construction of homosexuality, through the discourses of medicine, psychiatry, sociology, religion, and law (amongst others), as pathological deviance and/or moral degeneracy. Within this construction the choice of homosexual sexual-affective relationships can only be understood as a lesser form agency (addiction, compulsion etc) or as a form of volitional immorality.

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7. *[1993] 2 WLR 556.*
8. Queensland Supreme Court, 24 October 1997 (unreported).*
3.1 In the Publicity of the Bedroom – Bowers v Hardwick

The paradoxical quality of the notion of privacy in the context of (homo)sexual orientation rights has been the subject of a not inconsiderable literature. To take but one example, Kendall Thomas provides a very cogent analysis of the way in which, for gay men and lesbians privacy is "singularly sinister" (1992: 1456) because of the structural relation to secrecy which it necessarily implies:

For heterosexuals, the concept of privacy serves to carve out a safe haven for human flourishing. The category of the private may thus be said to carry a singularly positive valence: privacy is the place where individuals come to understand and express their understanding of the meaning of intimacy. For gays and lesbians, however, the language of privacy has never represented such an unqualified good. To be sure, the rhetoric of privacy has made it possible for gay men and lesbians to argue that what individuals do in their bedrooms is no one else's business and certainly not the state's. However, because of their historical social position, gay men and lesbians have not been able to ignore the double resonance of this argument. For them, the claim to privacy also always structurally implies a claim to secrecy. Under the existing political and legal regime, gay men and lesbians are aware that the chief value of the language of privacy is that it can be used not so much to provide a space for self-discovery, but to provide against the dangers of disclosure. (1992: 1454-5)

Morgan goes somewhat further, noting that the sexual "privacy" of gay men has routinely been publicly regulated. Notwithstanding the formal position that private, consensual adult sex – heterosexual or homosexual – is unregulated,

the non-regulation of the private has been a myth for gay men, at least throughout this century, because of both the direct formal regulation of gay 'privacy' (sodomy laws) and because of the unequal enforcement of laws dealing with other 'sex crimes'. Gay sex is prosecuted, straight sex is not. This used to happen under sodomy laws, now it happens under offensive behaviour laws. (1995: 19)

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9. Similarly, for example, Ruthann Robson notes that "[w]hen we think of our sexuality in terms of the legal concept of privacy, we become confused. We want to be both private and public. We want to be able to say that our sexuality is no one's business, and we want to be out of every closet" (1992: 64). See also Thornton (1990: 21) and Sheppard (1988).

10. One might also add here the operation of the homosexual panic defence under the guise of which, Dean Kiley (1994; 1996) argues, some extraordinarily violent "poofter (continued...)"
The complexity of the relationship between the public and the private – the contingency of these terms and their susceptibility to redefinition through the public discourses and practices of the institutions of the state – is nicely illustrated in *Bowers v Hardwick*. The basis of the decision was that the Georgia statute criminalising sodomy did not violate a constitutional right to engage in sodomy. Such a right could not be inferred from the line of cases establishing a right to privacy in relation to child rearing and education, family relationships, procreation, marriage, contraception and abortion (145-6):

> Accepting the decisions in these cases ... we think it evident that none of the rights announced ... bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated .... Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. (146)

Nor could it be argued that the right to engage in sodomy was fundamental – in the sense of being either "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition" – such that the statute was required to withstand a heightened level of judicial scrutiny:

> It is obvious that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. ... Sodomy was a criminal offence at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1967, all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy in private and between consenting adults. ... Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious. (references omitted, 147-8)

Rather, the required rational basis of the legislation could be found in the electorate's belief, as inferred from the legislature's passing of the legislation, "that homosexual sodomy is immoral and unacceptable":

(...continued)

> "bashing" assaults have been legitimated and excused.
Even if the conduct at issue is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. (references omitted, 149)

