

Critical Notice

L.W. SUMNER. *The Hateful and the Obscene: Studies in the Limits of Free Expression*. Toronto: University of Toronto Press 2004. Pp. xi + 275.

At a 1990 conference on freedom of expression Wayne Sumner presented a paper arguing that there were good reasons to grant Canada's hate propaganda law constitutional protection under the Canadian *Charter of Rights and Freedoms*.¹ Fourteen years on he has repudiated the same thesis at much greater length in this meticulously researched, beautifully written, and exhaustively argued book. The book was a finalist for the 2005 Donner Prize, a prestigious book prize for a non-fiction work on Canadian public policy. The book is written in an easy and accessible style, despite presenting arguments of considerable sophistication. It is the first time a philosopher has been so honoured by the Donner judges, and Sumner richly deserves such an honour. The book is (no surprise to Sumner-watchers) resolutely consequentialist in its argumentation. In fact, it represents the most sustained and articulate application of Mill's so-called Harm Principle to issues of practical policy that we have seen for some time. The book is appropriately dedicated to H.L.A. Hart and Joel Feinberg. They would have been proud to be associated with it.

When I heard Sumner's original 1990 paper I did have a settled view on the issue he was addressing, the one he then defended. Like many (including, I think, Sumner himself), I found Sumner's adoption of that view at that time much more surprising than his subsequent repudiation of it. I continue to believe that successive Canadian courts have been correct in refusing constitutional protection to the more extreme forms

1 The paper was subsequently published as L.W. Sumner, 'Hate Propaganda and Charter Rights,' in *Free Expression: Essays in Law and Philosophy*, W.J. Waluchow, Ed. (Oxford: Clarendon Press 1994).

of hate propaganda and pornography.² However, there is no question that in *The Hateful and the Obscene* (H&O for short) Sumner marshals impressive arguments to the contrary, and I will devote later sections of this Critical Notice to engaging them.

I The Argument of the Book

I will begin by laying out as fairly as I can, given my disagreements, the argument of the book. The first-order focus of H&O is quite narrow — sections 318-19 of the Canadian *Criminal Code*, which criminalize the distribution of hate propaganda and the utterance of hate speech; section 163 of the *Code*, which criminalizes the distribution and in some circumstances the possession of pornography; section 2(b) of the Canadian *Charter of Rights and Freedoms*,³ which grants constitutional protection to freedom of expression, and section 1 of the *Charter*, which allows for the possibility of limitations on a guaranteed *Charter* right; the Supreme Court of Canada's decisions in *Keegstra*⁴ and *Butler*,⁵ in which the Court reviewed the above *Code* sections in the light of the *Charter*, largely upholding the *Code*. However, the second-order focus of H&O on this first-order legal material is wide, taking the reader deep into background political morality and the reasons we might have, or not have, for bringing the coercive power of the law to bear on private actions.

To a large extent, the *Charter* itself mandates this wide focus. Sections 2-33 enumerate various rights and freedoms that are given constitutional protection, and various fundamental principles that must be applied in any case of judicial review of legislation under the *Charter*. According to the conventional view of constitutional guarantees of rights,⁶ courts in

2 Cf. Roger A. Shiner, 'Pornography and Freedom of Speech,' in *Freedom of Speech: Basis and Limits*, Gerry Maher, ed., *Archiv Für Rechts- und Sozialphilosophie Beiheft* 28 (Stuttgart: Franz Steiner Verlag 1986), 11-28, where I first tangled in print with this range of issues.

3 Sections 1-33 of Schedule B, Constitution Act

4 *R v Keegstra* (1990) 3 SCR 697

5 *R v Butler* (1992) 1 SCR 452

6 See, for example, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press 1996); W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press 1994), Ch. 5; W.J. Waluchow, 'Constitutions as Living Trees: An Idiot Defends,' *Canadian Journal of Law and Jurisprudence* 18.2 (2005) 207-47.

interpreting such legal documents may legitimately have recourse to arguments deploying considerations of background political morality, and not merely narrowly legal considerations. Sections 2-33 thus seem to mandate the use by Canadian courts of moral principles. Section 1, on the other hand, with its qualification of *Charter* rights as 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,' seems to open up normative issues that go beyond the narrowly moral into the practical and the political. Canadian law on hate propaganda and pornography at the bottom line, the blunt edge, the point of impact, thus consists of the provisions of the *Criminal Code* as informed by broad principles of political morality and broad considerations of practical policy.

Suppose, then, that a theorist — Sumner, for example — is motivated to enquire whether Canadian law on the regulation of hate propaganda and pornography has a sound normative basis. Both hate propaganda and pornography are arguably forms of expression. Such an enquiry in the Canadian context thus requires both a consideration of whether and if so how a regulation or restriction of hate propaganda and pornography conflicts with freedom of expression as a fundamental moral/political value, and a consideration of the appropriate normative political or policy principles that would imply that such regulation or restriction was 'demonstrably justified in a free and democratic society.'

Sumner's general utilitarian or consequentialist position on matters normative means that the breadth and complexity of the two projects just sketched present a lesser obstacle than they might for some. He has shown in previous work⁷ that the concept of a right is fundamentally a morally neutral one: a right is simply a protected normative position, a normative position protected by, in Joseph Raz's terminology, exclusionary reasons, reasons that exclude from the balance of reasons considerations that would otherwise apply.⁸ The moral argument that justifies the creation (in the case of legal rights) or the existence (in the case of moral rights) of such a protected normative position may deploy any available sound moral theory, including (and for Sumner paradigmatically) utilitarian or consequentialist moral theory. Thus there is no essential conflict, as some have thought there is, between utility and rights. In the context now of the project of *H&O* and its author, the principles of freedom of expression that justify creation of a constitu-

7 L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press 1987), Ch. 2

8 Joseph Raz, *Practical Reason and Norms* (London: Hutchinson 1975), 35-48

tionally protected right to free expression are consequentialist principles, and the principles that would be deployed in assessing whether in some given case the right to free expression can be justifiably limited are also consequentialist principles. Thus, in the interplay between s.1 and s.2(b) of the *Charter* (the section that guarantees freedom of expression), there is no problematic conflict of morality and policy. There is just one unified set of issues all fully tractable in consequentialist terms. Do the benefits of creating a constitutional guarantee of freedom of expression in the first place outweigh the costs? Do the benefits of permitting limitations on such a guarantee in the form of regulation or restriction of hate propaganda and pornography outweigh the costs? The elegant unity that Sumner's approach brings to such a tangled web of issues is undoubtedly one of its most seductive qualities.

