

*Father Knows Best: Transgressive Sexualities (?) and the Rule of Law**

Introduction

As I finished work on a draft of this comment, I was tempted to believe that my efforts had been in vain. I feared that I was about to receive a message informing me that the conference had been cancelled. The cause for my concern was a story in *The Sydney Morning Herald* on 1 March headlined "Gay, lesbian? It doesn't worry Sydneysiders a bit". Given the *Herald's* status as our paper of record, I was convinced that there could no longer be a reason to hold this conference since it was now clear that "homosexuality", in Sydney at least, is "normal". Therefore, there could not be any psychiatric difficulties or issues which need to be addressed.

I did, however, read beyond the headline and discovered that there were in fact reasons to proceed with the conference. For I discovered that in the opinion of Mr Chris Puplick, President of the New South Wales Anti-Discrimination Board, "homosexuality" is not in fact "normal", but rather it is something that the "normal" citizens of Sydney simply have learned to tolerate. He stated:

It's a sign of the increasing maturity of society that people realise you don't have to approve of someone's lifestyle or behaviour, but they should not be subject to discrimination or unfair treatment because of it.

It is clear to me at least that this message from the senior bureaucrat in charge of "tolerance" indicates that it is not time to cancel this meeting. Rather, it is incumbent upon us to think about and analyse here the implications, both epistemological and phenomenological, of the discourses of tolerance which now surround our understanding of, and politics informed by, "homosexuality". It is my assertion that this discourse of "pure tolerance"¹ which informs our legal and political interventions on issues such as human rights questions, anti-discrimination and anti-vilification legislation et cetera, on sexuality issues is, in fact, more indicative of the problem than it is of the solution. In other words, I contend that "rights talk"² is a more subtle form of oppression of gays, lesbians and bisexuals than the actual criminalisation of "homosexuality". The recent debates surrounding the battle against criminal sanctions for consensual adult homosexual activity in Tasmania, which culminated in the "victory" of Federal intervention and the legislative overriding of the offending provisions or surrounding "homosexual vilification" in New South Wales, demonstrate not just the power and apparent efficacy of the so-called "gay lobby" and the "pink dollar" but also, as I hope to outline in what follows, the dangers inherent in adopting non-transgressive discursive practices in defence of self-defined transgressive sexualities.³ In what follows, I wish to offer a necessarily brief outline of possible lines of inquiry

* This is the text of a paper delivered at the first Conference on Gay, Lesbian and Bisexual Issues in Psychiatry, held in Sydney, on Saturday 4 March 1995 which was organised by a group of interested mental health professionals. After Saturday's final morning session, many of those in attendance went on to participate in the festivities associated with the annual Gay and Lesbian Mardi Gras Parade and Dance Party that evening.

1 See Marcuse, H, "Repressive Tolerance", in Wolff, R, et al, *A Critique of Pure Tolerance* (1965).

2 See Tushnet, M, "An Essay on Rights" (1984) 62 *Texas LR* 1363.

3 I realise that this formulation is itself problematic in the sense that there is no unified political vision within the communities in question which would allow me to assert that all gays, lesbians or bisexuals are

for future work on questions of the legal/political/psychiatric discursive matrices and the possibility of transgressive sexualities.

Michel F Redux or policing our bodies ourselves

The point of transgressive sexual practices, or more precisely of transgressive sexualities, is exactly the point at which legal discourses of tolerance and repression intersect with those sexualities as they seek to upset, to deconstruct the hegemonic set of social and political practices and norms which seek in turn to "regulate" and to "normalise" "sex". Moreover and of great importance in our increasingly "traumatised" culture in which the syndromisation of our daily existence reaches pandemic levels, the idea of transgressive sexualities is also the nodal point of intersection with the discursive tropes and interventions of psychiatric normativity. Gone, for the most part, are the days of overt and repressive intervention by the formal forces of law and order; police, courts and prisons, replaced by the more civilised and civilising forces of psychiatric categories of the neurotic, psychotic and borderline personality disorders. Gone are the normativity-shaping functions of imprisonment to be replaced by therapy and readjustment. Ever present however, is the dominant tropic of "normality", the phenomenological discourse of "normalisation" becomes the (re)integrative and thus anti-transgressive functionality of a newly non-repressive psychiatry.