On the face of it, the circumstances of Hardwick's arrest would seem to be very clearly explicable in terms of a privacy analysis, whether that was understood in its decisional aspect or indeed its spatial aspect (in Gardner's terms "direction-sensitivity" and "spheres of social life" respectively). Hardwick was arrested, after all, in that most private of privacies — whilst having sex in his bedroom. And yet, as Thomas notes, Hardwick's arrest for sexual acts in private was the culmination of a longer history of public events. Some time before his arrest Hardwick was issued a ticket for drinking in public — a policeman had seen him throwing a beer bottle into a rubbish tin outside the known gay bar where he worked. Upon being questioned, Hardwick stated that he worked at the bar, which had the effect of immediately "declaring" his homosexuality. Through an administrative error Hardwick failed to appear, whereupon the ticketing officer appeared at Hardwick's home with a warrant. Learning of the visit upon his return, Hardwick then went to the courthouse and paid a $50 fine. Three weeks later, Hardwick was assaulted outside his home by three men who knew his name and whom he believed to be police officers. A few days later the ticketing police officer again appeared at Hardwick's home, with the now invalid warrant, and found Hardwick in his bedroom having sex with another man and they were both arrested. Thomas suggests, and rightly so it seems, that Hardwick would never have been arrested for his private sexual conduct had it not been for the incidental/accidental public revelation of his sexual orientation, a revelation which effectively publicised both his spatial privacy (through the unauthorised entry of a police officer into his bedroom) and his decisional privacy (through the threat of a custodial punishment). It is the transmutability of these categories along with the unwanted re-inscription of the private as public through the operation of the discourses and practices of the state that remains elusive to Gardner's analysis of privacy as personal autonomy when considered in the context of sexual orientation discrimination. What is also

11. Strikingly absent, one might note, from the public record of the judgment.
elusive – as will become clear in the following discussion of *R v Brown* and *QFG & GK vJM* – is that in this context, "autonomy", like "privacy", is subject to similar processes of (unwanted) discursive re-inscription.

### 3.2 Unmanly Diversions – *R v Brown*

There are some clear resonances between the circumstances of *Bowers v Hardwick* and those of *R v Brown*. It is not without interest, for example, that the eventual prosecution of the defendants – the eventual "publicising" of their "private" activities – came about as an accidental consequence of investigations into another matter (566, 607). Similarly, and again by way of comparison, it is interesting to note the assertion that it is both appropriate for the legislature to regulate the particular "private" sexual acts with which this case was concerned and that in so doing, the "public" interest is properly to be considered decisive:

The question of whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by consideration of policy and public interest. Parliament can call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and can also take into account public opinion. (my emphasis, 563)

For the purposes of this paper, however, attention will be focussed on the question of central doctrinal significance – the possibility of consenting to an assault occasioning actual bodily harm. More precisely, and remembering that it was never suggested by any of the "victims" that they had not consented, Gardner's theory of valuable personal autonomy is clearly problematised by the discursive construction of the forms of agency from which that consent is understood, in this case, (not) to flow. As discussed above, Gardner underscores the centrality to the ideal of valuable personal autonomy of the availability of an adequate range of valuable options and the opportunity to choose them. Importantly, however, the fact that, as a matter of social reality, the diversity of sexual-affective choices are not neutrally differentiated – that these choices are an ordered hierarchy rather than a series of equivalences – is not readily comprehended by the metaphor of a range. Denise Thompson explains Gayle Rubin's configuration of the "sexual value hierarchy" in "modern Western societies" as consisting in:

‘marital, reproductive heterosexuals’ as the most highly approved sexual individuals, who appear ‘alone at the top of the erotic pyramid’. Slightly below them are the ‘unmarried monogamous heterosexuals in couples’, with ‘most other heterosexuals’ following close behind. Masturbation is still somewhat frowned upon, as is evidenced by the idea that it is a ‘substitute for partnered encounters’. A little further down, and ‘verging on respectability’, are ‘stable, long-term lesbian and gay male couples’, while ‘bar dykes and promiscuous gay men’ are near the bottom of the scale. Occupying the very depths are such ‘despised sexual castes’ as
On Reconfiguring Autonomy

'transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models'. Right at the bottom of the scale of value, and 'lowest of all' ... are 'those whose eroticism transgresses generational boundaries'. (references omitted, 1991: 178)