That is the general shape of the argument of *H&O*: now for some of the details. In the first chapter, Sumner gives a basic sketch of the 'anatomy of rights' (*H&O*, 8), distinguishing claim-rights and liberty rights, the content of a right from its strength, and so on — all familiar to the professionals, but a model of clarity for those to whom these points are new. The chapter then reviews in general terms the debates and issues in relation to hate propaganda and pornography, to illustrate how they arise and how they revolve around the idea of justifying a limit on a right. One quibble: Sumner characterizes rights as 'rais[ing] thresholds against considerations of social utility' (*H&O*, 9). So they do, in many cases. But, as he himself showed in *Moral Foundation*, they may also raise thresholds against other kinds of normative considerations as well. In a theocratic state, for example, the assertion of rights may be a way of resisting considerations of religious or canon law. Of course, one might say that, in a theocratic state, considerations of religious law are just place-holders for considerations of social utility, but that would be to raise a wholly different set of issues.

Chapter Two sets out John Stuart Mill's classic utilitarian framework for addressing freedom of expression as an issue of public policy — that is, as far as concerns society's right, if any, to use the law to limit freedom of expression. The framework, as we know, revolves around the Harm Principle, that power can only be exercised over a member of a civilized community against his will to prevent harm to others (cf. *H&O*, 20). The familiar elements are all there — within the realm of the self-regarding any freedom of thought or belief is absolute (*H&O*, 20-1): Mill is aware freedom of expression is other-regarding, not self-regarding (*H&O*, 24-5): while Mill acknowledges social equality as a value, it is not automatically weightier than freedom of expression; it will depend on the facts of the case, and, where freedom of expression is less weightier, it can be legitimately limited (*H&O*, 26-30): moral distress, moral harm, moral

offence are all concepts which can have no place in a framework for the justification of limits on freedom of expression based on the Harm Principle (*H&O*, 35-50). The latter passage in particular anticipates the much more extensive critique of feminist support for legal restrictions on pornography that occurs in Chapter Five. Even though this account of Mill will be familiar to anyone who has taken or taught a basic undergraduate course in political or legal theory, it is worth having again here, for two reasons. First, the account is both careful and clear, and that cannot be said for every account of this much-discussed topic. Second, it is clearly being anticipated that the book will be marketed to and read by a wider audience than just people already in the field of political and legal theory. Such folk may not know the details of Mill's position, or even heard of Mill. For them, the chapter will serve as an excellent introduction.

I would though like to enter now one brief note of caution, on which I will expand later (see pp. 653-9, below). Sumner rightly says that Mill's theory of rights is 'instrumentalist': 'rights are devices — instruments — for the protection of important values, such as freedom or equality' (*H&O*, 30). That is incontestably true of legal rights, understood as human creations or constructs — the rights, if you like, of positive law, including positive constitutional law. Sumner continues immediately, though: 'Rights are not therefore the ultimate premisses of moral/political argument; that role is played by the foundational values which they protect or promote' (*H&O*, 30-1). What means this 'therefore'? It does not follow from the fact that legal rights are essentially instrumentalist that therefore all rights are. A theory such as Ronald Dworkin's 'rights thesis,' that 'judicial decisions enforce existing political rights'⁹ would similarly hold that legal rights are instrumentalist, but locate their instrumentalism in their capacity to embody in positive law background political rights construed deontologically. The political rights themselves then become the values that the legal rights protect and promote. Now, Sumner and Mill may both believe fervently that in fact there are no rights among the plausible candidates for foundational moral/political values, and they may be correct (though many will not think they are). But that correctness is not a valid inference from the instrumentalist character of legal rights, or of some lower-level moral rights. If the validity of utilitarianism or consequentialism is already assumed, then a certain account of rights both legal and moral will fall out. But one can't

9 Ronald M. Dworkin, *Taking Rights Seriously*, 2nd ed. (Cambridge, MA: Harvard University Press 1978), 87

begin with that account and argue backwards to utilitarianism or consequentialism without circularity.¹⁰

Chapter Three starts out with a discussion of *Keegstra* and hate propaganda, but fairly quickly mutates into a discussion of the internal logic of the *Charter*. The mutation is mediated by features of the *Keegstra* decision itself, features that are dictated by the structure of the *Charter*. I personally find this chapter extremely interesting, even though I take the opposite view to Sumner on many of the issues he mentions.¹¹ The discussion does get rather ‘Supremes-watcher-wonk’-ish, however, and one has to wonder what that broader audience for whom the book is such important reading will make of the chapter. Briefly, the issue is this.

The Canadian *Charter* is unique among charters or bills of rights in terms of which legislation may be invalidated in having the possibility of limitations on the enumerated rights and freedoms built into the *Charter* itself.¹² As I have briefly noted already, s.1 of the *Charter* endorses the possibility that *Charter* rights and freedoms may be ‘subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ Such a vague formulation cried out for further interpretation, and the Supreme Court of Canada provided that in its decision in *Oakes*.¹³ The Court there developed a complex test to operationalize this vague phrase about ‘demonstrably justified,’ a test involving such notions as a pressing and substantial legislative objective and proportionality between the objective and the means employed, the latter being unpacked in terms of rational connection, minimal impairment and proportional effects.¹⁴ The typical court case, therefore, where a piece of legislation is being challenged for constitutional validity under

10 In fairness to Sumner, I acknowledge that, in *The Moral Foundation of Rights*, he did argue that said foundation is utilitarian, not deontological. His argument in *H&O* can be looked at as assuming the soundness of the arguments in the earlier book. I suppose my arguments here can be taken as assuming the opposite. We can’t settle *that* here.

11 Sumner’s discussion in section I of his Critical Notice of *Freedom of Commercial Expression* (pp. 625-32 above) lay out his concerns about my views. See pp. 652-9 below for my concerns about his.

12 For example, the European Convention on Human Rights has the possibility of limitation attached to various enumerated rights piecemeal (including Article 10 on freedom of expression), but not to all.

13 *R v Oakes* (1986) 1 SCR 103

14 Not only here (*H&O*, 55-6), but in many places elsewhere, Sumner is very effective in parsing out the meanings of these technical notions into plain English: that’s one of the important achievements of the book.

the *Charter* involves two stages of reasoning: Is a guaranteed Charter right or freedom infringed by some government action? Is the infringement in question justified under s.1?

So far so good. But now a second element enters in. In the case of every other section of the *Charter* than the one (s.2(b)) protecting freedom of expression, the Court has regarded the first question as a real question. For instance, in the case of the s.15 equality guarantee against discrimination, the Court has made it very clear that not every distinguishing between cases is a 'discrimination.' 'Discrimination' connotes a particular kind of invidious distinguishing on a specific kind of ground — race, colour, creed and so forth, and, it is now clear, sexual orientation. In the case of s.2(b) and freedom of expression, however, the Court has interpreted the notion of expression very capaciously: anything that 'conveys or attempts to convey' a meaning is an 'expression' as far as s.2(b) is concerned.¹⁵ This ruling has the effect that the first stage of a constitutional freedom of expression case is nugatory: the Supreme Court has not found anything yet to fail it, although lower courts have.¹⁶ Thus an infringement of the s.2(b) guarantee is easily established. All the action is over whether the infringement can be justified under s.1.

