

Sex And The Supremes: Towards A Legal Theory of Sexuality

by

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ABSTRACT

This thesis examines how the Supreme Court of Canada, across legal contexts, has tended to conceptualize sexuality. It focuses primarily on areas of public law including sexual assault law, equality for sexual minorities, sexual harassment and obscenity and indecency laws. There were a number of trends revealed upon reviewing the jurisprudence in this area. First, the Court's decisions across legal contexts reveal a tendency to conceptualize sexuality as innate, as a pre-social naturally occurring phenomenon and as an essential element of who we are as individuals. This is true whether one is speaking of the approach to gay and lesbian rights, the occurrence of sexual harassment, or the sexual abuse of children. However, there is an exception to this trend. The exception relates to the Court's conceptual approach towards sexual violence against adults. The research revealed, likely as a result of feminist activism both in the legislative and judicial arenas, that there has been a shift in the way that the Court understands sexuality in the context of sexual violence. It is a shift away from understanding it as pre-social and naturally occurring towards understanding it as a product of society, as a function of social context. This change in the Court's conceptual approach towards sexual violence has engendered a shift in the law's moral focus as well – a shift away from a moral focus on specific sexual acts and sexual propriety and towards a moral focus on sexual actors and sexual integrity. The thesis weaves together the analytical observations about the jurisprudence just described with a theoretical argument that is both grounded in the case law and which draws upon a number of different theorists. The argument developed suggests that the Court, regardless of the legal issue involved, ought to conceptualize sexuality as socially constructed/ contextually contingent, that it ought to orient itself towards protecting sexual integrity, and that it ought to understand this sexual integrity as a common interest.

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Chapter 1 - Introduction

Sexuality has been for centuries a site of religious, moral, theoretical, societal and legal struggle. It has been described as a “transmission belt for a wide variety of needs and desires: for love and anger, tenderness and aggression, intimacy and adventure, romance and predatoriness, pleasure and pain, empathy and power.”¹ Sex has been, and continues to be, one privileged indicator of the difference between right and wrong.² Law is frequently the site where sexuality as privileged indicator of right and wrong is revealed. But the relationship between law and sexuality extends far beyond simply the use of law to make sexual norm based distinctions between right and wrong. Sexuality, as will be argued throughout this thesis, is an aspect of human experience that is at once produced through society, regulated by society, and used to regulate society. As such, the intersection of law and human sexuality is both complex and profound.

Jeffrey Weeks identifies five areas as being integral to the social organization of sexuality: “kinship and family systems, economic and social organization, social regulation, political interventions and the development of cultures of resistance.”³ One might just as easily identify these as the five areas integral to the social organization of law, or as the five areas integral to the legal organization of sexuality. All of which is to suggest that this complex intersection of law and sexuality truly pervades every area of social and individual life.

Given this complexity, it is important to examine how courts tend to understand sexuality, whether this is context dependent and whether the conceptual approach they adopt best promotes legal reasoning that can account for and accommodate the

¹ Jeffrey Weeks, *Sexuality*, 2nd ed., (Routledge: New York, 2003) at 1.

² *Ibid.*

³ *Ibid.* at 21.

complexity of issues, interests and perspectives that arise when law and sexuality intersect.

Issues of sexuality are found in both public and private legal contexts: tort law, contract law, constitutional law, family law, administrative law, education law, immigration law, and criminal law.⁴ The intersection of law and sexuality has been examined through feminist perspectives, critical race theory, liberal theories, post modernism (and more specifically queer theory), gay liberation theory, gender theories, cultural legal studies, law and economics, and political legal philosophy. There have been debates over essentialism versus constructivism, liberty versus equality, sex versus gender, assimilation versus subversion, assimilation versus resistance, universalism versus particularism, universalism versus relativism, harm versus morality, and private versus public.

Less examined is what, if any, connection exists *between* legal issues in terms of the intersection of law and sexuality? Often discussions about ‘good sex’, sexual liberty and the rights and/or oppression of sexual minorities tend not to also include focus on issues such as rape, sexual violence and the ‘bad of sex’. Similarly, discussions about sexual harm, about for example the sexual oppression of women and children, do not tend to emphasize theories or legal approaches that are overly concerned with also recognizing

⁴ While the focus throughout this work will be mainly on public law (contexts such as criminal law, human rights code provisions and constitutional law) there will be some examination of private law issues (such as tortious liability for breach of fiduciary duty – see Chapter Six). This focus on public law is not because the ideas and arguments would not be applicable to private law matters. Rather it is a function of feasibility. The argument developed throughout this work – a constructivist account of sexuality in which sexual integrity is understood as a common good which the law ought to be oriented towards protecting - would also beneficially inform private law matters such as contract law and family law. The implications of my argument for private law matters are briefly touched upon in Chapter 8.

and accommodating the good of sex, the benefit, joy and power produced through and by sexuality.

Is there a discernible conceptual approach to sexuality developed and/or applied by the courts, which is common to all areas of law and sexuality? Do courts reveal the same understanding of sexuality regardless of whether they are dealing with issues of, for instance, sexual liberty, equality, tolerance or individual and public safety? Related to this, can there be one legal theory of human sexuality which accounts for the good of sex but identifies and rejects the bad, which ensures equality without assimilation, diversity without exclusion, and liberty without suffering?

I. Trouble Me With Three Notes About Theories Incomplete

When I was fourteen years old I sat at the kitchen table and watched as my father took his and my mother's *Sears* credit cards and, with a black magic marker, crossed out *Sears* and wrote 'Queers'. He put the cards in an envelope, mailed them to the *Sears* customer service department and informed us that our family no longer shopped at *Sears* - this in response to the department store's recent announcement that they would begin granting spousal benefits to employees in same sex relationships. Apparently they were one of the first nation wide companies in Canada to do this. For my father this was a sign (of the apocalyptic variety) that the normative universe as he knew it was in serious jeopardy – the Queers were taking over. In contrast, for those who willingly label themselves with the intended slur smeared in black felt pen on his credit card, legal activism aimed at issues such as the acquisition of pension and health benefits for gay and lesbian couples is often considered a misallocated effort because it perpetuates

conformity to social norms rather than subversion of them – for them it is misguided because it is not queer enough. It can be troubling to think about how vast the space is between the perspectives of my father and the Queers.

I recently attended a conference on feminist constitutionalism. Having breakfast the second day I had the pleasure of sitting next to a professor who had given a presentation the day before which offered an insightful feminist argument advocating for certain reforms to the criminal law. At breakfast she was discussing Justice Wilson’s ground breaking interpretive approach to section 1, based as it was on a contextual analysis of proportionality. I mentioned the biography *Judging Bertha Wilson* by Ellen Anderson in which, in her overwhelmingly positive treatment of Justice Wilson’s jurisprudence, Anderson argues that Justice Wilson’s contextual approach was in a sense post modern. This professor immediately dismissed Anderson’s book – a work which seemed to me to be very consistent with her own argument but which used the term post modern in its conceptual approach – with one statement. ‘Yes, well...her feminist credentials are questionable.’ I was immediately troubled. I didn’t know whether *I* had feminist credentials and if I did whether I had packed them. What if they asked me to produce them?

Last year I was browsing through the queer theory section at Glad Day Bookshop in Toronto. Glad Day describes itself as the first Canadian lesbian and gay bookstore – they have been “serving the queer community since 1970”.⁵ I overheard a conversation two aisles over between two men who looked to be in their late 40’s or early 50’s. They were bemoaning the close mindedness and homophobia of western attitudes towards Afghani Imam and their supposed practice of taking young Afghani boys as ‘lovers’.

⁵ Taken from their website: www.gladdaybookshop.com/about.html (accessed April 7, 2009).

They expressed their disgust at western society's failure to learn from the lessons of the ancient Greeks and their 'boylovers'. I had recently finished reading Khaled Hosseini's *The Kite Runner* and just the previous week had watched the movie based on his novel. Images of the graphic depictions of the sexual interaction between the protagonist's young nephew and the Imam who had kidnapped him were still troubling me.

...

There are three broad theoretical approaches that have likely done the most work in terms of theorizing concepts of sexuality in a legal context. They are liberal rights theories, queer theory and branches of feminism, such as power feminism. (By power feminism I am referring to that branch of feminism that argues that inequality between men and women is itself sexualized and a function of social structure.) Each of these approaches, in their various manifestations, offers significant insight into certain aspects of the relationship between law and sexuality.

Equality theory provides a solid theoretical foundation to defeat laws that discriminate against gays and lesbians. Equality theory provides strong support for the assertion of rights to spousal benefits for the gay and lesbian employees of *Sears*; it is less able, however, to provide a theoretical basis for the assertion that the distribution of economic privileges ought not to be based on sexual relationship status or for the argument that gay and lesbian pornography ought to be treated differently under the law than heterosexual pornography. Nor will it avoid the model of exclusivity inherent to any rights based social justice movement; a model whose identity politics demand that lines be drawn in the sands of sexual normativity between which sexual deviants are in and

which are out, always at once constituting new sexual outlaws while at the same time permitting sexual citizenship for some.⁶

Queer theory can avoid drawing such lines; it can, for example, provide the basis for transgender folks to argue for the disruption of regulatory gender norms. But queer theory cannot avoid its infinitely regressive inability to ever draw lines in the sands of sexual normativity. It cannot, properly understood, provide a basis from which to argue that homosexuals ought to be *in* and hebephiliac Imams *out*.

Power feminism ably theorizes the gendered power dynamics within families and the disservice to women created by the social and legal distinction between public and private. It offers a clear theoretical basis for the assertion that violent pornography is anti-democratic (and that a failure to prohibit it is a failure to treat all citizens equally). It fails, however, to treat equally, sexual minorities oriented towards consensual sadomasochism. Nor does it handle well women who sexually harass men, women who rape⁷ or female heterosexual subjectivity.⁸ It is a structural theory that excludes any perspective that does not begin with a foundational *and* overarching assumption of male super-ordination over female.

None of these approaches provide a particularly convincing theoretical basis from which to argue in favour of a legal theory of sexuality that understands sexuality as a collective interest, without, that is, an assertion of sexual morality.

Can there be a legal theory of human sexuality which cuts across the space between good sex and bad sex, public sex and private sex, dominant sexual practices and

⁶ See Brenda Cossman, *Sexual Citizens*, (Stanford University Press: Stanford, 2007).

⁷ See Janet Halley, *Split decisions: Taking a Break from Feminism*, (Princeton University Press: Princeton, 2006).

⁸ See Carol Smart, "Desperately Seeking Post Hetero-sexual Women" in Janet Holland & Lisa Adkins, eds., *Sex, Sensibility and The Gendered Body*, (Macmillan Press: London, 1996) 222.

minority sexual practices, assimilation and tolerance, suffering and desire? Is there a theoretical approach that can resolve or reconcile all of these troubling tensions?

I doubt there is such a theory. It may be, however, that law does not need a theory that can accomplish this. The ideas and theoretical approach developed throughout this thesis are not an attempt to provide *the* answer, or resolve these tensions – quite the opposite in fact. My objective, upon examining how the Supreme Court of Canada currently conceptualizes sexuality, is to then offer one idea about how legal reasoning should conceptualize sexuality, to provide argument in favour of this idea, and to make the claim that so long as law is developed, interpreted, and applied in a manner that acknowledges the social contingency of sexuality and tries to stay open to new ideas and the possibility of new meaning there will always be trouble up ahead and that this may be a good thing.

II. There Is Trouble Up Ahead - Towards A Legal Theory Of Sexuality

Looking primarily at Supreme Court of Canada jurisprudence, how does the Court understand sexuality and does this understanding change depending on the type of legal issues involved? (For example, is the Court's conceptual approach different in the context of sexual assault cases than it is in the context of gay and lesbian rights under section 15 of the *Charter*?) Does the Court's understanding of sexuality influence their reasoning? Has the Court's conceptual approach changed in recent years and if so what has influenced this change? Finally is there a conceptual approach that is to be preferred and if so why?

In exploring these questions I have focused primarily on areas of public law including sexual assault law, equality for sexual minorities, sexual harassment claims and obscenity and indecency laws. I reviewed all of the Court's jurisprudence in these areas in the past twenty years as well as a significant amount of the lower court case law on these legal issues. The Court's decisions across legal contexts reveal a tendency to conceptualize sexuality as innate, as a pre-social naturally occurring phenomenon and as an essential element constitutive of who we are as individuals. However, there is an exception to this trend. There has been a shift in the way that the Court understands sexuality in the context of sexual violence between adults. It is a shift away from understanding it as pre-social and naturally occurring and towards understanding it as a product of society, as a function of social context. This is an exciting development with implications that have already begun to reveal themselves in cases in other legal contexts. This change in the Court's conceptual approach towards sexual violence has engendered a shift in the law's moral focus as well – a shift away from a moral focus on specific sexual acts and sexual propriety and towards a moral focus on sexual actors and sexual integrity.

This thesis weaves together the analytical observations about the jurisprudence just described with a theoretical argument that is both grounded in the case law and which draws upon feminist, liberal and post-modern theories. The argument developed suggests that the Court, regardless of the legal issue involved, ought to conceptualize sexuality as socially constructed, that it ought to orient itself towards protecting sexual integrity, and that it ought to understand this sexual integrity as a common interest.

As will be discussed in much greater detail in Chapter Two, sexuality is typically conceptualized as either an innate, naturally occurring, pre-social and essential element

constitutive of who we are, or as a product of norms, social practices, institutions and structures – much like language. The intention of this discussion is to demonstrate, through an examination of legal reasoning in different legal contexts in which issues of sexuality arise, that constructivist conceptions of sexuality produce more nuanced, more inclusive, more just legal reasoning, as well as to suggest one theoretical approach to sexuality that might help to produce and promote legal reasoning that ascribes to such constructivist conceptions. This will be achieved by advancing a number of claims each intended to build on one another.

The first claim, which will be made in Chapter Two, is that in order to ascertain the broader implications of a legal understanding of a sexual issue or behavior or phenomenon it is important to identify and understand the conceptual framework underpinning that legal understanding. Included in Chapter Two will be a discussion of what is meant by the term social constructivism, an explanation of how different queer and feminist theorists have used the concept and an argument as to why a constructivist legal conception of sexuality is to be preferred over an essentialist conception.

The second main claim will be made in Chapter Three. Chapter Three will demonstrate that, across different legal contexts, courts have tended towards an essentialist conception of sexuality. This chapter will examine the Supreme Court of Canada's jurisprudence (as well as some lower court decisions) in four different legal contexts –human rights complaints regarding sexual harassment, sexual minority claims under section 15 of the *Charter*, the use of similar fact evidence in sexual assault trials, and the criminal regulation of child pornography. Chapter Three will reveal how the Court's essentialist reasoning limits the availability of legal remedies for certain types of

claimants, and precludes legal recognition of the social factors that produce problematic and harmful sexual behavior.

The underlying argument established in these two chapters, and maintained throughout the remaining chapters, is that legal conceptions of sexuality as socially constructed are to be preferred over essentialist conceptions of sexuality. I will argue that constructivist conceptions encourage legal reasoning that is less likely to understand and measure every sexual act, desire and identity through a heterosexual paradigm, and better able to accommodate the relational and contextual factors which contribute to the regulation and production of sexuality.

Building on these first two claims will be the observations made in Chapters Four and Five that where the Court has shifted towards a more constructivist account – such as in the context of adult sexual violence - the law’s moral focus has also shifted. It has shifted from a concern over sexual acts to a concern over sexual actors, from a focus on protecting sexual propriety to a focus on protecting sexual integrity.

Chapter Four will demonstrate the way in which the Court has adopted a feminist influenced understanding of sexual violence. It is an approach that conceptualizes both the perpetuation of sexual violence and the harm caused by sexual violence from a constructivist perspective. Chapter Four will examine the way in which the concept of sexual integrity has been incorporated into sexual assault law; it will argue that the law ought to understand sexual integrity as a common good and be oriented towards promoting and protecting this common good.

Chapter Five will demonstrate how, in the context of obscenity and indecency laws, the feminist influenced constructivist perspective towards sexual violence adopted

by the Court encourages legal reasoning focused on political morality rather than sexual morality. Chapter Five will also reveal, through an examination of criminal laws regulating sex work, how this change in the law's moral compass has the capacity to better protect individual sexual actors.

Following this will be the claim made in Chapter Six that despite these successes, constructivist approaches – such as power feminism - that remain firmly anchored in a specific structure fail to truly shift the law's focus away from sexual morality and towards political morality. Chapter Six, through an examination of the Court's analytical approach to sexual battery and to gay pornography, will argue that to avoid making universal (and correspondingly sexually moralistic) claims, a theoretical approach must be willing (and able) to introvert its constructivist analysis.

Chapter Seven will then add a cautionary note to the argument that a theoretical approach to sexuality must introvert its constructivist analysis. Chapter Seven will argue that while constructivist theories are methodologically invaluable (in that they demonstrate the need for any just system or social structure to recognize that its fairness depends on its ability to continually redefine and reinterpret itself and the social context in which it operates), once unhinged from any structure or foundation they do not meet the law's need to establish or identify criteria by which to judge.

The final chapter will argue that the Court ought to continue its shift towards a constructivist conception of sexuality and that it ought to do so by subscribing to the notion that sexual integrity is a common good and that legal reasoning should be oriented towards promoting and protecting this common good. Chapter Eight will consider what it means to suggest that sexual integrity is a common good. It will then explore the concept

of iconoclasm and suggest how it might be used to deploy the insights of pure social constructivism while accommodating the reality of law's judgment.

There are two key themes that run throughout all of these chapters. The first, as suggested above, is that constructivist conceptions of sexuality better account for its complexity and as a result lead to better legal reasoning. The second is that there is an irreconcilable tension between the theoretical underpinnings of the claim that sexuality is socially constructed and the acknowledgment that the legal regulation of sexuality, for it not to be arbitrary, requires criteria by which to distinguish good sex from bad sex. The purpose of this work is to suggest one account of how a legal conception of sexuality as socially constructed might attempt to accommodate this tension - that is, the tension between the recognition that what sexuality *is* is constituted through the norms, social practices, relationships and discursive regimes that describe and regulate it and law's need, despite this, to use these norms, social practices and discourses to judge that which is constituted through them. The approach suggested is that of a legal theory of sexuality which conceptualizes sexuality as socially produced, a legal approach in which sexual integrity is considered a common good that the law ought to protect through open ended and infinite re-evaluation and reconstitution of the relationships and interactions which constitute, promote and threaten this common good.

Chapter 2 – Legal Conceptions of Sexual Nature and Natural Sex

This chapter will examine the theoretical foundations for the assertion that sexuality is a product of social practices and norms. The next chapter will then apply this social constructivist theoretical approach to an examination of the Supreme Court of Canada’s jurisprudence on sexual harassment, sexual minority rights, and sexual violence against children to demonstrate that across legal contexts the Court often ascribes to an essentialist understanding of sexuality. Chapter Three will also further the argument, introduced in this chapter, that a constructivist approach would produce legal reasoning that is more inclusive and that better reflects the complexity of sexuality.

Social and legal understandings of sexuality have typically been bound up in and inextricably linked with perceptions about what is natural and what is unnatural. But for morality (with which it is often married), the concept of nature is likely the most common framework through which law has approached issues of sexuality, sexual identity and sexual activity. Whether informed by natural law concepts, god’s law or the scientific pursuits of the sexual enlightenment, the notion that sexuality is a force of nature has influenced how law characterizes families, criminal offences, and equality claims, as well as sexual actors, sexual identities and sexual acts. Another description of the notion that sex is natural (or ‘of nature’) is the term sexual essentialism. Gayle Rubin, one of the earliest ‘queer theorists’, defined sexual essentialism as “the idea that sex is a natural force that exists prior to social life”.¹ Sexual essentialism is the notion that sexuality is innate, unchanging, ahistorical and pre-cultural.

¹ “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality” in Carole S. Vance, ed. *Pleasure and Danger: exploring female sexuality*, (Pandora Press: London, 1989).

The most significant contribution to the theorization of sexuality made by queer theory is its challenge to, and disruption of, the concept of sex as natural or pre-social. Queer theory, in contrast to sexual essentialism, adopts a social constructivist conception of sexuality. A social constructivist conception of sexuality suggests that “sexuality is as much a human product as are diets, methods of transportation, systems of etiquette, forms of labor, types of entertainment, processes of production, and modes of oppression”.² Queer theory is premised on a specific characterization of this constructivist conception of sexuality. Why is a queer or constructivist theoretical approach to legal analysis significant?

It is not enough to simply ask how law regulates sexuality. To understand how law regulates sexuality it is important to identify how conceptions of sexuality inform legal reasoning and legal outcomes. To understand how sexuality conceptions of sexuality inform law it is necessary to ask whether the Court understands sexuality as immutable, as essential or as fluid and contextually contingent; it is necessary to ask what aspects of sexuality are considered pre-social and whether this depends on the legal issue the Court is addressing. To determine what the broader implications of a legal understanding of a sexual issue or behavior or phenomenon are, it is important to identify and understand the conceptual framework underpinning that legal understanding.

One issue which has received more attention than any other in the constructivist – essentialist debate is the ‘cause of homosexuality’. The debate has often been misunderstood as the debate between whether or not it is a choice to be gay. This is the ‘it’s a choice’ (and you should not choose it or you should not question it - depending on one’s perspective) argument versus the ‘it’s not a choice’ (I was born this way or it’s not

² *Ibid.* at 277.

my fault - again depending on one's perspective) argument. To take the argument that homosexuality is socially constructed as saying homosexuality is chosen is to fail to grasp the entirety or complexity of constructivist theories. To argue that an aspect of human behavior or human 'nature' is a product of social construction and not mother nature is not necessarily to suggest that it is mutable, or unstable. Eve Kosofsky Sedgwick suggests that underlying this widespread misapprehension of constructivist arguments is a homophobic sentiment.

It seems ominously symptomatic that, under the dire homophobic pressures of the last few years, and in the name of Christianity, the subtle constructivist argument that sexual aim is, at least for many people, not a hard wired biological given but, rather, a social fact deeply embedded in the cultural and linguistic forms of many, many decades is being degraded to the blithe ukase that people are free at any moment to ... choose to adhere to a particular sexual identity (say, at a random hazard, the heterosexual) rather than to its other.³

Many queer theorists and pro-gay scholars have come to the conclusion that the essentialist-constructivist debate is irresolvable⁴ and that regardless it asks the wrong question.⁵ They say that instead of concerning ourselves with the cause of 'homosexuality' we ought to be concerned with the broader social and legal implications of labeling someone, or being labeled, homosexual. Bruce MacDougall for example, who

³ Eve Kosofsky Sedgwick, *The Epistemology of the Closet* (University of California Press, Los Angeles, 1990) at 41.

⁴ For example, they argue that scientists are a long way from finding scientific proof of a biological distinction between straight people and gay people and that even if there were a 'gay gene' for example, isolating such a gene would still not resolve the causation question given the many social determinants that might contribute to actual same sex attraction in an individual with a genetic predisposition for 'gayness'. See Janet Halley, "Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability." (1994) 46 *Stanford Law Review* 503 at 557.

⁵ See for example Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*, (Stanford University Press: Stanford, 2007); Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*, (University of Toronto Press: Toronto, 2000) [hereinafter *Queer Judgments*]; Jeffrey Weeks, *Sexuality*, 2nd ed., (Routledge: New York, 2003); Eve Kosofsky Sedgwick, *supra* note 3.

argues in favour of an essentialist conception of sexual identity, suggests that, “what flows from that designation [homosexual] is much more significant. What is important is the consequential meaning placed on a particular term. Why are some things regarded as negative, so as to entail inferior characteristics or consequences? Can negative be made positive or at least neutral?”⁶

Professor MacDougall’s argument in favour of abandoning the quest to determine the source of homosexuality is persuasive. Determining the broader social and legal implications of sexual categorization does seem more important than arguing about the cause of homosexuality. Perhaps even the question ‘what causes homosexuality?’ privileges the concept of heterosexuality.⁷ However, a point should be made regarding Professor MacDougall’s argument. The questions posed by Professor MacDougall presume something of a social constructivist perspective. Implicit in his questions is the assumption that regardless of the *cause* of homosexuality, what matters is the social construction of homosexuality. Even if sexual orientation is a pre-social naturally occurring phenomenon constituting part of one’s essence, as MacDougall argues, his question concedes that what matters is the social and cultural interpretation of that naturally occurring sexual preference. That is to say, even understandings of essentialism are mediated through language, culture and politics.

Debating the cause of homosexuality may be ill advised both because a resolution is unlikely and because to do so privileges the concept of heterosexuality. However, the

⁶ Bruce MacDougall, *Queer Judgments*, *supra* note 5 at 46.

⁷ It may be that simply posing the question does not necessarily privilege heterosexuality. However, pursuing its answer with the focus, degree of determination and in some cases perhaps even obsession with which it has been pursued both culturally and scientifically, most certainly does suggest a privileging of heterosexuality.

notion of social constructivism and its implications for understanding sexuality are much broader than simply establishing ‘the cause of homosexuality’.

Understanding whether the law conceptualizes any particular aspect of sexuality as essential or constructed will help to answer Professor MacDougal’s questions. It will help to reveal “the consequential meaning placed on a particular term”⁸. Legal distinctions between ‘the natural’ and ‘the unnatural’ and legal conceptions concerning the essentialist or constructed ‘nature’ of sexuality carry significant weight regarding legal approaches to and regulation of sexual object preference. Moreover, the significance of such distinctions extends far beyond simply the issue of sexual orientation. “Appeals to nature, to the claims of natural, are amongst the most potent we can make. They place us in a world of apparent fixity and truth. They appear to tell us what and who we are, and where we are going. They seem to tell us the truth.”⁹

A constructivist perspective provides insight into the ways in which meaning, constituted in and through particular social contexts, allow some sexual norms (concepts, values, practices, subjects, orientations, traits, and desires) to become perceived as natural (hegemonic), and correspondingly regulative, by excluding other norms. For this reason, its analytical framework is useful for any examination of the legal regulation of sexuality, aspects of which have often been understood through discourses of deviation from ‘the norm’, or diacritical modes of knowing (i.e. unnatural means not natural, female means not male, woman means not man, and gay means not straight). Queer theory, and constructivist arguments generally, provide a powerful critique of laws, institutions, social practices, and beliefs premised on models of essentialism by identifying many of

⁸ MacDougal, *Queer Judgments*, *supra* note 5.

⁹ Jeffrey Weeks, *Against Nature*, (Rivers Oram Press: London, 1991) at 87.

the ‘naturalized’ assumptions about sex underpinning the Court’s jurisprudence. Social constructivism provides an analytical lens through which to examine the Court’s conceptions of sexuality and to understand how these conceptions influence legal outcomes and legal reasoning.

This chapter does not include a critique of queer theory (or social constructivism generally). This is not an oversight. An important critique highlighting the inherent paradox of queer theory and suggesting that a whole-hearted adoption of this theoretical approach is politically infeasible (and impossible) is found in Chapter Seven. In brief, Chapter Seven will demonstrate how queer theory and the post-modern theories upon which it is premised are unable to provide criteria by which to draw legal distinctions between good sex and bad sex and cannot alone be relied upon as the basis for the assertion that law conceptualize sexual integrity as a common interest.

Separating a discussion of the methodological insights provided by social constructivist theories of sexuality from a discussion highlighting the unavoidable pitfalls of these approaches, when considered to their full extent, was done intentionally. As noted in Chapter One, the goal of this discussion is the development of a legal theory of sexuality which conceptualizes sexuality as socially produced, a legal approach in which sexuality is considered a common good which the law ought to protect through open ended and indefinite re-evaluation and reconstitution of the relationships, and interactions which constitute, promote and threaten this common good. To make this argument requires a paradoxical analysis in which queer theory is both utilized for the insights it provides and rejected (which, not coincidentally, is reflective of the very paradox queer theory presents for law).

Throughout this introduction the terms queer theory and social constructivism have both been used. This is intentional, but ought not to suggest that they are synonymous. They are not. Queer theory relies on the conception that meaning is socially constructed. However, as will be discussed, there are other social theories, such as power feminism, which also rely on social constructivism but do not embrace the post-modern assertions regarding identity and subjectivity integral to queer theory. Queer theory is a social constructivist theory. It is the theory that the categories of gender, sex and sexuality are socially constructed. More specifically, they are constructed through the reiterative citation of dominant gender, sex and sexual norms – norms which are constituted through exclusion, through the discursive creation of binaries in which a norm’s meaning stems from that which it is ‘not’, and its power from the ability to define that ‘not’. Therefore, it is accurate to, in invoking the phrase social constructivism, also be alluding to the ideas propagated by queer theory, and vice versa. However, given that queer theory is a theory of social constructivism but not all theories of social constructivism are queer theories, it could be confusing.

One of the ‘other’ theories of social constructivism typically asserted in the area of sexuality is power feminism.¹⁰ Queer theory, which focuses on deviation, and power feminism, which focuses on male dominance as manifested by and perpetuated through the manner in which sexuality is socially constructed, are both examples of social constructivism. As will be discussed in Chapter Six, the difficulty with power feminism is its failure to introvert its analysis, to turn its focus inwards and reveal that its structural foundation produces the very same type of effect that it critiques. In other words, its

¹⁰ Power feminism will be defined and discussed more thoroughly at the beginning of Chapter Four. Briefly, the term refers to that branch of feminism, sometimes also referred to as ‘dominance feminism’, which argues that inequality between men and women is itself sexualized.

weakness or flaw is not in its assertion that sexuality is socially constructed in service of male dominance. Its weakness is in not applying this same insight that meaning is socially constructed to produce and perpetuate ‘technologies of power’ (including technologies stemming from knowledge, to borrow from Foucault¹¹) comprehensively.

While power feminism, like any theory, cannot reflect all sexual actors’ subjective experiences, it serves as a ‘powerful’ example of how the insight into sexuality offered by constructivist theories might be utilized in legal contexts. Power feminism offers a political strategy that, as will be demonstrated by an examination of its intervention in the area of sexual assault law in Canada, is/was, at a discrete moment, for a discrete segment, of a particular society, successful. However, the social constructivism of power feminism fails to adhere to the very process of deconstruction it sets in motion. This failure to turn its constructivist analysis inwards creates a conceptual inconsistency. (As will be explained in Chapter Six, it also perpetuates a link between power feminism and sexual moralism.) Its weakness is the failure to recognize that once a social constructivist conception of sexuality has been put into play it becomes impossible to coherently defend an objective or Archimedean perspective on any aspect of sexuality.

This however leads to the conclusion that the critique of queer theory suggested above (that is the suggestion that it is inherently paradoxical, and infinitely regressive thus inhibiting its ability to provide criteria for judgment... which is needed in law¹²) is a critique that actually applies to all (non-structural) social constructivist theories of sexuality. Power feminism, once freed of its problematic structuralism, is susceptible to

¹¹ Michel Foucault, “Two Lectures”, in Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, (Colin Gordon ed. & Colin Gordon et al. trans., 1980), 78 [hereinafter “Power/Knowledge”]

¹² This critique will be discussed at length in Chapter 7.

the same critique as is queer theory and constructivism generally. In this way queer theory and other social constructivist approaches such as power feminism offer many of the same insights *and* share many of the same conceptual difficulties.

Throughout this work a distinction is drawn between social constructivist conceptions of sexuality and essentialist conceptions of sexuality. The argument made throughout the remaining chapters is that legal reasoning ought to rely upon conceptions of sexuality as socially contingent rather than arising from nature. The remainder of this chapter will be devoted to a discussion of the basic theoretical arguments underpinning the claim that sexuality is a social construct.

I. Sexuality As A Social Construct

Feminist writers, such as Gayle Rubin and Catharine MacKinnon began to develop social constructivist theories of both gender and sexuality in the 1970's and early 1980's. The suggestion that sexuality is not an innate, naturally occurring and essential constituent of the human individual was preceded by the feminist challenge to the assumption that gender is an essential element of the self.¹³

Gayle Rubin, in her 1975 article "The Traffic of Women", made the argument that the biological distinctions between male and female (such as reproductive capacity) have been transformed through social practice and systems into gender.¹⁴ She argued that the division of labour, the sexual hierarchy both in family life and the economic and political spheres are premised on gender differences, a cultural construct, and not sex (as in male/female) differences. In other words, it is the cultural interpretation of the

¹³ Janet Halley, *Split Decisions: Taking a Break from Feminism*, (Princeton University Press: Princeton, 2006) at 114. Halley reviews the development of this theory among feminist theorists.

¹⁴ Gayle Rubin, "The Traffic in Women: Notes on the 'Political Economy' of Sex," in *Toward and Anthropology of Women*, ed. Rayna R. Reiter (New York: Monthly Review Press, 1975).

biological differences between male and female (i.e. gender) which have led to the systemic oppression of women. Gender, she purported, is a cultural construct not an essential element of the self; equality seeking feminists, she stressed, ought to be concerned with reconstituting the meaning of gender.

MacKinnon also made one of the earliest and most significant contributions to the development of an understanding of gender as socially constructed.¹⁵ She argued that the categories of woman and of man were not a thing of nature. “Male is a social and political concept, not a biological attribute. It has *nothing whatever* to do with inherency, preexistence, nature, inevitability or body as such.”¹⁶ MacKinnon argued that what ‘woman’ is, is an expression of male sexual desire. She argued that the meaning of woman is produced through cultural, social and legal institutions, norms and practices defined and controlled by men in accord with male sexual desire – a sexual desire that is oriented towards dominance and which correspondingly perpetuates women’s oppression. In other words to be a woman is to be what men want and what men want is to dominate women.¹⁷

What is often referred to as queer theory incorporated this same constructivist approach, albeit without the structural foundation integral to feminist theories such as MacKinnon’s, and applied it to a theory of sexuality intended to challenge those hegemonies regulated through constructs of sexual deviance (rather than constructs of gender and sexual difference).

¹⁵ Catharine MacKinnon, “Feminism, Marxism, Method and the State: An Agenda for Theory” (1982) 7 *Signs* 515 [hereinafter “An Agenda for Theory”]; “Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence” (1983) 8 *Signs* 635 [hereinafter “Towards A Feminist Jurisprudence”].

¹⁶ MacKinnon, “Towards a Feminist Jurisprudence”, *ibid.* at FN 3.

¹⁷ MacKinnon’s work – in particular her power feminist conception of sexuality - will be discussed in greater detail in Chapter 4.

Thus in *The History of Sexuality*¹⁸ Michel Foucault suggested that sexuality, sexual identities and sexual desire are products of power stemming from systems of social and institutional organization.¹⁹ That is to say sexuality, rather than an innate human libido, a natural urge or predisposition, is produced socially – through discourse to be specific.

The notion of sexuality as a key component of our “true selves” is often described in Freudian terms – the notion of sexuality as a turbulent sexual drive under which a healthy conscience is charged with guarding against the sexual excesses of our sub conscience.²⁰ Freud’s work and the essentialism of psychotherapy generally is certainly something to which Foucault’s argument was directed. He references Freud and *The Three Essays* throughout *The History of Sexuality Volume I*. A central theme of *The History of Sexuality Volume I*, is a rejection of Freud’s ‘repressive hypothesis’ arguing instead that what we think of as the “repression” of sexuality actually constituted sexuality as a core feature of our identities, and produced a proliferation of discourse on the subject. His central point was to suggest that instead of arguing in liberationist terms - ‘look at how repressed we are about sex that we can’t even talk about it’ - we should recognize how central sex has become to the institutional and systematic organization of society because we *can’t* stop talking about it.

¹⁸ Michel Foucault, *The History of Sexuality Volume I: An Introduction*, (Vintage Books, New York: 1978).

¹⁹ Foucault is often attributed with having first arrived at this conclusion regarding the social contingency of sexuality. In fact, there were other scholars making similar arguments both before and around the same time. Gayle Rubin, as already mentioned, is one example. See also Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, (London: Quartet Books, 1977); Jeffrey Weeks, *Sexuality*, (Ellis Horwood Ltd: London, 1986). Herbert Blumer, “The Methodological Position of Symbolic Interactionism” in *Symbolic Interactionism: Perspective and Method* (Berkeley University of California Press 1969) 1 at 5; Ken Plummer, *Sexual Stigma: An Interactionist Account*, (Routledge 1975).

²⁰ See for example Jeffrey Weeks, *The World We Have Won*, (Routledge: New York, 2007).

What arises from Foucault's theory of discursive formation is the possibility that what constitutes the 'essence' of a sexual identity today might be inconsequential or irrelevant at another time or in another culture.

In *The History of Sexuality, Volume I* and his two lectures on *Power/Knowledge*²¹ he described the emergence of what he identified as disciplinary and regulatory bio power. His focus was on the social and institutional contexts in which particular bodies of knowledge became intelligible and authoritative – hegemonic, if you will. He suggested that, who is empowered to speak, how credibility of the speaker is assessed, and which statements are taken seriously, delineate the formation of fields of knowledge and in turn, these fields of knowledge govern what will and will not be the objects of future discussion.²² He postulated that objects of discussion and investigation come into existence only as the ability to discuss them is born. This would include the formation of new sexual identities and sexual subjects.

Far from being only repressive, Foucault argued that the social organization of sex – in which modern societies purported to consign sex to a “shadow existence” but then actually “dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*”²³ - was actually productive. That through the ways in which sex was socially organized, different sexual identities were produced. Foucault suggested that most theory and discourse concerning power has focused solely on juridical forms of power (“in

²¹ Michel Foucault, “Power/Knowledge”, *supra* note 11 at 104.

²² *Ibid.* at 27. “Silence itself – the things one declines to say, or is forbidden to name, the discretion that is required between different speakers – is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies. There is no binary division to be made between what one says and what one does not say; we must try to determine the different ways of not saying such things, how those who can and those who cannot speak of them are distributed, which type of discourse is authorized, or which form of discretion is required in either case. There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.”

²³ *History of Sexuality*, *supra* note 18 at 35.

political thought and analysis we still have not cut off the head of the King”²⁴) and he urged inquiries into the nature of power that extend beyond simply questions of sovereignty, legitimacy and oppression. He suggested that devices of state sovereignty – such as the courts, prisons, the army, and hospitals - have become both dependent upon, and productive of, disciplinary and regulatory forms of power. Power relations, he suggested, are formed through extensive, intricate social networks that do not transmit power uni-directionally.²⁵ That is to say, power is something exercised, not possessed. It is a characterization of the way in which individuals and social institutions relate. Power is not an object or an entity possessed by some and not others, but rather the relationship of struggle. His theory of power is the foundation for his arguments regarding sexual identity and the social regulation of sex.

For Foucault power was not simply a hierarchical system of domination but more a pervasive and continuous web of relations between agents marked by continuous struggle or resistance. It is not that he denied the existence of sovereign powers such as the monarch, the father, or the judge. He acknowledged them as one type of power but suggested that these negative forms of power have been taken over by a multitude of productive force relations that function at a variety of levels. These disciplinary or regulatory types of power cannot be understood within the hierarchical uni-directional account of power contemplated by the ‘juridico-sovereign model’. Force relations do not simply impose sanctions; they do not stand outside of the subjects employing them, and they are instrumental to the production of knowledge.

²⁴ *Ibid.* at 88.

²⁵ “Power is employed and exercised through a net-like organization. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power.” *Power/Knowledge, supra* note 11 at 98

Foucault suggested that only thinking of power in terms of the juridical model obfuscates all of these other power relations in our society.²⁶ You cannot, he argued, adequately object to the powerful effects of discipline simply by appealing to the right of sovereignty, because discipline and sovereignty are both integral components of the general mechanism of power in our society and these general mechanisms of power actually produce our subjectivities.

Thus, he suggested that the *species homosexualis* for example, did not exist until it had been medicalized, therapized and theorized into existence:

[S]odomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, with an indiscreet anatomy and possibly a mysterious physiology... The sodomite had been a temporary aberration; the homosexual was now a species.²⁷

Social constructivists argue that this process – what Gayle Rubin called erotic speciation – produces all sorts of erotic individuals who are then aggregated “into rudimentary communities”.²⁸ The modern sexual system, Rubin suggests, “contains sets of these sexual populations, stratified by the operation of an ideological and social hierarchy”.²⁹

Social constructivist theories of sexuality take many forms. Janet Halley, borrowing from Carol Vance, highlights the different varieties of social constructivism.³⁰ There are those who claim that sexual orientation is fixed and that the categories of heterosexual and homosexual can be found across cultures and time periods. But the

²⁶ *Ibid.* at 87-88.

²⁷ *History of Sexuality*, *supra* note 18 at 43.

²⁸ Rubin, *supra* note 1 at 285.

²⁹ *Ibid.*

³⁰ Halley, “Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability”, *supra* note 4 at 557.

meanings attached to these categories and their attendant range of activities will differ across culture and history.³¹ There are those who recognize that acultural sexual orientation categories may exist but that they are not necessarily defined by gender-of-object choice – that “some other form or forms of human variance are primary”.³² Some claim that the capacity for erotic pleasure is constitutive of the individual but that the manifestation of that into a coherent sexual subject is culturally determined.³³ In other words, sexual object choice, behavioral repertoire, social meaning, emotional meaning are all socially determined.³⁴

The most radical social constructivists (this would include Foucault) assert that “culture supplies the very terms for understanding bodily sex”.³⁵ In other words, that sexuality is prior to sex. Included in this group of most radical social constructivists are those who argue that culture also supplies the terms for understanding bodily (genital) sex as in male/female.

The emblematic text proposing this theory is the work of Judith Butler. Drawing on the notion of regulatory bio-power developed by Foucault, Judith Butler argued that the category of sex (as in male/female) itself was “part of a regulatory practice that produces the bodies it governs, that is whose regulatory force is made clear as a kind of productive power, the power to produce – demarcate, circulate, differentiate – the bodies

³¹ *Ibid.* For example in Culture A homosexuals might be considered perverts and anal sex dirty while in Culture B the same individuals would be considered spiritual leaders and anal sex wholesome.

³² *Ibid.* at 558. This is the suggestion that categorization based on same sex versus opposite sex desire is a cultural construct. It is the suggestion that other orientations – such as monogamous or polyamorous or those who like sex a lot versus those who do not - might be more relevant but have not been constructed as such in this culture. Eve Kosofsky Sedgwick’s work is a good example of this proposition. *The Epistemology of the Closet*, *supra* note 3.

³³ Halley, “Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability”, *supra* note 4 at 558.

³⁴ *Ibid.*

³⁵ *Ibid.*

it controls”.³⁶ In other words, she theorized that the category of sex is itself, from the start, “indissociable from discursive demarcations”.³⁷ The category of sex (which is to say, the notion of sexual differences), she suggested, is normative. Sex is not a “simple fact or static condition of a body, but a process whereby regulatory norms materialize “sex” and achieve this materialization through a forcible reiteration of those norms”.³⁸

Noting historical and anthropological work that understands gender “as a relation among socially constituted subjects in specifiable contexts” (this would include work such as Rubin’s) Judith Butler observed that “what gender “is”, is always relative to the constructed relations in which it is determined”.³⁹ Butler however went further, suggesting that not only is there “a radical discontinuity between sexed bodies and culturally constructed genders” but moreover, gender designates “the very apparatus of production whereby the sexes themselves are established”.⁴⁰ As a result, she argued, “gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which “sexed nature” or a “natural sex” is produced and established as “prediscursive”...”.⁴¹ One of Butler’s central claims, then, was that sex is as culturally constructed as gender, and that as such “the distinction between sex and gender turns out to be no distinction at all”.⁴² What does all of this mean?

³⁶ Judith Butler, *Bodies That Matter: On The Discursive Limits of Sex* (Routledge: New York, 1993) at 1.

³⁷ *Ibid.*

³⁸ *Ibid.* at 2.

³⁹ *Gender Trouble: Feminism and The Subversion of Identity* 2nd ed. (Routledge: New York, 1999) 14-15.

⁴⁰ *Ibid.* at 11.

⁴¹ *Gender Trouble*, *supra* note 39 at 11.

⁴² *Ibid.* Butler would make the same claim regarding sexuality. The New Brunswick Court of Appeal’s decision in *R. v. Chase*, (1984), 13 C.C.C. (3d) 187, discussed in chapter four, provides an example of how law contributes to the discursive means by which sexuality is produced and established as pre-discursive. In that decision Justice Flynn states that sexual assault ought to be defined by giving the word sexual its *natural* meaning as limited to the sexual organs or genitalia. It reflects the assumption that sexuality is produced by and understood through a pre-social/pre-discursive meaning of genitals. The reasoning in this decision was not followed. It is offered here only for its very clear demonstration of essentialism.

The feminist account of the relationship between sex and gender is that sex is biological and gender is the cultural reflection of sex. In other words sex is to female as feminine is to gender.⁴³ Under this account sex is a fixed biological fact; sex is part of the “presocial ontology of persons”⁴⁴, while gender is the cultural inscription upon this pre-given, and foundational biological fact. As discussed above, this understanding of the relationship between sex and gender arose as a result of feminist challenges in the 1970’s to the assumption that biological sex determined (caused) all of the (hierarchical) social differences between men and women.⁴⁵ The categories ‘man’ and ‘woman’, they argued, were socially constructed. Gender, in other words, is a social construct.

Butler’s theory of gender performativity challenged this account of the relationship between sex and gender. She argued that the concept of pre-social, or ontological, is itself a social concept. She suggested that it is impossible to imagine a realm outside of culture without reasoning within the realm of culture. In other words, it is impossible to think about or understand sex outside of a cultural framework; how we think about sex is always through a cultural lens. We haven’t the conceptual framework to think about sex (or anything else) outside of culture. In fact, she argued, the concept of thinking of culture outside the context of culture is itself a cultural concept. By all of this she meant to suggest that it is culture, not biology, which is first, prior or ontological.⁴⁶ As such, gender (a cultural construct) “is actually constituting the thing [sex] whose effect

⁴³ Some feminists have understandably placed a lot of emphasis on this distinction on the basis that it is an important refutation of biologically based, essentialist defences to sex based employment discrimination and sexism generally.

⁴⁴ Butler, *Gender Trouble*, *supra* note 39 at 5.

⁴⁵ This is the distinction that Rubin relied upon to suggest that the social and economic hierarchies privileging men and oppressing women were culturally and historically contingent.

⁴⁶ *Ibid.* at 11.

it appears to be”.⁴⁷ In other words, the cultural signifiers that appear to describe someone can actually create them (at least in part). It is the idea that a subject is formed through acts and social context rather than by some pre-discursive (natural) foundation.

To suggest that this very radical claim met with a great deal of skepticism would be to understate the response to *Gender Trouble*.⁴⁸ Arguably, her theory was also greatly misunderstood, which Butler suggested was the impetus for her second book on the issue – *Bodies That Matter* – published only three years later.⁴⁹ Butler’s theory of gender performativity was taken by many to suggest that gender was some sort of freely chosen drag performance in which each of us go to the closet each day and garb ourselves in our chosen gender. This misunderstanding likely stems in part from a confusion between the concept of performance and the concept of performativity which may be in part due to a failure to understand what she means by performative.⁵⁰ Butler’s idea was that gender is created through a set of infinite and infinitesimal acts over time, on the part of the individual and those around her both present and past. Butler did not suggest that any given performance of gender thereby constituted gender for the performer or in general. As she clarified in her 1999 preface to the second edition of *Gender Trouble*,

⁴⁷ Kenji Yoshino, “Covering” 111 Yale L.J. 769 (2002) at 866. In this article Yoshino provides an exceptionally clear and accessible summary of Butler’s theory.

⁴⁸ *Supra* note 39.

⁴⁹ *Supra* note 36.

⁵⁰ “Performativity is the reiterative and citational practice by which discourse produces the very effects that it names.” *Gender Trouble*, *supra* note 39. In “Covering”, *supra* note 47 at 868, Kenji Yoshino traces the intellectual history of the term to a theory of speech acts called linguistic performativity developed by J.L. Austin. Austin observed that some speech acts create rather than simply describe the things that they name. For instance when one says “I ... warn you,” “I promise,” or “I bet” the warning, promise and the bet are not being described, but rather being created, by the words. Austin creates the neologism “performative” to describe this category of words.” So for example, a Justice of the Peace *performs* a wedding ceremony when she says (among other statements in the ceremony): ‘I now pronounce you man and wife’. The statement ‘I now pronounce you man and wife’ is *performative*. The pronunciation of the statement constitutes that which it pronounces. “I am out” uttered by a gay person is also performative in this way. Butler’s theory of gender performativity is that the infinite and infinitesimal performance of gender norms constitutes that which it performs - gender.

“performativity is not a singular act, but a repetition and a ritual, which achieves its effects through its naturalization in the context of a body, understood, in part, as a culturally sustained temporal duration”.⁵¹

Butler was also criticized by some for what appeared to be her willingness to disregard the materiality of the body, to ignore biological realities such as chromosomal and gonadal distinctions between people. While Butler suggests that *Bodies That Matter* was an effort in clarification, in it she actually softens the claim made in *Gender Trouble* in a manner that suggests that its response was not simply to the misconceptions about her theory but also to the skepticism it received. In *Gender Trouble* Butler suggested that gender is actually constituting sex rather than reflecting its effect: that is, that the materiality of sex is constructed through a ritualized repetition of gender norms. In *Bodies That Matter*, she argued that in ascertaining what constitutes sex it is impossible to know where biology ends (or begins) and the discourse constructing and regulating our understanding of sex begins (or ends). In other words, we can not really know what the biological component to sex is because we can only apprehend it through culture: “to claim that discourse is formative is not to claim that it originates, causes, or exhaustively composes that which it concedes; rather it is to claim that there is no reference to a pure body which is not at the same time a further formation of that body.”⁵² Butler, at least in *Bodies That Matter*, is not denying that biological differences exist. I think that, at its most basic, what she is suggesting is that there are cultural forces at work which preclude us from ever being able to disaggregate culture from concept. In other words, there is no Archimedean seating at the local drag show.

⁵¹ *Supra* note 39.

⁵² Butler, *Bodies That Matter*, *supra* note 36 at 10.

Gender, created through culture, gives meaning to bodies and in doing so reinforces and reiterates normative understandings about sex (and gender) (and sexuality) – thus the assertion that sex as a category constitutes the sort of regulatory ideal suggested by Foucault. Sex, Butler suggested, is part of a regulatory practice that regulates the bodies that it creates. The regulatory norms of sex materialize the body's sex; they materialize sex differences, so as, she suggested, to maintain hetero-normativity (which is itself a cultural construct). In other words, sex difference is never simply a function of material differences that are not in some way marked and formed by discursive practices. Drawing upon Foucault's suggestion that discourse is productive, that it is through discourse that the webs of 'force relations' are weaved, Butler argued that regulatory ideals of sex are perpetuated in the service of consolidating the heterosexual imperative.⁵³

One non-theoretical example that may help to demonstrate what Butler and other social constructivists of this genre meant to suggest is the medical community's traditional response to the birth of an intersex infant. In *Transsexual Warriors*, Leslie Fineberg provides a caricature of the hospital room scene after an intersex baby is born:

When an intersex infant is born, the parents are confronted with a shocking fact that violates their understanding of the world. Physicians treat the birth of such an infant as a medical emergency. A medical team, generally including a surgeon and an endocrinologist, is roused from bed, if need be, and assembled to manage the situation. Intersexual bodies are rarely sick ones; the emergency here is culturally constructed. The team analyzes the genetic makeup, anatomy, and endocrine status of the infant, "assigns" it male or female, and informs the parents of their child's "true" sex. They then proceed to enforce this sex with surgical and hormonal intervention.⁵⁴

⁵³ Butler, *Bodies That Matter*, *supra* note 36.

⁵⁴ Leslie Fineberg, *Transgender Warriors: Making History From Joan of Arc to Dennis Rodman* (Beacon Press 1996) at 104. Medical standards of care regarding infants born with intersex conditions are beginning to change. This is likely due in large measure to the activist and lobbying efforts of adult survivors of unwanted and unnecessary medical interventions. See for example the Intersex Society of North America at <http://www.isna.org/> (accessed September 27, 2008).

That the conditions causing these medical emergencies are often not harmful and that the physical abnormalities often do not give rise to functional difficulties⁵⁵ suggests that the eagerness to surgically intervene stems more from a concern over securing a certain and stable status at the beginning of a life than from a concern about ambiguous genitalia. In other words, it suggests that there is some cultural imperative at play.⁵⁶ In other medical circumstances doctors often wait until children are older to surgically correct congenital abnormalities.

The medical community's decision of which sex and gender to assign to intersex infants is often premised on stereotypical and essentialist gender/sexuality roles which assume that 'to be a man' is to possess a penis capable of penetrating a vagina and 'to be a woman' is to possess a vagina with the capacity to be penetrated by a penis.⁵⁷ Thus, traditionally if an XY baby is born with a penis that is less than 2.5 centimeters when fully stretched, the child will be surgically and hormonally altered to create female genitalia and the parents will be told they have a girl.⁵⁸ This procedure may be performed regardless of the fact that such intervention could preclude the individual's reproductive abilities. If an XX infant is born with a phallus that resembles a penis rather than a clitoris the doctors will surgically reduce the baby's phallus even if such a procedure

⁵⁵ Indeed, while intersex conditions frequently do not result in functional difficulties, other than sterility, the postpartum medical intervention these infants endure often does result in permanent functional difficulties. See Reilly, Elizabeth Reilly, "Radical Tweak: Relocating the Power to Assign Sex from Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Legal Response to Intersexuality", University of Akron School of Law Public Law & Legal Theory Working Paper Series No. 05-20, October, 2005 available online: <http://ssrn.com/abstract=820186>.

⁵⁶ See Anne Fausto-Sterling, *Sexing the Body: Gender Politics and The Construction of Sexuality*, (Basic Books: New York, 2000) for an at length discussion on the intersection between biological determinism and social convention in cultural understandings of the body.

⁵⁷ Julie A. Greenberg, "Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience" (2002) 39 San Diego L. Rev. 917 at 934 [hereinafter "Deconstructing Binary Race"].

⁵⁸ Greenberg, "Deconstructing Binary Race", *ibid.*

destroys the child's future ability to experience genital sexual response.⁵⁹ "In other words, men are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate."⁶⁰ This, Butler would argue, is an example of gender norms and regulatory ideals regarding sexuality (masculine is to penetrate, feminine is to be penetrated) constituting male and female in service of 'the heterosexual imperative'. In this respect, Butler's theory is reminiscent of MacKinnon's assertion that to be male is to dominate sexually (penetrate) and to be female is to be dominated sexually (penetrated).⁶¹

In addition to theoretical arguments that claim that male/female and feminine/masculine are socially constructed, there are also arguments asserting that sexual orientation and sexual identity are socially constructed. Such arguments have been the focus of queer theorists.

II. An Introduction To Queer Theory

One particular aspect of discursive power, and its contribution to the social construction of sexuality, is diacritically constituted knowledge. Diacritically constituted knowledge and its implications for sexual identity and subject formation is the focus of queer theory. Foucault alludes to it through his discussions of the tactical polyvalence of discourses in which reverse discourses (such as gay identity) arise (and produce power).⁶² Butler more directly acknowledges the concept where she argues that what is considered as normal is only cognizable because of what is identified as abnormal.

⁵⁹ Greenberg, "Deconstructing Binary Race", *supra* note 58. In a disturbing further example of the medical community's preoccupation with 'normal' gender expression Greenberg notes, at FN 90, that "often infants are subjected to painful invasive surgery to allow the child to stand while urinating. The result of such surgery may be severe scarring and inability to experience sexual sensation."

⁶⁰ Julie A. Greenberg, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology", (1999) 41 Ariz. L. Rev. 265 at p.4WL (page numbers not available).

⁶¹ MacKinnon's constructivist theory of male and female is further described in chapter four.

⁶² Foucault, *supra* note 18 at 101.

The characteristics hailed as normal (and that enforce heterosexuality) change over time. Therefore, one's "sex" is recognizable only to the extent that one assumes the current socially approved characteristics. Paradoxically, these standards--which rule everyone--enable people to defy and/or refuse to follow the norms. The standard is defined as "normal" only because groups of people (those who defy) are chosen to represent what is "abnormal".⁶³

Queer theory has been particularly occupied with examining and challenging the heterosexual biases implicated or manifested through binary understandings of sex and gender. While the focus of queer theory has typically been on sexual orientation this work is significant in any discussion regarding distinctions, legal or otherwise, between natural and unnatural.

One of the early contributions to queer theory, and a contribution which focused significant attention on this aspect of discursive formation, was made by Eve Kosofsky Sedgwick in *Epistemology of the Closet*.⁶⁴ Sedgwick suggested that heterosexuality is an incoherent identity category that relies completely on the presence of a homosexual identity category for its existence.⁶⁵ To put it simply, the existence of homosexuality is indispensable to those who define themselves as against it. She noted that "erotic identity, of all things, is never to be circumscribed simply as itself, can never not be relational, is never to be perceived or known by anyone outside of a structure of transference and counter-transference".⁶⁶

The implications arising from Sedgwick's insights regarding the "diacritical frontiers between genders"⁶⁷ as they relate to sexual identity formation are noteworthy. I

⁶³ Judith Butler, "Gender as Performance: Interview with Judith Butler," *Radical Philosophy* 67 (Summer 1994): 38

⁶⁴ *Epistemology of the Closet*, *supra* note 3.

⁶⁵ *Ibid.*

⁶⁶ *Epistemology of the Closet*, *supra* note 3.

⁶⁷ *Ibid.* at 31.

have suggested elsewhere that knowing one's place in the social order, whether that place is one of relative privilege or not, serves two psychologically ameliorative functions.⁶⁸ It relieves one from the "anxiety of identity interrogation"⁶⁹ and it helps to inform one as to the socially agreed upon, acceptable conduct for interpersonal exchanges – the episteme of social interaction. I argued that gender identity is produced through relational, contextually influenced, interpretative processes. I suggested that because gender is produced in this manner, in societies which strongly embrace static, binary conceptions of gender, and in which social, familial, occupational, and sexual interactions are heavily influenced by gendered social scripts, gender expressions which are ambiguous, or which have changed since a prior interaction, or which are strongly incongruent with normative understandings of the correlation between gender and biology, are often experienced by others as uncomfortable, if not disruptive.

Examples of the manner in which this operates today may be found in the social, political and legal response to bi-sexual identity claims and transgender expressions or claims. In identifying what he described as bisexual erasure by both heterosexuals and gays and lesbians, Kenji Yoshino offered as one motivating factor for this erasure their shared investment in stabilizing group identities by eradicating the threat to these identities that he suggested is posed by bisexuality.⁷⁰ "In a world that denies bisexual existence, cross-sex desire and same-sex desire are mutually exclusive. This means that the presence of cross-sex desire ipso facto negates the presence of same-sex desire, and

⁶⁸ Elaine Craig, "Trans-phobia and the Relational Production of Gender" (2006) 18(2) *Hastings Women's Law Journal* 101. I suggested that in order to reduce the disruption experienced as a result of this uncertainty static, binary understandings of gender must be re-conceptualized.

⁶⁹ This phrase is borrowed from Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, (2000) 52 *Stan. L. Rev.* 353 at 362.

⁷⁰ Yoshino, *The Epistemic Contract of Bisexual Erasure*, *supra* note 69. Yoshino argued that bisexuals pose an identity threat both to heterosexuals and gays and lesbians and that this serves as one of the factors motivating both groups to render bisexuality invisible.

vice versa.”⁷¹ He argued that the existence of bisexuality, however, calls into question the sexual orientation of the self. It does so, he suggested, by disrupting the ‘bifurcated identification strategies’ deployed by gays and straights to understand their sexualities; bisexuality disrupts their identity categories thus depriving them of the comfort members of all groups take “in knowing their place in the social order”.⁷²

With respect to the implications of binary thinking on identity formation and identity maintenance one earlier theorist ought to be discussed. While much of queer theory literature attributes its beginnings to Michel Foucault, Judith Butler and Eve Kosofsky Sedgwick, the exclusionary result of binary identity models was also noted in the 1960s by sociologist Mary McIntosh.⁷³ McIntosh, in a 1968 examination of the social construction of sexuality, suggested that both heterosexuals and homosexuals are invested in conceptualizing homosexuality as a condition “[f]or just as rigid categorization deters people from drifting into deviancy, so it appears to foreclose on the possibility of drifting back into normality and thus removes the element of anxious choice (emphasis added)”.⁷⁴

This analysis can also be applied in examining responses to gender transgression. Judith Halberstam suggests that “[t]ransgender may indeed be considered a term of relationality; it describes not simply an identity but a relation between people, within a community, or within intimate bonds”.⁷⁵ She notes that transgender is an important term

⁷¹ *Ibid.* at 400.

⁷² *Ibid.*

⁷³ Mary McIntosh, “The Homosexual Role”, (1968) 16 (2) *Social Problems* 182. For a review of these early constructivist sociologists see Janice Irvine, “The Sociologist as Voyeur: Social Theory and Sexuality Research, 1910–1978” (2003) 26(4) *Qualitative Sociology*, 429.

⁷⁴ *Ibid.* at 184.

⁷⁵ Judith Halberstam, “An Introduction to Female Masculinity: Masculinity Without Men” in *The Masculinity Studies Reader*, Rachel Adams David Savran eds, (Blackwell Publishers: New York, 2002) 355 at 365.

not just for those “who want to reside outside of categories all together but to people who want to place themselves in the way of particular forms of recognition”.⁷⁶

Not unlike the perceived threat to sexual identity posed by the bisexual, the existence of transgenderism challenges dyadic and biological, genitally determined understandings of gender and sexuality. In a world in which each of us is supposed to be either a man or woman, identifying to which of ‘the two gender categories’ another individual belongs affirms one’s understanding of within which category one’s own gender may be located.⁷⁷ Under a binary understanding of gender, and because gender is produced relationally, the very fact that one cannot easily or instantly determine whether another individual is ‘the same’ as them or ‘the opposite’ of them disrupts affirmation of one’s own gender categorization.⁷⁸ This internal disruption is ultimately reflected in one’s negative outward response. In this way, gender conformity is subtly, and constantly, socially rewarded. Gender transgression is subtly (and often not so subtly) and constantly socially discouraged. This is an example of the way in which diacritical models of knowing, or discursive formations founded on ‘diacritical frontiers’, socially construct, and then proceed to regulate, the very dyads they describe.

Conclusion

Sexual essentialism understands sexuality as unchanging, ahistorical and asocial or pre-social. Essentialists maintain that sexuality is a property of individuals, and is without social determinants. If sexuality is pre-social what is its origin or source? For an essentialist the source of sexuality must be nature. Indeed, the assumption “that our sexuality is the most natural thing about us” is deeply embedded in the social

⁷⁶ Judith Halberstam, “An Introduction to Female Masculinity: Masculinity Without Men”, *supra* note 72.

⁷⁷ Craig, “Trans-phobia and the Relational Production of Gender”, *supra* note 75.

⁷⁸ *Ibid.*

consciousness, at least in the modern western world. Whether founded on Christian doctrine⁷⁹ or sexual science,⁸⁰ an essentialist approach understands sexuality as spontaneous and as natural.

The chapter to follow will demonstrate the problem when law adopts this naturalistic fallacy as the story of human sexuality. If sexuality is rooted in nature then it will always and forever be understood, measured and evaluated through one specific dyadic episteme: natural versus unnatural.

As will be discussed, there are a number of problems with legal conceptions of sexuality that understand it as pre-social. First, it is a problem because “we learn very early on from many sources that ‘natural’ sex is what takes place with members of the ‘opposite sex’. ‘Sex’ between people of the ‘same sex’ is therefore, by definition, ‘unnatural’.”⁸¹ In other words, as Jeffrey Weeks argues, every sexual act, desire or identity is understood through and measured against a heterosexual paradigm. Underpinning an essentialist conception of sexuality is a heterosexist conception of sexuality. This is a conception in which same sex desire is and will always be not simply abnormal but unnatural.

Not only does a conceptual framework which at its core understands sexuality through a heterosexual paradigm entrench same sex desire and identity as unnatural, it

⁷⁹ See for example John, Finnis, “Law, Morality, and Sexual Orientation.” 69 *Notre Dame Law Review* 1049 (1994).

⁸⁰ By sexual science I refer to the early sexologists such as Havelock Ellis, Magnus Hirschfeld and Richard Kraft Von-Ebing all of whom took a somewhat biological and scientific approach to the examination of ‘sexual deviance’. Also included would be the work of Alfred Kinsey and Sigmund Freud. While Freud didn’t understand sexuality as rooted in biology he did understand it as deeply rooted in the subconscious. For him too sexuality was a deeply embedded aspect of our true selves rather than a social product contingent on relationships, discourse, culture and power.

⁸¹ Weeks, *Against Nature*, *supra* note 9 at 4.

also entrenches the notion of sexual difference thus polarizing the distinction between men and women:

[T]here is a continuing assumption of a sharp distinction and polarization between ‘the sexes’, a dichotomy of interests, even an antagonism (‘the battle of the sexes’) which can only be precariously bridged. Men are men and women are women – and this is truth embodied in the dominant structures of heterosexuality, from which everything else falls away.⁸²

Jeffrey Weeks notes that a naturalistic understanding of sexuality also leads to the conception that “‘sex’ is an overpowering natural force, a biological imperative mysteriously located in the genitals”.⁸³ He argues that this too gives rise to a “pyramidal model of sex, to a sexual hierarchy stretching downwards from the apparently Nature-endowed correctness of heterosexual genital intercourse to the bizarre manifestations of ‘the perverse’.”⁸⁴

A third difficulty with a legal understanding of sexuality as pre-social or naturally occurring is that it, to some extent, obfuscates the ability to perceive the relational, contextual and institutional factors which contribute to the regulation of sexuality by overemphasizing biology, heterosexual arousal, romance, and sexual morality (rather than political morality). Legal conceptions of sexuality founded on essentialism tend to focus the law’s moral compass on sexual acts rather than sexual interactions.⁸⁵

⁸² Weeks, *Against Nature*, *supra* note 9 at 4.

⁸³ *Ibid.* at 5.

⁸⁴ *Ibid.*

⁸⁵ One might argue, but doesn’t the law – especially the criminal law – have to focus on *acts*? My argument is not that acts are irrelevant. It is that there is no inherent morality or immorality to any particular sexual act. The moral significance of – and in fact the very meaning attributed to – a sexual act is constituted by the context, interaction and relationship in which it is occurs. The law – including the criminal law – often focuses on relationships rather than acts. Think for example of the sexual exploitation provisions of the *Criminal Code*. (Sex with a seventeen year old with whom one is in a relationship of dependency or leadership is criminal but if the relationship does not involve such a power differential it is not prohibited under this provision.) Think of legally imposed obligations to provide the necessities of life to one’s child (but not one’s neighbor’s child). Think of the age of consent laws under the *Criminal Code*. (A fourteen

A final difficulty with an essentialist understanding of sexuality is that it evinces an air of inevitability – if not an abdication of power then at least a concession that changes to gendered and sexualized hierarchies are and will always be to some extent bounded by parameters beyond or external to the choices, practices, beliefs and epistemes that presently operate in this society.

The alternative, or one alternative, is the view of sexuality put forth by constructivist theorists. It is an understanding of sexuality not simply as a biological fact or naturally occurring phenomenon that can be repressed or suppressed but rather a complex series of interactions and relationships, a “historically shaped series of possibilities, actions, behaviors, desires, risks, identities norms and values that can be reconfigured and recombined but not simply unleashed”.⁸⁶

This is not to suggest that sexuality does not exist. Nor is it to suggest that biological and mental factors, or the materiality of the body do not contribute to the concept of sexuality. “All the constituent elements of sexuality have their source either in the body or the mind...But the capacities of the body and the psyche are given meaning only in social relations.”⁸⁷ Rather it is to suggest that sexuality is as much a social product as is food, language or familial structure.

This is not a particularly radical claim. Sexual behavior, sexual identity, and sexual norms will logically vary across culture, religion, climate, class, economic conditions and time. For example, sexual practices might vary somewhat in warm climates from what they will be in cold ones, just as they may vary in cultures where

year old cannot consent to sex with a forty year old – unless that forty year old is her husband. Section 150.1)

⁸⁶ Jeffrey Weeks, *The World We Have Won*, *supra* note 20 at 5.

⁸⁷ *Ibid.* at 7.

large amounts of alcohol are consumed from cultures that tend to imbibe less. Changes in economic and political structure will bring changes to sexual practices and sexual identities.⁸⁸ Sexual practices may be different in societies whose norm it is for couples to live with one's extended family than in those where single-family households are the norm. They may vary depending upon availability and knowledge of birth control, prevalence of sexually transmitted infections, or male to female ratio. They could be different in twenty-first century western society, where personal hygiene involves daily cleansing, than they were in the 16th century tenements of Europe.

In fact, less intuitive is the assertion in light of all of this, that sexuality is something more than the product of social patterns, normative distinctions and the development of meaning through choices and practices. So it is not a particularly radical claim to assert that sexuality is particularized...that it is socially contingent. What is perhaps a more significant claim is the assertion made in the chapter to follow that the law ought to conceptualize, and correspondingly treat, sexuality as a socially contingent

⁸⁸ For example, the World War II and post World War II era, in which large numbers of young adults were leaving their sheltered, supervised and confining rural settings in order to join same sex environments to serve their countries and upon return to find employment in cities, is often attributed with creating new opportunity for same sex sexual exploration, and creating for the first time gay and lesbian communities, thus allowing greater possibilities for gay and lesbian sexual identities and instigating the gay and lesbian rights movement, at least in North America. See Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women In World War Two*, (Free Press: New York, 1990). Not only was the development of same sex sexual identity contingent on societal factors but so too were the same sex sexual practices which people engaged in. Chauncey, and others, have suggested that gay men during this pre World War II era generally did not seek or desire sex with other gay men but rather were much more likely to pursue sexual interactions with 'straight', and usually very stereotypically masculine, men. In these sexual interactions the 'straight participant' always played the active or insertive role. That is to say, to be "a gay man" in the 1930's meant giving, not getting, a blow job. Chauncey argues that a number of factors in the middle of the 20th century shifted public perceptions as to the defining features of 'the homosexual' such that any party to same sex relations, regardless of their role in the interaction, now became labeled a homosexual. As a result, 'straight men' who had before not felt their sexual identity threatened by these types of sexual encounters with other men, began to withdraw from these sexual activities leaving those that had identified as 'homosexual' without sexual partners. Chauncey suggested that as a result the sexual behavior of gay men began to shift. They began to have sex with other gay men, which changed the dynamic such that the inserter could become the insertee in a sexual interaction, and vice versa. George Chauncey, *Gay New York: Gender, Urban Culture and The Making of the Gay Male World 1890-1940*, (Basic Books: 1994).

social good. This approach, I will argue, better enables the law to remain open to the infinite re-articulation of sex, gender and sexuality norms while at any given moment draw distinctions and make judgments about how best to protect individual sexual integrity.

Queer theorists claim that the categories of sexual orientation, and the categorization of sexual acts as natural or unnatural are socially constructed. A queer, or constructivist, approach to sexuality understands sexuality as “a social fact deeply embedded in the cultural and linguistic forms of many, many decades”.⁸⁹ In other words, a complex social phenomena produced through a combination of factors including, depending on the degree of constructivism embraced, aspects of particular subjectivities, social relationships, cultural practices and institutional structures. Gayle Rubin’s distinction between sex and gender, Catharine MacKinnon’s power feminist assertion that sexuality is prior to gender, Judith Butler’s theory of gender performativity, Eve Kofsky-Sedgwick’s assertion that the diacritical frontiers upon which understandings of sexuality currently rely are socially contingent, Michel Foucault’s genealogy of sexuality and Jeffrey Weeks’ historiography of sexuality are all part of the same project. It is a project oriented towards examining what sexual norms have become dominant and regulative, and understanding how these social and cultural understandings of sexuality constitute the relationship between sexuality and power, and the systemic or institutional forces which regulate and further shape what sexuality is today and what it will be tomorrow.

In examining the intersection of law and sexuality the question becomes how the law understands sexuality? Do courts tend to approach sexuality as an innate, unchanging and essential element of who we are as individuals – the ‘truth of the self’ - or as a

⁸⁹ Sedgwick, *Epistemology of the Closet*, *supra* note 3 at 41.

historically and culturally contingent social phenomena? More importantly, what are the legal implications of the ways in which the law conceptualizes sexuality? How do conceptions of sexuality inform, influence and impact the law?

A review of Supreme Court of Canada cases in different legal contexts – the section 15 equality claims of sexual minorities, sexual harassment cases, admission of similar fact evidence in sexual assault trials, and the criminalization of child pornography – demonstrate that the Court often understands sexuality through an essentialist perspective.

The cases discussed in the next chapter reveal that the Court considers sexual object choice to be both unchanging and an element of one's true self. Many of the cases also reveal a tendency on the part of the Court to categorize sexual acts as either 'natural' or 'unnatural'. But the cases show something more. They show that when the Court operates under an essentialist understanding of any aspect of sexuality – including but also beyond the issue of sexual object choice – the legal 'space' in which to identify the social forces, and contextual factors contributing to or producing many aspects of human sexuality is significantly constricted. An essentialist understanding of sex and sexuality conceals the sexual harassment of boys and men by heterosexual men; it precludes rights recognition for those sexual minorities that cannot or will not assimilate to the dominant norm of 'monogamy and immutable sexual object choice'; it precludes a re-valuing of same sex desire; it obscures the relationship between poverty, alcoholism, lack of education and child sexual abuse.

As discussed in the next chapter, when adopted by the law, essentialist conceptions of sexuality justify the hierarchical distribution of legal rights and privileges

based on sexual object choice, render some victims (and perpetrators) invisible, and reify problematic distinctions between men and women. This focus on the biological, on genitals, on sex as a force of nature to be contained or liberated (depending on one's perspective) also drives the law's traditional concern with, and moral focus on, sexual acts rather than sexual actors. A moral focus on sexual acts rather than sexual actors, as will argued throughout the remaining chapters, is less capable of promoting and protecting sexual integrity as a common good.

Chapter 3 – Natural Categories and Non-Categorical Approaches To Sexuality

Having discussed in the previous chapter the distinction between essentialist and constructivist conceptions of sexuality, this chapter will examine legal contexts in which the Supreme Court of Canada's reasoning reveals an essentialist approach towards sexuality. The objective is to demonstrate that across legal contexts an essentialist conception of sexuality contributes to legal reasoning which fails to account for the social contingency of sexuality. A failure to account for the social contingency of sexuality is problematic for different reasons across different legal contexts. The chapter will begin with an examination of similar fact evidence in sexual assault trials. These cases demonstrate that courts often (problematically) rely on an essentialist conception of those who sexually assault children. Following this will be a brief discussion of the criminal regulation of child pornography and the way in which, here too, the Court's essentialist conception of 'the pedophile' is revealed. This section will argue that such a conceptual approach fails to develop a legal discourse or promote legal strategies to address the social factors that perpetuate the sexual victimization of children. Next will be discussed the way in which equality rights for gays and lesbians have been achieved through a categorical approach to equality which emphasizes sexual identity as an innate and essential aspect of one's self. This is an achievement that has benefited some sexual minorities. It is also an approach to equality that has been criticized for not being transformative enough. Finally the chapter will examine the issue of sexual harassment, demonstrating how an essentialist conception of sexuality identifies male heterosexual

arousal as the cause of sexual harassment; such a conceptual approach fails to adequately emphasize the contextual and relational factors associated with sexual hostility and obscures the sexual harassment of boys and men by other boys and men.

I. ‘The Rapist’ And ‘The Pedophile’ – Natural Deformities Or Human Products?

How does the Court approach concepts such as rape, sexual assault, child sexual abuse, ‘the pedophile’, and ‘the rapist’? What does it mean to suggest that the Court adopts reasoning that tends towards an essentialist conception of those who sexually violate children – a conception in which those who sexually offend against children are understood to have an innate, pre-social disposition oriented towards this type of sexual violence and in which the problem of child sexual abuse itself is understood as pre-social, acontextual?

Foucault’s discussion of the 19th century France village idiot who molests one of the village girls, and is then arrested for his simple, ‘bucolic pleasures’ and forced to spend the rest of his life speaking about them to the police, the courts, the doctors... is one of the central images in *The History of Sexuality: An Introduction*. Foucault writes of this incident:

[w]hat is the significant thing about this story? The pettiness of it all; the fact that this everyday occurrence in the life of village sexuality, these inconsequential bucolic pleasures, could become from a certain time, the object not only of a collective intolerance but of judicial action, a medical intervention, a careful clinical examination, and an entire theoretical elaboration... So it was that our society ... assembled around these timeless gestures, these barely furtive pleasures between simple minded adults and alert children, a whole machinery for speechifying, analyzing and investigating.¹

¹ Michel Foucault, *The History of Sexuality Volume I: An Introduction*, (Vintage Books, New York: 1978) at 31.

Foucault's claim was that the intervention of the many and sundry officials and less simple-minded adults changed what was a harmless and 'barely furtive pleasure' into a discourse which then socially constructed this behavior as a particular understanding of sexual deviance. That is to say, the interaction between the child and the half-wit *becomes* understood as a sexual one – a sexually deviant one – because of the 'truths' spoken about it. Foucault's description/theorization of their interaction makes two interrelated constructivist claims. The first suggests the social construction of 'the victim'. The second suggests the social construction of 'the offender'.

i) Foucault's Precocious Child

Robin West critiques Foucault's discussion of this interaction, noting that in all the attention given to the ensuing discourses swirling around the village idiot "neither the French officials, nor Foucault himself, nor the vast majority of social and legal critics he has influenced, have yet heard scarcely a word from the child who was molested in that eerie scene..."² She asks whether it is actually pleasures that are transformed into discourse. "Is it as true of the "alert child" as it is of the half-wit? Or is this Foucauldian "truth" about how "natural-pleasure-is-transformed-into-socially-constructed-sexuality" only maintainable because of the alert child's silence?"³ This question is a good one. Whose truth are we to believe? The Village Officials' or Foucault's? It reveals the way in which Foucault's work is at once both a description and manifestation of that which he proposes to describe. It would be impossible for it not to be such. Foucault's anecdote and West's critique of the analysis drawn from it reveal both the use and limitations of queer theory – an issue to be discussed at greater length in Chapter Seven.

² Robin West, *Caring For Justice*, (New York University Press: New York, 1997) at 272.

³ *Ibid.* at 273.

Foucault's observation that both what we understand to be sexual interactions and how we understand those sexual interactions are socially constructed through discourse is noteworthy.⁴ It is an important observation because it provides a theoretical framework from which to challenge dominant conceptions about sexuality. It is a framework that readily allows one to argue, for example, that neither homosexuality nor female promiscuity are inherently harmful nor self-destructively perverted. It is a framework that has much to contribute to claims of sexual liberty, and perhaps even substantive sexual equality. Methodologically, as will be discussed in Chapter Eight, it provides important insight into the account of sexual integrity that I develop throughout this work. As referenced in the section below regarding sexual harassment, his discursive theory offers insight into the ways in which sex, gender and sexuality norms act as (and constitute themselves through) regulatory mechanisms in institutional settings. It is an analytical framework which allows Robin West to point out that his analysis is not quite right—that it leaves out a very large and important piece of 'the truth' – the (lack of) discursive contribution of the young girl.⁵ It is noteworthy because its description permits

⁴ Certainly the concept of child, at its fringes, is in this context socially determined. A thirteen year old Canadian may experience sexual interactions with an adult very differently now than in 1870. See for example Carol Smart, "A History of Ambivalence and Conflict in the Discursive Construction of the "Child Victim" of "Sexual Abuse" (1999) *Social & Legal Studies* 391 at 393:

Sociologically speaking, it would seem that we can now easily accept the idea that the extension of schooling to children in this century changed childhood. However, the idea that extending the age of consent for girls from 13 to 16 years old in 1885 also changed the nature of childhood is less easily grasped. We tend to think that it was self-evident that a 13-year-old could not consent and was too immature for sex. In fact this was not then self-evident at all. Rather we ought to understand the extent to which the Criminal Law (Amendment) Act 1885 was part of a new construction of modern childhood. It created and extended a particular, historically and culturally specific type of childhood to the age of 16 in much the same way as the Education Acts did subsequently.

This point is interesting. It reveals not only the fact that 'childhood' is a social construct but also the very significant role that law specifically plays in socially constructing it.

⁵ While West is certainly not writing from a post modern perspective, but rather a cultural feminist one, the structure of Foucault's argument does create the space in which to observe those social actors not contributing to the discursive formation of sexuality.

one to examine, as will be done in the discussion to follow, how the law contributes to the conception of the village half-wit.

But it is only an account of social meaning (formation).⁶ It describes a process - one aspect of how societies come to be organized, understood and regulated. However, whether or not the ‘subject is dead’ so to speak,⁷ does not change the fact that one cannot be extracted from one’s context and so in the context in which the discussion to follow is situated, whether sex with children only causes harm because society has constructed it as harmful or whether it causes harm for some innate and pre-social reason which was subsequently labeled harmful is normatively irrelevant.

There are two counter points to this assertion that should be noted. First, while it may not be normatively relevant in this discussion of sexual assault law generally – where harm is presumed and where the primary inquiry is into the social construction of the offender– is it not relevant to, for example, a NAMBLA argument about lowering the age of consent?⁸

No, not necessarily. At least not in the example I have just given. NAMBLA’s argument is not that sex between adult men and pubescent boys is only harmful because

⁶ Of course, according to its own precepts it is at once a description and a contribution to the discourse (and discursive meaning formation) that it describes. This point isn’t intended as a critique but merely an observation. It is this observation that explains both why Foucault’s work is at once both a description and if one accepts the description, a manifestation of that which he supposedly describes and why it would be impossible for it not to be such.

⁷ This is the notion that there is no doer behind the deed – all there is, is the deed. Judith Butler, borrowing from Nietzsche, makes this suggestion in *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed (Routledge: New York, 1990) at 33. She quotes Nietzsche’s assertion in *On the Genealogy of Morals* that “there is no ‘being’ behind the doing, effecting, becoming; ‘the doer’ is merely a fiction added to the deed – the deed is everything.” Applying this in the context of gender, Butler suggests we might state as a corollary that “[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very “expressions” that are said to be its results”. (See Chapter 2 for a discussion of Butler’s theory of gender performativity)

⁸ NAMBLA is the North American Man/Boy Love Association. They advocate for an end to "the oppression of men and boys who have freely chosen mutually consenting relationships". See www.nambla.org.

society has socially constructed it as such. NAMBLA's argument is that it is not harmful to boys but rather beneficial for them. The issue in the NAMBLA example turns on whose account/argument regarding the fact of, or potential for, harm is more persuasive.⁹ This is an argument that should be had. It is particularly an argument that should be had regarding issues of sexual conduct that exist in the currently potentially grey areas at the ends of social/sexual regulatory spectrums such as age, degree of consanguinity, or nature of commodification. While the law can and should question, critique and challenge assumptions about sexual harm and the criteria by which it assesses harm, and while what is harmful now might not always be harmful and an approach to sexuality should accommodate this 'truth', my point at this stage is that it does not matter for my argument whether sex with children is inherently harmful or harmful because of social context. I can presume it harmful without relying on essentialist reasoning.

In Canada, the law presumes that a young girl who, under coercion, bribery or even just encouragement, manually ejaculates a grown man, is sexually violated – that she suffers harm.¹⁰ Whether that harm is the manifestation of a socially constructed victim discourse, or rather some innate and instinctively felt loss of dignity, and bodily and personal autonomy, Foucault might have agreed that in the here and now the young girl's sexual integrity was compromised. The process by which the harm came to 'be'

⁹ Now this raises the question, but isn't scope of harm (beyond perhaps pure physical harm) itself socially constructed? As demonstrated in Chapter Seven, queer theory, with its infinite regression, does not have a good response to this counterargument. My response to this counterargument is found in chapter 8. It is not a perfect response – but then thrust of it is that it does not need to be a perfect response – it need only be open to perfection.

¹⁰ While the Court has established that Parliament may criminalize conduct for purposes other than the prevention of harm (see *R. v. Marmo-Levine* [2003] 3 S.C.R. 571) it would be a stretch to suggest that the justification underpinning most sexual offences is not some version of the harm principle. The most obvious justification for the offence of sexual assault is the presumption that nonconsensual sex is harmful – whether that harm is theorized as a violation of autonomy, equality or property interest (for a modern day argument regarding the latter as justification see Donald Dripps, "Beyond Rape: An Essay On the Difference Between The Presence of Force and The Absence of Consent" (1992) 92 Colum. L. Rev. 1780.)

may very well be socially constructed. However, the harm is real. Given that social constructivists do not necessarily assume that a social concept is more readily changed than is an inherent one, it is not theoretically inconsistent to stake this claim and still pursue a constructivist project of inquiry and theorization.

The second counterargument would be that this claim suggests a very problematic approach in terms of sexual liberty and non-majoritarian sexual interests. For example, doesn't my argument suggest then that *whatever* society labels harmful is, in the context of that society, harmful? Again the answer is no. This counterargument misconstrues constructivist claims; it miscalculates both the lengthy process through which conduct may come to be understood as – and therefore be – harmful and the degree of entrenchment, stability and permanency this process creates and sustains. It is a misapprehension analogous to the one discussed in Chapter Two regarding the assumption that if sexual object preference – i.e. sexual orientation – is socially constructed this means that it is easily and readily changed.¹¹ A legislative, adjudicative, religious, political or pedagogical statement or declaration that behavior X is harmful does not socially construct harm anymore than a drag show, fashion show or wedding socially constructs gender. If harm is socially constructed it is constructed, as Butler would likely say, through the infinite and reiterative citation of norms and social practices... of which legislative, adjudicative, religious, political or pedagogical

¹¹ One might follow this point by saying, well if this is true of sexual assault victims and 'homosexuals' is it not equally true of those who sexually assault children? This may well be true of individual sexual actors who sexually assault children (or adults). This does not change the argument. It only raises the following question: if one accepts that harm *and* pedophiles are contextually produced and socially contingent and one acknowledges that there should nonetheless be efforts at changing this circumstance – since the harm is real - the choice becomes to start talking differently about one or the other (or both). My argument regarding the discursive production of 'the pedophile' is that to change the discourse regarding sexual offenders would first entail recognizing that there are social and contextual factors that perpetuate this behavior rather than innate biological deviations. Recognizing these factors- starting with a legal discourse that acknowledges them –seems to me a good idea.

statements would be a part. Sexual liberty and non-majoritarian interests, as will be discussed in Chapter Eight, can be protected – at least to some degree - by critical, open ended engagement with the criteria by which the law assesses harm.

ii) Foucault's Village Idiot

It is the second constructivist claim found in Foucault's passage regarding the village idiot, and throughout *Volume I*, which is the main focus of this section of Chapter Three. The second claim is that just as the homosexual was speechified into existence so too were other types of 'perverts' - namely the sex offender. The suggestion that the child molester as a species is socially constructed is not a conceptual perspective that has revealed itself in the law's approach to those who sexually offend against children. Rather, an examination of two different areas of law –similar fact evidence in sexual assault cases and the Court's approach to the criminal regulation of child pornography – suggest an essentialist conception of those who commit sexual offences – in particular those who sexually abuse children. Such a conception understands those who sexually abuse children as having an innate sexual orientation or sexual predisposition towards children. In this way child sexual abuse is often considered a function of the innate perverted arousal of a discrete minority. While the 'pedophile' has been, and continues to be, treated by law as a member of a discrete and identifiable sexual minority, the 'rapist' does not. As discussed in Chapter Four, the case law concerning the definition of sexual assault and the definition of consent in the last fifteen years suggests that the Court has shifted, perhaps in part due to particular feminist interventions, towards a more constructivist approach with respect to the perpetrators of sexual assault against adults. In fact, even when an essentialist understanding of sexual violence against adults was more

typical, the essentialist assumption tended to be that the sexual assault was a function of an unnatural or uncontrollable sexual *arousal* rather than an unnatural or uncontrollable sexual *pervert*.¹² It may be that the natural/unnatural distinction is more pronounced in the context of intergenerational sex thus making essentialist thinking more entrenched in this context.

The next section will review cases dealing with similar fact evidence in sexual assault cases. The section to follow will examine the Court's approach to the criminal regulation of child pornography.

II. Similar Fact Evidence

The law surrounding the introduction of similar fact evidence has developed in large measure in the context of sexual assault cases.¹³ While earlier cases involved wives in bathtubs¹⁴ and babies in the backyard¹⁵ for several decades now, both in the United Kingdom¹⁶ and in Canada¹⁷, the leading precedents concerning this evidentiary issue have involved cases of sexual assault.¹⁸ It is an evidentiary issue that arises in criminal trials

¹² See for example *R. v. Dick, Penner and Finnigan*, 1965] 1 CCC 171 at para. 39 where the court refers to the accused's animal lust in describing his rape of an adult woman.

¹³ This was true even before many of the more recent Supreme Court of Canada cases were released. Lynn Hanson made the observation in 1993. Lynn Hanson, "Sexual Assault and The Similar Fact Rule" (1993) 27 U. Brit. Colum. L. Rev. 51.

¹⁴ *R. v. Smith* (1915), 84 L.J. K.B. 2153.

¹⁵ *Makin v. Attorney-General for New South Wales* (1893), [1894] A.C. 57.