That the particular sexual-affective relationships involved in this case are very nearly "lowest of all" is clearly evidenced by the proliferation throughout the judgments of the language of repugnancy. The practices were "evil" and "uncivilised" (566), "disgusting" (585), "repugnant to general public sentiments of morality and propriety" (585), "unpredictably dangerous and degrading to body and mind and ... developed with increasing barbarity" (564); they consisted in the satisfaction of a "perverted and depraved sexual desire" (583) and could not but produce a "feeling of revulsion and bewilderment" (603) and a "repugnance and moral objection, both of which are entirely natural" (599). Hence, "[i]t is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions – perhaps horror, amazement or incomprehension, perhaps sadness – very few could read even a summary of the other activities without disgust" (584).

Given this hierarchical structure, it seems clear that Gardner's suggestion that the autonomous individual is constituted through the selection of choices from an adequate range of valuable options ought properly to be considered alongside an analysis of the processes whereby those choices acquire (moral/social) value. As the following passage from the dissenting judgment of Lord Mustill pointedly demonstrates, it is not enough (as Gardner seems to imagine) that one is "free" to make a particular "choice" from a range of options if that "choice" is already constructed as morally unacceptable:

12 It is also strikingly apparent in the concern evinced as to the dangers of corruption of youths — in respect of one younger male participant the court noted with relief that "[i]t is some comfort at least to be told ... that K is now it seems settled into a normal heterosexual relationship" (573) — and proselytising. This latter is a particularly curious concern because it was clearly apparent from the evidence that the activities of the groups were highly ordered and secretive, that entry into the group was by way of a complicated route of phone numbers and preliminary meetings, and that it was entirely in the hands of the potential member to initiate contact. One cannot but expect therefore that one would have been proselytising to the converted.

13 In a different context, Wayne Morgan also gives a particularly a nice example of this problem in discussing the Western Australian decriminalisation of sodomy legislation which simultaneously makes homosexual conduct publicly available — in the sense that it is no longer subject to criminal sanction — at the same time as it inscribes, literally in
When proposing that the conduct is not rightly [charged under the relevant Act] I do not invite your Lordships' House to endorse it as morally acceptable. Nor do I pronounce in favour of a libertarian doctrine specifically related to sexual matters. Nor in the least do I suggest that ethical pronouncements are meaningless, that there is no difference between right and wrong, that sadism is praiseworthy, or that new opinions on sexual morality are necessarily superior to the old, or anything else of the same kind. What I do say is that these are questions of private morality. (599)

The majority, of course, were adamant that, precisely because homosexual sado-masochistic practices are "unacceptable" – because this is a "perverted and depraved sexual desire" – they should not be available as a choice at all. The satisfaction of the sado-masochistic libido (564, 582) – unlike for example, "manly diversions",\(^{14}\) the welfare of society, or the promotion of family life – does not fall within the category of "good reason" in the context of the general principle that one must not occasion actual bodily harm to another except for "good reason":

What the appellants are obliged to propose is that the deliberate and painful infliction of physical injury should be exempted from the operation of statutory provisions the object of which is to prevent or punish that very thing, the reason for the proposed exemption being that both those who will inflict and those who will suffer the injury wish to satisfy a perverted and depraved sexual desire. Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation of the [relevant provisions] can only encourage the practice of homosexual sado-masochism with the physical cruelty that it must involve (which can scarcely be regarded as a 'manly diversion'), by withdrawing the legal penalty and giving the activity a judicial imprimatur. (583)

(continued)

its preamble, the moral degeneracy of that very option: "AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex" (Wayne Morgan 1995: 5).

\(^{14}\) One cannot but be amazed by the extraordinary classificatory gesture involved in discussing S&M sexual practices alongside the range of (acceptably violent and injurious) "manly diversions" — from boxing, duelling, sparring, rough but innocent horseplay, wrestling, playing with single sticks, properly organised contact sports — and other consensual assaults such as tattooing, ear piercing, lawful chastisement and correction, dangerous pastimes, bravado and religious mortification.
Furthermore, not only does the placement of homosexual S&M practices at the very depths of the sexual pyramid deprive that particular sexual-affective choice of any possible moral value, it is also from this position that the very possibility of choice is eroded. Thus, in *R v Brown*, this lowliest of sexual desires comes to be articulated as a lesser form of agency – "consent" to such practices is assumed to flow from coercion (564) or addiction (565) or proselytising corruption; there is assumed to be an inevitable risk that under "the powerful influence of sexual instinct" matters will "get out of hand" (583) and so on. Thus, Lord Templeman concludes that:

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim was usually manacled so that the sadist could enjoy the thrill of power and the victim could enjoy the thrill of helplessness. The victim had no control over the harm which the sadist, also stimulated by drink and drugs might inflict. (my emphasis, 565)

This is a peculiar assertion because, as both Fraser (1993: 19-23) and Stychin (1995: 122) note, the singularity of S&M practices is that they are deeply negotiated, "tightly controlled", "scripted and therefore collaborative" and always the "product of an agreed set of terms" (references omitted, Stychin 1995: 122). And indeed, in this particular case, the evidence disclosed that the activities were conducted "in secret" and in a "highly controlled" (567) and "well-ordered manner" (573) and that there were agreed code words which could be used "when excessive harm or pain was caused" (565). So, not only has the subjectivity of the S&M libido come to be inscribed as repulsively deviant, but, by means of this further assertion – by (re)presenting a consensual agreement as a form of intoxicated uncontrollability – it also comes to be inscribed as scarcely even a subjectivity at all. In the logic of this judgment, the particular sexual practices involved are, in an almost literal sense, unthinkable – being so repugnant that no autonomous agent could conceivably choose them, they are not "choices" at all.

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15. Lord Slynn of Handley, in dissent, is a singular exception on this point. He notes that: In the present cases there is no doubt that there was consent; indeed there was more than consent. Astonishing though it may seem, the persons involved positively wanted, asked for, the acts to be done to them, acts which it seems from the evidence some of them also did to themselves. All the accused were old enough to know what they were doing. The acts were done in private. Neither the applicants nor anyone else complained as to what was done. (607)
3.3 Re-producing Lesbian Infertility – QFG & GK v JM

The mirror image of this diminished agency is the conception of homosexuality as a form of volitional immorality. What is emphasised in this conception is individual responsibility and blameworthiness for "deviant" sexual-affective choices and for the "consequences" which are assumed to flow, inevitably, from them (Sheppard 1988: 250; Editors of the Harvard Law Review 1989: 2-3). The problem that QFG & GK v JM poses for Gardner's theory of valuable personal autonomy is that these "consequences" – the social meaning of particular sexual-affective choices – may be discursively constructed in ways that are decidedly not autonomy-enhancing. For this reason, it is simply not enough to insist that one be assured the possibility of choosing from a range of valuable sexual-affective options.

JM had been living in a stable and exclusive lesbian relationship with her partner for over four years. Together they decided to have a child by artificial insemination. After having had some difficulty in accessing fertility clinics in Queensland, JM contacted the Queensland Fertility Group [QFG] clinic. Her initial telephone contact with QFG – in which she stated that although she was not married, she was in a long-term relationship, without specifying that it was a lesbian relationship – was favourable. She subsequently made an appointment to see one of QFG's doctors, a Dr GK. Dr GK agreed to treat her by means of artificial donor insemination [ADI]. At the conclusion of the interview JM was given a form requiring both "husband" and "wife" to consent to the ADI treatment. JM considered forging the signature but later communicated to Dr GK that she wished to be treated on the basis of her "real circumstances" – that she was involved in an exclusive, stable lesbian relationship – whereupon he refused to treat her. JM then lodged a complaint with the Anti-Discrimination Commission which, following unsuccessful conciliation, was referred to the Queensland Anti-Discrimination Tribunal [QADT].

Dr GK's argument before the QADT was that QFG's policy was to treat only medical conditions resulting in "infertility", defined as:

a medical problem affecting one or even both partners such that through normal [heterosexual] intercourse, they are unable to achieve a pregnancy. (cited in Bunney 1997: 59)

The "problem" with a lesbian couple, he argued, is that there may be no medical problem affecting either of them. His refusal to treat JM was based, therefore, on the "biological fact" that she was not infertile – that is, that there was no medical cause for her infertility – rather than on the basis of her lawful sexual activity.