Sumner and I (see section II below) part company on whether this is a desirable state of affairs. From his point of view, it is highly desirable. The whole process of reasoning in s.1 analysis Sumner maintains to be a process of balancing costs against benefits, a characteristically consequentialist or utilitarian process. The result, then, of the pre-s.1 stage in freedom of expression cases being trivial is that freedom of expression cases become nothing but a balancing of costs against benefits. The reasoning behind the creation of a constitutional right to free expression in the first place is consequentialist. The reasoning behind the justification (or otherwise) of a limitation on the right is consequentialist. Given that the intervening stage of establishing that there is an infringement of the right is virtually transparent, then the constitutionalizing of the right to free expression, in Canada at least, comes out as consequentialist from top to bottom. Nothing could delight a consequentialist more.

Sumner spends two sections of the chapter (*H&O*, 55-70) showing how the *Keegstra* decision embodies in the way that the Court handled the s.1 analysis the consequentialist story about the right to free expression that he (Sumner) has told, with the Court in its own mind ending up with a

15 *Irwin Toy v Quebec* (1989) 1 SCR 927, at 969-70

16 See here Roger A. Shiner, *Freedom of Commercial Expression* (Oxford: Clarendon Press 2003), 85-7.

justification for the limitation on the right that the relevant section of the *Criminal Code* subtends. In the U.S., however, hate propaganda has received full protection under the First Amendment.¹⁷ Sumner concludes the chapter with a fascinating comparison of the two Supreme Courts. He suggests that, while it may be differences of national character that have led to this difference of opinion on hate speech, such a hypothesis remains without serious evidentiary support. His own preferred hypothesis is the fact that the Supreme Court of Canada's capacious definition of expression together with the separate stage of s.1 analysis means it is essentially 'directly instrumentalist' about the right to free expression, while the U.S. Supreme Court is 'indirectly instrumentalist,' embodying a deeper commitment to intervening principles such as are embodied in doctrines of 'core values,' categories of speech and the like. Sumner speculates that 'the costs of the more direct procedure by the Canadian courts may be a higher degree of deference to legislative judgment' (*H&O*, 87).

Canadian obscenity law, following the decision in *Butler*, relies essentially on two crucial notions, the idea of materials that contain 'an undue exploitation of sex,' and the concept of a 'community standards' test for when an exploitation is 'undue' or not. Chapter Four subjects these two ideas, especially the community standards test, to unrelenting critique. First, Sumner reviews the history of obscenity law in Canada, from the early days of the application of the *Hicklin* test in terms of 'corrupting morals,' taken from Victorian English law,¹⁸ all the way through to *Butler*. Sopinka J's complex analysis of obscenity in the latter decision is generally positioned as a considerable improvement on what went before, in terms of clarification. Sumner does not disagree, but argues that far Canadian courts are still far from a definition of obscenity that invokes anything other than the private views of the trier of fact as to whether something satisfies the definition. Moreover, in Sumner's view, however 'objective' we manage to make the community standards test, in the end it is still a test of decency, not of harm. It is still a moralistic test, not a harm-based test, and thus objectionable by the standards of the Millian framework he has adopted.

This last theme of the powerful fourth chapter leads on to Chapter Five, entitled 'In Harm's Way?' which may well be thought to be the most controversial chapter of the book. This Chapter focuses, not on the question of Canadian law's actual struggles with pornography, but

17 *R.A.V. v City of Saint Paul* (1992) 505 US 277

18 *R v Hicklin* (1868) LR 3 QB 360

rather on the more abstract and strictly normative matter of whether we should recognize a justified limitation on the right to free expression in the case of pornography. The focus is on the need for real evidence of real harm if any such limitation is to be justified.

Sumner distinguishes participant harms and third-party harms. Participant harm is harm to someone who is participating in the production of pornography. Sumner is somewhat sceptical about the existence of such harms (*H&O*, 129-31). The world-wide pornography industry has become like any other mainstream industry. In the U.S., for example, the gross income of the industry is estimated to be more than that of professional football, baseball, and basketball combined (*H&O*, 129n17). This mainstream product is non-child, non-violent pornography. The mainstream industry has a measure of internal self-regulation; it's just another part of the movie industry as a whole. In Sumner's view, while it cannot be ruled out that there are pornographic movies made in which the participants are harmed, there's little evidence for it, and certainly not enough to justify a harm-based argument for the restriction of pornography in general.

Sumner then turns to third-party harms and the thought that there is a causal link between pornography and violence against women. Again, he asks for the hard evidence. There's no hard social science evidence on working conditions in the industry, and plenty of evidence that entry into the industry is voluntary. Insofar as the industry has a structure of employing large numbers of temporary workers at low rates of pay without employment benefits, it is no different from many industries today that we do not think 'harmful' enough to restrict (*H&O*, 143). The argument that working in the pornography industry is degrading work, and so the industry should be closed down, seems in the end to be simply a moralistic argument of a kind the Millian framework commits us to rejecting (*H&O*, 144-5).

The final two sections consider child pornography and hate propaganda. In the case of the former (*H&O*, 156-8), there are two real sources of harm. Children do suffer participant harm in the making of child pornography, because they cannot give meaningful consent to participating in the making of the pornography. Moreover, insofar as that pornography will then be used to 'groom' other children for sexual activities, it is causally linked to harm. On the other hand, the evidence that simply exposure to explicit sexual images is harmful to children is weak. The underlying argument seems simply to be moralistic.

In the case of hate propaganda (*H&O*, 158-64), participant harm is not at issue, and, as far as third-party harms are concerned, there is a general lack of hard social science evidence. There is no scientific evidence that hate propaganda does have the effect of increasing discriminatory attitudes. Sumner acknowledges the testimony of those who are on the

receiving end of hate propaganda that they are hurt by it, and that it is intuitively plausible that hate propaganda advocating violence towards minorities may contribute to a climate that fosters hate crimes. But that is something difficult to measure. In any of these cases, Sumner emphasizes, even if we can establish a plausible causal connection with the occurrence of harm, we have only done enough to show that the activity in question is a proper candidate for regulation or restriction. Whether it actually should be restricted requires the balancing process where the costs and benefits of restriction are weighed against the costs and benefits of a limitation on freedom.

In the final Chapter, Six, Sumner moves, as its title has it, 'From Principle to Policy.' The preceding chapters have developed a normative framework, drawing on Mill's Harm Principle, for defining the conditions under which regulation or restriction of pornography and hate propaganda using the coercive power of the law could be justified. Some considerable theoretical scepticism has been expressed as to whether regulation or restriction of pornography and hate propaganda can in fact be justified by such a framework. Suppose such scepticism is justified. What are the policy consequences? The chapter first looks at forms of restriction other than criminalization. Sumner discusses human rights legislation, customs regulation, film review boards, and Internet regulation as other means by which the freedom to distribute or to consume pornography and hate propaganda are limited by governments. These subsections are wholly appropriate. Notoriously, in Canada, the Canadian customs have been able to limit access quite effectively to materials aimed at lesbian and gay audiences that are without question not pornographic by the definition in the *Criminal Code*. One significant feature of the book is the reality-driven emphasis on the way that the Internet has changed the distribution and consumption of both pornography and hate propaganda. It is an important medium of distribution for adult pornography, and by far the main medium for child pornography and hate propaganda. Moreover, it is largely beyond regulation by Canadian authorities. Important issues of practical efficiency therefore arise in relation to control or restriction of pornography and hate propaganda.