Thus, at the nodal intersection of psychiatric and legal discourses, we find the need for understanding and for tolerance, for acceptance and therapy. Transgressive sexuality becomes treatable, nothing more than a sign, a signifier for a maladjusted personality, an over-aggressive *id*, an improperly resolved Oedipus/Electra conflict et cetera. While it is conceivable that current academic and political trends mean that Foucault has gone the way of the late (un)lamented Karl Marx with the fall of the Berlin Wall, I will nonetheless run the risk of being untrendy by making the assertion here that we find a classic Foucauldian moment in the practices of the psycho/legal institutional discourse. What we discover is nothing more and nothing less than a "policing of sex: that is, not the rigor of a taboo, but the necessity of regulating sex through useful and public discourses".⁴

While Foucault makes this point about the regulatory function of all discourses about sex, I would argue that it must be read to apply *a fortiori* in relation to sexual practices/politics which see themselves as transgressive of the normatively ordinary. Hence, it would be possible to trace the evolution of legal discourses of repression and of tolerance not as opposing norms but as valences within an overarching architectonics of law as a patriarchal normativity which, in appropriately Freudian terms, seeks to protect its penile superiority against all comers.

At the same time, I believe that it would be useful to trace the creation, within the psychoanalytic matrix, of a set of norms and tropes which Freud constructed through and by, for example, his reaction to the medicalisation of the Jew in the dominant professional discourses of his day. I am thinking here, for example, of the ground-breaking work of Sander Gilman on Freud's complex psychological position as a Jew and as a physician in the anti-Semitic world of Viennese medicine and culture.⁵ Building upon Gilman's psy-

self-definitionally "transgressive" or wish to be so labelled.

4 Foucault, M, *The History of Sexuality: An Introduction* (1990) Vol 1 at 25.

5 Gilman, S, *The Case of Sigmund Freud* (1993).

cho-historical biographical insights, it might be possible, for example, to illuminate the complex and contradictory discourses through and within which psychoanalysis, both Freudian and non-Freudian, has constructed the openly or secretly transgressive “homosexual” as a medicalised Other. From homosexuality as a “Jewish” disease, to homosexuality as an improperly resolved infantile sexuality is a socially complex and ideologically rich terrain for political intervention. Regardless of the ultimate fruitfulness or intellectual utility of such a program it seems clear at this stage that in the intersections of the psycho-legal *Weltanschauung* we can find yet another Foucauldian “truth”, i.e. that the “homosexual” has become a legally and medically distinct personage constructed through and by the policing functions of law and psychiatry.⁶ When this is combined with yet another Foucauldian insight, we can begin to inquire into the possibility of transgressive sexualities as realistic political categories.

The last Foucauldian insight to which I have referred is to the dominance of the pastoral or confessional mode within hegemonic discourses like law and psychiatry. A further exploration, beyond the scope of this intervention, would be required to draw out all the subtleties of Foucault’s insight as well as to highlight the implications for transgressive sexual political practices. Suffice it to say for the present rhetorical purposes that the etymological proximity between amnesty on the one hand and amnesia on the other might serve as a point of deconstructive incision into the purposes/functions of confession in both the therapeutic and legal worlds. To confess, to be forgiven, to have our trespasses forgotten — these are the functions of the confessional practices of law and medicine. To amnesty transgressive sexuality in the psychiatric or legal context is to manifest the nefarious or annihilating effects of the politics of tolerance. Let me turn quickly to two brief and necessarily cursory examples from the world of forensic practice to highlight my concerns and to point to areas for possible deeper and fuller elaboration.

S & M and the beat goes on: is a transgressive sexual politics possible?

As all of you know, a recent decision of the House of Lords, *Brown v K*⁷ reaffirmed the common law position that consensual sado-masochistic relations between adults were nonetheless covered by the law of criminal assault. The case caused outrage and controversy and is now on appeal to the European Court. The dominant legal-semantic argument against the position of the House of Lords can be seen to revolve around the transgressive potential contained in the deconstructive parody of the notion of “contract”. In other words, what the Law Lords either failed to grasp, or grasped all too well, is that S & M involves a parodic upsetting of the normative matrix which surrounds our legal understanding of contractual relationships. Because of the hyper-normality of the parody implicit and explicit in such relationships, the transgressive nature of the acts is contained in the excess of legality. This is potentially exacerbated by the danger of HIV infection, real or imagined, which so intrigued the Court.