The QADT, however, concluded that Dr GK had adopted an unnecessarily narrow and discriminatory definition of infertility. Dr GK's refusal to provide ADI services to JM therefore constituted unlawful discrimination in the provision of
services, pursuant to the *Anti-Discrimination Act 1992* (Qld). There was direct discrimination (s 10 (1))\(^{16}\) as Dr GK refused services to JM on the basis of her lawful sexual activity of being engaged in an exclusive sexual relationship. There was indirect discrimination (s 11 (1))\(^{17}\) as the form requiring the consent of JM's male partner imposed a term with which JM was unable to comply; a term with which a higher proportion of people seeking ADI and not involved in a stable lesbian relationship would be able to comply; a term which is not reasonable since there are accepted definitions of infertility which do not require discrimination against a person such as JM involved in an exclusive and stable lesbian relationship. When the matter was determined on appeal before the Supreme Court, Ambrose J set aside the finding of direct discrimination; he referred the matter concerned with the finding of indirect discrimination back to the QADT. This referral back was for the reconsideration of the "reasonableness" of Dr GK's policy of restricting access to treatment with ADI to "medically infertile" (as he defined the term) (heterosexual) couples.

It is something of a leit motif of Ambrose J's judgment that JM had *chosen* to maintain an exclusive lesbian relationship. Ambrose J repeatedly mentions the voluntariness of "the exclusively homosexual lifestyle she had chosen with her lesbian partner" (16) and makes a point of comparing "lawful sexual activity" with other attributes on the basis of which unfair discrimination is prohibited—religion, political belief or activity, and trade union activity— which he considers to be voluntarily adopted/maintained (23). Similarly, in summarising the QADT's findings, Ambrose J rightly identifies the centrality to those findings of the fact that JM, as she quite properly was entitled to do (and without fear of discrimination), had made a series of choices:

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\(^{16}\) Section 10 (1) defines direct discrimination as follows:

Direct discrimination on the basis of an attribute happens if a person treats ... a person with an attribute less favourably than a person without the attribute is or would be treated in circumstances that are the same or not materially different. This will include treatment based on characteristics generally belonging to or imputed to persons with an attribute.

\(^{17}\) Section 11 (1) defines indirect discrimination as follows:

Indirect discrimination on the basis of an attribute happens if a person imposes ... a term —

(a) with which a person with an attribute ... is not able to comply; and

(b) with which a higher proportion of people without the attribute ... are able to comply; and

(c) that is not reasonable.
The ultimate finding [by the QADT] on the evidence seems to be founded on the propositions that –

(a) [JM] had chosen to become a party to a stable and exclusive lesbian sexual relationship which had subsisted for about four years;

(b) As a consequence of the maintenance of that relationship she chose not to attempt to become pregnant by engaging in normal heterosexual intercourse;

(d) The stable exclusive homo-sexual relationship which [JM] had chosen amounted to a 'lawful sexual activity' in the sense that it was not an unlawful activity;

(f) The refusal of artificial insemination was based on the fact that because of her chosen lifestyle [she] had not attempted to become pregnant by the normal biological means and thus demonstrate medical infertility. (my emphasis, 16-17)

As the judgment progresses this discourse of legitimate choice shades into a rather more sinister discourse of (unreasonable and inexplicable) non-compliance – almost obstinacy – on JM's part. That JM had chosen to maintain an exclusive lesbian relationship simply provides no explanation, in Ambrose J's assessment, for JM's failure to comply with Dr GK's definition of medical infertility:

There is nothing in the evidence nor any finding to the effect that there was any explanation for [JM's] abstinence from heterosexual intercourse which would in the normal course of events produce a child other than the choice she made not to have heterosexual intercourse because of her homosexual preference.