Sumner is importantly correct to insist that these non-criminalizing measures be subjected to fundamentally the same normative tests as criminalization, although, the limitation on expression not taking the form of criminalization, they may weigh differently in the final balance. I should note, however, that his examination of 'other means' is almost entirely one-sided. His aim is to ensure non-criminalizing measures are judged by standards appropriate to criminalization, and the policy recommendations that result are consequently largely negative (see pp. 651-2 below). This approach is markedly different from that taken by the Law Commission of Canada in their research project 'What Is A Crime?'

They too point out the variety of resources a society has available to deal with (what they call) 'unwanted behaviours' other than criminalization — non-criminal regulation, surveillance, therapeutic approaches, public education, community supports and reward programs are identified by the Commission as available 'intervention strategies.'¹⁹ Mill saw nothing wrong with society using its full powers of moral disapprobation to influence for the better unacceptable other-regarding behaviour that fell short of qualifying for criminalization (*On Liberty*, section IV). Both Sumner and the Law Commission are deeply suspicious of what the latter call 'the reflex to criminal law.' But it is a limitation of policy proposals founded on negative liberty to tend to fall victim to the complementary reflex, of assuming that valid policy options end when criminalization has been shown to be unjustified.

After this section on 'other means,' Sumner develops his policy guidelines (*H&O*, 180ff.). These are as follows. The case for restricting freedom of expression must be exclusively harm-based. Since the community standards test is a test of offensiveness, not harm, it has to go. We must make use of the best social science evidence for the existence of harmfulness, given first a presumption in favour of liberty. The *Charter* s.1 requirement that a limitation be 'demonstrably justified' is not satisfied by the Supreme Court's actual requirement of merely a 'reasonable basis' when actual social-scientific evidence is wanting: the Court is being too deferential to Parliament. The evidence suggests that it is the 'violent' element in violent pornography that has an effect on men's attitudes, rather than the 'sexual' element. If that is true, regulation based on the sexual element is focussing on the wrong thing. Restraints on pornography or hate propaganda carry their own risks of harm, because of the weight of the interests advanced by freedom of expression. Account must be taken of the 'chilling effect' of restriction of hate propaganda on the vigour and robustness of political debate. Similarly in the pornography case, there may be a 'chilling effect' on legitimate free expression of sexuality. If something is made a criminal offence, there are costs of enforcement and incarceration or fine. Consideration of the costs of restraint imposes an effectiveness requirement on any form of legal regulation. Futile laws should not be on the books.

Deploying these guidelines, Sumner then offers the following recommendations. The child pornography framework is too broad. The community standards test has to go, and any vague definition in terms of

19 Law Commission of Canada, *What is a Crime? Challenges and Alternatives*, Discussion Paper (Ottawa 2003), 3, http://www.lcc.gc.ca/en/themes/crime/discussion_paper/toc.asp

'undue exploitation.' No law imposing a content restriction on hate speech can be justified. The same will apply to all mechanisms of prior restraint. Customs in particular has to get out of the business of intercepting expressive materials. The recommendations boil down to: 1) a slimmed down child pornography law; 2) no (further) content restrictions on expressive material; 3) more use of context restrictions; and 4) no use of prior restraint. This position commits Sumner, as he notes (H&O, 202) to rejecting as mistaken every decision by the Supreme Court of Canada since 1990 on pornography and hate propaganda (except for the one in which they struck down the 'spreading false news' section of the *Criminal Code*. All these decisions upheld as justified limitations on expressive freedom that do not satisfy Sumner's demand of a harm-based test supported by clear social science evidence of harm.

It is clear that the book succeeds spectacularly in its chosen task — that of developing a Millian harm-based and consequentialist framework for the legal restriction or regulation of pornography and hate propaganda, deriving the more specific normative principles that such a framework subtends, demonstrating that current Canadian law fails to conform to such principles, and proposing how it should be changed in order to conform. The question remains, however, whether there aren't costs, normative and philosophical, to this unrelenting commitment to utilitarianism and consequentialism, as well as benefits. My concerns about the book fall into two general categories — the story Sumner tells about the relation between s.1 and s.2(b) of the *Charter*, a story that has both technical and more far-reaching normative aspects; and the concept of harm that Sumner assumes and that is so fundamental to his enterprise in the book. It's very clear that we have different bottom-line intuitions about two key points. Sumner supports, while I reject, the 'capacious' interpretation of 'expression' adopted by the Supreme Court. I support, while he rejects, the approach and the result in *Keegstra* and *Butler*. I don't think either of us at this point is going to convert the other, but it is worth laying out an alternative view.

II The Structure of the *Charter*

As has been noted already,²⁰ I have long been opposed to the Supreme Court's 'capacious' interpretation of 'expression,' on the grounds that,

20 See L.W. Sumner, 'Critical Notice of Roger A. Shiner, *Freedom of Commercial Expression*,' *Canadian Journal of Philosophy* 35 (2005) 623-40; Roger A. Shiner, 'Freedom of Commercial Expression,' in *Free Expression: Essays in Law and Philosophy*, W.J.

when combined with the Court's desire always to give contextualized decisions as regards limitations of *Charter* rights and freedoms, it leads to a lack of principled decision-making in the area of freedom of expression. As Jamie Cameron has pungently put it, the contextual approach has the effect with respect to freedom of expression adjudication of 'emasculat[ing an] inclusive definition of the right and transform[ing] section 1 review into an ad hoc exercise that exalts flexibility at the expense of principle.'²¹ What I regard as a weakness, however, Sumner, as we have seen, regards as a strength. Lying behind this specific difference of opinion are much deeper ones.

The first concerns whether the Court's approach to s.2(b) adequately respects basic democratic concerns about the separation of powers in a constitutional democracy. It is a well understood principle that as far as possible constitutional courts consider issues of rights, and legislatures have authority over social and economic policy in the broadest sense.²² The issue cuts against Sumner as follows. If the reasoning of the Supreme Court is utilitarian cost-benefit analysis, and the legislature in designing the legislation under review itself conducted a similar utilitarian analysis, as it likely did, then the Court will inevitably be, in Sumner's own words, 'replicating the process carried out in the first instance by the legislature' (*H&O*, 85). Sumner does not see a problem with this replication, of course — the more cranks of the utilitarian calculating device the better, as it were. His nod to the separation of powers is that the Court should overturn the legislature 'only if it can locate some discernible defect' (*ibid.*), giving some pre-emptive weight to the legislature's opinion. But, to deflect my criticism, we would have to be able to distinguish between a defect of methodology and a defect of outcome. Utilitarian or consequentialist cost-benefit analysis links methodology and outcome too closely for such a distinction to be drawn.