¹⁶ *R. v. Horwood*, [1970] 1 Q.B. 133; *D.P.P. v. Boardman*, [1975] A.C. 421 (C.A.)

¹⁷ *R. v. D.(L.E.)*, (1989), 71 C.R. (3d) (S.C.C.); *R. v. B.(C.R.)*, *infra* note 38; *R. v. C.(M.H.)*, *infra* note 47; *R. v. B.(F.F.)*, *infra* note 56; *R. v. Handy*, *supra* note 21.

¹⁸ This is not coincidental. Developments in the laws surrounding sexual assault, such as the fact that consent is now determined based on the subjective perspective of the complainant thus making lack of consent part of the *actus reus*, as well as the factual circumstances in which sexual assaults typically occur (i.e. in private), mean that in many sexual assault trials assessments of credibility will often determine the outcome: 'he said – she said' or 'he said- he said' has become the face of sexual assault prosecution in Canada. Given the burden of proof in criminal cases and given the frequency with which the complainants involved are children or other less than optimal witnesses it is unsurprising that similar fact evidence has come to play such an important part in the prosecution of sexual assault offences. For an explanation premised less on doctrinal changes to sexual assault law and more on feminist analysis of sexual assault law generally see Hanson, "Sexual Assault and The Similar Fact Rule", *supra* note 13. She argues that what she describes as an overrepresentation of similar fact issues in sexual assault cases is due to factors

regarding any type of offence; nevertheless case law determining its admissibility has been, at least in recent times, developed almost exclusively in the context of sexual assault cases.

What is similar fact evidence and why is it pertinent to a discussion regarding how law conceptualizes sexual deviancy? To properly explore the ways in which the Court's treatment of propensity based reasoning reflects the Court's conceptions of sexuality in the context of sexual violation, it is necessary to review in brief this complex area of evidentiary law – both in terms of its jurisprudential history and as it stands today.

Similar fact evidence is factual evidence of the past misconduct of an accused (or opposing party) proffered for the purpose of inferring that the accused committed the misconduct at issue in the trial.¹⁹ The issue of similar fact evidence typically arises in the criminal law context when the Crown seeks to introduce prior bad acts as circumstantial evidence to establish the following inference: if the accused committed the prior bad acts suggested by the similar fact evidence then by inference he is also likely to have committed the act with which he is currently charged. It is presumptively not admissible under the “general exclusionary rule of evidence which prohibits the Crown or a party from adducing evidence of bad character of the accused...”²⁰ The principle behind this rule is that individuals accused of a crime are to be convicted based on evidence showing that they committed the crime and not evidence showing that they are a bad person.²¹

including “the historical tendency of the courts to doubt sexual complainants and to search for corroborative evidence; the perceived lack of credibility of some complainants; the law's tendency to confine analysis to a restricted set of facts and to view incidents as discrete events in isolation from their context...”.

¹⁹ John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 523.

²⁰ *Ibid.*

²¹ In *R. v. Handy* [2002] 2 SCR 908. Justice Binnie suggests that behind the presumptive inadmissibility of similar fact evidence is a recognition of “the difficulty of containing the effects of such information which,

However, in what the Court has described as *exceptional circumstances*, similar fact evidence is admissible if it is relevant to an issue in the case and its probative value outweighs its prejudicial effect.²²

Establishing what these exceptional circumstances will be, and what the actual probative value of similar fact evidence is, has been a matter of considerable academic discussion and judicial consideration. The main point of contestation and confusion, and the point that is of significance to this discussion, concerns the issue of propensity reasoning. The issue of evidence adduced to show that the accused has a propensity to act in the very same manner with which he is now accused of acting has been difficult for courts to address; the issue of reasoning based on propensity is of particular relevance to a discussion concerning legal notions about innate, essential human (sexual) nature.

i) Evolution Of The Similar Fact Rule

once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body.'" Justice Binnie's quote is taken from the following passage of Shakespeare's *Hamlet*:

Upon my secure hour thy uncle stole,
With juice of cursed hebenon in a vial,
And in the porches of my ears did pour
The leperous distilment; whose effect
Holds such an enmity with blood of man
That swift as quicksilver it courses through
The natural gates and alleys of the body,
And with a sudden vigour doth posset
And curd, like eager droppings into milk,
The thin and wholesome blood: so did it mine;
And a most instant tetter bark'd about,
Most lazar-like, with vile and loathsome crust,
All my smooth body.

The lines are those of King Hamlet's Ghost, who is describing his own death at the hands of "that incestuous, that adulterate beast..." his brother Claudius. *Hamlet*, in this passage and throughout the play as a whole, is laden with incestuous overtones, corporeal metaphors involving bodily invasion, and allusions to sex as diseased and infectious. Given the factual circumstance in *Handy* (accusations of sexual assault) and more significantly in the law of similar fact evidence generally (i.e. the great preponderance of which involves cases concerning sexual assault and child sexual abuse) in conjunction with the analysis to follow regarding the Court's essentialist conception of certain forms of sexual assault (in particular those involving children who have a familial relationship with the accused) this particular quote was a rather poignant selection on the part of Justice Binnie.

²² See for example *R. v. Arp*, [1998] 3 SCR 339.

To understand what the Court's approach to propensity based reasoning reveals about their conceptions regarding the perpetrators of sexual offences, it is necessary to understand the conundrum historically presented by the similar fact rule. In an effort to ensure that people are tried for what they have done, not for who they are, courts for nearly a century cited the Privy Council decision in *Makin v New South Wales (Attorney General)*.²³ Lord Herschell in *Makin* held that:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.²⁴

This quote was interpreted by courts to mean that similar fact evidence was permissible in certain circumstances but only where its use came within one of a number of predetermined categories. The categorical approach softened over time²⁵ and eventually the courts came to view the rule as stipulating that "evidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character, and (2) the probative value outweighs the prejudicial effect".²⁶ However as Justice Rosenberg points out, this

²³*Supra* note 15.

²⁴*Ibid.* at 65

²⁵ *Guay v. The Queen*, [1979] 1 SCR 18; *D.P.P. v. Boardman*, *supra* note 16.

²⁶ See Marc Rosenberg, "Similar Fact Evidence" in *Special Lectures 2003: The Law of Evidence* (Irwin: Toronto, 2003) 391.

articulation of the rule created a conundrum.²⁷ Hamish Stewart summarizes well the conundrum presented by the application of the Privy Council's articulation of the similar fact rule in *Makin*:

...evidence of the accused's prior discreditable conduct is not admissible if it is relevant only to show that he is more likely to have committed a crime because he is a bad person; to be admissible the evidence must have probative value on another issue which outweighs the danger that it will be used for the improper purpose of inferring guilt from bad character. As has often been pointed out, the rule in this form creates something of a conundrum: if evidence of the accused's prior bad acts is ever relevant, it would seem that its relevance would derive from showing his bad character; yet the evidence is said not to be admissible on that ground.²⁸

The Supreme Court of Canada is said to have resolved this conundrum in its 2002 decision in *R. v. Handy* by acknowledging that it *is* propensity based reasoning which constitutes the probative value of similar fact evidence.²⁹

The next statement by the Court regarding similar fact evidence came in 2002 in *Handy*. *Handy* remains the leading precedent on the similar fact evidence rule in Canada. The accused in *Handy* was charged with sexual assault causing bodily harm. The complainant alleged that while she had consented to vaginal intercourse with the accused she had not consented to painful, aggressive sex or to anal intercourse. The accused and the complainant had met at a bar the night of the incident. The two drove to a motel with the intention of having sex. While engaged in vaginal intercourse the complainant alleged that she became upset and asked the accused to stop because he was hurting her by forcing himself into her. She testified that he refused to stop and then brusquely

²⁷ Rosenberg, *supra* note 26.

²⁸ Hamish Stewart, "Rationalizing Similar Facts: A Comment on R v Handy"(2003) 8 Can. Crim. L. Rev. 113 at 114.

²⁹ *Handy*, *supra* note 21. See Rosenberg, "Similar Fact Evidence", *supra* note 26; Stewart, "Rationalizing Similar Facts", *ibid*.

switched to anal intercourse. She said she tried to fight him off and that he punched and choked her. The accused's defence was that the sex was consensual. "The issue thus came down to credibility on the consent issue."³⁰

The Crown sought to introduce similar fact evidence from the accused's ex-wife to establish that he had a "propensity to inflict painful sex and when aroused will not take no for an answer."³¹ His ex-wife testified to a number of incidents of violence in which the accused forced her to have painful vaginal intercourse or anal intercourse. She also testified as to incidents of choking and other violence.

Justice Binnie determined that the similar fact evidence should not have been admitted based primarily on the issue of possible collusion but also based on Justice Charron's finding (in the Ontario Court of Appeal) that "[w]hile the acts alleged by the ex-wife took place during a conjugal, long-term relationship, the acts alleged by the complainant took place during a short casual affair that began with her consent."³² With respect to the issue of collusion, several months before the alleged incident the ex-wife had told the complainant about compensation she had received from the Criminal Injuries Compensation Board for abuse she alleged that Handy had inflicted. She told the complainant that "[a]ll you had to do [to get the money] was say that you were abused."³³

In *Handy* Justice Binnie established an analytical framework for assessing the admissibility of similar fact evidence. He noted that evidence of other (presumptively inadmissible) discreditable conduct may be admitted where the prosecution establishes "that in the context of a particular case the probative value of the evidence in relation to a

³⁰ *Handy, supra* note 21 at para. 4.

³¹ *Ibid.* at para.6

³² *Handy, supra* note 21 at para. 21.

³³ *Ibid.* at para. 15.

particular issue outweighs its potential prejudice and thereby justifies its reception".³⁴ He stated that probative value may be assessed by considering the strength of the similar fact evidence, including the extent to which the evidence can be proven and any allegations of collusion. He established that a trial judge must identify the issue in question (that is the issue at trial to which the proposed similar fact evidence is said to be relevant) narrowly. After doing so, the trial judge should then examine the factors that connect or distinguish the similar fact evidence to or from the facts alleged in the charge. These "connecting factors" may include proximity in time for similar acts, extent to which the other acts are similar in detail to the charged conduct, number of occurrences of the similar acts, circumstances surrounding or relating to the similar acts, any distinctive feature or features unifying the incidents, intervening events and any other factor which would tend to support or rebut the underlying unity of the similar acts.³⁵

Finally, under Justice Binnie's framework, the trial judge must assess the potential prejudice to the accused. A trial judge must consider the potential for moral prejudice against the accused, meaning the risk of convicting the accused because he is a bad person, and the potential for reasoning prejudice against the accused, meaning the risk of distracting or confusing the jury.

Leading up to *Handy* the Supreme Court of Canada decided a number of similar fact cases in the early 1990s in which the accused were charged with sexual offences and the Crown sought to lead evidence regarding prior sexual misconduct.³⁶ Critics have

³⁴ *Ibid.* at para. 55.

³⁵ *Supra* note 21 at para. 82.

³⁶ The distinction should be noted between cases involving sexual assault charges in which the Crown seeks to introduce the similar fact evidence to establish identity and those in which it is offered to establish that either the sexual act occurred or that it was non-consensual. A great deal turns on the purpose for which similar fact evidence is offered – in other words the fact in issue for which similar fact evidence is being adduced to prove. While there are no longer discrete categories of purpose which similar fact evidence is

suggested that prior to the Court's ruling in *Handy* the law on similar fact evidence was unclear and that the Court's rulings regarding it were inconsistent.³⁷ It may be true that the law was unclear doctrinally. However, the Court's rulings were, in terms of certain factors, quite consistent with each other and with how these issues tend to be addressed in lower courts post-*Handy*. For this reason, it makes sense to review the Court's decisions leading up to *Handy*, despite the fact that *Handy* is now the seminal case on similar fact evidence. These factors include their degree of reliance on the accused's propensity to relate in a particular manner with the complainants (depending on whether the complainant was an adult or a child at the time of the offence) and whether, in the case of adult complainants, the sexual acts alleged to have occurred are outside the range of those considered 'natural' or usual by the Court.

The paragraphs to follow will discuss the Court's reasoning in cases leading up to *Handy*. The section to follow will demonstrate how lower court decisions post-*Handy* continue to rely on these same factors and continue to adopt reasoning that suggests different conceptualizations regarding the sexuality of 'the pedophile' and 'the rapist'.

The first of this series of similar fact cases decided by the Supreme Court of Canada in the 1990's was *R. v. B.(C.R.)*.³⁸ In *B.(C.R.)*, Justice McLachlin (as she then was) upheld the trial judge's decision to admit similar fact evidence regarding prior acts

required to fall into in order for it to be admissible, analytically the 'identity' cases are somewhat distinct from the *actus reus* cases. As noted above, Justice Binnie determined in *Handy* that while it is not the case that "the degree of similarity in such a case must be higher or lower than in an identification case...the issue is different, and the drivers of cogency in relation to the desired inferences will therefore not be the same" (at para. 78). The cases that are of particular significance for this discussion are those in which the factual issue in dispute essentially comes down to credibility as to the *actus reus*. These cases can and should be distinguished from cases in which the factual issue in dispute concerns the identity of the perpetrator. The analysis in identity cases understandably focuses almost exclusively on the similarity in *modus operandi*, and evidence of signature type behavior.

³⁷ See Lee Stuesser, "Similar Fact Evidence in Sexual Offence Cases" (1996) 39 C.L.Q. 160; Stewart, "Rationalizing Similar Facts Evidence", *supra* note 28.

³⁸ [1990] SCJ No. 31.

of sexual misconduct on the part of the accused. The accused was charged with sexual offences against his biological (or in the Court's words "natural"³⁹) daughter, who was aged 11 to 13 at the time of the assaults. His daughter alleged that the sexual acts had occurred "two or three times a week, progressing from fondling to fellatio, cunnilingus, sexual intercourse and buggery".⁴⁰ She testified that on occasion they had also urinated on each other. The Crown led similar fact evidence that, several years earlier, the accused had had sexual relations with the fifteen-year old daughter of his common law wife – a girl with whom he had "enjoyed a father-daughter relationship".⁴¹ His stepdaughter testified that within a year of living with the accused he had made sexual advances towards her – starting with fondling and culminating in five or six acts of sexual intercourse. The Crown introduced the similar fact evidence in order to support the complainant's testimony that the acts occurred. In other words, it was led to bolster the complainant's credibility.⁴²

There are two interrelated points arising from Justice McLachlin's decision in *B.(C.R.)* that should be noted. The first is with respect to her general comments regarding the use of propensity based reasoning. The second concerns her application of the law of similar fact evidence, as she states it in *B.(C.R.)*, to the facts of *B.(C.R.)* itself.

³⁹ *Ibid.* at para. 33. She uses the phrase throughout her decision. She also uses the term natural father as in: "For a time...he acted as one would expect of a natural father".

⁴⁰ *Ibid.* at para. 33.

⁴¹ *Ibid.* at para. 2.

⁴² The trial judge confused the issue somewhat by stating that the admissibility of the step-daughter's evidence turned on "whether the similarities are sufficient to show that the accused had common characteristics in the methods he used in the sexual acts...and that it is likely that they are one and the same man" (at para. 35 of the Supreme Court's decision, *ibid.*). His reference to identity as the fact at issue helped form one of the grounds of appeal. Justice McLachlin was satisfied that despite this reference to identity the trial judge's reasons demonstrate that he considered the central issue of the case to be whether to believe the complainant's allegations.

It was actually *B.(C.R.)*, not *Handy*, in which the Court first acknowledged that in fact the probative value of similar fact evidence does turn on propensity based reasoning.

Justice McLachlin stated that:

[i]t is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition [E]vidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.⁴³

Justice McLachlin went on to note in *B.(C.R.)* that “in cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility.”⁴⁴ She found that the probative value of the stepdaughter’s evidence stemmed from its demonstration of the accused’s propensity to engage in the sort of sexual misconduct with which he was charged. She found that the main similarity in each case was that “the accused shortly after establishing a father-daughter relationship with the victim is alleged to have engaged her in a sexual relationship”.⁴⁵ She also noted dissimilarities the trial judge had observed relating to the place and manner in which the acts occurred. She identified the differences as follows:

[t]he age of the girls was different; one was sexually mature, the other only a child when the acts began. One girl was a blood relation, the other was not. While many of the acts were the same, there is no suggestion of urination with M.H.S. [the step daughter] And there is a considerable lapse of time between the two alleged relationships.⁴⁶ (text added)

⁴³ *Supra* note 38 at para. 24. Justice Binnie noted this in his decision in *Handy*, *supra* note 21.

⁴⁴ *Ibid.* at para. 41.

⁴⁵ *Ibid.* at para. 42

⁴⁶ *Ibid.* at para. 42.

In light of these differences, to what propensity was Justice McLachlin referring? Given that one victim was a child and the other a post-pubescent teenager, it was not a pedophilic propensity *per se*. Nor was it a propensity to engage in the ‘unnatural’ act of incestuous sexual contact, nor a propensity for the ‘unnatural’ practice of incorporating bodily wastes into one’s sexual repertoire. She was referring to a propensity to take sexual advantage of a father-daughter relationship. The Court’s analysis was directly tied to what it determined to be the similarity in nature of the relationship between each of the two victims and the accused. As discussed below, this particular factor - how the accused relates to the complainants – appears to be the single most significant factor in the great majority of cases involving the admission of similar fact evidence in trials concerning the alleged sexual assault of a child.

Almost exactly one year after *B.(C.R.)* the Supreme Court of Canada, with Justice McLachlin (as she then was) again writing for the majority, released *R. v. C.(M.H.)*.⁴⁷ In *C.(M.H.)* the accused was charged with indecent assault against his ex-wife and sexual assault against the daughter of a subsequent common law wife. The issue regarding similar fact evidence related to the charge of indecent assault against his ex-wife. She alleged that the accused forced her to have sexual intercourse with a dog. The Crown led evidence from the accused’s subsequent common law wife that he had: (1) requested she submit to sexual intercourse with a dog; (2) made a remark suggesting that she should have sexual intercourse with a bull; and (3) requested that she engage in sexual conduct involving a cucumber and body oils and foams.⁴⁸ Like in *B.(C.R.)*, the accused denied

⁴⁷ [1991] 1 SCR 763.

⁴⁸ *Ibid.* at para. 20.

that he had committed the behavior he was accused of and therefore the fact in issue concerned whether the sexual acts had occurred.⁴⁹

As noted above, a year earlier in *B.(C.R.)* Justice McLachlin determined that “[i]t is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition”.⁵⁰ She also stated that “[c]atchwords have gone the same way as categories. Just as English courts have expressed doubts about the necessity of showing “striking similarity” ...so in *Robertson Wilson J* rejected the validity of this phrase as a legal test”.⁵¹ However, in *C.(M.H.)* she held that:

Evidence as to disposition, which shows only that the accused is the type of person likely to have committed the offence in question, is generally inadmissible. Such evidence is likely to have a severe prejudicial effect by inducing the jury to think of the accused as a “bad” person. At the same time it possesses little relevance to the real issue, namely, whether the accused committed the particular offence with which he stands charged. There will be occasions, however, where the similar fact evidence will go to more than disposition, and will be considered to have real probative value. That probative value arises from the fact that the acts compared are *so unusual and strikingly similar* that their similarities cannot be attributed to coincidence. Only where the probative force clearly outweighs the prejudice, or the danger that the jury may convict for non-logical reasons, should such evidence be received.⁵² (emphasis added)

The Court in *C.(M.H.)* found that the evidence regarding the cucumber and body foam had no probative value and should not have been admitted. Justice McLachlin distinguished the ‘cucumber and oil’ requests from those involving requests to engage in sex with dogs and bulls. She determined that the cucumber and oil requests had no probative value because, at best, they demonstrated the appellant’s “particular sexual

⁴⁹ Like in *B.(C.R.)* although for different reasons, the credibility of the complainant was perhaps not as solid as the Crown would have liked. This is typical in cases involving child complainants. In *C.(M.H.)* the credibility issue stemmed not from the age of the victim – she was an adult – but from her confusion regarding the dates on which the acts allegedly occurred.

⁵⁰ *B.(C.R.)*, *supra* note 38 at para. 24.

⁵¹ *Ibid.* at para. 27.

⁵² *C.(M.H.)*, *supra* note 47 at para. 22.

tastes or fantasies”.⁵³ Invoking with respect to the allegations concerning bestiality, the concept of, and a distinction between, natural and unnatural sexual acts she stated that “it can be argued that the suggestion that one’s spouse should participate in such unnatural acts is so remarkable that the separate incidents might be viewed as highly similar, giving the evidence sufficient probative force to take it out of the category of mere evidence of disposition”.⁵⁴

Categorizing sexual acts as ‘natural’ and ‘unnatural’, and determining admissibility based on this distinction, clearly reveals essentialist assumptions about sexuality. To categorize in this way also has normative implications regarding the potential for judicial bias against those whose sexual practices deviate from whatever the sexual norms may be in a given community at a given time. While a distinction between usual and highly unusual sexual acts may often be relevant in a determination regarding the admissibility of similar fact evidence it is not necessary to make this distinction by identifying which sexual practices are natural and which are unnatural. Moreover, courts should be very cautious when employing an analytical approach based on their own assumptions about what sexual practices are usual. While it may be obvious and therefore highly cogent in regards to sexual practices at the far end of the usual-unusual spectrum – such as perhaps bestiality? - it is likely more often the case that situating sexual practice “X” on the usual-unusual spectrum requires a fairly subjective and non-quantifiable assumption on the part of the judge.

While she did determine that the evidence regarding bestiality could be admissible because it was unnatural, Justice McLachlin also referenced the usual/unusual distinction

⁵³ *C.(M.H.)*, *supra* note 47 at para. 24.

⁵⁴ *Ibid.* at para. 25.

in *C.(M.H.)*. As such, it is impossible to say whether she deemed the evidence regarding bestiality potentially admissible solely because she considered such acts to be unnatural or because in addition she also considered them unusual. Certainly the decision suggests that the distinction between natural and unnatural figured prominently in her analysis. She did more than simply suggest that the acts were unusual. She determined that it would be highly unusual for a spouse to ask their partner to perform acts as unnatural as the ones the appellant was accused of suggesting.

There are two additional noteworthy analytical points regarding the distinctions between *B.(C.R.)* and *C.(M.H.)*. The first is the significant difference in terms of what factors in each seem to determine the similarity or lack of similarity between the allegations and the similar fact evidence. The second point concerns the seemingly contradictory statements Justice McLachlin made regarding the use of propensity evidence to demonstrate disposition rather than to establish some other fact in issue.

In *B.(C.R.)* Justice McLachlin determined that in certain circumstances evidence may be admitted to demonstrate propensity and she admitted the similar fact evidence despite distinctions regarding factors such as age of the victims, type of sexual acts, and presence or absence of blood ties. A year later, she stated that similar fact evidence will typically only be admitted where it goes to something more than disposition and she employed the very ‘catchwords’ she had rejected in *B.(C.R.)*. The similar fact evidence was admitted in *B.(C.R.)* despite not sharing what Justice McLachlin would surely characterize as the unusual character of the sexual acts alleged by the complainant (incestuous pedophilic relations and acts of urinating on one another). The focus in *B.(C.R.)* was on similarity in relationship dynamics. In *C.(M.H.)* the ‘peg on which to

hang' the similar fact evidence offered by Justice McLachlin was the unusualness and unnaturalness of the alleged sexual misconduct. She found that upon re-trial the evidence regarding bestiality (but not that regarding cucumbers and oil) could be admissible on the basis that it was "strikingly similar"⁵⁵ to the allegations because of the unusualness of suggesting one's spouse engage in such unnatural acts. She did not discuss relationship dynamics - the accused's propensity to relate in a specific manner to his spouses.

The next similar fact evidence case released by the Court was *R. v. B.(F.F.)*.⁵⁶ In *B.(F.F.)* the accused, B., was charged with numerous sexual offences against his niece P.L. The accused was the brother of the complainant's mother; he lived with her family and was responsible for the care of her children for a number of years. P.L. alleged that the sexual abuse, including the first instance of sexual intercourse, began when she was aged 10. The abuse continued for a number of years, stopping only when one of P.L.'s brothers caught the accused sexually assaulting P.L. The accused denied all of the allegations. At trial, two of P.L.'s siblings gave evidence of repeated and brutal, although not sexual, attacks against them by the accused. Justice Iacobucci's ruling regarding the siblings' similar fact evidence received the unanimous support of the Court. He held that it was admissible to show the accused's pattern of domination over P.A.L. and her siblings - his "system of violent control" - and thus it explained why it took P.L. so long to come forward⁵⁷ and why the abuse was allowed to continue for so many years.

⁵⁵ *C(M.H.) supra* note 47 at para. 22.

⁵⁶ [1993] 1 SCR 697.

⁵⁷ It is interesting to contrast Justice Iacobucci's insight on this point with Justice Binnie's puzzling suggestion in *Handy, supra* note 21 at para. 23, that the fact that the accused's ex-wife had not come forward to reveal his abusive conduct until *after* he was incarcerated threatened her credibility. Isn't there a very obvious explanation as to why a woman allegedly raped and beaten for years by her husband would wait until he was safely behind bars before coming forward to report his abuse? At the very least wouldn't this proposition be enough to neutralize the adverse inference regarding her credibility to be drawn by her delay in reporting? See *R. v. D.D.* [2000] 2 S.C.R. 275 at HN: "a failure to make a timely complaint must

It has been suggested that Justice Iacobucci's reasoning, like Justice McLachlin's reasoning in *C.(M.H.)* was inconsistent with *B.(C.R.)*. That is to say, critics have argued that *B.(F.F.)* was also a retreat from *B.(C.R.)*.⁵⁸ On its face this observation seems accurate. Justice Iacobucci did refer to the old categorical approach, suggesting the evidence could be admitted to rebut the accused's defence of innocent association. He did cite prior Supreme Court case law stating that similar fact evidence was not to be admitted to show disposition.⁵⁹ However, a closer examination of his reasoning in *B.(F.F.)*- particularly when analyzed in relation to *B.(C.R.)* and *C.(M.H.)*- suggests a more nuanced conclusion. Unlike the reasoning in *C.(M.H.)*, Justice Iacobucci did not compare the similarity of the acts against the different victims. He did not look for striking similarity between the acts. Indeed, the similar fact evidence did not even relate to sexual behavior. The evidence was admitted to show a pattern of relating – to demonstrate the accused's system of violent control. In *B.(F.F.)* similar fact evidence of other misconduct on the part of the accused was admitted not because it shared with the allegations an unusualness, an unnaturalness or a striking similarity. It was admitted in order to establish the accused's propensity to develop a certain type of relationship with the children in his care: a relationship of domination, power imbalance and violence.⁶⁰

Despite Justice Iacobucci's reference to the categorical approach, despite the fact that he linked the similar fact evidence to an explanation regarding the complainant's

not be the subject of an adverse inference based upon rejected stereotypical assumptions of how persons react to sexual abuse.”

⁵⁸ R.J. Delisle, Annotation, *R. v. B.(F.F.)* (1993), 18 C.R. (4th) 261; Hanson, *supra* note 13.

⁵⁹ *B.(F.F.)*, *supra* note 58 at para. 23.

⁶⁰ After *B.(F.F.)* the next similar fact evidence case from the Supreme Court of Canada was their 1998 decision in *R. v. Arp*, *supra* note 22. In *Arp* the similar fact evidence that the Crown sought to adduce was offered to establish identity. In other words, the factual issue in dispute was identity not credibility. In ‘identity cases’ similarity is going to be the *sine qua non* of admissibility. *Arp* is a difficult case to reconcile given the fact that it is an identification case, yet the Court allowed similar fact evidence for two murders that did not actually share a high degree of similarity.

delayed disclosure, the inferential reasoning underpinning *B.(F.F.)* is much more akin to *B.(C.R.)* than to *C.(M.H.)*. As Professor Delisle notes:

[w]hat premise, unarticulated in *B.(F.F.)* makes this similar fact evidence, the physical mistreatment of L.L., relevant to rebut the defence of innocent association with P.L.? What generalization concerning human conduct makes this evidence meaningful in that regard? The only generalization that comes to my mind is: People who would physically abuse a male child in their care are the sort of person who would sexually abuse a female child in their care since both types of conduct are examples of the exercise of power.⁶¹

It would be possible to characterize the inconsistent reasoning in these cases as evidence that pre-*Handy* the Court was all over the map in terms of its doctrinal approach to similar fact evidence. I want to suggest an alternative interpretation - based on certain trends evident in these cases and which are more pronounced in the post-*Handy* lower court cases discussed below. The alternative interpretation is as follows: there is actually a consistency in how the Court approached similar fact evidence cases in the early 1990s; the seeming inconsistency stems from a distinction in how the Court treats similar fact evidence in adult complainant cases and child complainant cases – a distinction that stems from a difference in how the ‘pedophile’ and the ‘rapist’ are conceptualized by the Court.

ii) The Significance Of Similar Fact Evidence In Lower Court Cases

Wigmore defines propensity as a trait or group of traits, or the sum of her or his traits - the person’s actual moral or psychological disposition.⁶² Regarding issues of sexuality, the law’s treatment of and approach to ‘disposition’ is illuminating. Do courts treat

⁶¹Delisle, *supra* note 58; see also Stewart, *supra* note 28 at 119 where he states that “...while the evidence does indeed tend to demonstrate B.’s pattern of domination over the complainant and her siblings, which in turn explains how the abuse could occur with so many witnesses, and why the complainant waited so long to come forward with her story, it does so by demonstrating B.’s disposition to behave violently.”

⁶²Sopinka, *The Law of Evidence in Canada*, *supra* note 19 at 524.

similar fact evidence in sexual assault cases as suggesting a propensity to *act* a certain way or to *be* a certain way?

As Justice Binnie stated in *Handy* “[w]hen similar facts are attributed to an accused acting “in character” it is the inferred continuity of character and nothing else that displaces what might otherwise be explained innocently as mere coincidence”.⁶³ All similar fact evidence cases involve a double inference; the probative value of similar fact evidence relies on the inference that the accused’s propensity for X makes it extremely unlikely that it is merely a coincidence that both complainants are lying or mistaken in their allegations of X(ish).⁶⁴ The first inference is that the similar fact evidence establishes a specific propensity. The second inference is that this propensity makes it highly unlikely that it is a mere coincidence that both or all of the complainants are making similar allegations.⁶⁵ (This is why evidence of collusion requires that similar fact

⁶³ *Supra* note 21 at para. 63.

⁶⁴ The ‘ish’ is meant to suggest that while they needn’t be identical, there must be a high degree of similarity between the propensity established by the similar fact evidence and the allegations at issue.

⁶⁵ The factual issue in dispute for which similar fact evidence is offered is an important factor in determining its admissibility. Indeed, the analysis developed by the Court in *Handy* emphasized the need to identify the particular factual issue in dispute with some degree of specificity. Justice Binnie held, at para. 116, that “identification of credibility as the “issue in question” may, unless circumscribed, risk the admission of evidence of nothing more than general disposition (“bad personhood”)”. Instead he suggested, at para. 120, the issue in dispute was “the consent component of the *actus reus* and in relation to that issue the respondent’s alleged propensity to refuse to take no for an answer”. With respect, in sexual assault cases where the accused denies that the acts occurred or denies that the acts were non-consensual, identifying the issue as ‘proving an element of the *actus reus*’ rather than ‘bolstering the credibility of the complainant’ may be more about form than substance. A preponderance of sexual assault trials turn on a determination between ‘he said-she said’ or ‘he said-he said’. Whether the ‘lack of consent component of the *actus reus* is proven beyond a reasonable doubt, or whether the ‘sexual touching component of the *actus reus* is proven beyond a reasonable doubt often turns on the credibility of the complainant and the accused. So really all that should be needed is to identify the issue as ‘bolstering the credibility of the complainant’ with respect to her assertion of non-consent or in the case of a child complainant, her assertion that the sexual act occurred. This point is evident in the way that lower courts, post-*Handy*, mechanically identify credibility as the issue, then cite *Handy* for the proposition that the issue of credibility is too general and then state that the issue more specifically is the *actus reus* of the offence. (See for example *R. v. Stea*, [2007] O.J. No. 2220; *R. v. R.T.*, [2004] B.C.J. No. 2563; *R. v. Finelli*, [2008] O.J. No. 2242; *R. v. M.B.* [2008] O.J. No. 2358; *R. v. Schug*, [2007] O.J. No. 4318; *R. v. R.B.*, [2003] O.J. No. 4589.)

evidence be excluded. It destroys the second inference. If there is evidence of collusion there is little if any probative value left to the similar fact evidence.)

To avoid convicting someone for being a ‘bad person’ rather than for doing the ‘bad act’ with which they have been charged, it is critical that the similar fact evidence raise *both* inferences. This means sufficient focus in the court’s reasoning not only on how the evidence demonstrates a specific propensity but also on the likelihood of coincidence that both complainants are lying or mistaken given this propensity.

This takes on a particular flavor in the context of sexual assault cases. Propensity based reasoning may differ depending on whether one understands sexuality as an innate and pre-social disposition or a contextually dependent social variable. The distinction might be thought of as a distinction between reasoning based on the propensity to *act* a certain way and reasoning based on the propensity to *be* a certain way (which suggests one acted a certain way).

The lower court decisions applying the *Handy* ruling reveal that the focus of propensity based reasoning seems to differ somewhat in some cases involving child complainants from that found in cases involving adult complainants. In cases involving child complainants the focus often tends to be more on the disposition of the accused (the first inference). The reasoning is focused more on whether the similar fact evidence demonstrates a particular propensity. In cases involving adult complainants the courts tend to focus more on the likelihood of coincidence that both complainants are making similar allegations (the second inference). The focus is centered more on the similarities between the allegations. It is not that the reasoning in similar fact evidence cases involving child complainants is unrelated to the unlikelihood of coincidence and it is not

that the adult complainant cases lack reasoning through propensity. The distinction between the two types of cases is actually much like the distinction between cases in which the fact in issue is identity and cases in which the fact in issue is an element of the *actus reus*. As Justice Binnie noted in *Handy*, in comparing cases in which *actus reus* rather than identification is the issue, “the point is not that the degree of similarity in such a case must be *higher* or *lower* than in an identification case. The point is that the issue is *different* and the drivers of cogency in relation to the desired inferences will therefore not be the same”.⁶⁶ Similarly, the post *Handy* cases discussed here seem to suggest that the drivers of cogency in adult complainant cases are not always the same as in child complainant cases.

In many cases involving child complainants the courts tend to use a form of propensity based reasoning which relies more on assumptions about an offender’s ‘true sexual nature’ – there is more interest in an accused’s sexual arousal patterns and proclivities. That said, courts in child complainant cases also focus heavily on the accused’s method or manner of relating to children. Indeed, unlike in cases involving adult complainants, in child complainant cases the single most important factor very often appears to be the nature of the relationship between the accused and the complainants. In this way the analysis in many child complainant cases reveals an unusual integration of both essentialist and constructivist reasoning. Promisingly, courts identify similarity between certain important contextual factors (not even necessarily related to sexual conduct) such as relationship dynamics, patterns of control, and positions of power within a family, as the drivers of cogency. Less promisingly, in many lower court decisions this analysis of the accused’s relationship propensity is then integrated back into an

⁶⁶ *Handy*, *supra* note 21 at para. 78.

essentialist approach which focuses on an offender's 'true nature' or innate disposition. This approach leads to at least two problems with these lower court decisions.

The first is its potential to result in the type of unjust reasoning that cases from *Makin* to *Handy* have attempted to avoid: Mr. X is a pedophile therefore he did what this child says he did. The concern is that once the similar fact evidence establishes that the accused has a particular sexual disposition, moral prejudice or reasoning prejudice kicks in and the accused is convicted based on who he is rather than what he has done. Similar fact evidence should only be admitted where its ability to establish the second inference – 'given his propensity towards interacting/relating in this way with children it is highly unlikely that these *similar* allegations are a mere *coincidence*' - is as heavily scrutinized as is its ability to establish the first inference – all of this evidence shows he has a propensity to groom, manipulate and interact sexually with children with whom he has a particular type of relationship. Essentialist conceptions of those who sexually offend against children may be more likely to overly emphasize the first inference (or sometimes even to misstate it as 'a sexual orientation towards children' rather than 'a propensity to groom, manipulate and interact sexually with children').

The second problem with this reasoning is discussed at greater length below in the section addressing child pornography. Briefly and simply put, the problem is that this reasoning further promotes a legal discourse that conceptualizes those who sexually assault children as a discrete minority of sexual deviants with an innate sexual orientation towards children. This is undesirable because an essentialist approach to child sexual abuse limits recognition of the social factors that produce this problem. A more constructivist conception of sexual offenders would encourage a legal discourse that

acknowledges the social conditions and context in which child sexual abuse most frequently arises. A legal discourse that recognizes this will help to promote legal reasoning and legal approaches oriented more towards alleviating these conditions rather than only attempting to identify and contain the ‘disordered other’.⁶⁷

Unlike in child complainant cases, in cases involving adult complainants courts seem less inclined to adopt propensity based reasoning that relies on essentialist assumptions about an accused’s ‘true sexual nature’. Justice Binnie notes in *Handy* that “not only can people change their ways but they are not robotic”.⁶⁸ It seems much less likely that one would read such an assertion in reference to an individual accused of having sex with multiple children. In adult complainant cases courts are less likely to look for, make references suggesting, or rely on assumptions about, an offender’s innate sexual preference and more likely to focus their propensity based reasoning on the likelihood of coincidence.

Adult complainant cases do not reflect the same sorts of assumptions about an offender’s true nature. Instead, essentialist assumptions are revealed by the courts’ greater emphasis on the second inference – the likelihood of coincidence. More focus on the second inference typically means greater weight is given to the degree of similarity between allegations. For a judiciary tending to conceptualize sexuality from an essentialist perspective this means more focus on and comparison of the specific sexual acts at issue and less focus on the relationship dynamics, the interactional aspect of the allegations. It may also mean resort to reasoning that assesses probative value based on

⁶⁷ A change in the way that courts conceptualize sexual offenders in the context of applications to admit similar fact evidence is obviously not enough to radically revamp the way that the law, legislators, courts and policy makers approach the problem of child sexual abuse. It is however a start. Moreover, legal discourse is a good and sensible place to start.

⁶⁸ *Supra* note 21 at para. 35.

characterizing sexual acts as natural or unnatural. For example, in *C.(M.H.)* discussed above, the Court drew distinctions between natural and unnatural sexual acts and relied upon these distinctions analytically.⁶⁹

In adult complainant cases courts fail to do what they achieve in the child complainant cases; they fail to properly consider the cogency of similar fact evidence that demonstrates how the accused relates to women with whom the accused is sexually intimate. In other words, they focus too much on the specifics of the sexual act alleged and not enough on the relationship dynamics involved. As will be discussed below, in child complainant cases courts appear able and willing to examine similarity in relationship *dynamics*. In adult complainant cases, the courts do not seem to consider the accused's relationships – or manner of relating – in the same way.

An examination of the lower court decisions on similar fact evidence released since *Handy* brings into better focus the different emphasis in cases involving child complainants as compared to those involving adult complainants.⁷⁰ A review of these cases reveals certain trends: a pattern of relying on degree of similarity in *modus operandi* with an emphasis on likelihood of coincidence type reasoning in adult complainant cases where similar fact evidence is adduced to help prove an element of the *actus reus*; a pattern in child complainant cases of emphasizing the presence of a propensity to sexually abuse children in the context of a particular type of relationship; an emphasis on the accused's relationship dynamics in child complainant cases that is not as evident in adult

⁶⁹ *Supra* note 42 at para. 25.

⁷⁰ The examination of lower court decisions involved a review of 242 cases. All of the cases examined were released after *Handy*.

cases.⁷¹ The paragraphs to follow will demonstrate how similar fact evidence is treated differently depending on the age of the complainant. The cases discussed reveal essentialist assumptions in both adult and child complainant cases as well as how these essentialist assumptions are different in adult and child complainant cases. In child complainant cases the essentialism is evidenced by the courts' focus on an accused's 'true nature'. In adult complainant cases the essentialism is revealed by the heavy emphasis placed on similarity between the specific sexual acts alleged. The cases also show that, perhaps oddly enough, in child complainant cases there is also a constructivist aspect of the reasoning focused on context, particularly on relationship dynamics, that is not evident in the adult complainant cases.

iii) A Propensity To 'Relate'

In many lower court child complainant cases it would appear that the factor that is most significant is the nature of the accused's relationship to the alleged victims. This seems to matter more than similarity in the types of sexual acts engaged in, gender of the

⁷¹ There is one specific context in which the reasoning in adult complainant cases, in lower courts at least, closely resembles the reasoning in child complainant cases. That is where the relationship between the accused and the complainants is an institutionally recognized relationship of care – such as between a doctor and patient. See for example *R v Stewart*, [2004] B.C.J. No. 195 where the British Columbia Court of Appeal affirmed the trial judge's decision to admit similar fact evidence against a doctor charged with sexually assaulting nine adult female patients. The focus of the decision to admit the similar fact evidence was on the way the defendant sexualized the doctor–patient relationship. The sexual acts alleged, the pattern of grooming, and the type of relationship he had with the various women differed. The court dismissed these differences on the basis that what was more significant was the similar way in which he abused his relationship of trust with these women. See *R. v. Gavrilko* [2007] B.C.J. 2154 where the British Columbia Supreme Court admitted similar fact evidence on the basis that the “underlying unity of the evidence was sexual touching in a dentist and patient relationship” (at para. 31). See *G. (J.R.I.) v. Tyhurst* [2003] 6 W.W.R. 402 where similar fact evidence against a psychiatrist being sued for breach of fiduciary duty arising from his sexual conduct with the plaintiff was admitted. The court conceded that there were numerous points of dissimilarity in the evidence of the three women but admitted it because it was, at para. 24, “strikingly similar, distinct and unique on the central question of whether a master/slave relationship played a part in their therapy, the demeaning and submissive nature of that relationship and the fact of whipping by the defendant in the course of therapy.” The courts do not focus on relationship dynamics in adult complainant cases that do not involve professional relationships such as these. So in adult cases where the power imbalance is assumed (due to the nature of the relationship), relationship dynamics play a similar analytical role to the role they play in child complainant cases.

victims and any other element of the accused's *modus operandi*. Promisingly, in these cases context is the single most important analytical factor.

For example, in *R. v. R.B.* the Court of Appeal for Ontario found that the required level of connectedness between four different complainants had been met, despite the fact that two of the cases involved fondling and masturbation while the other two escalated to anal intercourse, on the basis that the relationship of trust was the same in each case.⁷² R.B. had acted as a foster parent for each of the four adolescent boys. He denied engaging in any sexual interactions with any of the complainants. The court found that despite the significant discrepancies in terms of the offending behaviors, the evidence in each case could be used in the others to demonstrate “a specific propensity to engage in sexual misconduct with boys in his care who came to him in a vulnerable condition”.⁷³ The court further found that despite the lack of similarity in sexual acts a sufficient degree of connectedness existed. The similarities highlighted included the fact that “the appellant first engaged in sexually abusive conduct when the complainant was especially vulnerable” because of injury, illness or inebriation and that “in each case the complainant came to view the appellant as a father figure”.⁷⁴

In *R. v. Finelli* the Crown was permitted to lead similar fact evidence of prior sexual assaults against young girls in order to “demonstrate a specific propensity on the part of Mr. Finelli to exploit his status as a family friend and overnight guest in order to sexually assault prepubescent girls in their own homes by fondling” [first inference].⁷⁵ The court went on to note that “while propensity underlies the probative value of true

⁷² [2005] O.J. No. 3575.

⁷³ *Ibid.* at para. 11.

⁷⁴ *R v R.B.*, *supra* note 72 at para. 15.

⁷⁵ [2008] O.J. No. 2242.

similar fact evidence, the breaking point between general propensity and specific propensity is most easily understood as depending upon the objective improbability of coincidence”.⁷⁶ In other words, “is it against all probability that, in light of what the Crown can show that Mr. Finelli did to the three similar fact witnesses on other occasions, it is a mere coincidence that the complainant is not telling the truth when she describes what she alleges Mr. Finelli did to her on this occasion?” [second inference].⁷⁷

The same observation regarding the significant weight given to relationship dynamics in child complainant cases can be observed in the Supreme Court of Canada’s decision in *R. v. Shearing* (released the same year as *Handy*).⁷⁸ In *Shearing*, the accused was a cult leader accused of sexually assaulting a number of complainants - all but two of which were members of his cult. The other two complainants, sisters, lived with him; their mother was a member of the cult and his housekeeper. The Court found that he had a situation specific propensity to groom adolescent girls for sexual gratification by exploiting the cult’s beliefs and that he proceeded that way with each complainant. The evidence of each of the believer complainants was also admitted with respect to the non-believing sisters because the abuse of power and *modus operandi* were similar and because, with them as well, he exploited his status as leader of the cult. The cogency of the similar fact evidence stemmed from his “gross abuse of power”.⁷⁹

In cases like these, courts rely on, as the cogent factor for establishing the objective improbability of coincidence (and therefore demonstrating the probative value of the similar fact evidence), a specific propensity on the part of the accused to sexually

⁷⁶ *Ibid.* at para. 29.

⁷⁷ *Ibid.*

⁷⁸ [2002] 3 SCR 33.

⁷⁹ *Shearing*, *supra* note 78 at para. 54.

exploit a specific type of relationship with children.⁸⁰ This reasoning seems sound. The courts in these cases draw the first inference regarding his propensity and then base the second inference on an assessment of the degree of similarity in how the accused interacts with the different complainants – there is a recognition that an accused’s propensity to relate in a particular manner is a critical aspect of his *modus operandi*. There is nothing in these cases to suggest that the courts folded this evidence of propensity back into assumptions about the accused’s essence as a pedophile, pervert or sexual predator.

In child complainant cases with this type of reasoning but where the relationship between the accused and the complainants differ, the similar fact evidence is less likely to be admitted, even where the sexual acts were quite similar. For example, in *R. v. J.M.H.* the Ontario Superior Court of Justice refused to admit as similar fact evidence the accused’s conviction of sexual assault against his nine year old step-daughter.⁸¹ J.M.H. was charged with sexually assaulting a ten year-old girl whom he had invited into his apartment after speaking with her on the street. The sexual acts alleged were similar to those that he had been convicted of doing against his stepdaughter and other aspects of the accused’s *modus operandi* were similar. However, the court found that the similar fact evidence was not sufficiently similar stating that “[t]he accused, in the similar fact evidence, was in a relationship of trust...a stepdaughter he had known for years in a home

⁸⁰ For further examples of this see *R. v. Escobar*, [2008] O.J. No. 264 where similar fact evidence was admitted to show that the accused has a “situation specific propensity to sexually abuse young children with whom he is in contact as a result of his relationship with a particular person” (at para. 55). See *R. v. E.S.*, [2006] O.J. No. 1750 where similar fact evidence involving the accused’s seven daughters and one sister-in-law was admitted. See also *R. v. R.C.* [2003] O.J. No. 3919; *R. v. K.M.*, [2008] O.J. No. 198; *R. v. Kennedy*, [2006] O.J. No. 4976.

⁸¹ [2003] O.J. No. 5511.

they shared. In the case at bar, it was a random encounter (sic) neither of them know the other.”⁸²

In *R. v. Blake* the Ontario Court of Appeal set aside the appellant’s conviction and ordered a new trial on the basis that similar fact evidence regarding two prior convictions for sexual assault against children was wrongly admitted by the trial judge.⁸³ While the sexual acts alleged in all three cases were similar there was no similarity in terms of his relationship to the complainants. The Ontario Court of Appeal found that the prior assaults “lacked the degree of connection necessary to make the discreditable conduct evidence admissible”.⁸⁴ They held that “the identified similarities in the appellant’s past conduct amounts to little more than that he has engaged in genital touching of children aged ten or under in the past, in circumstances involving privacy, and that following the sexual abuse he may apologize to the child”.⁸⁵

Again, in these cases the reasoning seems sound and does not resort to essentialist conceptions that risk overemphasizing the first inference and underemphasizing the second inference. Indeed the focus on manner of relating as a key aspect of the accused’s *modus operandi* could be characterized as taking a constructivist approach (a recognition that it is the interactions rather than the acts that is most significant in these cases). However some lower court decisions incorporate this analysis of the accused’s relational propensity into an overall approach that reveals assumptions about the accused’s innate sexual disposition rather than relying on degree of similarity such that the chance of coincidence is highly unlikely.

⁸² *Supra* note 81 at para. 41.

⁸³ (2005), 68 O.R. (3d) 75.

⁸⁴ *Ibid.* at para. 54.

⁸⁵ *Ibid.* at para. 65.

iv) Folding Propensity To Relate Into Propensity To ‘Be’

An analytical approach that relies on underpinning assumptions that essentialize those who sexually offend against children can result in reasoning that places too much emphasis on propensity (the first inference) and not enough on coincidence (the second inference).

In *R. v. R.W.D.* the accused was charged with sexual assault and sexual interference against his two daughters.⁸⁶ One of the daughters was pre-pubescent at the time of the assaults; the other daughter had reached puberty when she was assaulted. The defence moved to have the counts severed; this motion was denied. Justice Whitten of the Ontario Superior Court of Justice found that the allegations of each would be admissible against the other under the similar fact rule and that given this it would not be in the interests of justice to have two trials. The sexual offences against his younger daughter were alleged to have occurred between the ages of eight and ten. After the sexual abuse against her stopped, (because he was forced to leave the house) he began sexually assaulting her older half-sister. These offences were alleged to have occurred when she was fourteen.

With A.P. he was accused of starting with innocuous touching and eventually graduating to fondling of her breasts and vagina. With S.W. he started with genital fondling and progressed to vaginal intercourse. According to the court, the factor supporting the probative value of the similar fact evidence was his sexual disposition towards his daughters.

This evidence if accepted as such by the jury, may demonstrate a context in which the assaultive behavior took place and or a sexual attraction or proclivity

⁸⁶ [2004] O.J. No. 3091.

that Mr. R.W.D. has towards his daughters. Both phenomena, may be of assistance in the evaluation of the veracity of the assertions of A.P. and S.W.⁸⁷

The cogent factor for Justice Whitten was that the accused's behavior displayed a certain sexual disposition. "That disposition would be described as an active interest in touching his prepubescent daughter in a sexual manner. In other words he has a sexual interest in his young daughter." Justice Whitten found that "this overall interest is a distinct deviation from the norm of a father-daughter relationship".⁸⁸ He went on to state that the accused's manner of relating to these girls was a manifestation of this sexual interest. Only then did he compare whether the manifestation of this sexual interest was similar in both cases. By reasoning in this manner his analysis was driven almost in whole by his finding regarding the accused's propensity. Compare his reasoning with the court's reasoning in *R. v. R.B.* In *R. v. R.B.* the court identifies an accused's propensity to act a certain way. In *R. v. R.W.D.* the court identifies an accused's propensity to be a certain way that makes him act a certain way. Justice Whitten may very well have arrived at the same outcome without over emphasizing the accused's sexual propensity. The point is that courts should not rely on reasoning that risks convicting an accused for 'being' a pedophile.

In *R. v. M.B.* the Ontario Superior Court of Justice admitted similar fact evidence of prior sexual misconduct despite the fact that the sex of the complainants alleging the similar fact evidence were different than the complainant in the charge being tried.⁸⁹ In *R. v. M.B.* the accused was charged with sexual assault, sexual interference, and sexual exploitation against his nephew, C.B. The Crown sought to introduce evidence regarding

⁸⁷ *R. v. R.W.D.*, *supra* note 86 at para. 78.

⁸⁸ *Ibid.* at para. 75.

⁸⁹ *R. v. M.B.*, [2008] O.J. No. 2521.

his convictions for sexual assault and sexual interference against his two nieces – K.B. and J.B. (C.B.’s younger sisters). The accused denied sexual contact with any of the children. C.B. testified that his uncle forced him to have anal intercourse with him over eighty times starting when he was seven or eight years old. K.B. testified to one act of vaginal intercourse occurring when she was eight or nine. J.B. alleged approximately seven incidents of vaginal intercourse. The children also had another brother, L.B., around the same age who denied being assaulted by their uncle.

Justice Spies admitted the evidence of the nieces on the basis that “the similar fact evidence demonstrates a specific propensity on the part of Mr. B. to engage in sexual contact with young children within the family home and with whom he stands in a close familial relationship, as uncle”.⁹⁰ She found that the fact that the accused was the children’s uncle was a significant connecting factor.⁹¹ “The evidence of the relationship between Mr. B and the family, and in particular C.B., is stronger than I anticipated. Mr. B was clearly a trusted member of the family.”⁹²

Justice Spies’ treatment of the fact that the similar fact evidence concerned sexual assaults against girls yet the complainant in the case before her was a boy, suggests an underpinning assumption about innate sexual orientation and its relevance to the admission of this evidence. She identified the most significant difference in the evidence as the fact that the prior complainants were girls while the current complainant was a boy. She suggested this was particularly significant given that there was no evidence that the fourth child – who was also a boy – was sexually assaulted. In admitting the similar facts she addressed this distinction as follows:

⁹⁰ *Supra* note 89 at para. 105.

⁹¹ *Ibid.* at para. 105.

⁹² *Ibid.*

The major difference that remains, of course, is the fact that C.B. is a boy and the similar fact witnesses are both girls. This is significant not only because of the difference in gender but also because L.B. does not allege that his uncle sexually assaulted him... *Given the young age of the children when the assaults are alleged to have occurred, or in the case of C.B. started, gender may well not have been a factor.* In both the case of the girls and C.B., intercourse is alleged. *As for why L.B. does not allege any sexual impropriety, there could be many reasons. One, of course, may be that because he is a boy, his uncle did not want to engage in sexual acts with him.* However, it is also possible that Mr. B made a call on how complicit he might be or for some other reason chose not to assault L.B. For these reasons, I have decided that the pattern established by the allegations of the two girls is relevant and more significant than the fact that L.B. does not allege that he was sexually assaulted.⁹³

Justice Spies' reasoning is awkward. She seems to struggle with reconciling an assumption that gender of object preference is fixed and immutable (and presumptively heterosexual - despite the fact that the vast majority of the sexual abuse was against the boy) with the fact that M.B.'s victims were both male and female. She offers a number of possible explanations as to why L.B. did not allege sexual abuse and why this need not impact the probative value of the girls' allegations. One in particular - the fact that the children's secondary sexual characteristics had not yet developed - reveals the essentialist assumptions underpinning her reasoning. She determined that, given their age, "gender may not have been a factor". Presumably she is assuming that gender was not a factor because M.B. is sexually oriented towards prepubescent bodies; M.B. is a pedophile. (It also resolves any hetero/homo confusion for her - 'oh, this is why he assaulted the boy - his genitals hadn't developed yet'). M.B. may very well be sexually oriented towards children but the reasoning justifying the admission of prior bad acts should not be based on the fact that M.B. is sexually oriented towards children.

⁹³ *R. v. M.B.*, *supra* note 89 at para. 107, 108 (emphasis added).

In *R. v. F.L.* the accused was charged with sexually assaulting his next-door neighbor's daughter when she was between the ages of ten and fourteen.⁹⁴ The complainant alleged that he had sexually touched her on six different occasions. The allegations included assertions that he had put his hands inside her panties and that he had performed oral sex on her. The Ontario Superior Court of Justice admitted the evidence of the accused's ex-wife. She testified that during the latter part of their marriage he was impotent. She claimed that the only way he could orgasm was to fantasize and masturbate in her presence about having oral sex with young girls in the neighborhood. She testified that he had asked her to arrange for him to see S., a nine year old girl in the neighborhood that he fantasized about, naked. She refused. She testified that he began fantasizing about S. when she was 9 and that he lost interest in her by the time she reached 11 and had grown tall. She testified that he asked her to purchase a pair of young girl's panties. She did this. She said that "he held them in his hand when he fantasized about having sexual relations with young girls and masturbated. It assisted him in achieving sexual arousal".⁹⁵ She testified that she discovered her husband "accessing internet sites which showed girls in school uniform" and that he "called her into the computer room... where he showed her child pornography on the computer".⁹⁶

She said that on one occasion while fantasizing about having sex with young girls he told his wife that he had committed a sexual assault on the complainant. "Specifically he said that when he was in the playroom he lifted her nightgown, touched her breasts and sucked on her titties. The next morning she asked him if what he said about A.F. was

⁹⁴ [2003] O.J. 4040.

⁹⁵ *R. v. F.L.*, *supra* note 94 at para. 20.

⁹⁶ *Ibid.* at para. 21.

really true. He said that she should not even think about it.”⁹⁷ The court admitted this last piece of evidence as a prior statement by the accused against interest. The evidence regarding internet pornography was not admitted. However, the ex-wife’s evidence regarding his sexual fantasies, his masturbatory patterns, his requests to see other girls in the neighborhood naked, his use of girl’s underwear for purposes of arousal, the age range of girls about whom he fantasized and his sexual practices with his wife (describing his sexual fantasies to her about young girls and having her recount them back to him while masturbating) was admitted. The court was careful to note that this evidence was not being admitted with respect to propensity but instead to establish the context and narrative for his ex-wife’s testimony regarding his confession:

If the trier of fact accepts the evidence of D.L. that she and her husband engaged in the sexual practices that she describes, this will support her evidence that F.L. made the confession. If her evidence that she and her husband engaged in these sexual practices is disbelieved, it is unlikely that the confession will be believed.⁹⁸

It is difficult not to suggest that underpinning the court’s decision, particularly given its bizarre reasoning regarding the narrative exception, were essentialist assumptions about ‘pedophiles’ and this ‘pedophile’ specifically. This is particularly the case in light of the court’s decision to include evidence of the age at which the accused’s sexual interest in S. (another child in the neighborhood) allegedly waxed and the age at which it, according to the ex-wife, waned; as well as her evidence regarding his use of girl’s underwear to masturbate. Was the age range of those he fantasized about, or his use of girl’s

⁹⁷ *Ibid.* at para. 22.

⁹⁸ *R. v. F.L.*, *supra* note 94 at para. 43.

underwear to masturbate really relevant to establishing the context of the confession or was it really about establishing that he was a ‘pedophile’?⁹⁹

In *R. v. T.B.* the evidence of each of the step nieces’ allegations against the accused was admitted regarding the other charges because it was highly probative in that the similarities made it unlikely that the complainants were lying or mistaken.¹⁰⁰ The Ontario Court of Appeal found that “the force of similar circumstances in this case refutes coincidence or other innocent explanation. This evidence is sufficiently compelling to safely draw the inference of many sexual assaults on the facts charged.”¹⁰¹ However, they went on, unnecessarily, to say “in short, toward his step-nieces the respondent was a sexual predator”. The concept ‘sexual predator’ has been used in other child complainant cases.¹⁰²

Consider the following two cases where the concept ‘sexual predator’ was at play. While not directly tied to the courts’ similar fact evidence analysis in these cases, their use of the term ‘sexual predator’ and the role in their analysis that the term plays is nonetheless revealing. In *R. v. D.I.* the Crown sought to admit the evidence of each complainant as similar fact evidence for the counts relating to each of the other complainants.¹⁰³ The Crown argued that the evidence was relevant to show among other things “the relationship the accused established with the daughters of his girlfriends” and

⁹⁹ Admitting this evidence to establish narrative and context for the confession is itself problematic. It is a misuse of the narrative exception regarding prior consistent statements. The exception is meant to cover evidence that is part of the narrative in the sense that it “advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice”. *R. v. F.(J.E.)* (1993), 26 C.R. (4th) 220 at para. 237.

¹⁰⁰ [2009] O.J. No. 751.

¹⁰¹ *Ibid.* at para. 38

¹⁰² It has never been used in an adult complainant similar fact evidence case where the issue is *actus reus*. It has been used in a similar fact identity case (*R v Myers*, [2007] O.J. No. 5396). It has also been used in sentencing decisions (*R. v. Pelland* [1997] O.J. No. 1539). However, the implications of its use are not the same in identity and sentencing cases as in cases where the issue is establishing *actus reus*.

¹⁰³ [2008] O.J. No. 1823.

“to show a distinct pattern of conduct by the accused that involves dominance over vulnerable victims”.¹⁰⁴ The defence argued that the “true issue to which the similar fact evidence is directed is that of identification, thus requiring a higher standard to be applied on admissibility, namely that of "striking similarity".¹⁰⁵ The court accepted the defence position that the real reason for the evidence was to establish identity. This was based in part on evidence that there were other men in the house at times. Regardless, the court denied the Crown’s application, in part on the basis that there was the potential for innocent collusion. What is interesting about this case is the court’s ruling in the trial itself. The court found that the evidence of each of T.M. and S.M. was unreliable because of the possibilities of innocent collusion, false memory, and the identification of the wrong perpetrator. While the Crown argued that there was no evidentiary foundation to believe that a perpetrator other than the accused was involved, the court determined that there was some support for the proposition. The support was based on the court’s assumptions about ‘sexual predators’. The court stated that:

Tiffany M. states only one assault occurred and Sasha M. states there were two. If true, the assaults would be consistent with a perpetrator who had limited access to the girls. Assuming (Mr.) Daniel I. was a sexual predator, one would assume that numerous assaults would have occurred over the four year period that he lived with the girls. While this is speculation, it nonetheless gives me a disquieting feeling about the reliability of Tiffany M. and Sasha M.'s evidence in relation to their identification of (Mr.) Daniel I. as being the perpetrator of the assaults upon them.¹⁰⁶

¹⁰⁴ *Supra* note 103 at para. 3.

¹⁰⁵ *Ibid.* at para. 4. The defence argument misconstrues the law on similar fact evidence. Justice Binnie was clear in *Handy*, *supra* note 21 that there is not a higher standard in identity cases; the drivers of cogency may be different, but the standard is not higher.

¹⁰⁶ *Ibid.* at para. 13.

Similar reasoning about sexual predators was relied on in *R. v. Wadel* to assess similar fact evidence.¹⁰⁷ In *Wadel* the accused was alleged to have sexually assaulted the five complainants while they were residents of the juvenile detention facility where he worked. The judge admitted each of the complainants' testimony as similar fact evidence on each of the other charges. However, he gave it very little weight. This was a very tragic case in which all of the complainants had gone on to have numerous problems including addictions issues and significant criminal records. The court found them to be less than credible witnesses. The accused was acquitted. There was an additional witness, D.M., who was also a resident at the institution; he had not endured the same sorts of personal struggles the other complainants had experienced. He said he had a very close and personal relationship with the accused but did not have sex with him. He testified that Wadel would visit him at bedtime and have long intimate talks with him. D.M. stated that he was confused about his sexual identity at the time. Significant is the court's treatment of his evidence:

It would seem to be a reasonable conclusion that given D.M.'s homosexual orientation and his significant fondness for Dwight Wadel, had Dwight Wadel wished to involve D.M. in homosexual acts, either at White Oaks or at his residence, there would have been no resistance on D.M.'s part. The fact that there was no such intimacy between D.M. and Wadel is urged upon me as a significant piece of evidence from which the Court can infer that the events involving Wadel and the other five named complainants did not take place. It is the Crown's theory that Wadel engaged in such misconduct with the five named complainants and that he was a sexual predator who was exploiting the wards under his care for his own sexual gratification. If this were true then one might wonder why D.M. would be an exception from this group? Why would he not have been a victim of explicit sexual contact with Dwight Wadel during his stay at White Oaks? Dwight Wadel had the opportunity and it would appear from D.M.'s evidence that he would have been a willing participant, had Wadel so wished.¹⁰⁸

¹⁰⁷ [2001] O.J. No. 4248.

¹⁰⁸ *Supra* note 107 at para. 440.

The court concluded that D.M.'s evidence could be seen as helpful to the defence in several respects. In particular, the court noted that the fact that Wadel could have sexually assaulted D.M. – given the child's homosexuality? – but did not, favoured the defence.¹⁰⁹ The assumption underpinning this reasoning was that either Wadel *is* a sexual predator or he *is not*. Sexual predators indiscriminately sexually abuse every boy to whom they have access. The fact that Wadel did not sexually abuse this boy suggests he *is not* a sexual predator. That he *is not* a sexual predator supports the defence's assertion that Wadel did not sexually assault these other five boys. This reasoning is based almost exclusively on essentialist assumptions about who an accused is or is not rather than reasoning based on what he has or has not done.

v) Adult Complainant Cases

In adult complainant cases where the Crown seeks to introduce similar fact evidence to establish an element of the *actus reus*, outside of those involving doctor-patient type relationships, the courts do not tend to look for and rely on a propensity to engage in a particular type of sexual behavior tied to a specific relationship dynamic. In adult cases the focus appears to be more on the sexual acts and not on the sexual interactions.¹¹⁰

Take for example the case of *R. v. G.G.*¹¹¹ In *R. v. G.G.* the accused's adult daughter alleged that she awoke one night to find her father's hands inside her panties.

Her father had come into her house without her knowledge while she was asleep on the

¹⁰⁹ In his closing remarks Justice Stayshyn referenced the Crown's position that Wadel was grooming D.M. for further sexual contact. It was clear from his reasons that he favored the defence's position regarding D.M.'s evidence.

¹¹⁰ See for example *R. v. J.G.E.S.* [2005] B.C.J. No. 3161; *R. v. Yusufi*, [2007] O.J. No. 2321; *R. v. Whitehead* [2004] O.J. No. 4030. In cases such as these the focus of the similar fact evidence ruling was on whether there were striking similarities between, or a degree of distinctiveness to, the accused's *modus operandi*.

¹¹¹ [2003] N.W.T.J. No. 88.

couch. The Crown sought to have admitted similar fact evidence of a prior conviction of sexual assault against the accused's other adult daughter – G.L. G.L. had also awoken to find her father's hand inside her panties fondling her genitals. The trial judge refused to admit the similar fact evidence. One of the issues was that the complainant was aware of the prior conviction. The trial judge found that there was a possibility of collusion – which would of course destroy the probative value of the similar fact evidence. However, the trial judge determined that the similar fact evidence would not have been very probative even had there not been a possibility of collusion because

the circumstances surrounding the sexual assault of G.L. i.e. the placing of the accused's hand inside the panties and touching the genital area of an unconscious, vulnerable woman, who is an acquaintance or relative of the accused, cannot reasonably be described as peculiar or highly distinctive, but rather as a generic act, which is sadly far too common or present in sexual assault cases brought before the Court in this jurisdiction.¹¹²

The relationship status between the accused and the complainants was the same, and his *modus operandi* was the same. The similar fact evidence was not admitted because from the judge's perspective the sexual misconduct – the sexual act alleged – was too common, not unusual enough. This reasoning much more closely resembles the type of reasoning used in identity cases than the reasoning in *actus reus* child complainant cases. Had this case involved allegations by these daughters as children it is most likely that the court's examination of similarity in circumstances surrounding the allegations would have differed; the reasoning most likely would have focused much more on the relationships between the accused and his daughters rather than on the specific sexual act alleged and how common or unusual it might be.

¹¹² *Supra* note 111 at para. 14.

In adult complainant cases where the accused's propensity to relate to his alleged victims in a particular manner *is* examined it may be less likely that courts will give it the kind of weight it is given in the child complainant cases.

In *R. v. C.P.K.* for example, the Ontario Court of Appeal overturned the trial judge's decision to admit similar fact evidence concerning the accused's conduct towards his previous domestic partner.¹¹³ The accused was charged with unlawful confinement, sexual assault, anal intercourse, and uttering a death threat against the complainant; she was his common law spouse at the time of the alleged offences. The complainant testified that the accused had become increasingly jealous and possessive, that he had started acting strangely and had accused her of having sex with other people (including her mother, the neighbor and the dog). If she denied his accusations he became physically aggressive. The events from which the charges stemmed involved a period of two or three days during which he kept her at a motel and forced vaginal and anal intercourse on her at knife point. He threatened to kill her.

The similar fact evidence was from a previous domestic partner. She alleged that shortly after moving in with him the accused began acting paranoid. He accused her of sleeping with other people and if she denied it he became aggressive. He physically assaulted her on numerous occasions. He threatened to kill her at knifepoint while straddling her on the bed. He held her down and kissed her against her will. He choked her. The Crown acknowledged that the allegations of sexual assault differed between the two but argued that, "in the context of abusive domestic relationships in which the

¹¹³ [2002] O.J. No. 4929.

appellant used fear as a means of control, the sexual assaults described by the complainant were simply another method of asserting control.”¹¹⁴

The Ontario Court of Appeal excluded the evidence. They determined that the trial judge had erred in identifying the complainant’s credibility as the fact in issue. The fact in issue should have been identified as whether the sexual assault, the threatening and the confinement occurred. (The accused pled guilty to the charge of assault causing bodily harm). The court also determined that the similar fact evidence lacked cogency. It was not similar enough given that it did not relate to the same sort of sexual misconduct – as such it amounted to general bad character evidence according to the court. Contrast this reasoning with the Supreme Court of Canada’s reasoning in *B.F.F.* where the accused’s non-sexual but violent conduct towards the complainant’s siblings was admitted to demonstrate a propensity for relating in a controlling and violent manner to the children in his care.¹¹⁵

vi) What Ought The Court To Do?

Approaching the issue of similar fact evidence with a recognition that method or manner of relating is an important part of the *modus operandi* for those who sexually assault children (and therefore ought to be given significant consideration) seems both advisable and promisingly constructivist. Where, however, this analysis is folded back into assumptions about true nature and innate sexual proclivities its social constructivism is lost. In adult complainant cases, the problem is not that the court’s inquiry is focused on discovering the accused’s true nature to relate – the problem is the lack of focus on the accused’s relational propensities.

¹¹⁴ *Supra* note 113 at para. 20.

¹¹⁵ *Supra* note 56.

There are constructivist and essentialist elements to both of these approaches. What courts ought to do is apply an analysis that relies on likelihood of coincidence based reasoning (so as to eliminate the true nature – innate sexual deviant assumptions underpinning child complainant cases) but which recognizes the significant cogency of similar fact evidence regarding an accused’s propensity to relate to ...children or women or men ... in a particular manner (so as to examine and compare relationships rather than relationship status and so as to focus more on relationship dynamics than on comparisons between specific sexual acts). In other words for all cases regardless of age of the complainant, maintain the more sophisticated understanding of the role of power currently evident in many child sexual abuse cases but lose the essentialist elements evident in both approaches by rejecting reasoning based on assumptions about innate disposition and natural versus unnatural sexual acts, and focusing on similarity in method or manner of relating as a significant element of *modus operandi*.

III. The Criminal Regulation Of Child Pornography

The suggestion made in the previous section that courts often conceptualize ‘the pedophile’ as a pre-social category or type of person is also raised by the Supreme Court of Canada’s differing approach to the criminal regulation of child pornography and adult pornography.

The Court’s approach to child pornography reveals an assumption that those who sexually offend against children are of a discrete class of individuals with an innate, sexual pre-disposition constitutive of their essence. Conversely, in the context of adult pornography, the Court’s approach reveals a conception of sexuality, an orientation towards coercive or violent sex with other adults, as socially produced. Comparing the

Court's reasoning in cases addressing adult pornography with its analysis in cases concerning child pornography illustrates that while the Court identifies pedophiles as a discrete category of individuals with an innate and pre-social sexual orientation they do not conceptualize those who sexually assault adults in the same way. As will be discussed in Chapter Four, conceptualizing sexual violence as socially contingent both requires and promotes legal reasoning that acknowledges the contextual factors that contribute to the perpetuation of these harms; it also better accommodates the perspectives of all sexual actors involved in an interaction (not simply the perspectives of the accused and the justice system). In contrast, understanding sexual violence as a function of the perverted arousal of a discrete minority (a conceptual approach evident in the Court's treatment of child pornography) produces a legal discourse that obscures the social factors that perpetuate the sexual violation of children.

Chapter Four will include an in depth discussion of how the Court conceptualizes sexual assault against adults. The criminal regulation of adult pornography will be addressed at length in Chapter Five. Chapter Five will demonstrate how the Court's approach to the definition of obscenity began to change in the early 1990's. The Court began to adopt a more constructivist understanding of sexual violence. They began to focus on adult pornography's potentially detrimental attitudinal impact towards women – what is sometimes described as the potential for 'attitudinal bias'. The harm of obscenity identified by the Court turned on its potential to perpetuate inequitable perceptions about, and treatment of, women by men. They gave recognition to the argument that depictions of rape could normalize and perpetuate more rape.¹¹⁶

¹¹⁶ See *R. v. Butler*, [1992] 1 SCR 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2002] 2 SCR 1120.

Does the Court justify criminalizing child pornography in the same way - on the grounds that to do otherwise might harm society by corrupting the way in which people treat children? In other words is it justified by the concern that the proliferation of child pornography might cause more people to sexually abuse children – that it might create more pedophiles? This is certainly one of the justifications that the Crown argued in *R. v. Sharpe* – the Court’s leading precedent on the criminal regulation of child pornography.¹¹⁷ In fact, the Court did not justify the prohibition against possession of child pornography on the basis of attitudinal bias; the prohibition was not justified on the basis that child pornography risked creating attitudinal changes in society such that more people would begin sexually assaulting children.

R. v. Sharpe involved a constitutional challenge to section 163.1(4) of the *Criminal Code*.¹¹⁸ Section 163.1(4) prohibits the possession of child pornography – that is any visual representations that show a person who is, or is depicted as, under the age of 18 years and is engaged in, or is depicted as engaged in, explicit sexual activity and visual representations the dominant characteristic of which is the depiction for a sexual purpose of a sexual organ or the anal region of a person who is under the age of 18 years.¹¹⁹ The defence argued that the provision, because it prohibited not just the production, sale or distribution but also the possession of child pornography, was an unjustifiable violation of

¹¹⁷ [2001] 1 SCR 45. Unlike with adult pornography (or similar fact evidence), there have not been a series of Supreme Court of Canada decisions concerning child pornography specifically. The conclusions drawn and assertions made here are based on only one decision. That said, the Court’s treatment of child pornography in *Sharpe* remains significant to this discussion and supportive of my argument. Particularly when it is considered both in comparison to the Court’s treatment of adult pornography and as a furtherance of the arguments made above regarding the legal tendency in similar fact cases to conceptualize the pedophile as a discrete sexual ‘other’.

¹¹⁸ R.S.C. 1985, c. C-46.

¹¹⁹ *Sharpe*, *supra* note 117.

sections 2(b) and 7 of the *Charter of Rights and Freedoms*.¹²⁰ But for two exceptions – what might be described as the ‘private diaries’¹²¹ and the ‘teenage experimentation’¹²² exceptions – the Court found that while section 163.1(4) does violate section 2(b) it was saved under section 1. The two exceptions were overly broad and not saved under section 1. For purposes of this discussion what is of most significance are Chief Justice McLachlin’s reasons for finding that the prohibition on possession of child pornography bears a rational connection to the pressing and substantial objective of the law – the pressing and substantial objective being the prevention of harm to children.¹²³

The Crown argued, and the Court adopted versions of, five different harms caused by child pornography. It is the first harm alleged by the Crown - that child pornography promotes cognitive distortions – that reveals the Court’s essentialist conception of those who sexually offend against children. The Crown argued that, “pornography may change possessors’ attitudes in ways that make them more likely to sexually abuse children”.¹²⁴ They argued that *people* may come to see sexual relations with children as normal and have their moral inhibitions weakened. The Crown argued that *people* who would not otherwise abuse children might consequently do so. This argument tracks precisely the

¹²⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the “*Charter*”].

¹²¹ The Court found that the provision should be read so as not to cover written material or visual representations (i.e. drawings) created and held by the accused alone solely for his or her personal use. (*Sharpe, ibid.*)

¹²² The Court found that the provision should be read so as not to cover visual recordings created by or depicting the accused that do not depict the accused committing unlawful sexual acts and are held by the accused exclusively for private use.

¹²³ Chief Justice McLachlin noted an additional objective that the government in *Sharpe* did not, but in her estimation could have, put forth. That is the objective of promoting the value of children as a defence against the erosion of societal attitudes toward them. Despite being *obiter*, this observation, in light of the discussion to follow should be noted and distinguished from the Court’s reasoning in *Butler, supra* note 120. Promoting the value of children is not the same as preventing harm to children. Chief Justice McLachlin is referring to the need to encourage people to value children, not discourage people from sexually assaulting them.

¹²⁴ *Sharpe, supra* note 117 at 87.

argument made by the Crown and accepted by the Court in *Butler* and *Little Sisters* – cases dealing with the criminal regulation of adult pornography.¹²⁵

However, the Court in *Sharpe* did not accept this justification. Instead they adopted a modified version of the Crown’s argument. The Court accepted that, while the scientific evidence linking cognitive distortions to increased rates of offending was limited,¹²⁶ there was a reasonable apprehension of harm. They accepted that “child pornography may reduce *pedophiles’* defences and inhibitions against sexual abuse of children”.¹²⁷ The nuance of their modification to the Crown’s argument is significant.¹²⁸

In *Butler* and *Little Sisters* the Court justified the prohibition on the production and distribution of certain types of pornography based on the concern that such materials and depictions could *induce* individuals to change their sexual behavior and would influence and reinforce negative perceptions about women.¹²⁹ In *Sharpe* the Court justified the prohibition on the possession of child pornography based, in part, on the concern that such materials and depictions would *incite* pedophiles making them more likely to offend.¹³⁰

This distinction raises a number of questions. Why is ‘the pedophile’ a discrete and identifiable sexual orientation whereas ‘the rapist’ is not? Those with a propensity for

¹²⁵ These cases will be discussed at length in Chapter Five and Six.

¹²⁶ This is similar to the finding in *Butler*, *supra* note 116 and *Little Sisters*, *supra* note 116. In both, the Court found that the government is not required to provide conclusive scientific proof that the images will cause behavioral changes. Instead they are required to establish a reasonable apprehension of harm. All of which is to say that the evidentiary standard was the same in all three cases. The distinction is with what the Court considers a *reasonable* apprehension of harm.

¹²⁷ *Sharpe*, *supra* note 117 at para. 88 (emphasis added).

¹²⁸ The second harm argued by the Crown and accepted by the Court was that child pornography fuels fantasies “making pedophiles more likely to offend.” The third alleged harm was that decriminalizing the possession of child pornography would make it more difficult to enforce the prohibition against the production and distribution of child pornography. The fourth was that it is used for grooming and seducing victims. The fifth was that some child pornography is produced using real children.

¹²⁹ *Butler*, *supra* note 116 at para. 108; *Little Sisters*, *supra* note 116 at para. 60.

¹³⁰ *Sharpe*, *supra* note 117 at para. 89

sexual interactions with children are ascribed an innate sexual orientation. But sexually violent behavior directed towards adults is socially contingent and could, through exposure, be induced in an individual.

Why is it problematic for courts to understand child sexual abuse through an essentialist lens – to perceive pedophilia as an innate sexual orientation? It is problematic because it obfuscates many of the dynamics and larger social issues involved in both the perpetuation of and social response to child sexual abuse; an essentialist conception of child sexual abuse conceals the larger social context - the social determinants - that produce sexual violence against children. Constructing ‘the pedophile’ as a discrete category of people, making him the archetypical child sexual abuser is a dangerous misapprehension of the social problem of child sexual abuse. It portrays the child abuser as atypical (and child sexual abuse as “aberrational rather than systemic and ubiquitous”).¹³¹ Under an essentialist framework the pedophile is defined as ‘different in kind’ from most of us, who are ‘normal’. The pedophile is not one of us but rather a disordered ‘other’. The problem with this conception is that it “suggests that the solution to sexual violence is to identify, and then excise and banish the problem. Systemic approaches to sexual violence are not necessary. We need not change anything fundamental in our society. We need only find the “predators and banish them.”¹³²

More sexual abuse against children is perpetuated by their own family members than by anyone else known or unknown to the child.¹³³ Less frequently are child sexual abuse victims violated by ‘the pedophile’ - that aberrational ‘other’ lurking around playgrounds

¹³¹ For a discussion of this see Eric S Janus, “Don’t Think Like A Predator” – Changing Frames For Better Sexual Violence Prevention” (2007) Sex Offender Law Report Vol. 8, No. 6, pgs 81-96.

¹³² Janus, “Don’t Think Like A Predator”, *supra* note 131 at 90.

¹³³ Family Violence in Canada: A Statistical Profile, 2001, edited by Catherine Trainor and Karen Mihorean, Canadian Centre for Justice Statistics, Statistics Canada.

or trolling on the internet. Children are in much greater numbers violated by their fathers and grandfathers, stepfathers, uncles, cousins and brothers.

Understanding the issue as the ‘problem of the pedophile’ encourages discussion, policy and legal approaches for keeping children safe from that ‘other’ - it does nothing to keep children safe from their own families.¹³⁴ It does nothing to recognize that child sexual abuse is often a threat that comes from *within* the family and not external to it.

The focus of those criminal law approaches aimed at preventing child sexual abuse which are proactive (as opposed to reactive) are typically oriented towards keeping children safe from the sexual predator who stalks them in the playground, toy store or on the internet. Section 161 of the *Criminal Code* provides one such example.¹³⁵ It permits a court to make an order prohibiting anyone convicted of a sexual offence against a person under 16 from attending a park, playground, school ground, swimming pool or community centre where children are likely to be present. Section 161 was enacted following a British Columbia Court of Appeal decision striking down as unconstitutional a similar provision which automatically prohibited anyone convicted of a sexual offence from loitering in or near a park, playground or bathing area.¹³⁶ It is not that laws such as section 161 are themselves problematic. It is that these legal approaches target only one specific subset of child sexual abuse and there do not seem to be parallel proactive or

¹³⁴ “The more concern is expressed about the threat of strangers, the less close relatives could be brought into the frame. The more child sexual abuse was depicted as a horrible pathology, the less could ordinary fathers be seen as depicting such deeds.” Carol Smart, *Feminism and the Power of Law*, (Routledge: London, 1989) 52.

¹³⁵ R.S.C. 1985, c. C-46.

¹³⁶ *R. v. Heywood* (1992) 18 C.R. (4th) 63 (aff’d [1993] 3 S.C.R. 761). In *R. v. Heywood*, section 179(1)(b) of the *Criminal Code* was found to be an unjustifiable violation of section 7 of the *Charter* due to its over breadth.

preventative legal initiatives aimed at preventing the larger category of sexual abuse that occurs within families.¹³⁷

The federal government's recent *Tackling Violent Crime Act* further exemplifies this point.¹³⁸ The Act, which purports to address the issue of child sexual abuse, raises the age of capacity to consent to sexual interactions from 14 to 16. Its legislative objective, as articulated in the preamble to the Act is to ensure that "families should be able to raise their children without fear of sexual predators".¹³⁹ According to legislators, raising the age of consent from 14 to 16 will make the streets safer for our children and protect communities from sexual predators and human trafficking. Discussion about the proposed Act in the House of Commons reveals the degree to which legislators seek to distance 'us' from 'them':

If the hon. member would have followed what has happened, he would know that, for example, our bill to raise the age of consent. We know that child welfare advocates and child sexual exploitation experts have told us that Canada has become, in some instances, a destination for those adult sexual predators, who have come from jurisdictions where their age of consent is higher. We do not want Canada to become a destination for adult sexual predators.¹⁴⁰

The government's impetus for addressing the problem of sexual abuse against children in Canada was the influx of sexual predators from foreign lands, the threat that Canada will become a hotbed of child sex tourism?¹⁴¹ Enacting proactive provisions to

¹³⁷ There are some examples where the law does attempt to penetrate this circle. One would be the exception to spousal privilege found under section 4(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Section 4(2) stipulates that a husband or wife is a competent and compellable witness against a spouse charged with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329.

¹³⁸ S.C., 2008, c.6.

¹³⁹ Preamble to the *Tackling Violent Crime Act*, *ibid*.

¹⁴⁰ 39:2 Hansard - 9 (2007/10/26).

¹⁴¹ Not only is the new provision ill conceived as an approach to addressing child sexual abuse, it is also legislation that suggests a traditional, family values agenda. Section 150.1(2.1)(b) permits an exception

protect children from those who lure and exploit them through the use of the internet is desirable. Taking measures to ensure that Canada does not become the next Phuket, as ridiculous as that proposition is, is not the problem. (Although the efficacy even of meeting the articulated objective of these measures is questionable in this instance.)

Again, what is problematic is that these sorts of measures and the articulated justifications for pursuing them distort the issue. The law is, of course, much more willing and able to intervene in the regulation and surveillance of public spaces. It is more comfortable for judges and lawmakers to speak of and think of those who sexually abuse children as aliens, outsiders, ‘others’, than it is to acknowledge that it is our social structures, our educational deficits, our systemic poverty, our social dysfunction, and our families that are hurting our children. Given that the vast majority of children who are sexually abused are violated by family members and acquaintances, drawing a circle around the family, reifying the public/private distinction and identifying the threat as from without rather than within is dangerously obtuse. Jurisprudence that conceptualizes ‘the pedophile’ in this way contributes to this problematic discourse.

This is not to suggest that the criminal law ought not to be concerned with taking measures to prevent the sexual exploitation of children by strangers. Rather the point is that legal conceptions which promote the notion that child sexual abuse is perpetuated by

where the accused is married to the complainant (and the complainant is 14 or older). Section 150.1(2.2) creates a transitional exception for those accused where the complainant is 14 or older and is the accused’s common law partner or has a child or is expecting a child with the accused, at the time the act comes into force. In other words, but for those common law couples who are grandfathered in, accused who marry 14 or 15 year olds can have consensual sex with them, while those who merely shack up with them cannot. The traditional family values suggested by such a legislative scheme include a moral distinction between married and common law couples, and a disapproval of premarital sex (and a privileging of marital sex). The exception also implicitly endorses marriages between young girls and adult men, a practice which religious right and ultra conservative sectors might continue to embrace but which most feminists reject as a practice which perpetuates the treatment of women as the (sexual) property of men – first their father’s and then their husbands.

the anomalous and disordered ‘other’ are likely to encourage legal approaches to prevention which focus on identifying and containing those ‘others’ rather than truthful if uncomfortable acknowledgment that the behavior is prolific, that it is more often uncles, grandfathers, coaches and teachers than it is three eyed, candy peddling, sex tourists and that like other criminal offences, it is strongly correlated with the typical social determinants of crime. Focusing on the child pornography consuming sociopathic pedophile trolling the playgrounds, rather than the dangerous and violent landscape of so many children’s family lives is much like the way that courts and legislatures traditionally focused on stranger rape while ignoring the much more common rape of women by their spouses, co-workers, neighbors and friends.¹⁴² It does nothing to encourage an examination of the social structures that perpetuate this violence against children. It fails to make the connection between child sexual abuse and other types of child abuse, including mental and physical abuse as well as neglect. An essentialist understanding of child sexual abuse, in which ‘the pedophile’ is constructed as the archetypical offender is unlikely to examine the possible correlation between child sexual abuse, other forms of child abuse, alcoholism, poverty, drug addiction and lack of education.¹⁴³ It is unlikely to

¹⁴² See Susan Estrich, *Real Rape: How The Legal System Victimized Women Who Say No*, (Harvard University Press: Cambridge, 1987).

¹⁴³ For example some studies have suggested that there is a much higher rate of child sexual abuse in aboriginal communities and families – families and communities with a drastically lower level of income and a drastically higher level of substance abuse. (See for example Virginia Davis and Kevin Washburn, “Sex Offender Registration in Indian Country” forthcoming September 2008 <http://ssrn.com/abstract=12423> where they suggest the rate of sexual abuse among aboriginal girls is one in four and among boys one in seven. See Janet Stanley et al, “Child Abuse and Family Violence in Aboriginal Communities - Exploring Child Sexual Abuse in Western Australia” May, 2002 Australian Institute of Family Studies online: <http://www.aifs.gov.au/nch/pubs/reports/wabrief.pdf> (accessed October 19, 2008) where they estimate that aboriginal children in Australia are seven times more likely to be abused (sexually or physically) than non-aboriginal children in Australia. See Alliance of Five Research Centres on Violence. (1999, December). *Violence prevention and the girl child: Final report*, <http://www.unb.ca/departs/arts/CFVR/girl.html> where they found that 75% of Aboriginal girls under the age of 18 were sexually abused. In aboriginal communities in Canada it is difficult to know to what degree the higher rates of child sexual abuse correlate to socioeconomic status and rate of substance abuse

recognize the generational, systemic way in which this social problem, once it has infected a family, is very likely to reproduce itself over and over again.

The Court in *R. v. Sharpe* did not need to rely on (and in doing so reinforce) an essentialist understanding of those who sexually abuse children in order to uphold the constitutionality of section 163.1(4) of the *Criminal Code*.¹⁴⁴ They could have come to the same conclusion by relying on the same reasoning they endorsed in adult pornography cases. There was no analytical need in terms of their reasoning, to modify the Crown's argument that child pornography may reduce *people's* defences and inhibitions against sexual abuse of children. If the Court is willing to accept, as they did in *Butler*, that exposure to sexual violence against women could influence one's sexual behavior in a social context where women are systematically disempowered, why couldn't they accept the same argument with respect to exposure to sexual images involving children, also a disempowered demographic?¹⁴⁵ The unlikelihood that elected officials will pursue legal reforms which force their voters to see child sexual abuse as a problem produced by, and typically contained within, their own families makes it all the more important for courts to adopt conceptual frameworks which promote such a legal discourse.