It seems to me that it would be more precise to say that [JM] refused to comply [with the requirement that she return a consent form signed by her male partner] because of her choice or election to maintain an exclusive lesbian relationship. In my view it is impermissible to infer from the fact that [JM] had made such a choice ... that [she is] not physically or psychologically 'able to comply' with the criteria adopted by [Dr GK] for the provision of his specialist medical services. (my emphasis, 15)

In no sense could JM properly be considered to be unable to comply with those criteria. There is "no evidence" to support the suggestion that JM was "physically or psychologically incapable of engaging in heterosexual intercourse". Any such supposed "incapacity" emerged entirely "as a matter of choice":

Accepting that [JM's] 'stable lesbian relationship' constituted under s 7(1)(l) of the Act the attribute of 'lawful sexual activity' it does not follow as a matter of law that the possession of such an attribute showed
that the [she] was a least physically and psychologically 'not able to comply' with the requirement. There is no evidence whatever to suggest that [JM] was physically or psychologically incapable of engaging in heterosexual intercourse. The evidence indicates that because of her lesbian sexual orientation she had chosen an exclusive sexual activity which excluded the possibility of achieving pregnancy in the normal way. There is no evidence that as a matter of choice she was not capable of engaging in heterosexual activity either instead of or in addition to the homosexual activity which she had chosen with her partner. (my emphasis, 21)

nd having chosen this "heterosexually eschewed lesbian lifestyle" (4), JM has also chosen what Ambrose J assumes to be its "inevitable consequences" (4) - unless JM is prepared to engage in heterosexual activity in addition to, or instead of, homosexual activity she will never meet Dr GK's criteria for medical infertility. Hence the extraordinary conclusion which the judgment reaches:

On the evidence ... it seems clear that had the [JM] also engaged in lawful heterosexual activities at the same time as she was engaging in lawful homosexual activities [Dr GK] would have had no policy which would have resulted in his refusal to give her the medical artificial insemination service which she sought. (13)

Whilst Ambrose J (not to mention Dr GK) might find the false simplicity of this conclusion appealing, it is nonetheless false. For JM's failure to demonstrate medical infertility is only an "inevitable consequence" of JM's sexual-affective choices, if Dr GK's definition (or something very like it) is itself accepted as "inevitable" (or at least uncontestable). And yet, as Dr GK's own evidence shows, infertility is not an exclusively biological fact but is equally a socially constructed phenomenon existing within a complex matrix of historical and cultural specificities (Derek Morgan 1995: 40; Chester 1997: 23). Dr GK elaborates on his understanding of the purposes of infertility treatment in these terms:

[T]he implication always is that you are treating something which has gone wrong or isn't working. If someone has blocked tubes we can try and fix them; if someone doesn't ovulate we can fix that; if someone has a very low ... sperm count we can fix that. Now in this case with lesbians we're not - our group doesn't have any views or antagonism towards lesbian relationships and perhaps that should be stated in case we're made to look like a sort of bunch of rednecks. We're not. But lesbians cannot have children because they have a biological problem. No two females and no two males can have children. Now people may have access and say 'We would like to get hold of some sperm because we want a child' and that may or may not be a good thing. We're not there to comment on that.
I have given our medical definition which is the way doctors would understand infertility. ... I think it's an excellent definition of infertility. If you wish to add on to that [that] people who biologically cannot have children should have access to some of the services like – donor sperm – ... then that's another thing altogether. But we won't change our definition of infertility to suit the politics or the political correctness of the 1990s. Medical infertility is – has a definition and it's grown up and the way we view it is the way we view it and we can't change that. That's just the way you're programmed, it's how you're educated. That's what medicine is all about.18 (evidence presented to the QADT and cited in QFG & GK v JM at 33-34)

I have quoted this passage at length because it points to a sleight of hand in Dr GK's definition of infertility as a (purely) biological/medical "condition" affecting one or both partners such that they are unable to achieve a pregnancy through "normal" heterosexual intercourse. For it is clear from a more detailed analysis of Dr GK's understanding of the nature of infertility and of the role of infertility treatment that there are circumstances not readily comprehended within this definition in which infertility treatment would nonetheless be available.