In other words, the contract involved in S & M if the notion of transgression is taken to its politico-logical extreme, would be a contract for death. The Law cannot countenance

6 Above n4 at 43.

7 *R v Brown* [1993] 2 WLR 556. I have elaborated on some of the points in my article ‘Ora Sex in the Age of Deconstruction’ (1993) 3 *Australasian Gay and Lesbian LR* 1.

such an agreement because, to simplify, it would remove the basis of all legal normativity which is the juridical monopoly over death. The moment of ultimate transgression must never be available or the Law itself would perish. Let me now argue that this transgressive possibility was in fact overestimated by the Court, or at least has been mischaracterised.

Let me try to explain my position, however briefly, in reference to the Gay and Lesbian Mardi Gras which culminates tonight with the parade and party, in a public and then a private manifestation of the apparently transgressive potential of the gay, lesbian and bisexual population. As we know, and as others have pointed out today, the Mardi Gras is a carnivalesque intervention into the normality of existence. It is intentionally transgressive and there is certainly a cogent and powerful political message in this reading and practice of Mardi Gras. At the same time, and this is perhaps by now a trite point, all transgression is necessarily implicated in that which is transgressed, that is, in this case the normativity of the normal. Therefore, a study of the phenomenon of Mardi Gras in the sense of a political/legal/psychiatric discourse would seek to explore not just the transgressivity in cross-dressing, leather, sequins et cetera, but to explore on the one hand the pagan origins of the festival and also the dominant religious meaning of Mardi Gras and especially its connection with the sacrifice and asexuality of Lent. In addition, any useful and complete hermeneutic or semiotic of the Gay and Lesbian Mardi Gras would have to explore with subtlety and depth that I would not pretend to offer here, the signifier of Easter, of the Crucifixion (the story of the Cross), of the resurrection, et cetera. This is important, I would argue, not just to examine the transgressive limits of Mardi Gras as a result of its necessary implication in the dominant signifiers but more importantly for how it reads itself, or how it can be read in relation to the connection between the message of life/death of Easter and the message of life/death of AIDS/Mardi Gras. Such a study might bring us to a different idea about the politics not just of Mardi Gras but of the politics of AIDS/death which is always present in Mardi Gras simply as a commemorative trope or as that against which affirmation of sexuality/life might be (re)presented in the community. In place of this ultimately, I would argue, non-transgressive signifying function of Mardi Gras, it might then be possible to present a more nuanced reading of the tropes of transgression/death/carnival which would give an appropriate or at least a different weight to the negation which must always be present in transgressive discourses. In other words, I am suggesting that we try to offer a reading of the carnivalesque aspects of Mardi Gras which would pay fuller attention to the tropes of death and abjection, of AIDS as carnival which could offer not just a greater complexity to the politics of Mardi Gras but which, to return to the discussion of S & M, would, once again, place death on the agenda of transgression. In such a scenario, it might well turn out that the truly transgressive Mardi Gras parade would ignore the leather and sequins to replace them with a manifestation in which the participants simply marched up Oxford Street in complete quotidian normality and absolute silence.⁸

Let me now turn to the second example of transgressive sexuality which raises for me the entire problematic of the confessional mode/amnesty function of the forensic discursive matrix. I speak here of the beat, those places where men meet, generally anonymously, to have sex with other men.⁹ The potential transgressive nature of the beat manifests itself,

8 I borrow this idea of the deconstructive political moment *par excellence* from Duttman, A, "The Elasticity of Terms: On Deconstruction, Critique and Politics" (unpublished) Rethinking the Political Conference, Monash University, July 1993.

9 See generally, Swivel, M, "Public Convenience, Public Nuisance: Criminological Perspectives on 'The

at first glance, on two levels. First, it obviously offers the opportunity to upset our normal/legal ideas of the public and private.¹⁰ Indeed, the forces of legal oppression generally operate to police this distinction in the beats since the “crime” of “offensive behaviour” occurs in a “public” place. Moreover, the phenomenology of the beat serves to upset a general normativity, at the ideological level at least, which condemns anonymous sex and which appears to be itself grounded in the public/private distinction.