This section demonstrated the essentialist conceptions of sexuality underpinning legal approaches to sexual violence perpetuated against children, and examined the

versus the degree which should be attributed to generational sexual abuse instigated by teachers and clergy in residential schools and now working its way through the generations. Regardless of exactly what the proportions of each might be, both are socially contingent factors. Essentialist understandings of the pedophile as an alien 'other' fail to recognize and address these social realities.

¹⁴⁴ *Supra* note 118.

¹⁴⁵ This should not be taken as a wholehearted endorsement of the Court's decisions in *Butler*, *supra* note 116. While the more constructivist approach to sexuality that they adopt seems correct there is another element to the case that remains problematic. This is their failure to reject the "community standards of tolerance" test to establish harm. For a discussion of this see Chapter Five.

shortcomings of essentialism in this context. The section to follow will discuss the role of essentialism in legal approaches to achieving equality for some sexual minorities.

IV. Conceptions Of Sexuality Under Section 15

There now exist in Canada a number of legal instruments, some constitutionally entrenched, which provide protection against discrimination for some sexual minorities. These include the provincial human rights codes, the *Canadian Human Rights Act*,¹⁴⁶ and the equality guarantee under section 15 of the *Charter of Rights and Freedoms*. Each of these legal instruments adopts a categorical approach to the prohibition of discrimination. In other words, each prohibits discrimination that is based on certain categories of people – each adopts a series of legislatively enumerated, or subsequently identified or interpreted, grounds of discrimination.¹⁴⁷ Sexual orientation is an analogous prohibited ground of discrimination under section 15 of the *Charter*.

i) The Categorical Approach To Section 15 And Its Critics

The categorical approach to human rights and equality guarantees shared by each of these legal instruments means that claims for freedom from discrimination based on sexual orientation, behavior, identity and desire, and the legal reasoning which grants

¹⁴⁶ R.S., 1985, c. H-6.

¹⁴⁷ Section 3 of the *Canadian Human Rights Act* R.S., 1985, c. H-6 for example prohibits discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. Section 8 of the *British Columbia Human Rights Code* RSBC 1996 C. 210, prohibits discrimination based on race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons. While tribunals and courts have, through purposive interpretation, modestly expanded protection under the enumerated grounds found in the statutes (such as in *Sheridan v Sanctuary Investments* (1999), 33 C.H.R.R. D/467 where the British Columbia Human Rights Tribunal determined that discrimination based on gender identity constituted sex discrimination) adjudicators are bound by, and restricted to the grounds identified in the Act. Section 15 of the *Charter* enumerates the following grounds: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. In addition, the Supreme Court of Canada has, since its earliest treatment of the provision, established that discrimination will also be prohibited if it is based on grounds analogous to those enumerated in section 15 (*Andrews v. British Columbia Law Society*, [1989] 1 S.C.R. 143). In *Egan v. Canada* [1995] 2 S.C.R. 513 the Court held that sexual orientation was an analogous ground.

these claims, lend themselves well to an essentialist conception of sexuality. An understanding that sexual orientation, behavior, or desire is dictated by an innate, immutable, or not readily mutable sexual object preference and that this gender preference constitutes an essential element of one's self provides a strong justification under section 15 jurisprudence, for arguing that the law not discriminate on the basis of sexual preference.

While courts often assume sexual orientation to be immutable¹⁴⁸ this is not always the case; significantly, this was not the assumption in *Egan v Canada* - the Supreme Court of Canada case in which sexual orientation was determined to be an analogous ground under section 15.¹⁴⁹ In *Egan*, Justice LaForest, writing for the majority, characterized sexual orientation as “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”¹⁵⁰ Recall that constructivists do not necessarily suggest that an individual's sexual object preference is mutable. For many constructivists, the problem is the combination of the assumption of immutability with the assumption that sexual object preference is a ‘natural’ way in which to draw distinctions, identify social categories and structure social institutions. In other words, the problem is not with the construction of sexual orientation as immutable or mutable only at great personal cost, it is with the assumption that sexual object preference is an essential element of the self, constitutive of who we are.

There is a rich scholarship of analysis and critique of section 15 jurisprudence demonstrating both how the categorical approach essentializes sexual identity and why

¹⁴⁸ See for example *Hislop v. Canada (Attorney-General)*, [2004] O.J. No. 4815.

¹⁴⁹ *Egan*, *supra* note 147.

¹⁵⁰ *Ibid.* at para. 5

this is problematic.¹⁵¹ Scholars such as Carl Stychin, Didi Herman, Brenda Cossman, Ruthann Robson, Bruce Ryder, Susan Boyd, Lise Gotell and many others have demonstrated and critiqued the essentialist assumptions about sexuality evident in the Court's section 15 cases addressing sexual minority claims. Briefly, critiques of the categorical approach to equality for sexual minorities include the following three interrelated arguments: i) the assertion that because it relies on essentialist conceptions regarding sexual identity this means that those sexual minorities who experience their sexuality as fluid, as in transition or as impossible to categorize, will be excluded from protection under current equality guarantees;¹⁵² ii) the claim that a categorical approach means that dominant hetero-normativity will not be challenged, subverted, deconstructed. That those sexual minorities able to conform or assimilate will receive equality guarantees while those who deviate too far, those who are too 'queer', will not be recognized by law;¹⁵³ iii) the argument that the categorical approach to equality, in which the claims of sexual minorities are framed under the category of 'sexual orientation', means that other categories – prohibited grounds of discrimination - are heterosexualized.¹⁵⁴

¹⁵¹ See for example Carl Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Can. J.L. & Jurisprudence 49; Brenda Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" 40 Osgoode Hall L.J. 223 (2003); Didi Herman, *Rights of Passage: Struggles for Lesbian & Gay Legal Equality*, (University of Toronto Press: Toronto, 1994); Jody Freeman, "Defining Family in *Mossop v D.S.S.: The Challenge of Anti-Essentialism and Interactive Discrimination For Human Rights Litigation*" (1994) 44 U. of Tor. L.J. 41; Douglas Kropp, "Categorical Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and The Legal Subject", (1997) 23 Queen's L.J. 201.

¹⁵² See for example, Kropp, "Categorical Failure", *ibid.*; Stychin, "Essential Rights and Contested Identities", *ibid.*

¹⁵³ See for example Ruthann Robson, "Assimilation, Marriage and Lesbian Liberation" 75 Temp. L. Rev. 709; Stychin, "Essential Rights and Contested Identities", *ibid.*; Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*", *supra* note 151.

¹⁵⁴ See Lise Gotell, "On Law's Categories" (2002), 17 No. 1 Can. J.L. & Soc'y 89; Katherine Lahey, *Are We Person's Yet? Law and Sexuality in Canada*, (Toronto: University of Toronto, 1999).

One of the difficulties with a categorical approach to anti-discrimination law is that “[c]ategories can become naturalized and essentialized and a list of enumerated categories – such as the grounds of prohibited discrimination – may appear historically and socially fixed”.¹⁵⁵ As both Nitya Iyer and Carl Stychin have argued, such an approach does not recognize that “social identities are geographically and historically contingent”.¹⁵⁶ It does not conceptualize identity as socially constructed. They argue that the existence of such categories obscures the “invisible background norm”.¹⁵⁷ In other words, while the law begins to protect certain categories of individuals who deviate from the norm it does nothing to challenge the dominant norm against which these individuals are being measured. In fact, it does nothing even to reveal that such measurement is taking place. They argue that the norm remains in place, permanently fixed, immutable, and ‘undeconstructed’. They also point out that this approach requires individuals seeking equality to “fit themselves within one grouping that can be labeled disadvantaged” thus obfuscating very real differences among ‘members’ of a particular category.¹⁵⁸

In “On Law’s Categories” Lise Gotell, borrowing from Foucault, engages in a discursive analysis of *Vriend v. Alberta*,¹⁵⁹ in order to conclude that “through a reliance on fixed sexual identity categories[,] the liberal legal framing of sexual orientation” in

¹⁵⁵ Carl Stychin, *supra* note 151 at 52 discussing Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen’s L.J. 179.

¹⁵⁶ Stychin, *ibid.* at 53.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ [1998] 1 S.C.R. 493. In *Vriend*, the Supreme Court of Canada found that Alberta’s refusal to include sexual orientation under provincial human rights legislation was a non-justifiable violation of section 15 of the *Charter*. The Court recognized sexual orientation as an analogous ground under section 15 three years earlier in *Egan v. Canada*, *supra* note 147. However, *Vriend* was the first time that a denial of formal equality to gays and lesbians was recognized by the Supreme Court of Canada as an unreasonable violation of section 15.

Vriend works to reinforce the naturalness of heterosexuality.¹⁶⁰ Her emphasis is on the increasingly powerful role of law in constructing sexual subjectivity and the limits placed upon the potential for transformative social and political change embedded in producing a rigidly demarcated category of gay/lesbian.¹⁶¹ However, also to be drawn from her analysis is the assertion that by relying on a rigid heterosexual/homosexual divide, claims of discrimination based on sexual orientation serve to heterosexualize other important human signifiers which have been identified under section 15 as prohibited grounds of discrimination.¹⁶² She suggests that this process of heterosexualization was instigated prior to the addition of explicit sexual orientation protections under anti-discrimination provisions. Gotell contends that the initial exclusion of sexual orientation clauses from human rights legislation has precluded the ability of “non-heterosexuals” to claim protection against other prohibited types of discrimination. She notes, citing cases such as *Canada v. Mossop*,¹⁶³ that “prior to the addition of explicit sexual orientation protections” unsuccessful complaints were made on the basis of existing categories, including sex, marital status and family status.¹⁶⁴ Cossman makes similar observations about these same cases.¹⁶⁵

Borrowing from Katherine Lahey’s conclusions in *Are We Persons Yet? Law and Sexuality in Canada*,¹⁶⁶ Gotell suggests that such decisions confirmed the exclusion of ‘non-heterosexuals’ from these categories. “Discrimination against gays and lesbians, in other words, was not about sex, family status and so on; instead, it was discrimination on

¹⁶⁰ Gotell, *supra* note 154 at 112.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at 98.

¹⁶³ [1993] 1 SCR 554.

¹⁶⁴ Gotell, *supra* note 154 at 98.

¹⁶⁵ “Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*”, *supra* note 151.

¹⁶⁶ *Supra* note 154 at 11 to 13.

the basis of a missing pocket, -- sexual orientation.”¹⁶⁷ In this way, she suggests, the existing grounds were effectively heterosexualized and sexual identities, as constituted by the law, further essentialized. For example in *Mossop*, the Court denied the appeal of a gay man who claimed that he had been discriminated against on the basis of family status, which was prohibited under the *Canada Human Rights Act*. Mossop’s employer had denied him bereavement leave upon his partner’s father’s death. The Court found that the employer’s discrimination was based on sexual orientation, not family status. Sexual orientation was not covered under federal human rights legislation at that time.

Lahey suggests that the Court, “in concluding that this discrimination was not ‘really’ on the basis of marital status, but was ‘really’ on the basis of unprotected ‘sexual orientation’” extended heterosexual presumptions about family and essentialized Mr. Mossop’s identity by assuming that the source of discrimination against him must relate to his sexual orientation.¹⁶⁸ This is similar to the manner in which the complainants and human rights tribunals discussed in the next section used the category of discrimination on the basis of sexual orientation to conceptualize the sexual harassment of heterosexual men by heterosexual men.

Brenda Cossman suggests that the Court’s treatment of gay and lesbian issues in Canada over the past twenty years has left a legacy both of transgression and normalization.¹⁶⁹ She suggests that “the progress of formal equality in same-sex relationship recognition...has brought a new lesbian and gay legal subject on stage. It is a subject constituted in and through the discourses of formal equality – a radically different subject than the lesbian and gay subject that was constituted in and through the

¹⁶⁷ Gotell *supra* note 154 at 98.

¹⁶⁸ Lahey, *supra* note 154 at 12.

¹⁶⁹ Cossman, *supra* note 151 at 246.

conservative discourses of deviance, biology and exclusion.”¹⁷⁰ She argues that while this new legal subject does in some respects challenge and displace the heteronormativity of legal subjectivity in the familial context, the process of inclusion through which this occurs is at the same time a normalizing strategy in which “gays and lesbians are reconstituted through discourses of sameness.”¹⁷¹ Discourses of sameness both promote the conceptualization of sexual identity as innate and pre-social, and favour formal equality over substantive equality. In other words, they expand the category of who is *in*, but maintain an approach limited to making sure everyone who is *in* is treated the same rather than changing the categories or rejecting the necessity of a particular category.

There are issues that should be noted in response to these arguments. The legal advances made by certain sexual minorities since *Egan* and *Vriend* should not be underestimated, nor should their future role in laying the groundwork for further social change be underestimated. Indeed, it may be that until a certain degree of legal recognition was achieved, legal arguments based on disruption or a queering of the law or its subjects were likely to fail. Take for example, the right to legal recognition of same sex relationships. Arguments based on recognizing diverse and alternative familial type relationships and a queering of the family, in a legal era in which the disruption or destruction of the family was precisely the argument put forth by opponents to same sex marriage would have been certain to fail.¹⁷² Indeed, the Ontario Court of Appeal, in

¹⁷⁰ *Ibid.* at 246.

¹⁷¹ *Ibid.* at 236.

¹⁷² Of course one might claim that seeking legal recognition of same sex relationships ought not to have been the objective in the first place. There are arguments to be made for this claim. However, this is a much broader socio-legal critique than simply a critique of the categorical approach to rights under section 15 of the *Charter*. It is a claim advocating for a much more radical shift in how the law distributes rights and responsibilities.

granting same sex marriage in *Halpern v. Canada (Attorney-General)*,¹⁷³ went to great lengths to assure the Attorney General that same sex marriage would not lead to the destruction of the family. Moreover, a premature argument focused too heavily on the relational interest denied by the exclusion of gays and lesbians from the institution of marriage, rather than a claim of identity based discrimination, would have played right into the hands of those decision makers responsible for the formal type of equality so parsimoniously handed out in the early same sex marriage decisions¹⁷⁴ – ‘we aren’t denying gays and lesbians the right to marital *Bliss*¹⁷⁵ (pun intended): no one is saying homosexuals can’t get married...they just can’t marry each other’. As Cossman notes, arguments “driven by the discourse of sameness”, ones which represented a “less radical shift”, in cases such as *M. v. H.*, had greater resonance with the Court than did those in the earlier days of *Mossop* and *Egan* “where at least some litigants were explicitly concerned with resisting a politics of sameness”.¹⁷⁶ It may be, however, that while Cossman’s observation is accurate, it is only now, with the wisdom of hindsight and experiential learning that the Canadian public and its legal system, having not witnessed the collapse of life as we know it in an era of gay weddings, is ready to entertain arguments about the value of disrupting the normative family model.¹⁷⁷

¹⁷³ [2003] OJ No. 2268.

¹⁷⁴ See *Layland v Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 DLR (4th) 214.

¹⁷⁵ In *Bliss v Canada*, [1979] 1 SCR 183 the Court denied a *Canadian Bill of Rights* challenge to provisions of the *Unemployment Insurance Act* arguing that the provisions discriminated on the basis of sex by providing different benefits for pregnant women than for other claimants under the insurance scheme. The challenge was denied on the basis that “inequality between the sexes in this area is not created by legislation but by nature”. In other words the provisions don’t distinguish between men and women but rather between those who are pregnant and those who are not pregnant.

¹⁷⁶ Cossman, *supra* note 151 at 236.

¹⁷⁷ Bill Eskridge advocates for this incremental type of approach both analytically and practically in *Equality Practice: Civil Unions and the Future of Gay Rights* (Routledge: London, 2001).

Foucault's argument that power produces as much as it oppresses should also be raised in this discussion. As noted in Chapter Two, Foucault suggested that power was not simply a hierarchical system of domination but more a pervasive and continuous web of relations between agents marked by continuous struggle or resistance. The legal and social conception of sexual identity or preference as a category of folks (a 'species') also produced an 'it's not a choice' type reverse discourse – what Foucault called the “tactical polyvalence of discourses”. This is a reverse discourse that was used very successfully under section 15 to radically change the legal landscape of sexual minority rights in Canada in a very short period of time.¹⁷⁸

It seems reasonable to assume that, at least for now, the categorical approach to equality, and the obstacles it presents for more transformative, perhaps 'queer' innovation of social structures, is here to stay. This may mean that transformative approaches aimed at creating yet more inclusive social structures ought to be directed towards queering or disrupting these categories themselves.

While all have been addressed under the rubric of sexual orientation, there is an important distinction between the form of social exclusion underlying the discrimination

¹⁷⁸ *Egan* was decided in 1995. Less than ten years later, culminating with the federal *Civil Marriage Act* S.C. 2005, c. 33, almost total formal equality for gays and lesbians had been achieved in Canada. *Egan* serves as a good example of the tension discussed here. Both the reasoning that recognized section 15 rights for gays and lesbians and the reasoning that denied the claim in *Egan* were founded on essentialist assumptions about sexual relationships. *Egan* recognized sexual orientation as a prohibited ground of discrimination under section 15 on the basis that it is unchangeable or changeable only at great personal cost. That is, sexual orientation is a stable category of identity or a discrete type of people. The majority in *Egan* determined that the heterosexual definition of 'spouse' under the Old Age Security Act was not discriminatory because heterosexuality was inextricably linked to the objective of the law. He concluded that the objective of the 'Old Age Security Act' was to support and protect marriage and that because the 'natural' meaning of marriage is heterosexual the distinction was not discriminatory. Marriage, he stated at 536, is “firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.”

at issue in cases such as *Vriend*,¹⁷⁹ *Trinity Western University v. British Columbia College of Teachers*,¹⁸⁰ *Little Sisters Book and Art Emporium v. Canada*¹⁸¹ and cases such as *Halpern*,¹⁸² *M. v. H.*,¹⁸³ *Egan*¹⁸⁴ or even more obviously *Chamberlain v. Surrey School District No. 36*,¹⁸⁵ *Mossop*,¹⁸⁶ or *Doe v. Canada*.¹⁸⁷ The former set of cases constitute specific claims of direct discrimination on the basis of sexual orientation, the latter set of cases are about claims to societal recognition of queer relationships and families. The significance of this distinction lies in its illumination of what I would suggest, perhaps optimistically but I hope not naively, is the broader, underlying purpose motivating the latter type of case: a desire for social or institutional affirmation and recognition of a relationship, or a family which deviates from the norm ... none of which is necessarily about, or even directly involves, sexual object preference. To be sure, it would be more than a little formalistic to suggest that a prohibition against same sex marriage is not also about discrimination on the basis of sexual orientation. The fact is that it is about both. However, one reason that gays and lesbians in Canada, relatively speaking achieved so many rights so quickly may be because of the legal battles to achieve recognition already fought and won by other non-traditional families in Canada. This helped to produce a legal and social culture less reticent to at least consider the possibility of a family model that might include monogamous gay and lesbian couples. The subversive potential, the opportunity to queer the family, to ‘de-essentialize’ sexual

¹⁷⁹ *Supra* note 161.

¹⁸⁰ [2001] 1 SCR 772.

¹⁸¹ *Supra* note 116.

¹⁸² *Supra* note 176.

¹⁸³ [1999] SCJ No 23.

¹⁸⁴ *Supra* note 151.

¹⁸⁵ [2002] 4 SCR 710.

¹⁸⁶ *Supra* note 165.

¹⁸⁷ *Infra* note 188. *Doe v Canada*, a decision of the Ontario Court of Appeal, will be discussed at length in the next section.

identity, starts with a recognition of the ability to transpose and thus transcend, if not the identities, then certainly the goals and motivations of various equality seeking or more importantly equality needing groups.

An analysis and critique of the Ontario Court of Appeal's decision in *Doe v. Canada*,¹⁸⁸ rejecting a constitutional challenge to the *Processing and Distribution of Semen for Assisted Conception Regulations*¹⁸⁹ demonstrates the promise of addressing equality for sexual minorities by attempting to disrupt the categorical approach to equality from within the categories themselves. The next section will argue that the claimants in this case would have been better served by the jurisprudence of section 15 of the *Charter* had they premised their argument on the assertion that they were discriminated against on the basis of family status rather than sexual orientation. Such an approach would be preferable both in terms of avoiding the pitfalls of the formal equality approach to section 15 adopted by both levels of court in this case, in addition to providing a more inclusive and progressive litigation strategy for acquiring legal recognition of familial relationships which deviate from the essentialist, hetero-normative paradigm assumed by the *Semen Regulations*. It may be that such an approach would encourage a more constructivist, contextual, socially contingent equality analysis in the context of sexuality, sexual identity, and sexual preference.

ii) Family As Status Under Section 15

¹⁸⁸ *Susan Doe v. Canada (Attorney General)*, (2006) 79 O.R. (3d) 586 aff'd 276 D.L.R. (4th) 127 (C.A.). The constitutional validity of the *Semen Regulations* was originally challenged in an earlier case *Jane Doe v. Canada (Attorney General)*, [2006] O.J. No. 191. *Jane Doe v. Canada* was dismissed after the claimant successfully conceived through home insemination.

¹⁸⁹ S.O.R./96-254 [hereinafter the "*Semen Regulations*" or alternatively the "*Regulations*"].

The *Semen Regulations* were enacted in 1996 under the *Food and Drug Act*.¹⁹⁰

The impetus for the *Regulations* arose as a result of a concern expressed in the *Report of the Royal Commission on New Reproductive Technologies* in 1993 over the lack of uniform national standards applicable to the several sperm banks (now called semen establishments) across Canada responsible for the screening and collection of semen from anonymous donors.¹⁹¹ The concern was that women who utilized semen from anonymous donors who had deposited at sperm banks that did not screen for diseases were at risk of contracting some form of communicable disease. The source of the Royal Commission's concern with the risk of infection from donor insemination was the use of semen from anonymous donors, not the use of semen from known donors. In fact it is unlikely that the Commission focused on known donors at all, given that the Report does not actually distinguish between known and anonymous donors.

The *Regulations* prohibit the clinical use of semen in "assisted conception" unless and until the following has occurred: the donor has tested negative for a number of communicable diseases including HIV and Hepatitis B and C, the semen has been cryo-preserved (frozen) and quarantined for six months and, the donor has then re-tested negative for these diseases. The inequality created by the *Semen Regulations* relates primarily to their application to known donors rather than to restrictions and prohibitions on the use of anonymous semen donation in assisted conception practices.¹⁹² The inequality stems from the *Regulations*' definition of "assisted conception".

¹⁹⁰ R.S.C. 1985, c. F.27, s.31.

¹⁹¹ Canada, *Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Political and Social Affairs Division, 1993) Part 2, s. b.

¹⁹² The potential section 15 challenge to the *Semen Regulations* on the basis that they outright prohibit all anonymous semen donations from gay men should be noted but will not be addressed here.

The *Semen Regulations* define “assisted conception” as a “reproductive technique performed on a woman for the purpose of conception using semen from a donor who is not her spouse or sexual partner”.¹⁹³ In other words, women who are married to, living together in common-law relationships with, or having sex with their chosen donor, can access assisted conception procedures without being subject to the *Regulations*’ restrictions; they can be inseminated by their physicians without their donor first undergoing the screening, and without being subjected to the wait period and the costs (both pecuniary and otherwise) imposed as a result of the *Semen Regulations*. Women who are not in a spousal or sexual relationship with their chosen donor do not have this option. Individuals who are not in a spousal or sexual relationship with their chosen donor, regardless of their relationship to the donor, will, in order to receive assisted conception services, first have to incur the cost of having the semen screened, cryo-preserved for six months and then re-screened¹⁹⁴ – a cost which is measured in the thousands. In the end, they will only have access to cryo-preserved semen rather than fresh semen. The rate of successful assisted conception using frozen sperm is, however, significantly lower than the rate of success when assisted conception is conducted with fresh sperm.¹⁹⁵ The *Regulations* impose an additional barrier to accessing assisted conception procedures for those women who are not in a sexual or spousal relationship with their known donor and whose known donor is gay or over 40.¹⁹⁶

¹⁹³ *Supra* note 189 at s. 1.

¹⁹⁴ *Ibid.* at s.4, 9-11.

¹⁹⁵ This was a finding of fact recognized by the Court in *Doe v. Canada*, *supra* note 188 at para. 51.

¹⁹⁶ Prior to 2002, under the *Regulations* the use of semen in assisted conception from men belonging to one of a number of particular categories was not permitted under *any* circumstances. The excluded categories include men over the age of forty, alcoholics, and men who have had sex with another man, even once, since 1977. In 2002 the government amended the *Regulations* to provide for what is described in the *Regulations* as Special Access Authorization. Under the new provisions a physician can now, with special government authorization, use the semen of a gay man to perform assisted conception procedures. To

Doe v. Canada involved a challenge to the *Semen Regulations* by ‘Susan Doe’ a woman who sought assisted conception to conceive using semen from the same gay man who had biologically fathered the claimant and her partner’s first child. The claimant’s partner conceived and gave birth to the family’s first child and the couple wanted their second child to be biologically fathered by the same man who had biologically fathered their first child. However, because Susan Doe was not in a sexual or spousal relationship with him, her donor and his semen were subject to the *Regulations*.¹⁹⁷ While her donor was willing to provide fresh semen for use in assisted conception he was not willing to have his semen cyro-preserved and quarantined. As a result, Susan Doe was denied access to assisted conception procedures using her chosen donor’s semen.

Susan Doe challenged the constitutional validity of the definition of “assisted conception” under the *Regulations*, arguing that it violated section 15 of the *Charter* by discriminating on the basis of sexual orientation.¹⁹⁸ The Ontario Superior Court of Justice held that the definition of “assisted conception” in the *Semen Regulations* did not violate the claimant’s rights under section 15 of the *Charter*; this decision was upheld on appeal.

Susan Doe argued that this exemption from the *Regulations* for the semen of a woman’s spouse or sexual intimate discriminates against lesbians who by definition will not have a semen donor who is a spouse or sexual partner. Justice Dambrot, of the Ontario Superior Court of Justice, and Justice Macpherson of the Ontario Court of Appeal

acquire that authorization a physician is required to provide the government with, among other things, a rationale outlining “the reasons that justify the use of the requested semen” and the “reasons why the needs of the patient cannot be met using semen” from a man who hasn’t had sex with another man, even once, since 1977.

¹⁹⁷ In addition, because he was a gay man over the age of 40 his semen could only be used if Susan Doe’s physician received a Special Access Authorization from the federal government.

¹⁹⁸ The claimant also unsuccessfully challenged the *Semen Regulations* under section 7 of the *Charter*. Notably, the *Assisted Human Reproduction Act* declares that “persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status”(S.C. 2004, c.2, s.2(e)).

(who on the whole adopted Justice Dambrot’s reasoning) disagreed.¹⁹⁹ Justice Dambrot found that the exemption from the *Regulations* was not, as Susan Doe had argued, a recognition that “women are entitled to knowingly and voluntarily accept the risks to themselves and to their unborn children associated with conceiving a child with the donor of their choice.”²⁰⁰ His rejection of this claim was premised on the fact that heterosexual women who are not in a sexual or spousal relationship with their donor are also subject to the *Regulations*. As such he reasoned,

...simple logic tells me that the justification for the exemption of spouses and sexual partners cannot be recognition that women are entitled to knowingly and voluntarily accept the risks to themselves and to their unborn children. It would be impossible to reconcile that purpose with the fact that a heterosexual woman who wants to be inseminated by a known donor is not exempt from the scheme.²⁰¹

Instead he suggested, “it makes perfect sense to exclude from the scheme women seeking assisted conception with the semen of their spouses or sexual partners, because there is no point in imposing the Semen Regulations on such women having regard to the fact that they have already been exposed to any risk that exists, and will likely continue to be exposed.”²⁰² As such, for Justice Dambrot the *Regulations* logically draw a distinction between donors who are sexually intimate with, or married to, the women seeking assisted conception and donors who are not.²⁰³ Having identified this as the purpose of the exclusion, Justice Dambrot unsurprisingly came to the conclusion that while concededly “lesbians do not ordinarily have spouses or sexual partners who can donate

¹⁹⁹ *Doe v. Canada*, *supra* note 188.

²⁰⁰ *Ibid.* at para. 79-80.

²⁰¹ *Ibid.* at para. 82.

²⁰² *Ibid.* at para. 83.

²⁰³ This health based rationale for the exemption assumes that the risk of acquiring infectious diseases is the same whether or not the donor is known to the recipient or anonymous.

semen” and therefore the *Regulations* do impose differential treatment on them, sexual orientation is not the basis for this differential treatment.²⁰⁴

Undeniably, one of the legislative objectives of the *Semen Regulations* is to prevent the spread of communicable diseases. In keeping with this objective, it is simple, and logical (to use Justice Dambrot’s language²⁰⁵) to subject anonymous semen to the regimen of testing prescribed in the *Semen Regulations*. It would also be consistent with the legislative objective articulated by the Court, although perhaps not efficacious, to subject the semen of all known donors to this regiment of testing. However, there does not appear to be a well reasoned basis, consistent with the stated objective, to exclude from the strictures of the *Semen Regulations* some known donors, but not others.²⁰⁶ I would suggest that the exclusion from the *Semen Regulations* of known donors who are in a spousal or sexual relationship with the women seeking assisted conception, is actually

²⁰⁴ *Doe v. Canada*, *supra* note 188 at para. 109. For further critique of the formalistic reasoning in this decision see Elaine Craig, “Family as Status in *Doe v Canada*: Constituting Family Under Section 15 of the Charter” (2007) 20 National Journal of Constitutional Law 197.

²⁰⁵ *Doe v. Canada*, *supra* note 188 at para. 82, 83.

²⁰⁶ It actually does not reflect reality logic or reality to suggest, as Justice Dambrot did, that a woman using a non-spousal known donor would be unlikely or less likely to take suitable precautions, such as STD testing, for her designated donor. Indeed women in such circumstances may very well be *more* likely to insist that their chosen donors be tested than are women who are in an intimate spousal or sexual relationship with their donors. Setting aside this point, Justice Dambrot also suggested that “unlike the case where the donor was a spouse or sexual partner, where any risk of infection had already been assumed before the assisted conception procedure, in the case of other known or anonymous donors the woman had not assumed any risk prior to the assisted conception procedure” (at para.23). This reasoning too defies both logic and reality. It would not be unreasonable to assume that, before incurring the expense and intervention of assisted conception, women who approach their doctors for assistance in conceiving with known donor semen will have first attempted home insemination; therefore those women using a non-spousal known donor for whom they have not taken suitable precautions will (like those women using a spousal donor) have already been exposed to the risk of infection. What is more, women do not automatically, upon initial exposure to infected semen, contract sexually transmitted diseases such as HIV. Arguably, any woman who has not actually been infected by diseased semen faces the same risk from assisted conception, regardless of whether she has previously been exposed to the semen. In other words, the purpose of the exclusion identified by the Court is only logical for women who have already been infected by the semen of their spouse or sexual intimate. Those excluded women, who are in a spousal or sexual relationship with their donor, but who have not been infected by their semen, are, in terms of risk of infection, in the same position as women who are subject to the requirements of the *Semen Regulations*. Finally, if the purpose of the restrictions against using semen donated by men over 40 or by alcoholic men is actually to prevent birth defects, as was suggested by the Court, it isn’t logical to exclude from this restriction women who are in a spousal or sexual relationship with men over 40 or alcoholic men.

based on hetero-normative and essentialist assumptions or understandings about family and interpersonal relationships in contemporary Canadian society. That is to say, the exclusion from the *Regulations* is premised on a monogamous, heterosexual ideal of the family that presumes that the semen of husbands ought not to be subjected to the same testing and restrictions as that of any other known donor semen. If this is so then, the constitutional difficulty with the definition of “assisted conception” under the *Semen Regulations* is not only that its effects impose a differential burden to some as a result of their sexual orientation but that, by relying on a hetero-normative, traditional conception of the family its purpose imposes differential treatment based on family status. If this is the case then even within an analytical framework which privileges purpose over effect – such as Justice Dambrot’s - the definition of assisted conception under the *Regulations* violates section 15 of the *Charter*.

Had Susan Doe argued that the definition of assisted conception treated certain types of families differently and that this differential treatment was based on family status, her claim at the very least would not have fallen prey to the formalistic bent with which courts of late appear to be approaching section 15 challenges.²⁰⁷

Premising a constitutional challenge to the *Semen Regulations* on the basis of family status discrimination rather than simply on the basis of sexual orientation discrimination is both more inclusive now, and more likely to promote greater inclusivity in the future. As a category family status may be more conducive to maintaining open-ended and constantly re-articulated boundaries as to who is in and who is out. It is by its structure oriented towards litigation strategies intended to re-define it – to queer which

²⁰⁷ See Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* eds Sheila McIntyre & Sandra Rogers (Butterworths: Canada, 2006) 135.

relationships/ which interpersonal social dynamics constitute family– to change its social meaning. Every piece of equality litigation successfully argued under family *status* – a relational concept- rearticulates and in this process contributes to the social construction of family.

Despite the semen, despite the importation of sexual intimacy into the definition of assisted conception, and despite the litigants’ decision to argue discrimination on the basis of sexual orientation, *Doe v. Canada* is not solely about sex...or sexual orientation. It is, in large measure, about relationships. Yet cases like this are consistently presented to the public, and analyzed on the sole basis of whether or not there has been discrimination on the basis of sexual orientation.

The Court in *Doe v. Canada* was right to suggest that the category of individuals disadvantaged by the *Semen Regulations* does not just include lesbian couples, it also includes heterosexual women who wish to start, or who belong to, families with known donors with whom they are not in a sexual relationship, such as single women or any three or more parented family. The *Semen Regulations* discriminate against anyone, regardless of their sexual orientation, who wants to start or expand a family that does not conform to the traditional, stereotypical model of a monogamous, two biologically parented, heterosexual family, upon which the exclusion was premised. In addition to the possibility of success, the distinct advantage of premising a claim in this case on the basis of family status rather than sexual orientation is that it pursues the same goal, recognition of a different way of life, a different type of family, a different choice, without capitulating to the essentializing effect of the rigid heterosexual/homosexual classification of sexual identity. While still premised on the need to establish differential treatment, a

pragmatic reality under the binding analytical framework established by the Court, this approach is more in keeping with both the element of human dignity Justice L'Heureux-Dube sought to have transcend notions of enumerated and analogous group identity²⁰⁸ and with the desire to further social transformation through the disruption of loci of institutional power, such as the family.

It is true that the categorical approach to equality does nothing to challenge the fact that the law's distributive role is being dictated by or in reference to certain norms. It is true that it requires individuals to fit themselves into categories. It is true that with respect to the category of sexual orientation this results in an essentialist conception of sexuality. I do not, however, agree that the success of the sexual minority equality movement has done nothing to challenge those norms upon which 'individuals are measured' – or to put it otherwise, upon which the distribution of rights, privileges, and legal benefits are based. I have argued elsewhere that the access to cultural paradigms acquired by the successes of the sexual minority rights movement lends itself well to a process of subversion (or what I would now describe as iconoclasm) from within.²⁰⁹ I will argue in Chapter Eight that legal movements, such as the movement to acquire same sex marriage, provide a good example of this.

The categorical approach to equality driving section 15 has ascribed to an essentialist conception of sexuality. As noted above, legal scholars have argued that while many sexual minorities have received the benefit of section 15 protection, these legal successes have not resulted in transformative changes to the social and legal

²⁰⁸ See *Mossop*, *supra* note 163; *Egan*, *supra* note 147; *Vriend*, *supra* note 159.

²⁰⁹ Elaine Craig, "'I DO' Kiss and Tell: The Subversive Potential of Non-Normative Social Sexual Expression From Within Cultural Paradigms" (2004) 27 *Dalhousie Law Journal* 403; Elaine Craig, "Laws of Desire: The Political Morality of Public Sex" (2009) 54 *McGill Law Journal* (forthcoming).

institutions that regulate sexual behavior or to the assumption that economic privileges be distributed based on sexual relationship status. However, some of the power and access to cultural and social institutions achieved under this approach have successfully disrupted and replaced certain essentialist conceptions about family, sexuality and sexual relationships. Given the legal reality – the categorical approach to section 15 is unlikely to be rejected anytime soon – it is necessary to devise new equality seeking strategies to promote more constructivist legal conceptions about sexuality, sexual relationships, and sexual preference. Claims of discrimination based on sexual orientation may have had their (very successful) day in court. This does not mean that the pursuit for equality for those whose sexual identity, sexual preferences, and relationship choices do not conform to the hetero-normative paradigm is over. It does not mean that the essentialist conception of sexuality adopted and perpetuated under section 15 should be accepted. It may mean, however, that efforts should now be directed towards queering the categories themselves, making less claims based on identity and more based on status – on relational and interactional concepts. The downside, of course, will be that these are not claims that will benefit as significantly from those reverse discourses that achieved so much for some sexual minorities.

This part has noted how the essentialism driving the categorical approach to equality unavoidably excludes those unable or unwilling to ‘fit into the category’. It has attempted to reconcile the power produced through an essentialist conception of sexual orientation with its corresponding obstacles to more transformative approaches. The final section of Chapter Three will examine how an essentialist conception of sexuality leads to an approach to sexual harassment that fails to fully account for the social context that

produces this type of sexual hostility. Part Three will also demonstrate how categorical approaches to issues of sexuality can be problematic not only in the equality context but also in the area of sexual harassment law.

V. The Sexual Hostility Of Sexual Harassment – A Non-Categorical Approach

The Supreme Court of Canada's current approach to sexual harassment was established in 1989 in *Janzen v. Platy Enterprises*.²¹⁰ In *Janzen v. Platy*, the Supreme Court of Canada recognized, as human rights violations, allegations of sexual harassment perpetrated against the two waitress claimants by 'Tommy the cook' and his boss (the owner of the company with which they were employed). The Manitoba Human Rights Tribunal had found in favour of the complainants; however upon judicial review, the Tribunal's decision was quashed by the Manitoba Court of Appeal.²¹¹ Justice Hubbard was of the view that to harass and to discriminate are two "entirely different concepts."²¹² He argued that "[w]hen a schoolboy steals kisses from a female classmate, one might well say that he is harassing her. He is troubling her; vexing her; harrying her -- but he surely is not discriminating against her".²¹³ Justice Twaddle, in his concurring opinion, argued that sexual harassment did not constitute sex discrimination because it was not a distinction based on the category of sex but rather an action based on sexual attraction or 'sex appeal'.²¹⁴

On appeal to the Supreme Court of Canada, Chief Justice Dickson overturned the Manitoba Court of Appeal's determination that sexual harassment did not constitute sex discrimination. Chief Justice Dickson determined that a finding of discrimination does

²¹⁰ [1989] 1 S.C.R. 1252.

²¹¹ *Janzen v. Platy Enterprises Ltd.*, [1987] 1 W.W.R. 385 (Man. C.A.).

²¹² *Ibid.* at para. 29.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

not require the uniform treatment of all members of that particular group. He found that to argue that it is not discrimination because it is based on the sexual appeal of a particular woman rather than women as a whole is analogous to suggesting that discrimination on the basis of pregnancy is not sex discrimination because it only discriminates against pregnant women and not all women are pregnant.

This reasoning was rejected by Chief Justice Dickson in *Brooks v. Safeway Canada Safeway Ltd.* on the basis that while it was true that Safeway had only discriminated against pregnant women, it is only women who can be pregnant.²¹⁵ Pregnancy he argued cannot be separated from gender. Correspondingly, he found in *Janzen v. Platy* that “[o]nly a woman could be subject to sexual harassment by a heterosexual male” and “sexual attractiveness cannot be separated from gender”.²¹⁶

In terms of outcome, a feminist analysis of the Supreme Court of Canada’s reasoning would consider *Janzen v. Platy Enterprises* a victory for women. The Court held, in no uncertain terms, that sexual harassment – whether it be in the form of *quid pro quo* or hostile work environment – was indeed a form of discrimination based on sex. Moreover, the Court made steps towards adopting a constructivist notion of sexual harassment as a systemic product of a sexist labour market.²¹⁷ However, Chief Justice Dickson’s reasoning in *Janzen v. Platy* also relies significantly on an essentialist conception of sexual harassment. This has led, in one particular legal context, to an application of sexual harassment law that relies on the same type of problematic and essentialist categorical reasoning discussed above regarding section 15 of the *Charter*.

Chief Justice Dickson focused a great deal of his analysis on sexual demands:

²¹⁵ [1989] 1 S.C.R. 1219. *Brooks* was released the same day as *Janzen v. Platy*.

²¹⁶ *Janzen v. Platy*, *supra* note 210 at para 64, 65.

²¹⁷ *Ibid.* at para. 57.

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands...sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands...Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behavior.²¹⁸

Instead of rejecting the Manitoba Court of Appeal's assumption that sexual harassment was about sexual attraction not sex (and therefore was not sex discrimination) he found that it was sex discrimination because "sexual attractiveness cannot be separated from gender",²¹⁹ which he assumed to be synonymous with sex (as in male/female sex). From here he drew the analogy to pregnancy and came to the conclusion that "only a woman could be subject to sexual harassment by a heterosexual male"²²⁰ and that therefore sexual harassment constitutes sex discrimination.

Why did the Court suggest that "only a woman could be subject to sexual harassment by a heterosexual male"²²¹ or that "sexual attractiveness cannot be separated from gender"?²²² Was this necessary in order to avoid the formalistic reasoning adopted by the Manitoba Court of Appeal? Was it consistent with Chief Justice Dickson's (decidedly constructivist) recognition that sexual harassment is produced through social context (i.e. a sexist labour market)?

In fact, it was neither necessary nor consistent and it is problematic to conceptualize sexual harassment as 'sourced' in biology and arousal. As demonstrated in

²¹⁸ *Supra* note 213 at para.49 and 52.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

the paragraphs to follow, it leaves less analytical space to recognize claims of sexual harassment by heterosexual men against other men (and by heterosexual women against women).²²³ It also leaves those sexually harassed because of or based on transgressive gender expression less protected. It encourages a categorical approach to sexual orientation in which claims of sexual harassment by men and boys that should be understood as sexual harassment are framed as claims of discrimination on the basis of sexual orientation. An essentialist conception of sexual harassment cannot accommodate a truly complex gender analysis of the issue – something that an understanding of ‘straight male’ on male sexual harassment, for example, may demand. Moreover, an essentialist conception of sexual harassment is inconsistent with those aspects of Chief Justice Dickson’s decision in which he recognized the role of social and contextual factors -such as power and systemic inequity - in producing sexually harassing behavior.²²⁴ It does not ask or answer the question as to why sexuality is the weapon of

²²³ See *North Vancouver School District No. 44 v Jubran*, *infra* note 227 discussed below; see *MacDonald v Brighter Mechanical* *infra* note 239 discussed below; see *R (on behalf of her son) v. Squamish School District No. 48 (c.o.b. Myrtle Philip Community School)* [2003] B.C.H.R.T.D. No. 49. This case was held in abeyance pending resolution of the *Jubran* appeal, discussed below. However, like in the other cases, much of the analysis – prior to suspending the hearing- turned on whether the alleged victim was gay. In fact this case exemplifies particularly well why the reasoning and argument in these cases is ill conceived. In this case the complainant mother argued that her son was discriminated against based on sexual orientation while in grades 1 through 6. He was teased and harassed for being gay by other students. The mother alleged that the school failed to adequately protect him. She stated that because he was so young she didn’t know whether he was gay. The School responded that the claim should be dismissed because the mother admitted that her son had never declared that he was gay and because she admitted that she didn’t know whether he was gay. The mother made an application requesting that the Tribunal hold a hearing to determine whether or not her son was gay! Instead of advising the complainant and the respondent that they were both totally missing the point, and that it was ridiculous to suggest they hold a hearing to determine the sexual orientation of her elementary school aged child, the Tribunal determined that the proceeding should be held in abeyance until the Court of Appeal ruled in *Jubran* on whether “there must be a connection between actual or perceived identity in relation to sexual orientation and the use of hurtful words”.

²²⁴ For a discussion on this point see Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (Yale University Press: London, 1979). The Court in *Janzen v. Platy* cited Catherine MacKinnon’s definition of sexual harassment: “the unwanted imposition of sexual requirements in the context of a relationship of unequal power “. While the Court cited Mackinnon’s definition, among

choice in so many employment, educational and institutional settings. It does not inquire into the other power dynamics at play – whether these are individual, institutional, political, economic or social. It fails to fully explore why Tommy the Cook’s boss, who presumably was not motivated by sexual arousal, chose to ignore his employees’ complaints.

A conception of sexual harassment focused on sexual attraction is less likely to produce systemic remedies. A failure to account for the many social and institutional factors and complex power dynamics that contribute to sexual harassment obscures systemic labour hierarchies between men and women; it obscures the distinction between sex and gender and the role that gender (in addition to or perhaps in some cases even instead of sex or sexuality) plays in sexual harassment cases; it also makes it much more difficult to identify the many sites where it occurs and the diversity of individuals who are subjected to it.

i) Straight Eye For The Straight Guy, High School Pariahs And Social Solutions

Given the Court’s determination in *Janzen v. Platy* that either the perpetrators or complainants of sexual harassment may be male or female, the assumption that only a woman could be subject to sexual harassment by a heterosexual male is based not on the belief that men cannot be sexually harassed, nor even that men cannot sexually harass other men but rather on the assumption that straight men will not sexually harass other men.

What underpins the claim that straight men will not sexually harass other men? First, it is underpinned by an assumption that sexual harassment is motivated by sexual

others, it did not adopt MacKinnon’s analysis of power or MacKinnon’s constructivist account of sexuality and gender.

desire, sexual attraction and sexual arousal; while such an assumption is consistent with Chief Justice Dickson's focus on sexual demands, to characterize sexual harassment this way was precisely the understanding of sexual harassment that feminists argued against. Second, it assumes that sexual desire, sexual arousal and sexual attraction are fixed. In other words, a heterosexual man will not sexually harass another man because sexual harassment is about sexual attraction (and in addition an assumption that men who identify as heterosexual are never sexually aroused by other men). Chief Justice Dickson's reasoning leaves little, if any, analytical opportunity to address cases of sexual harassment by heterosexual men against other heterosexual men. The sexual harassment by men or boys of other men or boys, completely irrespective of the sexual orientation of either the victims or the perpetrators, is not uncommon.²²⁵ Indeed, one might find that the more male dominated, the more butch, the work place or social context the more likely this is to happen.²²⁶

The reasoning in *North Vancouver School District No. 44 v. Jubran* illustrates exactly how an essentialist conception of sexual harassment can impede recognition of other victims in a way that a constructivist understanding of sexual harassment does

²²⁵ See *North Vancouver School District No. 44 v. Jubran*, *infra* note 227 discussed below; *MacDonald v. Brighter Mechanical* *infra* note 239 discussed below; *Smith v. Menzies Chrysler Inc.*, [2008] O.H.R.T.D. No. 35; *Selinger v. McFarland*, [2008] O.H.R.T.D. No. 48; *R (on behalf of her son) v. Squamish School District No. 48 (c.o.b. Myrtle Philip Community School)*, *supra* note 223. For a well known American example see *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998).

²²⁶ See Michael Messner, "The Triad of Violence in Men's Sports" in Emilie Buchwald, Pamela Fletcher & Martha Roth, ed.s, *Transforming A Rape Culture*, revised edition, (Milkweed Editions: Washington, 2005) 23 for a discussion of the way in which young male athletes use sexuality to bond with each other but also to bully those teammates with less social status. His research revealed that the more aggressive the sport and the higher the social status of that sport in a particular community the more likely the higher status members of the team were to be sexually aggressive.

not.²²⁷ *North Vancouver School District No. 44 v. Jubran* involved a human rights complaint against the school board by one of its former students.

For Azmi Jubran high school was a “living hell”.²²⁸ This was because in grade eight, Azmi was selected as the class “pariah” and spent the next five years being singled out and picked on by a group of fellow students. In particular, he was called a “homo”, a “queer” and a “faggot”. He was kicked and he was spit on. His tormentors drew sexually graphic pictures of him and attached the label homo to them. On a number of occasions his entire class chanted “Azmi is gay” in unison.²²⁹ Azmi alleged that he had been discriminated against on the grounds of sexual orientation. The school board argued that a student who identified as heterosexual and was perceived to be heterosexual could not claim that he had been discriminated against on the basis of sexual orientation.²³⁰

The British Columbia Human Rights Tribunal found that Azmi was not a homosexual, nor according to the Tribunal, were his tormentors. They also found that the students did not perceive Azmi to be a homosexual. Regardless, the Tribunal held that Azmi had been discriminated against on the ground of perceived sexual orientation and that the school board had failed, without reasonable justification, to provide a discrimination free learning environment.

The Tribunal’s award was quashed on judicial review to the British Columbia Supreme Court.²³¹ Justice Stewart stated that

²²⁷ [2005] B.C.J. No. 733 (C.A.) [hereinafter *North Vancouver School v. Jubran*].

²²⁸ Taken from the British Columbia Supreme Court’s description. (2003), 9 B.C.L.R. (4th) 338 (S.C.) (rev’d [2005] B.C.J. No. 733 (C.A.)).

²²⁹ [2002] B.C.H.R.T.D. No. 10 at para. 10.

²³⁰ *Ibid.*

²³¹ *North Vancouver School v. Jubran*, S.C., *supra* note 228.

of overarching importance, the Tribunal proceeded on the basis that even if it accepted as a fact that the students who attacked him did not believe Jubran to be a homosexual their conduct fell within s. 8 of the Human Rights Code, *infra*. For my purposes therefore the case must be approached as one in which Jubran is not a homosexual and the students did not believe him to be a homosexual.²³²

Based on this reasoning Justice Stewart held that, given that Azmi is not a homosexual, and that the students did not believe him to be a homosexual he could not find that their harassment was discrimination based on sexual orientation. He stated that the Tribunal erred by equating “discrimination through harassment by the use of hurtful words of a sexual nature with discrimination "because of the sex or sexual orientation OF THAT PERSON OR CLASS OF PERSONS".²³³

If one understands sexual orientation as an essential part of self, constitutive of who we are, and one determines that human rights legislation prohibiting discrimination on the basis of sexual orientation is confined to protecting those belonging to historically disadvantaged or oppressed sexual minorities, then one must find that Azmi, who identified as straight and was perceived as straight, was not discriminated against based on sexual orientation. If one finds that sexual harassment is behavior motivated by sexual arousal (as dictated by one’s pre-social and innate sexual object preference) then the use of hurtful words and conduct of a sexual nature by these heterosexual students against another heterosexual student was not discrimination based on sex. Justice Stewart’s reasoning is consistent with the Supreme Court of Canada’s interpretation of sexual harassment in *Janzen v. Platy*. It is reasoning which demonstrates how an essentialist conception of both sexual orientation and sexual harassment precludes legal recognition

²³² *Ibid.* at para. 6.

²³³ *Ibid.* at para. 13 (emphasis in original).

of this human rights violation because of an overly simplistic interpretation of the behavior at issue. Instead of recognizing the multilayered and immensely complex intersection of power with sex, sexuality and gender and the relationship dynamics these social practices and cultural understandings of sexuality and gender produce, Justice Stewart chalked these sexualized attacks up to an unexplored, and frankly uncritical assumption of teenage cruelty. Thus his explanation for the harassment: "His high school years were a living hell. Why? Because a group of students singled him out for attack. For reasons unknown - and probably capable of being understood only by the addled brains of certain teenagers - Jubran was a pariah."²³⁴

Are they reasons unknown? Are they incapable of comprehension? Azmir's classmates testified that they did not perceive him to be homosexual. They claimed that they were not targeting him because he was gay. The explanation provided by the school board and supported by the testimony of the students was that they targeted him because he was different and that the homophobic slurs were the form that their attacks took.

From an essentialist perspective it may be incomprehensible why a group of heterosexual students would sexually harass another heterosexual student, who they perceived to be heterosexual, by demonizing him as a 'faggot'. It may not be possible from this perspective to identify the behavior – which no one questioned was harassing - as sexual. However, from a social constructivist account of sexual harassment which understands it as a product of social and institutional practices - a multiplicity of force relations manifested through webs of relationships in which sexual identity and the categories of sex themselves are produced and regulated through the normative practices

²³⁴ *Supra* note 228 at para. 5.

which are typically understood to reflect them, as Foucault might suggest²³⁵ - the conduct becomes both comprehensible, as normative policing, and identifiable as sexual harassment. Under this account, assuming the Supreme Court is correct that harassment that is of a sexual nature constitutes discrimination based on sex then, the conduct directed towards Azmi was certainly discrimination based on sex.²³⁶

The British Columbia Court of Appeal came to a different conclusion than that of Justice Stewart of the British Columbia Supreme Court.²³⁷ They found that “the consequences of the actions of Mr. Jubran's harassers was that he was discriminated against because of his sexual orientation, whether or not he was or his harassers believed or perceived him to be homosexual.”²³⁸

But does it really make sense to suggest that Azmi was discriminated against because of his sexual orientation or even perceived sexual orientation? Certainly he was discriminated against. Certainly it demeaned him in a way that interfered with his participation in school life. But his sexual orientation, according to him, is heterosexual. His harassers testified that they understood his sexual orientation to be heterosexual. They further testified that they did not mean to imply by their taunts that he was homosexual. Azmi was straight. His harassers knew him to be straight. His harassers were not trying to suggest that he was other than straight.

In fact, Azmi was not discriminated against because of or based on *his* sexual orientation. But was he discriminated against based on sexual orientation generally –

²³⁵ Michel Foucault, “Two Lectures”, in Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, (Colin Gordon ed. & Colin Gordon et al. trans., 1980),

²³⁶ In *Janzen v. Platy* the Court found that harassment that is sexual constitutes sex discrimination because sexual norms – in that case sexual attractiveness- cannot be disaggregated from, and are in some loose sense dictated by sex (as in male/female). The constructivist claim made here relies on the different suggestion that sex – as in male/female- cannot be disaggregated from and is dictated by sexual norms.

²³⁷ *North Vancouver School District No. 44 v. Jubran*, *supra* note 227.

²³⁸ *Ibid.* at para. 50.

based on the concept of sexual orientation? He was wrongly labeled homosexual. However to identify someone as gay, regardless of whether or not they are sexually attracted to members of the same sex, is not an act of discrimination - to suggest otherwise carries with it heterosexist, if not homophobic, normative assumptions. The issue is that he was persecuted and that the weapon of choice was reliance on social attitudes of hatred and fear towards sexual minorities – Jubran was subjected to sexual hostility not discrimination on the basis of his sexual orientation.

In *Macdonald v. Brighter Mechanical Ltd.* the complainant alleged that he was discriminated against on the basis of sexual orientation.²³⁹ MacDonald was not gay. There was no evidence to suggest that his alleged harassers (fellow heterosexual employees) thought that he was gay. However, like in *Jubran* the complainant's claim was nonetheless framed as discrimination on the basis of sexual orientation.

Macdonald alleged that among other things he was called a fag, asked how he liked sucking cock, and on a regular basis had sexually explicit material placed in his toolbox suggesting he try pussy for a change.²⁴⁰ The Tribunal found that he had not proven these allegations on a balance of probabilities. However the Tribunal went on to discuss what their outcome would have been had he proven the allegations. The Tribunal determined that “even if Mr. MacDonald was occasionally called gay or a fag, or did receive a few ads or pictures in his toolbox, I would not find that he had been discriminated against in the course of his employment on the basis of sexual orientation.”²⁴¹ This finding was based on five points: i) this, unlike the *Jubran* case, was an employment case - involving adults – and so MacDonald was not as vulnerable or

²³⁹ [2006] BCHRTD No. 326.

²⁴⁰ *Ibid.* at para. 21.

²⁴¹ *Macdonald v. Brighter Mechanical Ltd*, *supra* note 239 at para. 210.

as in need of protection as a student would be; ii) the conduct occurred over the course of a relatively short period of time – one year not several years as in *Jubran*; iii) any homosexual epithets directed at Mr. MacDonald and any sexually related material which may have been placed in his toolbox were because his fellow employees disliked him – the conduct was therefore unrelated to any ground protected under the Code; iv) it was both “clear and relevant”²⁴² that no one at Brighter Mechanical perceived Mr. MacDonald to be gay or anything other than a heterosexual male”.²⁴³

Maintaining that Jubran or MacDonald were discriminated against based on their sexual orientation is not the only or the best way to establish that the conduct they alleged violates human rights legislation. Under a socially constructed understanding of sexuality, in which sexuality is more than nature, more than biological drives, but also (or instead, depending on the degree of constructivism) a product of social organization, a description of relationships, social interactions, and regulative sex and gender norms, and in which sexual harassment is not understood through innate sexual object choice designations or sexual arousal, it makes much more sense to say that these allegations, if proven, demonstrate sexual harassment (discrimination based on sex) rather than discrimination based on sexual orientation.

The benefit of adopting the approach I am advocating is that claims will not turn on whether the complainant was or was not gay or whether respondents thought that the complainant was gay. This approach does not obscure the systemic way in which sex, gender and sexuality are produced as categories of identity through social and institutional practices that are then deployed to regulate the very categories they have

²⁴² *Ibid.* at para. 206.

²⁴³ *Ibid.* at para. 49.

produced.²⁴⁴ All of which ought to i) provide greater insight into how and why homophobia still reigns over playgrounds and many job sites and ii) better reveal how sexuality, through the policing of sex and gender norms, is so often the weapon of choice in both the social demand for sex, gender and sexuality conformity and the mechanism of power that both informs, and flows from, such demand.

One might respond to this approach by asking what then would distinguish sexual harassment from other forms of harassment? In other words, what basis justifies the law's distinction between sexual harassment and plain old name-calling? The response to this critique is two fold. First, simply put, the law often makes distinctions based on choice of weapon. Second, the law also often makes distinctions based on the impact of the conduct or social practice at issue. Much as is the case with respect to race, for historical reasons as well as current social conditions, sexual hostility has a different impact than plain old name-calling - on both an individual level and a societal one. One of the, although not the only, reasons why sexual hostility is so often the weapon of choice is because sexual hostility has often been and is so often the weapon of choice. Indeed, in part, it is the very fact of this circumstance that makes sexual hostility such an effective weapon. One of the policy objectives of human rights legislation is broad or general social amelioration. In other words one of its objectives is to reduce the efficacy of weapons like sexual hostility.

²⁴⁴ Such as, for example, the way in which pubescent adolescents, by vigilantly policing gender norms in an effort to secure their own tentative sexual identities, might produce both the identities they seek to secure and those they wish to reject or furthermore, the ways in which institutional systems such as formal education systems facilitate such gender policing. Both Michel Foucault and Judith Butler, discussed in Chapter Two, offer theoretical explorations/explanations of how this sexuality/gender policing through social and institutional norms functions.

In *Mercier v. Dasilva* the complainant identified as straight as did the supervisor he accused of violating his human rights by among other things asking him repeatedly – in front of co-workers - to ‘do him a fellatio’.²⁴⁵ The Tribunal noted that neither Mercier nor Dasilva identified as gay. The Tribunal found that the evidence did not establish that Dasilva actually wanted Mercier to perform oral sex on him. In light of this evidence the Tribunal rejected Mercier’s claim of discrimination on the basis of sexual orientation; instead they found that he was sexually harassed. In doing so the Tribunal conceptualized sexual harassment as an act of sexual hostility – as the use of sexuality as a weapon to demean and humiliate. The Tribunal’s reasoning accommodates the group dynamics at play (the fact that the requests for fellatio not coincidentally occurred in front of other co-workers). Under the Tribunal’s reasoning, the fact that Dasilva may have been motivated by his dislike for Mercier would not be a basis on which to dismiss the claim (unlike the reasoning in *Macdonald v. Brighter Mechanical*). It is reasoning that does not require the Tribunal to assume that being, or being identified as, gay is presumptively demeaning.²⁴⁶ It is reasoning that recognizes sexual harassment as much more complex than simply the sexualization of the workplace. It is reasoning that accommodates the fact that a straight man may sexually harass another straight man.

In *Janzen v. Platy* Chief Justice Dickson makes reference to the issue of power. He states that sexual harassment is “the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working

²⁴⁵ [2007] B.C.H.R.T.D. No. 72 at para. 27.

²⁴⁶ It is true that an adjudicator may not *personally* presume it to be demeaning. However, unless a decision states explicitly that what the Tribunal is doing is recognizing that many presume it to be demeaning, the effect is the same.

conditions of employees who are forced to contend with sexual demands.”²⁴⁷ While he gives recognition to the role of power he then ties this to the making of sexual demands – the importation of sexual requirements. Contrast this with the reasoning of the Tribunal in *Mercier v. Dalsilva* where an analysis of the power dynamics at play was incorporated into the Tribunal’s conception of the actual behavior at issue.

As feminists have argued for decades,²⁴⁸ understanding sexual harassment as a social practice - as a product of the context in which it is situated - will be more likely to produce legal reasoning aimed at discerning whether sexuality is being deployed as a weapon in a particular workplace or institutional setting. There is nothing to suggest that a more constructivist approach could not be accommodated under the current definition of sexual harassment. *Janzen v. Platy* defined sexual harassment as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.²⁴⁹ While Chief Justice Dickson’s essentialist reasoning should be rejected, the definition itself does not preclude the possibility of a conception of sexual harassment that recognizes it as a social, institutional and systemic problem in which sexuality is the weapon of choice.

Conclusion

²⁴⁷ *Supra* note 210 at para. 49.

²⁴⁸ Feminist arguments such as those made on behalf of the intervener LEAF in *Janzen v. Platy* did in part take this systemic, constructivist approach by invoking the notion of power. However, because of the way that they framed their argument, their reasoning much like Chief Justice Dickson’s, also relied on an essentialist conception of sexual harassment. They argued that the complainants were discriminated against based on sex on the grounds that any women employed by the restaurant were at potential risk of being harassed by Tommy whereas any men employed by the restaurant did not face the same risk. As will be discussed in chapter 6, were their arguments regarding power disaggregated from the structural approach upon which their claim in *Janzen v. Platy* (and many other cases) was framed, their argument would not have lost its ‘constructivist bent’.

²⁴⁹ *Ibid.*

This chapter has demonstrated how the Court in different legal contexts - sexual harassment suits, the equality claims of sexual minorities, similar fact evidence cases and the criminal regulation of child pornography – tends to conceptualize sexuality as innate, pre-social and biologically driven. The objective of this chapter was to develop (or in the case of sexual minorities acknowledge and modify) arguments that reveal why constructivist legal conceptions of sexuality are to be preferred over essentialist legal conceptions of sexuality. The aim was to demonstrate that the Court’s essentialist understanding of sexuality cuts across different legal contexts and that while the issues it raises differ significantly depending on the legal context, in each, essentialist assumptions give rise to problematic reasoning - reasoning that constricts the legal ‘space’ in which to identify the social forces, and systemic factors contributing to or producing many aspects of human sexuality.

Part I exposed legal reasoning which suggests that the Court conceptualizes those who sexually abuse children as a discrete minority – an identifiable ‘other’ – and argued that such an understanding perpetuates a legal discourse that obscures the relationship between child sexual abuse and the social conditions that produce this problem – social conditions such as poverty, alcoholism, lack of education and dysfunctional family dynamics. Part II discussed how the Court’s approach to the equality claims of sexual minorities relies on the assumption that sexual object choice is an unchanging and innate element of one’s essential self. Many have argued that this justifies a hierarchical distribution of legal rights and privileges that demands some degree of assimilation and excludes those who cannot or will not assimilate. Part II also suggested that at this point in time a more transformative approach might be to make equality claims based on those

categories of prohibited discrimination that are relational in nature – such as family status. Part III revealed how essentialist conceptions of sexual harassment render some victims invisible while reifying those gender norms that help to constitute and regulate problematic distinctions between men and women, and between sexual majorities and sexual minorities.

The next chapter will examine a legal context – that of sexual violence against adults - in which the Court has shifted from this essential conception. In doing so Chapter Four will further demonstrate why the law ought to conceptualize sexuality as socially constructed. Chapter Four will also begin to demonstrate how a legal conception of sexuality as a social construct creates greater opportunity to orient law towards the protection and promotion of sexual integrity.

Chapter 4 – Queering Sexual Assault: Socially Constructed Conceptions Of Sexual Violence

The previous chapter examined different legal contexts (sexual harassment cases, sexual minority equality rights cases, and cases involving the sexual abuse of children) in which the Supreme Court of Canada ascribes to an essentialist conception of sexuality. Chapter Three also alluded to one area in which the Court's reasoning indicates a shift towards a more constructivist approach to issues of sexuality – that being the issue of sexual violence among adults. This chapter and the next one will examine that area. They will demonstrate how, influenced by feminist intervention, the Court has in the last twenty years adopted a more constructivist understanding of sexual violence.

This newly adopted social constructivist understanding of sexual violence is reflected in the Court's approach to the regulation of obscenity and indecency, how the Court defines consent to sexual touching and how the Court characterizes the harm of sexual violence. It is a change that reflects a shift in the law's moral focus - a shift from protecting sexual propriety to promoting sexual integrity, a shift from moral concern over sexual acts to moral concern over sexual interactions.

Until recently the law conceptualized sexual violence against women the same as, or very similar to, the way it often continues to conceptualize the sexual violation of children.¹ Legal reasoning in cases involving sexual violence between adults revealed the

¹ The issue of why the law has shifted towards a socially constructed conception of sexual violence among adults but not as perpetuated against children is a topic unto itself. Perhaps this has occurred in part because the ideas advanced by feminists regarding power and equality, if ascribed to, demand a different conceptual approach to the rape of women by men but do not necessarily require a re-conceptualization of 'pedophilia'. In other words, power feminist theories cannot be universalized to explain or theorize other types of sexual violence. Alternatively, as suggested in Chapter Three, it may be that the natural/unnatural distinction is more pronounced in the context of intergenerational sex thus making essentialist thinking more entrenched in that context.

view that rape was perpetuated by men who were cursed with a natural sexual drive gone awry, or an uncontrollable or abnormal lust.

In *R. v. Dick, Penner and Finnigan*, for example, the Manitoba Court of Appeal, in upholding convictions against three defendants who brutally raped a young woman stated that “they defiled the body of the complainant for no other purpose than of gratifying their animal lusts; they robbed her of what a chaste woman considers her dearest possession, her virginity.”² In *R. v. Phelps*, the trial judge noted that “I want to stress that this was not a case where the assailant let his victim go after gratifying his perverted lust. She escaped. There is no telling what further indignities she would have had to undergo if she had not escaped.”³ Lest one think such sentiments are from a bygone era consider Justice McLung’s 1998 characterization of a sexual assault as the defendant’s “clumsy passes” and “sexual overtures” in his infamous decision in *R. v. Ewanchuk*.⁴

Under the old essentialist conception there was less space for the law to recognize and give import to the role of hate, anger, misogyny, power or dehumanizing disrespect at play in sexual violence. It was about lust and perverted urges – the greater the severity and frequency of the offensive conduct the more perverted the offender. In other words, in older cases essentialist thinking led courts to conclude that the sexual violation was instigated either by a natural male sexual urge gone awry or a perverted sexual drive. While the latter sentiment might arguably be revealed in contemporary cases regarding dangerous or long term offender hearings, which feature a discourse of psycho-pathology,

² [1965] 1 CCC 171 at para. 39

³ [1983] B.C.J. No. 1387 at para. 3.

⁴ [1998] 6 W.W.R. 8 at paras. 5, 11. Clumsy passes and sexual overtures – as if to suggest that Ewanchuk simply let his passion and lust get the better of him. For further discussion on the essentialist reasoning in these older cases see Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada 1900-1975*, (Irwin Law: Toronto, 2008).

penile plethysmographs and personality disorder assessments, in a typical sexual assault case, the perception of a natural sexual urge gone awry no longer plays the same analytical role in sexual assault law.⁵

This chapter will demonstrate how feminists, in the context of sexual assault cases, both explicitly advocated for the Court to conceptualize sexual violence as socially contingent and, through their success in doing so, demonstrated how sexual violence is a socially constructed concept. It is not only that the Court began to recognize instances of sexual violence that they previously had not; it is that conceptualizing sexual violence as socially contingent rather than the product of a natural sex drive gone dysfunctional changed what does and does not constitute sexually violative behavior. In other words, the very meaning of sexual violence, as conceptualized by the law of sexual assault, changed.

Queer theory claims that the concepts of sex, gender and sexuality do not connote or describe an innate, pre-social essence, but rather constitute themselves in and through their categorization via the social ascription of normative meaning. The feminist intervention on the issue of sexual violence between men and women both made, and in its successes exemplified, a very similar claim.

I. The Power Feminist Intervention

In the late 1980s and early 1990s Supreme Court of Canada jurisprudence began to reflect a perception that sex is about power and that sexual violence is an equality

⁵ An emphasis on uncontrollable urge or impulse may still be found in decisions addressing applications to have an individual convicted of sexual assault declared a long term or dangerous offender. This does not take away from the assertion that, in terms of the offence itself, the Court has shifted away from a conceptualization of sexual violence as either an instance of, or orientation towards, uncontrollable lusts or urges. To focus on this in order to determine whether an individual is likely to re-offend is different from understanding the offence itself as defined by, or even caused by, innate or natural sexual drive.

issue.⁶ Within the span of just a few years the Court incorporated a power/dominance analysis into its reasoning in the context of obscenity law,⁷ tort law,⁸ and sexual assault law.⁹ While today it might seem axiomatic to suggest that coercive or forced sex between men and women is, and ought to be, understood as an equality issue, this was not always the case.

This change in the way that the law conceptualizes sexual violence was guided in large measure by ideas advocated through legal activism (in both judicial and legislative forums) on the part of what might be described as power feminists. What does the phrase ‘power feminism’ mean?¹⁰

This phrase refers to that branch of feminism, sometimes also referred to as ‘dominance feminism’, which argues that inequality between men and women is itself sexualized. Beginning in the late 1970s and early 1980s power feminists began to respond to issues such as rape, pornography, commercial sex, incest, public sex and sexual harassment. These issues became the sites for legal and political activism, as well

⁶ Justice L’Heureux-Dube, the “great dissenter” as she was sometimes known, incorporated a power analysis of sex into her dissenting and concurring opinions before the majority of the Court began to adopt this position. See for example her reasoning in *Seaboyer v. The Queen*, [1991] 2 S.C.R. 577.

⁷ *R. v. Butler*, [1992] 1 SCR 452.

⁸ *Norberg v. Wynrib*, [1992] 2 SCR 226; *M.K. v. M.H.*, [1992] 3 SCR 6.

⁹ See for example *R. v. Osolin*, [1992] 2 SCR 313; *R. v. Litchfield*, [1993] 4 SCR 333; see *R. v. R.A.* [2000] 1 SCR 163 where the Court relied on the power imbalance between employer and employee as an aggravating factor in sentencing an accused convicted of sexually assaulting his employee.

¹⁰ The phrase is borrowed from Janet Halley but ought not to be taken as a complete endorsement of the specific critique of feminism asserted by Halley. In *Split Decisions: Taking a Break from Feminism*, (Princeton University Press: Princeton, 2006) Janet Halley uses the term to label Catharine MacKinnon’s work. I intentionally employ the term to invoke a double *entendre*: the power in ‘power feminism’ can be said to refer both to the theory of gender in which power is sexualized as well as to characterize its theorists. It is neither coincidental nor insignificant that power feminism is/was advanced by a segment of feminists (whether they be liberal, radical, etc) with a considerable degree of power. They are its practitioners. They are legal advocates, legal scholars, successful writers and politicians. They are women with institutional connections – women with (at least some degree of) power.

as the impetus for, and subsequent target of, feminist theories that identified male sexuality as a primary source of female subordination and thus a major social problem.¹¹

Power feminism (and the legal activism it engendered among Canadian feminists) has been heavily influenced by the work of a number of feminist theorists. There are two main conceptual frameworks for theorizing sexual violence that have advanced the many and varied ideas and proposals of power feminists.

The first framework advanced arguments suggesting that rape be understood as violence rather than sex. Susan Brown Miller was among the most prominent of those who theorized that rape be understood as systemic violence perpetuated against women by men.¹² Some of these theorists demonstrated how the historical context for rape laws was not the protection of women's sexual integrity but rather the protection of a male proprietary interest in female sexual property.¹³

The suggestion that rape is an act of violence was the conceptual framework underpinning the significant legislative reforms to sexual assault law adopted in the mid 1980s. "One gains a very clear impression from reading the debates that there was considerable consensus on this aspect of the reform."¹⁴ However, as Professor Boyle points out, while the 'new' sexual assault provisions emphasize violence, they tend to do so as a means of classifying assaults as more or less serious; "the violence in question is

¹¹ See for example in the context of sexual assault, Maria Bevacqua, *Rape On The Public Agenda: Feminism and The Politics of Sexual Assault*, (Northeastern University Press: Boston, 2000) where she traces the historical development of rape as part of the feminist agenda.

¹² Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam, 1975). See also Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist*, (New York: Vintage, 1978) and Lorenne Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977).

¹³ Brownmiller, *Against Our Will*, *ibid.*; Clark & Lewis, *Rape: The Price of Coercive Sexuality*, *ibid.*

¹⁴ "During the debates on Bill C-127 the Honourable Flora MacDonald made the following statement: This legislation makes a clear statement. It calls a spade a spade. It says that sexual assault is primarily an act of violence, not of passion; an assault with sex as the weapon." Taken from Christine Boyle, *Sexual Assault*, (Carswell Company Limited: Toronto, 1984) at 53.

other than the sexual touching itself...It seems inevitable that this will keep attention focused on the “sexual” aspect of the attack.”¹⁵ There are three ‘degrees’ of sexual assault: sexual assault, sexual assault with a weapon, and aggravated sexual assault. The more force used the more serious the offence. Boyle’s point was that the violence recognized by the provision is in relation to the degree of force used; it is not recognition of the sexual aspect of the assault as itself violent.¹⁶

While the issue of violence has certainly permeated Canadian sexual assault law, the suggestion that rape be equated with (or reduced to) an act of violence – a ‘de-sexualized’ conception of sexual violence – has not been adopted in Canadian sexual assault law.

The second conceptual framework for theorizing sexual violence advanced by power feminists did not take a ‘de-sexualized’ approach. These perhaps more radical (in terms of the essentialist/constructivist divide) theorists, the most prominent of which was Catharine MacKinnon, argued that the sexual violation of women by men is itself the process through which sexuality (and gender) is socially constructed.¹⁷

MacKinnon’s theory is both constructivist and structural. She argues that social relations between the sexes are organized in a hierarchical manner such that men will

¹⁵ *Ibid.* at 53.

¹⁶ Boyle’s prediction in 1984 was that this would mean a definition of sexual assault that constituted an assault with a sexual motivation. As discussed below, this prediction did not come to bear.

¹⁷ See Catharine A. MacKinnon, *Toward A Feminist Theory of State*, (Cambridge University Press: Harvard, 1989); Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press: Cambridge, Massachusetts, 1987) [hereinafter *Feminism Unmodified*]; Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (Yale University Press: London, 1979); Catharine A. MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory”, *Signs*, Vol. 7, No. 3, Feminist Theory. (Spring, 1982), pp. 515-544; Catharine MacKinnon, “Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence” (1983) 8 *Signs* 635 [hereinafter “Towards A Feminist Jurisprudence”].

dominate and women must submit.¹⁸ She suggests that the problem with much feminist legal analysis is its failure to understand that “the mainspring of sex inequality is misogyny and the mainspring of misogyny has been sexual sadism”.¹⁹ In other words, sexual dominance causes a hatred of women that in turn causes inequality between men and women. Intent on challenging the assumption that sex and violence are mutually exclusive, she argues that:

[s]exuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual subordination. If this is true, sexuality is the linchpin of gender inequality.²⁰

MacKinnon’s claim is that once one takes into consideration the frequency with which women are sexually violated by men it must be concluded that sexual violation is a sexual practice— in fact a very common sexual practice - and that it therefore forms the meaning and content of femininity (and masculinity).²¹ MacKinnon’s argument is that “[p]erhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance.”²²

¹⁸ *Feminism Unmodified*, supra note 17 at 4.

¹⁹ *Ibid.* at 5.

²⁰ MacKinnon, “An Agenda for Theory”, supra note 17 at 544.

²¹ MacKinnon’s claim is that rape *is* sex. It should not be confused with Andrea Dworkin’s claim that sex is rape. See Andrea Dworkin, *Pornography: Men Possessing Women*, (Penguin Group: New York, 1979, 1989). The distinction might be thought of as follows: for Dworkin all sex is rape, for MacKinnon some sex is rape. That is to say rape is not distinct from sex – it is a type of – a common type – of sex.

²² MacKinnon, “Toward Feminist Jurisprudence”, supra note 17 at 187.

What MacKinnon is suggesting is that “violence is sex when it is practiced as sex”.²³ In other words, “when acts of dominance and submission, up to and including acts of violence, are experienced as sexually arousing, as sex itself, that is what they are.”²⁴ For MacKinnon, the way women are restricted and violated is often what sex is for men and women and as such dominance will be experienced by men as sexual pleasure and submission will be experienced by women as sexual pleasure.²⁵ That is to say, both men and women understand sexuality through the concept of male dominance. She suggests that sexism is a political inequality that is enjoyed sexually and because the inequality is socially defined as sexually pleasurable it will be considered consensual.

MacKinnon asserts that social hierarchy is prior to gender itself - the social understanding of men and women is itself an effect of power. “Gender is an inequality first constructed as a socially relevant differentiation in order to keep that inequality in place.”²⁶ Men’s gender is produced by using their sexuality to dominate women. Sexual domination of women by men *is* men’s gender. Similarly, women’s gender is produced through their subordination by men. Sexual subordination *is* women’s gender.²⁷ The inequality that exists between men and women is sexualized.

In less theoretical wording, of the sort that made its way into the Supreme Court of Canada’s reasoning, sex is about power.²⁸ More specifically, it is about the power imbalances that exist (or can exist) in sexual relationships between men and women.

²³ Catharine A. MacKinnon, “Feminist Approaches To Sexual Assault in Canada And The United States: A Brief Retrospective” in Constance Backhouse and David Flaherty, eds., *Challenging Times: The Women’s Movement in Canada and The United States*, (McGill Queens-University Press: Montreal, 1992) 186 at 191.

²⁴ MacKinnon, *Feminism Unmodified*, *supra* note 17 at 6.

²⁵ *Ibid.*

²⁶ *Ibid.* at 42.

²⁷ *Ibid.* at 46.

²⁸ See for example *R. v. Osolin*, *supra* note 9.

Both the suggestion that rape is violence and that sexual violence is itself constitutive of (hetero)sexuality (and thus gender) provide theoretical groundings for the assertion that sexual violence is an equality issue; both have had an impact on the way that the Court conceptualizes sexual violence.

MacKinnon's theory may be more radical (in terms of its degree of constructivism) than those who argue that rape is about violence not sex. However, interestingly it is MacKinnon who has been relied on by feminist interveners in Canadian sex equality, sexual assault and obscenity cases²⁹ and it is MacKinnon who among power feminist theorists is most often cited by the Supreme Court of Canada.³⁰ This is not to suggest that

²⁹ While MacKinnon is considered by many to be on the 'radical side' of power feminism her contribution to its theory and her impact on law reform in areas such as pornography and sexual harassment is unquestionable. She is cited in numerous LEAF factums (including their submissions in *Butler*, *supra* note 7; *Norberg v. Wynrib*, *supra* note 8 and *R v. Ewanchuk*, [1999] 1 S.C.R. 330. (LEAF has, since 1985 intervened in numerous Supreme Court of Canada cases involving issues such as sexual assault and pornography and presumably their submissions contributed to the eventual adoption of power feminist analysis by the Court. For a discussion of their interventions and support for this presumption see Christopher Manfredi, *feminist activism in the supreme court: Legal Mobilization and the Women's Legal Education and Action Fund*, (UBC Press: Vancouver, 2004); see also Christopher Manfredi "Judicial Discretion and Fundamental Justice: Sexual Assault in the Supreme Court of Canada" 47 *Am J of Comp L*, (1990) 489 at FN 4 where he cites further support for the assertion that LEAF has been influential in the Supreme Court of Canada: Lori Hausegger & Rainer Knopff, "The Effectiveness of Interest Group Litigation: An Assessment of LEAF's Participation in Supreme Court Cases," paper presented to the Annual Meeting, Canadian Political Science Association, June 12-14, 1994; F.L. Morton & Avril Allen, "Feminists and the Courts in Canada: Measuring Interest Group Success," paper presented to the Annual Meeting, American Political Science Association, Aug. 29-Sept. 1, 1996. Manfredi notes that "both of these studies place LEAF's litigation success rate at approximately 60%, compared to an overall litigant success rate of 31%." Manfredi's research reveals that "LEAF participated in 28 Supreme Court cases from 1988 to 1997, presenting arguments on 49 separate Charter issues in those cases. The Court adopted the position advocated LEAF on 34 of those issues (69.4% agreement rate)." As of 1999 LEAF had "intervened in almost one-third of the Court's sexual assault cases to support legislation and common law rules that favor the interests of sexual assault complainants" (Manfredi, *ibid.* at 491). "LEAF's position has been adopted on thirty-four of forty-nine issues in the twenty-eight Supreme Court cases in which it has participated since 1988" (Manfredi, *ibid.* at 499.) LEAF's track record in sexual assault cases specifically is not on par with these overall results. In cases such as *Ewanchuk*, where what is at issue is the substance or meaning of sexual assault laws, LEAF has been relatively successful. In cases more directly related to issues of due process (such as admission of prior sexual history evidence or third party records) LEAF has been less successful.

³⁰ She was cited approvingly by Justice Cory for the majority in *R. v. Osolin*, *supra* note 9, by Justice L'Heureux-Dube in her concurring decision in *R. v. Ewanchuk*, *ibid.*, her dissent in *Symes v. R.*, [1993] 4 S.C.R. 695, and her partial dissent in *R. v. Seaboyer*, *supra* note 8. She was cited approvingly by Chief Justice Dickson in *Janzen v. Platy*, [1989] 1 SCR 1252 for her definition of sexual harassment (see Chapter 2 for a discussion of how regardless of what theoretical framework the Court referenced they did not adopt

the Court has not relied on the work of many feminist writers. The doctrinal work of feminist legal scholars, such as Christine Boyle and Elizabeth Sheehy, has been cited by the Supreme Court of Canada in several sexual assault cases.³¹ Rather it is to suggest that in terms of conceptualizing sexual violation (and thus implicitly adopting a particular conceptual account of sexuality), whether that be in the sexual assault, sexual harassment or obscenity context, it is Catharine MacKinnon's work which both activists and the Court have referenced most frequently.

Nor should recognition of the influence of MacKinnon's work be taken as a suggestion that members of the Court *never* adopt the less radical but still constructivist conception of 'rape as violence'. They do. This is evidenced by Justice Wilson's concurrence in *R. v. Bernard*.³² The majority in *Bernard*, upholding the rule in *R. v. Leary*³³ found that where the accused admitted to the sexual assault but denied *mens rea* based on his self-induced intoxication, the intention to get drunk could be substituted for the intention to commit the physical act. Typically individuals are presumed to intend the natural and probable consequences of their acts and *mens rea* can be inferred from their actions. Justice Wilson (and Justice L'Heureux-Dube) concurred in the majority's result but did not substitute the fault of committing the sexual offence with the fault of getting drunk. Justice Wilson held that in this case the necessary *mens rea* for sexual assault could be inferred from the accused's sexual behavior. She determined that in the very rarest of circumstances intoxication would be extreme enough as to raise doubts as to the

a constructivist conception of sexual harassment in *Janzen v. Platy*).

³¹ See for example *R v. Seaboyer*, *supra* note 6; *R v Ewanchuk*, *supra* note 29 where Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989), 21 Ottawa L. Rev. 741 was cited. Christine Boyle's book, *Sexual Assault*, (Carswell Company Limited: Toronto, 1984) has been cited repeatedly by the Supreme Court of Canada. These important works, however, have been more doctrinal than theoretical.

³² [1988] 2 SCR 833.

³³ (1977), 33 C.C.C. (2d).

presumption that an individual intends the probable and natural consequences of their volitional conduct. However, she argued, in most cases a guilty mind can be inferred from the physical act of nonconsensual sexual touching itself. Underpinning her decision was her assertion that

[s]exual assault is a crime of violence. There is no requirement of an intent or purpose beyond the intentional application of force. It is first and foremost an assault. It is sexual in nature only because, objectively viewed, it is related to sex either on account of the area of the body to which the violence is applied or on account of words accompanying the violence. Indeed, the whole purpose, as I understand it, of the replacement of the offence of rape by the offence of sexual assault was to emphasize the aspect of violence and put paid to the benign concept that rape was simply the act of a man who was "carried away" by his emotions.³⁴

Under her reasoning sexual violence is violence. Full stop. Her reasoning demonstrates how the 'rape is violence' conception of sexual violence is a constructivist approach intended to counter the 'natural urge gone awry' conception of sexual violence. It also demonstrates how this account, unlike the yet more contextualized, more socially constructed, more nuanced and more radical approach of MacKinnon leaves less analytical space for a definition of sexual assault that incorporates the perspective of the complainant. Justice Wilson's account focuses exclusively on the actions, conduct of the accused.³⁵

While there are cases with references to sexual assault as violence for the most part neither the legislature nor the Court has completely adopted the perspective that rape

³⁴ *R. v. Bernard*, *supra* note 32 at para. 84.

³⁵ A version of Justice Wilson's concurring opinion in *Bernard* was ultimately adopted by the majority in *R. v. Daviault*, [1994] 3 SCR 63. The defence of self-induced intoxication for general intent offences was subsequently limited legislatively under section 33.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 so that it could not be applied against charges of sexual assault. The legislature limited it by applying a reasonable standard of care element to the defence and stipulating that anyone who, while drunk, commits an assault or other violent crime has departed from that standard of care. In other words they adopted a version of the rule in *Leary*.

is purely about violence not sex. There is, as discussed below, a sexual component to the offence that limits the opportunity to conceptually reduce the offence simply to violence.

There are many implications of an equality type approach to conceptualizing sexual violence.³⁶ To understand sexual violence under the rubric of equality is to adopt an analysis that will focus on relationships, on power, on the subjective perspective of all sexual actors involved in the interaction. In other words, it is to adopt an approach that understands sexual violence as socially contingent.

There are two legal contexts in which a power feminist (and constructivist) conception of sexual violence has clearly been adopted by the Court. These include the substantive meaning of sexual assault (that is the harm to be protected against, the meaning of sexual assault, and the doctrine of consent) and the criminal regulation of adult pornography. The remainder of this chapter will focus on sexual assault law demonstrating how this constructivist conception of sexual violence promotes a shift in the law's focus away from sexual propriety and sexual acts and towards sexual integrity and sexual interactions. The chapter to follow will examine the criminal law definition of obscenity and indecency.

II. The Meaning Of Sexual Violence

There are two major definitional issues concerning sexual assault law that indicate that the Court has adopted the understanding that sexual violence is about power and inequality. They include how the Court designates an assault as a *sexual* assault and how

³⁶ For example, there have been legislative and judicial attempts to balance the due process interests of an accused with the privacy interests of a complainant (such as with respect to issues like the introduction of evidence regarding the complainant's prior sexual history and defence counsel use of third party records). The complainant's privacy interest has been articulated as an equality interest. See for example *R. v. Seaboyer*, *supra* note 6; see also section 276 of the *Criminal Code*, *ibid*.

the Court has come to interpret the definition of consent.³⁷ The constructivist perspective adopted in both of these reforms share the same analytical shift. Both the definition of sexual assault and the definition of consent arrived at by the Court in recent years incorporate a new factor into the analysis of the offence. That factor is the subjective experience of the complainant.

In defining sexual assault the subjective experience of the complainant is incorporated into the newly adopted concept of “sexual integrity”.³⁸ In defining consent it is manifested through an explicit determination that consent is both a part of the *actus reus* and the *mens rea* - a determination which understands consent as both attitudinal and communicative depending on whose perspective is being considered. In determining the *actus reus* for sexual assault whether there was consent for the sexual interaction turns entirely on the state of mind of the complainant at the time the sexual interaction occurred. Consent under the *mens rea* now refers to the accused’s perception of the complainant’s positive expression of consent rather than communication of non-consent or lack of any expression of consent.³⁹

Why do these changes indicate a more constructivist understanding of the issue of sexual violence? As will be demonstrated by examining the cases below, these changes

³⁷ Several writers have observed the shift in how sexual assault is defined. Susan Estrich for example suggests that there is no longer significant disagreement over what rape is and so now the only game in town is credibility. Susan Estrich, “Sex at Work” (1991) 43 Stan. L. Rev. 813. Lise Gotell makes a similar argument. Lise Gotell, “The Discursive Disappearance of Sexualized Violence” in Dorothy E. Chunn, Susan B. Boyd, and Hester Lessard, *Reaction and Resistance: Feminism, Law and Social Change*, (UBC Press: Vancouver, 2007). Before examining how sexual assault law addresses issues of credibility it is important to do more than simply observe that the meaning of sexual assault has changed (and become better defined). It is also important to understand how that change happened, and what that change suggests in terms of the law’s conception of sexuality in the context of sexual violence. It is important both in terms of its potential insight into issues of credibility in the sexual assault context as well as its implications for issues of law and sexuality more broadly. Examining this change and its conceptual implications is the objective of this section.

³⁸ *R. v. Chase*, [1987] 2 SCR 293.