A second issue is this. If one's approach to the analysis of rights is deontological, then the approach of the Supreme Court is objectionable

Waluchow, ed. (Oxford: Clarendon Press 1994) 91-134, at 117-20 & 125-7; Roger A. Shiner, 'The Silent Majority Speaks: *RJR-MacDonald Inc v Canada*,' *Constitutional Forum* 7.1 (1995) 8-15, at 13-14; Shiner, *Freedom of Commercial Expression*, 88-90.

21 Jamie Cameron, 'The Past, Present and Future of Expressive Freedom Under the *Charter*,' *Osgoode Hall Law Journal* 35 (1997) 1-74, at 5.

22 Some of course argue that separation of powers value imply that courts should not be in the business of reviewing legislation at all. Jeremy Waldron is probably the most energetic defender of this view among contemporary theorists: see Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press 1999); *The Dignity of Legislation* (New York: Cambridge University Press 1999); and elsewhere.

because all the deontological content of the right is consumed by the s.1 analysis. As McLachlin CJC herself said, interpreting the equality guarantee of s.15 of the *Charter* while on the British Columbia Court of Appeal, allowing anything to count as discrimination for purposes of the section 'would trivialize the fundamental rights guaranteed by the *Charter*,' and would lead to all sorts of 'manifestly desirable legal distinctions' being required to 'run the gauntlet of s.1.'²³ But a difference of opinion on the merits of combining a capacious interpretation of 'expression' with *Oakes*-testing for justified limitations is not going to be solved from the top down. The matter must be approached from a different direction.

If one is committed from the outset to a consequentialist theory of normative institutional design, then it is easy to see why the Supreme Court's approach to s.1 and s.2(b) is so attractive. The reasoning goes like this:

- 1) S.1 analysis is through and through consequentialist.
- 2) To restrict the range of candidate expressions that are covered by s.2(b) is to exempt such candidate expressions from consequentialist analysis.
- 3) Therefore, to ensure that the fullest range of candidate expressions are subjected to consequentialist analysis as to the character of any harm or benefit that might result from their limitation, 'expression' in s.2(b) should be interpreted as broadly as possible.

The Supreme Court does exactly that; hence Sumner's approval of their approach. However, none of (1) through (3) are uncontroversial, and, if we consider why, we can, if not exactly refute Sumner, at least show that his consequentialist approach makes assumptions that are not yet defended.

Let's begin with (1): what is the argument for it? One might think at first sight that (1) needs no argument: it is just plain obvious. The *Oakes*

23 *Re Andrews and Law Society of British Columbia et al.* (1986) DLR (4th) 600 (BC CA), at 606-7. The Court has said much the same of the s.7 guarantee of 'life, liberty and security of the person': 'We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s.7 into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, independent of any identified principle of fundamental justice, would entirely collapse the s.1 inquiry into s.7' (*R v Malmo-Levine* [2003] 3 SCR 571, at para.96: the Court's emphasis).

test, with its language of 'pressing and substantial legislative objective,' 'rational connection,' and 'proportional effects' certainly seems to be inviting courts to make a detailed comparison of the value of the candidate limitation with the value of the right or freedom whose limitation is being considered. But is that all it takes to prove that the Court's interpretive directions can only be properly theorized in consequentialist terms?

Here's a familiar, everyday occurrence. My wife and I were debating earlier in the year whether to leave where we then lived and move to a different area of Kelowna. At one point, we sat down and drew up a list of the pros and cons of staying and the pros and cons of moving, and we formed a judgment on which would be the preferable course of action for our family (to move, in fact). Does that description of what we did do enough to show that only a consequentialist account of practical reasoning will properly theorize the actual practical reasoning in which we engaged? I do not believe so, and here's why.

Here are two commonplaces about practical reasoning. The first is that it is only sensible to investigate what will happen if one option is chosen, and what will happen if another option is chosen. The second is that practical reasoning typically involves, not a comparison of a clearly attractive option with a clearly unattractive option, but a comparison of one option that is in some ways attractive and in some not with another option that is in some ways attractive and in some not. These commonplaces are just basic uninterpreted data about human practical reasoning. They don't by themselves show that a consequentialist account of practical reasoning at the level of technical theoretical analysis is correct.

Moreover, contemporary English-speakers find it extremely natural to use both the idiom of 'costs and benefits' and the idiom of weighing and balancing to describe the decision-making process in practical reasoning. But these idioms are in origin metaphors, images;²⁴ they have become so familiar that their metaphoric character is totally forgotten. Not only that, they are (relatively) modern images. In the *Nicomachean Ethics*, Aristotle talks about the structure of practical reasoning. In various passages, the standard Ross translation²⁵ has him using the language of 'weighing' and of 'costs and benefits,' much as we would. But that's

24 As Sumner seems aware: 'in *Keegstra* both the majority and the minority helped themselves freely to this rhetoric of balancing' (*H&O* 59).

25 W.D. Ross, trans., 'Aristotle, *Nicomachean Ethics*,' in vol. II of *The Complete Works of Aristotle: The Revised Oxford Translation*, Jonathan Barnes, ed. (Princeton, NJ: Princeton University Press 1984), 1729-1867

not Aristotle: it's Ross.²⁶ Aristotle uses *sunarithmein* ('add up,' or, to use a very modern image, 'compute' or 'compile') and *ischuein*, 'has strength' (EN 1104a34-b3). Where the translation talks about costs and benefits, Aristotle's language is much flatter, simply the normal Greek preposition *anti* used for comparing one thing with another (EN 1110a29-30, 1117b13-15, 1119a1-3). So it is possible to appreciate the basic points about practical reasoning that these idioms respond to without using those idioms, and it is possible to appreciate those points without being a consequentialist about moral/political reasoning and judgment. Aristotle was no consequentialist even if he did realize that in practical reasoning one looks to the end one aims to achieve and assesses competing means. Instrumentalism is not the same as consequentialism.

However, there's no question that McLachlin J (as she then was) refers to s.1 analysis in *Keegstra* as a 'cost-benefit analysis' (*Keegstra*, at 863). Only that once, however, although there are also a couple of other references to the 'costs' of a certain policy.²⁷ The dominant image all over the Court's judgment (which means, 'all over s.1 analysis,' since, as has been noted, it takes but a moment to establish that a limitation on 'expression' has occurred) is that of 'weighing' — it occurs almost forty times. How are we to construe the reference? Consider again our debate whether to move house. Our considering of pros and cons is certainly a 'weighing'; but is it a 'cost-benefit analysis'?