The second level at which the beat serves as a potentially transgressive *locus* is by combating potential hegemonic discourses about the appropriate definition and behaviour which should, according to some, inform “homosexual” action. In other words, the man who has sex in toilets with other men not only subverts dominant, normal tropes and standards of “heterosexuality” but also prevents a hegemony about appropriate practices being imposed by some elements of the “homosexual” community who denounce beats as not only unhealthy in the age of HIV (see above) but as preventing greater acceptance of “homosexuals” because of associations with elements of secrecy, denial, shame et cetera. The man who has sex with other men in toilets may well be transgressing the self-defined transgressive norms of the “homosexual” norm, thereby serving the valuable semiotic and political function of undermining all normalising discourses about sex.

However, it quickly becomes clear that the policing functions of law and psychiatry, even when these discourses are apparently deployed with the best of intentions, can simply serve to radically and permanently efface the transgressive semiotic space carved out of hegemonic discourses in the beat. In his paper for this conference,¹¹ David Buchanan tells of a young man arrested and charged after having sex with another young man who turned out to be under the legal age in a beat. At the behest of his lawyer, the young man entered counselling and came to terms with his homosexuality. He came out, “bought some nice clothes”, got himself a boyfriend and testified in his own defence at trial. The judge was convinced that the offence in question had been the result of the young man’s confusion over his sexual orientation. Now that the offender was “out” there was no likelihood of recidivism and judgment was rendered accordingly. Mr Buchanan tells this story as a triumphant example of the intersection of legal and psychiatric discourses being deployed in the defence of a transgressive sexuality and to the best interests of all concerned, especially his client. I have no doubt of Mr Buchanan’s good faith here, nor do I doubt that the counsellors involved in the “resolution” of the accused’s confused sexuality acted, as did Mr Buchanan as his barrister, in what they saw as the client/patient’s best interest. What I want to highlight here is how easily and perhaps inevitably all those concerned, including the accused himself, became participants in the confessional modes and discourses of psychiatry and law. In each professional circumstance and then in their concatenation at trial, the “deviant” was able to “confess” to his “real” or “true” sexual orientation. In the psychiatric context, he confessed and came to terms with his true, now non-deviant self. In the legal context, he was able to confess as to his true self, to come to terms with a former deviancy, and to be granted absolution through the amnesty of the pastoral court. His once transgressive sexuality has now been forgotten (amnesia) and forgiven (amnesty). I am not suggesting here that the young man would in practical terms

Beat” (1991) 3(2) *Curr Iss Crim Just* 237.

10 See generally, Freeman, A and Mensch, E, “The Public /Private Distinction in American Law and Life” (1987) 36 *Buffalo LR* 237.

11 Buchanan, D, “What can psychiatrists offer lawyers and society on sexuality issues?” (unpublished).

have been better served by a declaration of perversity, a refusal to confess and imprisonment. Rather I simply wish to highlight the inevitability of the result in this case given the discursive matrices and semiotic deployments involved. Law and psychiatry, in the best interests of the patient/client, in Foucauldian terms, interpolated the "homosexual" as the creation of their truth-creating discourses. The confessional of both law and psychiatry, the amnesty/amnesia, are the grounds on which transgressive sexuality is eliminated as discursive and/or political possibility.

In conclusion, I want simply to add that I am not sure if there is any way out of the conundrum exemplified in this case. Can the death of the Father be reconciled in a sexually liberating way? Is the decoding of the *objet* a possible in psychiatric practice? Are transgressive sexualities possible? Can we achieve the point of a carnivalesque abjection at the edge of death?¹² Is HIV/AIDS the only point of imaginable transgression? Is negativity the only way?¹³ Is it even possible to speak of transgressive sexualities within the policing discourse of psychiatry and law? All I can do is identify these and related questions as politically and ethically necessary. While simply posing the questions here may be unsatisfactory for the practical political agenda of some, it is nonetheless my view that in the absence of these questions, a politics of transgressivity is inconceivable.

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12 See generally, Kristeva, J, *Power of Horror: An Essay on Abjection* (1982). I have addressed this issue in another context in "Truth and Hierarchy: Will The Circle Be Unbroken?" (1983) 33 *Buffalo LR* 729.

13 On this point in philosophy, see Agamben, G, *Language and Death: The Place of Negativity* (1991).