³⁹ *R. v. M. (M.L.)*, [1994] 2 SCR 3; *R. v. Ewanchuk*, *supra* note 29.

reflect an approach that is concerned more with power, relationships, equality and sexual actors than with sexual arousal and sexual acts.

i) Defining Sexual Assault – From Sexual Propriety To Sexual Integrity

There has been a shift in the meaning that the criminal law assigns to the harm of sexual violence. It is a conceptual shift from defining sexual violence based on deprivations of sexual propriety to identifying and defining sexual violence based on violations of sexual integrity. This is a shift that now incorporates into its analysis an objective assessment of the subjective experience of the victim in defining the harm of sexual violence.⁴⁰ It is a shift that rejects to some extent the former essentialist analysis based on genitals, sexual arousal or community standards of sexual propriety.⁴¹ This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivation of honour, chastity or bodily integrity as was more the case when the law's concern had a greater focus on sexual propriety.

There have been a number of legislative reforms to the *Criminal Code* provisions addressing sexual violence in the time since power feminism came to the fore.⁴² (Indeed,

⁴⁰ It is true that the subjective experience of any particular complainant may involve a notion of propriety. But this refers to the complainant's own sense of propriety, not the community's sense of propriety. A violation of one's sense of propriety relates to one's sense of integrity. In other words, the meaning of sexual assault needn't be cleansed of any notion of propriety it just shouldn't be focused on the *community's* sense of propriety. The definition of sexual assault still retains an objective element so one needn't worry that relying on an individual complainant's sense of propriety will result in inconsistency (or an injustice) in the law.

⁴¹ It should be noted that some feminist theorists, such as MacKinnon, have argued strongly not to have a gender neutral definition of rape. This seems contrary to their overall constructivist account of sexual assault; it seems difficult to imagine a gendered definition of sexual assault that doesn't invoke the penis. This seeming inconsistency in such an approach is resolved when one recalls that theories such as MacKinnon's are constructivist *and* structural. For further explanation of this point see Chapter Six.

⁴² In 1975 the government passed the *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c.93. This Act removed the requirement that judges warn juries that, for offences such as rape, incest and indecent assault of a girl under 14 (note that indecent assault of a male complainant did not need to be corroborated) it was

the significant reforms to the criminal laws regulating sexual violence were a product of not only of a shift in legal reasoning but also, to a large extent, parliamentary initiatives spurred on by feminist advocacy.) Of particular significance to this discussion is the 1982 amendment to the *Criminal Code*; an amendment that, among other things, replaced the offences of rape and indecent assault with sexual assault, established three tiers to the offence and added a definition of consent (which was again amended in 1992).⁴³

The offence of rape, as it stood prior to the 1982 amendment, stipulated that “a male person commits rape when he has sexual intercourse with a female person who is not his wife” without her consent.⁴⁴ Under the rape provision, the offence could only be perpetuated by a male against a female; it required penile-vaginal penetration. The definition of rape turned on penises, biology and correspondingly (hetero)sexual gratification rather than on power, relationships and context.⁴⁵

unsafe to convict solely on the uncorroborated evidence of the complainant. Section 142 of the Act limited the accused’s ability to ask questions concerning the complainant’s prior sexual history with people other than the accused by requiring that such questions be pre-screened by the judge *in camera*). In 1982 the government passed *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person*, S.C. 1980-81-82-83, c. 125, s.19. The 1982 amendments repealed the corroboration rule altogether. Not only were judges not required to warn the jury it was unsafe to convict on uncorroborated testimony of the complainant, they were no longer permitted to do so. Section 246.6 of the 1982 Act also revised the prior sexual history rules, abrogated the doctrine of recent complaint, established that sexual reputation could not be admitted to challenge the credibility of the complainant and redefined rape as sexual assault. For a comprehensive discussion of the evolution of these early legislative reforms see Christine Boyle, *Sexual Assault*, *supra* note 16. There were further reforms in 1987 (S.C. 1987, c.34, ss. 1-8), 1992 (S.C. 1992, c.38, ss. 1-3) and 1997 (S.C. 1997, c.30, ss.1-3).

⁴³ *Ibid.* Christine Boyle suggests that “the concept of sexual assault was introduced ... in response to concerns that the emotional and political baggage carried by the term rape was a serious impediment to the reporting of, and conviction for, the crime of rape.” Boyle, *ibid.*

⁴⁴ R.S.C. 1970, c. C-34, s. 143 [repealed 1980-81-82, c. 125, s.6]. A number of feminist writers have argued that the offence of rape was historically a law intended to protect the proprietary interests of men (fathers, and husbands) in women. See for example Boyle, *ibid.*; Susan Estrich, *Real Rape: How The Legal System Victimized Women Who Say No*, (Harvard University Press: Cambridge, 1987); Constance Backhouse, “Nineteenth-Century Canadian Rape Law 1800-92” in D.H. Flaherty, ed. *Essays in the History of Canadian Law*, Vol II (1983), 200; Lorene Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality*, *supra* note 12.

⁴⁵ One might argue that the fact that the offence of rape was one of general intent and not specific intent suggests that sexual arousal, i.e. (hetero)sexual gratification, was not instrumental to its analysis. This argument is not persuasive. Sexual arousal was likely an assumed aspect of the offence of rape given that it required penile penetration of a female by a male. All of the rhetoric in the courts

The replacement of the offences of rape and indecent assault with the sexual assault provisions opened the door for the Court to adopt a new conception of sexual violence. It is, as will be discussed, a conception that focuses more on power, relationships and context than on sexual motives, genitals and sexual gratification.

As noted above, the offences of indecent assault against a female, and indecent assault against a male were also removed and replaced by the offence of sexual assault in 1982. Unlike rape, the definition given to these offences pre-reform did leave the analytical opportunity to focus on power and relationships rather than an approach premised on essentialist conceptions of sexual violence. However that opportunity was not realized.

The Supreme Court of Canada, in *R v Swietlinski* affirmed the definition of indecent assault as

an assault that is committed in circumstances of indecency, or as sometimes described, an assault with acts of indecency. What acts are indecent and what circumstances will have that character are questions of fact that will have to be decided in each case, but the determination of those questions will depend on an objective view of the facts and circumstances in relation to the actual assault, and not upon the mental state of the accused.⁴⁶

The offence did not require that the accused act with a specific intent (i.e. a sexual purpose).⁴⁷ However, whether a circumstance was indecent was gauged not by violation of the sexual integrity of the complainant (which in post-*Chase* cases would

regarding uncontrollable lust, in conjunction with the fact that presumably given its definition the offence required an erect penis (although that would perhaps not be the case for attempted rape), suggests that although sexual arousal was not explicitly necessary to the offence it was likely presumed. More plausibly, rape was a general intent offence for the purely instrumental reason that that meant intoxication was presumptively not a defence.

⁴⁶ [1980] S.C.J. No. 107. The Court relied on earlier cases that defined indecent assault in this way (see *R. v. Resener*, [1968] 4 C.C.C. 129).

⁴⁷ Although some courts did wrongly interpret it that way. See for example *R. v. Collins*, *infra* note 51.

mean an objective consideration of the complainant's subjective experience⁴⁸) but by the adjudicator or jury's perception of the moral standards of the community. The analysis focused on immorality or impropriety rather than on power and the perspective of the other sexual actor/s involved in the interaction.⁴⁹ Sexual morality and propriety, not context and relationships, determined what was indecent. Often, rather than defining indecent assault it was assumed "self-explanatory" and left up to the common sense of the jury.⁵⁰ The focus was on sexual propriety not sexual integrity.

The 'community standards' of propriety type analysis resulted in an essentialist approach to potentially offensive sexual behavior short of intercourse or attempted intercourse (which would be covered under the offence of rape); factors such as community morality, sexual gratification or motives of the accused, and heterosexual assumptions, determined whether a particular sexual interaction constituted 'circumstances of indecency'.

For example in *R. v. Collins*, the Ontario Court of Appeal affirmed that the accused's conduct amounted to an indecent assault not because repeatedly forcing his tongue into the complainant's mouth, despite her contestations, violated her sexual

⁴⁸ This should not be taken to suggest that the subjective experience of the complainant – i.e. whether the complainant experienced a violation of sexual integrity – is determinative. It is not. See *R. v. Robicheau*, [2002] SCJ No. 50 overturning the Nova Scotia Court of Appeal in [2001] N.S.J. No. 113. Rather, what it is suggesting is that in objectively determining whether the assault occurred in 'sexual circumstances' the most salient factor will be whether the complainant's sexual integrity was violated and determining whether the complainant's sexual integrity was violated will of necessity require an examination of the complainant's perspective and experience (see *R. v. Litchfield*, *supra* note 9). This makes it different than the analysis of indecent assault. Indecent assault based its objective determination on the sexual propriety, morality, standards...of the community not the integrity of the complainant. Of the only ten reported cases prior to the 1987 *Chase* decision that mentioned sexual integrity all but one were for charges of sexual assault not indecent assault.

⁴⁹ *R. v. Louie Chong* (1914), 23 C.C.C. 250, where the Court upheld the trial judge's conviction on the basis that the appellant seized hold of the complainant and offered her money for "an immoral purpose". This case was cited with approval by the Court in both *R. v. Swietlinski*, *supra* note 46 and in *Leary v. The Queen*, [1978] 1 SCR 29] at 57.

⁵⁰ *R. v. Hay*, [1959] M.J. No. 4 para. 7.

integrity or dignity as a human being, but because of it “ being morally offensive, violating prevailing notions of decency, and being committed in circumstances which, viewed objectively, involved the sexual gratification of the appellant.”⁵¹

The reasoning in *R. v. Moore* provides an example of how in 1955, based on 1950s community standards of tolerance, a woman making a pass at another woman constituted circumstances of indecency,⁵² where the same action by a man would not.⁵³

As noted above, with the new sexual assault offences came a new legal approach. The Court was clear that the new provisions did not simply re-word the offence of rape (or indecent assault). Instead, the Court found that the reforms intended to create new offences.⁵⁴

The Supreme Court of Canada established the meaning of this new offence - sexual assault - in *R. v. Chase* in 1987.⁵⁵ The Court in *Chase* overturned a New Brunswick

⁵¹ [1985] O.J. No. 51. Where, in any of those factors might one find consideration of the perspective of the ‘object’ upon whom this morally offensive behavior engaged in for purposes of the sexual gratification of the accused was perpetuated?

⁵² [1955] A.J. No. 1, a conviction for indecent assault against a female was overturned not because the defendant’s actions were not indecent (the Court did not dispute this) but because the act lacked hostility. Prior to the lunch date, at which the defendant had tried to kiss the complainant, she had written her a love letter. The trial judge found that the letter, revealing the defendant as a “sexual invert” and constituting a clear “invitation to Lesbianism” established circumstances of indecency. The letter, stated in part “I would never ask you to try to change. That would be very foolish. Any such thought or desire would have to come from your side. I do ask, though, that you be a bit tolerant of me...If you have no interest in me or my type of life, nothing I could do to you would phase you one way or another and would certainly leave you unblemished. How many men can say that?” For a description of this case and its historical background see Backhouse, *Carnal Crimes*, *supra* note 4.

⁵³ For substantiation of the assertion that the same behavior by a male towards a female in 1955 would likely not have been deemed indecent, much less have resulted in a conviction at trial see Backhouse, *Carnal Crimes*, *ibid*.

⁵⁴ *Chase*, *supra* note 38 at para. 4.

⁵⁵ *Ibid*. In *Chase* the Court did suggest that in determining the meaning of sexual assault the law ought to draw on the jurisprudence surrounding indecent assault. However, as discussed in the pages to follow, the incorporation of the notion of sexual integrity into its definition and the particular notion of sexual integrity adopted suggests that while certain similarities exist between the two lines of caselaw – such as the need to make the test objective – there also exist fundamental and important distinctions between them which challenge the assertion that the Court really has relied much on the indecent assault jurisprudence. Certainly in the cases since *Chase* the old indecent assault case law does not appear to be relied upon by courts. The Court, in *Chase*, did draw significantly on the Alberta Court of Appeal’s decision in *R. v. Taylor* (1985), 44 C.R. 3d (263). The impact of the *Taylor* decision is

Court of Appeal finding that the act of grabbing a girl's breast and demanding that she engage in sexual intercourse with the accused did not constitute a sexual assault on the basis that sexual assault was limited to intentional and forced contact with the sexual organs or genitalia of another person without that person's consent.⁵⁶ In overturning the Court of Appeal, Justice McIntyre writing for the Supreme Court of Canada found that

[s]exual assault is an assault within any one of the definitions of that concept in s. 244(1) of the Criminal Code which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one...If the motive of the accused is sexual gratification, to the extent

noteworthy because the case involved the intersection of the new sexual assault provisions with section 43 of the *Criminal Code* – the use of corrective force defence. In an effort to limit section 43's application to the new sexual assault provisions (section 43 serves as a defence for parents, under certain circumstances, to charges of assault) Chief Justice Laycraft stipulated a definition for sexual assault that did not require sexual intent. Significantly, he did not however include in his definition a consideration of the sexual integrity of the victim. In "The Corrective Force Defence (Section 43) and Sexual Assault" (2001) 6 Can. Crim. L. Rev. 35, Professor Mark Carter somewhat overstates the impact of *Taylor* and section 43 on the development of sexual assault doctrine in Canada. While it is true that *Taylor* was relied on by the Court in *Chase* and it is also true that *Taylor* found that an interest in or pursuit of sexual gratification was not an essential element of the definition, he fails to note that it was the Supreme Court in *Chase* that added consideration of the sexual integrity of the complainant to the definition. Those who doubt that the concept of sexual integrity is central to the harm to be protected against by the sexual assault provisions need only consult the third of the three classes of conduct exempt from the possible justification for unlawful activity of a law enforcement official provided for under section 25.1 of the *Criminal Code*: "(a) the intentional or criminally negligent causing of death or bodily harm to another person, (b) the willful attempt to obstruct, pervert or defeat the course of justice, or (c) any conduct that would violate the sexual integrity of an individual."

⁵⁶ *R. v. Chase*, (1984), 13 C.C.C. (3d) 187. The New Brunswick Court of Appeal's decision in *Chase* is an excellent example of extremely essentialist reasoning; ironically it also brilliantly exemplifies the manner in which law contributes to the social construction of sexuality. The New Brunswick Court of Appeal determined that the grabbing of the fifteen year old girl's breasts was not a 'sexual' assault because her breasts are a 'secondary sexual characteristic' – like a man's beard or a bird's plumage (at para. 10). Justice Angers held that "to include as sexual an assault to the parts of a person's body considered as having secondary sexual characteristics may lead to absurd results if one considers a man's beard. Nor am I prepared to include those parts of the human body considered erogenous zones lest a person be liable to conviction for stealing a goodnight kiss. In any event, to involve secondary sexual characteristics or erogenous zones or, for that matter, the sexual gratification intent of the accused might well lead the court into the domain of sexology or at least require it to examine the sexual behavior of the human species (at para. 14)." He concluded "it seems to me that the word "sexual" as used in the section ought to be given its *natural* meaning as limited to the sexual organs or genitalia." It is odd that he selects a man's beard rather than a man's nipples as his analogue. His reasoning invokes the notion of a *natural* meaning for sexual organs, genitalia, (and implicitly also secondary sexual characteristics and erogenous zones) while simultaneously providing an example of how the law constructs the meaning of sexual organs, genitalia, secondary sexual characteristics and erogenous zones.

that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.⁵⁷

An assault then, becomes a sexual assault where it violates the sexual integrity of the complainant.

Prior to *Chase*, the phrase “sexual integrity” had never before been used in a reported decision of the Supreme Court of Canada. Of the 551 reported decisions in which Canadian courts have used the term “sexual integrity” only ten of them were prior to the Supreme Court’s decision in *Chase*.⁵⁸ Until 1980 the term had never been used in a reported decision in Canada.⁵⁹ Today the notion of sexual integrity is the governing concept in the legal definition of sexual assault in Canada.

Not only was the adoption of this term to determine the wrong of sexual assault novel, the manner in which the Court employed it signals a shift that has had significant impact. It is a shift towards a substantive meaning for a sexual offence that at the definitional stage flipped the analytical perspective from that of the accused (or the community) to that of the complainant.⁶⁰ It is, of course, not the use, *per se*, of the term ‘sexual

⁵⁷ *Chase*, *supra* note 40 at para. 11.

⁵⁸ Based on a quick law search of all Supreme Court of Canada decisions using the search term “sexual integrity” (accessed December 12, 2008).

⁵⁹ The term sexual dignity, which has been used in thirty reported decisions was not employed until 1985. It was only used seven times prior to *Chase*. (Quicklaw search of the term “sexual dignity” last accessed January 21, 2009).

⁶⁰ This is not a development that has necessarily occurred in other jurisdictions. In most U.S. jurisdictions the focus at the definitional stage remains on the offender. Whether that be by maintaining an offence which turns on penetration, or by adopting a definition of “sexual contact” which requires a specific intent to “arouse or gratify the sexual desire of either party”. See *State v. Darby*, 556 N.W. 2d 311, 318 (S.D. 1996); *People v. Norman*, 184 Mich. App. 255, 457 N.W. 2d 136 (1990); *State v. Schmidt*, 5 Neb. App. 653, 562 N.W. 2d 859. The closest the U.S. cases seem to come to focusing less on the essential and biological and more on the social and the interactional is to define the offence based on sexual intrusion. However even then the offence is still determined from the perspective of the accused and typically tends to still involve a corporeal focus on bodily penetration.

integrity' that effected a significant impact, but rather the meaning that the Court attached to the term sexual integrity.

The term could have been used simply to imply protection for some notion of chastity or propriety, thus perpetuating the law's interpretation of indecent assault and maintaining an unfortunate tradition in sexual assault law's approach to women's sexuality.⁶¹ In those ten cases prior to *Chase* which utilized the term, several used it to connote antiquated and paternalistic notions of chastity or propriety in which the interest in prohibiting sexual violation was still understood more as a proprietary interest held, in an individual sense, by a woman's husband (or father) or in a societal sense by 'the community'. In other words, the pre-*Chase* cases used the concept in the same way that 'indecent' assault had been understood in Canadian jurisprudence.

ii) Pre-*Chase* Use Of The Concept Of Sexual Integrity

(See for example the *Colorado Criminal Code*, which includes under its sexual assault provisions definitions for sexual contact, sexual intrusion and sexual penetration. Sexual intrusion, for example, is defined as "(5) any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse." Sexual contact is defined as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse" and sexual penetration means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime" (6) C.R.S.A. § 18-3-401). The focus is exclusively on genitals and biology. Sexual violations are defined and understood more from the perspective of what the accused may or may not have inflicted upon the complainant rather than what a complainant might objectively be expected to have experienced. (*Heywood v Wyoming*, 170 P.3d 1227, 2007 WY 149 (2007).) Working from a definition based on sexual intrusion is very different from relying upon one based on sexual integrity. In *all* of the reported American criminal cases, the term "sexual integrity", at the time of writing, had only been used nine times (as compared to 551 times in Canada) and never in the sense it has been used in Canadian cases since 1987. This is all the more remarkable given that the number of Canadian cases each year is, due to smaller population and fewer jurisdictions, vastly outnumbered by the number of American cases each year.

⁶¹ That is, an approach concerned more with sexual propriety (and property) and sexual morality than with integrity.

The first reported use of the term by a Canadian court exemplifies this point. In *R c. Archontakis*, the trial judge stated, “[m]y prime concern has to be the protection of society. Our streets must be made safe, especially for those who are least able to protect themselves. Our wives and our daughters must be able to walk about on the streets without having their physical and sexual integrity trampled upon by such as you.”⁶² One question arising, what of those individuals whose subjectivity does not reach the acclaimed status of ‘wife’ or ‘daughter’?

In *R v. G.B.* the trial judge stated that “I must, however, look beyond this accused and the circumstances of this particular offence and consider the extent to which the court must sentence with a view to discouraging others, particularly where the sexual integrity of women in the community is concerned.”⁶³

The term sexual integrity could also have been understood by the Supreme Court as synonymous with bodily integrity. In the New Brunswick Court of Appeal decision in *Chase*, Justice Angers found that

the addition of the word "sexual" to the term assault, in my opinion, suggests that it is now necessary to determine to which part of the body the unlawful force was applied. Based on the meaning of sexual, the concept of a sexual assault as being an intentional and forced contact with the sexual organs or genitalia of another person without that person's consent is rather easily understood. So would, for that matter, the forced and intentional contact of one's sexual organs with any part of another person. The problem in this case is that the contact was not with the sexual organs of the victim but to the mammary gland, a secondary sexual characteristic.⁶⁴

⁶² [1980] J.Q. No. 196 at para 9.

⁶³ *R. v. G.B.*, [1982] N.W.T.J. No. 40 at para. 6.

⁶⁴ *Supra* note 56 at 190.

While the New Brunswick Court of Appeal reasoning was not followed in other attempts to determine the meaning of sexual assault prior to the Supreme Court's decision in *Chase*, the reasoning in these other cases was also problematic.

In *R. v. Alderton* the trial judge noted in her charge to the jury that sexual assault was any assault that also included anything connected with reproduction or sexual gratification or desire, especially if that desire was of the heterosexual variety. She stated that “[t]he next question is whether the assault was sexual. The word "sexual" in this context means involving anything connected with sexual gratification or reproduction, or the urge for these, especially the attraction of those of one sex for those of the other. A sexual assault is simply an assault of a sexual nature.”⁶⁵

On appeal the Ontario Court of Appeal in *Alderton* found that “without in any way attempting to give a comprehensive definition of a "sexual assault we are all satisfied that it includes an assault with the intention of having sexual intercourse with the victim without her consent, or an assault made upon a victim for the purpose of sexual gratification.”⁶⁶ While it is true that this definition does not exclude consideration of

⁶⁵ [1985] O.J. No. 2419. The accused in *Alderton* had entered the complainant's apartment. Wearing a nylon over his head and rubber gloves he held her on the bed with one hand covering her nose and mouth. While he was trying to unroll tape, with his teeth and other hand, the complainant struggled and was able to escape. The accused appealed his conviction for sexual assault. One ground of his appeal was that his actions did not equate to a sexual assault. He lost the appeal. The Court of Appeal suggested that there was ample evidence for a jury to find that he had committed a sexual assault. They argued that the evidence does not permit of any other interpretation. Under the *Chase* definition it is no longer necessary to make assumptions about his sexual motives, and require a specific intent in relation to those motives. The court post-*Chase* would be bound to determine the issue not based solely on his sexual motives (or lack thereof) but rather on determining the following: objectively speaking, would a woman who at 4:00 a.m. wakes to find a strange man in her bedroom wearing a nylon over his face and pink rubber gloves, a man who then proceeds to push her onto the bed, force her head onto the pillow and attempt to tie her up, have had her sexual integrity violated? Without question she would if the notion of sexual integrity includes not only freedom from bodily invasion but also the conditions necessary for a sexual actor to flourish (as discussed below, *infra* page 25). Such an approach may arrive at the same outcome but without having to rely on potentially problematic assumptions about specific sexual intent and without adopting an analysis that fails to incorporate the perspective of (up to) one half of the sexual actors involved in the interaction.

⁶⁶ *Ibid.* at para. 22.

sexual integrity (given its refusal to comprehensively define the offence) it affirmed the trial judge's reasoning. It is reasoning which is problematic both because it would have inadvertently created a specific intent offence for those sexual acts of violation short of intercourse and because it is premised on heterosexist, phallogentric and essentialist reasoning which focuses entirely on the perspective of the accused.

iii) Sexual Integrity As 'Conditions For...'

Certainly the notion of bodily autonomy is included within the concept of sexual integrity, but the concept should mean something more. It should advert to the importance of the integrity of one's sexuality itself. A legal focus on sexuality more broadly, rather than bodily integrity specifically, is consistent with the constructivist suggestion that the law ought to focus its moral concern on sexual actors rather than sexual acts.

Bodily integrity constitutes one aspect of sexual integrity, but sexual integrity should mean much more than simply 'freedom from' bodily violation. It should include, along with 'freedom from', the 'conditions for'... sexual fulfillment, sexual diversity, the safety necessary for sexual exploration and sexual benefit.

To suggest that sexual integrity extends beyond the notion of bodily invasion invokes the notion of protecting sexuality itself (not to be confused with protecting sex itself). To suggest that sexual integrity is about one's sexuality and not simply 'freedom from' bodily invasion is to suggest that sexual integrity also includes 'conditions for' - so for example the conditions necessary to create the capacity for developing a sense of sexual self, sexual self-esteem, opportunity for sexual exploration, and beneficial sexual interactions. Some of these conditions will necessarily entail other people, as some of them will

include sexual interactions or sexual relationships with others.⁶⁷ This will require that other members of one's community also experience a lived sexuality in which the conditions for sexual integrity are available. It suggests the need for a community of sexual actors with intact sexual integrities, so that each of its members might have access to the relational aspects of sexual integrity. In this way sexual integrity is in part relational. That it is in part relational suggests that it could be understood as a social good.⁶⁸

In fact, sexual integrity ought to be thought of as one of those social goods, like language perhaps, that individuals need in order to be autonomous. "Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us (or developed in us) through our interactions with others...[T]here are no human beings in the absence of

⁶⁷ It is important that the conception of sexuality advanced here be understood holistically. A failure to do so leads to reasoning such as the Ontario Court of Justice's decision in *R. v. Spence*, [1994] O.J. 981. In *Spence*, the complainant was physically abducted, off the street, by her former pimp and two other men. She was placed in the back of their car, threatened with gang rape if she continued to refuse to remit to them the proceeds of her sex work and ultimately forced to disrobe. They were acquitted of sexual assault on the basis that while her personal integrity had been violated, and her commercial integrity had been violated, the crown had not proven beyond a reasonable doubt that her sexual integrity was violated. One wonders whether the Court would have considered the sexual integrity of a woman who was not already a sex worker, to be violated were she physically abducted, forced to disrobe, and threatened with gang rape and other violence if she refused to prostitute herself for the benefit of her abductors.

⁶⁸ What about asexual and sexually abstinent individuals? The fact of sexually abstinent individuals does not present a challenge to the assertion that sexual integrity is a social good shared by all. That some people experience their sexuality unilaterally does not change the benefit they derive from a sexually healthy community. They may be sexually active with themselves making it no less important that they experience the conditions for sexual integrity than it is for those whose sexuality is experienced in part through interactions with others. Sexually abstinent individuals live their sexuality as much as those who are sexually active; they just live it differently. It may be similar to the way people of differing abilities experience language. In terms of asexual individuals, a community with the conditions for sexual integrity to flourish is in their interests for two reasons, the second of which they share with those who sexually abstain. First, the possibility exists that they will not remain asexual throughout the entire course of their lives. Second, protection of bodily integrity remains an important part of sexual integrity and a value that is as important to the asexual and abstinent as it is to others. It may be that for a small proportion of the population, those who are asexual, this aspect of the social good of sexual integrity is all that is needed to maintain it.

relations with others. We take our being in part from those relations.”⁶⁹ In other words certain relations are necessary in order to ‘be’ a ‘being’ – to be autonomous. Like language, it would seem sensible to suggest that one’s sexuality, and thus sexual integrity in the broader sense of the term, would be heavily contingent on, and deeply dialogic with, one’s sexual interactions with the rest of society. It would also seem sensible to suggest that sexual relations (and sexuality) constitute one type of those relations from which ‘we take our being’.⁷⁰

To be autonomous, then, we need certain relational opportunities – relationships in this sense are a social good. One of those relational social goods pertains to sexuality. If it is the case that sexual relations constitute one of the social goods needed for autonomy it seems logical to suggest that sexuality be protected. Correspondingly, it seems necessary to propose a conception of sexual integrity that extends beyond ‘freedom from’ bodily invasion to also include protection for one’s sexuality itself. In other words, an understanding of sexual integrity that includes the conditions for the production of a community of sexual actors whose lived sexualities include the possibility of a sense of sexual self, with an ability to sexually relate to others, a faculty for sexual exploration and

⁶⁹ See Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) Yale J.L. & Feminism 7 at 8. Nedelsky emphasizes in her work the need to conceptualize rights as relationships, with equality being the right that dictates the types of interpersonal relationships that a society promotes. Jennifer Nedelsky, “The Practical Possibilities of a Feminist Theory”, (1993) 87 Northwestern U.L. Rev. 1286. As will be discussed in Chapter Eight it may be that more can be achieved under the concept of social goods than the concept of rights, even the non-traditional version put forth by Nedelsky. That sexual integrity is necessary for autonomy does not mean that the concept need be reduced to traditional liberal notions of autonomy. Under the conception of sexual integrity proposed here a concern with sexual actors does not suggest such a privileging of the individual. As will be discussed in Chapter Eight, a Razian conception of autonomy requires the provision of certain social goods. People, to be autonomous, require certain relational components to their lives – access to language, for example, would be one such component. Sexual integrity would be another. These are types of social goods. Under this Razian conception of autonomy it is incumbent upon legislators and adjudicators to provide and promote these social goods because without them individuals cannot be autonomous.

⁷⁰ Obviously this is meant figuratively but it would be equally true in a literal sense.

a capacity for sexual benefit (whether that be economic, emotional, psychological or physical).

If this is the case it becomes incumbent upon law to interpret - so that it might protect - sexual integrity as including not just 'freedom from' bodily invasion but also 'conditions for' an integrated, coherent and functional sexuality.⁷¹ In the context of identifying and defining the harm of sexual violence such an interpretation of sexual integrity lends itself to consideration of factors such as sexual shame, humiliation, violations of trust, and sexual self-esteem.⁷²

Nicola Lacey argues that developing an approach to sexual violence that incorporates affectivity is critical.⁷³ She suggests that the criminal law, to expand beyond the concept of freedom from bodily invasion, needs to re-conceptualize its assumption of body-mind dualism and shift its focus from autonomy, as traditionally understood, to integrity. (She is referring to bodily integrity rather than the notion of sexual integrity employed here.)

Drawing on the work of Jennifer Nedelsky and Drucilla Cornell, she suggests that rape law perpetuates a mind-body dualism and in the process fails to adequately respond to both the corporeal and affective elements of sexual violence.⁷⁴ She suggests that the law needs a different idea of the body. She argues that the criminal law currently conceptualizes it as bounded – as self-contained not breached, penetrated, or invaded.

⁷¹ The suggestion that the law ought to be oriented towards protecting the 'conditions for' sexual integrity (in conjunction with the relational concept of sexual integrity described here) might sound problematically communitarian to some. There are many critiques and concerns raised by arguments suggesting that the law (or a society) ought to conceive of (and correspondingly protect) sexuality as a common good. These concerns are critical and have not been overlooked. My response to them (my attempt to overcome them) will become evident as my argument continues to unfold in the remaining chapters.

⁷² As will be discussed in Chapter Eight this interpretation ought to apply to other legal contexts as well.

⁷³ See "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law", (1998) 11 *Can. J.L. & Juris.* 47.

⁷⁴ *Ibid.* at 57.

(She notes that under this conception, gay men, women and children are abnormal or exceptional while heterosexual men constitute the norm or frame of reference). The current conception, she suggests, is an image of the body as territory, or property, divorced from reason and emotion. Under the current conception bodies are boundaries that separate autonomous individuals. Instead, bodies ought to be understood as aspects of lived subjectivity through which people relate to one another. In this way the criminal law might begin to protect those relational values it currently marginalizes.⁷⁵

Lacey argues that the concept of bodily integrity is better than the concept of mentalist autonomy (which she states is the current focus of rape law) because it puts the bodily and affective aspects of sexual life more directly in issue. Her objective is to destabilize the artificial distinction between mind and body so that the law might recognize that rape violates the victim's capacity to integrate psychic and bodily experiences - a capacity needed to achieve autonomy.

Her argument and those of the relational feminists she draws on, supports the suggestion made here that sexual integrity be thought of as a social good. However the argument made here also differs slightly from Lacey's position. It shares with Lacey's argument the assertion that integrity ought to include elements of body, mind and heart and that there is a relational aspect to each of these elements. However, Lacey advocates for a conceptual shift from autonomy to bodily integrity – with the concept of bodily integrity including not only the corporeal but also affect and reason.

The argument made here is for a shift from focus on the body and on propriety to a focus on sexual integrity. Unlike Lacey's argument, it does not risk collapsing the

⁷⁵ Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law", *supra* note 73.

distinction between mind and body by incorporating into the notion of bodily integrity the elements of the psyche. Lacey's approach risks advancing the suggestion that the mental, emotional and social elements of integrity diminished by sexual violence are a function of bodily invasion – almost like a symptom.

Irrefutably the sexual violation of a person's body is likely to *cause* an affective harm. Lacey suggests that where criminal law does attempt to incorporate affect into its analysis it is always at the sentencing stage not the definitional stage. My concern is that from an analytical perspective, collapsing the heart and mind into the concept of the body might be susceptible to the same shortcoming. Why do all of the definitional work under the concept of bodily integrity?⁷⁶ The concept of sexual integrity developed here includes the body, affect and reason, (as does Lacey's approach); it recognizes that these elements of the self are fundamentally relational (as does Lacey's approach). The distinction, and it may be a modest one, is that it does so without relying on the notion of bodily integrity as the foundational or pre-requisite concept.

Incorporating a constructivist understanding of sexual violence inevitably requires consideration of issues of power, relationships, specificity and the subjective experience

⁷⁶ Donald Dripps is another theorist who has attempted to identify the harm of sexual violation without relying on a 'thin' notion of autonomy that, he argues, demands that rape be defined by the conjunction of non-consent with violence- a definition which offers an impoverished foundation for the law of sexual assault; ("Beyond Rape: An Essay On the Difference Between The Presence of Force and The Absence of Consent" (1992) 92 Colum. L. Rev. 1780). Dripps argued that rape laws are premised on an historically patriarchal foundation and ought to be outright rejected in favour of a new legal regime. The regime he proposed draws a distinction between violent forced sex and coercive non-violent sex. To theorize the harm of the former he suggests focusing exclusively on its violent characteristics and regulating it through the law of assault. In terms of non-violent but coercive sex he suggests adopting a commodity theory of the sexual harm caused and regulating it through the notion of sexual expropriation. Sex will be expropriated where the defendant knowingly disregards the victim's expression of non-consent. Unfortunately, the only factor that is relevant under Dripps' account is whether the accused 'acquired' the sex through wrongful means. That is to say, there is *nothing* interactional about his approach. It does not conceptualize the complainant as a sexual actor. Moreover, it offers less, if any, protection for certain categories of complainants- such as wives (see for a discussion on this point Robin West, "Legitimizing the Illegitimate" (1993) 93 Colum. L. Rev. 1442). Finally due to its central tenet – body as property- sex as service (regardless of context) – his theory is also too focused on bodily integrity.

of any of the sexual actors involved. To understand the harm of sexual violence (as well as the sexual goods that the criminal law is assumedly meant to protect⁷⁷) the law cannot focus only on unwanted penises, penetrations, and (hetero)sexual desires. It must also take into account preservation of sexual self-esteem, sexual awareness, sense of sexual self, and ability to achieve sexual pleasure or benefit. It must develop language and concepts that accommodate the ‘conditions for’ sexual integrity (and ‘freedom from’ is only one of those conditions). An understanding of sexual integrity that extends beyond bodily integrity is a start.

In the criminal law context, which is only one of the legal arenas in which law and sexual integrity intersect, the interference with sexual integrity at issue will often involve a bodily component. This does not demand that the criminal law’s conception of sexual integrity need be reduced to bodily integrity.

Promisingly, it would appear that as sexual assault jurisprudence has developed in the Supreme Court of Canada since 1987, sexual integrity and bodily integrity have not necessarily been considered synonymous⁷⁸ and the adoption of a definition for sexual assault which involves an objective assessment of the impact on the complainant’s sexual integrity has shifted the law’s focus so that what counts is not simply the sexual motives, arousal or body parts of the accused or the community’s standard of sexual propriety but also the perception, experience and impact on the complainant. In other words, it is a

⁷⁷ See Lacey, “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law”, *supra* note 73 at 54 for a critique of the law’s impoverished account of the value of sexuality. “There is little trace in criminal law, then, of those things which contemporary social discourses of sexuality mark as its values and risks. Ideas of self-expression, connection, intimacy, relationship – those things which surely underpin contemporary understandings of what is valuable about sexuality – are absent.”

⁷⁸ This is not to suggest that bodily integrity is not still considered the premier interest at stake. Justice Major’s states in *Ewanchuk*, *supra* note 29 at para. 28, that “every man's person being sacred, and no other having the right to meddle with it in any the slightest manner.” Rather it is to note that physical integrity is not the only interest recognized by the interpretation of “sexual assault” given by the Court.

definition that is corporeal, *and* affective, relational and interactional; that is to say, it is a definition that looks at the interaction, the relationships, the perspectives (both affective and corporeal) of all of the sexual actors and the surrounding circumstances.⁷⁹ A definition, in other words, that operates from a social constructivist conception of sexual violence.

iv) *Chase* And Its Impact

The doctrinal import of this shift is not to be underestimated. The very first reported post-*Chase* case applying the Supreme Court's definition exemplifies this point. In *R. v. Crowe*, a former United Church Minister was charged with sexually assaulting two pre-pubescent boys (ages 11 and 12).⁸⁰ The first complainant alleged that Crowe had on more than one occasion sat him on his knee, hugged and kissed him on the lips, fondled his penis both over top of and underneath the boy's clothing, and attempted to have the boy touch his penis. The defendant admitted to hugging and having kissed the boy on the lips but denied, and claimed he found repugnant, the suggestion that he had fondled the boy's genitals or asked the boy to touch his penis.

⁷⁹ See for example the Supreme Court of Prince Edward Island's affirmation of the trial judge conviction for sexual assault in *R. v. Howe*, [2003] P.E.I.J. No. 21. The Court held that

"[i]n accordance with *R. v. Chase*, supra, we have to ask "was the sexual integrity of the victim violated?" The test is an objective one. "Viewed in light of all the circumstances is the sexual or carnal context of the assault visible to a reasonable observer?" Being prevented from pulling one's pants up in public is clearly a violation of a person's sexual integrity to say nothing of the continued contact of the appellant's bare penis against the exposed portion of the complainant's body. Even if the appellant's stated motivation for the continued contact was accepted as being believable, or could reasonably be true (as referred to in *R. v. W.D*) it does not, on an objective standard, eliminate the violation of the victim's sexual integrity and would not have led to an acquittal with respect to the charge of sexual assault."

The appellant's stated motivation for continued contact (after the complainant had verbally withdrawn her consent) was to ascertain what was wrong. He argued that at that point the contact changed from sexual to non-sexual. The court found that any calming down could have been done by removing his penis from contact with the complainant and giving her space.

⁸⁰ [1987] O.J. No. 1671.

Judge Carter determined that the touching had not been proven beyond a reasonable doubt, in large measure because he found it difficult to convince himself that “a man dedicated to God, whose good reputation throughout the years has been vouched for by several witnesses, some of whom are outstanding men themselves, would do the “touching” that is complained of here, and compound the matter by perjuring himself.”⁸¹

However, Judge Crowe convicted him of sexual assault regardless. He did so on the basis that the kiss on the lips and the hugging had been proven beyond a reasonable doubt – it had been admitted to by the accused. Basing his decision on the definition established in *Chase*, and noting that while the accused denied any motive of sexual gratification this did not preclude a conviction, he found that

a reasonable observer, seeing a 71 year old man alone with an 11 year old boy who is sitting on his lap, pinch, hug and kiss the boy and then kiss him on the lips, may well put the pinching down to horseplay, the hugging and the kissing on the cheeks down to affection, but the kissing on the lips he would not consider normal, but violating the sexual integrity of the boy.⁸²

A definition of sexual assault that turned on sexual motives or genital contact would not, on the findings of fact made by the trial judge in this case, have resulted in a conviction.

The Supreme Court of Canada’s decision in *R. v. Litchfield* provides a pronounced example of the assertion that the shift from defining sexual violence based on sexual propriety and biology to defining it based on sexual integrity promotes a constructivist conception of sexual violence better able to account for the harm of sexual violation.⁸³

⁸¹ *Ibid.* (para. and page numbers not available).

⁸² *Supra* note 80.

⁸³ *Supra* note 9.

In *Litchfield*, the accused was a doctor charged with fourteen counts of sexual assault against seven of his female patients.⁸⁴ Prior to trial a chambers judge granted an order severing and dividing the counts such that there were to be three separate trials: one to deal with alleged assaults involving the complainants' breasts, one for those complaints involving genitals and one for complaints of touching to other areas of the complainants' bodies. The Crown proceeded first on the counts involving vaginal exams. The trial judge refused to admit evidence of the complaints involving other body parts. At the close of the Crown's case, the accused's motion for a non-suit was granted and an acquittal entered. On appeal to the Supreme Court of Canada the order dividing and severing the counts as well as the acquittals were set aside and a new trial ordered.

Justice Iacobucci writing for the majority found that the chambers judge did not have jurisdiction to order the counts divided and severed. He went on to determine that even had the jurisdictional error not been present the chambers judge's order should be set aside because it resulted in an injustice. The injustice stemmed from the impact that severing and dividing the counts would have on the test to be applied in determining whether an accused's conduct had the requisite nature to constitute a sexual assault.

Justice Iacobucci found that

the arbitrary distinction based on the body parts of the complainants amplified the difficulties in assessing the alleged sexual assaults in the context of all of the circumstances surrounding the conduct by creating an evidentiary problem which would not have existed but for the order...[T]he order *denied the reality of how the complainants experienced the conduct* which they alleged constituted sexual assaults, and sent an inappropriate message that a complainant's physical attributes were more important than her experience as a whole person.⁸⁵ (emphasis added)

⁸⁴ *Supra* note 9.

⁸⁵ *Litchfield*, *supra* note 11 at HN.

The difficulties in assessing the alleged sexual assaults in this case stemmed, in part, from the fact that the complainants had consented to some touching for medical purposes including touching of their breasts and genitals. In other words, in this case the fact that the touching occurred, and the fact that it involved touching of breasts and vaginal penetration revealed nothing to indicate whether or not the conduct was sexually assaultive.

Justice Iacobucci noted that in light of the objective test established in *Chase* in which all of the circumstances surrounding the conduct in question will be relevant to the question of whether the touching was of a sexual nature such that it violated the complainant's sexual integrity, it is essential that "courts not create unnecessary barriers to considering all the circumstances surrounding conduct which is alleged to constitute a sexual assault."⁸⁶

Of significance are the factors that Justice Iacobucci focused on. Under a sexual propriety approach the analysis would likely have turned on the perspective of the accused; given that the touching occurred in a doctor's office, under the cloak of doctor-patient relations, an assessment of whether or not the community would deem it improper would likely turn on the accused's motives. In other words it would have been necessary to establish a sexual motive.⁸⁷

The injustice that Justice Iacobucci's reasoning identified is the injustice that would occur if evidence regarding the nature of the relationship between the accused and the complainant, the potential power imbalance at play and the experience of the

⁸⁶ *Litchfield*, *supra* note 11 at para. 13.

⁸⁷ It is not that sexual motive is not relevant under Justice Iacobucci's reasoning. It is and given the facts in this case it may be more significant than in other cases. It is that under the *Chase* approach the sexual motive of the accused is not determinative nor is the perspective of the accused all that is relevant in determining whether the conduct was sexual.

complainants as whole persons were inadmissible. Referencing the Court's decision in *Norberg v. Wynrib*, he emphasized the importance of recognizing the imbalance of power that can occur between a doctor and a patient where an alleged sexual assault is concerned.⁸⁸ He went on to note that not only did focusing on body parts rather than "the larger context within which that complainant felt that the respondent's actions were inappropriate" deny coherent sexualities to the complainants, it sent an inappropriate message about women in general.

Justice Iacobucci's reasoning also led to the determination that among other errors committed by the trial judge in rendering a directed verdict was his finding that the only evidence going to show lack of consent was that of the two medical experts.⁸⁹ Instead, Justice Iacobucci held that the trial judge also ought to have considered "the testimony of the complainants as to their feelings of specific distress and discomfort, as well as their testimony that they had never had similar experiences with other doctors as evidence going to lack of consent."⁹⁰

As previously noted, Nicola Lacey argues that one of the most significant inadequacies of the criminal law's treatment of sexual offences she has identified is the virtual absence of affectivity from criminal law's doctrinal scheme.⁹¹ She is referring to

⁸⁸ *Litchfield*, *supra* note 11 at para. 14. *Norberg v Wynrib*, *supra* note 8 will be discussed at length in the next chapter. It was one of the first decisions in which the influences of power feminism can be seen to have taken hold in the Court's reasoning. While Justice LaForest for the majority in *Norberg v. Wynrib* does continue to focus on propriety rather than integrity, his decision does begin to incorporate a constructivist perspective towards sexual violation. Justice McLachlin (as she then was) writes a minority opinion that also invokes a power analysis but does so without relying on standards of propriety.

⁸⁹ "The medical experts had produced evidence on the necessity of and the proper procedures for the types of medical examinations in question." *Litchfield*, *ibid.* at 58.

⁹⁰ *Ibid.*

⁹¹ "Unspeakable Subjects" *supra* note 73. While Lacey's article was written after both *Chase* and *Litchfield* it may be that she was focusing more on British jurisprudence. Britain, at the time she wrote the piece, still had very antiquated and extremely essentialist laws regarding sexual offences (see *Sexual Offences Act* 1956, c. 69). While their criminal laws prohibiting sexual violence did undergo major reform in 2003

the criminal law's frequent failure to accommodate emotion. Justice Iacobucci's reasoning in *Litchfield* very much incorporates affectivity into its analysis.

The Supreme Court of Canada's decision in *R. v. Cuerrier* provides another example of this trend towards greater concern with sexual interactions than with sexual acts.⁹² In *Cuerrier* the Court determined that fraud that did not go to the "nature and quality of the act" could still vitiate consent to sexual touching if it carries with it the risk of serious harm.

Under the common law, fraud only vitiated consent where the fraud went to the nature or quality of the act consented to by the complainant.⁹³ In *Bolduc v. The Queen*, which was a case applying the common law definition, a doctor was convicted of indecent assault arising from a medical examination conducted on a patient in front of the doctor's friend.⁹⁴ The complainant consented after being led to believe that the friend was an intern and was observing for medical/educational purposes. The Court reversed the conviction against the two on the basis that the complainant had consented to a medical examine by the Doctor and the act completed was a medical exam by the Doctor:

Bolduc did exactly what the complainant understood he would do and intended that he should do, namely, to examine the vaginal tract and to cauterize the affected parts. Inserting the speculum was necessary for these purposes. There was no fraud on his part as to what he was supposed to do and in what he actually did. The complainant knew that Bird was present and consented to his presence. The fraud that was practiced on her was not as to the nature and quality of what

(*Sexual Offences Bill*, 2003), today they still continue to maintain a hierarchical statutory distinction between sexual offences involving penile penetration and all other sexual offences. Moreover, the concept of sexual integrity has not been incorporated at a definitional level in English criminal law. (For a discussion of sexual offences in UK criminal law see Nicola Lacey, Celia Wells & Oliver Quick, *Reconstructing Criminal Law*, 3rd ed. (LexisNexis UK: London, 2003).

⁹² [1998] SCJ No. 64.

⁹³ See *R. v. Clarence* (1988), 22 Q.B.D. 23 at 44 where the husband's failure to disclose that he had gonorrhoea did not vitiate his wife's consent because "the only sorts of consent which so far destroy the effect of a woman's consent...are frauds as to the nature of the act itself, or as to the identity of the person who does the act."

⁹⁴ [1967] SCR 677.

was to be done but was as to Bird's identity as a medical intern. His presence as distinct from some overt act by him was not an assault.⁹⁵

Returning to the case of *Cuerrier*, the issue was the definition of 'fraud' as it pertains to consent under section 265(3)(c) of the *Criminal Code*.⁹⁶ As noted, the common law definition of consent as a defence to assault had stipulated that consent was vitiated by a fraud related to the "nature and quality of the act" to which consent was granted. When the *Criminal Code* amendments in 1982 were enacted the definition dropped these words; the provision now states that consent is vitiated where it is given pursuant to a fraud.⁹⁷

In *Cuerrier* the accused was charged with aggravated assault. He had knowingly and repeatedly had unprotected sexual intercourse with two women without disclosing to them that he was HIV positive. Both women testified that they would not have consented to unprotected sex with *Cuerrier* had they known of his HIV status.

Justice Prowse of the British Columbia Court of Appeal upheld the trial judge's directed verdict of acquittal in *Cuerrier*.⁹⁸ She did so on the basis that the legislature had not intended to broaden the categories of fraud vitiated by consent. Justice Prowse rejected the Crown's alternative argument that the respondent's acts exceeded the scope of the complainants' consent. Her reasoning, much like the Court's reasoning in *Bolduc*, focused on the sexual acts not the sexual actors. The complainants consented to a particular sexual act – unprotected sexual intercourse with the respondent – and this was the act that occurred. Given her narrow reading of what constitutes fraud under section 265 of the *Criminal Code* she upheld the directed verdict.

⁹⁵ *Bolduc*, *supra* note 94.

⁹⁶ *Criminal Code*, *supra* note 35, section 265(3)(c).

⁹⁷ *Ibid.*

⁹⁸ (1996), 83 B.C.A.C. 295.

Justice Cory, writing for the majority in *Cuerrier* disagreed. He found that “Parliament had intended to move away from the rigidity of the common law requirement that fraud must relate to the nature and quality of the act”.⁹⁹ He determined that “it was no longer necessary when examining whether consent in assault or sexual assault cases was vitiated by fraud to consider whether the fraud related to the nature and quality of the act”.¹⁰⁰ He went on to find that in addition to fraud pertaining to the nature and quality of the act or identity of the partner, the non-disclosure of important facts combined with deprivation or risk of deprivation also vitiates consent. The deprivation must relate to a serious harm or risk of serious harm.¹⁰¹ Rather than focus solely on the specific sexual act, Justice Cory adopted an interpretation that takes into consideration the entire sexual interaction, and the complainant’s perspective not just regarding the specific physical act – penile/vaginal intercourse - but also regarding the context of the interaction as a whole.¹⁰²

⁹⁹ *Cuerrier*, *supra* note 92 at para. 105.

¹⁰⁰ *Ibid.* at para. 108.

¹⁰¹ Justice L’Heureux-Dube in her concurring opinion, *ibid.*, broadened the types of frauds capable of vitiating consent. She found, at para. 16, that any fraud which is “designed to induce the complainant to submit” to the act will vitiate consent and constitute assault. Justice Cory, understandably rejected this approach on the basis that it would “trivialize the criminal process by leading to a proliferation of petty prosecutions” (at para. 131). Justice McLachlin (as she then was) and Justice Gonthier found that while Parliament had not intended to broaden the category of frauds capable of vitiating consent, a failure to disclose HIV status did vitiate consent because it was a fraud going to the nature and quality of the act.

¹⁰² There may be a strong policy oriented justification for this approach that also relies on recognition of the social contingency of consent. There are those who argue that *Cuerrier* is wrongly decided from a public health policy perspective. They suggest that the responsibility to practice safe sex should lie with the individual, that each of us is responsible for either ensuring that we practice safe sex or accepting the risk of choosing not to practice safe sex, and that decisions such as *Cuerrier* are problematic because they will not send the message to individuals that they are responsible for ensuring that their sexual partners wear a condom. This argument works better in some communities of sexual actors – say for example a gay male community- than it does in others. It may not be as persuasive in the context of heterosexual interactions where women, due to gendered, economic, social and physical inequities, may not have the same sexual bargaining power. That is to say, gay men might be better situated and socially equipped to refuse sex or negotiate safe sex than are many women. For a discussion regarding the arguments for and against the use of criminal law to control the failure to disclose HIV status to sexual partners see Isabel Grant, “The Boundaries of the Criminal

Where the law maintains an essentialist focus on sexual acts as opposed to sexual actors the reasoning in *Bolduc* makes sense, as does Justice Prowse's reasoning in *Cuerrier*. A legal conception of sexuality focused on sexual actors (and thus sexual integrity) forces a different analysis. It requires the Court to ask much more than 'did she say he could insert a speculum into her vagina and if so is that what he did?' It requires the Court to inquire into the experience and perception of, as well as the potential impact on,¹⁰³ all sexual actors involved. The reasoning in *Cuerrier* suggests a concern with how people treat each other sexually. The moral focus is on sexual relationships rather than sexual acts. This is more likely to engender an emphasis on sexual integrity.

By focusing on sexual interactions the law is better able to consider the interests of sexual actors themselves. A focus on the sexual act itself inevitably relies on essentialist conceptions about sex that are more concerned with propriety than integrity.

It is not that anatomy is irrelevant. It is that its relevance is understood through a constructivist lens in which power, inequality and the nature of the interaction is determinative, not the body parts involved. The decision of the British Columbia Court of

Law: the Criminalization of the Non-disclosure of HIV", (Spring, 2008) 31 Dalhousie L.J. 123. She argues that it should only be used as a last resort in cases where other measures have failed and the individual has had multiple sexual partners.

¹⁰³ A response to the critique that the criminal law's reliance on the impact of a sexual interaction in ascertaining whether an offence has occurred constitutes impermissible or at least inadvisable retrospective reasoning, will be discussed in Chapter 5 under the section addressing the post-*Labaye* case law. With sexual assault, unlike for example aggravated assault, it is not only the consequences (or potential consequences) of the sexual act that can vitiate consent thus making the conduct a sexual assault. (See *R. v. Williams*, [2003] 2 SCR 134 where an accused continued to have unprotected sex with his partner after becoming aware of his HIV positive status. At some unknown point his partner became infected. He was convicted of attempted aggravated assault. He was not convicted of aggravated assault *simpliciter* because the Crown could not establish that the complainant was still HIV negative by the time the accused knew he was HIV positive. The *actus reus* for aggravated assault requires endangering the life of another. It is based on the potential consequences of the accused's actions. (*Cuerrier* could be convicted despite not having actually infected either of the complainants because his actions at the time he was aware of his sero-status did pose a significant risk of serious bodily harm. The issue of lack of simultaneity that existed in *Williams* did not arise in *Cuerrier*.) Justice Binnie noted in *Williams* that unlike with aggravated assault this is not the case with sexual assault where the *actus reus* can be met regardless of the potential consequences.

Appeal in *R. v. Nicolaou* provides a good example of this.¹⁰⁴ The decision demonstrates the way in which the corporeal can be incorporated into a social constructivist understanding of the definition of sexual violence.

Nicolaou involved numerous charges against the defendant including assault, living on the avails of prostitution, and sexual assault. The complainant alleged that Nicolaou, who lived next door to her and supplied her with drugs, had beaten her and forced her to prostitute herself in order to pay him money for drugs that he said she owed to him.

The accused also ordered another woman to search the complainant's vagina against her wishes. The sexual assault charge stemmed from this nonconsensual search. Relying on *Chase* the trial judge found him guilty of sexual assault on the basis that a motive of sexual gratification was not necessary and that assault for the purpose of power and control can, where it violates the complainant's sexual integrity, support a conviction.

The Court of Appeal quoted with approval the trial judge's analysis of the gendered power dynamics at play: "the evidence here clearly shows that [the appellant] was demonstrating his power and control over not only the complainant but other women present. I find him guilty of the sexual assault set out in Count 6."¹⁰⁵

The appellant argued that the trial judge erred because there "was no sexual or carnal aspect whatsoever to the force employed".¹⁰⁶ He argued that the trial judge "implicitly, and incorrectly, focused on the anatomy involved in the assault".¹⁰⁷ The appellant suggested that "[t]here is nothing in *Chase* or in the Criminal Code definition of assault that suggests a sexual assault can simply involve the exercise of control and domination

¹⁰⁴ 2008 CarswellBC 1489.

¹⁰⁵ *Ibid.* at para. 23

¹⁰⁶ *Ibid.* at para. 28.

¹⁰⁷ *Ibid.*

over another".¹⁰⁸ The Court of Appeal rejected his arguments and affirmed the trial judge's reasoning in the case. They found that "a motive of sexual gratification is not essential; the anatomy involved is relevant; [and] the exercise of power and control over the victim and his or her humiliation or subservience can engage his or her sexual integrity."¹⁰⁹ The involvement of sexual organs combined with the exercise of power and control equaled, in this case, a violation of the complainant's sexual integrity.¹¹⁰

In this analysis power becomes the salient factor. An examination of power necessitates an examination of the corporeal *and* the affective. Humiliation, subservience, and a contextual analysis of the gendered inequities at play (as evidenced by the reference to the domination of other women present) all become not only relevant but also a substantive element of what sexual assault means.

The Ontario Court of Appeal's decision in *R. v. V. (K.B.)* provides an example of similar reasoning.¹¹¹ In *R. v. (K.B.)* the appellant's sexual assault conviction against his three year old son was upheld. The appellant admitted to grabbing his son's genitals in order to discipline him. The child frequently complained of pain in the pelvic area and a medical examination confirmed that the child's injuries were not inflicted accidentally. The appellant admitted to assaulting his son in this manner. The issue on appeal was as to whether the assault was a sexual assault. The Ontario Court of Appeal found that the appellant's "misguided and primitive disciplinary exercise was an aggressive act of domination which violated the sexual integrity of his son and constituted an assault which

¹⁰⁸ *Ibid.*

¹⁰⁹ *Nicolaou, supra* note 104 at para. 31

¹¹⁰ The accused's conduct was found to be sexual assault because of a confluence of power, control, gender (the court found he was exercising his control over not just the complainant but other women present) and bodily integrity (through the court's focus on sexual anatomy).

¹¹¹ [1992] O.J. No. 561 aff'd. [1993] 2 SCR 857.

can properly be viewed as a sexual assault.”¹¹² Their decision was upheld by the Supreme Court of Canada.¹¹³

Justice Osborne for the majority of the Ontario Court of Appeal found that the presence or absence of sexual gratification was merely one of the factors to be considered in determining whether a sexual assault has occurred. Sexual assault, Justice Osborne stated, is “an act of power, aggression and control, [and] does not require sexual gratification. In some cases, it is inimical to it...its absence in these circumstances does not detract from the finding that the assault here was sexual in its overall context.”¹¹⁴ Again, power served as the most salient factor in the definition of sexual assault.

It might be argued that the reasoning in *R. v. V.(K.B.)*, contrary to what is being suggested here, is extremely essentialist – that it is all about anatomy- because but for the fact that it was the child’s genitals, the assault would not have been characterized as a sexual assault. It is true that if the father had flicked the child’s ears rather than the child’s testicles he would not have been convicted of sexual assault. He also would not have violated his son’s sexual integrity. It does not all come down to anatomy. In this case, as in *Nicolaou* it is the combination of power and assault on sexual anatomy that makes the offence a sexual assault. Not because it involved genitals but because it involved an “an act of power, aggression and control” such that the child’s sexual integrity was violated.¹¹⁵

¹¹² *Supra* note 112 at para.14

¹¹³ [1993] 2 SCR 857

¹¹⁴ *Ibid.* at para. 15.

¹¹⁵ One cannot help but suggest that it was precisely this effect that motivated the father to opt for this particular form of discipline.

R. v. Larue provides the Court's most recent interpretation of the meaning of sexual assault.¹¹⁶ In *Larue*

the uncontested evidence at trial indicated that the highly intoxicated victim awoke to find Larue on top of her, holding her down with a knife to her throat and trying to force her legs apart. Her pants and underpants had been removed, but she did not recall how. Larue slashed her throat and she pushed him off and went for help.¹¹⁷

The "uncontested evidence at trial" established that the accused climbed on top of the unconscious and naked from the waist down victim, and while holding a knife to her throat tried to force her legs apart. The issue was whether this constituted aggravated assault or sexual assault. A determination of such turned on whether the assault occurred in circumstances that were sexual. The trial judge had a reasonable doubt as to whether the assault was sexual. His reason was as follows:

[The complainant] agreed that her pants and panties may have been removed before she realized that the accused was on top of her. On the evidence, there may have been some romantic activity between [the complainant] and the accused, before he attacked her with a knife, and this may have been consensual. There may have been some sexual activity between E.L. and [the complainant]. The fact that neither [of the complainant's cousins] noticed such activity does not mean that it could not have occurred. If it did, and [the complainant] was in a blacked out state, such as was described in the evidence, it may have been consensual between she and the accused, or between she and E.L., or E.L. may simply have removed her pants with some intentions of his own. The probability is that the accused was in the process of sexually assaulting the complainant. Her pants and panties are off, he is on top of her, and he has a knife. The zipper on her pants is broken, which is evidence consistent with forceful removal of that garment, but I cannot decide this case on a balance of probabilities.¹¹⁸

¹¹⁶ [2003] 1 S.C.R. 277.

¹¹⁷ Taken from the head note of the Court of Appeal decision in the same case [2002] B.C.J. No. 1903

¹¹⁸ [2002] B.C.J. No. 3045 at paras. 33 to 36.

The Crown appealed this decision arguing that the trial judge erred in law by drawing an artificial line between the potentially consensual sexual events that may have occurred prior to the attack and the attack itself.¹¹⁹ The majority of the British Columbia Court of Appeal rejected the Crown's appeal, finding that if any error occurred – which they were not convinced was the case – it was an error of fact not law.

The Court of Appeal determined that there were two compelling pieces of evidence suggesting the attack was sexual. The first was the state of disarray of the complainant's clothing. They noted the evidence suggesting it may have been E.L. who removed her clothing, arguing that

the disarray of clothing was one of the two most significant matters in relation to the question whether the assault was sexual. If the accused was responsible for that disarray, it was a most compelling circumstance against him. But he may not have been responsible for it. To carry the possibilities further, he may have come across the complainant in that condition and that may have led him to lodge the vicious attack on the complainant, an action for which the evidence seems to offer no clear explanation.¹²⁰

What was the court referring to in terms of “no clear explanation”?

They were referring to no clear evidence that the accused acted out of sexual interest, was motivated in some way sexually, was pursuing sexual gratification. The point under

¹¹⁹ How *any* sexual interactions between the accused and the complainant could have been consensual seems unclear, given the complainant's level of intoxication. Justice Prowse, makes this point in her dissent from the majority of the British Columbia Court of Appeal: “it is difficult to fathom how a woman who has blacked out could be found to be consenting to any sexual activity, with either Mr. N.E.L. or Mr. Larue.” (*Supra* note 118 at para. 12). Implied consent is not a legitimate defence in Canadian sexual assault law (see *R. v. Ewanchuk*, *supra* note 29). Consent must be operative at the time the sexual touching takes place. Nor is prior consent a defence. A state of unconsciousness means an incapacity to withdraw consent. An incapacity to withdraw any previously granted consent means the complainant was incapable of giving consent at the time the sexual touching occurred. See *R. v. Esua*, [1997] 2 SCR 777 where Justice McLachlin (as she then was) states, at para. 73, that “the hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.”

¹²⁰ *Larue*, *supra* note 117 at para. 35.

Chase is that the court does not need an explanation of this sort to find that the attack was a sexual assault. As noted above, the definition of sexual assault found in *Chase* does not rely on an understanding of sexual assault as necessarily dictated by sexual arousal, or sexual gratification. It is not that it denies that this may sometimes be the case (or that it may sometimes be relevant to determining whether the assault was a sexual assault), it is that this is not determinative of how the law *defines* sexually assaultive behavior.

The second compelling piece of evidence identified by the Court of Appeal in *Larue*, on the issue of whether the assault was sexual, was “the complainant's statement that, when she awoke to find him lying on top of her, he said, "If you don't let me fuck you, I'll kill you.”¹²¹ Indeed, this does seem compelling. However there was a difficulty with this evidence; the complainant retreated from it during cross- examination. The trial judge found the complainant not to be a reliable witness.

The Court of Appeal went on to determine that even if the trial judge had made an error it was an error of fact not law – it was open to the trial judge to conclude from the evidence a reasonable doubt as to whether the attack was sexual. This is where the Court of Appeal erred. They misinterpreted *Chase*. As the Supreme Court noted, under a proper application of *Chase* it was not open to the trial judge, on the evidence (i.e. the uncontested fact that the complainant woke to find the defendant lying on top of her trying to pry her naked legs open), to find that this assault was not sexual in nature.

Larue demonstrates well the significance of conceptualizing sexual assault the way the Court chose to do in *Chase*. Under an essentialist understanding of sexual assault the actions of the accused will be interpreted through an understanding of sexual assault as about arousal, and the inappropriate exercise of sexual desire. Uncontested evidence that

¹²¹ *Larue*, *supra* note 117 at para. 36.

the complainant awoke to find the accused on top of her prying her naked legs open would not necessarily be sufficient to establish that the assault ought to be characterized as a sexual assault. Under such a conceptual framework the evidence in this case (that the complainant's pants may have been removed consensually by someone else) would be enough to possibly raise a reasonable doubt as to the sexual nature of the attack.

Under a conception of sexual assault which examines the context in which the acts occurred, the impact on the sexual integrity of the complainant, and which interprets the accused's actions based on these factors rather than on the presence or absence of arousal, or sexual intentions, climbing on top of a partially disrobed and unconscious woman, holding a knife to her throat and attempting to pry her naked legs open constitutes sexual assault. It does not matter who took her pants off.

The definition of sexual assault in *Chase* does more than simply objectivize the *actus reus* for this offence. It shifts the conception of what sexual violation is, what it means in this society. It shifts it away from an understanding of sexual violation as (or as caused by) the eruption of, or inability to control, a sexual drive. It shifts it away from an understanding which relied on the conception of sexuality as a romanticized, heterosexualized and naturally occurring drive, away from a model which understood sexuality as a turbulent sexual drive under which a healthy conscience is charged with guarding against the sexual excesses of the sub conscience¹²² (excesses which can result in sexual violation) away from the notion of a sexual sub conscience in need of civilizing control both by the properly developed conscience of the adult mind and, for those not properly developed, that great surrogate, the properly developed conscience of the law. Instead, this substantive change to the legal concept of the harm caused by sexual violence reveals

¹²² Jeffrey Weeks, *The World We Have Won*, (Routledge: New York, 2007).

an understanding of sexual violation as about interactions rather than acts – a context dependent behavior in which the most salient factor is power not natural urge.¹²³

III. Defining Consent: No Still Means No But What Matters Is *Saying* Yes

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The definition of sexual assault adopted by the Court in *Chase* signals a shift towards a less essentialist conception of sexual violence. The development of the Court's doctrine on the interpretation of non-consent as an element of the offence of sexual assault has further advanced this shift. There have been significant changes to the way in which the Court understands what the criminal law considers as consent to sexual interaction.

These changes, like with the changes to the definition of sexual assault, better incorporate the complainant's perspective of the sexual interaction thus requiring the analysis to focus on the entirety of the sexual interaction rather than simply the experience/perspective of only one of the sexual actors (the accused).

i) The *Ewanchuk* Decision

¹²³ This is not to suggest that the law now fully conceptualizes sexual violence as socially constructed. Nor is it to suggest that references to and reliance on notions about sexual drives (uncontrollable or otherwise) are no longer to be found in cases about sexual violence. (Not only are sentencing decisions in sexual assault cases, particularly those addressing dangerous offender and long term offender designations, overflowing with references to arousal patterns an assessment of these factors is often heavily weighted in sentencing decisions. Similarly, whether penetration occurred appears to be a significant factor in determining severity of sentence. In addition, as demonstrated in Chapter Three, in assessing admissibility of similar fact evidence in adult complainant cases, there is an element of essentialism revealed, not in terms of sexual disposition, but with respect to the undue focus on specific sexual acts.) Rather, it is to suggest that in this one important respect the law has adopted a conceptual approach to defining sexual violence, to identifying the harm that sexual violence perpetuates, which is more constructivist. That is to say, at this definitional stage, the law has come to understand that whether an act is sexually violative is contingent on *all* of the social factors surrounding and contributing to the act and how it is experienced by the sexual actors involved.

The Court's decision in *R. v. Ewanchuk* affirmed two significant conceptual changes to the doctrine of consent in sexual assault law.¹²⁴ The first was the elimination of any notion of implied consent.¹²⁵ This firmly entrenched consent as an element of the *actus reus* the absence of which is a purely subjective determination based on the complainant's perspective at the time of the sexual interaction.¹²⁶ As the law now stands, in any sexual interaction either there was consent to the sexual touching or there was not consent to the sexual touching and this will be determined based on direct and/or indirect evidence of the complainant's state of mind.¹²⁷

The second was the characterization of knowledge of consent on the part of the accused in the affirmative rather than the negative - the stipulation that consent means indicating yes, rather than failing to indicate no.¹²⁸ Prior to the Court's decision in *Ewanchuk* the consent element of the *mens rea* for sexual assault required that the

¹²⁴ *Ewanchuk*, *supra* note 29. The word affirmed is used here because many of the changes with respect to the doctrine of consent recognized in *Ewanchuk* had already been adopted in earlier concurrences or dissents and in lower court decisions. See for example *R. v. Park*, [1995] 2 SCR 836; *R. v. Esua*, *supra* note 119; *R. v. M.L.M.*, *supra* note 39.

¹²⁵ *Ewanchuk*, *ibid.* at para. 31.

¹²⁶ *Ewanchuk*, *ibid.* Both at common law (*Ewanchuk*, *ibid.* at para. 36) and under sections 265.(3) and 273.1 of the *Criminal Code*, *supra* note 35 consent must be freely given in order to be legally effective. Fear, duress, incapacity, abuse of trust, and coercion all vitiate consent to sexual touching.

¹²⁷ Among others, this change responds to the critique that “[a]lthough the law is framed around mens rea and consent, the issue of mens rea only becomes relevant if consent/pleasure cannot be established. The man's intentions are therefore not a priority, the whole focus is on the woman, her intentions and her pleasure...The law in seeking to find innocence or guilt cannot accommodate the supposed ambiguity of a submission to a sexual assault. Either a woman does not consent or she consents. If the former cannot be established the latter must have occurred. Hence, in law's domain the more that non-consent can be made to look like submission, the more it will be treated like consent.” Carol Smart, “Law's Truth/Women's Experience” in Nicola Lacey, Celia Wells & Oliver Quick, *Reconstructing Criminal Law*, 3rd ed. (LexisNexis UK: London, 2003) at 492.

¹²⁸ *Ewanchuk*, *ibid.* Justice Major in *Ewanchuk* quotes from para. 39 of Justice L'Heureux-Dube's concurring opinion in *R v Park*, *supra* note 124: “the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes”.”

accused had believed that (or been reckless or willfully blind to the fact that¹²⁹) the complainant was not consenting.¹³⁰ In other words a guilty mind was a mind that knew or was reckless as to whether the complainant had withheld consent.¹³¹

The post-*Ewanchuk* conception of consent establishes that the accused, to be morally innocent, must have believed (or been reckless or willfully blind to the fact that) the complainant communicated consent. *Ewanchuk* established that for the purposes of *mens rea*, consent is established based on the accused's perception of the complainant's words or actions and not on the accused's speculation as to the complainant's desire for sexual contact.¹³² This means that the accused's belief that a complainant did not say no will not exculpate the accused nor will his belief that she said no but meant yes. It also means that a complainant's passivity is not a defence.¹³³ It is only a mistaken belief that the complainant communicated consent that will raise a reasonable doubt as to *mens rea*- not a mistaken belief that the complainant was consenting.¹³⁴

¹²⁹ Prior to the 1992 amendment to the *Criminal Code* recklessness as to consent did not suffice to establish *mens rea* (see *An Act to Amend the Criminal Code (sexual assault)* S.C. 1992, c.38, ss.1-3 for the amendment; see *R v Pappajohn*, [1980] 2 SCR 120 and *Sansregret v R*, [1985] 1 SCR 570 for the pre-1992 determination that recklessness as to consent did not constitute *mens rea*.)

¹³⁰ See *R v Pappajohn*, *ibid.* at 140: "the essence of the crime consists in the commission of an act of sexual intercourse where a woman's consent, or genuine consent, has been withheld". See also *Sansregret, ibid*; *R v Robertson*, [1987] 1 SCR 918.

¹³¹ This was supported by sections 265.(3) and 273.1 of the *Criminal Code*, *supra* note 35, both of which are framed in the negative. Did the complainant submit or not resist? (section 265.(1)) Did the complainant express a lack of consent? (section 273.1)

¹³² *Ewanchuk*, *supra* note 29 at para. 46. "In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question."

¹³³ The Court had earlier affirmed the rather significant point, that passivity or silence did not constitute consent, in an unremarkable one paragraph decision overturning the Nova Scotia Court of Appeal. (*R. v M.L.M.*, *supra* note 39) In addition, section 265(3) of the *Criminal Code*, *supra* note 35, defining consent as a defence to assault (including sexual assault) stipulates that no consent is obtained where the complainant submits or *does not resist* by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. As noted by Justice L'Heureux-Dube in *Ewanchuk*, *supra* note 29 at para. 86, this supports the finding that passivity or silence does not constitute consent.

¹³⁴ It is worth noting the way in which this significant shift in the Court's approach was adopted. In *Ewanchuk* the majority adopted this new approach with very little discussion – almost as if without

In other words, it means that what is relevant in establishing *mens rea* is an assessment of the actual interaction between the sexual actors involved and not an assessment of the accused's potentially distorted perspective regarding the complainant's sexual interest. It limits the accused's (and the courts') ability to rely on essentialist understandings of what women are 'like', or what 'certain' women are 'like', or what women, or 'certain' women 'want', in order to raise a reasonable doubt as to *mens rea*.

The result of these modifications is a conception of consent in which all parties to the interaction must be sexual *actors* and in which the perspectives of all sexual actors involved in the interaction must be taken into account, at the definitional stage, in order to determine whether a sexual assault has occurred.

The criminal regulation of sexual assault faces exceptionally difficult challenges in identifying sexually violative and morally blameworthy sexual interactions between otherwise consenting adults. These challenges stem from the many social factors that constitute how sexuality is expressed, how sexual interactions are gendered, what norms of sexual conduct are created and how those norms are experienced by different sexual actors. One of the main examples of this relates to the reality that sex involves socially contingent power dynamics and in a society in which gendered power hierarchies are the norm in familial, social, financial, psychological, physical and emotional contexts it is not difficult to imagine that many women would acquiesce to sexual touching that they do not desire.¹³⁵ Distinguishing genuine consent from disingenuous consent is easier when there

recognizing the dramatic change that was occurring. The fleshing out – the discussion- of the analytical approach adopted with very little fanfare in *Ewanchuk* is found in Justice L'Heureux-Dube's concurrence in *Park*, *supra* note 124 and Justice McLachlin's dissent in *Esua*, *supra* note 119.

¹³⁵ Desire is used here in a broad sense to suggest an act of consent that is consistent with the preservation of sexual integrity. People consent to sex for all sorts of reasons beyond physical, sexual or emotional desires. People consent to sex for money, out of boredom or curiosity or even pity. People consent to sex because they are too tired to argue with their partner and they know that next

is violence, threat of violence or some other form of overt coercion involved. It is more difficult when none of these are present. However, if what the law deems important is whether the consent was genuine (which it must if its interest is in preserving and promoting sexual integrity) then it matters not whether the disingenuous consent arises because of a knife to the throat or a context of systemic inequality and gendered sexual violence in which many women have acculturated to what others might consider a conservative sense of when it feels ‘safe’ to say no.¹³⁶

A definition of consent that is in part based on acknowledgment of this context reveals a conception of sexual violence that accounts for its social contingency. Post-*Ewanchuk* the concept of consent under the *actus reus* and *mens rea* is very different. In identifying the *actus reus* the concept of consent is used in an attitudinal sense.¹³⁷ It is used to describe a state of mind – an unobservable feeling, sentiment or perspective about the sexual interaction. In interpreting the *mens rea* for sexual assault, post-*Ewanchuk*, the concept of consent is used in an expressive or communicative sense.¹³⁸ The distinction in

time around it might be them initiating. While some of these circumstances might not be particularly ‘sexy’ they do not necessarily compromise sexual integrity. In all of them an interest is present and so mutuality and thus sexual integrity is maintained. The need for mutuality to preserve sexual integrity does not suggest that power imbalances necessarily vitiate consent. People with less (or different kinds) of power can consent to people with more power and mutuality is still maintained. Mutuality is destroyed where consent flows only as a result of power, whether perceived or real, whether exercised or not. Nor should this be taken to suggest that mutuality is all that is needed to produce a community of sexual actors capable of promoting the social good of sexuality. Mutuality will be needed in a criminal law context in sexual interactions between two individuals. As will be demonstrated in Chapter Eight, law’s role in promoting the social good of sexuality extends beyond simply recognizing the need for mutuality.

¹³⁶ Equally important is the principle that a just criminal legal system does not convict the morally innocent. To be consistent with this principle, a sexual assault law concerned with sexual integrity and therefore valuing genuine consent through a subjective definition of consent under the *actus reus* must be certain to develop a *mens rea* requirement (i.e. an adequate mistaken belief in consent defence) sufficient to ensure that the ‘morally innocent’ are not convicted. The assertion that *Ewanchuk* has not threatened this principle will be addressed *infra* page 57.

¹³⁷ Nathan Brett, “Sexual Offenses and Consent” (1998), 11 Can. J. Law. & Juris. 69 uses the term “attitudinal consent” to characterize this understanding of the term.

¹³⁸ This has also been described as a performative concept of consent (see Brett, “Sexual Offenses and Consent”, *ibid.*). Brett advocates for the use of a performative concept of consent both in terms of

how the term consent is understood in these two contexts reveals an attempt on the part of the Court to recognize the contextual, socially contingent, gendered factors that constitute consent to any sexual interaction. Employing an attitudinal concept of consent to define the *actus reus* of the offence permits an analysis that acknowledges that (often gendered) power dynamics short of overt (and therefore objectively ascertainable) coercion, are nonetheless just as relevant to a determination of the authenticity of consent.¹³⁹ By rejecting the possibility of implied consent it also definitively draws the complainant's perspective into the legal definition of consent to sexual touching.¹⁴⁰ Employing consent as a communicative or expressive construct at the *actus reus* stage of analysis creates an approach to sexual assault that recognizes these imbalances. A communicative

mens rea and *actus reus*. Justice Major rejects this suggestion outright in *Ewanchuk* stating that for the purpose of establishing the *actus reus* of sexual assault the complainant's state of mind is determinative. The obvious critique of this suggestion arises in facts such as those found in *Sansregret*, *supra* note 130 – circumstances in which the complainant *did* express consent – but did so under duress or out of fear. Brett responds to this critique by arguing that coerced consent is not consent. His response is lacking. In order to ascertain coerced consent one must rely on attitudinal consent. In other words, to ascertain whether the performance was 'real' one must still assess the underlying state of mind of the complainant. The less obvious the coercion the more salient attitudinal consent becomes. Setting aside Brett's suggestion for a performative concept of consent the only other option that comes readily to mind would be an objective assessment of whether the complainant really did agree to the sexual touching. It is difficult to see how this approach would avoid relying on problematic assumptions about how people behave, or even worse ought to behave, in sexual encounters.

¹³⁹ Potential injustices to the accused that could arise from the approach adopted by the Court should be safeguarded against by the subjective nature of the *mens rea* standard. (While section 273.2 of the *Criminal Code*, *supra* note 35 does now incorporate an objective aspect into the defence of mistaken belief in consent (which is in essence a denial of *mens rea*) it remains a subjective assessment – it requires that an accused take reasonable steps, *in the circumstances known to the accused at the time*, to ascertain consent. See the Ontario Court of Appeal's decision in *R. v. Darrach*, (1998), 38 O.R. (3d), *aff'd* (although not on this point) [2000] 2 SCR 443. While, as Justice L'Heureux-Dube notes in *Park*, *supra* note 124, and Justice McLachlin notes in *Esua*, *supra* note 119, it is not often that a genuine misunderstanding resulting in a sexual assault will occur, in those cases where it does it may very well be that a complainant who articulated consent was sexually violated, but in a way which is not criminally culpable.

¹⁴⁰ See *R. v. J.R.* [2006] O.J. No. 2698 where the complainant had no recollection of the events and could not say whether she had consented. She was able to testify that because she had, only a few days earlier, had an abortion and the doctor had told her that she should not have sexual intercourse for a certain period of time, and because she had no sexual interest in either of the two accused who had sex with her while she was passed out on the bathroom floor of a Toronto hotel, she would not have consented. Justice Ducharme found beyond a reasonable doubt that the complainant did not consent. His finding was based on her testimony regarding the abortion, doctor's instructions and her lack of sexual interest in either of the accused.

understanding of consent at the *actus reus* stage acknowledges that consent to sex does not mean the same thing to everyone, or even the same thing to anyone, in different contexts; it shifts the salient interpretation to an interpretation of acts or words rather than desires or natures. It ensures that *all* parties to the interaction are recognized by the law as sexual actors.

Lise Gotell argues that in *Ewanchuk*, Justice Major's reasoning was narrow, doctrinal and decontextualized.¹⁴¹ She suggest that his decision "located the importance of sexual assault law on protection of individual autonomy and control over who touches one's body rather than equality based rationales".¹⁴² She contrasts his reasoning with that of Justice L'Heureux-Dube's concurrence, suggesting Justice Major's reasoning lacked the contextualization and equality based rationales present in Justice L'Heureux-Dube's decision.

It is true that Justice L'Heureux-Dube's concurrence in *Ewanchuk* is contextual in a way that Justice Major's is not. She begins by citing statistics revealing the gendered nature of sexual violence and then continues by referencing the international *Convention on the Elimination of All Forms of Discrimination Against Women*.¹⁴³ However, two points should be made regarding Gotell's critique.

First, Justice L'Heureux-Dube's reasoning in *Ewanchuk* did not need to be as "doctrinal" and "narrow". She had already laid out her approach to the doctrine of

¹⁴¹ Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall L.J. 251. For a similar critique see Hester Lessard, "Farce or Tragedy? Judicial Backlash and Justice McClung" (1999) 10 Constitutional Forum 65.

¹⁴² Gotell, *ibid.*

¹⁴³ *Ewanchuk*, *supra* note 29 at paras. 68-69. Indeed she says at para. 69 "[v]iolence is as much a matter of equality as it is an offence against human dignity and a violation of human rights."

consent to sexual touching four years earlier in *R. v. Park*¹⁴⁴ - an approach that the majority in *Ewanchuk* adopted (as did Justice McLachlin, as she then was, in her dissenting opinion two years earlier in *R. v. Esau*¹⁴⁵).

Second, the doctrine developed by Justice L'Heureux-Dube in *Park* and adopted by Justice Major in *Ewanchuk*, itself gives recognition to the gender based inequities present in sexual violence and perhaps sexual interactions generally. Contextualization is incorporated into the analytical framework of the doctrine itself. The doctrinal approach developed by Justice L'Heureux Dube in *Park* (and adopted by Justice Major in *Ewanchuk*) did not come from nowhere; it was informed by the contextualization - the social factors – that she returns to in *Ewanchuk*.

In *Park* Justice L'Heureux-Dube gives recognition to the social factors that determine how consent is understood in terms of defining both the *actus reus* and *mens rea* for sexual assault. While her choice of language perhaps might be interpreted as suggesting some 'essential' gendered element to the issue – she characterized the issue in part as a gender gap in sexual communications – an examination of the theoretical source she relied on in *Park* suggests that she did indeed adopted a constructivist conception of what consent to sexual contact means; it is this conceptual framework that informs the doctrinal analysis she developed and the Court as a whole ultimately adopted (in *Ewanchuk*). Quoting R.D. Weiner she relied on the notion that:

Because both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, men often see extreme forms of this aggressive behavior as seduction, rather than rape. A great many incidents women consider rape are,

¹⁴⁴ *Supra* note 124.

¹⁴⁵ *Supra* note 119.

in effect, considered “normal” by both male perpetrators and the male-dominated legal system.¹⁴⁶

It is a recognition of this social context which gives rise to the need for a purely subjective standard of consent under the *actus reus* and a communicative notion of consent under the *mens rea*.

Gotell also points out that post-*Ewanchuk* the analysis in sexual assault cases remains at the level of the individuals involved in the case rather than at the systemic level in which this social phenomena is produced.¹⁴⁷ This is also true. However, it is difficult to imagine how in the context of criminal law it could be otherwise. What is significant is that the Court, in defining consent, in the context of individual cases – as they must do in criminal law - did so based on a consideration of the social/contextual factors that help to constitute what consent does and does not mean in a ‘system’ where sexual autonomy is not distributed equally.

ii) The Response To *Ewanchuk*

¹⁴⁶ *Park, supra* note 125 at para. 40. To apply MacKinnon’s theory in its entirety would be to suggest that women too (other than, of course, Catharine MacKinnon herself) also perceive many incidents of rape as “normal”. Weiner’s quote is somewhat confusing on this point. In the first sentence she suggests this is the case by stating that “both men and women are socialized to accept coercive sexuality as the norm”. However she then contradicts this assertion in the next sentence by suggesting that it is men and not men and women who experience this as normal. It may be possible to reconcile these two sentences along with MacKinnon’s theory by understanding coercive sex in gradations. At the lowest level of coercion it is only MacKinnon who sees that these acts are acts of sexual dominance and aggression – her definition of rape. At the next level of coercion women but not men understand certain acts of dominance or aggression as rape and it is only at the highest level of coercion that men and the male dominated legal system understand and experience the acts as rape.

¹⁴⁷ Gotell, *supra* note 141. One of Gotell’s main critiques of current sexual assault jurisprudence in Canada is that it promotes an individualized, neo-liberal conception of sexual violence that tends to obscure the systemic inequality that produces sexual violence and perpetuates the judicial system’s mistreatment of rape victims. Her critique may be more accurate with respect to due process type legal issues such as the use of prior sexual history and third party records, than it is with respect to the substantive definitional elements of sexual assault law.

Ewanchuk, which remains the leading precedent on the interpretation of consent in the context of sexual assault, was a controversial decision¹⁴⁸ and has been the subject of some scholarly debate.¹⁴⁹ Critics suggested that the Supreme Court of Canada had swung the pendulum too far towards the ‘radical feminist agenda’ and away from the rights of the accused. The sentiment underpinning this assertion is captured by the following response to Justice L’Heureux-Dube’s *Ewanchuk* concurrence:

But just as he had no empirical evidence to support his view (if you discount all of human history), she has no empirical evidence to say what she says (if you discount Catharine MacKinnon's collected works) ... Madam Justice L'Heureux-Dubé has shown an astounding insensitivity and an inability to conceive of any concepts outside her own terms of reference and has thereby disgraced the Supreme Court.¹⁵⁰

This is a quote taken from lawyer Edward Greenspan’s letter to the National Post reacting to Justice L’Heureux-Dube’s decision in *Ewanchuk*. Given his notation of MacKinnon’s work presumably the ‘terms of reference’ to which he is referring relate to MacKinnon’s power feminist conception of sexual violence. Certainly his nod to “all of human history” demonstrates his own reliance on an essentialist conception of sexual

¹⁴⁸ *Ewanchuk* was controversial not simply for its doctrinal implications but also due to reactions stemming from Justice L’Heureux-Dube’s concurring opinion responding to Justice McLung’s decision in the case at the Alberta Court of Appeal (*supra* note 4). It is the former debate that will be the focus of this discussion. For a discussion regarding the latter controversy surrounding *Ewanchuk* see Joanne Wright, “Consent and Sexual Violence in Canadian Public Discourse : Reflections on *Ewanchuk*” (2001) 16 No. 2 Can J L&S 173; Constance Backhouse, “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case” (2003) 15 Can. J. Women & L. 167; Hester Lessard, “Farce or Tragedy? Judicial Backlash and Justice McClung” (1999) 10 Constitutional Forum 65; Edward L. Greenspan, "Judges Have No Right to Be Bullies," National Post (2 March 1999) A18.

¹⁴⁹ See Christine Boyle, “Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses” (2004) 20 C.R. (6th) 359; Lucinda Vandervort, “Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault” (2004) 42 Osgoode Hall L.J. 625; Don Stuart, “*Ewanchuk*: Asserting “No Means No” at the Expense of Fault and Proportionality Principles” (1999) 22 C.R. (5th) 39 [hereinafter “*Ewanchuk*: Asserting “No Means No”].

¹⁵⁰ Edward L. Greenspan, "Judges Have No Right to Be Bullies," National Post (2 March 1999) A18 as cited in Constance Backhouse, “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case” (2003) 15 Can. J. Women & L. 167.

interactions (between men and women...). His concern seemed to be that *Ewanchuk* was in tension, if not conflict, with the *natural* way of the (heterosexual) world.

Doctrinal critics of *Ewanchuk* articulated this same fear by suggesting that the communicative definition of consent would lead to the criminalization of sexual overtures¹⁵¹ – including between individuals in ongoing sexual relationships.¹⁵² One of the central doctrinal issues raised by critics of *Ewanchuk* was a concern that it would not sufficiently allow for the mistaken belief defence in cases involving ‘morally innocent’ accused engaged in typical sexual overtures¹⁵³ or in cases where the accused and complainant were in an ongoing sexual relationship at the time of the offence.

In order to ensure that the ‘morally innocent’ not be convicted of sexual assault, the adoption of a subjective notion of consent under the *actus reus* analysis (in conjunction with a communicative or performative notion of consent under the *mens rea*) requires that there be a sufficiently robust defence of honest but mistaken belief in consent.