Much depends of course how 'cost-benefit analysis' is defined. In the strict sense, as an instrument for public policy decision-making, the term refers to economic or monetized costs and benefits. On the standard view, cost-benefit analysis involves 'list[ing] all parties affected by the project and then valu[ing] the effect of the project on their welfare as it would be valued in money terms by them.'²⁸ In that standard sense, part of our reasoning relating to the house purchase certainly was 'cost-benefit analysis': we set up spreadsheets that would allow us to insert different purchase prices, different sale prices, factor in commissions, fees, new appliances, window coverings, etc. etc., to see how the dollars and cents would fall out. But then we considered other factors too. Our

26 Ironically, where Aristotle does use the vivid image of *rhophê tês zôês*, 'weight [in the balance] of life' (EN 1094a23, 1101a29), Ross drops the image out and simply talks about 'having influence in.'

27 She also refers to the *Oakes* test as a cost-benefit calculation in *R v Lucas* [1998] 1 SCR 439, at para. 113.

28 Richard Layard and Stephen Glaister, eds., *Cost-Benefit Analysis*, 2nd ed. (New York: Cambridge University Press 1994), 4

former neighbourhood was very hilly, and isolated. Our children couldn't just cycle around to see friends, and in any case there were few children their age. You had to drive to get anywhere. It didn't promote a healthy lifestyle. The new neighbourhood is far more child-friendly, with many children from their school. On the other hand, I have to drive further to get to campus: but then again we are somewhat nearer where we often shop. Is considering all these factors also doing a 'cost-benefit analysis'? Well, one might say, of course it is: you are looking at the costs of living where you are and the benefits of living somewhere else. Is that all it takes to be doing a 'cost-benefit analysis' — to look at how you would be affected in different possible circumstances, to look at the implications of different scenarios? One can see the difference here between 'cost-benefit analysis' in the technical sense of public policy discussions, a large part of which really is assessing actual costs and actual benefits, and the looser colloquial sense of 'cost-benefit analysis,' which is just a metaphorical way of referring to typical practical reasoning. The vividness of the metaphor does not prove that the underlying reasoning is at the theoretical level properly represented as 'consequentialist.'

Fundamentally, cost-benefit analysis in the strict sense provides *information*: these are the costs of this option and that option, and these are the benefits of this option and that option. It's always a next step to say, Well, we must obviously pick this option, because it maximizes costs against benefits. As has been pointed out, sometimes ethics involves not maximizing.²⁹ Moreover, cost-benefit analysis does not leave room for side-constraints on the decision-making such as citizen rights.³⁰ My point is not that side-constraints in the form of rights can only be explained by a non-consequentialist or deontological moral theory. As acknowledged already, a right in the sense of a protected normative position can be backed by a consequentialist theory as much as a deontological one. My point is just that, if a public decision is such that rights play a role in the justification of that decision, then the justification for that decision cannot be exhausted by cost-benefit analysis.

This straightforward point has two important implications in the present context. First, it underlines the inconclusive character of the language of 'cost-benefit analysis,' 'weighing' and 'balancing' when it

29 Donald C. Hubin, 'The Moral Justification of Benefit/Cost Analysis,' *Economics and Philosophy* 10 (1994) 169-94, at 178-9; David Schmidtz, 'A Place for Cost-Benefit Analysis,' *Philosophical Issues* 11: Social, Political and Legal Philosophy, *Nous* (2001) 148-71, at 153

30 Hubin, 'Moral Justification,' 181-2

comes to considering whether protection for freedom of expression in *Charter* adjudication is best construed in consequentialist terms. Sumner quotes a long passage from McLachlin J (*Keegstra*, at 845), which he acknowledges to be 'the most elaborate and developed account of what is involved in [the balancing] process' (*H&O*, 59). The passage contains such locutions as 'on the one hand ... on the other hand,' 'the exercise ... requir[es] the judge to make value judgments,' 'what must be determinative in the end is the court's judgment, based on an understanding of ... values and ... interests,' 'the judge must ... [weigh] the different values represented,' and so on. Nothing in this language is inherently consequentialist. The language is all compatible with a judge's or court's practical reasoning being technically construed as a matter of a case by case comparison, averred by John Wisdom³¹ to be found paradigmatically in legal reasoning, or the kind of reasoning sponsored by moral particularists (including, and famously, Aristotle).³²

Second, the point underlines a particular difficulty in seeing protection for freedom of expression in *Charter* adjudication in consequentialist terms, since the *Charter* is a charter of *rights and freedoms*. It's not that, if one is already committed to a consequentialist theory of practical reasoning, one can't make *Charter* adjudication, given that it concerns the force of side-constraints on government action, fit the theory. One can, and Sumner does in this book. It's that, if one begins the other end, with an open mind as to how best to construe *Charter* adjudication in the light of available moral theories, it is simply question-begging to say that we have to approve of the Supreme Court's approach to *Charter* adjudication in freedom of expression cases because the approach fits best with a consequentialist theory of such adjudication. If *Charter* rights and freedoms have a deontological backing, then the Court's approach fails to give a proper role — proper weight, one might even say — to that backing. In that the Court reasons in the way it would reason if a fully consequentialist account of *Charter* adjudication is correct, Sumner has grounds to approve of the Court's reasoning, and approve of it he does. But that the Court so reasons is not a ground for non-utilitarians to approve of the Court's reasoning, and I for one do not.

31 John Wisdom, *Proof and Explanation* (Lanham, MD: University Press of America 1991). See also Roger A. Shiner, 'Ethical Justification and Case-by-Case Reasoning,' in *Ethics and Justification*, D. Odegard, ed. (Edmonton, AB: Academic Printing and Publishing 1988), 91-108.

32 Brad Hooker and Margaret Little, eds., *Moral Particularism* (Oxford: Clarendon Press 2000); Jonathan Dancy, *Ethics Without Principles* (Oxford: Clarendon Press 2004)

Of course, to return to my argument of (1) - (3) a few pages above, if (1) is undermined for the reasons given, (2) and (3) speedily follow. Indeed the effect of saying in essence that some expressions in the ordinary sense are within the scope of the constitutional protection afforded by s.2(b) and some are not is that some expressers won't get their day in court because their expressions are not 'expressions' within the meaning of s.2(b). But that is of no concern, unless those expressions *ought* to be within the scope of s.2(b), as determined by some appropriate moral theory. We don't know that yet: the point has to be argued independently. It is not an argument against people who believe that pornography and hate propaganda should be excluded from the scope of s.2(b) for deontological reasons that, if consequentialism is correct, the best consequentialist approach to s.2(b) adjudication would be to include them.