For example, although insisting that it is implicit in the notion infertility that there is "something which has gone wrong or isn't working", something "we can fix", Dr GK's own evidence clearly showed that in the many cases where there is no known medical reason for the infertility – so-called "unexplained infertility" – the couple will still be defined as infertile:

[Unexplained infertility [is infertility in which] apparently everything is there. The tubes are there, the sperm is there and the eggs are there but someone isn't getting pregnant. Can we help them get pregnant?] Then that's what we treat yes. ... It is saying that in the testing that we do now we cannot find a reason for that couple not getting pregnant but they have some fertility and we will treat them. (evidence presented to the QADT and cited in QFG & GK v JM at 34)

Moreover, it is patently obvious that there is no purely medical/biological difference between a heterosexual woman seeking ADI services because of her male partner's infertility and a lesbian woman in JM's position.19 In each case the

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18 Presumably this means that the appearance of intellectual intransigence is to be preferred to being made to look like a bunch of rednecks.

19 In a similar vein, one might ask whether a woman involved in an exclusive lesbian relationship who did have an identifiable fertility problem such that it was possible to determine that even "through normal [heterosexual] intercourse", she would be unable (continued...)
"biological" (in)fertility status of the recipient of ADI, considered as an individual, is identical. The difference, however, is that infertility is (socially) constructed so as to legitimate and protect the integrity of the exclusive couple relationship in the former case (where the heterosexual couple is infertile) but not in the latter (where the lesbian woman is not). Thus, a "fertile" heterosexual woman whose male partner was "infertile" would not be expected to go beyond the parameters of this exclusive couple relationship and engage in "normal heterosexual intercourse" with some third (fertile, male) party in order to achieve pregnancy "in the ordinary biological way". And yet, Ambrose J's conclusion that it was only "as a matter of choice" that JM was "not capable of engaging in heterosexual activity either instead of or in addition to" (21) her "chosen" sexual activity with her partner, imposes precisely this imperative. What is evident is the astounding judicial invisibility of JM's relationship from which such a conclusion flows.

In the discussion of *R v Brown*, above it, was suggested that the putatively autonomy-enhancing possibility of choice from a range of valuable sexual-affective options may well be undermined by the discursive processes through which those choices acquire (moral) value. The particular sexual-affective choices with which that case was concerned are re-interpreted as being either so perversely violent that they almost cease to be sexual (hence the endless comparisons to "manly diversions") or, to the extent that they can be considered to be sexual, they descend to such a level of repugnant degeneracy that they are placed beyond the range of possible objects of autonomous choice. A structurally similar problem is presented by this case. The "inevitable consequence" of JM's particular sexual-affective choices is a kind of volitional (and hence medically untreatable) "infertility". Having chosen to enter an exclusive lesbian relationship she is also understood to have chosen, voluntarily (inexplicably, unreasonably, obstinately), not to comply with the medical definition of infertility and to have placed herself beyond the scope of assisted reproductive technologies. But this consequence is simply not "inevitable". Rather, it is produced by a mediation (through the discourses of medicine and law) between the supposedly "biological facts" of "infertility" and a set of normative assumptions as to the value/integrity of heterosexual relationships and as to the "proper" shape of familial procreation.

(...continued)

to achieve a pregnancy, would be able to seek infertility treatment.
4. Conclusion: Speaking (Other than) the Law's Truth

What each of these analyses ultimately reveal is that the telling absence in Gardner's theory of autonomy is an understanding of law as discursive process. While, for Gardner, a chief value of the theory of valuable personal autonomy is that it is consistent with actual social reality – it embodies the pluralistic and tolerant culture we already understand ourselves to be – this obscures the role of legal discourse(s) in producing, for some, a very much less than autonomy-enhancing social reality. In the context of (homo)sexual orientation discrimination, this process is most strikingly directed at the production of a deviant subjectivity. Whilst this process will necessarily speak in the repressive voice of law's homophobia (as it clearly does in these instances), an understanding of this process also offers the necessary epistemological premise through which marginalised subjects may come to apprehend the possibilities for "expression and self-representation" (Wayne Morgan 1995: 37) – indeed the very possibilities of self-authorship that Gardner prizes. What these analyses may well suggest is that the liberating promise of self-authorship will not be achieved for sexual minorities through the re-configuring of legitimacy or privacy as autonomy, but rather through the reconfiguring of autonomy as discursivity – allowing the possibility of speaking truths about (homo)(sexual) identity other than the law's "truth".

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