However, a review of the reported decisions addressing the mistaken belief in consent defence since *Ewanchuk* indicates that while sex may be complex,¹⁵⁴ and while it may well be difficult for courts to wade into the morass of ongoing sexual relationships, judges do appear able to apply the more constructivist definition of consent adopted in *Ewanchuk* in a manner which recognizes the complexity and diversity of sexual dynamics

¹⁵¹ Stuart, “*Ewanchuk*: Asserting “No Means No”, *supra* note 149.

¹⁵² See for example Criminal Review.ca *R v Ashlee* (<http://criminalreviewca/index.php/2006/08/24/r-v-ashlee> accessed January 30, 2009); see also Justice Thomas’s decision in *R. v. R.V.*, [2004] O.J. 849 (varied [2004] O.J. 5136 (C.A.)) stating that in cases involving spouses the doctrine of implied consent should still be considered; see *R. v. Went*, [2004] B.C.J. No. 190 where the British Columbia Supreme Court also suggested this – but then went on to apply the principles of *Ewanchuk* regardless.

¹⁵³ Stuart, “*Ewanchuk*: Asserting “No Means No”, *ibid.*

¹⁵⁴ In “*Ewanchuk*: Asserting “No Means No”, *ibid.*, Stuart cites several decisions recognizing the “complex and diverse nature of consent” to sexual touching.

without resulting in the sort of injustices to the accused that were once suggested by the decision's critics. The jurisprudence since *Ewanchuk* demonstrates that, despite fears to the contrary, the art of seduction has not yet been criminalized in Canada. In fact, a review of the post-*Ewanchuk* case law suggests that in cases involving allegations of sexual assault by an accused against a long-term intimate partner, *Ewanchuk* has not swung the pendulum far enough.

iii) Preserving The Art Of Seduction – A Kiss Is Still A Kiss

There were two main critiques regarding the doctrinal implications of the Court's decision in *Ewanchuk*. Both stemmed from the proposition that the Court's interpretation of consent would overly restrict the defence of mistaken belief in consent. The first was the concern that Justice Major's holding that assuming silence, or ambiguous conduct means consent is a mistake of law, and therefore not a defence, would result in the criminalization of harmless sexual overtures in ambiguous cases where "there is a real issue of whether a sexual assault occurred".¹⁵⁵ This concern is well illustrated by the hypothetical situations Professor Stuart suggested could problematically result in conviction post-*Ewanchuk*:

Situation 1: Two teenagers, Jack and Jill, have their first date at the movies. After the movies they go to Jack's apartment for coffee. They talk. Jill tells Jack that she has a boyfriend but also that she is an open, friendly, and affectionate person; and that she often likes to touch people. Jack tells her that he is an open, friendly, and affectionate person; and that he often likes to touch people. They talk more. They touch each other; they hug. At some point Jack kisses Jill. Jack thinks she has responded positively to his sexual advance although nothing was said. Jill did not welcome the kiss and felt she did nothing to encourage Jack. She was not scared of him. She admits that at that point she opened two buttons of her blouse but this was because she felt claustrophobic and nothing else. Jack felt he was being encouraged by her action and touched her breasts. Jill slaps him.

¹⁵⁵Stuart, "*Ewanchuk*: Asserting "No Means No", *supra* note 149.

Situation 2: The same as situation 1, except that it was Jill who kissed Jack.¹⁵⁶

The concern was that, in the first situation, post-*Ewanchuk* “since the complainant did not communicate her consent to be kissed or for her breasts to be touched, it would appear that the accused has no defence whatever he thought”.¹⁵⁷ Additionally, “there could be no defence of mistaken belief even in the second hypothetical since the opening of the blouse was ambiguous conduct and belief that ambiguous conduct constitutes consent is a mistake of law.”¹⁵⁸ Critics suggested that if the Court’s proposition in *Ewanchuk* that the presence of consent is determined solely on the subjective perspective of the complainant and if mistaking silence, passivity or ambiguity for consent is a mistake of law and therefore not a defence, an accused could be convicted of sexual assault simply for pursuing a sexual encounter in a manner in which sexual encounters are quite commonly pursued and innocently carried out. In other words, the Court will have criminalized seduction in Canada.¹⁵⁹

The decade worth of case law that has applied *Ewanchuk* in cases involving claims of honest but mistaken belief in consent demonstrates that i) the types of situations with which *Ewanchuk*’s critics were concerned have not actually been brought before the courts; and ii) were a truly ambiguous situation of this nature to come before a court a proper interpretation of *Ewanchuk* would not result in a conviction.¹⁶⁰

¹⁵⁶ Stuart, “*Ewanchuk*: Asserting “No Means No”, *supra* note 149.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ Searches were conducted on both the Quicklaw database and Westlaw database using the following search terms: “*Ewanchuk*” and “mistaken belief”. All reported decisions that included both of these search terms were reviewed. Quicklaw produced 165 cases (last accessed January 23, 2009). Westlaw produced 156 cases (last accessed January 23, 2009).

The following offers a hypothetical that much more aptly reflects the type of ambiguous situations that have come before the courts in mistaken belief cases post-

Ewanchuk:

Situation 1: Two teenagers, Jack and Jill, both attend a mutual friend's house party. Jill, an inexperienced drinker, consumes a great deal of alcohol. Jack also consumes alcohol. As the party progresses, Jill becomes increasingly intoxicated to the point where her friends take her upstairs and put her to bed in one of the host's bedrooms. Jill passes out. After the party has wound down, Jack heads upstairs, finds Jill in bed and proceeds to roll her over, and remove her pants. As Jack is pulling Jill's pants down he notices Jill lift her hips slightly. Jack interprets this as an indication of her willingness. Jack begins to fondle Jill's breasts and then her genitals. Jill fades in and out of consciousness as this is occurring. At one point Jill moans. Jill awakens to find that Jack has inserted his penis into Jill's vagina. Jill immediately passes out again. Shortly thereafter Jack ejaculates.

Situation 2: The same as situation 1 except, earlier in the evening before Jill passes out, Jack and Jill flirt and Jill kisses Jack.

A remarkably high number of the post-*Ewanchuk* reported decisions involving cases where a claim of mistaken belief in consent was denied closely resemble the factual circumstances highlighted in the hypothetical situation just described.¹⁶¹ In fact, situations quite similar to those I have just described constitute the most common factual circumstances in all of the reported decisions where the mistaken belief defence is raised and rejected.¹⁶² In these cases, the silence or passivity of the complainant stems from unconsciousness not coyness or indecisiveness. 'Ambiguity' arises in these cases not from a pubescent and gendered confusion over the complainant's (lack of) sexual interest

¹⁶¹ See for example *R. v. H.(S.L.)*, [2003] S.J. No. 645; *R. v. J.A.*, [2003] O.J. No. 2803; *R. v. Cedeno* [2005] O.J. No. 1174; *R. v. J.R.*, [2006] O.J. No. 2698; *R. v. G.A.L.*, [2001] N.S.J. No. 54; *R. v. A.J.* (2003), Carswell Ont 2624; *R. v. Ashlee*, [2006] A.J. No. 1040; *R. v. Reichmuth*, [2007] CarswellBC 592; *R. v. Despina*, [2007] S.J. No. 577; *R. v. Dumais*, [2008] S.J. No. 323; *R. v. B.S.B.*, [2008] B.C.J. No. 1319; *R. v. Doll*, [2004] B.C.J. No. 285; *R. v. Morningchild*, [2004] S.J. No. 126; *R. v. Bird*, [2004] A.J. No. 449; *R. v. Cornejo*, [2003] O.J. No. 4517; *R. v. K.D.* [2001] N.J. No. 347; *R. v. P.D.*, [2002] O.J. No. 3593; *R. v. Baynes*, [2007] O.J. No. 633; *R. v. Luddington*, (2001) 191 N.S.R. (2d) 118; *R. v. Malcolm*, [2000] M.J. No. 387; *R. v. Vaillancourt*, [2007] O.J. No. 3471.

¹⁶² *Ibid.*

but rather from a sleeping or barely conscious complainant who moans¹⁶³, rolls over¹⁶⁴, or lifts her hips slightly¹⁶⁵ while the accused is disrobing, fondling or penetrating her. It is not that critics of *Ewanchuk* suggested that denying the defence of mistaken belief in consent in these types of cases posed a problem. However, the practical reality is that these are the types of cases in which the principle in *Ewanchuk* that silence, passivity and ambiguity do not connote consent has most commonly been applied.

The counter argument to this practical observation regarding the types of cases that actually do come before the courts is that it does not matter whether the type of case critics feared has yet come before the courts; the significance of the critique is established simply by the possibility that an accused could be convicted without the degree of fault required by fundamental criminal law principles. This counter argument raises the second point demonstrated by the post-*Ewanchuk* cases. Under a proper interpretation of *Ewanchuk*, were a truly ambiguous situation in which an accused relied on a complainant's conduct as an indication to proceed incrementally to come before the court, it would not result in a conviction.

It may be that some of the concerns raised by critics of *Ewanchuk* involved a misapprehension of the test established in *Ewanchuk*. As noted above, Professor Stuart suggested that in his first hypothetical situation "since the complainant did not communicate her consent to be kissed or for her breasts to be touched, it would appear that the accused has no defence whatever he thought".¹⁶⁶ *Ewanchuk* does not require that

¹⁶³ See *R. v. Doll*, [2004] B.C.J. No. 285 (In fact, in *Doll* the court determined that her moaning and lifting of the hips did raise an air of reality to the defence. However, it was not sufficient to establish the defence.); *R. v. Despins*, [2007] S.J. No. 577; *R. v. Baynes*, [2007] O.J. No. 633; *R v K.D.*, [2001] N.J. No. 347

¹⁶⁴ See *R. v. S.T.*, [1999] O.J. No. 268.

¹⁶⁵ See *R. v. Cornejo*, [2003] O.J. No. 4517.

¹⁶⁶ Stuart, *Ewanchuk: Asserting "No Means No"*, *supra* note 148.

the complainant communicated consent in order to allow the defence of honest but mistaken belief in consent. To do so would remove entirely the subjective component of the *mens rea* for sexual assault. Rather, *Ewanchuk* determined that in order to establish the defence there must be evidence to lend an air of reality to the suggestion that the accused *believed* that the complainant *communicated* consent.

The belief that consent was communicated can be based on the complainant's words or actions.¹⁶⁷ *Ewanchuk* has not been taken to stand for the proposition that an individual engaged in sexual activity with a genuinely consenting partner can never rely on a kiss as evidence of an honest but mistaken belief that there had been an indication for further, more involved kissing, or rely on further consensual kissing as evidence of a belief that there was an indication of consent to intimate touching and so on.... In cases where a complainant has consented to some sexual touching, courts have allowed the accused to rely on this as evidence of a mistaken belief that consent to progress (incrementally) was communicated. This is provided there was not some affirmative indication that consent had been withdrawn or some other factor that the accused should have reasonably known suggested the complainant was no longer consenting -which would then require him to take further steps to ascertain consent. The concern that *Ewanchuk* would result in the unjust conviction of an accused who has commenced consensual sexual touching that unbeknownst to him at some point becomes unwanted (but unexpressed) by the complainant has not been realized. In fact, in such

¹⁶⁷ So for example, applying this aspect of *Ewanchuk's* reasoning to Professor Stuart's hypothetical, in the first situation, evidence that Jill hugged and touched Jack would be evidence that Jack could rely upon to lend an air of reality to the belief that Jill communicated consent for the kiss (regardless of whether Jill intended the hug and touching to communicate consent for the kiss). In both situations, evidence that subsequent to the kissing Jill then unbuttoned her blouse would be evidence that Jack could rely upon to establish a belief that Jill communicated consent for the touching of her breasts (regardless of whether Jill intended the unbuttoning of her blouse to communicate consent for the breast touching).

circumstances courts have required evidence that the complainant indicated a withdrawal of consent before rejecting the possibility of an honest but mistaken belief in consent.

Consider the case of *R v Kuryluk*, in which the Nova Scotia Supreme Court acquitted the accused after finding that there was a reasonable doubt as to whether the complainant had communicated her withdrawal of consent to further sexual activity.¹⁶⁸ In *Kuryluk* the complainant and the accused, former lovers, returned to the accused's apartment after having been re-acquainted at a bar. Once at the apartment the two engaged in consensual kissing and fondling which then progressed to mutual oral sex and then vaginal intercourse. After the oral sex, vaginal intercourse occurred. Kuryluk testified that he believed the complainant consented to all activity short of ejaculation during intercourse. The complainant testified that the mutual oral sex was not consensual but that she had not indicated this to the accused and that she had said no to the vaginal intercourse. The Court found that "[a]lthough his belief may have been mistaken, Mr. Kuryluk's evidence that he believed the complainant consented to engage in the sexual activity performed, albeit without ejaculation, supports the defence of honest but mistaken belief".¹⁶⁹ The evidence raised "a reasonable doubt that lack of consent was communicated to the accused with respect to any act other than accidental ejaculation, which alone does not amount to a sexual assault".¹⁷⁰ There was conflicting evidence as to whether the complainant said no to the intercourse. Justice Murphy found the accused credible on this point.

Based on the consensual kissing, fondling and disrobing that preceded it, and her testimony that she went along with it, Justice Murphy found that the evidence did not

¹⁶⁸ [2001] N.S.J. No. 545.

¹⁶⁹ *Ibid.* at para. 32

¹⁷⁰ *Ibid.* at para. 35.

indicate that the oral sex was a sexual assault. In doing so he noted that the Crown had acknowledged that the complainant did not communicate to the accused that she was not consenting to oral sex.¹⁷¹

As noted above, the complainant's evidence as to whether the oral sex was consensual had been inconsistent. She initially told police it was consensual. On direct examination she said she did not recall objecting to it, but then on cross-examination she said it was not consensual. However, despite issues with her credibility it was the fact that she had not communicated non-consent for the oral sex that Justice Murphy highlighted.

In other words, Justice Murphy found that the consensual kissing, fondling, and disrobing in conjunction with no indication by the complainant that she was no longer consenting, could be relied upon by the accused as evidence to establish a mistaken belief that the complainant had communicated consent to progress to oral sex.

In the Ontario Court of Justice decision in *R v Anderson*, the accused and the complainant met in a bar where they hugged and kissed briefly. Justice Brophy found that this was consensual hugging and kissing.¹⁷² The accused and the complainant then exited the bar and while outside continued kissing and touching. Justice Brophy found that this too was consensual. The two then went around to the side of the building and lowered themselves onto the ground where kissing and some fondling ensued. The Crown conceded that the complainant consented to the initial kissing and hugging that occurred

¹⁷¹ *Supra*, note 168 at para. 25

¹⁷² [2005] O.J. No. 5381. The complainant's and the accused's versions of events after having left the bar were different. The complainant testified that she had said no. Justice Brophy found both witnesses to be reliable and as is required by the presumption of innocence, gave the benefit of the doubt to the accused (*R v W.(D.)*, (1991), 63 C.C.C. (3d) 397). Presumably, had he been convinced beyond a reasonable doubt that the complainant had indicated 'no' to further sexual touching he would not have acquitted Anderson.

outside the bar. Justice Brophy acquitted on the basis that the Crown had not proven lack of consent. He further held that even had the Crown established lack of consent beyond a reasonable doubt the accused would have been entitled to rely on a mistaken belief in consent. Justice Brophy stated that

if the complainant then changed her mind (which I find the Crown has not proven beyond a reasonable doubt), there is obviously a transitional period where that change of mind is going to have to be communicated in some fashion to the accused. In that transitional period, it is quite possible for the accused to have held an honest but mistaken belief that the complainant was still consenting to his actions. I am of the view that the accused stopped his actions when it became clear that the complainant wished to leave. At that point there was a message being sent that she wished to stop and the accused did in fact end his sexual advances.¹⁷³

In the Supreme Court of Nova Scotia's decision in *R v MacIsaac* the appellant's conviction for sexual assault was overturned on the basis that the trial judge had erred by not considering the defence of honest but mistaken belief in consent.¹⁷⁴ The appellant testified at trial that he had visited the home of a woman with whom he was acquainted. While there he hugged the complainant twice; the second time he followed the hug with a brief kiss on the lips. The following day she made a complaint of sexual assault to the police. The appellant testified that he did not ask permission to hug her or to kiss her. Presumably given the trial verdict, the trial judge had made a finding of fact that the complainant did not consent to the hug or kiss. On appeal Justice Edwards found that the trial judge had failed to apply *Ewanchuk* and that the evidence clearly raised the defence of honest but mistaken belief in consent. The evidence Justice Edwards was referring to included the appellant's testimony that after he put his arm around the complainant, as they were walking to the door, she responded by putting her arms around him. It included

¹⁷³ *R v Anderson*, *supra* note 172 at para. 38.

¹⁷⁴ [2005] N.S.J. No. 126.

the appellant's evidence that when he hugged her she took her shoulders and tilted them forward, burying them into his chest. It included his evidence that the kiss on the lips lasted approximately one second, that he did not use tongue and that when she broke off the kiss and informed him she "didn't want to go through with this" he did not engage in any further overtures.¹⁷⁵ Applying *Ewanchuk*, Justice Edwards found that the mistaken belief in consent defence was available based on this evidence. A returned hug and a tilting of the shoulders, regardless of what the complaint meant to communicate, was sufficient evidence, if believed, to establish a mistaken belief that the complainant had communicated consent for the kiss. That is to say, presuming his evidence was believed, Mr. MacIsaac's sexual overtures were not criminalized.

The key in cases of the type just discussed is the notion of incremental conduct and the possibility of consent through words *or conduct*. *Ewanchuk* established that there must be an affirmative unequivocal indication of consent to sexual touching. It established that *any* adverse indication requires an accused to cease all sexual advances until a clear and unequivocal affirmative indication is subsequently obtained. It also established that "an unequivocal "yes" may be given by either the spoken word *or by conduct*".

In *Anderson*, provided the 'transitional period' was not unreasonable and provided the accused did not escalate his sexual advances during the 'transitional period' (during which the complainant would have done nothing through words or actions to indicate her consent for such escalation) it would seem that Justice Brophy's reasoning was consistent with *Ewanchuk*. Similarly in *Kuryluk*, setting aside the issue of intercourse, and lack of consent to ejaculation and looking specifically at the Court's

¹⁷⁵ *Supra* note 173 at para. 14.

analysis regarding the mistaken belief in consent defence as it would apply to the mutual oral sex, it seems consistent with *Ewanchuk* to allow the accused (absent any indication by the complainant to the contrary) to rely on the consensual mutual kissing as evidence of a belief that the kissing communicated consent for fondling, on the consensual mutual fondling as evidence of a belief that the fondling communicated consent for the disrobing, and on the consensual mutual disrobing (in conjunction with all of the prior consensual activity) as evidence of a *mistaken* belief that consent for the mutual oral sex had been communicated.

In the great preponderance of cases dealing with claims of honest but mistaken belief in consent between strangers and acquaintances the ‘ambiguities’ argued by the defence stem from severely intoxicated complainants not crossed wires. Cases such as *Kuryluk*, *Anderson* and *MacIsaac* demonstrate that where there is some legitimate confusion stemming from the transition period between consensual sexual touching and the lack of consent to incrementally progress to more involved sexual touching courts have not applied *Ewanchuk* in a manner that unjustly denies the possibility of the defence.

iv) Mistaken Belief In Consent In Ongoing Sexual Relationships

Having dispensed with the apprehension that *Ewanchuk* would lead to the criminalization of seduction, it is necessary to turn to the second main doctrinal concern voiced by opponents of the decision. This was the suggestion that *Ewanchuk*, by rejecting the doctrine of implied consent to sexual touching, would result in the unjust conviction of accused who were involved in an on going sexual relationship with the complainant at the time of the alleged offence. The concern was that the *Ewanchuk*

reasoning would not give adequate recognition to the manner in which consent to sexual interaction often occurs in the context of on going intimate relationships.

A review of the cases applying *Ewanchuk* in which an accused claims a mistaken belief in consent in defence of sexual assault allegations made by a complainant with whom he was involved in an on going sexual relationship demonstrate that this concern also has not come to realization. In fact the post-*Ewanchuk* cases reveal that lower courts are quite able to apply the communicative notion of consent adopted in *Ewanchuk* in a manner that recognizes and accounts for both the fact that consent is often communicated differently between long or longer term sexual partners than it is between strangers or shorter term sexual partners as well as the diverse ways in which consent can be communicated within the context of an ongoing sexual relationship. These cases demonstrate that the communicative definition of consent can be properly applied in cases involving intimate partners.

Unfortunately there are also lower cases indicating that if anything, the criminal law, despite *Ewanchuk*, has failed to provide the same level of protection for sexual autonomy inside intimate relationships as it does outside of them.¹⁷⁶ As will be discussed, the rejection of the doctrine of implied consent by the Supreme Court of Canada has not been consistently applied by lower courts in cases involving spouses.

The paragraphs to follow will focus on three issues: i) the use of prior sexual history in cases involving intimate partners; ii) cases where the couple had, or the accused claims they had, a history of consensual sado-masochistic or ‘rough’ sex and; iii) cases

¹⁷⁶ See Melanie Randall, “Sexual Assault in Spousal Relationships, “Continuous Consent”, and the Law: Honest But Mistaken Judicial Beliefs”, (2008) 32 Man. L.J. 144.

where the sexual interaction arose in circumstances where the relationship was in jeopardy.

a) Prior Sexual History In Cases of Sexual Assault Between Intimates

Many of the cases in which claims of mistaken belief in consent defences to sexual assault charges in the context of on going relationships arise also involve applications by the defence under section 276 of the *Criminal Code* to introduce the couple's prior sexual history. The first indication that those accused of sexually assaulting an intimate partner will not be unjustly denied the mistaken belief in consent defence is revealed by the courts' liberal approach to the use of prior sexual history in these circumstances.¹⁷⁷

Justice McLachlin (as she then was) noted in *R v Seaboyer* that prior sexual history between the complainant and the accused may be relevant to a claim of mistaken belief in consent.¹⁷⁸ To be admitted under section 276 of the *Criminal Code* the prior sexual history must not be introduced as evidence that the complainant was more likely to consent or as evidence of her credibility generally; in addition, it must have significant probative value relevant to an issue at trial.¹⁷⁹ In *R v Darrach* Justice Gonthier noted that

[t]o establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. This is necessary

¹⁷⁷ It has been argued that, problematically, "past sexual history seems to figure more prominently and slip in automatically in spousal sexual assault cases" rather than through a proper section 276 process. See Randall, "Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs", *supra* note 176.

¹⁷⁸ *Supra* note 6 at 407.

¹⁷⁹ *Ibid.*

for the trial judge to be able to assess the relevance of the evidence in accordance with the statute.¹⁸⁰

In light of the definition of consent adopted in *Ewanchuk*, courts could have taken a strict interpretive approach to the admission of prior sexual history in these cases by finding that it will only have significant probative value where it is evidence of how consent was communicated through words or conduct in the past. In fact some have argued that such an approach may be a more appropriate interpretation of the interplay between the requirements of section 276 and the *mens rea* definition of consent established in *Ewanchuk*.¹⁸¹ However, courts have tended to interpret the relationship between a mistaken belief in consent defence post-*Ewanchuk* and an application to introduce evidence of a prior sexual history between the accused and the complainant more liberally, such that the prior sexual history, provided it is recent,¹⁸² tends to be admitted.¹⁸³

¹⁸⁰ [2000] 2 S.C.R. 443 at para. 59.

¹⁸¹ See Janine Benedet, Case Comment *R. v. B. (A.J.)* (2007) Carswell Man 300:

if the focus of the mistaken belief defence is on whether the complainant communicated her voluntary agreement to the accused, the only past history that is arguably relevant would relate to how voluntary agreement was communicated by the complainant to the accused in the past.

See *R. v. Mondesir* (2004), CarswellOnt 6405. In *Mondesir* the Ontario Superior Court did apply this interpretation to deny an application to admit evidence of a prior ‘kinky’ sexual incident on the basis that during the previous ‘kinky’ sexual interaction the complainant had instructed the accused as to what she wanted him to do. During the alleged assault she was silent.

¹⁸² See *R. v. Power* [1999] N.S.J. No. 269; *R. v. Kynoch* [2002] A.J. No. 1256 at para. 42 where evidence of prior sexual history was not admitted because there had been a lapse in time between the history of sexual touching and the present alleged offence. Even the reasoning in these cases demonstrates how courts have interpreted the interplay between section 276 and *Ewanchuk* in a manner favorable to the accused. The assumption underpinning these rulings is that the prior sexual history – given the lapse in time – is not relevant because it does not support the inference that the accused was reasonable in relying on the fact of prior sexual relations to support a belief in present consent.

¹⁸³ This observation should be qualified somewhat. In many cases the accused claims that the complainant consented or in the alternative that he had a mistaken belief that she consented. Courts do not always indicate, at the section 276 application stage, whether evidence of prior sexual history is being admitted as relevant to the former or the latter or both. (See for example *R. v. G.P.*, [2008] O.J. No. 5038.) Several courts have suggested that prior sexual history between the accused and the complainant is admissible as part of the context in cases where the accused maintains that she

In *R. v. Wilson* for example the Court admitted evidence of prior sexual history between the complainant and the accused as relevant to the defence of mistaken belief in consent. It was admitted not to demonstrate his perception that consent had been communicated prior to the alleged offence but simply to show that she had in the past consented to ‘unusual sex’:

The sex alleged, as perceived by Mr. Wilson, involves the unusual feature of bondage. Any consent to such sex would necessarily be an exceptional consent. Whether Mr. Wilson had received such consent from Ms. C. previously would be a factor in the consideration of evidence of such a perception.¹⁸⁴

Consider also the case of *R. v. B.J.S.*¹⁸⁵ In *B.J.S.* the accused was charged with sexually assaulting his wife.¹⁸⁶ The accused testified that he believed his wife had given him permission to touch her for the purpose of inspecting her fidelity based on a prior incident that had occurred in 1987. The Alberta Provincial Court admitted the evidence of the 1987 incident – presumably a prior inspection – on the basis that it was significantly probative of his mistaken belief that he had permission nearly twenty years later to again ‘inspect’ his wife. The evidence was as to the fact of the prior supposedly consensual vaginal examination and not as to how consent for that examination was

consented (See *R. v. Strickland* (2007), 45 C.R. (6th) 183). In those cases it is admitted more to show a general history of sexual interaction – the specifics of communication of consent are not necessarily relevant to this (arguably problematic) type of reasoning. As such, those cases where it is admitted, and where the court does not stipulate whether it is relevant only to consent or to mistaken belief in consent, cannot be relied on to support the argument made herein. Of course, neither do they challenge the argument made here.

¹⁸⁴ *R. v. Wilson* (2008), O.J. No. 3583.

¹⁸⁵ [2005] A.J. No. 883.

¹⁸⁶ In *B.J.S.*, *ibid.*, the Court found that in determining the admissibility of prior sexual history under a section 276 application, the provisions of section 273.2 of the *Criminal Code* – which stipulate that the defence of mistaken belief is not available where the belief arose from drunkenness, recklessness, willful blindness or unreasonableness in the circumstances – were not relevant. Setting aside whether this is the right approach, it should be noted that it is an approach that broadens admissibility and thus favours the accused.

communicated nor as to why the fact of the prior sexual interaction evidenced his belief that consent in the present circumstance was *communicated*.

b) Cases With A History of Consensual ‘Rough Sex’

In cases involving sexual assault charges between sexual intimates, the impact of *Ewanchuk* does not seem to have resulted in a more restrictive approach to the admission of prior sexual history between the accused and the complainant as evidence to establish an honest but mistaken belief in consent. Moving forward then, has the ‘communicative’ definition of consent (and its corresponding rejection of the doctrine of implied consent) adopted in *Ewanchuk* resulted in an approach to consent that fails to accommodate the complexity and diversity of sexual communications between intimate partners? The litmus test to answer this question might be found by examining how courts, post-*Ewanchuk*, have approached cases where the accused bases his mistaken belief in consent on a prior sexual history between the accused and the complainant which featured dominance and submission and in which sometimes ‘no’ genuinely did mean yes.

In fact, the communicative definition of consent found in *Ewanchuk* does not appear to work any injustice to the accused in these types of cases. This is demonstrated by the British Columbia Supreme Court’s appellate decision in *R. v. Went*.¹⁸⁷

In *Went* the accused and the complainant had been in a healthy social and sexual relationship for a number of years. The relationship frequently included “forceful sex” and “insincere verbal exhortations” by the complainant to stop.¹⁸⁸ Their sex play included the accused “grabbing her hair during sex and gently pulling it, engaging in activity which could be characterized as Mr. Went “taking” her, and the initiation of oral

¹⁸⁷ [2004] B.C.J. No. 1900 [hereinafter *Went*].

¹⁸⁸ *Ibid.* at HN.

sex by one partner pushing the head of the other partner into the initiator's lap".¹⁸⁹ The Court noted that:

...of some importance in this case and in their relationship, Ms. D. agreed that she, from time to time, would say "no" or "don't" in relation to the initiation of sexual contact by Mr. Went when she did not mean for him to stop. In this context, she agreed that she enjoyed and was aroused by being "taken" in a sexual way.¹⁹⁰

The complainant testified that on all of these occasions "her use of the words "no", "stop" or "don't" during sexual activity were preceded by a direct or subtle invitation to sexual activity, such as hugs or flirtation".¹⁹¹

The charges arose as a result of a sexual interaction that the accused conceded was not consensual; his defence was that he mistakenly believed that she was consenting. On the night of the incident the couple were watching a movie together on her couch. The movie depicted a man having sex with a woman who had a plastic bag over her head. The accused testified that the complainant said "see, she likes it". The complainant denied making this statement. The trial judge did not make a finding of fact as to whether she made the statement. At some point the accused, as he had done in the past, put his hand over the complainant's mouth and nose to which she responded by saying "don't".¹⁹² There was disagreement as to whether this was preceded by a hug. The trial judge said he was unable to make a finding of fact on this point. The accused then grabbed the back of her head and forced it into his lap to initiate oral sex – again as had occurred in the past. Both parties agreed that she resisted all of this. The accused then got on his knees in front of her and tried to remove her clothing. There was disagreement

¹⁸⁹ *Supra* note 187 at para. 6.

¹⁹⁰ *Ibid.* at para. 7

¹⁹¹ *Ibid.* at para. 8.

¹⁹² *Ibid.* at para. 12.

as to whether she assisted in the removal of her clothing by lifting her bottom. The trial judge did not make a finding of fact on this point either. After this the accused attempted to initiate sexual intercourse at which time, according to him, the complainant's protestations finally registered with him and he realized that she was actually not consenting. There was as noted above, agreement that the complainant was not consenting; thus the *actus reus* was established. The sole issue was as to the accused's claim of mistaken belief in consent. In other words, as to whether there was evidence he could rely upon to establish a mistaken belief that she had communicated consent.

The British Columbia Supreme Court allowed the defence and overturned his conviction because the trial judge had not made a finding of fact as to whether the consensual hug, positive comment about the film or assistance with the removal of pants had occurred. The benefit of the doubt of course goes to the accused. The accused then, was permitted to rely on his evidence (of the hug, comment, and hip lifting) to allow the mistaken belief in consent defence. Presumably given all of the other evidence, had the trial judge made a finding of fact that the hug had not occurred, that complainant had not made the comment about the film or lifted her hips the defence would not have been allowed. There are two important points to be noted about this case. First, Justice Koenigsberg based on his own reasons, despite his contestations to the contrary, did apply the communicative definition of consent established in *Ewanchuk*. While Justice Koenigsberg both misconstrued the definition of consent in *Ewanchuk* (by suggesting that *Ewanchuk* precluded the possibility of relying upon 'behavioral consent'¹⁹³) and wrongly

¹⁹³ *Ewanchuk* did not, as was suggested in *Went*, hold that an accused could not rely on evidence of 'behavioral consent' to establish a mistaken belief in consent. The Court in *Ewanchuk* did not even employ the term 'behavioral consent'. They did, however, establish that it is evidence of a mistaken belief that consent was communicated through words *or actions* that raises an air of reality to the

suggested that *Ewanchuk*'s rejection of the doctrine of implied consent only applied in cases involving strangers,¹⁹⁴ he actually did go on to properly apply the analysis in *Ewanchuk* and in doing so overturned the accused's conviction.

Second, he did so in a manner that appeared to accommodate the very specific sexual dynamics of the couple at issue in this case. Courts are able to make assessments as to what constitutes ambiguity in a particular sexual context. It seems that both common sense and the *Ewanchuk* analysis are able to distinguish between relying as an indication of consent on the lifting of one's hips by a barely conscious and severely intoxicated acquaintance¹⁹⁵ and the lifting of one's hips by a sexual partner with whom one has a history of 'no means yes' sex play.¹⁹⁶

c) mistaken belief when intimate partners are 'on the rocks'

The concern that *Ewanchuk* would unduly restrict an accused's access to the defence of honest but mistaken belief in consent in cases where the accused and the complainant had been involved in an on going relationship has not been realized in post-*Ewanchuk* decisions. However, some post-*Ewanchuk* cases involving intimate partners do indicate the possibility of a different problematic trend. This involves a failure on the part of lower courts to consistently ascribe to the communicative notion of consent in

defence. Presumably, *actions* would cover whatever concept the court in *Went* intended by the term 'behavioral consent'.

¹⁹⁴ *Supra* note 187 at para. 22. In *R. v. R.V.* [2004] O.J. No. 5136 the Ontario Court of Appeal held that the *Ewanchuk* analysis does apply in cases involving spouses. In doing so the Court in *R.V.* explicitly overturned the trial judge's holding that *Ewanchuk* did not apply to intimate partner cases.

¹⁹⁵ See *R. v. Cornejo*, *supra* note 165.

¹⁹⁶ Contrast the decision in *Went* with the outcome in *R. v. J.A.*, [2008] O.J. No. 1583. In *R. v. J.A.* the accused was convicted of sexual assault after inserting a dildo into his partner's anus while she was unconscious. She had been rendered unconscious by the accused. The couple had on a number of occasions engaged in 'breath play' where one partner chokes the other to the point of unconsciousness. Anal penetration had not in the past been a part of their sexual activities. Justice Nicholas convicted on the basis that there is no defence of implied consent and, because the anal penetration was initiated while the complainant was unconscious, it was not possible for her to have communicated consent. There was thus no evidence possible of establishing consent or a mistaken belief in consent.

cases involving sexual assault allegations between long term intimate partners – more specifically, in cases where the accused’s actions appear to be motivated by a desperate attempt to ‘win back’ or ‘re-claim’ his partner.

In *R. v. T.V.* the accused and the complainant had been married for several years.¹⁹⁷ The complainant wanted to terminate the marriage. In addition to the charge of sexual assault, for which he was acquitted, the accused was also charged with several other offences including assault (for which he was convicted). The complainant had had an affair that according to Justice Baldwin had left the accused “devastated”, “heart broken” and “angry” but still wanting to continue the marriage.¹⁹⁸

According to Justice Baldwin “[w]hat occurred between the parties during the time period in question is a tale of betrayal and revenge”;¹⁹⁹ according to the complainant what occurred between the parties was a tale of violence, threats, sexual extortion and sexual assault.

The incident from which the charge of sexual assault stemmed occurred on the couple’s 16th engagement anniversary. The complainant testified that the sexual touching was not consensual. She testified that she repeatedly said no, that she told the accused to get off of her and that he ignored her protests. The accused did not testify. His defence was that the sexual interaction was consensual or that he had a mistaken belief that it was consensual. The judge did not advert to any evidence that the accused could rely on to establish his belief that consent was communicated – in fact quite the opposite. However despite this, he found that there was an air of reality to the defence and ultimately acquitted on this basis. He argued that this case was nothing like *Ewanchuk* because the

¹⁹⁷ [2006] O.J. No. 4089.

¹⁹⁸ *Ibid.* at para. 17.

¹⁹⁹ *Ibid.* at para. 19

couple here had been “sexually communicating” for years. Taking Justice L’Heureux-Dube’s comment that there was nothing romantic about Ewanchuk’s actions out of context, and distinguishing on the basis of it, Justice Baldwin noted that

the accused was desperately trying to save the marriage. It was their engagement anniversary and he had sent his wife flowers at work which she gave away to the cleaning lady. He E-mailed her to come home so that they could have a special dinner. She did not come home for dinner. He was trying to engage his wife romantically throughout the day.²⁰⁰

Despite his finding of fact that the complainant said she did not want to have sex²⁰¹, and despite there being no evidence that she communicated anything other than an explicit lack of consent, Justice Baldwin acquitted on the basis that “the evidence here established that the complainant submitted or did not resist to the sexual activity in question because she was “tired” and “tiredness does not vitiate consent”. In doing so he made an error of law. He put the cart before the horse. While tiredness may not vitiate consent, submission and a failure to resist do not constitute consent.²⁰²

Finding that the accused just “wanted to show her how much he loved her” Justice Baldwin noted that “although the complainant did not verbally agree to participate in the sexual activity, her protestations to “let me go” [made while the accused “lightly pinned her wrists to the side and slowly moved her PJ top up”²⁰³] can be understood to mean let me go from this marriage.” To suggest that Justice Baldwin’s analysis stretches the imagination is to understate the situation.

²⁰⁰ *R v T.V.*, *supra* note 197 at para. 153

²⁰¹ *Ibid.* at para. 155.

²⁰² *Ewanchuk*, *supra* note 29.

²⁰³ *R. v. T.V.*, *supra* note 197 at para. 80.

In *R. v. D.M.*, another case that involved an intimate couple, the Ontario Court of Justice did acknowledge that *Ewanchuk* was binding authority on the issue of consent.²⁰⁴ However despite this, the Court's reasoning suggests an implicit rejection of *Ewanchuk* – an implied consent.

In *R. v. D.M.* the accused was acquitted of sexually assaulting his girlfriend of two years. A few minutes prior to the sexual touching from which the charges stemmed, the accused had been advised by the complainant that she had been having sex with his roommate. The incident started when the complainant entered his bedroom and lay on the bed. He was upset and almost crying and began to rub the complainant's stomach. He then proceeded to touch her vagina. At this point she grabbed his wrist and tried to pull his hand away. She was unable to do so. He penetrated her digitally and although she told him to stop, he continued. Next she yelled (or screamed) at him to stop. From here their evidence differed. He said he stopped at this point. She said he did not stop and that she continued to yell and scream and it was only after she pried his fingers out of her and fell off the bed that he stopped. The yelling and screaming was sufficiently loud that the next door neighbors called the police.

Justice Tetley cited *Ewanchuk* and noted that "speculation by the accused as to what the complainant may be thinking does not provide the accused with a defence. The accused must believe that the complainant effectively said, "Yes" through her words or a combination of her words and her actions."²⁰⁵ Despite acknowledging this point of law, and despite that, even on the accused's own testimony, he continued the sexual touching at least until after the first time and up until the second time that the complainant had told

²⁰⁴ [2004] O.J. No. 4376.

²⁰⁵ *Ibid.* at para. 87

him to stop, the accused was acquitted on the basis of an honest but mistaken belief in consent. The evidence the Court relied on in order to establish an air of reality to the accused's belief that she had communicated consent was the fact that "on at least one prior occasion during an act of sexual intercourse the complainant had uttered the word "no", which had meant she was uncomfortable and was requesting a change of position."

In terms of evidence capable of supporting the honesty and reasonableness of his belief that her screams (screams loud enough to cause the neighbors to call the police) during this incident were the same as her 'uttering the word no' so that the accused might change position during a previous sexual encounter, the Court relied on the following: the fact that the complainant proposed to sleep in his bed; the accused's calm demeanor both pre and post incident despite having just discovered that his girlfriend had slept with his best friend; the fact that he calmly tried to kiss and hug the complainant after the incident; and his lack of sophistication on the stand.

One cannot help noting that in both *R. v. T.V.* and *R. v. D.M.* the female complainants had engaged in sex outside of the relationship and that in both cases the judges made more than passing reference to these women's infidelities and empathized with how difficult this must be for the accused.

In *R. v. C.M.M* the Nova Scotia Provincial Court found an accused whom had broken into his estranged wife's house, found a gun and threatened her with it before putting it away (*after* it had accidentally been fired) and having intercourse with her had an honest but mistaken belief she was consenting.²⁰⁶ The Court found that the accused entered the house intending only to let his wife know how he felt, that he found the gun after he arrived, and that he intended only to scare her with it. The gun went off

²⁰⁶[2002] N.S.J. No. 197.

accidentally and he laid it aside immediately. Despite finding that the accused intended to scare his wife with the gun, the Court determined that in the accused's mind, this was not a factor in the sexual assault. He found that the accused's wife had led him to believe, by her words and conduct, that she was consenting to the sexual intercourse.

It may be that it is trial judges in particular who are less willing to recognize that the doctrine of implied consent to sexual interactions no longer exists, even as between spouses. In addition to the two cases just discussed – which were not appealed – trial judges in *R. v. MacFie* and *R. v. R.V.* refused to, or failed to, apply *Ewanchuk*.

The trial judge in *R. v. R.V.*, in acquitting the accused husband, ignored *Ewanchuk*.²⁰⁷ He held that as between husbands and wives an implied doctrine of consent to sexual touching exists and that even proof that the wife said no and the husband knew she said no was not sufficient to establish guilt.²⁰⁸ “I am of the view that where a viable marital relationship exists, then it is not enough for the Crown to simply prove that the sexual conduct took place without the stated consent of the other party in order to secure a conviction for sexual assault by one marital partner against the other.”²⁰⁹

The trial judge in *R. v. MacFie* also found that an ex-husband who violently abducted his estranged wife and had sexual intercourse with her in the back of his van in a deserted gravel pit had a mistaken belief that she was consenting.²¹⁰ The acquittal was

²⁰⁷ [2001] O.J. No. 5143

²⁰⁸ *Ibid.* “The law still remains that unless a marriage is consummated, it may be annulled or it may be declared null and void. Therefore, when parties get married, they, by the very nature of the relationship, are consenting to engaging in sexual intercourse and consummating the marriage. Even after consummation, a marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship. Judge Wolder’s decision was initially upheld by the Ontario Superior Court 61 W.C.B. (2d) 57 but was ultimately overturned by the Ontario Court of Appeal [2004] O.J. No. 5136.

²⁰⁹ *Ibid.* at para. 14.

²¹⁰ [2001] A.J. No. 152. The accused killed the complainant three days after the abduction and sexual assault.

set-aside on appeal on the basis that there is no air of reality to a kidnapper's claim to have honestly believed his hostage was consenting to the sexual assault.

Recall that the trial judge in *R. v. Went* also stated that the *Ewanchuk* standard should be applied only between strangers and not intimates (although he went on to apply an analysis which did properly *Ewanchuk*).

The Supreme Court of Canada's decision in *Ewanchuk* engendered a great deal of controversy, some of it stemming from the concern that the communicative notion of consent adopted by the Court would unjustly deny the defence of honest but mistaken belief in consent to certain accused. In particular there was concern for those whose harmless sexual overtures were, unbeknownst to them, unrequited. There was also concern that the Court's explicit rejection of the doctrine of implied consent could not justly be applied to husbands and boyfriends charged with sexual assault.

A review of the reported cases, since 1998, in which the mistaken belief in consent defence arose demonstrates that cases with the types of ambiguity envisaged by *Ewanchuk's* critics have not come before the courts. The cases also demonstrate that the *Ewanchuk* analysis, properly interpreted, does not unreasonably constrain the progression of intimate behavior between genuinely consenting adults, and that where a legitimate confusion exists courts appear able to apply a communicative concept of consent that can accommodate the diversity and specificity with which sexual interactions tend to occur. Less promisingly, decisions in cases such as *R. v. T.V.*,²¹¹ *R. v. R.V.*,²¹² *R. v. D.M.*,²¹³ *R. v. C.M.M.*²¹⁴ and *R. v. MacFie*²¹⁵ suggest that in cases involving intimate partners or

²¹¹ *Supra* note 197.

²¹² *Supra* note 207.

²¹³ *Supra* note 204.

²¹⁴ *Supra* note 206.

spouses, trial judges may be more willing to resort to reasoning that wrongly relies on the assertion that as between spouses the doctrine of implied consent still exists. In other words they continue to rely on a problematic understanding of sexual assault that fails to incorporate the perspectives of up to one half of the sexual actors involved in any given interaction.

Ewanchuk, it seems, has done much to achieve better respect from the law for the sexual integrity of the intoxicated party-goer.²¹⁶ The trial decisions discussed in the last section suggest *Ewanchuk* has been less able to achieve this with respect to the sexual integrity of wives and girlfriends.

Conclusion

This chapter demonstrated how in the context of sexual assault, the Supreme Court of Canada has adopted reasoning which reflects a more constructivist conception of sexual violence. This is not to suggest that essentialist thinking has been eradicated from sexual assault law. Nor is it to suggest that the Court has now adopted a conception of sex and sexuality divorced from hetero normative and romanticized notions about sexuality.²¹⁷

However, while the shift towards a more constructivist conception of consent and mistaken belief in consent cannot be expected to (and has not) eradicated from the case law all remnants of essentialist reasoning, it has certainly done a great deal to replace and subvert many of the essentialist beliefs underpinning what the Court has elected to

²¹⁵ *Supra* note 209.

²¹⁶ See for example *R. v. H.(S.L.)*, *supra* note 161; *R. v. J.A.*, *supra* note 161; *R. v. Cedeno*, *supra* note 161; *R. v. Despins*, *supra* note 163; *R. v. Dumais*, *supra* note 161; *R. v. B.S.B.*, *supra* note 161; *R. v. Doll*, *supra* note 163; *R. v. Bird*, *supra* note 161; *R. v. K.D.*, *supra* note 161; *R. v. Cornejo*, *supra* note 165.

²¹⁷ See for example Justice Cory's observation, at para. 126, in *Cuerrier*, *supra* note 94 that "the act of intercourse is usually far more than the mere manifestation of the drive to reproduce. It can be the culminating demonstration of love, admiration, and respect. It is the most intimate of physical relations...".

describe as the ‘myths and stereotypes’ underpinning legal (and social) conceptions regarding sexual violence.²¹⁸

One of MacKinnon’s claims was that “rape is a sex crime that is not a crime when it looks like sex.”²¹⁹ This argument was based on the assertion that “what the law does not recognize is that the injury of rape is in the meaning of the experience to the victim, yet the crime is defined in the meaning of the act to the attacker.”²²⁰ The interpretation of the definition of sexual assault under *Chase* suggests that, in Canada, the law now does recognize that the injury of rape is in the meaning of the experience to the victim.²²¹ In addition, the doctrine of consent adopted in *Ewanchuk* establishes that where the attacker’s perception *is* considered (as it must be under the *mens rea* analysis) it is not the meaning of the *act* to the attacker, but rather the meaning of the *complainant’s words or actions* to the attacker that is relevant.

Together these two doctrinal developments in the law of sexual assault, by incorporating a conception of sexual violence which takes its meaning from the social factors, circumstances and overall context in which it is situated, introduce a shift in the law’s moral focus away from sexual propriety and towards sexual integrity. Notably the Supreme Court of Canada’s more recent approach to the definition of obscenity and indecency indicates this same move towards a constructivist conception of sexual

²¹⁸ Sexual assault jurisprudence in the last twenty years is rife with the rhetoric of ‘myths and stereotypes’. The difficulty with this type of rhetoric will be touched upon in Chapter Six. Briefly, it assumes a universalism that suggests an underpinning essentialism that is not reflective of the contextual definition of sexual assault and consent adopted by the Court.

²¹⁹ MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence (1983)" *supra* note 17 at 189.

²²⁰ Gavin Lust, “Advances Less Criminal Than Hormonal: Rape and Consent in *R. v. Ewanchuk*” (1999) 5 *Appeal* 18-27

²²¹ It recognizes it while still maintaining an objective element to the definition – an element likely needed to ensure certainty in the law. As discussed above, it is defined based on an objective assessment as to whether the complainant’s sexual integrity was violated – this requires consideration of the complainant’s perspective.

violence and the corresponding shift in the law from a concern over sexual propriety and sexual acts to a concern with sexual integrity and sexual actors. This will be the focus of the next chapter.

Chapter 5 – A Moral Shift

“Of woman as a real human being, with sexual needs and sexual responsibilities, morality has often known nothing.”¹ Havelock Ellis

The previous chapters demonstrated that the Court’s predominant view of sexuality – whether it be in sexual harassment cases, similar fact evidence cases, section 15 claims, or the criminalization of child pornography – is an essentialist understanding of sexuality. It is a conception of sexuality as a pre-social product more of mother nature than of culture, knowledge, relationships and social institutions. However, Chapter Four also revealed that with respect to one issue the Court (and lower courts) have begun to adopt a more constructivist approach to sexuality. That is the issue of sexual violence. This chapter will further explore the Court’s constructivist approach to sexual violence. It will reveal how the Court, in defining obscenity and indecency has shifted towards a conception of sexual violence as socially contingent. It will suggest that, as is the case with aspects of sexual assault law, this new constructivist approach (again an approach advanced by power feminist theories) precipitated a shift on the part of the Court from a conception of sexuality that reflected a moral concern over sexual acts to one that reflects a moral concern over sexual actors.

I. The Intersection Of Law And Sexual Morality

For a very long time the law and ‘sexual morality’ consorted with one another unabashedly. Their bond, pervasive throughout all areas of law that touch upon human relationships, was particularly evident in legal contexts such as the regulation of obscenity and indecency, the regulation of non-marital and non-procreative sexual

¹ Havelock Ellis, *Little Essays of Love and Virtue*, (A. & C. Black, LTD: Soho Square, London, 1922).

activity and prohibitions on the commodification of sex. And when law and sexual morality consort, naturalistic, essentialist understandings of sexuality are almost always there, lurking under the bedcovers.²

But what does it mean to suggest that law and sexual morality have danced together throughout the years? Does it mean that the law will have embraced, and will be invested in maintaining a status quo account of sexuality? This has likely been the case in Canada and the discussion in Chapter Three demonstrates that the particular account embraced by the law is an essentialist account. Does it mean that those who are overly sexualized, under sexualized, restricted, violated or ignored within a given sexual morality will be less likely to see their sexual integrity or sexual realities reflected back to them in the laws that govern their sexual conduct? As described in Chapter Three and Chapter Four, this too has been the case in Canada. Does it mean that laws will likely be geared towards protecting sex itself (or more specifically a particular essentialist understanding of sexual acts) rather than the individuals, relationships, rights, and duties

² The case law between 1958 and 1968 interpreting the offence of gross indecency (which was removed from the *Criminal Code* in 1987 (see *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 4) provides one of the best examples of this relationship. This date range in particular demonstrates this point because this was the period during which the provision covered acts of sodomy between men and women. In 1968 the legislature changed the offence so that it did not apply to husbands and wives (or other consenting adults) (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 7). However between 1958 and 1968 acts of sodomy between any two people heterosexual couples were prohibited by the provision. (Prior to 1958 the offence only prohibited acts of sodomy between two men.) Courts struggled with what to do about husbands and wives, girlfriends and boyfriends, caught in acts of oral sex. It seems this had not been a challenge for courts under the previous definition as it was assumed that such an unnatural thing as oral (or anal) sex between two men was grossly indecent. To determine whether heterosexual acts of (oral) sodomy were grossly indecent courts focused on factors such as monogamy, medical opinion as to prevalence of oral sex in society, and whether the oral sex was a precursor to penile-vaginal intercourse. For example, “mere contact of the male mouth with the female genital organs, during the course of preliminary lovemaking leading up to intercourse, [did] not constitute an act of gross indecency” (*R. v. B. and S.*, [1957] C.C.S. No. 921). Fellatio was not an act of gross indecency because the couple were “deeply in love, engaged and about to be married, [and] the evidence of the doctors [was] that that behavior is normal, natural” (*Regina v. P.*, [1968] M.J. No. 12 at para. 63). The courts in these types of cases relied heavily on medical expert opinion as to what sexual acts were normal and natural. (See *Regina v. J.*, [1957] A.J. No. 78 at para. 20).

implicated in, and through which is produced, this aspect of ‘being’ human/human ‘being’? The discussion below will demonstrate that this has also been the case in Canada.

The difficulty with much of the jurisprudence where the moral focus is on sex itself – whether that be in the context of sexual assault or equality or obscenity and indecency or sex work - is that it inhibits the law’s ability to accommodate in its analysis the nuance, fluidity and complexity of human sexual interaction and sexual identity much less recognize how these interactions produce sexual identities, norms and practices and the institutions that regulate them. (This includes a failure to recognize the perspectives of all of the sexual actors engaged, the diversity of sexual actors in a society, the manner in which a society produces that sexual diversity and the manner in which that diversity in turn impacts a society.) It is less apt to accommodate individual sexual narratives, likely because sexual stories are so often very complicated and socially nuanced. Moralistic legal approaches focused on sex itself do not incorporate this social nuance because they do not conceptualize sexuality as socially constructed – instead sex is conceptualized as this naturally occurring and asocial or pre-social ‘thing’ either to be feared or revered. It is either dangerous and must be controlled or it is sacred and must be cherished or released, but regardless it is something beyond, outside of or separate from the individuals and social contexts in which it is experienced.

But are these the only stories that can be told about the relationship between law and sexual morality?

Morality will always play a role in the legal regulation of sex. To make legal distinctions about sex is to make judgments between good sex and bad sex. Making

judgments about sex, unless they are arbitrary, is an exercise of morality. But there are as many sexual moralities in a society as there are people and while the law cannot attempt to reflect all of them, it can attempt to reflect the fact of all of them. In fact, recognition of this plurality could itself constitute the founding principles of a morality. A morality of this sort, unlike the one which has traditionally underpinned the legal regulation of sex in Canada, would not be driven to perpetuate one particular account of sexuality – a (sex) drive which has often led the law to protect sex itself rather than those subject to the law's sexual prohibitions and privileges. There is nothing to suggest that the legal regulation of sex must be driven by a morality underpinned by essentialist thinking and based on the preservation of sex itself.

But then what sort of morality ought the law to adopt? How can the law make distinctions between good sex and bad sex without a static and universal account of what sex is? One possibility is to develop an approach that is grounded in political morality. This might be achieved by adopting a legal approach to sexuality that focuses on the actors, relationships, and cultures that produce and are produced by sexuality rather than on sex itself.

In fact, just such an approach is developing in the relationship between law, sexuality and morality in Canada. This chapter will demonstrate how the Court's social constructivist understanding of sexual violence has precipitated a shift in the law's moral approach from one concerned primarily with protecting and regulating sex itself to one concerned with sexual relationships and sexual actors – a development which creates greater possibility for the protection of the sexual integrity (rather than sexual morality) as a common interest.

The remainder of this chapter will be divided into three sections. The first part will briefly outline the more recent history of one aspect of the relationship of law and sexual morality in Canada; it will examine the evolution of obscenity and indecency laws in Canada. This will be followed by a discussion illustrating how the Court's more constructivist understanding of sexual violence developed in *R. v. Butler*³ has led in recent cases to a shift in the law's focus from a moral concern with sex itself to a moral concern with sexual actors and relationships. This shift began with the incorporation of power feminist ideals in the 1990s and culminated in the Court's decision in *R. v. Labaye*,⁴ where the definition of indecency was interpreted such that the law's post-*Butler* indirect reliance on sexual morality was replaced with a reliance on political morality. The final section will examine what impact an emphasis on political morality rather than sexual morality ought to have on the legal regulation of sex work in Canada.

II. The Social Construction Of Pornography In Canada

If one had to identify one of the single most hotly debated, politically charged and, for power feminists such as MacKinnon, directly targeted sites of legal contestation for feminists in the 1990s it would be the issue of pornography.⁵ "It was prostitution that

³ [1992] 1 SCR 452.

⁴ [2005] 3 SCR 728.

⁵ Criminal laws regarding obscenity were not always considered issues of gender. In the 19th century prohibitions against the distribution and production of obscenity were motivated by a class based concern with preserving the sexual morality of supposedly morally vulnerable groups including the middle and lower classes and young people. "It was not the possession of obscene materials by the educated upper classes that was of concern but the possibility of the circulation of these materials among those who were more morally vulnerable to its poisonous influences" (Brenda Cossman, Shannon Bell, Lise Gotell & Becki L. Ross, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) [hereinafter *Bad Attitude/s*] at 12). It is perhaps not surprising that classism would have perpetuated an understanding of human sexuality in which the poor were inclined to possess 'weaker sexual morals'. Think for example of racist stereotypes that construct African American women as highly sexualized and exceptionally promiscuous. (See for example Dawn Rae Flood, "They Didn't Treat Me Good" African American Rape Victims and Chicago Courtroom Strategies During the 1950s" (2005) *Journal of Women's History* 17(1) 38.) The intersectionality of classism, racism, sexism and heterosexism with moral majoritarianism is not a novel concept. If one considers the way in which classist and racist

epitomized the problem of the dual standard of morality and the abuse of women...in the last century. In the late twentieth century pornography has come to fill this role. For many feminists pornography is regarded as the very essence of patriarchy, indeed it is theorized as the mainstay of male power and female subjugation.”⁶ Carol Smart divides anti-porn feminists of the 1980s and 1990s into two categories – those with the ‘pornography as violence’ perspective and those with ‘the pornography as representation’ perspective. She does so with the self-conscious admission that such a division does not really encompass the complexity and diversity of feminist positions against pornography.⁷

The first category sees pornography as “a practice of male power over women”.⁸ Catharine MacKinnon’s work would be characterized as falling into this first category.⁹ In *Only Words* MacKinnon argues that pornography is not speech but rather an act of sexual violence against women (and that as such it should not receive constitutional protection under freedom of speech guarantees).¹⁰ In other words, pornography, she

attitudes tend to dehumanize and correspondingly animalize those that are ‘other’, it is unsurprising to observe that such attitudes are also consistent with one particularly constricted view of sexuality. This view, which Jeffrey Weeks suggests was the dominant model of sexuality in the 1960s for example, understands sexuality as an essentialist (rather than socially constructed) force of nature, often uncontrollable, which like a head of steam is either to be released or repressed depending upon which end of the political spectrum one happens to reside. Jeffrey Weeks, *The World We Have Won*, (Routledge: New York, 2007), Chpt. 2

⁶ Carol Smart, *Feminism and the Power of Law*, (Routledge: London, 1989) at 114.

⁷ Smart, *Feminism and the Power of Law*, *supra* note 5 at 116.

⁸ *Ibid.* at 120.

⁹ See for example, Catharine A MacKinnon, *Only Words*, (Harvard University Press: Cambridge, 1993).

¹⁰ *Ibid.* LEAF takes this position in their submission to the Court in *Butler*, *supra* note 1 at paras. 8 and 31 of their Factum, where they argue that some pornography is not protected under section 2(b) of the *Charter* because it constitutes a violent form of expression (Factum of the Women’s Legal Education and Action Fund, *R v. Butler*). The Supreme Court of Canada has taken a very broad view of what constitutes expression under section 2 of the *Charter* (*Irwin Toy v. Que.*, [1989] 1 SCR 927); pornography while not considered worthy of the same protection as political speech or perhaps even commercial speech is considered expression by the Court (*R. v. Butler*, *supra* note 1; *R v Sharpe*, [2001] 1 SCR 45). Note the distinction between claiming that certain pornographic depictions can be prohibited because they are not even protected by the very wide net cast by section 2(b) and claiming that they can be justifiably prohibited under section 1 of the *Charter*. Expressive activity that takes the form of violence is not protected under section 2(b) (*R. v. Keegstra*, [1990] 3 SCR 697) and so it was open to the Court to adopt LEAF’s analysis on this point. However, while, as argued here, the Court does adopt a conception of obscenity that seems

suggests, is itself a sex act; “pornography is no less an act than the rape and torture it represents.”¹¹ The extreme articulation of this position is summarized by Robin Morgan’s quote “Pornography is the theory; rape is the practice”.¹²

The second category – pornography as representation – does not approach pornography as itself an act of violence but rather as a “metaphor for a patriarchal society”.¹³ Regardless, Smart tells us, both agree that “pornography eroticizes domination and power differentiation” and that this is harmful to women.¹⁴

The first approach, the assertion that pornography is itself a practice of subordination that constitutes sexuality (and correspondingly gender) is, in terms of constructivist accounts, the more radical approach. Again, as is the case with sexual assault jurisprudence, interestingly it is this more radical approach that seems to better characterize the theoretical underpinnings of the Court’s approach to obscenity and indecency in *R v. Butler*.

The Court’s decision in *R v. Butler* initiated a shift towards a constructivist conception of pornography in which the law’s moral focus is on sexual integrity rather than sexual propriety.¹⁵ In *Butler* the Court determined that material will be obscene where it

influenced by LEAF’s (and correspondingly MacKinnon’s) argument, it does not go so far as to determine that pornography is violence and not expressive activity.

¹¹ MacKinnon, *Only Words*, *supra* note 8 at 29

¹² “Theory and Practice: Pornography and Rape” in *Going Too Far: The Personal Chronicle of a Feminist* (Random House: New York, 1978) at 139.

¹³ Smart, *Feminism and The Power of Law*, *supra* note 5 at 117.

¹⁴ *Ibid.* at 117. It should be noted that there was/is another ‘camp’ of feminists on the pornography issue. This other camp of feminists “resisted this characterization of pornography as exclusively a source of danger and subordination” (see *Bad Attitude/s*, *supra* note 4 at 22). A well known advocate of this position was Carol Vance, who argued that it is important not to ignore the presence and role of pleasure in women’s sexuality. See Carole S. Vance, ed. *Pleasure and Danger: exploring female sexuality*, (Pandora Press: London, 1989). While it might seem unnecessarily binary, if not polemic, to divide those with differing positions on the issue into ‘camps’, the issue was so divisive and the arguments so entrenched that ‘camps’ seems quite an apt description. Had there not been camps, how ever would the ‘sex wars’ have been waged?

¹⁵ *Supra* note 1.

constitutes the ‘undue exploitation of sex’. The Court in *Butler* divided sexually explicit material into three categories: i) material which depicts explicit sex with violence – this material will almost always be characterized as the undue exploitation of sex; ii) material which depicts explicit sex that is non-violent but which is degrading or dehumanizing – this material will be characterized as the undue exploitation of sex if the material creates a substantial risk of harm; and iii) material which depicts explicit sex without violence and that isn’t degrading or dehumanizing – this material generally won’t be obscene unless it employs children in its production.¹⁶ Under *Butler*, determining whether material ‘unduly’ exploits sex depended upon the degree of harm posed by the material as dictated by the ‘community standards of tolerance’. Whether the community standards of tolerance test is still applicable in obscenity cases is unclear. As will be discussed below, the Court in *Labaye* rejected the community standard of tolerance test in favour of a harm based approach premised on constitutional principles such as autonomy and equality. However, *Labaye* involved the definition of indecency not obscenity. While obscenity and indecency have traditionally been defined under the same test,¹⁷ whether the Supreme Court’s definition in *Labaye* also applies in the context of obscenity is yet to be explicitly confirmed.

The notion of harm has in one sense or another always been a part of the law criminalizing obscene depictions.¹⁸ While in earlier cases this notion took different forms, such as a general sense of the need to protect from harm the moral integrity of a society as

¹⁶ *Ibid.*

¹⁷ *R. v. Mara* (1997), 213 NR 41.

¹⁸ *R. v. Hicklin* (1868), LR 3 QB 360; In 1959 the law was amended to define obscenity as “crime, horror, cruelty and violence” combined with sex (as well as the undue exploitation of sex itself). In *Towne Cinema* the Court found that obscenity could be established either by showing that the material violated the norm of what Canadians would tolerate other Canadians viewing or doing or by showing that the material would have a harmful effect on others in society. *Towne Cinema Theatres v. R.*, [1985] 1 SCR 494 (SCC) [hereinafter *Towne Cinema*].

a whole, in *Butler* the notion of harm assumed a new meaning and a new role in the definition of obscenity. *Butler* established that the notion of harm was to be incorporated directly into the community standard of tolerance.¹⁹ “The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.”²⁰ In other words, what the community would tolerate others doing or seeing was to be determined based on how much harm an act or sexually explicit depiction posed.

However it was not simply that degree of harm (as tolerated by the community) was to be the ultimate arbiter in defining obscenity. *Butler* also represented a shift in the Court’s understanding of the type of harm that obscenity laws were, or ought to be, concerned with. The Court in *Butler* found that the harms caused by pornography and the harms that obscenity laws ought to be concerned with related not to issues of morality but to real harm to women. This was not the first time that the Court recognized that moral approbation regarding ‘dirt for dirt’s sake’ was not the proper impetus for the law. In *Towne Cinema*, Chief Justice Dickson found that “it is harm to society from undue exploitation that is aimed at by the section, not simply lapses in propriety or good taste.”²¹ However, there was something new in the way that *Butler* conceptualized this harm to society. First, the Court recognized the potential harm as a systemic harm caused primarily to women. Second, for the first time they began to conceptualize it as the physical, sexual and arguably social harm caused to women as a result of the behavioral and attitudinal changes induced in those individuals who viewed certain types of

¹⁹ *Butler*, *supra* note 1.

²⁰ *Ibid.*

²¹ *Supra* note 17.

pornography. *Butler* might be pointed to in this sense as an indirect recognition of sexual integrity as a common good.

The Court in *Butler* adopted a harm-based justification for the censorship of some pornography by adopting the presumption that “exposure to images bears a casual relationship to changes in attitudes and beliefs”.²² They found that it was not unreasonable for Parliament to conclude that certain types of pornography will harm society by altering the sexual attitudes and ultimately sexual behavior of those who view it. Justice Sopinka in *Butler* quoted with approval from the Meese Commission Report on pornography:

the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a casual relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.... The evidence says simply that the images that *people* are exposed to bears a causal relationship to their behavior (emphasis added).²³

The harm based justification for the criminal law definition of obscenity adopted by the Court in *Butler* reflects a conception of sexuality as socially constructed and mutable.²⁴

The reasoning in *Butler* relies on the assumption that a desire for sexual violence, or an orientation towards sexual violence is not innate and pre-social but rather is susceptible to external influences – in other words, it is socially contingent.

²² *Supra* note 2.

²³ *Butler*, *supra* note 2 at para. 108.

²⁴ While the Court also referenced changes in beliefs and attitudes towards women they were very clear that harm in this context means that it “predisposes people *to act* in an antisocial manner incompatible with society’s proper functioning. (para. 61)” Moreover in conducting the ‘rational objective’ component of their section 1 analysis they specifically identified and adopted as reasonable the conclusions of the Meese Commission that substantial exposure to sexually violent materials bears a causal relationship to antisocial acts of sexual violence and for some subgroups unlawful acts of sexual violence (para. 108). (As an aside, it is difficult to know what the Meese Commission intended by distinguishing between antisocial acts of sexual violence and unlawful acts of sexual violence.)

The shift in *Butler* in the Court's approach to the harms caused by pornography was clearly influenced by the power feminist analysis of pornography offered by the intervener LEAF.²⁵ LEAF argued that sexual violence, as depicted in pornography, constitutes the practice of sex discrimination. Their argument was founded on MacKinnon's assertion, discussed in the previous chapter, that inequality between men and women is eroticized - that the gender hierarchy between men is a consequence of the eroticization of sexual violence. Pornography depicts sexual violence as enjoyable and as the norm ...as natural. It is depicted as what women want, what women do and consequently what it is to be a woman.²⁶

According to MacKinnon, pornography depicts sexual pleasure for women as the act of submission; it depicts sexual pleasure for men as the act of domination. In turn, these depictions socially construct conceptions of gender. Not only do women understand sex as domination but these portrayals reinforce that what it is to be a woman is to be sexually dominated and what it is to be a man is to sexually dominate. "In pornography the violence is the sex. The inequality is the sex. Pornography does not work sexually without hierarchy. If there is no inequality, no violation, no dominance, no force, there is no sexual arousal."²⁷ MacKinnon argued that pornographic depictions institutionalize this gender hierarchy. Pornography "institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male

²⁵ For example the Court in *Butler* quoted the same passages from the MacGuigan Report as those provided to them in LEAF's Factum. (*Butler, ibid.* at para. 85; Leaf Factum, at para. 16).

²⁶ See LEAF Factum, at para 7. "LEAF submits that pornography amounts to a *practice* of sex discrimination against individual women and women as a group (emphasis added)" and at para. 22 where they argue that "pornography is a systematic practice of exploitation and subordination based on sex that differentially harms women".

²⁷ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge: Harvard University Press, 1987) at 172..

and female.”²⁸ As such, to legalize pornography is to legalize the subordination of women.²⁹

MacKinnon’s theory is structural. There is nothing in her theory itself to suggest that a man who views violent pornography will change his sexual attitudes (that was the Court’s interpretation of LEAF’s submissions as influenced by MacKinnon’s theory). However, that being said, one would assume that MacKinnon’s legal activism advocating for the prohibition of pornography must have been motivated by some hope for at least the possibility of change. She must have assumed the possibility that if male sexual violence was no longer ‘naturalized’ through pornographic depictions then women would at some future point stop experiencing sexual dominance as pleasurable and ultimately conceptions of what it is to be a woman (and a man) would change. This must have been the impetus behind MacKinnon’s legal advocacy in this area, as well as her invocation that women begin consciousness raising.³⁰

After *Butler* the Supreme Court of Canada’s next significant statement on adult pornography came in 2001 in the case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.³¹ *Little Sisters* involved a constitutional challenge by a queer bookstore that was discriminated against by Custom’s Officials who consistently detained

²⁸ MacKinnon, *Feminism Unmodified*, *ibid.* at 160.

²⁹ *Ibid.* MacKinnon argued that under this account, pornography is not protected under the First Amendment. This is because, for her, pornography should not be considered speech but rather an act, or acts, of sexual violence against women. She argues that even if it is considered speech there is no reason to assume that the First Amendment guarantee of freedom of speech trumps the equality protections guaranteed under the 14th Amendment. She further argues that pornography violates not only the equal protection clause of the 14th Amendment but it also infringes the right to (positive) liberty guaranteed under the due process clause of the 14th Amendment. (Catharine MacKinnon, *Only Words*, *supra* note 8.)

³⁰ According to MacKinnon, this consciousness raising is the tactic necessary to achieve ‘feminism unmodified’. That is to say, woman *not* constructed by man.

³¹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

materials that the bookstore tried to import.³² Little Sisters argued, among other things, that due to the unique role that pornography plays in the gay and lesbian community the *Butler* definition of obscenity as applied to gay and lesbian pornography violates section 15 of the *Charter* – that it discriminates on the grounds of sexual orientation. Justice Binnie, in rejecting this argument stated that:

The potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable. Parliament’s concern was with behavioural (sic) changes in the voyeur that are potentially harmful in ways or to an extent that the community is not prepared to tolerate. There is no reason to restrict that concern to the heterosexual community.³³

It would seem then that while same sex object choice may be conceptualized by the Court as a fixed and immutable sexual orientation,³⁴ in the Court’s view a proclivity for coercive or violent sex is as socially contingent among gay and lesbian individuals as it is with respect to their straight counterparts.³⁵

It is noteworthy to compare the way in which the obscenity and indecency cases reveal the same shift from a concern over sexual propriety and sexual acts to a concern with sexual integrity and sexual interactions as was revealed in the Court’s sexual assault jurisprudence in the previous chapter. This is best accomplished by examining the

³² While the Court rejected arguments asserting that ss. 58 and 71 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), or the definition of *Butler* as it applied to gays and lesbians in the context of the *Customs Act*, were discriminatory, they did find that customs officials had discriminated on the basis of sexual orientation in their application of the customs laws.

³³ *Little Sisters*, *supra* note 30 at para. 60.

³⁴ See Chapter Three for a discussion of the Court’s essentialist approach to sexual orientation.

³⁵ There are some difficulties with the Court’s reasoning in *Little Sisters* regarding their failure to fully contextualize their approach to depictions of same sex sexual dominance and submission. These will be discussed in Chapter Six.

Court's application and eventual revision of the *Butler* test in the indecency cases that came after *Butler*.

III. Re-Defining Indecency – A Standard Of Tolerance For The Community

A different version of pages 239 to 255 was previously published in (2009) 54 McGill Law Journal 3.

In 2005, the Supreme Court of Canada revised the meaning of indecency (and correspondingly, perhaps also obscenity) under the *Criminal Code*.³⁶ They did so by removing from its definition any reliance on community perceptions about sex, a consideration that had, in a variety of manifestations, underpinned indecency and obscenity laws in Canada for the better part of the last one hundred years. Removing the community's perceptions regarding what constitutes good sex and what constitutes bad sex from the definition of indecency meant that harm had to be identified in some other way.

In *Labaye*, Chief Justice McLachlin writing for the majority turned to constitutional principles to do so; she reasoned that for sexual activity to be considered indecent under the criminal law, the harm which it is alleged to have caused must be harm which is actually proven, whether that be through expert evidence or otherwise.³⁷ This is a change in the law, a change with potentially significant implications regarding the role that sexual morality is to play in the criminal regulation of certain types of sexual activity.

The Court's reasoning in *Labaye* reinforces the notion that the focus of laws regulating sexuality should not be on sexual morality and moral harm to society but rather on political morality and real harm to individuals. In doing so it leaves more space for considerations, under the law, of sexual agency, and allows for greater consideration of

³⁶ *Labaye*, *supra* note 3.

³⁷ *Labaye*, *supra* note 3.

individual subjectivities. This, as will be discussed below, creates greater opportunity within legal reasoning for more diverse sexual narratives, all of which contributes to a more constructivist conception of sexuality that recognizes the shared interest in protecting sexual integrity.

i) The Constitution As *Custos Morum*

In *Labaye*, the majority of the Supreme Court of Canada allowed the appeal of Jean-Paul Labaye's common bawdy-house conviction on the ground that the acts occurring at his establishment, Club L'Orage, did not constitute indecent ones under the *Criminal Code*.³⁸

Club L'Orage, was a private swingers club with an annual membership fee. It was located on the top floor of a building that also housed a strip club owned by Mr. Labaye. The club was open to members and their guests only. Essentially, it consisted of "a number of mattress...scattered about the floor of the apartment" that served as a meeting place for individuals interested in partner swapping and group sex. Labaye was charged with keeping a common bawdy house after undercover detectives observed a group of four or five men having sex with one woman while other members of the club observed. All of the activity was, concededly on the part of the crown, consensual.

Under the *Criminal Code*, a bawdy house is an establishment kept for the purpose of committing acts of prostitution or indecency.³⁹ The issue in this case was whether the activities occurring at Club L'Orage were indecent. In other words, the case turned on a matter of statutory interpretation – the interpretation of the term indecent.

³⁸ *Labaye and Kouri*, [2005] 3 SCR 789, were heard by the Supreme Court on the same day. The refined legal test for indecency established by the majority in *Labaye* was relied upon to uphold the acquittal in *Kouri*. The cases were dealt with by the Supreme Court of Canada as companion cases. Except where otherwise indicated references to *Labaye* can be assumed to also refer to the analysis in *Kouri*.

³⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 197.

The majority of the Supreme Court of Canada determined that only activities which pose a significant risk of harm, of the type “grounded in norms which our society has recognized in its Constitution or similar fundamental laws,” harm so serious as to be incompatible with proper societal functioning, will be considered indecent.⁴⁰ In the majority’s opinion the type of group sex occurring at Club L’Orage did not constitute harm of that nature.

Prior to the Supreme Court’s decision in *Labaye*, courts used the community standard of tolerance test to determine whether an act was indecent (or whether material was obscene). The test was adopted in 1962 in an attempt to achieve a more objective standard for obscenity and indecency than had been the case under the common law definition of obscenity. The common law test for obscenity initially asked whether the material at issue would tend to deprave and corrupt other members of society.⁴¹ As Chief Justice McLachlin notes in *Labaye*, this test stood for almost a century before the Supreme Court in *Brodie v. R.*, emphasizing the need for more objective criteria, adopted a test based on the community’s standard of tolerance for sexually explicit material.⁴² The community standard of tolerance test adopted in *Brodie*, still considered difficult to apply in an objective fashion, was eventually revised to explicitly incorporate a notion of harm.⁴³ In its original form, the test did not include any reference to harm.⁴⁴ In an effort

⁴⁰ *Labaye*, *supra* note 3 at para. 29.

⁴¹ *R. v. Hicklin*, *supra* note 17.

⁴² [1962] SCR 681 (SCC).

⁴³ *Towne Cinema Theatres v. R.*, *supra* note 17.

⁴⁴ *Brodie v. R.*, [1962] SCR 681 (SCC). In fact, *Brodie* did little to objectivize the test. It shifted it from a test based on what the Judge thought intolerable to what the judge thought the community would think intolerable. In post-*Brodie* decisions the Supreme Court held that, while in some cases it may be possible to do so, it was not necessary for the Crown to lead independent evidence as to community standard of tolerance. (See for example *R. v. Dominion News & Gifts (1962) Ltd.*, [1964] S.C.R. 251; *R. v. Provincial News Co.*, [1974] SCJ No 140) They found that a judge was capable of determining this without independent evidence. The problem with this was that most judges would consider themselves part of the

to make it yet more objective and less susceptible to the subjective sexual morality of any given adjudicator the test was revised in *Towne Cinema* to incorporate into it a notion of harm.⁴⁵

In *Towne Cinema*, the Court found that obscenity could be established either by showing that the material violated the norm of what Canadians would tolerate other Canadians viewing or doing or by showing that the material would have a harmful effect on others in society. Then in *Butler*, as discussed earlier, the notion of harm was incorporated directly into the standard of community tolerance.⁴⁶ The community's standard of tolerance was to be determined based on based on how much harm an act or sexually explicit depiction posed.

This distinction between the test in *Towne Cinema* and the test in *Butler* is significant. In *Towne Cinema* it was still possible to find material obscene solely on the basis of community sexual morality. As noted above, *Butler* ostensibly changed this; *Butler* purported to resolve (and reject) the morality issue once and for all. However, there have been those who have challenged this suggestion. Brenda Cossman, for example, described the test in *Butler* as "sexual morality in drag".⁴⁷ Cossman's assessment of *Butler* seems apt. *Butler* did not rid the law of obscenity and indecency of sexual morality; its continued reliance on the community standards of tolerance test precluded this even had it been the Court's intention. Had *Butler* actually resolved (and

community and so it would be very difficult if not unreasonable to expect them to disaggregate their own subjective perception of the sexual act or depiction at issue from their subjective assessment of the community's overall subjective assessment of the sexual act or depiction at issue.

⁴⁵ *Towne Cinema Theatres v. R.*, *supra* note 17.

⁴⁶ *Butler*, *supra* note 1.

⁴⁷ Brenda Cossman, *Bad Attitude/s*, *supra* note 4 at 30. See also Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*, (University of Toronto Press: Toronto, 2000) at 50. Leslie Green, "Men in the Place of Women, from Butler to Little Sisters" reviewing Gay Male Pornography: An Issue of Sex Discrimination by Christopher Kendall, (2005) 43 Osgoode Hall L.J. 473.

rejected) the sexual morality issue once and for all it is unlikely that Chief Justice McLachlin would have thought it necessary, in *Labaye* to reject the community standard of tolerance altogether.

What *Butler* (and to some extent *Towne Cinema*) did do was to encourage a shift away from a moral concern over sex itself towards a moral concern over power. The harm based approach to the definition of obscenity and indecency is a shift towards a moral concern over power. At the heart of an approach centered on a moral concern with power (a political morality driven approach rather than a sexual morality driven approach) is power feminism's social constructivist conception of sexual violence.

The focus on power in MacKinnon's theory and in the Court's approach in *Butler* is underpinned by a social constructivist account of sexuality which does focus more, and as discussed above, in a new way, on sexual integrity rather than sexual propriety. While this itself did not produce a shift from sexual morality to political morality in the criminal regulation of obscenity and indecency, it did lay the essential groundwork.

In *Labaye*, Chief Justice McLachlin suggests that the *Towne Cinema* decision marked the beginning of a shift from a community standards test to a harm based test;⁴⁸ a shift which she suggests was completed by the Court's decisions in *Butler*⁴⁹ and *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*.⁵⁰

⁴⁸ *Labaye*, *supra* note 3 at para. 21.

⁴⁹ *Ibid.*

⁵⁰ *Little Sisters*, *supra* note 30. The dissent in *Labaye* disagreed with Chief Justice McLachlin's analysis of the prior doctrine. They suggested that the prior cases did not establish harm as the determining factor and that the majority's reasoning is a total departure from an established line of jurisprudence. Conversely, Chief Justice McLachlin suggests that the adoption of harm as the animating principle of the test for indecency had already evolved from the case law by the time *Labaye* reached the Court. Arguably, the state of the law pre-*Labaye* was actually something in between. The majority's adoption of harm as the determinative criteria was not a departure but rather flows logically from the reasoning in *Butler*. However, extracting the harm criteria from the context of a test concerning the community's standard of tolerance, and making it a stand alone definition is somewhat of a departure; if not in terms of doctrinal outcomes in

Building on the *Butler* description of the type of harm targeted by the concept of indecent conduct under the *Criminal Code* (that being “conduct which society formally recognizes as incompatible with its proper functioning”) in *Labaye* Chief Justice McLachlin determined that the harm must be both grounded in norms which our society has formally recognized in the Constitution or similar fundamental laws and it must be so serious as to be incompatible with proper societal functioning:

The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. This is not to say that social values no longer have a role to play. On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society’s Constitution or similar fundamental laws...Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values. (emphasis added)⁵¹

What Chief Justice McLachlin suggests in *Labaye* is that the law, when considering or upholding social values, ought to rely on those values that the whole society agrees upon. This is why her theory of harm relies on those values that have been formally recognized – those that are reflected in our society’s Constitution or other fundamental laws. Which social values does she identify? She identifies autonomy, liberty, equality and human dignity. Despite the fact that *Labaye* did not involve a constitutional challenge but rather a matter of statutory interpretation, the theory of harm (and definition of indecency) that Chief Justice McLachlin ultimately adopts turns on

the future than certainly in terms of what it suggests about the court’s philosophical approach to crimes of public indecency. Indeed, the implications of such a move are precisely what the dissent takes issue with. The Court also addressed the role of the harm principle in criminal law in *Malmo-Levine*, *infra* note 58. See *infra* page 24 for a discussion of this case.

⁵¹ *Labaye*, *supra* note 3 at 33.

constitutional law. In other words, instead of measuring harm based on what the community will tolerate, she suggests it ought to be measured against the Constitution. Instead of measuring it against the social sexual values of the community taken as a whole, it ought to be measured against the fundamental values underpinning the Constitution.

What Chief Justice McLachlin does in *Labaye* is dispose of the community standard of tolerance test by relying instead on the political morals reflected in the Constitution to inform the definition of indecency. In essence she invokes constitutional principles in order to protect constitutional principles.

The structure of her reasoning is very consistent with Ronald Dworkin's theory of liberal equality. A judicial assessment of the sexual morals of a large number of Canadians is legal reasoning based on what Dworkin describes as first person ethics. Dworkin distinguishes between first person ethics and third person ethics. Third person ethics reflect those commonly held beliefs that all or most members of a liberal democracy ascribe to. He also articulates the distinction by differentiating between moral principles (which define our responsibilities and obligations to others – third person ethics) and ethical convictions (which define our beliefs about the good life – first person ethics).

Dworkin acknowledges that it is impossible for people to engage in political debate completely outside the realm of their deeply held personal convictions. He suggests that, as a result, what we must do is identify those comprehensive ethical principles about dignity and personal responsibility that the majority of us share and then resolve our conflicting political principles by determining which policies or political

structures are more securely grounded in those more fundamental ethical convictions that are shared by all or most. He bases this on the suggestion that the tolerance and neutrality demanded by liberalism arises not simply from the need to separate the right from the good, but from a certain understanding of the good – a certain model of ethics. Dworkin’s theory of liberal equality attempts to maintain a link between personal ethics (what he describes as first person ethics) and political values (what he describes as third person ethics) while honoring the overriding liberal principle of state neutrality between conceptions of the good.

This, in a nutshell, is Dworkin’s theory of justice. He arrives at this account of justice by privileging the notion of autonomy. Autonomy (more specifically the equal distribution of autonomy) is both the foundation and structure of Dworkin’s theory of liberal equality. His liberal ethics is premised on the overarching and assumed value not of a particular type of life, but rather, of a particular way of living: the performance of living autonomously. Dworkin appeals to ethical convictions of a more general nature in an effort to garner broader appeal or greater consensus. Similarly, Chief Justice McLachlin relies upon more general convictions to justify the majority’s decision. In the same way that, for Dworkin, autonomy serves as both the foundation and the structure of his theory of liberal equality, Chief Justice McLachlin relies upon, in order to protect, the fundamental ethical and social considerations enshrined in the Constitution.⁵²

Responding to Chief Justice McLachlin’s reasoning, the dissent in *Labaye* commented that “the existence of harm is not a prerequisite for exercising the state’s

⁵² See Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press: Princeton, 2006); Ronald Dworkin, “Liberalism” in S. Hampshire, ed., *Public & Private Morality* (Cambridge: Cambridge University Press, 1978) at 134; Ronald Dworkin, “Foundations of Liberal Equality”, in S. Darwall, ed., *Equal Freedom* (Ann Arbor: University of Michigan Press, 1995) 190.

power to criminalize certain conduct. The existence of fundamental social and ethical considerations is sufficient.”⁵³ However, despite this statement by the dissent, the dispute between the majority and the dissent in *Labaye* is not actually over whether social values ought to play a role in making or enforcing indecency laws – both adopt reasoning which turns on an application of social values. Their disagreement is over *which* social values to rely upon, and what role they ought to play, in ascertaining what constitutes indecency.

While the majority reasoning turns on what sexual restrictions and standards a society can legitimately impose on its members without compromising broader ethical convictions as articulated by the Constitution, the dissent depends on their perception and interpretation of what sexual mores the majority of Canadians have adopted. This is why the dissent endorses a strikingly quantitative approach to sexual morality and the definition of indecency in which “use can be made of factual evidence, such as surveys, reports or research regarding Canadians’ sexual practices and preferences, and their attitudes toward and levels of tolerance of sexual acts in various contexts”.⁵⁴ It is also the reason why the dissent suggests that, contrary to the majority’s opinion, the community’s standard of tolerance remains a salient consideration in identifying acts of indecency and that “serious harm is not the sole criterion for determining what the Canadian community will tolerate”.⁵⁵

The dissent makes this argument on two bases. Firstly, they suggest that morality for the sake of morality –and here they are referring to majoritarian sexual mores- should

⁵³ *Labaye*, *supra* note 3 at para. 104. As discussed below, the theoretical foundation for the dissent is consistent with the approach adopted by Lord Devlin regarding the state’s right to criminalize consensual sodomy. See Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959).

⁵⁴ *Labaye*, *supra* note 3 at para. 86.

⁵⁵ *Labaye*, *supra* note 3 at para. 97. In this respect the majority and the dissent are quite far apart. Not only does the dissent argue that harm is not now and should not become the sole criterion for determining the standard of tolerance, they also do not agree with the majority’s assertion that *Butler* suggested otherwise.

be permitted to play a role in defining the state's power to criminalize conduct, regardless of whether there is an associated harm.⁵⁶ Secondly, and perhaps alternatively, they suggest that activity which is inconsistent with the community's sexual morality, in and of itself causes harm to the community's political morality.⁵⁷ In other words, they argue that there is always a harm associated with transgressions of those sexual values held by most Canadians. The former argument concerns issues of the criminal law's legitimacy and its theory of harm. The latter combines this with an argument about the significance and role of community in the maintenance of a political morality.

In support of their argument that majoritarian sexual mores may serve as a basis for the criminalization of conduct regardless of whether there is an associated harm, the dissent cites examples such as "child pornography, incest, polygamy, and bestiality."⁵⁸ Whether or not each of these sexual offences has an associated social harm of the type contemplated by the majority is debatable.

The Court addressed this issue in *R v Malmo-Levine*.⁵⁹ *Malmo-Levine* involved a section 7 *Charter* challenge to the criminalization of marijuana. In *Malmo-Levine*, the Court rejected the argument that the harm principle is a principle of fundamental justice. They determined that while the presence of harm to others may justify legislative action under the criminal law, the absence of proven harm does not create an unqualified section 7 barrier to criminalization. Two important points on this issue should be noted. First,

⁵⁶ They cite as examples of such, child pornography, incest, polygamy and bestiality. Whether or not each of these sexual offences has an associated social harm of the type contemplated by the majority is debatable.

⁵⁷ The dissent argues that "[t]here is also harm where what is acceptable to the community in terms of public morals is compromised." 'Public morals' refers to sexual morality. In this context the word public refers to a quantitative not qualitative qualification of the term the morality. The concept of harm, or what constitutes harm, is a dilemma the criminal law has always faced. In the context of indecency, the issue becomes what to base assessments of harm on – political morality or sexual morality?

⁵⁸ *Ibid.*

⁵⁹ 2003 SCC 74, [2003] 3 S.C.R. 571, 233 D.L.R. (4th) 415.

the harm principle referred to in *Malmo-Levine* was more akin to the principle as it was conceived by John Stuart Mill than the harm principle adopted by the *Labaye* majority.⁶⁰ Although the dissent in *Labaye* argues that the majority relies on John Stuart Mill's harm principle,⁶¹ Chief Justice McLachlin's theory of harm in *Labaye* differs from Mill's original principle. Her theory of harm includes attitudinal harm to others and harm to the participants. It is in this sense much more accommodating to the use of the criminal law power. Second, the claim that the harm principle is a principle of fundamental justice and therefore a precursor to the use of the criminal law which controls legislative action is related but not identical to the assertion that some version of the harm principle is the right principle of interpretation to establish the legal definition of a socially or culturally constructed, and value laden, concept such as indecency. Indeed, the Supreme Court of Canada recognized the validity of this assertion in *Butler* by incorporating the notion of harm directly into the community standard of tolerance test.