III The Concept of Harm

Let me lay aside now concerns over the structure of *Charter* adjudication and technical sense of 'cost-benefit analysis,' and turn to the substance of Sumner's views on legislative control over the distribution of pornography and hate propaganda. On the bottom line, as I have said, my instincts are to defend the decisions in *Keegstra* and *Butler*, whereas his are to reject them. I agree with the general idea that the *Oakes* test and s.1 analysis in theory are quite appropriate, since there really are costs to the regulation of these forms of expression, and regulation should be rationally justified by a balancing of costs and benefits (in some to-be-defined/clarified sense of 'balancing of costs and benefits'). So where we disagree is over the presence (or weight) of 'harm' in the balance. A recurrent theme in *H&O* is that regulation of expression is justified if and only if the harm prevented outweighs the harm done by regulation, and there is no evidence of that being so. I tend to support regulation of pornography and hate propaganda, not because I reject the claim that harm matters, but because I think there's more harm in the balance than Sumner does.

Consider the following remarks in the book about child pornography:

Children are participants in the making of child pornography when they are photographed, filmed, or videotaped in sexual activities or in sexually inviting or suggestive poses. In those cases the pornographic product is itself the visual record of the sexual abuse of the children who are being exploited or manipulated for the sexual purposes of adults. The key difference between children and adult women as models or performers is the incapacity of the former to give meaningful consent to their involvement. To the extent that this involvement results in any of the sequelae commonly associated with sexual abuse, the children have been thereby harmed. (157, footnote omitted)

There are two different issues being raised in this passage concerning the harm to children involved in the making of child pornography. The first is this. Sexual abuse causes physical and psychological harm to the person abused. Insofar as children involved in the making of child pornography suffer sexual abuse, they are harmed — in a well-understood sense of ‘harm.’ Second, there are issues raised of exploitation, manipulation and lack of consent. These are also harms, but harms of a different order.

Psychological harm, in the form of, say, a crippling of emotional development, a devastating loss of self-esteem, is something that could result from a traumatic natural catastrophe as much as from the actions of a pornographer. Bruising and damage to body parts of one sort or another likewise may have a human or a non-human cause. But how do we best record these distinctions in legal theorizing? Not all harms interest the law. A person whose heart failure results from the natural course of disease is in the same harmed condition (in this sense of ‘harmed condition’) as one whose heart failure results from the ingestion of deliberately administered poison. The notion required for jurisprudential purposes is not so much ‘harm’ as ‘wrong’ or unjustified violation of right. Not all harms are wrongs (suppose I put the poison into your drink by accident). So the focus has to be on that subset of harms that are also wrongs.

What, however, is it that turns a harm into a wrong? What do we need to add, to define the relevant subset? Obviously, one element is causation: one important difference between the rock hitting you as a result of a landslide and the rock hitting you as a result of my throwing it lies in the cause of the rock hitting you. But more is needed. Consider the difference between my throwing the rock and you unforeseeably getting into its path, my throwing the rock without paying any attention to who might get hit, and my throwing it intending to hit you. The law’s interest in your ‘harmed condition’ of being rock-damaged is confined to the latter two cases.

This train of thought leads to what has been called by Antony Duff the ‘conduct-cause-harm’ model of wrongdoing.³³ It is the model adopted by consequentialists, and we see it in operation in *H&O*. According to the model, the coercive force of the law is properly used only against those whose conduct causes (or threatens or makes more likely) harm to

33 R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell 1990), 105-11; R.A. Duff, ‘Rule-Violations and Wrong-Doing,’ in *Criminal Law Theory: Doctrines of the General Part*, Stephen Shute and A.P. Simester, eds. (Oxford: Oxford University Press 2002), 58

another. The model, however, is problematic. The focus of concern consists of two related points. Consider, first, the crime of sexual assault. In Canadian law, sexual assault is an assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated.³⁴ Compare that definition with a more conventional one in terms of the occurrence of penetration. The objection can be made to the conventional definition that, in characterizing sexual assault as a harmful result caused by conduct, the definition diverts attention away from the conduct itself, and so leaves out what is most fundamental and striking about such assaults — namely, that the victim's autonomy is deeply violated, that the victim's status as a person is repudiated, that the victim is reduced to a means of gratification.³⁵ The Canadian definition has the advantage that the expression 'sexual integrity' does not mean simply physical integrity defined by the outer limits of the body. The expression is not simply a disguised way of referring to bodily penetration. Instead, it is intended to cover such actions as groping, grabbing, slapping and the like, although degrees of heinousness are acknowledged. Violating integrity, however, is not an action that can be broken down into 'conduct-cause-harm.' The description of the action itself says why the action is repugnant. We are dealing here with a case of what I would call non-consequential harm. The harm at issue is constituted by the action, not caused by it.

This point can, second, be extended more widely. Consider again the Canadian definition of sexual assault, invoking the idea of 'circumstances of a sexual nature.' This reference to 'circumstances of a sexual nature' brings out that the whole matter of the occurrence of harm so as to concern the law is fundamentally social in character. The harm-causing acts with which the law is concerned are socially embedded acts. The individuals who are causing and suffering the harm are also socially embedded. We fail to understand how it is true that harm is being caused unless we attend, not merely to conduct and the results of conduct, but also to the modes, contexts and embedded attitudes of conduct. An assault on a victim may contain precisely the same bodily movements as the caress of a lover. If there is harm done in one case, but not in the other, it is not because some bodily condition results from the one that does not result from the other. It is because different action descriptions are appropriate, drawing for their differences on the background stock of social concepts and norms in which the bodily movements are embedded.

34 *R v Chase* [1987] 2 SCR 293

35 R.A. Duff, 'Harms and Wrongs,' *Buffalo Criminal Law Review* 5 (2001) 13-45, at 24-5

It is, however, a move from here to the case of pornography — but not, I believe, that large of a move. Sumner says, *à propos* of Martha Nussbaum's analysis of objectification³⁶ and the emphasis in *Butler* on depictions of sex that are 'dehumanizing and degrading': 'But it cannot be right to say that women in general are harmed simply by virtue of the fact that degrading representations of them are being marketed to men. We would need causal evidence' (*H&O*, 150). With respect — why do we need causal evidence? The marketing of degrading representations is itself a harm, a non-consequential harm. In order to understand what is happening when pornography is marketed, we need to draw on the background stock of social concepts and norms in which the representations are embedded. Consider the analogy of insults. Suppose we hear a person being insulted. Do we need to wait around to see if an insult has actually caused someone to think worse of the insultee before determining that an insult has occurred? No: we know an insult has occurred simply as a result of what we hear in the circumstances in which we hear.³⁷ It won't do simply to assign laws that penalize non-consequential harm to the 'symbolic function of law' and summarily conclude, as Sumner does (*H&O* 195) that as such the laws cannot pass the test of the Harm Principle.

As Sumner points out, both Dickson CJC for the majority and McLachlin J (as she then was) for the dissent in *Keegstra* describe the harms that they consider the dissemination of hate propaganda might bring. Dickson refers to 'emotional damage,' being 'humiliated and degraded,' 'a severely negative impact on the individual's sense of self-worth and acceptance,' which in turn may cause 'avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority' (at 746). He also talks about wider effects 'upon society at large' and the possibility of 'creat[ing] serious discord between various cultural groups' (at 747-8). McLachlin talks about minority groups being 'inhibited from contributing to the extent of their desire and ability,' considered a loss to Canada, and about the further 'exacerbat[ion of] the divisions of a nation' (at 847).

36 Martha Nussbaum, 'Objectification,' *Philosophy and Public Affairs* 24 (1995) 249-91

37 Arguably, a claim like this is best defended in term of an underlying speech-act theory of language. Hornsby and Langton have in fact attacked pornography on such a basis (Jennifer Hornsby and Rae Langton, 'Free Speech and Illocution,' *Legal Theory* 4 [1998] 21-37). Sumner rejects this approach on the grounds that it confuses illocutionary and perlocutionary acts (*H&O*, 152-4). But of course the issue is whether the harm involved in the utterance of pornography is properly theorized by a view that deems it a perlocutionary consequence.

Sumner takes these passages to be evidence that the Court understands that we are dealing here with restrictions on expression that can be justified only in terms of consequentialism and the Harm Principle. With respect, that seems to me not so obvious. For one thing, while the Court's reasoning is instrumentalist, it does not comfortably fit the utilitarian 'cost-benefit analysis' model. Humiliation and degradation are not economic or monetizable costs: they are not even quantifiable costs. Take the familiar case of a work environment filled with nude posters of women in sexual poses and constant sexually aggressive banter. If someone thought that the issue here was potential loss of productivity on the part of the sole woman in the work environment, that person would not understand the situation any better than the person who thought the only issue in sexual assault was physical damage. Similarly, a social environment that leads to members of disadvantaged groups yielding some or all of their dignity and self-respect in order to conform or to avoid 'derision, hostility and abuse' (Dickson, *Keegstra*, at 746) is not an environment where the harm done is a quantifiable cost.

There are three different issues here. The first is whether it is sufficient in order to establish that a criterion of restriction-worthy harmfulness is met to look at the consequences of the activity or action that is a candidate for restriction. There are undoubtedly many, many situations in life where this is the case. As I have argued in the previous section, however, this dull fact about how the world works does not secure the truth of consequentialism as a technical ethical theory. The second is whether it is necessary in order to establish that a criterion of restriction-worthy harmfulness is met to look at the consequences of the activity or action that is a candidate. I have argued in the present section that this claim cannot be secured. The third issue is whether among the class of harms that can serve as the ground for instrumental (and in that sense consequentialist) justifications for restriction of an action or activity are harms that I have been calling non-consequential harms. If non-consequential harms can legitimately so serve, then a wholly consequentialist account of practical reasoning is inadequate. The passages quoted from the majority and dissent in *Keegstra* show that non-consequential harms can indeed so serve. Humiliation, degradation, destruction of a dignity and a sense of self-worth or a sense of acceptance into the community are harmful results, but results whose harm cannot be understood except by locating those concepts in the background stock of social concepts and norms out of which we construct the ideal of an individual with a proper place within a liberal community.

IV Conclusion

There are many issues, both greater and lesser in scope, that *H&O* presents to which I cannot do justice here. One important one is this. In the previous section, I argued against Sumner that the notion of 'harm' is capable of different interpretations than those subtended by the Harm Principle in its Millian/Sumnerian form. Be that as it may. In section 2, I argued that the images of weighing and balancing, costs and benefits did not have to be tied even to consequentialism in a broad sense, let alone an economic reading of consequentialism. Be that as it may too. Even if I am right, though, it remains true, as Sumner so often valuably reminds us, that the very act of legal restriction, especially in the form of criminalization, carries with it its own costs, its own harms, along with whatever are its perceived benefits. To show (supposing I have done so) that the Supreme Court of Canada in s.1 analysis is simply making a judgment call involving an array of conflicting considerations, rather than calculating utility or welfare, does not refute the fact that central among those conflicting considerations are the disadvantages of restriction that go along with the advantages. I have not said anything in this essay about those, and I won't. It could still be correct that, even if everything I have argued in sections 2 and 3 is sound, nonetheless pornography and hate propaganda should not be legally restricted because they cannot be justified by even my interpretation of the *Charter* s.1 requirement of demonstrable justification. I acknowledge that: the present review does not present its own constructive proposals.

Millian liberalism based on the Harm Principle has been and still is a powerful theory, one that is deeply influential in the formation of present-day consciousness about the public and the private, and the limits of law. Moreover, there's no question that in *The Hateful and the Obscene*, the view receives an articulate and comprehensive exposition in the context of Canadian legal and public policy. It's a fine book. But the world has moved on in the last fifty years. Feminism and multiculturalism, the two '-isms' ostensibly hardest hit by arguments like Sumner's,³⁸ are not simply flavours of the month for politicians out to get votes. Not only are they fundamental legal values in Canada following from sections of the *Charter of Rights and Freedoms*. They are also real theories raising hard issues both practical and theoretical about the proper form of the liberal state and the proper way to respect the dignity of each

38 I say 'ostensibly,' because many who support the ideals of feminism and multiculturalism believe those ideals are ill-served by legal restraints on freedom of expression. That important issue is not on the table in the present discussion.

individual citizen. It is not clear whether the Harm Principle in the form defended by Mill and Sumner is a hindrance or a help in such an endeavour. Lorenne Clark argued against Millian liberalism almost thirty years ago that 'liberalism ... contains within itself the potential for promoting greater equality and greater positive liberty for all. It can realize this potential, however, only by reconceptualizing harm in a way consistent with sex and class equality.'³⁹ In my personal view, her challenge to reconceptualize harm is as valid now as it was then. No such reconceptualization is contemplated in *H&O*.

On the other hand, one might feel that the time is ripe for a ringing reminder of all that Millian liberalism stands for. In the rush to equality, we need (it could be said) to re-inherit our Millian bequest (or 'patrimony,' if one wants to be combative). Sumner challenges us to do exactly that. Perhaps we have in *H&O* a 'received opinion' that is 'not only true, but the whole truth' and needs to be 'vigorously and earnestly contested' in order not to be 'held in the manner of a prejudice.' Or perhaps 'the meaning of the doctrine itself [is] in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct.' Or perhaps we have 'an error,' but one containing 'a portion of truth' that needs to 'colli[de with] adverse opinions that the remainder of the truth has [a] chance of being supplied.'⁴⁰ Whatever one's view of the matter, *The Hateful and the Obscene* is a book to be studied, contemplated and absorbed. I unreservedly recommend it.⁴¹

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39 Lorenne Clark, 'Sexual Equality and the Problem of an Adequate Moral Theory: The Poverty of Liberalism,' in *In Search of the Feminist Perspective: The Changing Potency of Women*, Resources for Feminist Research: Special Publication 5 (Toronto: Department of Sociology, Ontario Institute for Studies in Education 1978) 63-75, at 74.

40 All quotations from Mill 'On Liberty,' John Stuart Mill, *Essential Works of John Stuart Mill*, Max Lerner, ed. and intro. (New York: Bantam Books 1961), 302

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