The judicial debate over social harm in *Malmo-Levine* correlates to the considerable debate in the academic literature over the legitimacy of 'morality for the sake of morality' as a foundation for the criminalization of particular sexual acts.⁶² The division of the Court in *Labaye* is largely a continuation and evolution of the famous exchange between

⁶⁰See J.S. Mill, *On Liberty and Considerations on Representative Government*, ed. by R. B. McCallum (Oxford: Basil Blackwell, 1946). Although the dissent in *Labaye* argues that the majority relies on John Stuart Mill's harm principle (*supra* note 3 at para. 105), the theory of harm put forward by McLachlin C.J. in *Labaye* differs from Mill's original principle. Her theory of harm includes attitudinal harm to others and harm to the participants (*ibid.* at paras. 45-47). It is in this sense much more accommodating to the use of criminal law.

⁶¹ *Labaye*, *supra* note 3 at para. 105.

⁶² See e.g. Stuart Hampshire, ed., *Public & Private Morality* (Cambridge: Cambridge University Press, 1978); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge: Harvard University Press, 1996); Joseph Raz, *Ethics in The Public Domain* (Oxford: Clarendon Press, 1994). For a cultural feminist analysis of *gendered* sexual harm see Robin West, *Caring For Justice* (New York: New York University Press, 1997); *contra* Janet Halley, "The Politics of Injury: A Review of Robin West's *Caring for Justice*", online: (2005) 1 Unbound: Harvard Journal of the Legal Left 65 <<http://www.legalleft.org/wp-content/uploads/2008/04/1unb065-halley.pdf>>.

Lord Devlin and H.L.A. Hart over the role of morality in the criminal law. At first blush, the disagreement between the majority and minority in *Labaye* might even be characterized simply as a reiteration (or manifestation) of the Hart/Devlin debate. Closer examination, however, reveals that while the dissenting opinion does mirror Devlin's position, the analogy is not as accurate when comparing Chief Justice McLachlin's reasoning with Hart's position.

Lord Devlin argued that in the interests of self-preservation, a society must be allowed to coercively restrict sexual conduct if that conduct threatens valued social institutions and is contrary to the personal sexual morality of most members of society.⁶³ Society, he argued, has a right to enforce certain moral convictions so as to preserve the particular social environment desired by the majority of its members. Devlin's concern (shared by the dissent in *Labaye*) was that without the ability to criminalize conduct that transgresses the personal morals held by the majority of citizens, the moral fibre of a society would crumble.⁶⁴ This same rationale is the basis for the *Labaye* dissent's suggestion that if the criminal law fails to incorporate the community standard of tolerance test, the values considered worthy of protection by the Canadian community as a whole will be "stripped of any relevance".⁶⁵ Upholding personal morals in the criminal law also grounds the connection the dissent makes between community views on sexuality and "social order".⁶⁶

Hart responded to Devlin's argument by suggesting that in the criminal law a line between private and public conduct must be maintained and that without some associated

⁶³Devlin, *supra* note 52.

⁶⁴*Ibid.* at 13.

⁶⁵*Labaye*, *supra* note 3 at para. 103.

⁶⁶*Ibid.* at para. 108.

and provable harm, it would be illiberal for the state to prohibit certain behavior *simply* on the basis that the majority is against it.⁶⁷ He argued that there is no empirical evidence to suggest that the separation of law and morality in law would lead to social decay. There is a distinction, he suggested, between morally driven decisions regarding the severity of punishment for a certain act (which may be acceptable) and morally driven decisions to punish that act in the first place (which are not acceptable). Ultimately, the enforcement of morality for the sake of morality is illiberal. Moreover, he contended, morality cannot be instantiated through law. According to Hart, legally-coerced morality, or legal moralism, is of no value as a foundational principle of the criminal law.⁶⁸

Chief Justice McLachlin’s approach differs from Hart’s approach in that she does endeavor to instantiate morality—political morality—through law.⁶⁹ Hart, relying on utilitarian theory, distinguished between “positive morality” and “critical morality” to question the role of morality in the law. Positive morality referred to “the morality actually accepted and shared by a given social group.”⁷⁰ Critical morality referred to “the general moral principles used in the criticism of actual social institutions including positive morality.”⁷¹ For Hart, therefore, the question “is one of the critical morality about the legal enforcement of positive morality.”⁷²

In *Labaye*, Chief Justice McLachlin instantiates political morality in the law by

⁶⁷ Hart, *Law, Liberty and Morality*, *supra* note 53 at 20.

⁶⁸ *Ibid.*

⁶⁹ Hart noted that he would not unequivocally defend Mill’s anti-paternal harm principle. While he did think that there “may be grounds justifying the legal coercion of the individual other than the prevention of harm to others,” he strictly limited such interference to either ‘physical paternalism’—preventing individuals from harming themselves—or provable harm to something beyond morality (*ibid.* at 5). Hart considered any principle requiring a lower standard of harm to be a form of legal moralism. 247 in *Sessional Papers*, vol. 14 (1956-57) 85.

⁷⁰ *Ibid.* at 20.

⁷¹ *Ibid.*

⁷² *Ibid.*

interpreting the bawdy house provision of the *Criminal Code* on the basis that principles of critical morality are a positive morality. In other words, for Chief Justice McLachlin, critical morality is a positive morality. The distinction may not be surprising given the different constitutional traditions in which Hart's work and Chief Justice McLachlin's jurisprudence are situated. The values Chief Justice McLachlin affirms are tolerance and respect for autonomy. She rejects the community standard of tolerance test and replaces it with a new standard of tolerance: a standard required by the constitution (of the community). Chief Justice McLachlin does not jettison 'morality for morality's sake' from the criminal law. She acknowledges that harm to values can, in and of itself, constitute the sort of harm that ought to be prohibited by the criminal law, but she strictly limits the range of values which may be subject to harm. In the end, she relies on values so cherished by Canadian society that they have been constitutionally entrenched.

Again, the values she identifies are autonomy, liberty, equality and human dignity. She identifies three types of harm sufficient to justify coercive prohibition on the basis that acts perpetuating such harm would compromise these fundamental constitutional values.

The first includes circumstances where members of the public would, or there is a significant risk they could, be involuntarily confronted with conduct that significantly interferes with their autonomy and liberty.⁷³ She suggests that "[p]eople's autonomy and enjoyment of life can be deeply affected by being unavoidably confronted with debased public sexual displays. Even when avoidance is possible, the result may be diminished

⁷³ *Labaye, supra* note 3 at para. 62.

freedom to go where they wish or take their children where they want”.⁷⁴ This, she is careful to point out, is not about aesthetics. This is about being confronted with something seriously and deeply offensive such that it creates an inability to go certain places. It is about not being able to take your kids to the park for fear that they will be unwittingly exposed to people engaged in sexual activity. By definition it refers to sexual activity occurring in public places. This branch of harm, alone, shouldn’t cover activity occurring in adult theatres or clubs because these are not places that members of the public unwittingly stumble upon.

The second type of harm involves conduct which would, or there is a significant risk it could, predispose others to anti-social behavior. Chief Justice McLachlin notes that “[a]s far back as *Hicklin*, Cockburn C.J. spoke of using the criminal law to prevent material from depraving and corrupting susceptible people, into whose hands it may fall.” This, she suggests, could extend to include attitudinal harm such as conduct which undermines respect for, and the dignity of, targeted groups. She notes that this must be harm which can actually be proven. She is also careful to again include some public element in the analysis under this branch of harm. “This type of harm can only arise if members of the public may be exposed to the conduct or material in question.”⁷⁵ Interestingly, and as the dissent notes, this second source of harm identified by the majority resorts back to a standard the Court had long ago rejected as potentially too open to the imposition of subjective moral views on the part of judges.⁷⁶

The third type of harm identified by Chief Justice McLachlin involves conduct which would, or there is a significant risk it could, physically or psychologically harm the

⁷⁴ *Ibid.* at para. 41.

⁷⁵ *Labaye*, *supra* note 3 at para. 47.

⁷⁶ *Ibid.* at para. 90.

persons involved.⁷⁷ “Sexual activity is a positive source of human expression, fulfillment and pleasure. But some kinds of sexual activity may harm those involved.”⁷⁸ She includes here both physical and psychological harm. While analysis of this sort of harm will generally be dictated by whether the participants consented (leaving considerable space for sexual agency), she acknowledges that sometimes consent is more apparent than real, and notes that in some cases harm may be established even where there is apparent consent. Courts, she suggests, “must always be on the lookout for the reality of victimization”.⁷⁹ As would be expected, she notes that the public/private distinction is not as significant under this branch of harm.

Chief Justice McLachlin then defines the degree of any of these three types of harm necessary to find a sexual act indecent. Borrowing from the language in *Butler*, she adopts the requirement that to be indecent, the harm caused by the sexual activity at issue must be significant enough that it is incompatible with the proper functioning of society.

There remains an ambiguity, one which is likely inevitable, both in Chief Justice McLachlin’s definition of indecency and in the argument to follow below regarding the interpretation of the bawdy house provisions. It relates to the fact that it is still necessary to measure harm. What is attitudinal harm and how will it be established? How will the court assess harm to the participants? What is the line between sexual autonomy and the law’s obligation to intervene in the face of obvious victimization? Won’t moralistic reasoning reveal itself once again when it comes time to assess harm? The answer to this, at least in part, is... yes. Attempts to argue for the complete disaggregation of law and morality are both futile and outdated. The more important question is what type of

⁷⁷ *Ibid.* at para. 62.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at para. 49

morality ought the law to trade in? My argument is that inevitably morality will come into play, and that what matters is what order of morality the law relies upon. What Chief Justice McLachlin does in *Labaye* is shift the law's focus from sexual morality to political morality. It is not a perfect answer but, as argued below, when it comes to the legal regulation of sex, it is much preferable that the law's moral compass be governed by attempts to balance constitutional values such as autonomy, liberty, equality and dignity rather than by an assessment of what the sexual consensus at any given time in Canada might be. I said the answer was "in part" yes. The equivocation stems from an evidentiary point of distinction between *Labaye* and the community standards of tolerance test. In *Labaye*, Chief Justice McLachlin is explicit in her assertion that *harm must be proven*. In other words there must be evidence of harm. This was not the case under the community standards of tolerance test.

The ultimate rejection of the community standard of tolerance test in *Labaye*, was a move initiated in 1992 in *Butler*. It represents a shift towards a legal morality concerned more with sexual interactions than with the categorization, assessment and judgment of specific sexual actions. Accordingly, power feminism's significant contribution to sexual jurisprudence in Canada should be recognized. By emphasizing the social factors and overall social context which produce sexual violence, an emphasis the Court endorsed, power feminism instigated a shift in the moral focus of the law from sex itself to the power dynamics and social factors constituting those dynamics.

ii) The Limits Of Sexual Morality

As articulated by the Court, the language of the test for obscenity or indecency, as it stood prior to *Labaye*, was as follows: "what would the community tolerate others

being exposed to on the basis of the degree of harm that might flow from such exposure”.⁸⁰ As a matter of application the test went something more like this: “indecent laws are about what Canadians would not abide other Canadians doing”⁸¹ and as will be discussed below, deciding “what Canadians would not abide other Canadians doing” was often determined based on quasi-quantitative assessments of the sexual practices of most Canadians. The moral focus was on sexual action rather than sexual interaction.

Assessing harm based on community tolerance allowed for the regulation of sex based on dominant sexual morality (as reflected in community levels of tolerance) rather than social or political morality (as reflected in instruments such as the Constitution). Historically, women (and sexual minorities) have not fared well under regimes governed by traditional sexual mores. Traditional sexual mores have been for the protection of men and male sexual propriety. A standard which is about sexual propriety is not a standard about women’s interests, neither their interests regarding sexual agency and autonomy, nor their interests with respect to sexual harms. A standard that is about sexual propriety is not a standard that is about sexual integrity.

As the pre-*Labaye* indecency cases discussed below demonstrate, a legal regime for the regulation of sex which is dictated by sexual morality rather than political morality is not one which deals adeptly with the complexity of sex, nor is it one which is particularly proficient at protecting the interests that sexual actors have in both their safety and their sexuality.

⁸⁰ *Butler*, *supra* note 1 at para. 61.

⁸¹ This is taken from the dissent of Justices Lebel and Bastarache in *Labaye*, *supra* note 3 at para. 101. Justices Lebel and Bastarache, who were strongly opposed to the majority in *Labaye* suggested that indecency should continue to be based on considerations of social morality as influenced by the dominant sexual practices in Canada.

Consider Justice Sopinka's reasoning in *R. v. Mara*.⁸² Justice Sopinka, declaring lap dances to be indecent under the community standard of tolerance test, stated that "it is unacceptably degrading to women to permit such uses of their bodies in the context of a public performance in a tavern. Insofar as the activities were consensual as the appellant stressed, this does not alter their degrading character."⁸³

Justice Sopinka went on to find that indecency laws are not there to protect the lap dancers, but rather to protect the spectators from harm. The risk of harm to the performers, he suggested, is only relevant insofar as that risk exacerbates the social harm resulting from the degradation and objectification of women. So neither the safety nor sexual agency of the women participants is relevant to the definition of indecency. Note however, that harm to the spectators is relevant.

Justice Sopinka found that, according to community standards of tolerance, lap dances are indecent because they desensitize sexuality and objectify women. Using the criminal law to protect the decency of sex itself, which is what it means to define acts as indecent on the basis that they might 'desensitize' sexuality, is about sexual propriety. It is unsurprising that an analysis underpinned by sexual morality is not an analysis which is particularly interested in harm to the actual women involved in a particular activity.

His decision is problematic for a variety of reasons. First of all, it is done on behalf of the decency of some monolithic notion of women as incapacitated victims of sexual objectification. Conceptualizing women's sexuality in this way is not progress for women. More importantly, nor is it good for the interests of those women involved in the sex trade, that is, those women who are directly affected by the legal and social

⁸² *R. v. Mara*, *supra* note 16.

⁸³ *Ibid.* at para. 35.

implications of sex work. By finding that the issue of consent is not even a relevant factor of consideration in defining what acts, in this ‘adults only’ establishment, constitute indecent ones, Justice Sopinka directly rejects the interests in sexual agency of the women involved. By finding that harm to these women is only relevant if harm to them results in greater harm to others, he does not focus on their interest in sexual safety.

His reasoning is not premised on relationships, nor on the sexual interactions at issue. It is premised on an assessment regarding the immorality of lap dances. It is underpinned by a moral assessment regarding the commodification of sex. The argument made throughout this thesis is that legal reasoning, legal assessments and legal definitions should be based on the understanding that the meaning of a sexual act (such as the exchange of money for a lap dance) is produced through the relationships, interactions and context in which it occurs. Justice Sopinka’s reasoning in *Mara* does not reflect a consideration of these contextual factors.⁸⁴

Even when the Court determined that a particular sexual act was not beyond the community’s standard of tolerance, the application of the community standard of tolerance test often produced reasoning which maintained a moralistic, majoritarian and essentialist approach to the regulation of sexuality. This is evident in the Supreme Court of Canada’s 1993 decision in *R. v. Tremblay*.⁸⁵ *Tremblay* concerned a charge of keeping a common bawdy house against the owner of a bar where nude dancers would perform in individual cubicles for clients who were permitted to masturbate while viewing the

⁸⁴ The act of exchanging sex (a lap dance) for money is not on its face an activity that violates the types of third person ethics (such as equality, liberty and autonomy) reflected in documents such as the Constitution. Under *Labaye*’s approach a determination as to whether lap dances are harmful would require an assessment of these factors.

⁸⁵ [1993] 2 SCR 932.

dancers, who were also masturbating or pretending to masturbate. In restoring the trial judge's acquittal, Justice Cory stated that:

...I am of the view that it was entirely appropriate for the trial judge to take into account the expert testimony of Dr. Campbell in determining the community standard of tolerance. That testimony was relevant and helpful in arriving at an objective appreciation as to what types of sexual behavior would be tolerated by the Canadian public. It was on the basis of the statistics provided by Dr. Campbell, which indicated that most Canadians engage in masturbation, that the trial judge concluded that the average Canadian was more likely to tolerate activities which were similar to those in which they engaged in themselves. Obviously, any perception of what would be tolerated will very properly be influenced by what is perceived as normal. What is normal will, in turn, depend upon the extent to which that same activity is engaged in by others. If the act in question is one that is performed by the majority in the community then it is impossible to say that the act itself would not be tolerated by the community. Thus, once the act itself is found to be tolerated THEN the inquiry must shift to focus on the circumstances surrounding its performance.⁸⁶ (emphasis added)

Now fortunately for Mr. Tremblay, the trial judge had made a finding of fact that, based on the testimony of Dr. Campbell, the expert sexologist, 90% of Canadian men and 50% of Canadian women do indeed masturbate – and so it is therefore ‘normal’. As a result, provided that it was not occurring in a location that is overly public, it is an activity that the community will tolerate. It isn't indecent.

This sort of legal analysis is problematic because it is dictated by the consideration of factors (such as sexual impropriety or what most Canadians are doing sexually and what they think normal) that do not allow for the nuanced and diverse reality of people's sexuality. The community standard of tolerance approach – from a conceptual perspective – is a status quo approach. When it comes to sex – conceptual or otherwise – status quo approaches are often not good for women. Women (one in four of whom, by some accounts, will experience forced sex at least once during the course of

⁸⁶ *Tremblay, supra* note 84 at para. 71.

their lifetime⁸⁷) should not want legal definitions of what is, and what is not, decent dictated by what is, and what is not, prevalent.⁸⁸

Reasoning founded on sexual morality is reasoning driven to constitute through law (as well as other social mechanisms) a particular account of sex. In fact, this is what is suggested by the notion of sexual morality. (As discussed above, the particular sexual morality that has dominated law, at least in Canada, is an essentialist, naturalized, sex as dangerous, account of sex). A close examination of the cases suggest that in order to achieve this, the law's preoccupation often tends to be with the protection of sex itself rather than with the sexual actors, relationships and interactions at issue in a given context.

The law often purports to act out of concern for the welfare of individuals or relationships and on one level this is likely true; but, scratch below the surface of these decisions and one can detect an underlying concern for the protection of sex itself which may be influencing or perhaps sometimes even driving the analysis in many of these cases. This was exemplified by the Court's approach to the concept of sexual exploitation. Obscene representations are representations that unduly exploit sex. This definition, even on its face, suggests that it is about the protection of sex itself. Its concern is directed towards ensuring that sex (not women, not children, not visible minorities) is not exploited. But it goes much further. Whether or not a representation is

⁸⁷ J. Brickman and J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population," *Int'l J of Women's Studies*, Vol. 7, no. 3, 1984. In addition, between 80% and 85% of all victims of sexual assault are girls and women. A 1993 Statistics Canada survey found that one-half of all Canadian women have experienced at least one incident of sexual or physical violence. Almost 60% of these women were the targets of more than one such incident.

⁸⁸ On a similar note, gays and lesbians (who supposedly make up less than 10% of the population) should not want legal definitions of what is and what is not decent dictated by what is and what is not normal.

considered to unduly exploit sex was to be determined based on community standards.⁸⁹ As noted above, prior to *Butler* ‘community standards’ referred directly and explicitly to dominant sexual morality.

Cossman and others have argued that, despite contestations to the contrary, *Butler* did not actually reduce the degree to which conservative sexual morality dictates a determination that a representation exploited sex.⁹⁰ Reasoning based on conservative sexual morality is reasoning directed towards protecting a particular account of, or understanding about, sex. Given this, it is perhaps unsurprising that incorporating a notion of harm *into* the community standard of tolerance did not result in reasoning *sans* sexual morality. After all, doing such ensures that obscenity laws safeguard against harm to sex. That is to say, against harm to a particular account of sex... a sexual morality. (An alternative would be to define exploitation based on harm to people.⁹¹)

This same observation can be made about Justice LaForest’s reasoning in *Norberg v. Wynrib*. In *Norberg v. Wynrib*, Justice LaForest determined that, for the purposes of battery, consent would be vitiated where the sexual relationship concerned an imbalanced and exploitative relationship between the parties. A relationship would be exploitative if

⁸⁹ The past tense is used here on the presumption – which is a presumption – that the rejection of the community standard of tolerance test in *Labaye* also applies to the definition of obscenity.

⁹⁰ *Supra* note 4.

⁹¹ Compare this conceptual approach to exploitation to the approach underpinning laws in Italy regarding prostitution. Like in Canada the exchange of sex for money is not illegal in Italy. What is illegal in Italy is the exploitation of prostitutes. This is not to suggest that laws regulating sex work in Italy are without problem. Prostitution, in what were called ‘closed houses’, was legal in Italy until 1959 when these legal brothels were closed down and a law prohibiting the exploitation of prostitution – aimed at prosecuting pimps – was enacted. Since then, by many accounts street prostitution has increased as has the number of young foreign women and underage girls involved in the trade. (see <http://www.uri.edu/artsci/wms/hughes/italy.htm> accessed June 9, 2008). There is currently debate in Italy about what to do about the “street prostitution problem”. However, interestingly and perhaps due to a conceptual approach which starts from a concern over the exploitation of the sexual actors at issue rather than the sexual acts, the discourse surrounding the debate, including that coming from Italy’s conservative government, seems to focus more on how to ensure that sex workers aren’t turned into slaves rather than on how to rid society of sex workers. (see <http://www.pr-inside.com/red-light-districts-berlusconi-s-government-r631221.htm> accessed June 9, 2008).

it contravened community standards of conduct (which intuitively must refer to sexual conduct). So instead of examining the individual and subjective perceptions and circumstances of, and risk to the parties involved,⁹² courts are to determine whether the relationship is exploitative based on the court's assessment as to what the community thinks - that is to say, as to whether this is the sort of sexual relationship the community would approve of. It will be exploitative if it does not jive with community sexual morality. In other words, it will be exploitative if it transgresses the dominant account of sex – in this context an idealized and romanticized account of sex. The inquiry, then, is focused not on exploitation to the perceived underdog but on safeguarding sex (as romantic⁹³, as about love not business etc...) itself. To define exploitation based on

⁹² This is particularly noteworthy given that the forte of tort law, by some accounts, is its ability to handle well individual circumstances and the subjective. (As discussed below *infra*, one criticism of individualized, contextual analysis often given in the criminal law context is that it tends to sacrifice certainty. While the same critique can be made in the context of tort law its implications are different. Certainty is a fundamental and constitutionally recognized principle under the criminal law. This is not necessarily the case with respect to tort law. Justice Sopinka, in his concurring opinion, did focus on the subjectivity of the parties themselves: “Certain relationships, especially those in which there is a significant imbalance in power or those involving a high degree of trust and confidence may require the trier of fact to be particularly careful in assessing the reality of consent. However, the question of consent in relation to a battery claim is ultimately a factual one that must be determined on the basis of all the circumstances of a particular case” at 88. He, like Justice McLachlin, found that the sexual contact was consensual. He based liability on breach of duty (either tortious or contractual).

⁹³ The sooner the notion of ‘romance’ and ‘the romantic’ is removed from the Court’s conception of sexuality the better. Romance, sexual propriety, and hetero-normative essentialism all seem to go hand in hand. Moreover, there just do not seem to be a lot of examples of case law where the notion of romance does much work – at least not the kind of work oriented towards constructivist conceptions of human sexuality. The trial decision in *R v Larue*, [2003] 1 S.C.R. 277 exemplifies this point perfectly. The trial judge in *Larue*, in describing the events occurring on the evening of the sexual assault, characterized the evidence suggesting some prior consensual contact between the accused and the complainant as: “there may have been some romantic activity between [the complainant] and the accused, before he attacked her with a knife”. The accused and the complainant in *Larue* met for the first time earlier on the night of the attack in a pub. After drinking copious amounts of alcohol the complainant left the pub with the accused and others and attended at her cousin’s townhouse where several other people were present. The complainant was so drunk that night that she had no memory of anything from the time they left the pub until the time she awoke with the accused on top of her. Whatever sexual interactions may have occurred between the accused and the complainant occurred while she was barely conscious or unconscious, on a foam mattress on the floor in the living room of her cousin’s townhouse with several others milling around. This is not exactly *A Love Story* (more like a violent and damaging *While You Were Sleeping*). While these details alone do not establish non-consent (for any acts occurring prior to her unconsciousness) nor do they in anyway suggest romance. References to lust and romance rely on essentialist conceptions about sex that tend to obscure more than they reveal.

whether it transgresses dominant sexual morality is to demonstrate a concern for protecting the integrity of whatever understanding of sexuality underpins that morality, rather than a concern for harm caused by the exploitation of people – whether it is the exploitation of people fucking, working, singing, dancing or dying.

What is needed is an approach that enables the law to accommodate the complexity that people engage with in relation to sexuality. The principles of harm and consent are not new concepts, and the reasoning in *Labaye* obviously will not serve as a panacea for what is an enormously complex social issue. That said, *Labaye*, by removing the community standards of tolerance test from the definition of indecency, shifted the criminalization of sex (in terms of indecency) from a purely majoritarian democratic approach to a constitutional democratic approach. Chief Justice McLachlin's decision in *Labaye* eliminates considerations of community tolerance (sexual morality) and instead, relies on the values underpinning the Constitution (political morality) in order to determine whether a particular sexual activity is harmful. A legal definition that turns on political morality rather than sexual morality, where that political morality is anchored in values such as autonomy and equality, lend itself well to a constructivist approach in which power dynamics, the perspectives of all sexual actors involved, and other social factors contributing to the character of the sexual interaction, are considered.

A review of the cases that have applied the reasoning in *Labaye* show that focusing on harm more objectively (as dictated by the Constitution rather than a quantitative assessment of the balance of a community's personally held sexual values) seems to create space for greater subjectivity in individual cases. The result appears to be legal narratives which do not construct an essentialist concept of women and sex but

rather demonstrate some recognition of the diversity of women's experiences and perspectives, and the social complexity (and production) of human sexuality. This may be an inevitable outcome of shifting the law's focus towards harm and away from morality.

IV. A Moral Shift: The Application Of *Labaye*

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One post-*Labaye* decision that exemplifies this possibility of accommodating women's sexual subjectivity is *R v Ellison*.⁹⁴ Ellison was a high school teacher charged with a number of counts of indecent assault and gross indecency, as a result of sexual contact he admittedly had with a number of female students and former students between 1973 and 1981. (Indecent assault, no longer in the *Criminal Code*, was an assault accompanied by circumstances of indecency.⁹⁵ Gross indecency was loosely defined as a marked departure from the decent conduct expected of the average Canadian in the circumstances.⁹⁶) The analysis regarding the charges of indecent assault for the most part turned on the issue of consent. He was convicted, in whole or in part, on three of the four charges of indecent assault. It is the analysis regarding the charges of gross indecency that is of particular interest to this discussion.

⁹⁴ [2006] BCJ No. 3241 [hereinafter *Ellison*].

⁹⁵ *R v Sweitlinkski*, [1980] SCJ No. 107.

⁹⁶ *R v Quisnel*, (1979) 51 CCC (2d) 270 (Ont. C.A.). Gross indecency is no longer an offence under the *Criminal Code*. Under its replacement, section 153, every person who has sexual contact with a 16 to 18 year old young person with whom they are in a position of trust or authority is guilty of sexual exploitation. The offence does not turn on the impact of the sexual contact on the young person, but rather on the status of their relationship and whether it is one of trust or authority. If it is such a relationship, this element of the offence is met. Whether such a relationship exists will be determined based on the age difference, the evolution of the relationship and the status of the accused in relation to the young person. While the analysis in *Ellison* isn't relevant under this law, it is nonetheless demonstrative of the way in which this harm based approach *could* be used in other sections of the *Criminal Code* which do continue to use the term indecent (such as ss. 163, 167, 169, 173, 175). Similarly, it might also be used to interpret what constitutes "abuse of trust power or authority" under provisions such as section 273.1(2)(c) defining consent in the case of sexual assault.

In *Ellison* the Crown urged Justice Takahashi to apply the reasoning in *Labaye* to inform his determination with regard to the gross indecency charges. While Justice Takahashi found that *Labaye* was not directly applicable on the basis that convictions of gross indecency ought not to be based on the broader implications of the indecent conduct on society, in the end result his analysis absolutely followed the harm based approach to indecency adopted in *Labaye*.⁹⁷ Moreover, he explicitly acknowledged that the *Labaye* reasoning was helpful to an analysis regarding gross indecency given the complexity and nuance involved in human sexual behavior:

The advantage of a harm based approach is that it establishes a method by which the boundary between criminal and non-criminal sexual conduct can be objectively ascertained. This benefits the individual in making his choice of behavior and the court in assessing what he chose. Human behavior is infinite in its variation. It is not easily quantifiable or measurable for making comparisons. Labaye...is instructive in directing the need for a principled approach to address criminal matters involving indecency.⁹⁸ (emphasis added)

What was the outcome of Justice Takahashi's approach and why is it a good one?

Ellison was charged with 12 counts of gross indecency; he had sexual contact with 12 different young women – some of whom were students, some former students. Some were teenagers, some were in their early twenties. Some were sexually inexperienced, others less so. Some continued a platonic relationship with Ellison for years after the sexual activity had occurred. Some did not. Some reported having enjoyed the sexual interactions they had with Ellison and wishing there had been more, others felt traumatized by what happened, still others reported little if any effect at all.

⁹⁷ Justice Takahashi's analysis is somewhat odd. While he seems to have overlooked the third branch of harm in *Labaye* – harm to the participants – by finding that *Labaye* is not directly applicable because it concerns the broader implications of the indecent conduct on society, he then goes on to both state that *Labaye* is informative in making determinations of indecency and to apply the *Labaye* harm based approach to his analysis – focusing particularly on the third branch in *Labaye*.

⁹⁸ *Ellison, supra* note 93 at para. 72.

How should a judge, twenty years after the fact, attempt to decipher, interpret, and unravel the innumerable and diverse variables involved in every one of the sexual encounters that occurred so as to determine whether what happened was or was not decent? How can a judge do this without either relying on his or her own sexual morality, or his or her assumptions about the sexual morality of the majority regarding sexual relations between a teacher and high school student? A judge can do this by doing what Justice Takahashi appears to have done. By hearing and accommodating into the analysis the perspectives and sexual narratives of the young women involved. By considering factors such as whether the sexual contact caused humiliation, forced secrecy, guilt or the defilement of one's first sexual experience. By acknowledging that the emotional risk at stake for each depended on each young woman's individual vulnerability and degree of maturity, and taking into account each woman's stated desire or lack of desire to engage in sexual contact with Ellison, whether they remained friends, and who terminated the relationship. In other words, some of what are the many complex, nuanced and sometimes messy elements that make up human sexuality.

What was the result? Ellison was convicted on four counts of gross indecency and acquitted on the others. Consensual sex which neither participant experienced as harmful was not considered indecent. Consensual sex which a complainant experienced as harmful in some regard was found to be grossly indecent. This reasoning is analogous to that used in the context of assault law, where the Supreme Court of Canada has held that consent is vitiated if adults intentionally apply force that causes serious hurt or non-trivial harm in the course of a fist fight.⁹⁹ It is not that one cannot consent to a fist fight, or even (in principle rather than effect, at least) consent to a fist fight causing bodily harm; nor

⁹⁹ See *R v Jobidon* [1991] 2 SCR 714.

does *Jobidon* require that one must intend to cause bodily harm for consent to be vitiated. It is that, for policy reasons, an otherwise consensual but socially useless and potentially dangerous activity such as fighting becomes non-consensual if, but only if, non-trivial harm is sustained by one of the participants. A similar policy justification could be offered to support the reasoning in *Ellison*. Where an individual knowingly engages in what is objectively potentially harmful sexual behavior (for example having sex with one's teenaged student) they are considered to have assumed the consequences arising from any harm caused.

One counterargument to this approach, based as it was on the third branch of harm under *Labaye* – sexual activity that causes harm to the participants – is that it sacrifices certainty under the law. One principle central to the criminal law is that it be knowable. The counterargument to defining indecency based on the harm to the participants involved in the sexual activity is that it makes the law uncertain because whether an offence occurs is contingent upon whether harm is suffered. However, there is nothing to suggest that the approach endorsed in *Labaye* and adopted in *Ellison* is any less certain than the community standard of tolerance approach. As is well demonstrated in a case such as *Tremblay*, ascertaining the community standard of tolerance entailed determining the sexual proclivities of the “normal Canadian”. This meant the somewhat nonsensical (and Alfred Kinsey-esque¹⁰⁰) process of gathering empirical evidence about the sexual

¹⁰⁰ Alfred Kinsey was a mid 20th century biologist, renowned for conducting the first mass scale quantitative research into the dominant (and not so dominant) sexual practices of men and women. He interviewed thousands of American men and women, recording the types and frequency of sexual activity they had experienced. The “Kinsey Reports” – *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female* – were published by Indiana University Press in 1948 and 1953 respectively. His sample was exclusively white and middle class. It included zero African Americans. Despite its broad spectrum of questions, his survey asked almost nothing about forced or coercive sex. For a critique of Kinsey's work see Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam, 1975).

practices of “average Canadians” from “expert sexologists” and the like. There is nothing more certain *ex ante* about such a definition of indecency.

What is more, the blurring of subjectivity and objectivity in laws regarding the criminal regulation of sex is unavoidable due to the nature of sex. Sexuality, in its infinite manifestations both in terms of acts and identities, is utterly subjective. Despite its corporeal element (which it typically entails), it is the antithesis of objectivity or pure physical reality. Without understanding how each of the parties involved in a sexual act (*any* sexual act short of one causing death or serious bodily harm) conceived of the act, it is impossible to know whether what occurred was a crime or an act of passion and pleasure.

But it goes further. It is not simply that it is impossible to know how to characterize the act without revealing how the parties conceived of it; it is that the act is itself, *defined*, by how the parties conceived of it.¹⁰¹ This is why the courts, in the context of sexual assault law, eventually established that the issue of consent must be dictated by the subjective perspective of the complainant at the time of the alleged offence. That is, that consent, or rather lack thereof, is part of the *actus reus* not the *mens rea*. It is

¹⁰¹ Sexuality might be the prototypical example of the sort of abstract human phenomenon that George Lakoff suggests we can only comprehend through what he describes as ‘conceptual metaphor’. George Lakoff & Mark Johnson, *Metaphors We live By*, 2nd ed. (University Of Chicago Press: Chicago, 1980). Lakoff suggests that metaphors are not simply a linguistic construction but rather are a conceptual construction integral to the development of thought. Only those things which are purely physical in nature can be understood and expressed without metaphor. He suggests that the greater the level of abstraction, the more layers of metaphor are needed to express it. For Lakoff, the development of thought has been the process of developing better metaphors. He suggests that applying knowledge from one conceptual domain to another domain of knowledge establishes new perceptions and understandings. What does this mean in terms of the relationship between law and sexuality? It means context and framing is never more present and relied upon than when the law attempts to deal with issues of sexuality.

dictated by “the complainant’s subjective internal state of mind towards the touching, at the time it occurred”.¹⁰²

This is not to suggest that this approach is perfect. Indeed, one count of gross indecency on which Ellison was acquitted involved sexual contact with a complainant who was 15 years old and extremely vulnerable at the time of the incidents. Ellison was acquitted because, while this young woman who had been raped as a child while in foster care did suffer from chronic fatigue syndrome, there was, according to Justice Takahashi, no evidence that she suffered psychological harm as a result of Ellison’s actions. So while the harm based approach to the definition of indecency does appear to facilitate the law’s ability to map onto the complexity of sex, it may still not be nearly nuanced enough. That is to say, not yet capable of handling a complex theory of harm which can account for and address the situation of a 15 year old such as this, in an organic way which doesn’t attempt to dissect and disaggregate human conditions which cannot possibly be dissected and disaggregated.

Another example of the manner in which the *Labaye* approach results in reasoning and outcomes which are better able to both accommodate sexual diversity and avoid regulating conduct based on dominant sexual morality is *Latreille c. R.*¹⁰³ This case involved an appeal to the Quebec Court of Appeal regarding a conviction against Latreille under section 163(1)(a) of the *Criminal Code*, for producing obscene pictures. The photographs, which Latreille had taken to his pharmacy for development included

¹⁰² *R v Park*, [1995] 2 SCR 836; *R v Ewanchuk*, [1999] 1 SCR 330. As discussed in the previous chapter, consent is dictated by the subjective state of the complainant at the time the sexual activity occurred. While this is different from an analysis like that in *Ellison* (or *Labaye*) where the issue is whether harm is suffered as a result of the sexual activity, it is offered more as an example of the need for subjectivity in legal matters of a sexual nature. In addition, it wouldn’t, relying upon on the reasoning in *Jobidon*, *supra* note 77, present a significant challenge to this argument anyway.

¹⁰³ [2007] J.Q. no 11274 (QB C.A.).

pictures of himself and a woman engaged in oral sex, pictures of that same woman performing fellatio on one other man and pictures of the woman, nude, and depicted in what the Court described as a “sado-masochistic context”. It was this last category of pictures for which he was charged with producing obscene materials. There was no evidence that any of the activities photographed were non-consensual. The “sado-masochistic pictures” portrayed the woman kneeling by a bed with clothespins on her nipples and a bathrobe tie binding her hands behind her back.

The trial judge, whose decision was released prior to the Supreme Court of Canada’s decision in *Labaye*, determined that the photographs depicted the undue exploitation of sex on the basis that they exceeded the community standard of tolerance in Canada. In addition to disagreeing that such photographs exceed the community standard of tolerance, the Quebec Court of Appeal, applying *Labaye*, found that such photographs do not create the type or degree of harm necessary to constitute a finding of obscenity. The Court emphasized that while the fact that the pictures were consensually and privately produced and for private use does not rule out the possibility that they are harmful enough to be considered obscene, it must be a factor which is taken into account.

The final ‘post-*Labaye*’ case to be discussed in this section is the decision of Justice Chisvin of the Ontario Court of Justice in *R v Ponomarev*.¹⁰⁴ Valeri Ponomarev, owner of a massage parlor in Vaughan, Ontario was charged under section 210 of the *Criminal Code* after an undercover police operation determined that the female employees of his establishment, in addition to providing full body massage, would also provide manual ejaculation if the client so desired.¹⁰⁵ For an additional twenty dollars the

¹⁰⁴ [2007] O.J. No. 2494

¹⁰⁵ *Ibid.* at 10.

masseuse would conduct the massage naked. The manual ejaculation was included in the price of the massage.

Justice Chisvin, relying on the definition established in *Labaye*, found that the activities occurring at Studio 176 were not indecent. This finding was based on the fact that it was clear from the evidence that the sexual acts were not occurring in public but rather in private rooms, that the fee was forty dollars whether manual ejaculation occurred or not, that the women employed at Studio 176 were there of their own volition, had accepted the position knowing what it entailed, and were not in anyway coerced into accepting the job. Based on Justice Chisvin's account of the evidence, it is clear that these women were in control of the way in which the massage would proceed.¹⁰⁶ In stark contrast to the reasoning in either *Mara* or *Tremblay* the perspective of the women involved in these activities was clearly represented in the decision. Justice Chisvin noted that the more credible of the two employees testified that she knew what the job entailed before she accepted it and that "she felt she was responsible for her own actions. No one pushed her to do this. Rather, she indicated that she chose to undertake the job. She said she accepted responsibility for her actions." The representation of these sex workers, their autonomy and agency and their own interest in being free from sexual harm is very different from the one in *Mara*.

A common bawdy house is defined as an establishment kept for the purposes of acts of indecency or prostitution.¹⁰⁷ In addition to determining that the acts were not indecent, Justice Chisvin also found that the activity occurring at Studio 176 did not constitute prostitution. Several courts, including the Supreme Court of Canada, have

¹⁰⁶ *Ponomarev*, *supra* note 103 at 13.

¹⁰⁷ *Criminal Code*, *supra* note 38, s. 197(1).

defined prostitution as the exchange of money for the offering of one's body for lewd purposes.¹⁰⁸ In order to conclude that there was no prostitution occurring, Justice Chisvin relied on the community standard of tolerance test.¹⁰⁹ In other words, what would the community consider to be the offering of one's body for lewd activity in exchange for money? Justice Chisvin found that the community would not consider this to be the exchange of money for sex on the basis that, because the "manual release" occurred in private and voluntarily, and because it was included in the price of the massage, it did not constitute prostitution.

It seems hard to believe that the community would conclude that simply because manual ejaculation was included in the price of the massage this did not constitute the exchange of sex for money. Had Justice Chisvin used the interpretive approach to the bawdy house provisions suggested here she would have reached the same result without having to suggest that two for one pricing somehow converts this exchange of money for services that include a hand job from prostitution into something else.¹¹⁰

i) Interpreting The Common Bawdy House Laws Post-*Labaye*

The exchange of sex for money is not, and has never been, a criminal offence in Canada. But curiously (as the Fraser Report noted¹¹¹), the activities associated with it

¹⁰⁸ *Prostitution Reference*, [1990] 1 SCR 1123 at para. 45.

¹⁰⁹ Justice Chisvin relied on the Ontario Court of Justice decision in *R. v. DiGiuseppe*, [2000] O.J. No. 3128 as authority for this interpretation. (*R. v. DiGiuseppe* was later overturned by the Ontario Court of Appeal but not on the basis of its use of the community standard of tolerance test to define prostitution ([2002] 161 C.C.C. (3d) 424.)

¹¹⁰ Justice Chisvin seems to have taken stock of this massage parlor and its various participants and come to the conclusion that this is not the sort of circumstance that requires the criminal law's intervention. It is not a stretch to assume that this is because of her assessment of the contextual factors – including her examination of the power dynamics- she highlights in her decision. However, instead of applying the type of contextual reasoning established in *Labaye* to the context she identified in order to arrive at this outcome, she instead relied on the incredulous conclusion that this was not the exchange of sex for money because it also involved a massage! The incredulity of Justice Chisvin's conclusion diminishes the credibility that a decision such as this is likely to receive.

¹¹¹ *Pornography and Prostitution in Canada* (Ottawa: Department of Supply and Services, 1985).

have been criminalized. This has meant, in effect, that you are allowed to sell sex but that you can't sell it in private and you can't communicate in any way about the sale of it in public. What is the purpose behind indirectly criminalizing prostitution? Purportedly, the rationale for the communication provision is to deal with the public nuisance assumed to be associated with selling sex on the street.¹¹² But what is the purpose of the bawdy house provisions, which criminalize sex work in the private sphere? Given that a single woman (or man) working as a sex worker out of their own home could be convicted of keeping a common bawdy house under the pre-*Labaye* interpretation of the law, it can't be simply public nuisance.¹¹³ The options left, it seems, are the prevention of harm or the protection of a particular sexual morality, a sexual morality that disapproves of commercial sex. *Labaye* adopts the former and rejects outright, and finally, the latter.

The principle underpinning Chief Justice McLachlin's approach in *Labaye* is that the criminal regulation of sex will only be legitimate where it is in furtherance of the political morality that we, as a society, have endorsed through the Constitution and not where it is deployed to sustain, or further, any particular sexual morality. *Labaye* establishes that an individual won't be guilty under the common bawdy house provisions unless the sexual activity occurring is of the sort that would cause the types of harm protected against by the values underpinning the Constitution. While *Labaye* dealt with the bawdy house laws within the context of indecency, there is nothing to suggest that this principle should not also apply in terms of the exchange of sex for money in a bawdy house.

¹¹² The legitimacy of this rationale will be discussed in section ii) below.

¹¹³ *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.).

To suggest this reasoning, of course, is to suggest that the exchange of sex for money is not in and of itself harmful. However, this is an assumption that the law has already made. As noted, the exchange of sex for money has itself never been criminalized. There are all sorts of examples, in addition to prostitution itself, where individuals legally make money by having sex, or paying others to have sex. The actors or producers of pornography come immediately to mind. The owner of a bath house, post *Labaye*, provides another example. Under the reasoning in *Labaye*, it is now no longer a criminal offence to own an establishment where patrons, for an entrance fee, can have sex (provided it isn't harmful) with one another. The only difference between this and an establishment used for prostitution concerns how, and between whom, money is exchanged. In the former, the participants engaged in sex have both (or all) paid money to a third party. It is consideration in exchange for the provision of a particular sexual opportunity and a location in which to carry it out. In the latter, the consideration is for the sex itself. Again, paying for sex is not illegal. Unless one resorts to moralistic assertions about the sanctity of sex, or the immorality of commercializing sexual acts themselves, something the law has to date refused to do, then without some further associated harm, there is nothing to distinguish these two circumstances.¹¹⁴ Protecting a particular sexual morality simply for the sake of itself, for example a sexual morality

¹¹⁴ As an aside, the approach to the bawdy house provisions adopted in *Labaye* is consistent with the recommendations recently issued by the majority of the Parliamentary Standing Committee on Justice and Human Rights; their recommendation to the government was to “engage in a process of law reform that will consider changes to laws pertaining to prostitution, thus allowing criminal sanctions to focus on harmful situations” (Report of The Standing Committee on Justice and Human Rights and the Standing Committee on Solicitation Laws, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (Communication Canada: Ottawa, December, 2006) at 89). It may be that as a result of the Supreme Court of Canada’s decision in *Labaye* this recommendation to Parliament is one that the Court has already, with respect to the bawdy house laws, adopted.

which disapproves of commercial sex, is not, following *Labaye*, the type of harm to which the bawdy house provisions can be directed.¹¹⁵

Following the interpretation and application of the bawdy house provisions established in *Labaye*, what types of sex for money transactions conducted in an establishment continue to contravene the bawdy house provisions?

The exchange of money for sex done in a way that deprives the liberty and autonomy of others, predisposes others to anti-social conduct, or where the sex is harmful to one or both of the participants would continue to violate the bawdy house provisions. This would include the exchange of money for sex in an establishment with unsafe working conditions, such as a lack of sufficient stage security or a refusal to provide condoms, for example. In such a case the proprietor of such a business would be guilty of violating section 210.

¹¹⁵ Given that the definitions of both prostitution and indecency have been open to interpretation under the bawdy house provision and that it is less than clear whether a given act will be considered one of indecency or prostitution under the provision, it may not make sense to even make distinctions between the two when considering the bawdy house provisions. See *R. v. Tremblay* (1991), 68 C.C.C. (3d) 439 (rev'd SCC) where the Quebec Court of Appeal (overturned on other grounds) held that the practice of prostitution does not require actual sexual intercourse or even physical contact between the customer and the performer; see Justice Lamer's minority decision, in the *Prostitution Reference*, *supra* note 94 at para. 45, where speaking "in terms of words and phrases like "prostitution" and "acts of indecency" he suggested that the "appropriate test to apply in this area is the "community standard of tolerance". Prostitution has frequently been defined as the offering of one's body for lewd purposes in exchange for money (see *Prostitution Reference*, *ibid.*) But what does "lewd purposes" mean? And if prostitution doesn't require intercourse but rather the offering of one's body for sexual gratification then when, under the bawdy house laws is an act prostitution and when is it indecency? In *R. v. Pelletier*, [1999] 3 S.C.R. 863 the Supreme Court determined that lap dances in a cubicle with a partially closed curtain, where the client is permitted to touch the breasts and buttocks of the dancer, are not indecent. But would they constitute prostitution – the offering of one's body for lewd purposes? (One municipal court judge in Quebec thought so. See *Alexandre c. R.*, [2007] J.Q. no 11152). The reasoning suggested here is consistent with Chief Justice Lamer's reasoning in *R. v. Corbeil*, [1991] S.C.J. No. 29, where, in defining "keeper" he noted that prostitution itself is not illegal and concluded, at para. 7, that "to ground a conviction under s. 210(1), it must be established that the accused exercised a degree of control over the care and management of the premises. If this element of control over care and management is not necessary to ground a conviction, the meaning of "keeps" for the purposes of s. 210(1) would effectively be expanded, given the broad definition of "common bawdy-house" in s. 197(1), to cover the act of prostitution itself."

The exchange of money for sex, where the consent is more apparent than real (such as where it is due to coercion, or due to intoxication), would violate section 210. Obviously, the exchange of money for sexual activity which is otherwise prohibited by law would also violate the bawdy house provisions, such as, for example, where there is no consent, where an animal is used, or where children might observe the sexual acts. In other words, the exchange of money for sex which would cause one of the types of harm identified in *Labaye* would be a violation of section 210; the exchange of money for harmless sex would not.

ii) Interpreting The Communication Provisions Post-*Labaye*

In the *Prostitution Reference*, the Court agreed that the communication law violates section 2 of the *Charter*.¹¹⁶ As is typically the case with freedom of expression cases, the main issue was whether that violation could be upheld under section 1. Key to this determination was whether the law's objective was important enough to justify a violation of the right to freedom of expression. The Court found that it was sufficiently important. Post-*Labaye*, it is apparent that the objective identified and relied upon in the *Prostitution Reference* is not, at least with respect to the general communication provision, sufficient.

Chief Justice Dickson, writing for the majority in the *Prostitution Reference*, adopted the reasoning of Justice Wilson's dissent with respect to the legislative objective of the communication provision.¹¹⁷ It is, they agreed, "meant to address solicitation in public places and, to that end seeks to eradicate the various forms of social nuisance

¹¹⁶ *Prostitution Reference*, *supra* note 107.

¹¹⁷ *Ibid.* at para. 2. Where Justice Wilson and Dickson disagreed was with respect to proportionality. Justice Wilson found that the means used to achieve the law's objective were not sufficiently tailored to the objective. She also disagreed with the majority's finding that section 7 was not violated.

arising from the public display of the sale of sex”.¹¹⁸ Both he and Justice Wilson concluded that the legislation does not attempt to address “the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution”¹¹⁹ nor does it seek to prohibit prostitution itself. The purpose of the law, particularly the general prohibition on any communication in any manner regardless of whether it causes traffic congestions or obstruction of others, is to reduce the social nuisance caused by the sale of sex in public. The legislation is aimed at taking prostitution “out of public view”¹²⁰. The Court (with the exception of Justice Lamer) accepted the Attorney-General’s suggestion that “Parliament did not seek to suppress solicitation, but only to remove it from the public areas where it was creating the obvious harm.”¹²¹

This is where the reasoning of Chief Justice McLachlin in *Labaye* becomes relevant. *Labaye* modifies the way in which the law is to conceive of harm under criminal laws that regulate sexuality. According to *Labaye*, concepts of harm in the criminal law context which are premised on sexual propriety and the protection of a particular sexual morality, rather than actual harm, are not consistent with the values underpinning the Constitution. *Labaye* should change the approach to the general communication provision (what is now section 213.1(c)) by modifying the notion of harm or social nuisance that can legitimately be targeted by the provision. The social nuisance or harm identified in the *Prostitution Reference* as the object of the general communication provision relates to the “public sensitivities ... offended by the sight of prostitutes negotiating openly for the sale of their bodies and customers negotiating

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at para. 123.

perhaps somewhat less openly for their purchase....Neither prostitution nor solicitation is made illegal. But the high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children.” The genre of harm referred to here falls under the first branch identified in *Labaye*: “the harm of public confrontation with unacceptable and inappropriate conduct.”¹²² However, as McLachlin notes in *Labaye* in the context of the bawdy house provisions, to be consistent with the values underpinning the Constitution, the degree of harm contemplated by this genre is not “the aesthetic harm of a less attractive community, but the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable...to live within a zone that is free from conduct that deeply offends them.”¹²³ The disruption to ‘public sensitivities’ by the mere sight of a sex worker soliciting money for sex, or a john offering money for sex, does not constitute the type of harm contemplated in *Labaye*. Communicating in a manner or location that would pose a deeply offensive affront to others, such as perhaps, persistent and aggressive or overly graphic and sexualized communication or perhaps communication in or near a church or playground, would constitute the type of harm contemplated in *Labaye*.¹²⁴

There are two counter-arguments in response to this suggestion which should be addressed. The first argues that a distinction between public indecency laws and public nuisance laws ought to be made because the standards established in relation to public

¹²² *Labaye*, *supra* note 3 at para. 40. That the Court (with the exception of Justice Lamer) agreed in the *Prostitution Reference* that the provision is not aimed at exploitation, degradation and subordination of women nor the prohibition of prostitution itself establishes that the second and third branches of harm under *Labaye* – predisposing others to antisocial conduct and harm to the participants – are not relevant.

¹²³ *Labaye*, *supra* note 3 at para. 40.

¹²⁴ Just as “the place in which acts take place and the composition of the audience” will affect whether or not such acts cause the type of harm necessary to be considered indecent” so too will location and audience affect whether communication causes the type of harm necessary to violate section 213(1)(c).

indecenty are not appropriately applied to laws regarding public nuisance. The response to this is as follows. In terms of offences whose purpose relates to the social nuisance of, for instance, communicating in a manner which stops traffic or obstructs a pedestrian (such as are found under section 213.1(a) and (b)) this counterargument is likely true.¹²⁵ These offences are not directed towards protecting a particular sexual morality.¹²⁶ However, in terms of an offence like section 213(1)(c), whose purpose is to protect people from the social nuisance of seeing something which offends their own moral sensitivities (such as “the sight of prostitutes negotiating openly for the sale of their bodies”)¹²⁷ the conception of harm established in *Labaye* is both valid and desirable.¹²⁸ Where the purpose of an offence is to prevent a moral affront, especially one related to matters of a sexual nature (given both its subjectivity and our tradition of intolerance in this area), it is entirely appropriate to measure harm based on the standards established in

¹²⁵ An alternative response to this counter argument would be that the types of harm addressed in section 213(1)(a) and (b) – interfering with traffic, obstructing pedestrians – constitute the types of harm incompatible with the proper functioning of society and would be covered under *Labaye*.

¹²⁶ In the *Prostitution Reference* the Court makes a distinction between the legislative objective of these provisions and that of the general prohibition against communication under section 213(1)(c).

¹²⁷ *Prostitution Reference*, *supra* note 107 at para. 128. This quote is from Wilson’s dissent but the majority adopts her reasoning on this point.

¹²⁸ Even beyond the Court’s conclusions in the *Prostitution Reference*, there are other arguments that reveal the sexual moralism underpinning the communication provision. Frances Shaver, in reviewing the legislative and social history of prostitution in Canada and its relationship to both Victorian era, and modern day moral crusaders, argues that underpinning the communication provision and the rhetoric of public nuisance are moralistic concerns about decency and propriety (Frances M. Shaver, “The Regulation of Prostitution: Avoiding the Morality Traps” 9 Can. J.L. & Soc. 123 (1994). She suggests that the gendered nature in which they are enforced reveals the moral impetus behind the law. Pointing to the fact that whether prostitution laws are tailored to be gender –specific and protectionist or adopt gender neutral objectives, women continue to be disproportionately punished under them. Shaver argues that, the modern day moral crusader, less overt than his or her Victorian antecedents, often hides behind the rhetoric of nuisance and that it is not always nuisance but rather a rejection of the acknowledgement by prostitution that “sex is recreation, that sex is entertainment and that it can be had commercially, anonymously and promiscuously” at 135. The history of the criminal regulation of prostitution (it was originally a status offence), the fact that noisome, harassing or disruptive public conduct is already criminally regulated regardless of whether the perpetrator is soliciting sex, votes, drugs, believers or customers (for example under section 175), the gendered manner in which the communication law is enforced, and the fact that, while subsections (1)(a) and (b) of section 213 refer to stopping vehicles or impeding traffic, subsection (c) prohibits any public communication in *any* manner, all evidence the sexual moralism underpinning the general communication prohibition.

Labaye. As Chief Justice McLachlin noted, “tolerance requires that only serious and deeply offensive moral assaults can be kept from public view on pain of criminal sanction.”¹²⁹ Tolerance, after all, is a key ingredient to the healthy functioning of a liberal democracy.

The second counter-argument is that to consider the general communication provision as only prohibiting communication which confronts the public in a way which threatens the loss of autonomy and liberty to others, that is to say harmful communication, will not adequately address the harm that the provision was meant to protect against – the social nuisance which arises when a number of sex workers tend to all work in the same area. In other words, the social nuisance to be addressed is that caused when a particular location becomes a stroll area. To some extent this objection is correct. However, the reasoning in *Labaye* suggests that objecting to the fact of a stroll area itself is not a legitimate criminal law purpose. Further, this approach will reduce some of the social nuisance caused by stroll areas by continuing to criminalize the more egregious conduct. The existence of a stroll area and the aesthetic affront experienced by some, at the mere sight of a sex worker plying their trade, like the fact that a particular neighborhood might contain one or more bawdy houses, is without some associated harm of the sort contemplated in *Labaye*, not something that ought to be targeted by the criminal law. Again, *Labaye* establishes that only “deeply offensive moral assaults can be kept from public view on pain of criminal sanction.”¹³⁰ It does so on the basis that, in a liberal democracy the force of the criminal law ought not to be brought down upon any one or group merely to protect some from the thought that other Canadians are having

¹²⁹ *Labaye*, *supra* note 3 at para. 41.

¹³⁰ *Labaye*, *supra* note 3.

group sex. In the same way, its force should not be deployed merely to sanitize and mask for others the reality that some (perhaps for survival or perhaps due to the systemic, entrenched and gendered disparity in economic opportunity existent in Canada), choose or are forced to sell their bodies for sex.

Why would the reasoning in *Labaye* ultimately lead to a reduction in the harmful impact on sex workers which has been perpetuated as a result of the common bawdy house provisions and the communication provisions? Reflecting upon the implications of *Labaye* for the common bawdy house laws and the communication law, it quickly becomes evident that most of the activities that would continue to be criminalized involve charges against johns and pimps and not against sex workers. Charges against sex workers would be most likely to arise only where their conduct is actually causing a disturbance.

It would mean that the bar owner who coerces women into doing live sex shows, should still be guilty of keeping a common bawdy house; so might be the owner of a ‘brothel’ who fails to provide security or condoms.¹³¹ It would mean that the john who solicits sex in exchange for money from an obviously intoxicated street worker whose consent would be more apparent than real should be guilty of communicating for the purposes of prostitution, as should be the seriously intoxicated street worker who is aggressively propositioning passersby.

But it also means that the woman who runs a sex trade out of her home should no longer be the target of the criminal law, nor should the boyfriend who lives with her. It means that the street worker who takes the time to properly interview a john so as to

¹³¹ In *Labaye*, *supra* note 3 at para. 51 Chief Justice McLachlin found that the risk of spreading sexually transmitted diseases was not a relevant factor in determining whether an act was harmful to the participants. The risk of spreading infectious disease and the provision of condoms are analytically distinct.

ensure her safety before climbing into a vehicle with him wouldn't be committing a criminal offence by doing so. It means that neither the "massage therapist" nor the owner of Studio 176 in *Ponomarev* should be the target of the criminal law and nor should the private dancers in adult clubs.

Conclusion

As noted, Chief Justice McLachlin's approach in *Labaye* suggests that the criminal regulation of sex will only be legitimate where it is in furtherance of the political morality that we, as a society, have endorsed and not where it is deployed to sustain, or further, any particular sexual morality. This distinction, borrowed as it is from Ronald Dworkin's theory of political liberalism,¹³² recognizes the significance of sexual autonomy; in doing so it permits greater space for sexual narratives which have not always been heard by the law. It is an approach which is consistent with Canada's liberal democracy and the values underpinning the Constitution. In this sense Chief Justice McLachlin's reasoning in *Labaye* relies upon, in order to protect, the fundamental ethical and social considerations enshrined in the Constitution.

However, emphasizing the importance of autonomy is not enough. Criminal laws regulating sexuality must acknowledge and accommodate the very significant sexual harms, particularly against women and children, which occur every day in Canada. These laws must account for harm in a very real way. But with this in mind, the challenge will always lie with deciding how harm should be defined. This is why law will never be fully disaggregated from morality. At some point there will always be a measure of judgment; even criminal laws used to regulate sexuality which adopt a harm based approach will always, at some point, demand some moral assessment of harm. Chief Justice

¹³² See Dworkin, *supra* note 52 at 190.

McLachlin's approach in *Labaye* does not avoid this quagmire. Moral assessments of harm will continue, to some extent, to be subjectively determined by individual adjudicators. What her approach does do is suggest that, when it come to that moment of truth - that point of moral assessment - adjudicators should be guided by political morality rather than sexual morality (their own or the community's). Is this more objective? Perhaps it is, perhaps it is not. But it is certainly less majoritarian and this is positive.

Those responsible for legislating and interpreting prostitution laws have explicitly taken the position that the purposes of the common bawdy house provisions and the communication for the purposes of prostitution provision are not to prevent the exploitation, degradation and subordination of sex workers.¹³³ In the case of the general communication provision, the purpose has been to prevent affronts to public sensitivities caused by the sight of the sale of sex, which is a thinly veiled sexual moralism that disfavors the commodification of sex. In the case of the bawdy house provisions there is no veil; the bride's face - big nose, warts, and all that sexual moralism- is revealed for all the church to see. *Labaye* rejects the legitimacy of including sexual moralism – whether at the level of the individual or the community – in the interpretation of the criminal law. In doing so, it offers hope for those whose perhaps already precarious life circumstances have been further jeopardized by the historical interpretation and application of the bawdy house provisions and the communication provision.

The Standing Committee on Justice recently found that “law enforcement officials and prosecutors do not seem to use general application provisions of the *Criminal Code*,

¹³³ In the *Prostitution Reference*, *supra* note 107 the majority and the dissent agreed that the communication provision is not concerned with the protection of sex workers (only Justice Lamer suggested that harm to sex workers might also be a legislative objective of the provision.) In *Mara*, *supra* note 16, Justice Sopinka rejected the notion that the bawdy house provision, in the context of indecency, was at all directed towards protecting the lap dancers themselves.

like kidnapping, extortion, sexual exploitation and assault to address the violence in prostitution”.¹³⁴ Those concerned with the harm that the exchange of sex for money causes women because of the messages it conveys should be more concerned about what it says about women and gender on a societal level that basic criminal law protection against rape, torture, assault and murder is not afforded to this category of sexualized women in the same way as it is to other citizens, rather than the messages conveyed about women and gender by the fact that some women choose to sell their bodies, and that some men choose to pay for sex (or lap dances or manual ejaculation). They should be more concerned with the latter rather than the former, if for no other reason than as a matter of priority and triage. And those concerned with those criminal laws which are presently enforced with respect to sex workers – that is laws which criminalize the activities associated with prostitution - should advocate to ensure that the objectives underpinning these provisions and the manner in which they are interpreted, at the very least, attempt not to compound the risk of harms that sex workers already face. This, however, will require relinquishing reliance on moralistic assumptions about commercial sex. So long as sexual morality continues to inform the interpretation, application, and enforcement of these provisions, the provisions will continue to perpetuate harm to those most affected by them.

This chapter demonstrated the manner in which the Supreme Court has, in its approach to the criminal regulation of obscenity and indecency shifted towards a more constructivist conception of sexual violence. A conception, like as was the case with changes to sexual assault law, that better accommodates the social factors through which sexual violence is constituted. In the context of sexual assault this meant revisions to the

¹³⁴ *The Challenge of Change*, *supra* note 91 at 88.

meaning of sexual assault and the meaning of consent that better incorporate the perspective of all sexual actors involved. In the context of obscenity and indecency it has meant a shift from sexual morality to political morality. In both contexts the result is a greater focus on sexual actors, and their sexual integrity. The social constructivist theory that seems to have been most influential in these cases is the power feminist assertion that sexual violence is produced by power imbalances, systemic gendered inequities, relationships, and context. It is the assertion that this aspect of sexuality – sexual violence - is socially produced rather than naturally occurring. Sexual violence is a product of social conditions not biological ones.

Thus far social constructivist theories have been employed uncritically. The chapters to follow will demonstrate the theoretical difficulties, and their legal implications, both with incomplete (as in the case of power feminism) and the complete (as in the case of queer theory) adoption of constructivist approaches.

Chapter 6 – The Trouble With Power Feminism

The previous chapter revealed the relationship between essentialist conceptions of sexuality and a moral focus on sex itself rather than sexual relationships. It argued that legal reasoning founded on sexual morality tends to articulate one specific set of sexual morals – one specific (essentialist) idea about what sex is (or should be); it demonstrated how the law traditionally perpetuated this approach by focusing on the protection of sex itself rather than the people or relationships involved in sexual interactions. Chapter Five also suggested that the invocation of a sexual morality concerned with sex itself – an approach which stems from an essentialist conception of sexuality - is problematic, particularly for women. Chapter Five concluded by demonstrating, using the example of the criminal regulation of sex work, how this shift to a more constructivist approach to the intersection of law and sexual morality if carried forward, could mean that those who, in this society, are overly sexualized, under sexualized, restricted, violated or ignored will be more likely to see respect for their sexual integrity and sexual realities reflected back to them in the laws that govern their sexual conduct.

Both Chapter Four and Chapter Five also argued that this shift towards a more constructivist conception of sexual violence – in which the law’s moral focus moved from a concern over sexual acts to a concern over sexual actors and in which certain legal definitions have been modified such that social factors including the perspectives of all sexual actors, and the power dynamics at play, are taken into account – was influenced if not precipitated by the theoretical perspectives of power feminism.¹ Chapter Five also

¹ LEAF in particular advanced this power feminist analysis regarding issues of sexual violence. For scholarship substantiating this assertion see Christopher Manfredi, *feminist activism in the supreme court*:

demonstrated that despite this influence, post-*Butler*, sexual moralism as manifested through the community standards of tolerance, was still very much a part of the Court's analysis in cases involving the criminal regulation of sex work, indecency and obscenity.

This chapter seeks to further explore this continued reliance on sexual moralism, in an effort to suggest why power feminism was unable to unhinge the problematic linkage between law and sexual morality.

I. The Structural Pitfall of Power Feminism

“Remember, Ginger Rogers did everything Fred Astaire did, but backwards and in high heels.”

Faith Whittlesey

What do power feminism, and the Court's recognition in 1992 that sex is an equality issue, have to do with the community standards of tolerance test and reasoning from sexual morality? An examination of cases such as *R. v. Tremblay*, *R. v. Mara*, *Reference Re Prostitution*, *Little Sisters*, and *Norberg v. Wynrib* demonstrates that, despite the fact that during this era the Court's opinions began to reflect aspects of the conception of sexuality suggested by power feminism, their decisions, because they also continued to rely upon the community standards of tolerance test, persisted in perpetuating a construction of female sexuality which was unsophisticated, highly moralistic and which failed to recognize women's sexual integrity.² In other words,

Legal Mobilization and the Women's Legal Education and Action Fund, (UBC Press: Vancouver, 2004); see also Christopher Manfredi “Judicial Discretion and Fundamental Justice: Sexual Assault in the Supreme Court of Canada” 47 Am J of Comp L, (1990) 489. For specific doctrine supporting this assertion compare for example their factums in cases such as *R v Ewanchuk*, [1999] 1 SCR 330, *R v Butler*, [1992] 1 SCR 452 and *Norberg v Wynrib*, *infra* note 12, to the Court's decisions in these cases.

² See the discussion of *R v Mara* [1997] 2 CSR 630 and *R v Tremblay* [1993] 2 SCR 932 and *Reference Re Prostitution*, [1990] 1 SCR 1123 in Chapter 5. See the discussion below regarding *Norberg v Wynrib*, *infra* note 12 at 8.

despite finally incorporating feminist analysis regarding sexual power dynamics into their reasoning these opinions *continued* to construct conceptions of consent, women's sexuality and sex itself that were moralistic, essentialist and oversimplified.

This is not to suggest that the lessons of inequity and discrimination which a power feminist analysis of sex offers are not important for courts' to grasp and incorporate into their reasoning; nor is it to dispute the fact that much substantive law reform has been achieved through this analysis. The objectives of Chapters Four and Five were to demonstrate precisely the opposite. Instead, these cases suggest that an application of power feminist analysis effected through a lens of sexual morality will continue to perpetuate a legal construction of sexuality which is not consistent with the promotion of sexual integrity as a social good and which will inevitably stunt the potential for a more sophisticated legal approach to sexuality that a constructivist based analysis might otherwise offer.

It may not be coincidental that the Court was able to incorporate power feminist ideals about sex into these decisions without relinquishing a foundation for their analysis that was premised on sexual morality. There is an epistemic structure which legal reasoning reliant in some respect on first person ethics (such as individual sexual morality)³ shares with the ideology advanced by power feminists in the 1980s and 1990s. Discourse, ideas and theories, legal or otherwise, that advance or ascribe to the possibility of an objective sexual morality rely heavily upon notions of universal truth⁴. The more

³ I am referring here to first person ethics in the sense described by Ronald Dworkin. (See Chapter Five at page 20 for a discussion of his theory). See Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press: Princeton, 2006); Ronald Dworkin, "Foundations of Liberal Equality", in S. Darwall, ed., *Equal Freedom* (Ann Arbor: University of Michigan Press, 1995) 190.

⁴ Note that a first person sexual ethics that adopts this sort of universalism is not in itself problematic provided it remains a universe of one. It is only when such ethics are applied to a larger universe that potential injustices begin to arise. Speaking in terms of sexuality, in a universe of one, finite meaning

radical proponents of power feminism also rely heavily on notions of undisputed truths and universally applicable claims (regarding power, dominance and sex).

In the United States movement power feminists “formed important alliances with social and religious conservatives morally opposed to issues such as “pornography, public sex, and commercial sex.”⁵ While this did not occur in Canada – perhaps because the Christian right was not politically active in Canada in the way it was/is in the United States – critics of power feminism in Canada have nonetheless linked the movement with conservative sexual morality.

In her analysis of the LEAF factum submitted to the Supreme Court in *Butler*, Lise Gotell discusses these not so strange bedfellows.⁶ Gotell’s claim is somewhat different from the suggestion made here that they share a similar epistemic structure. Gotell suggests that their position, which she refers to as ‘feminist foundationalism’, like that of the social puritans on the right, also stems from conservative sexual morality.⁷

Is Gotell correct to suggest that feminist foundationalism stems from conservative sexual morality? In fact some of the arguments made by LEAF in their *Butler* factum would suggest otherwise,⁸ as would their position in *Little Sisters*.⁹ Instead it may be that

formation ie closure, completeness, at any given moment should be possible. See the discussion of Ernesto Laclau’s work on meaning formation and closure in Chapter Seven for a greater exposition of this point.

⁵ Janet Halley, *Split decisions: Taking a Break from Feminism*, (Princeton University Press: Princeton, 2006) at 29.

⁶ Brenda Cossman, Shannon Bell, Lise Gotell & Becki L. Ross, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision*, (Toronto: University of Toronto Press, 1997).

⁷ This is directly contradictory to what feminists, such as LEAF interveners, have claimed. Indeed, they declared *Butler* a victory, in part, *because* of its purported rejection of sexual morality in favour of concerns regarding women’s equality.

⁸ *R v. Butler*, [1992] 1 SCR 452 (Factum of the Intervener LEAF at para. 7).

⁹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Factum of the Intervener LEAF). Admittedly there may also have been intra group politics, stemming from tensions between the lesbian faction and the straight faction of the group, motivating their position in *Little Sisters* or even a response to the critique they received from ‘pro-sex’ feminist and queer positive theorists post-*Butler*. Nonetheless, LEAF’s position in *Little Sisters*, at least as it pertains to lesbian pornography, can hardly be described as reflecting a conservative sexual morality.

the foundationalism in ‘feminist foundationalism’ stems simply from the fact that power feminism is a structural theory.

Power feminism is structural. The object of its critique is in every sense premised on the assertion of the following claim; society is structured in the following manner:

$$\frac{\textit{Male}}{\textit{Female}}^{10}$$

The difficulty with a structural theory is that it tends to produce a totalizing meta-narrative. The problem with meta-narratives is that they rely on universal claims. Universal claims, in turn, are founded on the possibility of objectivity. Claims of objectivity in the context of sexuality at some point in the analysis are underpinned by a particular sexual morality. The power feminist meta-narrative inevitably excludes perspectives and sexual realities not in keeping with its ideals or objective truths.

For example, a legal approach which starts from the premise that women, because of social realities such as economic deprivation, or social conditioning and false consciousness, can never truly consent to, for example, loveless sex, or involvement with pornography or consensual sadomasochism or prostitution is dogmatic, paternalistic and silencing for many women. It is a legal approach that refuses or fails to operate outside of the structure that it has claimed as both universal and universally the target of its critique.

Power feminism identifies $\frac{M}{F}$ as problematic. Its aim is to, if not invert this dynamic, at least redistribute its power. It uses constructivist arguments to ‘deconstruct’ the essentialist assumptions about masculinity, femininity and (hetero)sexuality that

¹⁰ The articulation of power feminism’s structural foundation as $\frac{M}{F}$ is borrowed from Janet Halley, *Split Decisions*, *supra* note 5 at 17. In *Split Decisions* Halley summarizes feminism in general as involving three fundamental claims: “m/f, m>f and carrying the brief for f”. By $\frac{M}{F}$ she is referring to power feminism’s critique of systemic male subordination of female.

perpetuate $\frac{M}{F}$. Its failure to disaggregate itself from sexual morality arises because it relies for its foundation on universal claims – assertions of objective truth – about this structure. In doing so is it unable to introvert its constructivist analysis (regarding the social contingency of sexuality) to allow conceptual space to challenge those claims it identifies as ‘truths’. The problem is that even if Ginger were to lead and Fred were to wear the heels, it may not be enough to simply dance the steps in reverse.

As suggested in the introduction to Chapter Two, once a constructivist understanding of sexuality has been adopted it becomes impossible to coherently defend an objective perspective on any aspect of sexuality. Once one acknowledges that the meaning of sexuality is socially constructed it becomes impossible to make objective claims of truth about sexuality. It becomes harder, with this conceptual approach to make legal distinctions about good sex and bad sex, and to create laws oriented towards protecting sexual integrity if sexual integrity and good sex cannot be objectively identified, or defined. This is because of what I describe in Chapter Seven as the paradox of queer theory. Power feminism avoids this paradox by anchoring its constructivist claim in a universal structural claim about inequality. However, in avoiding it, it creates its own paradox; it creates an inability to coherently detach from first person ethics – in this context, from sexual morality.¹¹

¹¹ It also unnecessarily confines power feminists to one type of argument - the equality argument. See for example LEAF's factum in *M.K. v. M.H.*, [1992] 3 SCR 6 where they frame their argument entirely based on a section 15 equality analysis and only then go on to offer the Court a very insightful and useful argument – one that was very contextual but not at all related to section 15 of the *Charter* – concerning the need to change limitation periods for tortious causes of action stemming from allegations of incest. The contextual arguments upon which the Court in *M.K. v. M.H.* based their decision to approach limitation periods differently in cases involving childhood sexual abuse directly mirrored the contextual arguments that LEAF made in their factum. The majority, at para.15, concluded in one sentence that it was unnecessary to address LEAF's constitutional arguments regarding section 15.

As will be discussed below, a legal approach which incorporates a social constructivist understanding of sexual violence into a broader conceptual framework which continues to conceptualize sexuality from an essentialist perspective imbued with sexual morality creates problematic decisions such as the majority opinion in *Norberg v. Wynrib*, or the decision in *Little Sisters*.

II. *Norberg v. Wynrib* – Desiring The Drug Not The Doc

Norberg v. Wynrib,¹² a civil case involving a 33 year old claimant who sued her 80 year old male doctor for negligence, battery and breach of fiduciary duty, was considered a victory by feminists. It was heralded as “a milestone in the legal history of sexual abuse litigation”.¹³ Like in *Butler*, LEAF also intervened in this case, and like in *Butler* the Court again approached the sexual interactions involved as issues of equality, embracing concepts such as power imbalance, trust and unconscionability to characterize the sexual relationship between the litigants. The majority opinion was written by Justice LaForest, with concurring judgments by Justice McLachlin (with Justice L'Heureux-Dubé) and Justice Sopinka. The decision touches upon issues of consent, commercial sex, tort law, fiduciary duty, and sexual assault.

In her early twenties Laura Norberg became addicted to pain killers after recovering from a dental problem. For a period of time she obtained the drugs she sought from various doctors and from her sister; eventually she began seeing Dr. Wynrib, an elderly medical practitioner. Using a variety of pretexts, she obtained prescriptions for painkillers from him for some period of time until he confronted her about her drug usage and she admitted that she was addicted to the drugs he had been prescribing. Upon this admission,

¹² [1992] 2 S.C.R. 226.

¹³ Jan Cowie, “Difference, Dominance, Dilemma: A Critical Analysis of *Norberg v Wynrib*” (1994) 58 Sask. L. Rev. 357 at 358.

he advised her that if she was “good to him he would be good to her” and pointed upstairs to his apartment.¹⁴

Norberg refused his offer and sought drugs from other doctors. However, eventually her other sources dried up and she returned to see Wynrib. On several occasions over the course of the following year Norberg would allow Wynrib to fondle her and simulate intercourse with her in exchange for prescriptions. After a time, she told him that she needed help with her addiction but instead of helping her he advised her to “just quit”.¹⁵ Norberg eventually, on her own initiative, attended a rehabilitation centre and was able to resolve her addiction.

She later sued Wynrib for sexual assault, negligence, breach of fiduciary duty and breach of contract. At trial, she admitted that she “played” on the fact that he liked her and that she knew throughout the relationship that he was lonely.¹⁶ The action was dismissed at trial and on appeal and Norberg appealed further to the Supreme Court of Canada. All members of the Court found for Ms. Norberg, but on the basis of different causes of action. Justice LaForest found liability on the grounds of battery. Justice McLachlin (as she then was) based liability on breach of fiduciary duty.¹⁷

For Justice LaForest the issue was one of consent and whether it was vitiated. For Justice McLachlin, that she consented was irrelevant – Dr. Wynrib breached his fiduciary duty and was liable on that basis. Justice LaForest, for the majority, having found that Wynrib’s conduct constituted sexual battery, determined that it was unnecessary to rule with respect to the other causes of action.

¹⁴ *Norberg v. Wynrib*, *supra* note 12 at para. 4.

¹⁵ *Ibid.* at para. 8.

¹⁶ *Ibid.* at para. 6.

¹⁷ Justice Sopinka also wrote a concurring opinion. He found that Wynrib’s conduct was negligent and established liability on that basis.

The tort of battery refers to the intentional infliction of unlawful force on another person; intentional touching will not be battery where the person touched has consented to the touch. In other words, battery is the intentional touching of one person by another, if that touch was not consensual. However, even if consent to the touch was explicitly or implicitly provided, such consent will be vitiated if it was obtained through force, or the threat of force, or through fraud or deceit or where it was given under the influence of drugs.¹⁸

Norberg agreed to participate in the sexual acts in exchange for drugs. There was no physical force perpetrated or threatened by Wynrib; nor was Norberg found to be under the influence of the drugs to which she was addicted when her consent was provided. However, Justice LaForest found that the factors vitiating the consent defence were not limited to these:

In my view, this approach to consent in this kind of case is too limited. As Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (19th ed. 1987), at pp. 564-65, put it: "A man cannot be said to be 'willing' unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will". A "feeling of constraint" so as to "interfere with the freedom of a person's will" can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.¹⁹ (emphasis added)

¹⁸ *Norberg v. Wynrib*, *supra* note 12 at 27.

¹⁹ *Norberg v. Wynrib*, *supra* note 12 at 27.

This is a significant finding. It is also consistent with the power feminist analysis submitted to the Court in this case by LEAF.²⁰ It is recognition of the basic claim that sex is about power and that as such, an inquiry into the power dynamics at play is required to accurately assess the authenticity of consent given in a particular sexual encounter. Where Justice LaForest's reasoning becomes problematic is in how he structures this inquiry into the power dynamics at issue.

Justice LaForest based his decision on principles of unconscionability and inequality of bargaining position as borrowed from the law of contract. He determined that in circumstances where two parties to a sexual encounter are not of equal bargaining position (which he suggests will typically be the case in special power dependency relationships²¹) and where the sexual relationship is exploitative, consent is vitiated. Exploitation, he determined, will be established based on community standards. He noted that contracts involving unequal parties will be considered exploitative where the transaction is sufficiently divergent from community standards of *commercial morality*.²²

Drawing a direct analogy to sexual battery in the next sentence, he suggested that "if the type of sexual relationship at issue is one that is sufficiently divergent from community standards of conduct, this may alert the court to the possibility of exploitation."²³ While he did not actually specify that it was community standards of *sexual morality* to which he was referring, it is difficult to imagine that he was referring to anything else, particularly given his direct analogy to commercial morality and his finding that the

²⁰ The LEAF factum focused particular attention on the battery (sexual assault) claim; less consideration was given, in their factum, to the breach of fiduciary duty and negligence claims.

²¹ By 'special power dependency relationships' he means doctor-patient, teacher-student, or lawyer-client type relationships.

²² *Norberg v. Wynrib*, *supra* note 12 at 37.

²³ *Ibid.* at para. 40.

sexual relationship here was exploitive because the community would find it “disgraceful” and “sordid”.²⁴

In this case he found that Wynrib’s medical knowledge, combined with his knowledge of Norberg’s drug addiction and his ability to prescribe drugs gave him power over her. He also found, as noted, that because the community (and the medical profession) would consider the sexual conduct ‘disgraceful’ and ‘sordid’, it had been established that the relationship was exploitive. As such he determined that Dr. Wynrib had committed sexual battery; that is to say, the sexual relationship between the parties was not consensual under tort law.

Unfortunately, despite his acknowledgment of the power dynamics at play in a sexual relationship of this sort, Justice LaForest’s decision gives with one hand and takes away with the other. To be more precise, he recognizes the importance of protecting women’s sexual integrity, while simultaneously undermining it. There are three significant and interrelated difficulties with his reasoning: i) by analogizing the sexual relationship between the parties to a contract and then using principles of contract law to develop his reasoning he obscures the complexity of sex, and ignores the important element of affectivity; ii) by concluding that the sexual relationship between the parties was non-consensual he denies recognition of the very autonomy he attempted to recognize;²⁵ iii) by

²⁴ *Ibid.* at para. 44.

²⁵ Certainly Justice LaForest’s reliance on tort evidences his intention is to recognize the importance of (women’s) autonomy. As he notes, at 27, “the concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will.” Indeed, the very premise of the tort of battery is one of autonomy. See *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, [2000] 1 SCR 551 at para. 15: “We should not lightly set aside the traditional rights-based approach to the law of battery that is now the law of Canada. The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy.” Another critique of his decision is to suggest that it protects a conception of autonomy which is inadequate. It protects a conception of autonomy as ‘freedom from’ – a conception which were he to understand

relying upon community standards of tolerance to determine whether or not a sexual relationship is exploitative his reasoning is unduly moralistic.

Attempting to apply the principles of contract law and the reasoning underpinning these principles to a sexual interaction results in an account of sex which is moralistic and which is not reflective of many women's sexual realities. As Justice McLachlin notes in her concurrence, the doctrines of tort and contract do not "capture the essential nature of the wrong done to the plaintiff. Unquestionably, they do catch aspects of that wrong. But to look at the events which occurred over the course of the relationship between Dr. Wynrib and Ms. Norberg from the perspective of tort or contract is to view that relationship through lenses which distort more than they bring into focus."²⁶ Instead, Justice McLachlin based her finding on breach of fiduciary duty.²⁷

Justice LaForest's analogy to contract law and relationships involving an inequality of bargaining power obfuscates the complexity and nuance that sex often entails. Contract law, Justice LaForest noted, has developed doctrine to ensure that where

autonomy in a Razian sense, or in the sense advocated by Drucilla Cornell in *The Imaginary Domain*, or Nicola Lacey in "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law" (1998) 11 Can. J.L. & Juris. 47" would appear impoverished.

²⁶ *Norberg v. Wynrib*, *supra* note 12 at 50.

²⁷ Doctrinally this move is significant. While there was at this point in the law of fiduciaries no question that a doctor – patient relationship could give rise to fiduciary obligations (*McInerney v. MacDonald*, [1992] 2 S.C.R. 138) the law was still unsettled as to what the nature of such obligations would be. In *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, Justice Sopinka writing for the majority, held that fiduciary obligations "must be reserved for situations that are truly in need of the special protection that equity affords". He suggested that the duty ought to be reserved for matters akin to the duty of confidentiality. Preferring instead Justice Wilson's earlier opinion in *Frame v. Smith*, [1987] 2 S.C.R. 99, Justice McLachlin held that the principles of fiduciary obligation should not be restricted to such narrow legal and economic interests but rather should also be used to defend fundamental human and personal interests. Justice McLachlin's approach to fiduciary duty in the context of sexual contact was adopted by the majority less than a year later in *M.K. v. M.H.*, *supra* note 11 where the Court, with Justice LaForest writing for the majority, found a father liable for breach of fiduciary duty based on incestuous sexual abuse he perpetuated against his daughter. Justice LaForest quoted approvingly from Justice McLachlin's decision in *Norberg v. Wynrib* although he continued to rely on tort law in addition to finding liability under breach of fiduciary duty. Of course, a finding of battery in *M.K. v. M.H.*, a case involving the sexual assault of a child, is not problematic in the way that such a finding is problematic in *Norberg v. Wynrib*. The issues that arise in *Norberg v. Wynrib* regarding a finding that consent was vitiated would not arise in *M.K. v. M.H.*, where the child lacked capacity to consent to sexual contact with the father in the first place.

contracting parties do not share equal bargaining authority the “weaker” party will be protected. “The doctrines of duress, undue influence, and unconscionability have arisen to protect the vulnerable when they are in a relationship of unequal power. For reasons of public policy, the law will not always hold weaker parties to the bargains they make.” He goes on to suggest that this same notion of unconscionability should be applied in the context of sexual battery.

One problem with this approach is that the rules, the social mores, the types of communication, the criteria for evaluation, the intent of the parties, the social attitudes, the law, the interpersonal dynamics and the power imbalances involved in negotiating a sexual encounter are not only different from those involved when negotiating for *anything* else, but complex relationships involving not easily discernable, let alone dissected, power imbalances are likely the norm and not the exception when it comes to sexual interactions.

Think, for example, of a stay at home mother of three who is financially and socially dependent on her husband, or think about an unpopular high school girl in the back seat of the captain of the hockey team’s car. Nor is gender the only salient factor implicated in these imbalances. Consider, for example, a young woman having sex with another much more experienced woman for the first time, or a middle aged gay man having sex with a much younger and more attractive twenty –five year old man, or think about a desperately in love man who knows his girlfriend is having an affair; perhaps think about a sex worker charging \$1500 to spend the night with a lonely and sexually disabled client, then think about the drug addicted sex worker charging \$20.00 to give a blow job to a drunk college student.

While the ideal conditions for any contractual relationship may be rare, perhaps it is possible to identify what those conditions would be and to, as a result, go about defining finite rules to govern the human behavior of contracting generally. Not so in the case of sexual negotiations.

There are problems with borrowing from contract law in a legal circumstance such as this. First, it is disingenuous. Justice LaForest had at this point in his analysis already indicated that ‘the community’ would find the exchange of sex for drugs ‘sordid’ and ‘disgusting’. One wonders what trades – outside of love, commitment or mutual orgasm - the community he draws on would find not to be exploitative. Adopted in its entirety, his position exposes a great number of sexual actors to tortuous liability for sexual battery.

Second, while it may well be possible to identify a balanced contractual relationship in other contexts and instantiate through doctrine a determinate set of rules to govern those relationships, attempts to do so in the context of sexuality seem less plausible. Sex, even when it is not dirty, is quite often messy.

This is not to suggest that the issue of power imbalances in sexual relationships is not crucially important to the legal regulation of sex or the concept of consent, nor obviously is it to suggest that there can not be legally enforced rules regulating sexual conduct in a society, but rather to suggest that Justice LaForest’s analysis is not a particularly helpful way to approach the issue. It is difficult to imagine a sexual interaction in which the parties are in completely the same position with respect to one another- that is to say, in which the exchange is purely an exchange of sexual ‘goods’.

Donald Dripps argues that there is no possibility of true parallel mutuality of this type in sexual interactions.²⁸ There is nothing to suggest, he argues, that the experience of sex for women is categorically similar to the experience of sex for men. Let alone the experience of sex by any given woman or any given man.²⁹ “Whether one cites feminist theorists or the judgment of Tiresius, there is no reason to believe that the exchange of a male orgasm for a female orgasm is any more symmetrical than the exchange of orgasms for money, affection, or security.”³⁰

The hypothetical sexual scenario that he suggests most closely approximates true mutuality would be the situation of two men, unknown to each other, who have anonymous sex, no strings attached, in a bathhouse. “Here is sex at its least constrained.”³¹ It is not he suggests, “influenced by threat of force or by promise of gain; their encounter has no history and no consequence. Their common gender spares us any difficulty with whatever domination may inhere, as a result of social injustice, in gender itself. They make love solely because they find each other sexually attractive.”³² But, he goes on to point out that, “[e]ven the bathhouse encounter is not the product of justly distributed erotic assets.”³³ Even it, he argues, is constrained; “the participants may diet or exercise but fundamental aspects of their bodies are unchangeable. One of them must

²⁸ See Donald Dripps, “Beyond Rape: An Essay On the Difference Between The Presence of Force and The Absence of Consent” (1992) 92 Colum. L. Rev. 1780.

²⁹ *Ibid.* at 1790.

³⁰ *Ibid.* at 1790.

³¹ *Ibid.* at 1788.

³² *Ibid.* at 1788. (His choice to describe their encounter as ‘making love’ is curious. It seems in tension with his overall argument. It also seems unlikely that very many men who have sex in bathhouses would describe it as ‘making love’. Anecdotally, the sense I have from those I have spoken with, is that men who frequent bathhouses do not typically go in search of love and those that do end up sorely disappointed. Setting aside his odd choice of colloquialism, his hypothetical is nonetheless illuminating.)

³³ *Ibid.* at 1791.

be more attractive, or more eager for sex, or know more about the possibility of doing better by waiting, than the other.”³⁴

Justice LaForest’s approach, by attempting to vitiate the consent that Norberg “undoubtedly gave”³⁵ is an attempt to avoid the messy acknowledgment that sex is very often, if not always, about more than the equal exchange of erotic experiences.

Unfortunately, to ignore this messiness is to embrace a conception of sexuality which is simplistic and which ignores both the insights of Tiresius and the lived realities of many sexual actors. While his approach is consistent with power feminist ideology -

MacKinnon argues that “consent in sex ... is supposed to mean freedom of desire expressed, not compensation for services rendered”³⁶ - he, like MacKinnon, relies on an assumption that is at best questionable.

Why should we assume such a constricted conception of consent? Is consent really always about desire? Sometimes people trade sex for drugs...or for money... or for a warm place to sleep. People tend to do that when they are hard up for drugs...or money... or a warm place to sleep. Laura Norberg was hard up for drugs. She traded some sex for drugs. As Justice McLachlin suggested, there is no doubt that she consented to the sexual activity and to engage in reasoning which attempts to show otherwise really just muddies what are already nasty waters.³⁷

³⁴ *Ibid.* at 1789.

³⁵ This is taken from Justice McLachlin’s concurrence, acknowledging the finding of the trial judge (*supra* note 12 at para. 57).

³⁶ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press: Cambridge, Massachusetts, 1987) at 11.

³⁷ “Tort and contract can provide a remedy for a physician's failure to provide adequate treatment. But only with considerable difficulty can they be bent to accommodate the wrong of a physician's abusing his or her position to obtain sexual favours from his or her patient. The law has never recognized consensual sexual relations as capable of giving rise to an obligation in tort or in contract. My colleagues, with respect, strain to conclude the contrary.” *Norberg v. Wynrib*, *supra* note 12 at 73.

Justice LaForest's conclusion that Norberg did not consent because her desire was for the drug not the doc is directly correlated with an idealistic and moralistic account of female sexuality and sexual innocence – an account that unfortunately dichotomizes women into victims and whores, tending to protect the former and ignore the latter.³⁸ In order to address the sexual wrong which most certainly occurred in this case without facing the, perhaps not so nice, fact that people sometimes trade sex for drugs Justice LaForest constructed a woman without any sexual agency because of her less than ideal circumstances. Sexual agency is an essential element of sexual integrity.

The moral implications of his reasoning are evidenced by what he identifies as the “determining factor”³⁹: the fact that Wynrib and not Norberg initiated the sexual exchange. In other words, he establishes a legal remedy precariously contingent on Norberg's relative sexual innocence - somewhat of a house of (playboy?) cards. Under Justice LaForest's reasoning if Laura Norberg had been the one to suggest the sex for drugs arrangement this same doctor who undoubtedly took gross advantage of his drug addicted patient would have escaped liability.

Alternatively, Justice McLachlin was able to acknowledge the sexual wrong and provide a remedy without denying Norberg's capacity for sexual agency or perpetuating the victim versus the whore dichotomy; under Justice McLachlin's breach of fiduciary duty finding, Norberg can be a woman who traded her doctor some sex for drugs and *still* be entitled to compensation. However, in order to make this finding Justice McLachlin

³⁸ It should be noted, MacKinnon's assumption that consent is supposed to mean freedom of desire expressed is not premised on an idealized and romantic account of sex – no one would accuse her of that. See for example Leo Bersani, “Is the Rectum A Grave?” October, 43 AIDS: Cultural Analysis/Cultural Activism (Winter, 1987) 197 where he discusses the very unromantic and idealized account of sex provided by MacKinnon and Andrea Dworkin.

³⁹ Justice LaForest stated, at para 46, “it seems to me that the determining factor in this case is that he instigated the relationship -- it was he, not the appellant, who used his power and knowledge to initiate the arrangement and to exploit her vulnerability” (*Norberg v. Wynrib*, *supra* note 12).

had to acknowledge the perhaps less than pleasant reality that Norberg *chose* to trade sex for drugs. Justice McLachlin did not question the fact that Wynrib took advantage of Norberg (and that because he did so in his capacity as a doctor he was liable⁴⁰) but nor did she question Norberg's sexual autonomy by suggesting she did not have the capacity to consent.

Under Justice LaForest's reasoning it was still necessary to inquire into the cleanliness of her hands – had he been unable to vitiate her own 'sexual naughtiness' under his consent analysis he would have had to bar recovery under the doctrine of *ex turpi causa*. Justice McLachlin, rejects outright the relevance of moral assessments regarding her sexual conduct:

The short answer to the arguments based on wrongful conduct of the plaintiff is that she did nothing wrong in the context of this relationship. She was not a sinner, but a sick person, suffering from an addiction which proved to be uncontrollable in the absence of a professional drug rehabilitation program.... It matters not that she walked into his office in an attempt to obtain drugs to which she was addicted. Even if that purpose had not been merely symptomatic of her illness, but in some sense immoral, Dr. Wynrib's conduct in exploiting her dependency for his own ends would have in any event constituted a breach of that aspect of his fiduciary obligation enshrined, thousands of years ago, in the words of the Hippocratic Oath.⁴¹

The final difficulty with Justice LaForest's reasoning is his reliance on community standards to determine whether a relationship is exploitative. What does it mean to suggest that whether a sexual encounter is considered exploitative will depend on community standards of morality? Why would a determination of exploitation turn on whether or not the community would consider the sexual conduct to be 'sordid' and 'disgraceful'? Taking into consideration the need to protect the sexual integrity of all

⁴⁰ "It is not disputed that Dr. Wynrib abused his duty to the plaintiff. He provided her with drugs he knew she should not have. He failed to advise her to enrol in an anti-addiction program, thereby prolonging her addiction. Instead, he took advantage of her addiction to obtain sexual favours from her over a period of more than two years." *Norberg v. Wynrib*, *supra* note 12 at 57.

⁴¹ *Norberg v. Wynrib*, *supra* note 12 at 90.

sexual actors in a community and the desire to protect *all* sexual actors from sexual harm, contrast his analysis with the harm based approach adopted by Chief Justice McLachlin in *R v Labaye*.⁴²

His reliance on community standards of tolerance to ascertain whether a sexual encounter is exploitative creates the possibility for a moralistically driven inequality in the treatment of claimants. Those whose sexual choices do not jive well with the sexual mores of the majority (such as, perhaps, sex workers) and those whose relationships of inequality are so entrenched in the social subconscious of dominant society that ‘the community’ would not recognize the relationship as sexually exploitative (such as, perhaps, women in traditionally gendered marriages), will be treated differently from other claimants on the basis of sexual morality assessments regarding the nature of the relationship. Legal determinations as to which sexual interactions are exploitative, and which are not, should not be based on moral distinctions founded on majoritarian sexual morality.

It is not that sexual relationships of the types just suggested necessarily should be treated the same as doctor-patient – or other special dependency type – relationships. It is that if they are to be considered different under the law the reason for the distinction ought not to be based on sexual morality. There is something deeply troubling about a legal standard for consent to sexual contact that is dependent upon a community standard of tolerance approach rather than a harm based approach. It is the sort of reasoning which engenders discriminatory laws such as a higher age of consent for anal intercourse than for vaginal intercourse under the *Criminal Code* and a historical definition of rape that

⁴² [2005] 3 SCR 728. See chapter 5 for a discussion of this decision.

denied a wife the legal ability (under the criminal law) not to consent to sexual intercourse with her husband.⁴³

In the end then, the manner in which Justice LaForest incorporates the ideals of power feminism into his reasoning results in an analysis that is disempowering for women; the power feminist claim of objective and universally applicable truth regarding consent lends itself to Justice LaForest's reasoning.

Justice McLachlin's reasoning does not deny women's sexual autonomy. It does not refute Norberg's sexual agency. Under her breach of fiduciary duty analysis Norberg's capacity, as a drug addicted woman, to consent is affirmed. Justice McLachlin acknowledges that she consented to the sexual contact. She also acknowledges that Norberg consented to the doctor-patient relationship – she voluntarily *gave* power in the context of this very specific relationship. The imbalance then stems from her status as a patient, a status men also hold, and not her status as a woman (or a drug addict). In fiduciary relationships, “the relation may expose the entrustor to risk even if he is sophisticated, informed and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation. (emphasis added).”⁴⁴

The fact of inequality of bargaining positions in sex should be recognized by the Court. It was prudent to recognize the power imbalance that exists between a patient and a doctor. However, it is one thing to attach legal prohibitions or liability to a specific social arrangement (such as doctor-patient relationships) which is what Justice McLachlin does in this case – it is quite another to liken sexual interactions to contracts

⁴³ ...or for that matter the disparate application of the mistaken belief in consent defence to sexual assault in cases where the accused was the spouse of the complainant at the time of the offence – a discrepancy that seems to reflect some of this traditional sentiment regarding the sexual accessibility of wives. See Chapter Four for substantiation of, and a discussion on, this point.

⁴⁴ *Norberg v. Wynrib*, *supra* note 12 at 60.

and then attempt to regulate them through the legal principles developed to regulate contracts. The latter, as discussed above, results in an idealized (and essentialist) notion of sexuality and legal reasoning based on sexual morality – reasoning which does not protect the interests of many women and which at an analytical level denies sexual autonomy thus threatening rather than protecting the community’s interest in the promotion of sexual integrity.

III. *Little Sisters*: You Can Take The Porn Out Of Context But You Shouldn’t Take The Context Out of the Porn

The Supreme Court of Canada’s decision in *R. v. Butler* was not well received among gay and lesbian activists and theorists.⁴⁵ Their fear was that the *Butler* decision’s injection of the harm principle into the definition of indecency would do nothing to prevent the discriminatory censorship of lesbian and gay erotic and pornographic materials.⁴⁶ They argued that in fact, maintaining any link to moral corruption in the definition of obscenity – which the Court did by identifying moral corruption “of a certain kind” as that which leads to the detriment of society- would result in the targeting of gay and lesbian materials. After all they argued, “[l]esbians and gay men have long experience with what the authorities think about “moral corruption”⁴⁷ as it pertains to sexual minorities. It turned out to be a well founded fear.

Unfortunately, as the post-*Butler* experience of businesses such as Little Sisters Book and Art Emporium in Vancouver and Glad Day Books in Toronto demonstrated, “lower

⁴⁵ See Brenda Cossman, “Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*.” 40 Osgoode Hall L.J. 223 (2003); Bruce Macdougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*, (University of Toronto Press: Toronto, 2000); Leslie Green, “Men in the Place of Women, from *Butler* to *Little Sisters*” reviewing *Gay Male Pornography: An Issue of Sex Discrimination* by Christopher Kendall, (2005) 43 Osgoode Hall L.J. 473.

⁴⁶ See Brenda Cossman, Shannon Bell, Lise Gotell & Becki L. Ross, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision*, *supra* note 6 for a discussion of the response to *Butler* among gay, lesbian and queer scholars.

⁴⁷ Green, “Men in The place of Women”, *supra* note 45 at 475.

courts had no difficulty in finding that even the mildest lesbian and gay pornography involved the undue exploitation of sex” and “[c]ustoms inspectors continued their pattern of homophobic seizures, nearly putting these [important community bookstores] out of business.”⁴⁸

LEAF’s argument in *R v Butler*⁴⁹ was informed by MacKinnon’s theory that the inequality between men and women is itself sexualized. LEAF was motivated by individual and societal inequities between men and women and their argument constituted a power feminist analysis of pornography in which pornography, by depicting sexual violence against women, perpetuates sexual violence against women through its reinforcement of the male-female gender hierarchy.⁵⁰

In *Butler*, Justice Sopinka’s application of these ideas regarding the harm caused by pornography clearly reflected the Court’s incorporation of this gender analysis:

[T]here is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading and dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole... Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or what is perhaps debatable, the reverse.⁵¹

In *Little Sisters*, Justice Binnie determined that the “portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its

⁴⁸ *Ibid.* at 476.

⁴⁹ *Supra* note 1.

⁵⁰ See Chapter 5 for a discussion on this point.

⁵¹ *Butler*, *supra* note 1 at paras. 52, 61.

reassurance to the viewer that the victim finds such conduct both normal and pleasurable.”⁵²

Is Justice Binnie’s analysis in *Little Sisters* a gendered one? Does it invoke the same power feminist influenced contextual factors at play in Justice Sopinka’s *Butler* decision? All of which is to ask, what harm is the Court in *Little Sisters* concerned with preventing? Is it the harm caused by the systemic hierarchical relationship between men and women and the manner in which rape (and consequently depictions of rape) perpetuates this hierarchy and thus a particular social construction of gender relations and identity (*ias* MacKinnon would argue) or is it the potential increase in sexual violence in the gay and lesbian community perpetuated by those gays and lesbians exposed to the “portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing [same sex] sex slave”?

The former type of harm would suggest that Justice Binnie was engaged in the same type of feminist analysis of pornography that the Court adopted in *Butler*. Here the argument would be that while gay and lesbian pornography does not depict the sexual subjugation of women, it does portray the sexual subjugation of the feminine subject and that this too perpetuates attitudes of a sexualized inequality between men and women which manifests as sexual violence.⁵³ There are a number of essentialist assumptions about sex underlying this argument. It assumes that there are feminine sexual acts and masculine sexual acts. That is to say, that men penetrate and women are penetrated, or as

⁵² *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, *supra* note 9.

⁵³ It was likely this perspective that motivated the feminist organization Equality Now to intervene on behalf of the government. See *Factum of Equality*. For an articulation of this argument see Janine Benedet, “*Little Sisters Book and Art Emporium v. Canada (Minister of Justice): Sex Equality and the Attack on R v Butler*” 39 *Osgoode Hall Law Journal* (2001) 187.

MacKinnon would say – man fucks woman – subject verb object.⁵⁴ Here the assertion would be masculine fucks feminine.

This reasoning is unavoidably heterosexist. As Bruce MacDougall notes, “domination of one gender by another is not a principal concern of gay and lesbian pornography... Gay men for instance who are getting fucked should not be thought of as women or as representing another gender from the man who is fucking.”⁵⁵ In other words, it is not masculine fucks feminine. It is man fucks man – subject verb subject - and it is heterosexist and essentialist to superimpose upon it, or interpret it through, a male/female, heterosexual paradigm.

But was this Justice Binnie’s theoretical approach in *Butler*? In fact, it would seem that this was not his approach.

Justice Binnie focused on the alleged harm to gays and lesbians posed by a potential increase in sexual violence in the gay and lesbian community perpetuated by those gays and lesbians exposed to sado-masochistic pornography. This is evidenced by his reliance on empirical research suggesting that the incidence of sexual violence in gay and lesbian communities equals that in heterosexual communities and by argument that gays and lesbians are equally deserving of protection against sexual violence.⁵⁶ Justice Binnie gave the following response to LEAF’s argument that same sex sado-masochistic

⁵⁴ Catharine MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory”, *Signs*, Vol. 7, No. 3, Feminist Theory. (Spring, 1982) at 541.

⁵⁵ Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada*, *supra* note 45 at 50.

⁵⁶ He quoted with approval from Professor Neil M. Malamuth “[t]here are studies suggesting that within homosexual interactions the frequency of sexually coercive acts as well as non-sexual aggression between intimates occurs at a frequency quite comparable to heterosexual interactions” (*Little Sisters*, *supra* note 9 at para. 199). He also noted that “Equality Now took the view that gay and lesbian individuals have as much right as their heterosexual counterparts to be protected from depictions of sex with violence or sexual conduct that is dehumanizing or degrading in a way that can cause harm that exceeds community standards of tolerance” (at para. 63).

pornography is different from heterosexual sado-masochistic pornography and that *Butler* failed to recognize this difference: “violence against women was only one of several concerns, albeit an important one, that led to the formulation of the *Butler* harm-based test, which itself is gender neutral.”⁵⁷

This declaration that the *Butler* test is gender neutral is significant. Justice Binnie’s definition of obscenity and application of the *Butler* test in *Little Sisters* assumes that gay and lesbian individuals who view sado-masochistic pornography are at risk of developing an orientation towards violent sex. *Butler* involved an equality analysis. It situated heterosexual pornography in a specific social context – a context of systemic sex and gender hierarchy. In *Butler* the Court adopted the feminist assertion that degrading and dehumanizing depictions of women would perpetuate and sustain inequality between men and women - that such depictions would encourage sexist and misogynistic attitudes by men towards women and that they risked inducing some men to behave in a sexually violent manner towards women.

Little Sisters adopts both the finding in *Butler* that pornography can induce violent antisocial behavior and its underpinning assumption that a desire for sexual violence is socially contingent. However, it leaves behind the contextual analysis in which the *Butler* reasoning was situated. In other words, it leaves behind the equality analysis of the overarching systemic gender hierarchy in which the constructivist assumption about sexual violence was originally adopted by the Court.

To determine that viewing images of sexual violence perpetuated against women will, in a society systemically structured through sexuality as a gender hierarchy, influence sexual norms such that more men are oriented towards sexually aggressive behavior

⁵⁷ *Little Sisters*, *supra* note 9.

directed at women suggests a socially contingent conception of sexual violence. To determine that viewing images of sexual violence will, regardless of the broader social context, promote violent sexual tendencies fails to fully account for the social contingency of sexual violence.

Contrary to Justice LaForest's position or LEAF's position the approach to obscenity found in *Butler* should be considered neither gender neutral nor inherently gendered. The depiction of sexual aggression, sexual dominance, even sexual coercion by one muscular, hyper-masculine white man over another hyper-masculine white man, under a constructivist conception of sexual violence should be treated differently by obscenity laws than the depiction of sexual aggression between two men one of whom is disabled, or one of whom is very obviously racialized, or one of who is a prisoner of war and the other a U.S. Marine. In other words, it is not that gay or lesbian pornography should be exempt from laws regulating obscenity. It is not that same sex depictions of dominance or degradation never pose the type of harm power feminists and the Court in *Butler* attributed to heterosexual depictions of male over female sexual aggression, and sexual dominance⁵⁸. It is that if the law defines obscenity through principles of harm, on the basis that sexual conduct is socially contingent, then the law in determining that harm must give recognition to the particularity of the social context from which it arises.

Take for example the power feminist argument that even pornographic depictions that do not depict violence still result in the objectification of those filmed or photographed and that this too is harmful. Unless the law assumes that sexual objectification in and of itself is harmful – an argument that relies on sexual morality and an interest in protecting

⁵⁸ I am not adopting LEAF's argument in *Little Sisters* that gay and lesbian pornography is just *different* than straight pornography. I am arguing that for all pornography the broader social context in which the depictions are produced and viewed should be taken into account.

sex itself- then to assess potential harmful impact the law must consider who is being objectified and by whom and in what social context is the sexual objectification occurring.

Why is, as Justice Binnie suggests, the “portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave ... no less dehumanizing if the victim happens to be of the same sex”?⁵⁹ It is only “no less dehumanizing” if the source of the dehumanization is purely the sexual degradation itself. That is to say, if there is some *inherent* harm, some *essential* aspect of consensual sexual degradation itself that makes it dehumanizing.

The problem with the Court’s approach in *Little Sisters* is not their conception of sexual violence as socially contingent. Nor is the problem their continued reliance on the principle of harm established in *Butler*. The problem is their failure to fully appreciate the concept of sexual violence as socially contingent. This is a failure that, in the context of same-sex pornography, results in a definition, the moral focus of which, remains on protecting a particular account of sex (an account that can never involve boots and whips and leather bustiers let alone nipple clamps, orgasm denial and rape fantasy). This is a circumstance that inevitably directs the law’s attention towards propriety and away from integrity - an analysis that power feminism lends itself to, despite its attempts to do otherwise. It is a circumstance that leaves the door wide open for discrimination on the part of homophobic customs’ officials and heterosexist adjudicators. It is a legal analysis that, like Justice LaForest’s decision in *Norberg v Wynrib*, demonstrates the consequence of adopting a partial conception of sexuality as socially constructed within a conceptual

⁵⁹ *Little Sisters*, *supra* note 52 at para. 60.

framework that continues to rely on sexual morality in order to maintain a particular (moral) account of sex itself.

IV. Drawing Moral Distinctions

Just as the universal claim that the exchange of sex for money, affection or status does not constitute consent fails to sufficiently contextualize sexual interactions so too does a claim that sexual objectification, or sexual degradation is inherently harmful. A failure to fully contextualize sexual interactions results in an incomplete or partial conception of sexual violence as socially constructed. An incomplete or partial conception of sexual violence as socially constructed must turn somewhere to fill in the gaps. It turns to essentialist conceptions of sexuality. Essentialist assumptions about sex – being that they are essentialist – have a certain interest in protecting a particular account of sexuality. A particular account of sexuality suggests a particular sexual morality. Laws oriented towards protecting a particular sexual morality tend to focus more on sexual acts than on sexual actors – a tendency that does not promote further inquiry into the social factors, relationships, and power dynamics that constitute sexual norms, orientations and behaviors. It is circular. Essentialist conceptions promote essentialist conceptions. Because power feminism relies on universal claims involving objective truths it does not lend itself to breaking this cycle.

Recall that the notion of sexual integrity articulated in Chapter Four included not only freedom from sexual violation – in other words the freedom to say no – but in addition the ‘conditions for’ a community of sexual actors with the capacity for sexual integrity. This would include a broad but not unrestrained freedom to say yes. Cases such as *Little*

*Sisters*⁶⁰ and *Norberg v. Wynrib*⁶¹ as well as cases like *R. v. Mara*,⁶² *R. v. Tremblay*⁶³ and *Reference Re Prostitution*⁶⁴ discussed in the previous chapter, demonstrate how a constructivist conception of sexual violence that remains rooted in sexual morality does not sufficiently protect this particular aspect of sexual autonomy (and thus sexual integrity as a whole).

Integrity suggests wholeness, integration, and cohesion. Just as the liberty interest in the freedom to say no must be steadfastly protected, so too must legal conceptions of sexuality recognize the important interest in the ability and freedom to say yes. However, the ‘conditions for’ sexual integrity cannot be reduced only to notions of sexual liberty – whether that be the freedom to say no or the freedom to say yes. There is something more to the notion of integrity. Integrity also includes the quality of being principled. To act with integrity is to be principled. To have sexual integrity requires sexual principles – to have sexual principles is to make distinctions between good sex and bad sex. As has been discussed, this can be done based on sexual morality (first person ethics) or political morality (third person ethics).⁶⁵

An Ontario Court of Appeal decision from 1999 demonstrates well how jurisprudential reasoning can articulate limits on sexual autonomy and be conducive to promoting the ‘conditions for’ sexual integrity - including the production of a community of sexual actors with the capacity for lived sexualities that promote sexual integrity as a

⁶⁰ *Supra* note 9.

⁶¹ *Supra* note 12

⁶² *Supra* note 2.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Ronald Dworkin discusses the distinction between first person ethics and third person ethics in Ronald Dworkin, “Foundations of Liberal Equality”, in S. Darwall, ed., *Equal Freedom* (Ann Arbor: University of Michigan Press, 1995) 190. Dworkin’s distinction is also referenced at FN 3. The discussion of *R v Labaye* and suggestions for its future application in Chapter Five, reveal arguments in favour of political morality as the foundation upon which to draw distinctions between good sex and bad sex.

social good.⁶⁶ *R. v. B.E.* dealt with charges against a father under section 172 of the *Criminal Code* for “participating in sexual immorality thereby endangering the morals” of his children.⁶⁷ The appellant was convicted of endangering the morals of his two sons and two step-daughters. The appellant’s wife was also charged under section 172. The Crown relied on the following evidence to support the charge that the appellant had endangered the morals of his children:

On one occasion, the appellant and his wife allegedly engaged in sexual intercourse in the family swimming pool in the presence of the children. This evidence came from neighbors. The children could not recall any such incident.

The appellant and his wife engaged in various group sexual activities in the home and videotaped those activities. Copies of the videotapes were kept in the home.

The appellant's wife participated in lesbian sexual activity in the house. That activity was videotaped and copies of the videotapes were kept in the home.

The appellant videotaped his wife masturbating with a vibrator. There was evidence that M.W. saw that videotape.

The appellant videotaped himself masturbating and ejaculating on his wife. There was evidence that one of the children, J.E., was present when the video was made or that he saw the video at some point.

There were sexually suggestive photos of the appellant's wife in the home. There were pornographic videos and books in the home.

There were vibrators and other sexual devices in the home.

⁶⁶ *R. v. B.E.*, [1999] O.J. 3869. The reasoning in *R v B.E.* in many respects foreshadowed the Supreme Court of Canada’s reasoning in *Labaye*. While the Ontario Court of Appeal did not reject the community standards of tolerance test, they did adopt reasoning which did not directly employ community standards of tolerance but rather focused primarily, if not solely, on harm. They also, at para 42, implicitly distinguished it from the test they were adopting:

As a first step, the trier of fact will have to decide whether the child was aware of the conduct and was able to appreciate the conduct to the extent that it could influence the development of the child's value system. I do not regard this inquiry as significantly different than that required by the harm-based community standard of tolerance test. Like that test, this inquiry involves a determination of the risk of harm flowing from the conduct in question. In the case of the s. 172 inquiry, that harm is encompassed by the phrase "endangers the morals of the child.

⁶⁷ *Ibid.* at para. 1. Section 172 of the *Criminal Code* R.S.C. 1985 c. C-46 stipulates that “everyone who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence...”

The appellant and his wife placed sexually explicit advertisements in newspapers.⁶⁸

Section 172 invokes the concept of morality twice: it references the alleged sexual immorality of the accused and the potentially endangered morality of the child. The analysis in this appeal turned on whether the conduct endangered the morals of the child.⁶⁹ Justice Doherty of the Ontario Court of Appeal based his determination as to what type of conduct would endanger the morals of a child, not on considerations of sexual morality but as measured against a sense of political morality. Based on his reasoning the focus of the provision ought to be on conduct that could impede a child's

⁶⁸ *R. v. B.E.*, *supra* note 66 at para. 10.

⁶⁹ As noted, the Crown argued that placing sexually explicit advertisements in newspapers, engaging in group sex, possessing sexually suggestive photos, pornographic videos, vibrators and 'other sexual devices', videotaping sexual acts with one's spouse, and participating in 'lesbian sexual activity' constitutes 'immoral sexual activity' pursuant to section 172 of the *Criminal Code*, *supra* note 64. With the exception of the evidence that one of the children was present when the appellant and his wife videotaped him masturbating and ejaculating on his wife, there was no allegation that any of the sexual conduct occurred with, or in front of, the children. Evidence of sexual activity performed with or in front of one of his children should be approached and assessed separately from evidence that the couple owned sex toys, that his wife engaged in 'lesbian sexual activity' or that the couple placed ads in the paper. While assuming that the mere possession of a vibrator or participation in 'lesbian sexual activity' is so morally egregious such that any home in which it occurs is a home unfit for a child would be consistent with the Catholic Pope's edict on what constitutes child abuse it is not consistent, nor was it consistent in 1999, with either the substantive laws in Canada guaranteeing equality rights to gay and lesbian families nor to the principles of liberal democracy underpinning the Canadian legal system generally. Note the distinction between potentially labeling conduct sexually immoral such that it endangers the morals of a child where the child is involved in some way in the conduct – i.e. the context in which the act occurs makes it immoral (which is the manner in which indecency laws in Canada were, even prior to *Labaye*, intended to be interpreted) and identifying certain acts as sexually immoral and then discerning whether they succeeded in endangering the morals of a child. Accepting that these sexual behaviors are immoral, simply on their face and absent evidence of a problematic context, is an example of making assessments about good sex and bad sex based on assumptions about the moral essence of a particular sexual act. This is a problem perpetuated by the two-step approach to the structure of the provision itself. The Crown identified and led evidence on that behavior which it determined constitutes sexual immorality. The jury then made a finding of fact as to whether the behavior constitutes sexual immorality. The analysis only at that point shifted to whether the now determined to be sexually immoral conduct had resulted in an endangerment to the children's morals. Justice Doherty's appellate decision addressed only the issue of morality at the second stage – how to conceptualize the children's moral interest. The opportunity to articulate a conception of morality in the first instance of the provision – the sexual immorality of the parent- did not arise in this case. The jury had made a finding of fact regarding the appellant's sexual immorality and it was not open to Justice Doherty to address this issue.

ability to develop the values needed to operate a free and democratic society.⁷⁰ Justice Doherty defined the moral harm at issue under section 172 as a matter of political, and not sexual, morality:

...the concept of morality for criminal law purposes must be restricted to those core values which are integral to the existence of a free and democratic society - a society in which personal autonomy has priority except where the exercise of that autonomy poses a real risk of harm to others. In my view, conduct that endangers the morals of a child is that which poses a real risk that the child will not develop those values which are essential to the operation of a free and democratic society. The morals of a child will be endangered by sexual immorality where sexual conduct presents a real risk that the child will not develop an understanding that exploitive or non-consensual sexual activity is wrong. Similarly, if the conduct degrades or dehumanizes women, it endangers the morals of the child in that the child will not develop an understanding that all persons are equal and worthy of respect regardless of gender. Furthermore, to the extent that the conduct actively involves the child, it may endanger the morals of that child by leaving that him or her without a proper sense of his or her own self worth and autonomy. Finally, to the extent that the conduct imperils the child's understanding of parents' responsibilities to protect and nurture their children, it may also imperil the morals of a child.⁷¹

This case is a good example of the different aspects of sexual integrity that laws regulating sexual conduct must accommodate. The sexual conduct at issue, by the very nature of the provision (which regulates conduct in the home of the child) involves a site where sexual actors' autonomy interests are thought to be at their highest – the home. It also involves prohibitions aimed at protecting sexual actors whose sexual integrity is in its most vulnerable, developmental and dependent state – children. Does Justice Doherty's approach meet the challenge posed by this very obvious tension between privacy and protection? Does it do so in a manner that protects and promotes sexual integrity?

⁷⁰ *R v B.E.*, *supra* note 66 at para. 40.

⁷¹ *R v B.E.*, *supra* note 66 at para 41.

The appeal in this case was resolved on the basis that the trial judge made an error of law by not properly explaining to the jury that the morals of a child could only be endangered by sexually immoral conduct of which the child was aware and capable of appreciating. In this case that meant overturning the conviction with respect to the two sons and upholding the convictions with respect to the two step-daughters. The conviction with respect to the step-daughters was upheld because, despite the trial judge's error of law the determination that he had endangered their morals would have been the same given that the father had also been convicted of sexually assaulting them.⁷²

The presence of pornography, suggestive photographs of the children's mother, and sexual devices would very likely have a different impact on a child whose father is sexually assaulting them than on one whose father has not engaged in or attempted to engage in any sexual interactions with them. It is helpful to examine how Justice Doherty's analysis would function had the father not also had sexual interactions with his step-daughters. Assume that the trial judge had properly charged the jury regarding the requirement that the child be aware and capable of appreciating the 'sexually immoral' conduct. Assume also that this father had not already been convicted of sexually assaulting his children nor had he intentionally exposed his children to his sexual conduct. Given these assumptions, how does the articulation of the values identified by Justice Doherty manifest when applied to the evidence of sexual immorality led by the Crown?

Under his approach, most of what was found by the jury to be immoral conduct would likely, under the counterfactuals offered here, not be considered conduct that would

⁷² Justice Doherty noted that "it was not argued that convictions for corrupting the morals of the daughters based on the evidence of the sexual assaults would, given the convictions on the sexual assault charges, infringe the rule against multiple convictions for the same delict. The trial judge recognized the very close connection between the offences by imposing concurrent sentences.

endanger his children's morals. Certainly it is unlikely that a court would find that a child's knowledge that his mother had 'engaged in lesbian activity', or that his father had ejaculated on his mother or that his parents owned a vibrator was likely to pose "a real risk that the child will not develop those values which are essential to the operation of a free and democratic society". At the same time, under Justice Doherty's approach, evidence that his mother had had sex with another woman in front of the child, or that the child was present when the father videotaped himself ejaculating on the child's mother likely would endanger the child's belief in his own autonomous ability to choose which sexual acts to engage in or be exposed to – his ability to make his own sexual choices.

Similarly a child who discovers videotapes of her parents engaged in consensual sexual activity with the neighbors would likely not be considered, on the basis of this experience alone, in jeopardy of failing to appreciate that non-consensual and exploitative sexual activity is wrong. However, exposure to videotapes depicting non-consensual sex between men and women in which women are degraded and demeaned very well might endanger the morals of the child "in that the child will not develop an understanding that all persons are equal and worthy of respect regardless of gender."

Justice Doherty's approach is oriented towards producing a community of sexual actors whose values include "an appreciation that exploitive or non-consensual sexual activity is wrong; an appreciation that conduct which dehumanizes or degrades women is wrong; an appreciation by the children of their own self worth and personal autonomy; and an appreciation of the responsibility of parents to protect and nurture their children".⁷³

⁷³ *R. v. B.E.*, *supra* note 66 at para. 80.

Conclusion

Unavoidably principles such as those identified by Justice Doherty draw moral distinctions between acceptable and unacceptable sexual conduct - they make distinctions between good sex and bad sex - but the distinctions are not premised on essentialist claims or first person sexual moralities. Nor are they premised on structural claims of objective truth about sex and/or gender. There is no overarching or underpinning assertion of truth about power in any of these principles. The principles Justice Doherty's approach identifies as those upon which the law ought to base the regulation of sexuality include the protection of bodily integrity, and the promotion of equality, autonomy, sexual liberty and positive duty. None of these principles are conceptually static or require a static analysis, none of them draw on judicial perception of the first person sexual moralities held by most members of the community and none of them need be hegemonic.

Through its equality analysis, power feminism has achieved a great deal in terms of furthering the law's conceptualization of sexual violence. Great strides towards understanding that sexual violence is a product of, rather than inherent to, society have been achieved. However, power feminism has not only privileged the principle of equality above all others, it has, based as it is on a structural claim, resulted in assertions of objective truth. The consequence of this is a failure to disaggregate itself from sexual morality. To disaggregate from sexual morality requires acknowledgement of the assertion that there are no objective truths regarding sex, gender and sexuality. That is to say, it requires an analysis that is not structural; it requires an analysis that can and will

apply its constructivist insights to its own claims. In the context of issues regarding sex, gender and sexuality that analysis has typically been referred to as queer theory.

One might respond to this by arguing yes but to say that non-consensual sex is wrong or that children should be taught an appreciation of their own sexual worth is also to state objective truths. This is accurate. However there are important distinctions that respond to this critique and that will be the subject matter of chapter 8.

In brief, these claims of truth are based on third person ethics. Okay, but isn't equality – the claim overarching and underpinning power feminism's approach to the legal regulation of sexuality – also a principle of third person ethics not first person ethics? This is true. However, the difference is that power feminism elevates equality over other principles. Its claim regarding equality is structural. Assertion of a hegemonic principle (equality) embedded in a structural claim - $\frac{M}{F}$ - is not conducive to a legal approach compatible with open ended, fully contextual and infinitely re-articulated conceptions of sex, gender, sexuality and sexual integrity. As will be argued in chapter 8 and 9, improving the law's ability to protect and promote sexual integrity as a social good depends upon the possibility of open ended, fully contextual and infinitely re-articulated conceptions about each of: sex, gender and sexuality. The notion of sexual integrity as a social good developed in this thesis is not structural; while objective truths are unavoidable if one seeks to draw distinctions between good sex and bad sex, it should still be possible to introvert the constructivist approach. In other words, it should be possible to maintain an open ended, fully contextual and infinitely re-articulated conception of what constitutes sexual integrity and how best it ought to be protected and promoted as a social good. This is not to suggest that this approach will provide *the answer*; nor is it to

suggest that the claims of power feminism (or queer theory) do not provide answers to some questions. Instead it is to make the rather simple suggestion that there is not one answer and that a legal conception of sexuality should attempt to accommodate this plurality (just as it should acknowledge and continually grapple with the plurality of sexual moralities that exist within an community of sexual actors at any given point in time.)

Chapter 7 – A Critique Of Queer Theory

“I prefer to utilize the writers I like. The only valid tribute to thought such as Nietzsche’s is precisely to use it, to deform it, to make it groan and protest.”¹

Chapter Two described the theoretical foundations and highlighted the main principles of social constructivism and queer theory more specifically. Chapter Three then examined the Supreme Court of Canada’s jurisprudence in several legal contexts – sexual harassment, section 15 equality claims, similar fact evidence in sexual assault trials and child pornography cases – demonstrating that the Court often ascribes to a conception of sexuality in which individuals are categorized based on an innate sexual orientation and in which sexuality is, with the exception of sexual violence between adults, understood as a pre-social phenomenon rather than a product of social interaction, norms, discourse, institutions, and practices. An examination of these cases and an analysis of the Court’s conception of sexuality in these cases also demonstrated how an essentialist understanding of sexual orientation is problematic in each of these legal contexts, suggesting that a recognition of the socially constructed nature of ‘sexual nature’, so to speak, would produce legal reasoning that better accommodates the complexity and social contingency of sexuality.

Chapters Four and Five discussed the exception to the Court’s naturalized approach to sexuality – that exception being its shift towards a conception of sexual violence between adults as socially contingent. Chapter Four also articulated a notion of sexual integrity as both a social good and as the interest that ought to motivate and inform laws regulating sexuality. Chapter Five also examined the way in which power feminist

¹ Michel Foucault, “Two Lectures”, in Michael Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, (Colin Gordon ed. & Colin Gordon et al. trans., 1980) at 53.

ideals motivated a conceptual shift in the Court's approach to sexuality - a shift from the traditional concern over sexual acts (underpinned by a sexual morality) to a concern over sexual interactions (underpinned by a political morality). This is a shift towards understanding this one aspect of sexuality – sexual violence - as socially contingent.

Chapter Six argued that while the power feminist intervention has been integral to the Court's shift towards a constructivist conception of sexual violence, its failure to introvert this analysis – to apply social constructivist approaches to the structure of power feminism itself – leaves it inevitably inhered in objective claims of truth about sex, gender, and sexuality. As was demonstrated in Chapters Five and Six, this circumstance lends itself to legal analysis that invokes power feminist ideals without rejecting sexual morality (first person ethics). Chapter Six ended by suggesting that what is needed is a more holistic re-conceptualization that accounts for the many other social factors that contribute to the construction of sexuality - a re-conceptualization that is not structural, a re-conceptualization that adopts an open ended, fully contextual and infinitely re-articulated conception of what constitutes sexual integrity. There are significant implications to, and at least one theoretical problem in the context of law with, this suggestion. The objective of this chapter and the next is to acknowledge these implications and attempt to address (although not resolve) this problem.

An invocation of the constructivist critique of essentialist conceptions regarding sexuality (as was done in Chapter Two) in conjunction with the assertion that it ought to be invoked without anchoring it in the foundation of a structural argument (as was made in Chapter Six with the suggestion that the problem with the power feminist intervention is that it did not turn its constructivist critique inward) begins to sound like a

wholehearted embrace of queer theory. Such an assertion calls for a closer examination of the implications of claiming that meaning is socially constructed; this chapter will examine those implications.

Up to this point queer theory and social constructivism have been treated relatively uncritically in this discussion. Social constructivism has been deployed methodologically to examine, critique and at times describe how the Court conceptualizes sexuality. Constructivist arguments provide a rich theoretical framework within which to do this. Queer theory and social constructivism have provided critical legal thinkers with novel ways to conceptualize sex, gender and sexuality. That said, as will be demonstrated in the discussion to follow, there are both theoretical and practical difficulties with queer theory which greatly circumscribe its contribution to the development of legal approaches towards issues of law and sexuality that promote and protect sexual integrity as a common good.

The assertion that sex and/or gender are socially constructed taken apart from power feminism's structural foundation, is a macro level application of the types of claims and challenges suggested by postmodern theories. Underpinning the theoretical claim that sexuality, sex and gender, as well as the *structures* in which and through which we understand these concepts, are socially constructed is the postmodern assertion that the formation of meaning occurs through an infinite process of exclusion in which meaning is never complete. The building blocks of social constructivist theories – when disentangled from structural claims - are found in the toy box of post modernism.

This chapter will demonstrate why a theoretical approach to the legal regulation of sexuality premised on the post modern (and queer theory) assertion that all meaning is

produced by and can be reduced to this infinite process of exclusion in which it is never complete, is problematic. This will involve a critique of queer theory, revealing its infinite regression and paradoxical approach to justice, while at the same time acknowledging its methodological advantages.

The chapter to follow – Chapter Eight - will then turn around and once again argue for the importance of incorporating into a legal theory of sexuality, the notion that the meaning of sexual integrity (and of sex, gender and sexuality) is constituted through its infinite cultural, social, relational re-articulations. It will suggest the critical role that queer theory and postmodernism could play in theoretical approaches to the legal regulation of sexuality. It will suggest that a theoretical approach to the intersection of law and sexuality which borrows methodologically from the insights of queer theory, but which is framed by the concept of iconoclasm, is better able to account for, reflect, and contest the context in which the legal regulation of sexuality operates in Canada's constitutional democracy.

To put it as plainly as possible, there is a tension between the two claims made throughout the preceding chapters. The first claim, remember, is the suggestion that sexuality be conceptualized by the law as socially constructed (and not reliant on a particular structural conception). The second claim is that the law ought to understand sexual integrity as a common good and be oriented towards creating the conditions to protect and promote this common interest. If the meaning of sexuality is solely a function of social context then on what basis can the law adopt a conception of sexual integrity that it is then justified in protecting and promoting? The objective of this chapter and

Chapter Eight is to give recognition to and attempt (unsuccessfully)² to respond to this tension.

I. Critiquing Queer Theory

As discussed in Chapter Two, queer theory is a conceptual framework, or perhaps methodology, which contests gender, sex and sexuality categorizations. Queer theory has three main themes. It seeks to re-conceptualize power, re-conceptualize knowledge and its relationship to power and re-conceptualize identity and subject formation. Note that these objectives, particularly the first two, are not dissimilar to the objectives of power feminist theories.

So why is this approach problematic in terms of law? Why is it problematic to suggest a conceptual approach to sexuality that is constructivist without being structural? Why is queer theory a paradoxical theoretical approach to justice?

The ‘death of the subject’ is a key theme in queer theory. Its central premise is the assertion that gender, sexuality and sexual identity are socially constructed categories rather than naturally occurring phenomenon.³ The theoretical foundation for this premise is drawn from the postmodern suggestion that, in fact, all meaning is socially constructed. (The paradox of postmodernism is evidenced in the previous sentence alone – ‘*in fact*, all meaning is socially constructed’).

While modern theorists developed a number of meta- theories that assumed that the individual or subject is created independent of social context and history, postmodern

² It will become evident in Chapter Eight why the attempt is, and must be, unsuccessful. Briefly, the value is in the trying and failing to reconcile this tension despite recognizing that to succeed in reconciling it would be to fail.

³ See Chapter Two for a discussion of those theorists (such as Judith Butler, Michel Foucault, Eve Kosofsky Sedgwick) who have most prominently developed this theoretical approach. See Chapter Four for a partial critique of categorical conceptions of identity in the context of equality rights.

thought suggests that such universal and essentialist notions of, and about, the human subject and the human condition are ill-founded and are themselves socially constructed. Postmodern thought suggests that we are not outside the discourses and social contexts that create us as subjects. That is to say, all meaning is constituted through discourse; there is no pre-discursive or essential aspect to the subject (or any subject).

Queer theory's central premise is drawn from this postmodern insight. While analytically postmodernism functions at a micro level (the site of its analysis is text) its theoretical implications, as demonstrated by the work of theorists such as Foucault and Butler, extend to macro level concepts and discourses like gender and sexuality. In other words, its critical method can be applied to deconstruct the meaning of a specific word or that of a larger concept (like gender or sexual identity). It is this notion, taken at face value, which provided the theoretical framework for the analysis of the cases examined in Chapter Three. It is this postmodern insight which underpins the assertion that sexuality is socially constructed, an assertion which allows one to ask what possibilities in terms of law reform, in terms of legal reasoning, in terms of how we structure relationships and families and the legal regulation of sex, are opened up when one thinks about sex as socially contingent, as a product of society not biology. As power feminism's impact on the substantive meaning of sexual violence under the criminal law demonstrates, this method of analysis is useful. It, for example, allows for legal definitions of sexual assault that incorporate the perspectives of different sexual actors by conceptualizing sexuality as an equality issue rather than a naturally occurring human drive. That said, it is also important to ask what are the logical implications of relying on a theoretical framework that claims that the meaning of sexuality is socially constructed?

Unlike modern thought, which assumes the existence of, and therefore seeks to discover, measure and characterize, universal meaning (or in the context of sexuality inherent or natural meaning)⁴ postmodernism focuses on the particular, on *différance*; it challenges the possibility of universal/pre-discursive meaning, asserting rather, that meaning, because it is formed through a process of exclusion (a social process) and is therefore permanently unstable, can never be complete or universal. Underpinning this claim is the Derridean concept of *différance*: the claim that words can never fully summon forth what they mean but rather can only be explained or defined by using more words, and that words and concepts derive their meaning in part by what they are not (the meaning of “house” is understood in part by the fact that it is not a “shed” or a “hotel” or a “barn” etc). The discussion in Chapter Two regarding diacritical modes of knowing is premised on this concept. Similarly the suggestion that gender identity is relational draws in part on this same insight.

In terms of law and social justice movements, there are both theoretical and practical difficulties with this suggestion. The predominant difficulty with queer theory is that it is paradoxical. In fact, queer theory actually represents a double paradox. It shares with all group identity politics that embrace a social constructivist approach to identity what Ernesto Laclau describes as the paradox of pure particularity. It is this paradox of particularity which creates the tension inherent to what Nancy Fraser has called the dilemma between the politics of recognition and the politics of redistribution – the

⁴ There have been legal examples of this conceptual approach throughout this discussion. Recall for example, Justice Cory’s reliance in *R. v. Tremblay*, [1993] 2 SCR 932, on Dr. Campbell the expert sexologist in an effort to determine whether masturbation was common enough (and thus naturally occurring behavior) not to be indecent.

recognition/redistribution dilemma.⁵ This is the argument that groups subject to both cultural and economic injustice seek both recognition (which requires declaring or performatively creating their group difference) and redistribution (which requires calls to abolish differential treatment) – a paradoxical need to both claim and deny their specificity.⁶

But then queer theory adds to this paradox of particularity a second level of paradox – due to its own conceptual framework as a relational concept. It is the implications arising from this double paradoxical nature that make it particularly problematic from a legal perspective. The next two sections will explain further how and in what way queer theory represents a double paradox that is problematic in terms of the legal regulation of sexuality. Following this will be an examination of postmodern theories (by Laclau and Derrida) that attempt to address this paradox. A discussion of these theories is included because the theoretical concepts provided in Laclau and Derrida’s attempts to reconcile the tension between nonstructural constructivism (i.e. queer theory or postmodernism) and law’s need, *Justitia’s* need, for criteria by which to judge, are relied upon in Chapter Eight to develop my argument regarding the promise of iconoclasm and the legal successes that occur in the space between failures.

i) The Paradox Of Pure Particularity

⁵ Nancy Fraser “From Redistribution to Recognition? Dilemmas of Justice in a Postsocialist Age” in *Justice Interruptus* (New York: Routledge, 1996).

⁶ Fraser identifies different collectivities that she suggests can be located at different places on a spectrum between groups who seek only recognition and those interested primarily or only in redistribution. Those that fall in the middle she describes as bivalent collectivities. She locates sexual minorities at the recognition end of the spectrum although recognizes that no collectivity can be neatly categorized as either a solely recognition seeking or a solely redistribution seeking group. Her proposed solution for remedying this dilemma is transformative remedies. These are remedies that destabilize both social categorizations and wealth distribution structures. It seems plausible as a solution for bivalent collectivities such as women (were that actually one social category which of course it is not) but does not seem to actually resolve the recognition end of the dilemma for other collectivities such as those sexual minorities who really do not want to assimilate or first nations groups not interested in destabilizing group differentiation.

Ernesto Laclau's postmodern account of the manner in which deviation is constituted (described as a 'chain of equivalence') provides a good example of the paradox of particularity.⁷ Laclau explores this paradox through his discussion of identity. However, the same theoretical claims can be made regardless of whether one is examining queer theory's claims regarding sex, sexual or gender identity or post(or non)-structural constructivist claims regarding the 'identity' (meaning) of sex, sexuality or gender itself.

For Laclau the paradox of identity is the ever-present conflict that arises as a result of the process of constitutive exclusion through which meaning (including identity) is formed. Laclau suggests that any identity (and by extension one could say any meaning) is created through its relative location in an open system of differential relations.⁸ By differential relations he means a relation of exclusion/and or antagonism. Meaning is created by what it excludes, or perhaps, what it is excluded from – in other words, it is what it is not.⁹ This is the same concept underpinning queer theory. Laclau argues that an identity, because it is constituted through its difference from all other identities, is never complete; there exists therefore a limitless field of differential identities.¹⁰

As Laclau notes, since all identities emerge from this constitutive exclusion or antagonism they all share in common this necessarily incomplete determination; this is

⁷ Ernesto Laclau, *Emancipations*, (Verso: London, 1996); Ernest Laclau, Judith Butler & Slavov Zizek, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso: London, 2000)

⁸ *Emancipations*, *supra* note 5 at 28. The assertion made in Chapter Two that one's own gender identity is threatened when one cannot discern another's gender because gender is understood relationally, through binaries, through diacritical modes of knowing, draws on reasoning similar in way to this concept

⁹ This is similar to Derrida's concept of *différance*. Derrida would describe this as the originary 'violence' at the root of all meaning. By violence he simply means the inevitable process of exclusion through which meaning is constituted. His use of the term violence in this context is not intended to refer to violence in a physical or material sense.

¹⁰ *Emancipations*, *supra* note 5 at 14-15.

what he suggests creates a ‘chain of equivalence’.¹¹ It is important to note that he suggests this incompleteness is inevitable.

The incompleteness is thought necessary under Laclau’s theory because the antagonistic process in which meaning is constituted through exclusion, through lack of recognition, suggests that a fully achieved difference or a complete integration into a particular eliminates this antagonistic dimension as constitutive of any identity. Therefore, as a result of this ‘chain of equivalence’, an attempt by any one group to universalize its own particularity, or make a claim of inherent meaning, is as misconceived as is any assertion of pure difference.

An attempt by any one group to universalize its own particularity is ultimately futile because it fails to realize that such an attempt is as much a threat to that group’s own identity as it is to the identities of others. Any assertion of difference will necessarily re-inscribe the very context from which it wishes to differ. Any claim of inherent and universal meaning will affirm the legitimacy of others’ claims of inherent and universal meaning. One cannot assert a differential identity or meaning without distinguishing it from a context and by making this distinction one asserts the context at the same time that one asserts the difference.

As noted, to assert its own identity a group must assert its difference from the identity of others; this cannot be done outside of a context of social relations. Any assertion of identity or meaning thus re-inscribes the identity, context and meaning it seeks to distance, distinguish or disrupt. This process operates both in terms of those with power and those without (or with less) power. In this respect it is expressed in the “undecidability between internality and externality of the oppressor in relation to the

¹¹ *Ibid.*

oppressed: to be oppressed is part of my identity as a subject struggling for emancipation; without the presence of the oppressor my identity would be different. The constitution of the later requires and at the same time rejects the presence of the other.”¹²

In this sense an oppressed group, whose identity is constructed within and without a given system of power is in a paradoxical circumstance with respect to that system – “the system is responsible both for the constitution of its identity and at the same time the system is a condition of its existence. Any victory against the system also destabilizes the identity of the victorious force”.¹³

Not only is it self-defeating, according to Laclau, an assertion of pure difference is also illogical. As Laclau suggests, to claim a differential identity requires a claim of commonality with the identity one wishes to be different from. This is because the assertion of a right to a different identity or to a claim of recognition for a particular identity can only be made by appealing to some principle of sameness (some universality). To claim a right to recognition of difference (indeed to claim a right to anything) requires an acknowledgment of sameness because it is to claim I have the same right to an identity as do you – some commonality which equally entitles me to my claimed identity. From this it can be concluded that it is impossible to claim a right to, or

¹² *Emancipations*, *supra* note 5 at 17.

¹³ Laclau, *Emancipations supra* note 5 at 27. This issue is one of the largest social challenges facing heterogeneous societies today and is itself the topic of countless books, articles and dissertations. There is an abundance of literature exploring this dilemma – annihilation through assimilation - from many different perspectives and in many different contexts and it seems almost trite to footnote sources discussing the issue. That said for a sampling, in the context of sexuality the work of Ruthann Robson provides a good example of the arguments against assimilation for sexual minorities. Ruthann Robson, “Assimilation, Marriage and Lesbian Liberation” 75 *Temp. L. Rev.* 709. In the context of ethnic minority and nationalism see Charles Taylor, “The Politics of Recognition” in *Multiculturalism: Examining The Politics of Recognition*, ed. Amy Gutman (Princeton, New Jersey: Princeton Press, 1994); Will Kymlicka, *Multicultural Citizenship*, (Clarendon Press: Oxford, 1995); Will Kymlicka, *The Rights of Minority Cultures*, (Oxford University Press, Oxford, 1995); Ayalet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, (Cambridge University Press, Cambridge, 2001). In the context of religious minority see Madhavi Sunder, *Cultural Dissent*, (2001) 54 *Stan. L. Rev.* 495; Madhavi Sunder, *Piercing the Veil*, (2003) 112 *Yale L.J.* 1399.

seek recognition of, pure difference. A claim of particularity is at once a claim of inclusion and exclusion. It is a claim of the right to be included in the right to be excluded. The paradox, of course, is that within any given system, if total integration does not take place it means the identity is not fully achieved – the antagonism - the exclusion – the lack of recognition - still exists; without the antagonism and exclusion, the identity ceases to exist but because of the antagonism and exclusion the identity is never complete – there will always be ‘a lack’. This describes the first paradox of queer theory – a paradox shared by identity politics generally.

ii) The ‘Double Bind’ Of Queer Theory

This paradox itself – this constitutive lack - is not the full extent of the theoretical problem, as it pertains to law, with queer theory. As noted above, it is not a paradox unique to queer politics or issues of sexuality. It is the paradox of group politics generally – whether those be, for example, the politics of ‘women’, the politics of ‘sexual minorities’, or the politics of ‘racialized minorities’.

The double paradox of queer theory stems from the fact that queer is a relational concept; it is a positionality in relation to a norm.¹⁴ While there will always be queer, there will never actually be queers in the true sense. This is because queer, conceptually speaking, is not an identity, but rather a critique of identity the effect of which is to contest or disrupt normative understandings of the subject by suggesting that identity is not fixed. While its site of contestation is the categorization of sexuality and gender, its

¹⁴ My use of the word “positionality” to reflect the relational nature of queer is borrowed from Adam Romero, “Methodological Descriptions: “Feminist” and “Queer” Legal Theories: Book Review of Janet Halley’s *Split Decisions: How and Why to Take a Break from Feminism*, 19 Yale J. L. & Feminism 227 (2007) at 228.

claim is directed more broadly, at identity in general. At its extreme, its methodology is used to suggest that there can be no subject, no doer behind the deed.¹⁵

Its paradox is illustrated both by the theoretical implications it produces and by the ironical results of its cooption as the basis of an identity category or movement. The paradox of queer theory is that it is a method of analysis, of which the motivating factor for its development is an objection to the oppression of sexual deviance, but whose animating feature is a disavowal of the possibility of knowing what a lack of such oppression would be. As such, its efforts cannot actually be directed towards attempting to create such a condition.

Take the supposed ‘founding theorists’ of queer theory: writers such as Judith Butler, Eve Kosofsky Sedgwick, and Michel Foucault.¹⁶ It is neither happenstance nor coincidence that the intersection of power and sexuality is the site of their analyses; rather, this reflects a deeply held, but unarticulated, concern for justice.¹⁷ However, none of them offers a theory of justice.¹⁸ This also is not a coincidence.

¹⁵ See Chapter three, FN 132 for a brief discussion regarding the claim that ‘the subject is dead’.

¹⁶ While Theresa de Lauretis is credited with coining the term queer theory (see David Halperin. "The Normalizing of Queer Theory." *Journal of Homosexuality* v.45, pp. 339-343). it is the early 1990s work of theorists such as Judith Butler, and Eve Kosofsky Sedgwick, using the method of deconstruction developed through Jacques Derrida’s concept of *difference*, and building on the discursive theory developed in the work of Michel Foucault, (*History of Sexuality, supra* note 1), and the notion of disaggregating sexual or erotic desire and gender introduced by Gayle Rubin in “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality,” in (*Pleasure and Danger: Exploring Female Sexuality*, Vance, Carol S, ed London: Pandora Press, 1989) which are generally considered the inaugural texts in this area of thought. (see *Split Decisions, supra* note 12 where Janet Halley suggests that were it not for the concepts developed in *History of Sexuality, Volume One*, and “Thinking Sex”, Judith Butler’s *Gender Trouble: Feminism and The Subversion of Identity* (Routledge: New York, 1990) and Eve Kosofsky Sedgwick’s *Epistemology of the Closet*, (University of California Press, Los Angeles, 1990) would not have been possible.)

¹⁷ I am unable to point to a precise reference to substantiate this assertion. However, my assertion is premised on two factors, neither of which directly substantiates it. The first is the manner in which, and the audience by whom, their work has been received and the way in which it has been applied by later queer theorists. (For instance, as David Halperin notes in *Saint= Foucault, Towards a Gay Hagiography* (New York: Oxford University Press, 1995) at 15, *The History of Sexuality, Volume 1*, is to queer political activists such as the members of the contemporary AIDS activist organization ACT-UP, as *The Communist Manifesto* was to American labour organizers of the 1930s.) The second factor upon which my assertion is premised is simply intuition, based on the assumption that human beings act with purpose and that these

Queer theory is a justice project that according to its own precepts cannot achieve justice. For a more concrete demonstration of its paradox consider the emergence of ‘queer’ as a category of self-identification. The self-identified queer is a walking paradox. When one *identifies* as a *queer* one is either declaring that one doesn’t *identify* as anything (which is nonsensical) or is, at the moment of identification, simultaneously adopting, and in doing so, negating ‘queer’. That is to say, any act of identification is an act of exclusion, a closure that correspondingly precludes the possibility of queer. This is because to identify is to identify with something, with some norm. Queer is a positionality in particular relation to a norm; that relation being the deviation from. To identify as queer is to identify with a norm of deviating from the norm. To do so is either an act of negation or of infinite regression. Either way the closure necessitated by the act of identification is impossible. Think of it in terms of discursive performativity.¹⁹ In the same sense that the statement ‘I am out’ is performative (in, and by, its declaration it constitutes that which it is), the statement ‘I am queer’ is a performative negation (in, and by, its declaration it de-constitutes that which it declares to be). I am suggesting that, in precisely the same, but structurally opposite, way in which Derrida suggests democracy is self-cannibalizing, one cannot truly identify as queer or with other ‘queers’.²⁰

The moment of this impossibility explains the ironical phenomena of queer youth. The ‘queer youth’, that is the youth who identifies as one who deviates from the norm, is

three self-identified sexual minorities who have dedicated much of their tremendous intellectual energies to theorizing about sexuality are no different. It is neither happenstance nor coincidence that the intersection of power and sexuality is the site of their analyses; rather, this reflects a deeply held, but unarticulated, concern for justice.

¹⁸ Foucault even went so far as to deny being motivated by politics (which is odd given his non-academic and quite radical activism regarding gay politics.) Halperin, *ibid*.

¹⁹ See Chapter Two at FN 50 for a discussion of the notion of performativity.

²⁰ See *infra* starting at page 22 for a discussion of Derrida’s ‘democracy to come’ and the analogy between his theory of justice and the observation I am making here regarding performative negations..

most likely to wear the same clothes, have the same facial piercings, espouse similar sexual and identity politics and make the same cultural references as all of his or her queer compatriots. A group of individuals who all declare the same identity and adopt similar clothing, physical presentation, music, culture and politics is a group with norms. Unavoidably, the act of identification necessitates the adoption of, perpetuation of and association with some norm or norms.

It is the implications of this paradox that suggest the problem with queer theory from a legal perspective. In order to be internally consistent with its own reasoning, queer theory cannot endeavor to articulate what sexual justice means. Recall that queer theory claims that gender, sex and sexuality are socially constructed and to make this claim it relies on the postmodern notion that meaning is constituted through a process of exclusion and therefore is never complete. Typically, from this follows the conclusion that if there can be no complete meaning to anything, there is no universal - the reason being that universal is a concept of totality, it is by definition all encompassing...its meaning is completed, closed. Conversely, the concept of queer is relational; queer is a positionality in reference to any hegemonic norm. Its meaning is never closed.

While the assertion that meaning is never complete, if accepted, resolves the structural pitfall of power feminism, it has from a legal perspective, problematic significance for the concepts of identity and the subject; it suggests that the subject, or an identity, is contextually dependent, never complete, and therefore immutably unstable; that is to say, that the only universal is that there is no universal. Judith Butler describes this notion of the incomplete subject as follows:

I understand the 'incompletion' of the subject-position in the following ways:

(1) as the failure of any particular articulation to describe the population it represents; (2) that every subject is constituted differentially, and that what is produced as the 'constitutive outside' of the subject can never become fully inside or immanent."²¹

Such a conviction, if accepted, has a significant impact on the role that law does or could play in the pursuit of justice. The potential futility of queer theory, from a legal perspective, stems from the fact that, by destabilizing all meaning including the identity of all subjects, it fails to provide any criteria, or conceptual framework, or even ability, to judge.

In this way, postmodernism presents a challenge in terms of law because law needs judgment to be operationalized. Its reforming, preventative and distributive functions all require judgment. And for law to be just, that judgment must not be arbitrary. To avoid arbitrary judgment requires meaningful criteria and in terms of law's distributive functions (whether it be the distribution of material resources, rights, privileges, or punishments) it also requires subjects.

As such, queer theory does not possess the analytical framework, or provide the analytical tools, to coherently pursue justice. It is not the fact that it cannot articulate a substantive meaning for a theory of justice (it cannot ...but many theories cannot); it is that it cannot defend an attempt even to try. Pure postmodernism (and correspondingly queer theory) does not have much to say about justice.²² The problematic created for law, particularly in a liberal democracy given law's distributional function, by the suggestion that there is no subject to which rights, for instance, might be distributed, substantiates this assertion; as does the practical and theoretical impossibility of queering law that is

²¹ *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, *supra* note 6 at 12.

²² Derrida, in "Force of Law", *infra* FN 30 denied that postmodern had nothing to say about justice.

created by the paradox of pure particularity in conjunction with the paradox of a relational (and infinitely regressive) concept founded on a performative negation.

This is not to suggest that queer theory is not important. Rather, it is to suggest that its contribution to an account of the intersection between law and sexuality (which is essential to any project of justice) is finite, purely methodological and only one piece of the necessary analytical framework. Aspects of its methodology are important to any theory of the legal regulation of human sexuality because as a theoretical approach it helps us to understand how deviation is constituted, how power is produced through meaning, how that power operates and how sexual actors are constituted and regulated as a result of the manner in which deviation is formed and power operates. While queer theory does not have much to *say* about justice it can offer a very useful way to *talk* about justice.

Queer theory gives a convincing account of how those who are ‘others’ become or remain othered;²³ however it cannot provide the vehicle for those who are othered to become other than othered, nor can it create the space for those others who prefer to remain others.

In this sense its methodological utility is essentially descriptive. An examination of Brenda Cossman’s recent book, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* demonstrates this point.²⁴ Cossman frames her analysis through the trope of citizenship; she spends the bulk of the book very proficiently demonstrating how American jurisprudence continues to both create new sexual citizens (by examining legal developments such as same sex relationship recognition) and construct and exile ‘bad’

²³ Those ‘others’ include those who, within a given conception of sexuality or a particular sexual morality are overly sexualized, under sexualized, restricted, violated or ignored.

²⁴ (Stanford University Press: Stanford, 2007).

sexual citizens (through her insightful analysis of phenomena such as the “new politics of adultery”).

For example, she discusses the Supreme Court of the United States’ finding in *Lawrence v. Texas* that a Texas law criminalizing sodomy between members of the same sex, was a violation of the due process clause of the American Bill of Rights. In doing so she suggests that “[t]he sexual citizenship of Lawrence is articulated against the backdrop of what it is not; it is always against an identifiable border”. She argues that the Court grants a liberty interest in consensual sodomy for gays and lesbians by reaffirming what sorts of sexual citizens remain exiled, done she suggests, through the Court’s anxious and incessant border patrolling. “In other words, the sexual conduct in question does not involve children, harmful sex, nonconsensual sex, public sex or commercial sex. The gay sex that is being protected is not all gay sex, nor is it *all sex*. [emphasis added]”²⁵

Of course sexual citizenship is articulated against a background of what it is not. Why wouldn’t it be? Of course the gay sex that is being protected is not all gay sex, nor is it all sex. It is not that Cossman’s analysis is lacking – it isn’t. It aptly describes the process of exclusion through which the meaning of sexual citizenship at a given point in time, in a given social context, is constituted. She goes on to make the same analytical move with respect to a number of other legal issues including the legal regulation of dildos, and the granting of legal recognition for same sex couples. Presumably, Cossman is not advocating in favour of a sexual citizenship that includes *all sex*. For example, she is presumably not suggesting a sexual citizenship that includes inter-generational sex. The difficulty is that structuring the analysis in the way that she does – demonstrating, the way she does, that there are borders - will inevitably lead to a debate about the

²⁵ *Ibid.* at 29.

advisability of having borders. This is the very conversation she indirectly acknowledges is no longer fruitful. Instead, let us accept that there are borders – which most of us do – accept that this is something we either need or want as a society– which most of us do²⁶ - and start focusing on how to patrol them in a way which continues to allow for the greatest possibility of revising them.

Queer theory and social constructivism (at its core) are situated somewhere between the nihilist's claim that there is no meaning and the universalist's or essentialist's claim that there is inherent meaning. Its claim is not that there is no meaning but rather that meaning is socially contingent. Its claim is that meaning is in constant movement through time and space. That it is constituted through infinite reiterations of, and deviations from, norms. But it is precisely this claim that, when it is not anchored in a structure such as is offered by feminist foundationalism, makes it recursive and therefore ultimately of only limited utility for projects of justice. As one account of, or attempt to understand, the relationship between hegemony and deviation it is useful. As a vehicle for the advancement of justice it offers little. Subversion for the sake of subversion is regressive (in fact infinitely so) not progressive. Borders and meaning are synonymous. Without borders there is no meaning. Meaning requires a closure; it requires exclusion.

A theoretical approach to sexuality and its regulation with the capacity to handle law and concepts of justice requires the possibility of a subject, an ability to judge (which necessitates both the possibility of substantive meaning and the possibility of its disruption) and recognition of the need and a space for deviation (or what might also be

²⁶ Cossman makes the point, towards the end of her book, that many sexual outlaws – such as perhaps pornographers of a certain genre (whose marketing strategies attempt to appeal to those consumers aroused by the notion of illicit or even illegal sexual material) also have a vested interest in the presence of borders. (Logically, the same would hold true for those consumers themselves.)

called dissent). Justice needs borders. Queer theory proficiently delivers the latter but is unable to offer, in any theoretically consistent manner, the former. It isn't by chance that *Lady Justitia* tends to hang out in front of the House of Law and not the Theatre of the Absurd.

Some postmodernists have recognized this difficulty. Postmodern theorists such as Laclau, Butler and Derrida have all attempted to resolve the paradox of postmodernism. However, they have all attempted to do so by reconciling this paradox from within postmodernism.

If social constructivist theories inherited to structure perpetuate sexual moralism yet divorcing constructivism from foundation or structure results in the paradox of queer theory, how ought a constructivist legal method conceptualize sexuality? Is there a theoretical approach that offers more hope? The challenge is to find a method that allows for meaning, judgment *and* openness. The section to follow will discuss attempts, by Laclau, Derrida and Butler, to meet this challenge. Laclau and Derrida's attempts are included in this discussion because the insights that they provide regarding versions of a 'space between' will be drawn on in Chapter Eight to develop my argument regarding iconoclasm and the legal successes achieved in the space between failures. Both Laclau and Derrida concede some space for normativity. Butler's attempt is examined because her failure to concede any space for normativity exemplifies why it is necessary to concede this space, as Derrida and Laclau both do, if the possibility of a nonstructural constructivist legal approach to sexuality is to exist. It is particularly apposite to include Butler's work given that she, more so than either Laclau or Derrida, has applied her postmodern approach in the context of gender and sexuality.

II. A Particular Universality?

Laclau acknowledges that, in its efforts to deconstruct the totalizing meta-narratives of modernity – the particularity of whose rationality he suggests was revealed through examples such as European imperialism and Stalinism – the postmodernists have created a paradox.²⁷ If everything is particular then there is neither structure nor foundation from which to identify or establish a grounding and correspondingly there is no way to reject the antisocial practices of others.²⁸

[A]n appeal to pure particularisms is no solution to the problems that we are facing in contemporary societies. In the first place, the assertion of pure particularism, independently of any content and of the appeal to a universality transcending it, is a self-defeating enterprise. For if it is the only accepted normative principle, it confronts us with an unsolvable paradox. I can defend the right of sexual, racial and national minorities in the name of particularisms; but if particularism is the only valid principle, I have also to accept the rights to self-determination of all kinds of reactionary groups involved in antisocial practices.²⁹

Think of it in terms of legal impediments to sexual liberty, as touched on above. Organizations such as NAMBLA³⁰ provide the most obvious and well-trodden example. It is difficult, likely impossible, to deploy post (or non) structural constructivist arguments to distinguish between the claims of different sexual minorities. Coherent legal distinctions between the constructivist claims of men oriented towards sexual interactions with other men and those of men oriented towards sexual interactions with boys requires resort to some principle/s beyond the principle of particularity. Similarly, think of the example of sex work. Constructivist arguments based on principles of particularity work

²⁷ *Emancipations*, *supra* note 6.

²⁸ *Ibid.* at 26.

²⁹ *Emancipations*, *supra* note 5 at 26.

³⁰ NAMBLA is the 'North American Man-Boy Love Association'. They describe themselves as a support group for "sexual freedom for all". NAMBLA advocates to "end the extreme oppression of men and boys in mutually consensual relationships". (<http://nambla.org/welcome.htm> accessed February 23, 2009).

well to destabilize the moral distinctions that power feminism makes between the exchange of sex for erotic pleasure and the exchange of sex for anything else. However, legal arguments that distinguish between trading sex for survival and trading sex for success do not tend to be based on principles of particularity.

Laclau suggests that if we are to meet the demands of, or at least regulate, groups with conflicting interests, it is necessary to appeal to some more general principles.³¹ Both Derrida, as discussed in the following section, and Laclau, as discussed in the one after that, attempt to do this.

i) The Space Between Derrida/s

Derrida's work in both "The Force of Law" and *Rogues* asks basically the same question:

How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal – or, others would quickly say, neither just nor unjust?³²

How is this question, seemingly about democracy and sovereignty, related to an inquiry into identity and legal theories of sexuality? It is related because his question identifies for democracy the same analytical paradox that queer theory poses for 'sexual justice'. In this way, his attempts to wrestle with this question and its underlying paradox (or 'aporia' as he would characterize it) both exemplifies the same type of claim about meaning formation that Laclau makes and offers one suggested approach to accommodating this paradox.

³¹ *Ibid.*

³² Jacques Derrida, "Force of Law" (1989) 11 Cardozo L. Rev. 919 at 927.

“The Force of Law” was published in 1990. In it Derrida describes his notion of justice as “to come”. *Rogues* was published fifteen years later, just before his death.

“The Force of Law” is framed by a discussion of ‘justice’ whereas *Rogues* is framed by a discussion of ‘democracy’. However, both are an attempt to theorize justice. In “The Force of Law” Derrida tells us that justice “requires us to calculate with the incalculable”³³.

Derrida claimed that "for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy or suspend it enough to have to reinvent it in the reaffirmation and the new and free confirmation of its principle."³⁴ As a result, to experience the paradox “in which the decision between just and unjust is never insured by a rule” is to experience justice.³⁵ For this reason

justice remains, is yet to come, à-venir, it has an, it is à-venir, the very dimension of events irreducibly to come. It will always have it, this à-venir, and always has. Perhaps it is for this reason that justice, insofar as it is not a juridical or political concept, opens up for l'avenir, the transformation, the recasting or refounding of law and politics. 'Perhaps', one must always say perhaps for justice.³⁶

What does it mean to suggest that justice is “the very dimension of events irreducibly to come”? To answer this it is helpful to examine and compare with this suggestion, Derrida’s notion of ‘democracy to come’. When Derrida speaks of a ‘democracy to come’, he is not referring to a future democracy, or a new regime, or new organization of political systems or nation-states. ‘Democracy to come’ is distinct from

³³ *Ibid.* at 947.

³⁴ *Ibid.* at 961.

³⁵ Derrida, “The Force of Law”, *supra* note 30.

³⁶ *Ibid.* at 969.

any kind of regulating ideal or teleological horizon.³⁷ By ‘democracy to come’ he is suggesting that democracy has the structure of a promise. In fact, he is suggesting that democracy is a promise. In a sense, he means that what democracy is... is the promise of democracy. The ‘to come’ indicates the promise of an authentic democracy which will never be embodied in any structure, institution, or system which we call democracy. He does not mean that ‘democracy to come’ will be simply a future democracy correcting or improving the actual conditions of present day democracies; he means that democracy as we speak of it is linked in its concept to a futural promise. He suggests that the structure of a promise is inscribed in the idea of democracy because, internal to the concept of democracy, is the notion of an endless process of improvement and perfectibility. “The expression ‘democracy to come’ takes into account the absolute and intrinsic historicity of the only system that welcomes in itself, in its very concept, that expression of autoimmunity called the right to self-critique and perfectibility.”³⁸

Derrida suggests that democracy needs deconstruction and deconstruction needs democracy. By this, it seems he means that democracy more than other forms of political organization demands or requires an openness to the future, that it needs to be associated with the deconstructive notion of an open future.³⁹ He suggests that the idea of democracy implies infinite perfectibility. By infinite he means unavoidably incomplete and by perfectibility he must mean ‘just’. His argument is that no political system or

³⁷ Jacques Derrida, *Rogues: Two Essays on Reason*, (Stanford University Press: Stanford California, 2005) at 82. “The “to-come” not only points to the promise but suggests that democracy will never exist, in the sense of a present existence: not because it will be deferred but because it will always remain aporetic in its structure....” (at 86). That is to say, like identity, it will always be a paradox.

³⁸ *Rogues*, *supra* note 35.

³⁹ Matthias Fritsch, in “Derrida’s Democracy to Come” *Constellations* Volume 9, No 4, 2002, 574 at 575, suggests that this is what Derrida means to suggest by the claim that democracy needs deconstruction and deconstruction needs democracy.

principle or law (or meaning) can by itself be called just (in other words be universally just) because any system or law – in other words all institutionalized power – arises out of and is instituted by or through an ultimately unjustifiable violence. By violence he does not mean physical violence. His assertion that no political system or principle or law can by itself be called just, is premised on the notion that any rule formation, any attempt at a closed meaning, and therefore any content to a system or principle or rule will inevitably involve a process of exclusion – an ‘inhospitableness’... a violence. (This concept of inevitable inhospitableness is similar, if not analogous, to Laclau’s chain of equivalence.) Democracy as a concept has to remain open to perfection – to a reality in which there is not the violence of excluding some (meaning) and favoring other/s (meaning).

Derrida is careful to point out in *Rogues* that by ‘democracy to come’ he is not simply making the observation that a true and full democracy will always remain to come, indefinitely deferred. He notes that had he meant only that, he would have been reproducing, if not plagiarizing, the classical discourses of political philosophy as far back as Rousseau.⁴⁰ By ‘democracy to come’ Derrida means something more than just that democracy is a work in progress. He is questioning the very idea that democracy as a concept can be understood. For Rousseau, true democracy in the present is unachievable because of inherent human fallibility. For Derrida, the embodiment of a true and living democracy is impossible because it is unknowable. Indeed, he says “[d]emocracy has always been suicidal, and if there is a to-come for it, it is only on the condition of thinking life otherwise, life and the force of life”.⁴¹

⁴⁰ *Rogues supra* note 35 at 73.

⁴¹ *Ibid.* at 73.

It is in relation to this ‘aporia’ that in *Rogues* he casts doubt upon the possibility that one could even speak democratically about democracy:

To speak democratically of democracy, it would be necessary, through some circular performativity and through the political violence of some enforcing rhetoric, some force of law, to impose a meaning on the word *democratic* and thus produce a consensus that one pretends, by fiction, to be established and accepted – or at the very least possible and necessary: on the horizon.⁴²

Derrida suggests that this openness or futural promise creates a self-destructiveness inherent to the concept of democracy. Derrida suggests that democracy carries within itself the seeds of its own destruction. The auto-immunity of democracy, its suicidal possibility, he suggests, is that through its openness it always exposes itself to the possibility of being taken over by the ‘un’ or ‘anti’ democratic. “The great question of modern parliamentary and representative democracy, perhaps of all democracy, in this logic of the turn or round, of the other turn or round, of the other time and thus of the other, of the *alter* in general, is that the *alternative to* democracy can always be *represented* as a democratic *alternation*.”⁴³ This, he suggests, is the ipseity of democracy.⁴⁴ It is a notion not unlike the paradox of pure particularity as an identity that Laclau describes. It is analytically analogous to the infinite regression, the performative negation, of queer theory.

So does Derrida’s theory offer us any assistance in avoiding or resolving this ipseity? Derrida’s ‘democracy to come’ names the structure of an event beyond calculation and program.⁴⁵ This is the sense in which it is unknowable and therefore

⁴² *Ibid.*

⁴³ *Ibid.* at 30.

⁴⁴ Think for example of the doctrine of effectivity in constitutional and international law. See *Reference re Quebec Secession*, [1998] 2 S.C.R. 217.

⁴⁵ *Ibid.* at 84.

unachievable. Derrida argues that “democracy will never exist, in the sense of a present existence: not because it will be deferred but because it will always remain aporetic in its structure”.⁴⁶ It will always be a concept tending to doubt. Why? Because it will always struggle with “force *without* force, incalculable singularity *and* calculable equality...heteronomy *and* autonomy, indivisible sovereignty *and* divisible or shared sovereignty...”.⁴⁷

The difficulty with conceptualizing justice (or identity) in this manner is not that it is nihilistic. It is not nihilistic. It is that it is a ceaseless and infinite struggle ending always and only in exclusion. To harbor simultaneously meaning and its negation is impossible.

Derrida’s deconstruction of democracy, the demonstration that it is unknowable, is not aimed at suggesting futility or annihilation; that said nor is the futural promise of ‘to come’ meant to connote the democracy of the future, or some coming event. So then how can the theory of justice claimed by Derrida be understood as other than self-annihilating and futile? Because tucked neatly inside the ‘space between Derrida/s’ is one little nugget of normativity.

Derrida suggests that the deconstruction of democracy, or the questioning of sovereignty is what is already happening. In *Rogues* he says “in any case, such a questioning of sovereignty [which he at times uses interchangeably with democracy]... is at work today; it is what’s *coming*, what’s *happening*. It *is* and it *makes* history through the anxiety-provoking turmoil we are currently undergoing.”⁴⁸ The ‘to come’ suggests that a democracy “must have the structure of a promise, and *thus the memory of that*

⁴⁶ *Rogues*, *supra* note 35 at 86.

⁴⁷ *Ibid.* at 86.

⁴⁸ *Ibid.* at 157.

which carries the future, the to-come, here and now."⁴⁹ When asked in interview "why discuss democracy", Derrida responded:

I think that there is inequality and repression in the traditional concept of friendship such as we inherit it. It is in the name of more democracy that I think we have to unlock, to open, to displace this prevalent concept, and this is not my initiative, not the initiative of someone operating in a deconstructive manner; it is what is happening today. Today this model of brotherhood, man, friendship is being deconstructed in the world. What I say about the nation-state is what is happening today in the world. This so-called deconstruction is simply what is happening in a more or less visible way, in an unequal way with what is called the 'inequality of development'.⁵⁰

He suggests that in the name of more democracy we ought to deconstruct friendship but then goes on to deny that this is what he is doing, suggesting rather, that he is merely describing what is transpiring in the world today. But Derrida is deconstructing something in this statement – he is actually deconstructing democracy in the name of more democracy. There is an important connection for Derrida between friendship – hospitality – and democracy. The normative posture with which he begins this observation ("It is in the name of more democracy that I think we have to unlock, to open, to displace this prevalent concept..."), and his references to inequality belie the purely observational characterization he goes on to give this statement. There is both a deconstructive aspect evident in his link between friendship and democracy and a very obvious normative assertion evident in his invocation of the concept of equality, his use of the phrase 'more democracy' and underlying the correlation he assumes exists between friendship and democracy. If this is true, if what he is doing is deconstructing democracy in the name of more democracy, then given his definition of justice – that being those

⁴⁹ *Rogues*, *supra* note 35 at 86.

⁵⁰ <http://www.sussex.ac.uk/Units/frenchthought/derrida.htm> accessed March 22.

“moments in which the decision between just and unjust is never insured by a rule”⁵¹ – it seems that in his invocation to deconstruct friendship in the name of more democracy he gives us his normative account of justice. Justice, for Derrida in 2005 in *Rogues*, is the very same paradox it was for him in 1989 in “The Force of Law”.

If we do not and can not know what democracy means, how can Derrida make the normative assertion that we ought to deconstruct friendship in the name of more democracy? The answer may be that Derrida’s concept of democracy to come is an observational assessment of what occurs; and that the normative component of his analysis is that it is justice that is both a work in progress and always only a work in progress. Certainly he would agree that democracy need not connote justice but perhaps there is something more significant to be gleaned by understanding his work in light of the disaggregation of these two concepts. It is true that at times in *Rogues*, such as in his discussion of Algerian or Chilean politics or more generally when he describes the murderous and suicidal inclinations inherent in the notion of democracy, he is not equating “democracy to come” with “justice to come”. However, at other times, he seems to use the term democracy to indicate concepts such as equality, and justice, such as in one interview where he states “but if we dissociate democracy from the name of a regime we can then give this name 'democracy' to any kind of experience in which there is equality, justice, equity, respect for the singularity of the Other at work, so to speak”⁵², or where he suggests that ‘democracy to come’ does call for a militant and immediate injunction or critique of every political discourse and human rights rhetoric which

⁵¹“Force of Law”, *supra* note 30 at 947.

⁵² *Rogues*, *supra* note 35.

remains little more than an obscene alibi so long as it tolerates the terrible plight of so many millions of human beings suffering from malnutrition, disease, and humiliation, grossly deprived not only of bread and water but of equality or freedom, disposed of the rights of all, of everyone, of anyone.⁵³

The implications of his use of the term in the former context are different than in the latter. It may be that in this latter context he is talking not about democracy but about justice. It is under this latter understanding of democracy that it makes sense to deconstruct democracy in the name of more democracy.

Derrida argues that because democracy is a promise and will remain a promise it keeps the meaning of fundamental terms like freedom and equality open-ended. The structure of a promise opens up a space between democracy's actual condition and its future space and it is in this space between present and the future to come – delineated by the concept democracy to come – where the meaning of fundamental terms like freedom and equality can remain open-ended. The normative shift in his argument, the point at which he begins to speak of his notion of democracy as justice is at that point where this space between present and the future to come enters his analysis.

What suggests this? Derrida gives us a sense of what *ought* to transpire in this space. He suggests that "to come" means also not a future but that it [democracy/justice] has 'to come' as a promise, as a duty, that is 'to come' immediately. We don't have to wait for future democracy to happen, to appear, we have to do right here and now what has to be done for it."⁵⁴ Derrida suggests that the promise of repetition and the open-endedness of the future to come keeps social values and institutional structures open to different interpretations of what democracy means thus allowing multiple voices to clash and

⁵³ *Ibid.* at 86.

⁵⁴ Interview, *supra* note 48.

negotiate with one another. It is in this 'space' that such clashes can and will occur.

Interestingly, his very articulation of this 'space' is simultaneously a performance within it, a demonstration of its functioning.

The open-endedness of this space between the present and the future to come applies to the identities of the subjects engaged in modern discussion as well as the topics of modern discussion. Derrida argues that pre-modern forms of social organization relied on extra-political factors such as caste and class to ground political order, whereas modern ones do not and so, with no identity being ahistorical and with the democratic political field being open, the sovereign's identity is open.⁵⁵ The identity of people is not fixed; it can only be determined by the interpretations and continuous re-identifications of the people themselves. This is why democratic unity and sovereignty are inherently unstable, internally and infinitely differentiated and open to never-ending contestation. It is also why Derrida focuses on notions of hospitality.

Matthias Fritsch suggests that Derrida's polemical space of democratic decision making is opposed to a notion of deliberative democracy that specifies normative criteria in advance.⁵⁶ Derrida's concern, he suggests, is that this would impose a universal and hegemonic model of language on the radically open forms of democratic discussion and questioning which Derrida proposes. Matthias suggests Derrida's understanding is a democratic discourse governed by openness, infinity and the possibility of unsurpassable dissension that requires compromise rather than by normative rules given as universal.

Derrida's rejection of all normative criteria, a refusal to lay down even a basic set of rules for what goes on in 'the space', or even for how to understand what happens

⁵⁵ Matthias, *supra* note 37.

⁵⁶ Matthias, *supra* note 37. This might be contrasted with Habermas' theory of communicative action as developed in *Between Facts and Norms*, (MIT Press: Cambridge, 1998).

within the space must stem from a belief that to do so would limit access to the space, that it would lead to inhospitality. But it may be that in taking such a position, Derrida has specified normative criteria in advance – he may have laid down at least one rule. His rule? Access for everyone to the space, to the place, medium or forum where clash occurs, where meaning is contested.⁵⁷ His rule is meant to achieve his concept of hospitality – unconditional openness to Other; a successful accommodation of singularity. So his rule, which is that there be no rules, is consistent with his underlying reason for having no rules, but it nonetheless results in just the sort of double bind in which he seems to delight. Ultimately, however, it seems that in all of this there remains, by the introduction of this space, a normative shift. Whether it be called democracy, or justice, equality or hospitality, in the space created by this futural promise a teleological horizon resides and that horizon means something.

It may be that for Derrida law is a performative negation of justice in the same way that queer is a performative negation of identity. Justice, perhaps, is the infinite repetition of these negations. What is Just about this? Where is the nugget of normativity? It is in the open-endedness - the hospitality and friendship – found in that space between now and the future to come. The concept of a space between now and the future to come, and the possibility for hospitality in that space will be relied upon in the next Chapter in the discussion regarding the promise of the space between failures.

ii) Laclau's Constitutive Lack

⁵⁷ This ought not to be confused with a rule or set of rules about deliberative democracy. Derrida's space isn't merely the public arena of political discourse. It is a radical space of struggle, violence and clash where there are no rules. The first (and only) rule of Derrida's fight club is that there are no rules in fight club. In this way everyone gets to join.

As noted above, Laclau explicitly acknowledged the paradox of postmodernism. That is its failure, due to its claim that all meaning is socially constructed and therefore there is no universal, to provide criteria from which to judge. Laclau rejected both the logical possibility and the desirability of pure particularity. He suggested that we need general principles to address the conflicting demands of different groups. He argued that unless there exists some sort of pre-established harmony, which he argued is neither realistic nor desirable, the demands of various groups will inevitably clash with one another; as such, he suggested, general or transcendent principles to address these conflicts are necessary.⁵⁸

Despite his assertion of the exclusionary manner in which identity (or meaning) is created (and its corresponding incompleteness and therefore particularity), Laclau does not suggest that universality itself is impossible. Instead, he attempts to conceive of a universal without meaning – universal as an empty place or space. He attempts to identify a general transcendent principle devoid of any particularity by conceptualizing a universal process. The process he refers to is the ‘chain of equivalence’ discussed above – the emergence of identity from a constitutive exclusion or antagonism which produces one necessary commonality ...incomplete determination. By suggesting that universality is an empty but ineradicable place, he acknowledges its possibility but suggests it has no

⁵⁸ He suggests that a pre-established harmony, even were it possible, isn’t desirable because it would sustain the currently existing major power differentials between groups. Relations between groups are constituted as relations of power (exclusions/inclusions) and so a pre-established harmony would be disrupted if these relations changed. As a result, a pre-established harmony, would, out of self-preservation, require that the status quo of power relations not be disrupted because without the operation of some general or transcendent principle there would be no method of resolving any disruption to such harmony. Premised on his suggestion that identity is constituted differentially, and that all identities are incomplete due to the differential manner in which they are developed (to be discussed below), Laclau argues that a state of harmony, even were it desirable, isn’t logically possible in a world without universality. Under the notion of pure particularity, each identity is in a differential, non-antagonistic relation to all other identities; to have a pre-established harmony presupposes both the presence of all other identities and the total ground which constitutes differences as differences. In other words, it presupposes a universal. *Emancipations*, *supra* note 4 at 26-27.

actual content (i.e. it includes no particular); Laclau proposes that it is actually the absence of any such shared content that constitutes the promise of universality. In doing so he may have arrived at two universals. What is universal is both the inability to ever fully put content into the universal and the structural process underlying such inability. In other words, what is universal, for Laclau, is both this constitutive lack and his process based explanation for why this lack exists. His empty but ineradicable place is, in some respects, similar to the promise theorized in Derrida's democracy to come, discussed above. As with the space Derrida creates between now and the future to come, the concept of Laclau's ineradicable place will be relied upon in Chapter Eight. Simply put, my argument will be that one of the infinite processes of meaning formation that might occur in Derrida's space or Laclau's ineradicable place is iconoclasm.

Having accepted the necessity, or at the very least utility, as well as the possibility of a universal, Laclau considers some of the historical ways in which the relationship between universality and particularity has been conceptualized. One understanding of this relationship between the two envisions a spectrum with universality on one pole and particularity on the other, with a distinct line dividing the universal and the particular.⁵⁹ According to Laclau, under this conception, there is no mediation between the two concepts – the particular can only corrupt the universal. Either the particular realizes in itself the universal (and thus eliminates its particularity) or it negates the universal by asserting its particularism. The reason for this relates to the frontier dividing the two poles. Is the line separating the two poles a particular line or a universal line? If this supposed line is universal then ultimately it will engulf all particular – the particular will become universal and the dividing line will blur. If the line is particular then universality

⁵⁹ *Ibid.* at 22.

is really only a particularity that defines itself in terms of limitless exclusion. The line, in a sense, becomes an infinite number of lines.⁶⁰

A second account of the relationship between particularity and universality identified by Laclau stems from a theological perspective. Under this account there is a point of view of totality, but it is God's view and is not accessible to human reason. Here, only God can see the universal, and humans cannot reason their way into discovering it – under this account “there is no timeless world of rational forms which we can discover through reason”⁶¹. Instead, God has a master plan (which is the universal or totality) which requires a temporal succession of essential events unknowable to the human subjects who “incarnate” each of these universal moments.⁶² In other words, God's master plan is the universal and the bodies incarnating it are the particular – and there is no rational connection between the two. Laclau calls this the logic of incarnation and suggests that it is because of this logic that history received a privileged position. He argues that it became a privileged agent – an agent whose body was the expression of a universality transcending it. The reason being because it was capable of, at least retrospectively, recounting God's master plan - history wasn't stuck in the particular of any one of these “universal moments” in the way that every human incarnate was. (It is interesting to think about this account of history in terms of Foucault's genealogies). Laclau suggests that with the Enlightenment, modern thought, with its emphasis on reason, eventually replaced this logic of incarnation. God as the universal and absolute source of understanding was replaced by reason. The Enlightenment ushered in an era in which there had to be a rational ground for everything. Laclau suggests however, that

⁶⁰*Emancipations*, *supra* note 30.

⁶¹*Ibid.* at 23.

⁶²*Ibid.*

rationality also has a logic, although it is not the same logic as that of the logic of incarnation. Under the logic of rationality everything must be transparent to reason including the connection between the universal and the body incarnating it –there must be a common ground between the universal and the body incarnating it. Rationality needs a body - this, Laclau would suggest, is where both the origin and site of modernity’s ‘universal subject’ is derived.

According to Laclau, however, while the universal had purportedly found its own body, this body was still the body of a certain particularity – European culture of the 19th century. Euro particularism and the universal functions this body was supposed to incarnate couldn’t be separated – this model of understanding the world and its humanity had universalized Euro particulars. Laclau suggests that as a result, European imperialist expansion was presented in terms of a “universal civilizing function” and the resistances of other cultures was presented not as struggles between cultures and identities but as a struggle between universality and particularity. This is the dilemma Laclau refers to in *Emancipations* when he states “in the case of a secular eschatology, however, as the source of the universal is not external but internal to the world, the universal can only manifest itself through the establishment of an *essential* inequality between the objective positions of the social agents.”⁶³ In his example, this would be the inequality manifested between the colonizers and the colonized.

In view of each of these accounts of universality, Laclau is left considering the possibility that the universal is no more than a particular that has become at some point dominant or hegemonic. As a result of arriving at such a conclusion, Laclau’s question, in both *Emancipations* and *Contingency, Hegemony, Universality* could be characterized

⁶³ *Emancipations*, *supra* note 30 at 25.

as: is there a universal or is the universal simply a particular which has become hegemonic?

Laclau's answer is that there is a universal: it is what, as was discussed above, he identifies as the 'chain of equivalence' through which all identity is constituted. Despite his assertion of the exclusionary manner in which identity (or meaning) is created (and its corresponding incompleteness and therefore particularity), Laclau does not suggest that universality itself is impossible. Instead, as noted above, he attempts to conceive of a universal without meaning – universal as an empty place or space. He attempts to identify a general transcendent principle devoid of any particularity by conceptualizing a universal process. By suggesting that universality is an empty but ineradicable place, he acknowledges its possibility but suggests it has no actual content (i.e. it includes no particular). Laclau proposes that it is actually the absence of any such shared content that constitutes the promise of universality. Laclau *identifies* a common condition to all politicization: the condition by which any specific content fails to fully constitute an identity, a condition of necessary failure which not only pertains universally, but is the empty and eradicable place of universality itself. It is inevitable that a political organization will posit the possible filling of that place and equally inevitable that they will fail to do so. In doing so he may have arrived at two universals. What is universal is both the inability to ever fully put content into the universal and the structural process underlying such inability.

In other words, what is universal, for Laclau, is both this constitutive lack and his process based explanation for why this lack exists. (His empty but ineradicable place is similar to the promise theorized in Derrida's democracy to come.)

Laclau argues that “[c]ontemporary social struggles are bringing to the fore this contradictory movement that the emancipatory discourse of both religious and modern secularized eschatologies had concealed and repressed.”⁶⁴ Laclau concludes that as a result we are currently “coming to terms with our own finitude” and the political possibilities this recognition opens.⁶⁵ It is with this that Laclau then suggests that “perhaps we are at the end of emancipation and at the beginning of freedom”.⁶⁶ Is Laclau then suggesting we ought to, in the name of progress, relinquish all claims to identity, all closed meaning? In order to understand what he means by this it is important to understand what Laclau means by freedom. By freedom Laclau does not mean a free subject with a positive identity. By freedom he means something ambiguous, something not necessarily positive and something that is not absolute; this is because for Laclau the source of freedom is the dislocation of the subject that arises out of the differential process by which identity is constituted.

The political possibilities that Laclau is suggesting will open up are those that will arise if we recognize the following: that there is no subject with a positive (complete) identity to emancipate; that what is universal is this structural failure in the constitution of the subject; and that because actual freedom resides in the dislocation caused by this structural incompleteness, freedom is not wholly positive; it must be coupled with 'unfreedom' because absolute freedom would lead to an unrestricted dislocation and the total disintegration of the social fabric.

⁶⁴ *Emancipations*, *supra* note 30 at 18. Derrida makes a similar suggestion in “The Force of Law”, *supra* note 30 at 971: “Nothing seems to me less outdated than the classical emancipatory ideal. We cannot attempt to disqualify it today, whether crudely or with sophistication, at least not without treating it too lightly and forming the worst complicities. But beyond these identified territories of juridico-politicization on the grand geo-political scale [here he refers to those emancipatory battles already and always in place in the world], other areas must constantly open up that at first can seem like secondary or marginal areas.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at 18.

What does this suggest in terms of a theory of sexual justice? Laclau is not arguing in favour of a total disintegration of the social fabric. Like Derrida, he is not arguing in favour of the nihilistic tendencies sometimes associated with postmodern thought. Indeed, in *Emancipations* he quite expressly critiques the limits of postmodernism's critique of meaning.

He does not suggest that there is no closed meaning – what he emphasizes is that in terms of the constitution of meaning, the subject, and identity, the potential for change, exists in those structural failures, those moments of dislocation, and the preservation and promotion of spaces of 'undecidability'. For Laclau no concept, including the concept of universality is closed – all encompassing- and the potential, or political utility of universality, is the open-endedness, the structural failure which results in a never ending struggle for hegemony.

There are two unstated assumptions that under gird his chain of equivalence and the assertion that a claim of particularity is at once a claim of inclusion and exclusion and it is therefore impossible to claim a right to recognition of an identity of pure particularity. A commonality or universality antecedent to that explicitly observed by Laclau is reason –not only his own but also that which he imputes to the identity claimant. Laclau's paradox of claims to differential identity or pure particularity operates within the framework of reason. More significantly perhaps, the type of reasoning that he adopts and imputes to the identity claimant is premised on a notion of mutuality. And what is more, it is an assumption of mutuality grounded in equity and parity. It is reasoning that assumes, without articulating or defending such, that commonality requires mutuality and therefore parity. He rightly asserts that a claim to a particular identity is a

recognition of other identities but doesn't acknowledge that such an assertion is based on reasoning which assumes that a recognition in oneself of commonality necessitates a mutuality in the recognition of others. It is, in this respect, perhaps the case that Laclau's theory, not unlike Derrida's democracy to come ends up at the same place: that of an undefended assumption of fairness or what might be called justice –there is a content to his constitutive lack.

iii) Butler's Particular Universality

Butler 'sets the stage' for her exploration or restaging of the concept of universality (and justice) by discussing hegemony.⁶⁷ She suggests that hegemony establishes the discourse for any particular setting, and the possibilities for articulation within any given political circumstance.⁶⁸ She argues that we ought to understand this field of articulation – the possible ways in which we talk about things – to be ahistorical and limitless. The notion that there may be a structural limit to the field of possible discourses is problematic for Butler because, if the terms of both dominance and opposition are limited in some underlying structural way, then so are the possible sites of articulation for justice, equality and universality.⁶⁹

Butler suggests that the radical possibilities for such an understanding of hegemony lie in the fact that such a circumstance emphasizes the ways in which power operates to form our everyday understanding of social relations. In this respect she gives a Foucauldian account of power – power is neither stable nor static, but rather is remade repeatedly within everyday life. It is “ensconced as the prevailing epistemes of a

⁶⁷ Judith Butler, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, supra note 5.

⁶⁸ *Ibid.* at 13.

⁶⁹ Butler, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, supra note 5.

culture”.⁷⁰ Butler argues that “social transformation occurs not merely by rallying large groups in favour of a cause but through the ways in which daily social relations are rearticulated and new conceptual horizons opened up by anomalous or subversive practices”.⁷¹ She draws an analogy between her notion of performativity and her theory of hegemony and suggests that both performativity and hegemony highlight the way in which the social world is constituted through collaborative relations with power.⁷²

Butler’s description of hegemony is grounded in a cultural context. Her description seems to be one of the manner in which culture, dominant culture, is constituted. This account of hegemony then leads into her discussion of universality and the notion of cultural translation. Her account of universality, like Laclau’s, is premised on the notion of constitutive exclusion. However, for Butler, what is universal is derived from what she describes as a process of cultural translation. She suggests that we think of universality “in terms of this constitutive act of cultural translation”.⁷³

Butler discusses the impossibility of conceiving of universality as that which is self-identical to all human beings and therefore constitutive of the general will because under such a conception there is no place for the individual will. Instead what happens is “universality must vanish the individual”; in other words, because it cannot have any particular, those who remain radically unrepresented by the general will do not rise to the level of recognizably human within its terms. It is, for example, an account of

⁷⁰ *Ibid.* at 14.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

universality that could coherently sustain the United States Supreme Court's infamous decision in *Dred Scott v. Sandford*.⁷⁴ Butler argues that:

[t]o the extent that universality fails to embrace all particularity and instead is built upon a fundamental hostility to particularity it continues to be hostile to and to animate the very hostility by which it is founded – the universal can be universal only to the extent that it remains untainted by what is particular, concrete and individual – thus it requires the constant and meaningless vanishing of the individual.⁷⁵

Under Butler's notion of universality, without the vanishing of the individual universality would vanish; what is universal is this vanishing; once it is understood that this vanishing of the individual is crucial to the operation of abstract universality then universality itself vanishes as a concept which is said to include all life. She suggests that there is no way to bring the excluded particularism into the universal without negating that particularism. This account of the universal may be likened to what Laclau identified as one historical understanding of the relationship between universality and polarity, that being as a spectrum with universality on one pole and particularity on the other, with a distinct line dividing the universal and the particular and no mediation between the two concepts – the particular can only corrupt the universal.⁷⁶

Under Butler's account, what you end up with inside the term universal is nothing and outside an inassimilable trace or remainder which forever haunts the term universal. This, she suggests, is the problem with universality as an abstraction: it is impossible to

⁷⁴ 60 U.S. (19 How.) 393 1857. The Supreme Court of the United States denied citizenship rights to Dred Scott, an African American slave who had sued under the Constitution for his freedom. The Court found that according to their interpretation the forefathers never intended "citizen" to refer to those of the "subordinate and inferior class of beings", and that such people were not afforded the rights of citizens.

⁷⁵ Butler, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, *supra* note 5 at 23.

⁷⁶ *Emancipations*, *supra* note 5 at 22.

eradicate the particular and so the thing that is universal is the fact that particularism is ineradicable.

This leads her to conclude that universalism must be thought of in concrete form and that in this context what is universal is the constitutive act of cultural translation.

And with this she suggests that

[i]f we are to begin to rethink universality in terms of this constitutive act of cultural translation...then neither a presumption of linguistic or cognitive commonness nor a teleological postulate of an ultimate fusion of all cultural horizons will be a possible route for the universal claim.⁷⁷

One distinction between Laclau's theoretical approach and Butler's is in relation to the possibility of structure. While both work from the assumption that foundation as a conceptual possibility is neither possible nor desirable (both are, in this respect, anti-foundational), they diverge on the issue of structure. For Laclau, the structure of the process of identity formation is the universal and the conflict inherent to the type of process he identifies holds the only potential for social transformation. His theory is similar to Derrida's in this respect. Butler eschews any notion of a structural universality, preferring instead to conceptualize universality purely in terms of process – or as a performance. Whereas for Laclau universality is located in a structural incompleteness arising from the constitutive exclusion through which identity is formed, for Butler universality is not to be located in a structure.

The notion that all identity is posited in a field of differential relations is clear enough, but if these relations are pre-social, or if they constitute a structural level of differentiation which conditions and structures the social but is distinct from it, we have located the universal in yet another domain: in the structural features of any and all languages. Is this significantly different from identifying the universal in the structural presuppositions of

⁷⁷ Butler, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, supra note 5 at 21.

the speech act, in so far as both projects elaborate a universal account of some characteristics of language?⁷⁸

Butler suggests that for a claim to universality to work, to become recognizable as a claim, to compel consensus, “and for the claim, performatively, to enact the very universality it enunciates, it must undergo a set of translations into the various rhetorical and cultural contexts in which the meaning and force of universal claims are made”.⁷⁹ That is to say, no assertion of universality occurs outside of a cultural norm and because norms vary from society to society, no assertion can be made across cultures without a corresponding translation. “Without translation, the very concept of universality cannot cross the linguistic borders it claims, in principle, to be able to cross.”⁸⁰ As a result, it is impossible to separate out the cultural features of any universalist claim.⁸¹

In terms of law and projects of sexual justice, Butler’s account of universality and its relationship to particularism is less promising than Laclau’s or Derrida’s. While under none do we have an account of a stable subject or identity, Laclau does provide for us some criteria for judgment. That is the desirability of recognizing and sustaining the open-ended process of conflict through which identity and meaning is unendingly constituted. Presumably, Derrida’s ‘democracy to come’ provides the same. Butler’s theory does not leave space for the law to be operationalized – it provides no criteria by which the law’s distributive functions might be guided. This is evidenced by her simplistic and positivist treatment of law as formal, instrumental and ultimately unsatisfying, in her discussion of Guantanamo Bay, American exceptionalism and notions

⁷⁸ Butler, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, *supra* note 5 at 34.

⁷⁹ *Ibid.* at 35.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at 37.

of sovereignty, found in her recent work on international human rights.⁸² For instance, Butler's discussion of the American government's decision to deny rights to detainees at George Bush's Guantanamo Bay makes undefended references to "the human community" and accusations that the "uniqueness and exceptionalism of this kind of war [that being the purported 'war on terrorism'] makes it exempt from the presumptions and protections of universality and civilization".⁸³ What civilization? What is the human community? And what protections are offered by a universality that is located strictly in a process of cultural translation?

Whether it is that the law can't handle Butler's theory or that Butler's theory can't handle law, and despite her assertion that a theory of hegemony and universality ought not be abstract (as she suggests Laclau's is), her failure in *Indefinite Detention* to actually apply her theory of universality to the concrete legal circumstance she discusses, suggests the unlikelihood of it providing the basis for developing a coherent theory of sexual justice.

If one was to compare, most queer theory would likely be closer to Butler's account of hegemony and universality than Laclau or Derrida's theories. There is a normative content to both Laclau and Derrida's theories that may offer some criterion for judgment – for law to be operationalized. This is not present in Butler's theory of

⁸² Butler suggests that at Guantanamo Bay, during Bush's presidency, the law was effectively suspended and that with this suspension came a new exercise of state sovereignty that she says took place outside of law through an elaboration of administrative bureaucracies. In this way sovereignty was re-introduced by the very acts by which the state suspended the law or contorted for its own uses. Borrowing Foucault's terminology, she suggests that there are procedures of governmentality that are irreducible to law and are used to extend forms of sovereignty that are also irreducible to law. She argues that the suspension of the rule of law at Guantanamo Bay allowed for the convergence of governmentality and sovereignty. Legal protections were withdrawn and as law itself withdrew from this domain it became open to an extra legal institution of governmentality which then made law into a tactic. In this sense she understands sovereignty as an extra-legal authority that may well institute and enforce law of its own making. Judith Butler, *Precarious Life: The Power of Mourning and Violence* (Verso: London, 2004) at chapter 3.

⁸³ *Ibid.* at 89.

universality. Queer theory is most like Butler's theory because it too lacks any normative content. It is a relational concept—a positionality.

Conclusion

What should be taken from this discussion? Perhaps the following: queer theory provides tremendous descriptive insight into the violence underpinning any social meaning (that is the process of exclusion through which meaning is constituted); it provides theoretical insight into how concepts such as gender and sexuality come to be; and it demonstrates that because of this originary violence (in the formation of any law or sexual norm) it is incumbent upon any just system or social structure to recognize that its fairness depends on its ability to continually redefine and reinterpret itself and the social context in which it operates.

This, however, still leaves at least two theoretical problems. First, how, in the context of sexuality, does any system or institution or social structure ensure access to that space between now and the future to come where meaning is constituted and reconstituted continually? Second, by what criteria and through what method are the meanings attached to sexuality or social evolutions of sexuality at any given moment, accepted or rejected?

Accepting as necessary for law the need to judge, is there a way to stay open to perfection without arriving at the paradox law faces when presented with such openness? Recall the competing claims made throughout these chapters: first, that law ought to continue its shift towards a constructivist conception of sexuality and second that it ought to further embrace and rely upon the notion of sexual integrity by understanding it is a common interest.

Chapter Eight will argue that the notion of sexual integrity that the law ought to rely upon should include at least two elements: a concept of protecting and promoting the ‘conditions for’ sexual integrity and a recognition that included in those conditions should be always the possibility to re-examine, re-articulate, disrupt, subvert and replace both the meaning of sexual integrity and the conditions thought necessary to promote that sexual integrity. Derrida argued that the concept of democracy must remain open to the possibility of perfection (it is in this sense self-annihilating). There is a similarity between Derrida’s need for hospitality (friendship) and Laclau’s notion of mutuality. In Derrida’s space between now and the future to come might reside Laclau’s infinite moments of undecidability and the assumption of mutuality embedded in his constitutive lack. This idea seems promising and will be relied upon in the next chapter to argue that through concepts like iconoclasm we might identify the finite successes that are achieved as law continues to try (and fail) to promote the conditions for sexual integrity.

Chapter 8 – Conclusion

A number of claims, intended to build on one another, have been made throughout the previous chapters. The first was that sexuality is typically conceptualized as either an innate, naturally occurring, pre-social and essential element constitutive of who we are, or as a product of norms, social practices, institutions and structures – much like language, “diets, methods of transportation, systems of etiquette, forms of labor, types of entertainment, processes of production, and modes of oppression”.¹ The second claim made was that, across different legal contexts, the Court has tended towards an essentialist conception of sexuality.² Following this claim was the assertion that legal conceptions of sexuality as socially constructed are to be preferred over essentialist conceptions of sexuality - that constructivist conceptions promote legal reasoning that is less likely to understand and measure every sexual act, desire or identity through a heterosexual paradigm, and is better able to accommodate the relational, contextual and institutional factors which contribute to the regulation and production of sexuality (by refusing to overemphasize biology, heterosexual arousal, romance, and sexual morality).³ The fourth claim was that where the Courts have shifted towards a more constructivist account – such as in the context of adult sexual violence - the law’s moral focus has also shifted - from a concern over sexual acts to a concern over sexual actors, from an interest in protecting sexual propriety to an interest in protecting sexual integrity.⁴ Related to this

¹ Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality” in Carole S. Vance, ed. *Pleasure and Danger: exploring female sexuality*, (Pandora Press: London, 1989).at 277. See Chapter 2 – Theories of Social Constructivism.

² See Chapter Three – Legal Conceptions of Sexual Nature and Natural Sex

³ *Ibid.*

⁴ See Chapter Four – Queering Sexual Assault Law and Chapter Five – A Moral Shift.

fourth claim was the assertion that the law ought to understand sexual integrity as a common good and be oriented towards promoting and protecting this common good. The fifth claim was the assertion that constructivist approaches that remain firmly anchored in a specific structure fail to remain open to perfection – they lack what Derrida would refer to as hospitality and in doing so do not truly shift the law’s focus away from sexual morality and towards political morality.⁵ Following this was the cautionary claim made in the previous chapter. This was the claim that while constructivist theories are methodologically invaluable, in that they demonstrate the need for any just system or social structure to recognize that its fairness depends on its ability to continually redefine and reinterpret itself and the social context in which it operates, queer theory and post modernism do not meet the law’s need to establish or identify criteria by which to judge.⁶

As suggested at the end of Chapter Seven, this final chapter will argue that the Court ought to continue this shift towards constructivist conceptions of sexuality. This chapter will argue that the Court ought to continue this shift by embracing and relying upon the notion of sexual integrity as a common good and that the notion of sexual integrity it ought to rely upon should include at least two elements: a concept of protecting and promoting the ‘conditions for’ sexual integrity (which will necessitate criteria of judgment) and a recognition that included in those conditions should be always the possibility to re-examine, re-articulate, disrupt, subvert and replace both the meaning of sexual integrity and the conditions thought necessary to promote that sexual integrity (which will require that it adopt approaches which remain open to perfection).

⁵ See Chapter Six – The Problem with Power Feminism.

⁶ See Chapter Seven – Critiquing Queer Theory.

This chapter will be broken into two parts. The first part will examine what it means to suggest that the law conceptualize sexual integrity as a common good. It will then explore the concept of iconoclasm and suggest how it might be used to deploy the methodological insights of post modernism while accommodating the reality of law's judgment. Part two will attempt to further exemplify the rather theoretical claims made in part one by examining how the conceptual approach suggested here either has or could in the future be applied by the Court in a particular legal context. The theoretical approach proposed in the pages to follow does not provide a perfect theory capable of responding to every theoretical, conceptual and doctrinal critique to be made where law and sexuality intersect. To suggest that it did (or assume that it could) would be inconsistent with the claims made throughout this work and summarized in the previous paragraph. As suggested in the introductory chapter, the objective here is to develop one account of how a legal conception of sexuality as socially constructed might attempt to accommodate the tension between the recognition that what sexuality *is* is constituted through the norms, social practices, relationships and discursive regimes (including legal discourse) that describe and regulate it and law's need, despite this, to use those norms, social practices and discourses to judge that which is constituted through them.

I. Sexual Integrity And Iconoclasm

i) Sexual Integrity As A Common Good

Throughout the previous chapters I have argued that the law ought to conceptualize sexuality as a social construct and that more specifically where law and sexuality intersect the law ought to concern itself with the promotion and protection of sexual integrity. This, I have suggested, will better enable legal approaches that focus on

the affective, interactional and contextual aspects of sexuality. I also argued that the law should be oriented towards not only ensuring freedom from violations of sexual integrity but also promoting and protecting the ‘conditions for’... sexual fulfillment, sexual diversity, the safety necessary for sexual exploration and sexual benefit.⁷ I proposed that this would include the need for a community of sexual actors with intact sexual integrities, so that each of its members might have access to the relational aspects of sexual integrity. This, I contended, suggests that sexual integrity is in part relational and that it is in part relational suggests that it could be understood as a common good.

In fact, sexual integrity, like language, is one of those common goods that individuals need in order to be autonomous. The purpose of this section is to further expand upon the assertion that people require certain relational components to their lives – such as a community with the ‘conditions for’ sexual integrity - to be autonomous.

Joseph Raz argues that autonomy (due to its integral connection to well being) is a good that should dictate for society what constitutes the right. In other words, liberalism (and the principle of personal autonomy) is a conception of the good; in fact, because it fosters wellbeing⁸, it may be the best conception of the good. In making this argument Raz has deviated from liberalism’s traditional principle of state impartiality whereby legitimate state policies dictate what are and are not right actions but do not dictate what

⁷ Chapter Two at pages 26 – 30.

⁸ Raz defines wellbeing as the whole-hearted and successful pursuit of valuable activities. His definition of well being as a successful pursuit – as activity rather than passivity - includes action or inaction (say for example the inaction of life dedicated to meditation) so long as either is motivated by one’s attitudes and goals and oriented towards valuable activities. Joseph Raz, *Ethics in the Public Domain*, (Oxford University Press: New York, 1994) at 4.

are and are not good lives. Raz suggests that it is not desirable to fully separate the right from the good in public decision-making.⁹

Raz argues that freedom is intrinsically valuable¹⁰ and in doing so, he raises the liberal ideal of personal autonomy to the highest normative level. However, he also qualifies this assertion by suggesting that freedom or autonomy is valuable only if it is exercised in pursuit of valuable projects.¹¹ At first glance, this seems contradictory. However, what he means is that freedom is morally valuable or intrinsically good but this does not connote that any activity becomes valuable simply because it is chosen freely. For Raz the overarching ethical conviction of individuals and society ought to be to foster individual wellbeing. The wellbeing of individuals is constituted by the pursuit of their relationships and projects, but only of those relationships and projects which are actually valuable.¹² Raz suggests that a project or relationship can only be valuable if it is willingly embraced. However, that a project or relationship is willingly embraced does not mean that it was autonomously chosen.¹³ He notes the parent-child relationship as an

⁹ This is why Raz's theory is described as liberal perfectionism. Perfectionism refers to the assertion that the state is entitled to or ought to, in some sense promote some version of the good. Raz would argue that evaluations of the good are already pervasive both at the individual and societal level. In other words, we know that this is something states do. Charles Taylor, "The Politics of Recognition" in *Multiculturalism: Examining The Politics of Recognition*, ed. Amy Gutman (Princeton, New Jersey: Princeton Press, 1994) at 53, points to the orientation of Quebec language laws to make the same argument. These laws exist not just to protect current French speakers; they are also aimed at preserving French culture and language for the future. Policies aimed at cultural survival actively seek to create members of a community. They differ from policies that accommodate the differences of present day already existing communities. Government policies that ensure the future survival of a minority culture require a substantive liberalism rather than a procedural one. They imply adoption of some vision of the good life – some value judgment.

¹⁰ Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986) at 12.

¹¹ *Ibid.* at 381.

¹² See Joseph Raz, *Ethics in The Public Domain*, *supra* note 8. What of those who live in collective societies? Raz recognizes the possibility that autonomy is a cultural value – that it is only of value in certain societies. However, he argues that for those who live in an autonomy-supporting environment there is no choice but to be autonomous; "there is no other way to prosper in such a society." *The Morality of Freedom*, *supra* note 10 at 391. See also "Philosophy and the Practice of Freedom: An Interview with Joseph Raz" in *Critical Review of International Social and Political Philosophy*, vol. 9, no. 1, 71, March 2006.

¹³ *The Morality of Freedom*, *supra* note 10 at 369.

example of such. “It is a relationship most people willing embrace but do not freely choose.”¹⁴

Raz identifies certain conditions for autonomy. A person must have certain cognitive and affective capacities as well as a certain degree of health and physical ability.¹⁵ An autonomous person must be free from coercion or manipulation by others and they must have a range of valuable comprehensive goals available to choose from.¹⁶ “To be autonomous and to have an autonomous life, a person must have options which enable him to sustain throughout his life activities which, taken together, exercise all the capacities human beings have an innate drive to exercise, as well as to decline to develop any of them.”¹⁷ However for Raz the conditions of autonomy are not enough. Raz places great emphasis on the distinction between the capacity for autonomy and the actual state of autonomy. He suggests that it is possible to have the capacity for autonomy and yet not to have an autonomous life.¹⁸ What is important is achieved autonomy (what I will refer to as ‘autonomy obtained’), not a mere capacity for autonomy - the capacity for autonomy, the ability to act autonomously, does not an autonomous person make. Raz argues that the value of the capacity for autonomy lies not in the capacity itself but in the achievement for which that capacity is needed. The capacity for autonomy is a necessary but not sufficient precondition for an autonomous person.¹⁹ What sort of person is this? One who is of sound mind, capable of affectivity, rational thought and action (the conditions for autonomy) and whose life circumstances have included a sufficient range

¹⁴ *Ibid.*

¹⁵ *The Morality of Freedom, supra* note 10 at 372.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 375.

¹⁸ *Ibid.* at 372.

¹⁹ *Ibid.* at 204.

of significant options at different stages of life some of which that person has willingly embraced.²⁰

Raz is, in a sense, more ends oriented than traditional liberal rights theorists such as Ronald Dworkin. Dworkin, for example, advocates for an *ex ante* right to autonomy – for the equal distribution of the right to conditions that allow the capacity for autonomy.²¹ Raz’s theory is not rights based. For Raz, morality, both political and personal, is about the promotion of wellbeing – the pursuit of value.²² It is an argument in favour of the proposition that there is a duty on states to promote wellbeing, to facilitate its citizens’ pursuit of their worthwhile goals – to promote, produce and protect those social forms necessary for autonomy. He suggests that our wellbeing depends on our ability to pursue valuable goals and that our ability to pursue valuable goals is limited by the social forms of our society.²³

As noted, for Raz, ‘autonomy obtained’ requires the existence of a range of options for the pursuit of valuable projects and relationships.²⁴ These options are derived from the social practices that define activities and relationships. “The existence of many options consists in part in the existence of certain social conditions.”²⁵ My argument would be that sexual integrity (on a community or a societal level) constitutes one of those necessary social conditions - that a community, society, and legal system that

²⁰ *Ibid.*

²¹ Ronald Dworkin, “Foundations of Liberal Equality”, in S. Darwall, ed., *Equal Freedom* (Ann Arbor: University of Michigan Press, 1995) 190.

²² For a discussion of this see Donald Reagan, “Authority and Value: Reflections on Raz’s Morality of Freedom” 62 S. Cal. L. Rev. 995. Raz denies being a consequentialist, both in *The Morality of Freedom* and specifically in response to Reagan. See Joseph Raz, “Facing Up: A Reply” 62 S. Cal. L. Rev. 1153. It may be that in the political philosophy context the term consequentialism has a very specific meaning, a meaning more narrow than, or to be distinguished from, for example, instrumentalism.

²³ Raz, *Ethics in the Public Domain*, *supra* note 8.

²⁴ *The Morality of Freedom*, *supra* note 10 at 373-375.

²⁵ *Ibid.* at 205.

promotes the conditions for sexual integrity is required in order to ensure that individuals can “exercise all the capacities human beings have an innate drive to exercise, as well as to decline to develop any of them”.²⁶

Raz uses the examples of professional opportunities and gay marriage to illustrate his point. “One cannot have an option to be a barrister, a surgeon, or a psychiatrist in a society where those professions, and the institutions their existence presupposes, do not exist.”²⁷ In countries where same sex marriage is not available, gay couples cannot “partake of a socially (and legally) recognized and regulated type of relationship. [They] cannot do that if their society does not recognize and regulate a pattern of relationship which could apply to them...they have to develop their relations as they go along, and do not have the option of benefiting from existing social frameworks.”²⁸ It is on this basis that Raz argues that governments cannot ignore conceptions of the good or avoid assessments of what is normatively valuable. To do so fails to account for the connection between individual goals and societal conditions.

Raz argues that the goodness of one’s life will be enhanced by the fact that one lives in a society of a certain kind. He argues that the state has an obligation to adopt policies that promote and encourage personal autonomy – not because autonomy is an individual right but because it is a social good (i.e. it furthers well being). If well being is attained through the achievement of worthwhile projects and the state’s role is to promote conditions for the well being of all of its citizens then the state has an obligation to create social forms which make such projects and relationships available. Raz does not suggest however, that individuals necessarily have a right to certain social forms - the reason

²⁶ *Ibid.* at 375.

²⁷ *The Morality of Freedom*, *supra* note 10 at 205.

²⁸ *Ibid.* at 206.

being the collective nature of many of these social forms: “at least some of the social conditions which constitute such options are collective goods.”²⁹ For Raz, political morality cannot be founded simply on individual rights to autonomy. There are certain collective goods (he uses the example of the expression of a people’s self-determination) that cannot be expressed in terms of individual rights because individuals, he argues, cannot claim a right to a particular social form.³⁰ Some values that are important at the individual level are also important at the societal level and cannot be conceptualized within a rights framework.³¹ The pursuit of excellence is a collective good that is needed for autonomy but that is greater than the sum of individual rights.³² Similarly, I would propose that a community of sexual actors with sexual integrity is necessary for autonomy but I cannot really argue that I have a ‘right’ to my neighbors’ sexual integrity. I would, of course, argue that I have a right to many aspects of my own sexual integrity, such as bodily autonomy and freedom from discrimination. The point is not to suggest that rights are anything other than essential. The point is that political morality cannot be reduced *simply* to an account of rights. Raz argues that “[r]ights are tied to duties. Reasons for action which do not amount to duties escape the notice of a right-based morality.... [R]ight-based moralities cannot allow intrinsic moral value to virtue and the

²⁹ *Ibid.*

³⁰ *The Morality of Freedom*, *supra* note 10 at 207.

³¹ “The thought that rights and rights alone are the ultimate moral consideration is encouraged by the fact that rights imply concern for the individual right holder. Many people believe that morality is ultimately about the interests or well-being of individuals. Does it not follow that it is at bottom about rights? No, it does not. Concern for the individual expresses itself in love and friendship; it is reflected in the doctrine of virtue and much else. But there is no right to have friends or be loved, and none of the virtues can be understood in terms of rights.” Joseph Raz, “Rights and Politics” 71 *Ind. L.J.* 27 at 31.

³² *The Morality of Freedom*, *supra* note 10 at 206. Both Charles Taylor’s politics of difference and Will Kymlicka’s version of group rights are arguments based in some respect on this recognition of the value of collectivity. Taylor argues that there are certain forms of recognition that cannot be claimed through the vehicle of individual rights. See Charles Taylor, “The Politics of Recognition”, *supra* note 9. Kymlicka would suggest that there is a collective element to this aspect of individual wellbeing. See Will Kymlicka, *Multicultural Citizenship*, (Clarendon Press: Oxford, 1995).

pursuit of excellence.”³³ Political morality, he suggests, is not based simply on, for example, a right to equality. For Raz, it must also contain duties regarding our responsibility towards others and principles concerning the wellbeing of people. His ideal of (what I have throughout this work labeled political) morality requires individuals and the state to promote conditions of autonomy for other individuals through the creation of an adequate range of valuable options.

Raz argues that any time a government encourages the pursuit of excellence it is not acting neutrally as to the good; it is in fact identifying the pursuit of excellence as a good. He suggests that governments frequently do this and that while there will be disagreement as to what the conditions for pursuing excellence might be, most would agree that having said conditions is a good we want the state (and the law) to encourage. Recall that Chapter 5 and 6 discussed the distinction between political morality and sexual morality and argued that where law’s moral compass is dictated by political morality rather than sexual morality the focus of legal reasoning is focused more on protecting sexual actors and sexual integrity than sexual acts and sexual propriety. Does Raz’s approach problematically suggest that law ought to be guided by sexual morality (what Dworkin would describe as first person ethics) rather than political morality (third person ethics)?

In fact it does not. Raz says his approach will not free the state to impose its will and infringe civil liberties to attain perfectionist goals because the promotion of a conception of the good based on the ideal of personal autonomy must recognize the

³³ *The Morality of Freedom*, *supra* note 10 at 196. Raz uses the example of honesty to illustrate this point. Even honesty, a virtue particularly tied to the duty not to deceive, isn’t exhausted by compliance with that duty. “The exemplary honest man is one who does more than his duty to make sure that his behavior does not mislead others.”

existence of, and the need for, value pluralism. Value pluralism recognizes that many of the choices available to individuals are both valuable and incompatible. Raz acknowledges the existence of incompatible values. How then, if this is the case, does his liberal perfectionism avoid the imposition of majoritarian morality in the inevitable eventuality of competing values?

He does so by adopting a version of John Stuart Mill's harm principle. He suggests that a theory which values autonomy highly can justify restricting the autonomy of one person for the sake of greater autonomy of others or even of that person himself in the future but cannot justify restricting autonomy on the basis of incommensurate values.³⁴ The harm principle "restrains both individuals and the state from coercing people to refrain from certain activities or to undertake others on the ground that those activities are morally either repugnant or desirable."³⁵ This is an argument in support of negative freedoms. He suggests that the prevention of harm to anyone, including one's self, "is the only justifiable ground for coercive interference with a person."³⁶ This is not premised on the assertion that a morally repugnant pursuit should be defended against coercion if not harmful on the grounds that it was autonomously chosen and therefore has value.³⁷ It is not about value. (Recall, for Raz, autonomy is only valuable if used in

³⁴ There is one exception to this assertion. It makes the a priori normative assumption that harm is prima facie wrong. "It is a normative concept acquiring its specific meaning from the moral theory within which it is embedded." Raz, *Morality of Freedom*, *supra* note 10 at 414. Raz defines harm as including pain and offence but also the deprivation of valuable options and the frustration of one's pursuit of the projects and relationships necessary for one's well being.

³⁵ *The Morality of Freedom*, *supra* note 10 at 413.

³⁶ *Ibid.*

³⁷ To what order of moral repugnance is Raz referring? Raz does not always draw the distinction that I do (as borrowed from Dworkin) between first person morality and third person morality. Here he may very well be referring to both political morality *and* (in the context of this discussion) sexual morality. His argument at this point is regarding coercion – that is that the state ought not to use coercive force to interfere with a harmless (sexual) activity that the state finds morally repugnant. Under my analysis this claim would be premised on political morality. I have adopted Raz's analysis regarding common interests and Dworkin's distinction between first order and third order morality. In other words, I want to maintain

pursuit of worthwhile goals.) Rather, he argues that the state ought not to use coercion to stop people from engaging in morally repugnant, but harmless, activities because the effect of coercion on the recipient's autonomy is imprecise.³⁸

That is, there is no practical way of ensuring that the coercion will restrict the victim's choice of repugnant options but will not interfere with their other choices. A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm. But it will not tolerate coercion for other reasons. The availability of repugnant options, and even their free pursuit by individuals, does not detract from their autonomy.³⁹

This aspect of the Razian harm principle is in keeping with Dworkin's assertion that a liberal society is one that draws a distinction between first person ethics and third person ethics and may legislate on the latter but not the former.⁴⁰ This element of Raz's reasoning, in addition to his thoughts on the value of tolerance as a common good as discussed below, serve as criteria by which to judge and make assessments as between sexual liberties a society wants to protect and those it wants to reject.

However, Raz extends the principle beyond concepts of negative freedom. He does so in three respects. His harm principle includes an understanding of the harm to autonomy caused by state inaction; secondly, his harm principle includes the possibility of coercive interference against an individual for the sake of that individual's own degree

the distinction between political and sexual morality and suggest that the promotion of sexual integrity as a common interest, because it is essential to autonomy, is a necessary component of a political morality such as the one reflected in our Constitution.

³⁸ Raz argues that a state's exercise of authority will only ever be legitimate where (inter alia) it is exercised to fulfill a task (for which governance is needed), where the exercise of authority will succeed or is likely to succeed in completing this task and where the authority is confined to actions aimed at discharging this task. Joseph Raz, "About Morality and The Nature of Law" (2003) 48 Am. J. Juris. 1 [hereinafter "About Morality"]. Coercion whose effect is imprecise doesn't meet these criteria for legitimacy.

³⁹ *The Morality of Freedom*, *supra* note 10 at 419.

⁴⁰ See Chapter 5 for a discussion of the distinction Dworkin draws between first person ethics and third person ethics.

of autonomy. Finally, he includes in his notion of the harm principle an element of futurity which opens up the possibility for greater positive action, including the promotion (through non-coercive means) of perfectionist policies by the state.

For Raz, since autonomy is an intrinsic good and since autonomy requires a range of valuable options, state inaction can also cause harm. That is to say, a government's failure to provide individuals with a range of valuable options also constitutes an interference with autonomy. He notes that

[n]egative freedom, freedom from coercive interferences, is valuable inasmuch as it serves positive freedom and autonomy.... Coercing another may express contempt, or at any rate disrespect for his autonomy. Secondly, it reduces his options and therefore may be to his disadvantage. It may, in this way, also interfere with his autonomy. It may but it need not: some options one is better off not having. Others are denied one so that one will improve one's options in the future. In judging the value of negative freedom one should never forget that it derives from its contribution to autonomy.⁴¹

For Raz then, the harm principle serves not as a restraint on the promotion of moral goals⁴² by the state but rather as "indicating the right way in which the state could promote the well-being of people."⁴³

There are two points arising from this aspect of Raz's work that are particularly relevant to this discussion. The first is his suggestion that autonomy obtained, as I refer to it, requires certain social forms. The second is his account of a harm principle in which a state's failure to act – to create certain social forms or support aspects of community –

⁴¹ *The Morality of Freedom*, *supra* note 10 at 410.

⁴² Again, here the moral goals Raz is suggesting could conceivably include both sexual morality and political morality. However, only if those goals promote social forms that further autonomy and autonomy, he recognizes, requires value pluralism.

⁴³ *The Morality of Freedom*, *supra* note 10 at 420. Notably, because Raz's harm principle derives from the value of autonomy "resort to manipulation [which also interferes with autonomy] should be subject to the same condition as resort to coercion. Both can be justified only to prevent harm." *Ibid.* at 20. This provides another check and balance for those endorsing liberal perfectionism.

also causes harm and therefore states have an obligation or duty to create certain social forms. Raz's theory is anchored in concepts not just of rights but also of duties, reasons for action and the overall promotion of wellbeing. In other words, it is centered on the pursuit of excellence and identifies the need for certain social forms as one prerequisite for this pursuit.

The recognition of a need for certain social forms is a recognition of the value of community; but under Raz's theory it is a recognition whose teleological horizon is still autonomy (because autonomy is needed for well being). To suggest that autonomy obtained requires the availability of a range of options which can, in part, only be provided through certain social forms, is to link the possibility of autonomy to some concept of community and correspondingly such a theory, if it recognizes the value of autonomy obtained implicitly recognizes the value of community. What is more, the suggestion that the state has an obligation to create or protect certain social forms, certain collectivities, because a failure to do so harms autonomy, also suggests that it would be nonsensical to protect or promote the community in a way that diminishes autonomy.

Raz's theory would not allow for the coercive enforcement of the majority of the community's sexual morality simply for the sake of community itself. Raz's theory identifies purpose in community for instrumental reasons. Communities (societies) provide certain social forms necessary for the autonomous pursuit of a range of valuable relationships and projects so as to promote individual wellbeing. Therefore, a Razian approach to the notion of indecency for example would, as did the majority in *R v Labaye*, reject a definition founded simply on the community's standard of tolerance.

However, it would do so in a manner that still recognizes and affirms the value of community.

I have suggested that sexual integrity be thought of as a social form that is in the common good. Raz makes a distinction between public interests and common goods. While under Raz's approach both are a function of individual interests, the common good is a good that is in the interests (albeit perhaps to varying degrees) of everyone in a given society while the public interest is based on a resolution of the conflicting interests of various citizens. He uses the examples of the existence of pollution free air and the existence of a network of railway tracks to illustrate the distinction. There may be a public interest in a system of railway tracks. It is an interest possessed not only by railway users but also by other members of the public, such as consumers. However some people may derive no benefit from this good and others may actually be adversely affected by the railway's existence. For instance the railway may cause them to endure noise or air pollution, or cause a decline in the value of their property. This does not mean that there is any less of a public interest in the existence of a viable railway. "[T]he judgment that the public interest is served by the existence of a railway network is based on the balance of good and evil, on a resolution of the conflicting interests of different people."⁴⁴ Raz contrasts this public interest with a common good such as the existence of clean air. "Everyone has a health interest which benefits from unpolluted air. The benefit is noncompetitive (one person's enjoyment is not at the expense of anyone else) and it is similar in nature for everyone."⁴⁵

⁴⁴ "Rights and Politics", *supra* note 31 at 35.

⁴⁵ "Rights and Politics", *supra* note 31 at 35.

Is sexual integrity more like a railroad system or clean air? Is its benefit noncompetitive and is it similar in nature for everyone? Recall that I characterized sexual integrity as including not just freedom from bodily violation but also the conditions for sexual benefit, fulfillment, diversity and exploration. I suggest that sexual integrity is more like clean air. But what of the individual who receives sexual gratification by violating the bodily integrity of another sexual actor for example? Does the fact of this suggest that sexual integrity is not a common interest, that its benefit is competitive? No, it does not. To argue such would be to misconstrue Raz's claim. Raz's argument is that a common good is one in which one person's enjoyment is not at the expense of anyone else. A polluter may well receive financial benefit from dumping toxins into the air rather than spending the resources to ensure a more environmentally friendly manufacturing process. This does not mean that that polluter has less of an interest in inhaling clean air into his lungs when he steps out of his office. That someone may take action (including action from which they derive a benefit) that threatens something that is in the common good does not make it less of a common good. A sexual actor who commit acts or behaves in ways that deprive others of their capacity for sexual pleasure, their sense of sexual self, their ability to relate in a sexually beneficial way to others in their community, does threaten the common good of sexual integrity. That person's actions do not, however, change the nature of this common interest or even this particular sexual actor's interest in its benefit. An individual who behaves in this manner is not enjoying the common interest in sexual integrity because they are not acting with sexual integrity. A conflict in interests is not created. An individual may enjoy chain smoking in a confined space with non-smokers present or hot boxing their parents' car without their

parents' consent – this does not mean that by doing so they have transformed a common interest in clean air into a competitive benefit not enjoyed similarly by everyone. It simply means they are not breathing clean air.

Recall that for Raz a society serves an instrumental purpose – that is to provide social forms that allow for a range of those valuable options needed for an autonomous life that cannot be created individually. It seems to me that the value he identifies in community is integrally related to the provision of common goods, while the service of public interests is more of an ancillary function. This is obviously not to suggest that the public interest is unrelated to community or the collective, but rather, that the promotion of public interests – a balancing of competing interests - is an inevitable product of, rather than a cause for, politics and government. That is to say, perhaps public interests are a functional outcome of the collective rather than the inherent value in the collective.

Social forms can only be created through the collective, through community. Some social forms originate from common goods (interests) and others from public interests. Raz says there are certain social forms, necessary for individual wellbeing, which the state has a duty to provide. I would argue that where a duty to provide a social form exists what must be at issue is a social form related to a common good rather than a public interest. In other words, the state (and a just system of law) has a duty to act in a manner that is consistent with common goods. To do otherwise is to fail to maintain the value of community and the collective. This seems to me to be consistent with the instrumental value that Raz locates in the collective. Conversely, particular social forms related to public interests rather than common goods are not necessarily duty based. That is to say, the state may choose to pursue a particular public interest or not and regardless

still act in a manner which maintains the value in community, provided whatever political process of balancing they conduct is done fairly. (In other words, there may be a common interest in a fair balancing process which gives rise to a duty on the part of the state to serve the public interest with integrity but there is not a duty on the state to serve any specific public interest.) However, where a common good is at stake the state must act in pursuance of it, or consistent with it, in order to maintain value in the community (and sustain their political legitimacy as a liberal democracy). If this is the case, then where a common good is at stake, so long as the state adopts policies or enacts and interprets laws in pursuit of such common good, some notion of community is maintained and recognition of the value in collectivity is reflected in such laws and policies.

ii) Trouble - An Iconoclastic Approach

A different version of pages 387 to 410 were previously printed in (2009) 54 McGill L.J. 3.

Let us assume that I am right to say that sexual integrity is a common good, that it is necessary for autonomy and that therefore the law ought to promote and protect the conditions for a community possessed of sexual integrity because it is one of those social forms necessary for the well being of individuals. Let us further assume, as I suggested in Chapter 4, that the range of valuable options necessary to create this social form includes as well as bodily integrity, the conditions for sexual fulfillment, sexual diversity, the safety necessary for sexual exploration and sexual benefit. Raz would say that “one particularly important type of common good is the cultivation of a culture and a social ambience which make possible a variety of shared goods, that is, a variety of forms of social association of intrinsic merit”.⁴⁶ The common good referred to here is the

⁴⁶ “Rights and Politics” *supra* note 31. Some reference ought to be made in this context to the distinction between laws that criminalize an activity, laws that decriminalize an activity and laws that actually promote

availability of an adequate range of shared goods;⁴⁷ in the context of sexual integrity this would mean the autonomy to choose one's forms of social (sexual) association (recall that for Raz autonomy requires the availability of a range of meaningful options)⁴⁸ and the capacity for sexual benefit. (Shared goods are goods whose benefit for people depends on people enjoying the good together and thereby contributing to each other's good.⁴⁹)

The difficulty with this suggestion is in ascertaining i) which forms of sexual association are of intrinsic merit ii) which conditions are necessary for a community of sexual actors possessed of sexual integrity and iii) what substantive concept of sexual integrity should the law be operating under. By what criteria should the law distinguish between social forms it is meant to promote and those it is meant to discourage or prohibit? Can a legal theory of sexuality accept the possibility of the intrinsic merit of some sexual social forms and still maintain a constructivist conception of sexuality? If law ascribes to a constructivist account of sexuality – which understands sexuality as a socially contingent product of norms and practices – by what criteria is sexual benefit to be identified and assessed?

In other words, how can law stay open to perfection in the Derridean sense while pursuing excellence in the Razian sense? My answer is that it cannot. But here is what it can do. It can try and fail. More importantly, it can fail over and over and over and over

an activity. In terms of the promotion of social forms, decriminalizing, for example, group sexual activity through the redefinition of indecency, cannot be equated with say offering tax incentives to swingers clubs or legal recognition of polyamorous relationships; however, due to the unique character of the law as a social form or potential good, the redefinition of a legal concept which regulates sexuality in a manner which makes some sexual association now legally available does increase the range or variety of shared goods available. In terms of the intersection between law and sexuality, coercively prohibiting, prohibiting, remaining neutral towards, promoting and manipulating particular sexual associations do not reside within distinct categories but rather lie on a spectrum.

⁴⁷ "Rights and Politics", *supra* note 31 at 36.

⁴⁸ Raz recognizes the importance of sex as a form of social association. See Joseph Raz, *Practice of Values*, (Oxford University Press: Oxford, 2003) at 153, FN 23.

⁴⁹ The distinction between shared goods and common goods will be further discussed below at page 27.

and over again...and in the space between failures we will find discrete moments of success (such as power feminism's intervention into sexual assault law) and finite moments of meaning formation and then reformation (such as the inchoate valuing of sexual minorities under section 15 of the *Charter*).

However, to fail over and over and over again – thus creating for a moment that potentially hospitable space between failures – is a necessary but not sufficient condition. Discrete moments of success, finite moments of meaning formation and then reformation require, by their very definition, closure – that originary violence that is the constitution of meaning. In each of those moments and in every failed attempt to stay open to perfection while at the same time pursuing excellence that come both before and after each of those moments, there is a need to judge - to say and to know what constitutes sexual integrity.

As suggested in the previous chapter, law needs judgment to be operationalized. Law cannot escape this. However, what law can do is drive itself (or be driven) to try (over and over and over again...) to stay open to perfection while it pursues excellence. A conception of sexual integrity measured against political morality rather than sexual morality – using the aspirational principles of the Constitution rather than those of god or nature – should drive law to keep trying (and failing). A relational standard of valuation, which evaluates social forms based not only on how well a sexual association fits within the standards of excellence for its genre but also on how it relates to its genre, should help to keep the space between failures hospitable. What does it mean to evaluate based on genre?

Raz suggests that specific social forms belong to a kind.⁵⁰ He notes that two elements determine how items or activities can be evaluated: the definition of the kinds of goods to which they relate (including the constitutive standards of excellence for each kind) and the ways the item relates to that kind. In other words, something may be evaluated based not on how neatly it fits within the standards of excellence for its genre but also based on how it relates to its genre.

Genre-dependent evaluation is marked by the fact that objects are evaluated by reference to kinds, to genres. But there are different relations they can bear to the genre. Straightforward membership or exemplification of the kind is only one of them. Two elements determine how items can be evaluated. First is the definition of the kinds of goods to which they relate, which includes the constitutive standards of excellence for each kind. Second are the ways the item relates to the kinds. It may fall squarely within them. Or it may, for example, relate to them ironically, or iconoclastically, or as a source of allusions...⁵¹

As Raz suggested, one way in which an item, activity or law can relate to its genre is iconoclastically. An iconoclast is one who challenges traditional or popular ideas or institutions, on the basis that those beliefs or institutions are wrong. Iconoclasm is not the same as subversion or deconstruction. Iconoclasm, unlike subversion, is about meaning formation. Why is this the case? Because the site of its transgression is expressly and concededly within a cultural construct not external to it. It is the intentional destruction within a culture of one of the culture's own icons, symbols or meanings. Unlike subversion, which aims simply to deconstruct, its purpose is to attack a cherished belief by relying on a new or different cherished belief. This is why it has the capacity to be a shared value; it is about the collective – often done for political (or in the past religious) reasons. Illuminating the distinction between iconoclasm and the notion of queer theory

⁵⁰ Raz, *The Practice of Values*, *supra* note 48 at 39.

⁵¹ *Ibid* at 41.

(because of its reliance on the concept of subversion) helps to illustrate how iconoclasm accommodates new meaning rather than simply disrupting old meaning. As demonstrated in Chapter 7, while the post modern method of deconstruction used by queer theorists is, in certain analytical instances, methodologically helpful, ultimately its method is self-destructing. Queer theory does not allow for the notion of genre-based evaluation. Judgment in kind necessitates the identification and affirmation of categories and is antithetical to queer theory, and deconstruction generally. The distinction between an iconoclastic approach and a queer approach is real. An iconoclast dissents against a popular belief or tradition on the grounds that it is in error. To disrupt cherished beliefs about sex, or to dissent against traditional sexual mores on the basis that they are wrong is not to contest the normative validity of sexual mores, the possibility of meaning, the existence of categories or the ability to judge – quite the opposite in fact. An iconoclastic approach to the legal regulation of sexuality, unlike a queer approach, acknowledges the inevitability of judgment; it recognizes the social fact that an icon once shattered will undoubtedly and expediently be replaced by a new icon. And for this reason it is better able to account for, contest and at times work within the liberal political context in which the legal regulation of sexuality operates in Canada's constitutional democracy.

As suggested in Chapter 3, the legal contest over same sex marriage provides a good example of this. Certainly, gay and lesbian marriages operate within this particular cultural construct (which is why queer activists opposed a social movement focused so heavily on this issue). But this very fact reveals its iconoclastic impact. In Canada, marriage no longer means the legal union of one man and one woman. It is true that gay

and lesbian marriages did not deconstruct the institution of marriage in Canada but they did change, to some degree, its icon.⁵²

If, in the context of legal regulation, the evaluation of a given sexual act is based on whether, and the way in which, it challenges traditional or popular ideas about sex, then the benefit or detriment (the good or bad) of it is in its effect; it is relational. It is dependent on there being a genre and the existence of a standard of evaluation for that genre but it is not dependent on what that standard is. Its benefit or detriment is in the process of reconsideration that its transgression perpetuates. This does not mean that every transgression, every new meaning formation, will promote the common interest in sexual integrity. It means only that the space between failures will be preserved and it will be preserved in a manner that allows for the possibility of those finite moments of meaning formation and then reformation.

This reasoning entails making two interrelated normative assumptions. First, it entails an assumption that there exists substantive meaning to the concept of sexual integrity albeit meaning which is constantly evolving and shifting and, due to its relational nature, potentially plural in form.⁵³ In other words, there need not be (nor could be) one account of what constitutes the standards of excellence for sex; however, in any and all sexual contexts there must (and will) be criteria constitutive of sexual integrity. Given that the focus of this discussion is on the potential good of iconoclastic jurisprudence, a standard under this account cannot be static. However, while it is not possible to assume one standard of excellence for sex, it is possible to assume that in any sexual act there is

⁵²Some argue that same sex marriage does not change the meaning of marriage but merely expands the scope of relationships to which it applies. Given that 'marriage' is the description of a particular type of relationship this is not a persuasive argument.

⁵³ I am indebted to Professor Leslie Green for observing that under the argument I am making it must be the case that any standards of excellence for sex be plural in form.

always a standard. The suggestion that a standard can be objective yet unstable in this way may create a certain degree of unease. The objective element of this assertion stems from Raz's observation that while a given value may not be universal, that people value IS universal. Raz argues that the fact of this universalism suggests that, through reason, pluralism can be accommodated.⁵⁴ The normative element at play is an assumption that judgment is both necessary and legitimate. Law needs judgment to be operationalized. Its reforming, preventative and distributive functions all require judgment. And for law to be just that judgment must not be arbitrary. To avoid arbitrary judgment requires meaningful criteria. That is to say, it requires standards of excellence.

Secondly and correspondingly, it entails an assumption that some sexual dissent, some challenges to social forms such as human sexuality, some degree of this process of openness, is required.⁵⁵ Evaluating how much, and when, dissent would be good, because it too is a relational concept, can be determined by resorting to an external standard, such as a harm principle or the promotion of community tolerance, rather than requiring reliance on a standard of excellence which is internal to the genre itself. That is to say, it is possible to articulate an impermanent content or meaning to what constitutes sexual integrity without attempting to articulate a coherent account of what constitutes excellent sex.

Part two, to follow, will revisit the Court's approach to the *Criminal Code* definition of indecency outlined in *R v Labaye* in an effort to reveal how the concepts and

⁵⁴ Joseph Raz, "Reason, Reasons and Normativity" (University of Oxford Faculty of Law Legal Studies Research Paper Series, January, 2008) at 22.

⁵⁵ Dissent is an essential criteria for the progress of any community. This is no less true with respect to sexual dissent than with respect to political dissent. Indeed to disaggregate sexual dissent from political dissent is in many respects a false distinction. Provided an ability to judge is maintained (which is what the first normative assumption I articulated achieves) it can fairly be said that sexual dissent is presumptively in the common interest. Both a standard, achieved through practice, argument and reason, and dissent are necessary to accommodate pluralism.

theoretical approach just described might be applied (or are already at play) when the law intersects with issues of sexuality and to demonstrate how the concept of iconoclasm might be deployed to evaluate the Court's reasoning.

II. In The Case Of Sexual Integrity And Iconoclasm: Laws Of Desire

R v Labaye, as discussed in chapter five, involved the re-interpretation of the definition of indecency under the bawdy house provisions such that the community standards of tolerance test was no longer part of the analysis. The majority of the Supreme Court of Canada determined that only activities which pose a significant risk of harm, of the type "grounded in norms which our society has recognized in its Constitution or similar fundamental laws," harm so serious as to be incompatible with proper societal functioning, will be considered indecent.⁵⁶ In what respect can the specific definition of indecency prescribed by Chief Justice McLachlin in *Labaye* be said to respect and promote the notion of sexual integrity as a common good?

There are two interrelated common goods one might argue are served by the majority's revised definition of indecency in *Labaye*. They are tolerance and the iconoclastic legal recognition of sexual desire.⁵⁷

The first, tolerance, is related to another type of good Raz discusses: shared goods. As noted above, "shared goods are goods whose benefit for people depends on people

⁵⁶ [2005] 3 SCR 728 at para. 29.

⁵⁷ It should be noted that liberal theories of state neutrality can also affirm the value of and need for tolerance. Tolerance is integral to Dworkin's challenge model of ethics for instance. That this is the case, however, does not diminish the argument that the common interest in tolerance affirmed and promoted by *Labaye* can be characterized as an investment in the collective, or the assertion that characterizing it in this fashion makes it more effective as a response to the dissent's communitarian concerns. Moreover, these theories provide different accounts of what tolerance is and what work it does – under a perfectionist oriented approach tolerance is valuable not only in terms of individuals but also for what it provides to a community.

enjoying the good together and thereby contributing to each other's good."⁵⁸ He notes a party or a dance, and the fact that such events are only enjoyable for their participants to the extent that they can be enjoyed together, as examples of shared goods. It is certainly the case that the sorts of sexual activities occurring at Club L'Orage and Coeur à Corps would be of this shared character; at issue after all was the decency or indecency of "orgies" to use the term employed by Chief Justice McLachlin.⁵⁹ However, shared goods are not to be confused with common goods. Common goods are those that serve the same interest of every person in a non-competitive way. The ability to legally engage in group sex in a semi-public setting does not serve the interests of every person in Canada. While it is a shared good among those who desire to engage in group sex in semi-public settings, it is not a common good. However, there is a common interest at issue in this case. The common good referred to here is the availability of an adequate range of shared goods; in the context of indecency and obscenity, the common interest in cultivating an ambience of eclectic sexual associations (which is needed for autonomy).

This is the common good of toleration. It is a common good to live in a tolerant society; in other words, we all benefit from living in a tolerant and non-discriminatory society.⁶⁰ This point becomes clearer "when we think of the failings of societies other than our own."⁶¹ Raz uses the example of an apartheid society and the ways in which such a system detrimentally affects the lives of all of its members.

A prejudiced and intolerant society affects adversely the options available to every one of its members. It colors the nature of the social relations each can have. It threatens to make each member complicitous with its bigotry through association with bigots, through involvement in projects

⁵⁸ Raz, "Rights and Politics", *supra* note 31 at 36.

⁵⁹ *Labaye*, *supra* note 56 at para. 69.

⁶⁰ See Raz, "Rights and Politics", *supra* note 31 at 38 where he makes this point.

⁶¹ *Ibid.*

which involve the display of prejudice and discrimination. It imposes duties actively to fight prejudice and discrimination in one's own society in order not to be tainted by its failures through membership in it; duties which are burdensome and limit one's ability to pursue other options.⁶²

The common good of living in a Canadian society that is not operating under a system of apartheid seems obvious. To think of an extreme, analogous to an apartheid society, in the context of sexual intolerance and repression, one might consider the treatment of women under the Taliban's regime in Afghanistan, or perhaps less controversially, the fictional, futuristic theocracy of Margaret Atwood's sexually repressed Republic of Gilead in *The Handmaid's Tale*:

What's going on in this room, under Serena Joy's silvery canopy is not exciting. It has nothing to do with passion or love or romance or any of those notions we used to titillate ourselves with. It has nothing to do with sexual desire, at least for me and certainly not for Serena. Arousal and orgasm are no longer thought necessary; they would be a symptom of frivolity merely, like jazz garters or beauty spots.⁶³

The common good of living in a Canadian society which has not relegated the female orgasm to the status of unnecessary trend from a by-gone era seems obvious; less clear for some is the common good of living in a society which tolerates sexual practices the majority of Canadians find disgusting, depraved, repulsive and immoral. However, as Raz notes, tolerance is not the approval of many incompatible forms of life; tolerance and pluralism are not synonymous.⁶⁴ "Toleration is a distinctive moral virtue only if it curbs desires, inclinations and convictions which are thought by the tolerant person to be in themselves desirable."⁶⁵ One is not exercising sexual tolerance by tolerating a particular

⁶² *Ibid.* at 38.

⁶³ Margaret Atwood, *The Handmaid's Tale*, (Seal Books: McClelland-Books, 1985) at 89.

⁶⁴ Raz, *The Morality of Freedom*, *supra* note 10 at 401.

⁶⁵ *Ibid.*

sexual act even though it is an act that one would never engage in. One is only exercising sexual tolerance where one tolerates a sexual act of which one disapproves.

Chief Justice McLachlin's definition of indecency and obscenity requires that we not criminalize as indecent or obscene any sexual act or depiction without an associated harm even if we find it repulsive, disgusting, immoral and of no intrinsic merit. Contrast this with the dissent's approach to the definition of indecency and obscenity: "[s]ocial morality, which is inherent in indecency offences and is expressed through the application of the standard of tolerance, must still be allowed to play a role in all situations where it is relevant."⁶⁶ To criminalize sexual conduct purely on the basis that it is, from a majoritarian perspective, immoral (as in it is harmless to others but would nonetheless be considered immoral by most citizens' first person ethics), and this is what the dissent suggests Canadian law should continue to do, cannot be an act of tolerance. To tolerate sexual conduct and depictions despite considering them immoral is to act out of toleration; it is to protect the common good of a tolerant society. To limit such tolerance to within the bounds of harmlessness is to act in promotion of the community's interest in sexual integrity. Chief Justice McLachlin rejects the traditional 'community standard of tolerance' and in doing so, instead sets a standard of tolerance for the community; a standard which our Constitution dictates is necessary so as to avoid being tainted by membership in an intolerant society. Her definition makes a demand for a standard of tolerance for the community which it is in the common good or interest of each of us to

⁶⁶ *Labaye*, *supra* note 56 at para. 103.

pursue, and which it is incumbent upon any state dedicated to acting in the interests of the community to maintain.⁶⁷

Having acknowledged that group sex itself cannot be considered a common good in Canadian society, does Chief Justice McLachlin's decision offer value beyond the common interest a society and each of its members have in promoting tolerance?

Recall that one way in which to evaluate the worth of an item or activity is to assess how it relates to its genre. Can the reasoning adopted by Chief Justice McLachlin in *Labaye* be evaluated based on an assessment of the iconoclastic effect the decision may have on the legal regulation of human sexuality or sexual expression? Does the decision produce an iconoclastic impact such that it serves the common interest in a community of sexual actors possessed with sexual integrity?

In fact, given that an iconoclastic decision challenges and replaces cherished beliefs, one could consider the Supreme Court of Canada's decision in *Labaye* and *Kouri* to be

⁶⁷ A consideration of the jurisprudential context in which this case was decided provides another way of thinking about this case in relation to the positive obligation to create certain social forms, in this case the promotion of some sexual relationships, born by the state. Any modicum of legal realism recognizes that laws are never made, and cases are never decided, in a contextual vacuum. In considering this case one ought to recall that the Court was making its determination in the context of a post *Charter* wealth of jurisprudence defining which sorts of sexual relationships will be recognized, valued and promoted in Canadian society (see for example *Halpern*, [2003] OJ No. 2268, *Nova Scotia v Walsh* [2002] 4 SCR 325, *M v H*, [1999] 2 S.C.R. 3, *A.A. v B.B.* [2007] O.J. No. 2). Both legislative and adjudicative branches of the Canadian state have focused a great deal of attention in the last twenty years on debating, re-defining and with respect to certain forms of sexual relationships (particularly same sex and non-married ostensibly monogamous heterosexual relationships) formalizing and privileging through legal recognition, particular types of sexual relationships; that is to say making available certain social forms that the state has recognized as valuable. This is consistent with Raz's suggestion that the state ought not to coercively prohibit undesirable or valueless options that do not cause harm but most certainly should endeavor to promote through incentive and preferential treatment those life options which are valuable and desirable and therefore promote well being (Raz, *Morality of Freedom*, *supra* note 10). The Court decided *Labaye* in an era where some would argue that as a society we have actually increased the role of law and government in the definition, regulation and control of human relating (albeit through positive mechanisms such as tax incentives, and property rights rather than negative legal mechanisms such as the criminal law). This may be a context that makes it "safe" for the Court (and the community) to withdraw regulation in areas which in a previous legal era might have seemed at least desirable if not outright needed. It is, as suggested, also consistent with Raz's assertion that the state ought to encourage, through incentive, certain common goods (for example social forms such as marriage) that promote wellbeing by increasing individual autonomy, rather than prohibit undesirable, but harmless, life choices.

some of the most iconoclastic jurisprudence to date regarding the legal regulation of sexuality in Canada. Why? Because in their outcome the decisions challenge two of what are the most significant pillars of the societal regulation of sex in this society: they transgress the heavily fortified sexual boundary of public/private and they challenge the taboo against the commodification of sex. Most significantly, they do so NOT on the basis of claims of anti-subordination, identity, privacy or safety.

Jeffrey Weeks suggests that our culture too often justifies erotic activity on some basis other than desire, such as reproduction, or the consummation of relationships.⁶⁸ The same could be said with respect to the law's relationship to sexuality. The law typically adopts an approach to sexual desire and erotic activity that focuses on rights, responsibilities and personal morality. Legal analyses concerning issues of sexual activity and human sexuality are most frequently framed as either claims to privacy,⁶⁹ claims to expressive rights⁷⁰ or claims of identity (or anti-subordination claims more generally.)⁷¹ As discussed in chapter three, in the case of sexual minorities, legal arguments and analyses typically focus on claims of identity or relationship recognition. In the case of sexual liberty more broadly the emphasis is usually on claims that reify the public sphere/private sphere division or on claims premised on the expressive rights held

⁶⁸ Jeffrey Weeks, *Sexuality*, 2nd ed. (London: Routledge, 2004).

⁶⁹ See for example *Bowers v Hardwick*, 478 U.S. 186 (1986) challenging Georgia's anti-sodomy laws on the basis of a liberty interest in sexual privacy; *Lawrence v Texas*, 539 U.S. 558 (2003) striking anti-sodomy law on basis of constitutional right to privacy under due process clause of the American Bill of Rights. In the Canadian context this right to sexual privacy has more frequently been acquired legislatively (as in Parliament's decriminalization of sodomy in 1967) or through equality claims (see for example *R v M (C)* (1995) 30 CRR (2d) 112). This may be, in part, due to the comparatively greater emphasis on equality in the Canadian constitutional context than is the case in the American constitutional context.

⁷⁰ See for example the claims in obscenity cases such as *R v Butler*, [1992] 1 SCR 452 and *Little Sister's Book and Art Emporium v Canada*, [2000] 2 SCR 1120 (which also included an equality claim).

⁷¹ The most obvious two examples being claims of discrimination based on sexual orientation (*Egan* [1995] 2 SCR 513, *Vriend v. Alberta*, [1998] 1 S.C.R. 493) and claims for relationship recognition made by same sex and common-law couples (*Halpern v Canada*, [2003] OJ No. 2268, *M v. H*, [1999] SCJ No 23, *Walsh v. Bona* [2002] 4 SCR 325).

by individuals. Legal recognition of the bodily pleasures behind or outside of an identity, relationship or sanctuary, of the significance of autonomously held and experienced sexual arousal, is infrequently claimed and less frequently, if ever, granted.

However as noted earlier, neither privacy rights, expressive rights nor identity claims aptly characterize the arguments or reasoning involved in *Labaye*. Both *Labaye* and *Kouri* involve sexual activity in semi-public.⁷² Neither *Labaye* nor *Kouri* involve a group of sexual actors that could reasonably be described as a sexual minority and neither *Labaye* nor *Kouri* involve claims regarding freedom of expression.

The jurisprudential construction of sexuality – what sex means in the context of its relationship to law – has taken different forms. At different times, in different legal contexts sex, has been about morality, religion, identity, privacy, and class. It has been about health, gender, expression, violence, family and love. It has even been about communism!⁷³ But it has never really been about the recognition of pleasure or desire. As discussed in the paragraphs to follow, this is not something that the Court has typically done and having done it in *Labaye* changes, at least to some degree, the meaning of the

⁷² *Kouri* in particular involved sexual activity occurring in a location (a dance floor with seventy or more people engaged in sexual activity at one time) that could hardly be labeled private in the sense of ‘acts occurring in private’. The Court found that the procedure at the door – in which the bouncer only admitted couples who declared themselves to be liberated couples – sufficiently ensured that individuals would not be involuntarily confronted with deeply offensive sexual conduct such that it would prove harmful in the sense defined under the first branch of harm in *Labaye*. This aspect of the decision related to a consideration of the evidence of a risk of unwanted confrontation. It was not really an attempt to reconstitute the boundaries between public and private such that a business open to the public, in which anyone willing to declare themselves a liberated couple gained admittance to a bar in which upwards of one hundred people were having sex together, is now considered private. If the decision were read in this latter light then it would also have to be characterized as a radical revision of the law’s distinction between public and private in which the private sphere is greatly expanded and the public sphere significantly contracted.

⁷³ In the 1950s and 1960s in Canada (and elsewhere) gays and lesbians were perceived by the government to be security risks due to purported close ties to communism (in addition to their supposed susceptibility to blackmail). Hundreds of gays and lesbians were purged from the RCMP and other public servant positions. By 1967 the government had a list of 9000 ‘suspected homosexuals’ in Canada. See Gary Kinsman, “Challenging Canadian and Queer Nationalisms” in T. Goldie, ed., *in a queer country: Gay and Lesbian Studies In The Canadian Context* (Vancouver: Arsenal Pulp Press, 2001) 209 at 220.

legal regulation of sexuality in Canada. It is an example of the formation and reformation of meaning, achieved at a discrete moment in a discrete context and as measured against the political morality underpinning the Constitution.

In *Labaye*, Chief Justice McLachlin states that “sexual activity is a positive source of human expression, fulfillment and pleasure”.⁷⁴ A review of prior case law defining obscenity demonstrates that legal recognition of the significance of sexual pleasure was not the focus (or even *a* focus) of analysis prior to *Labaye*. In 1962, when the Supreme Court first grappled with the British common-law definition of obscenity in a case involving the novel *Lady Chatterley’s Lover* the analysis focused on the merits and demerits of legal censorship.⁷⁵ The Court in *Brodie* did not concern itself with the sexual fulfillment and pleasure of Lady Chatterley, her lover, or the book’s readers. In 1985⁷⁶ and 1992⁷⁷ when the Court revisited the definition of obscenity the focus was on incorporating a notion of harm into the Court’s analysis of the community’s attitude towards a particular sexual act or depiction. Desire, pleasure and fulfillment were not taken into account. In *Little Sisters*, in 1997, claims about pleasure and desire actually were made by *Little Sisters* and certain of the interveners; however these claims were not endorsed by the Court.⁷⁸ *Little Sisters*, as discussed in chapter 5, involved a constitutional challenge to obscenity laws based on the discriminatory manner in which they were applied by customs officials to gay and lesbian material imported by the Little Sisters Bookstore. The challenge was brought on the basis of freedom of expression as well as an equality claim based on sexual orientation. Underpinning the equality argument in

⁷⁴ *Labaye*, *supra* note 56 at 48.

⁷⁵ *Brodie*, [1962] SCR 681.

⁷⁶ *Towne Cinema*, [1985] 1 SCR 494.

⁷⁷ *Butler*, *supra* note 69.

⁷⁸ *Little Sisters*, *supra* note 69.

Little Sisters (which was premised on the assertion that pornography figures differently in gay and lesbian communities than in straight ones) was a claim about desire – same sex desire specifically. The equality claim was rejected by the Court.

It may be that, for doctrinal reasons, the Court was not well situated in any of these pre-*Labaye* cases to give recognition to the significance of desire and sexual pleasure. Take *Little Sisters* for example. Given the other section 15 jurisprudence regarding sexual orientation developing at the time that *Little Sisters* was decided, it is not surprising that the Court was unwilling to accept arguments suggesting that the sexual needs (for pornography or particular sexual depictions) or the sexual acts of gays and lesbians were *different* from those of heterosexuals. More generally, it may be that until the Court had rejected the community standards of tolerance test there was not conceptual space for considerations of desire. Considerations regarding desire and sexual pleasure are more easily incorporated into a definition of indecency centered on actual, proven harm to sexual participants or other members of society as measured against the values of liberty, dignity, equality and autonomy but not so easily where harm is measured by the community's standard of tolerance.

As is the case with respect to the prior case law regarding obscenity, the prior Supreme Court of Canada cases defining indecency cannot be said to have given rise to a legal recognition of sexual desire. The lap dancing trilogy of the 1990s, *R v Tremblay*⁷⁹, *R v Mara*⁸⁰ and *R v Pelletier*⁸¹ all involved charges against tavern owners whose performers gave lap dances or private shows of some sexual variety. In *R v Mara* and *R v Pelletier* the Court found, applying the community standard of tolerance test, that the acts

⁷⁹ [1993] 2 S.C.R. 932.

⁸⁰ [1997] 2 S.C.R. 630.

⁸¹ [1999] 3 SCR 863.

were not indecent, while in *R v Tremblay* the Court found that the lap dances were beyond the community standard of tolerance. None of these decisions appear to take into consideration, as Chief Justice McLachlin did in *Labaye*, that sexual activity is a source of pleasure. However, this may be due in part to the factual patterns that gave rise to the indecency charges in these cases. All of them involved the explicit exchange of money for sexual contact of some type.⁸² It would perhaps be surprising to find that the Court had provided reasoning which suggested a legal recognition of sexual desire in cases involving the exchange of money for sexual contact where the sexual desire is presumably not mutually experienced by both or all of the sexual participants.

But *Labaye* also involves an exchange of money for sex. However, the interrelationship between sex, money and desire in *Labaye* is different than it is in any of these cases. Unlike these older cases, *Labaye* involves reciprocal rather than unilateral sexual desire and unlike these older cases it involves people paying money to have a sexual interaction but where money is paid by *all* of the sexual actors to a third party. Money isn't the motivating factor for any of the sexual participants; mutual desire to engage in the sexual activity at issue is the motivating factor. It is for this reason – the mutual desire of the individual sexual actors - that Chief Justice McLachlin determined that the commercial element of these activities was not a factor suggesting that the activities were indecent.⁸³ It may be that what distinguished the exchange of sex for

⁸² The only other case in which the Supreme Court considered the definition of indecency was *R v Clark*, [2005] 1 SCR 6. However *Clark* ultimately turned on the definition of public place. Moreover the case involved charges against a man seen by his neighbors masturbating in front of his window. Justice Fish's decision is certainly a recognition of the right to privacy and an admonishment to nosy neighbors, but the only sexual desire recognized in the *Clark* case was secondary, and well... not relational so to speak.

⁸³ "On the present set of facts, the commercial aspect of the respondent's operation is hardly relevant to this type of harm. The entrance fee was not paid by some to secure the sexual services of others. It merely enabled all the customers to gain access to the bar and to equally participate in the activities taking place therein." *R v Kouri*, [2005] 3 SCR 789 at para. 22.

money in *Labaye* from the exchange of sex for money in the lap dancing trilogy (where the exchange of sex for money was most certainly a determining factor – albeit under the community standards of tolerance test) was the role of (type of) desire.

Labaye and *Kouri* represent Supreme Court of Canada decisions stipulating that, absent an associated and provable harm, the law ought not to interfere with the exercise of a sexual desire. In particular, a sexual desire which takes place in semi-public settings and which includes a commercial element. The intrinsic worth of the shared goods occurring at Club L'Orage and Coeur à Corps are manifested through the Supreme Court of Canada's decisions. That desire may be beyond reason and rationality, and therefore not susceptible to valuation, does not suggest that the social forms which stem from drives or capacities that exceed the limits of reason can not be evaluated based on arguments regarding the standards of excellence for those social forms or their iconoclastic implications for those standards. The recognition of desire is a recognition, by law, of something outside of itself...something outside of law. Further, a legal recognition of desire is itself *prima facie* iconoclastic, because the law's legitimacy is premised on reason. The iconoclastic effect of these social forms is reflected in the legal recognition these pleasure seeking activities received from the highest court in the country. It is not simply that these forms of human relating transgress dominant sexual norms – many forms of human relating do so and may possess intrinsic worth (or be detrimental) for reasons of their own. It is that the fact of their existence resulted in a change or shift in the law's relationship to human sexuality. In *Labaye* and *Kouri* the Supreme Court of Canada shattered a long held and stridently protected legal (and social) belief that a legitimate exercise of the criminal law power can be premised, either directly

or indirectly, on sexual morality. In doing so it recognized if not for the first time, then in a novel way, the value of desire.

But having established that the legal recognition of desire changes the law's relationship to sexuality, replaces old and forms new meaning regarding the legal regulation of sex, in other words is iconoclastic, does not alone make it a common good. Iconoclasm is not presumptively good. What makes this particular iconoclastic jurisprudence a common interest? Why is changing the relationship between law and sexuality, such that it recognizes the value and significance of sexual pleasure, an iconoclastic effect of benefit and not detriment?

In "Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of Sex, Gender and Sexual Orientation in Euro-American Law and Society" Francisco Valdes identifies the defence of desire as the next strategic move in the pursuit of "sex/gender reform and equality".⁸⁴ He notes that "sexual and affectional intimacy, driven by erotic desires, is integral to humanity and society because both intimacy and desire are affirmations of life and therefore are diametrically opposed to dogmatic regimes such as the dominant Euro-American sex/gender system."⁸⁵ As such, he suggests (speaking from a pre *Lawrence v Texas*⁸⁶ American legal context and more specifically within a claim to the right to sexual privacy) that human intimacy and desire are neither frivolous nor legally insignificant. Whether it is cross-sex or same-sex desire, he argues that the defence of desire may be the most significant contribution queer theory⁸⁷ has to offer:

⁸⁴ 83 Cal. L. Rev. 1 (1995) at 368 [hereinafter "Queers, Sissies"].

⁸⁵ Valdes, *ibid.* at 368.

⁸⁶ 539 U.S. 558 (2003).

⁸⁷ Borrowing Valdes' focus on the regulation of desire ought not to be taken as a reliance on queer theory itself. While Valdes' project is substantive – it imagines queer theory as the substantive work of subverting sex and gender norms, recent writers argue that queer legal theory is not a substantive project but rather a methodology for critique. See generally Janet Halley, *Split Decisions*, (Princeton University Press:

The tactic of defending desire thus commits Queer legal theory to winning respect for the range of yearnings regarding consensual affection and intimacy that are felt by all humans in one form or another. But because desire is not rational in the Western sense, this tactic also commits Queer legal theory to engaging the law beyond the limits of (legal) rationality. This tactic or method calls forth a joy in and for humanity that is distinct, though not separate, from the notions (and the limits) of reason or logic that characterize the very culture of the law. In this sense, this tactic may be the most radical or subversive contribution of Queer legal theory to critical legal thinking; defending desire effectively calls for us to “come out of the closet” with respect to human pleasure and its worth. Consequently, the defense of desire as such amounts to much more than a challenge to the rationalized and selective version of instrumental “privacy” that characterizes and delimits the protection of intimacy afforded under the constitutional status quo....⁸⁸

What common interest (that is not already met through a rights paradigm) is served when the meaning of sexuality within the context of its legal regulation changes in this way? That is to say, what common interest is served when law comes out of the closet with respect to human pleasure and its worth.

When law comes out of the closet with respect to human pleasure and its worth a common interest in human flourishing is served. A focus on desire and pleasure (in conjunction with harm) locates wellbeing and human flourishing as central to the law’s concern in this context. It allows for legal analysis that takes as one of its primary considerations the quality of people’s lives. This is analogous, in some sense, to the way in which a re-conceptualization of the harm caused by sexual violence allows for legal analysis that takes as one of its primary concerns the perspective of all sexual actors involved in a sexual interaction.

Princeton, 2006). As suggested above, queer theory, unlike iconoclasm, is less able to accommodate theories of justice, reflect legal struggles as they actually transpire ...or operate within a liberal framework that operationalizes law through judgment.

⁸⁸ Valdes, “Queers, Sissies”, *supra*, note 83 at 369.

Incorporating concepts of pleasure and desire into the law's conception of sexuality reveals a more nuanced and truthful account of this human activity – an activity the ubiquity of which is matched only by the historical degree to which it has been socially and legally regulated. Why does this matter? Legal analysis that recognizes sex as having the capacity to be positive, pleasurable and fun reflects a reality about sex that the law has tended not to reveal. This is significant for a number of reasons. It is significant not simply for its celebration of one of the very positive aspects of our humanity but also because the law's capacity to better recognize, account for and reflect the good of sex might also lend itself to a capacity to better account for and reflect the bad of sex, that is to say, the very real harms related to or caused by certain sexual behaviors (particularly for women, children, and sexual minorities). A legal capacity to better reflect these sexual realities facilitates a greater ability to handle those complex and difficult legal circumstances in which pain and pleasure, desire and fear intersect, overlap and at times blur.⁸⁹

The decisions of the Supreme Court of Canada in *Labaye* and *Kouri* establish an understanding of the regulation of public sex that is based in morality and that acknowledges the value of community. Chief Justice McLachlin's reasoning, far from relegating Canadian values to the private domain, invokes our generally agreed-upon fundamental ethical convictions for the very purpose of protecting them, and she does so in a manner that continues to recognize the importance of community and common interests without subjugating minority desires to majoritarian sexual morality.

Chief Justice McLachlin relies upon principles reflected in the constitution—

⁸⁹ Issues such as sadomasochism and certain types of sex work for example, reveal circumstances where the law has, to date, failed to develop a coherent theory or theories of sexuality that can account for the infinite complexity that arises when human beings interact sexually.

principles such as autonomy and equality—to redefine the legal regulation of public sex in a manner that removes it from the community standard of tolerance test. She establishes a standard that regulates sexual activity based on principles considered to be agreeable to all or almost all members of a liberal society.

Labaye and *Kouri* are not premised on claims of identity, privacy, or expression, and therefore they actually represent the potential for a more significant shift in the jurisprudence. This interpretation of her decision identifies the iconoclastic implications of her reasoning and illuminates a shift in the legal regulation of sexuality towards an accommodation of concepts of pleasure and the significance of sexual desire. The reasoning in *Labaye* thus protects our common interests in tolerance and human flourishing, achieved through the recognition and affirmation of sexual pleasure, bounded by both sexual dissent and liberal judgment.

The legal recognition of desire in *Labaye* and *Kouri* reveal a moment of meaning formation and then reformation. The legal recognition of desire (even when confined by the principles of the constitution) won't solve every issue of sexual liberty anymore than equality rights for gays and lesbians will give the law a complete answer to the social conflict which inevitably arises from sexual diversity or than re-conceptualizing the harm of sexual violence will resolve the many other tensions evident in sexual assault law (such as the tension between the right to a fair trial and a complainant's right to privacy). The iconoclastic impact of the reasoning in *Labaye* reveals a moment of success – the legal recognition of desire changes the way in which law and sexuality intersect. It is a moment of success that must (in terms of law) be followed by a failure to stay open to perfection. What does desire mean? What types of desire should be valued and

protected? Can equality claims be made based on desire? How does the legal recognition of desire change what desire is?

Conclusion

Legal approaches to sexuality that understand sexuality as a product of social context, norms and regulative practices tend, as demonstrated in the context of sexual assault law and obscenity and indecency laws, to promote legal reasoning that is more concerned with sexual actors and sexual integrity than sexual acts and sexual propriety. Legal reasoning that identifies sexual integrity as the interest at stake when law and sexuality intersect is legal reasoning that will focus on sexual interactions, on context, on power dynamics, on affectivity not just bodily autonomy, on the perspectives of all sexual actors involved. Where the notion of sexual integrity that courts adopt is understood as social form that is in the common good, legal reasoning should reflect a concern over the social conditions that produce whatever issue of sexuality has come before the court – whether this is reflected in, for example, the development of remedies that are attuned to the social factors that perpetuate the use of sexual hostility in the workplace or a legal recognition that it is not only social categorizations such as ‘family’ that can evolve, shift, (or shatter and reconstitute!) as social contexts change but also the legal categories that reflect, regulate and in fact at times constitute these social categories.

Unavoidably, when law intersects with sexuality, morality will come into play. Given this, as argued in Chapter five, what is most significant is what order of morality legal reasoning is reliant upon. Where the common interest in sexual integrity is understood as necessary for individual autonomy then there should be space to recognize

a community's role in producing this social form by relying on reasoning based on political morality rather than resorting to legal reasoning reliant on sexual morality.

Finally, where it is recognized that sexuality is socially constructed through social practices, norms, and discursive regimes it should also be recognized that law constitutes one of the discursive regimes through which sexuality is constructed. This creates a tension, given that with law must come judgment, that for judgment not to be arbitrary there must be criteria by which to judge and that the criteria by which to judge are as socially constructed as are the subjects of law's judgment. There may not be a way to maintain a constructivist legal theory of sexuality that can reconcile this tension. But then there may not need to be.

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