Troubling Sex

Towards a Legal Theory of Sexual Integrity

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Troubling Sex

Introduction

Sex has been, and remains, a societal repository for distinctions between right and wrong, and law is frequently employed as the site, sentinel, and archivist for this social warehouse of distinctions. But the relationship between law and sexuality extends far beyond simply using law to make sexual norm-based judgments between right and wrong. Sexuality, as will be argued throughout this book, 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."[1] One might just as easily identify these five areas as being 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 pervades every area of social and individual life.

Given this complexity, it is important to examine how courts tend to understand sexuality, whether it is context dependent, and whether the conceptual approach they adopt best promotes legal reasoning that can account for, and accommodate, the 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. The intersection of law and sexuality has been examined through feminist perspectives, critical race theory, liberal theories, postmodernism (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, legal discussions about "good sex," sexual liberty, and the rights and/or oppression of sexual minorities tend not to include much focus on issues such as rape, sexual violence, and the "bad of sex." Similarly, discussions about sexual harm – for example, those that reflect on the sexual oppression of women and children – do not tend to emphasize theories or legal approaches that are overly concerned with also recognizing 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 that 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 these questions, can there be one legal theory of human sexuality that accounts for the good of sex but that identifies and rejects the bad, which ensures equality without assimilation, diversity without exclusion, and liberty without suffering?

Trouble Me with Three Notes about Theories Incomplete

✶ *I know of a fourteen-year-old who sat at the kitchen table and watched as her father took his, and her 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 company's customer service department, and informed her family that they no longer shopped at Sears – all in response to the department store's recent announcement that it would begin granting spousal benefits to employees in same sex relationships. Apparently, it was one of the first nation-wide companies in Canada to make this decision. For him, it 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 that family's credit cards, legal activism aimed at issues such as the acquisition of pension and health benefits for gay and*

lesbian couples is often considered a misdirected 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 this father and the Queers.

✶ *I recently attended a conference on feminist constitutionalism. During breakfast on the second day, I had the pleasure of sitting next to a professor who had given a presentation the day before that 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 a piece I had read, in which the author argues that Justice Wilson's contextual approach was in a sense postmodern. This professor immediately dismissed the author's work – which seemed to me to be consistent with the particular argument she was making, but which used the term postmodern in its conceptual approach – with one statement. "Yes, well ... her feminist credentials are questionable." I was immediately concerned. Were my feminist credentials questionable and, if so, would my ideas be dismissed just as easily? I did not know whether I had the "right" feminist credentials and, if I did, whether I had packed them. What if they asked me to produce them?*

✶ *A few years ago, 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 – it has been "serving the queer community since 1970."*[2] *I overheard a conversation two aisles over between two men who looked to be in their late forties or early fifties. They were bemoaning the heteronormativity and homophobia of Western attitudes towards Afghani Imam and their supposed practice of taking adolescent boys as "lovers." 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 with me.*

There are three broad theoretical approaches that have likely done the most work in terms of theorizing concepts of sexuality in a contemporary legal context. They are liberal rights theories, postmodern and queer theories, and feminist theories, in particular, radical feminism. Each of these approaches, in their various manifestations, offers significant insight into certain aspects of the relationship between law and sexuality. Each of these approaches has, at different times, helped me to grapple with the troubling tensions that arise

when law and sexuality intersect. At other times, each has left me with a sense of incompleteness, even dissatisfaction.

Equality theory provides a solid theoretical foundation to defeat laws that discriminate against gays and lesbians. It provides strong support for the assertion of rights to spousal benefits for the gay and lesbian employees of Sears, but it is less able to provide a theoretical basis for the contention that the distribution of economic privileges ought not to be based on sexual relationship status. It does not accommodate well 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 in 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.[3]

Queer theory (and postmodernism more generally) can avoid drawing such lines. Queer theory can, for example, provide the basis for transgender folks to argue for the disruption of regulatory gender norms or for women to argue that context encodes (female) bodies with meaning, not the other way around.[4] However, queer theory cannot really 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 hebophiles out. Queer theory and postmodernism offer important theoretical arguments that can promote notions of sexual justice and women's equality. However, they alone cannot coherently defend the choice to pursue either sexual justice or women's equality.

Radical feminism 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). Radical feminist thought has contributed enormously to the development of a contextual and more sophisticated understanding of sexual violence in Canadian law. It fails, though, to treat equally sexual minorities oriented towards consensual sadomasochism. Nor does it handle well women who sexually harass men, women who rape,[5] or the importance of promoting female heterosexual desire.[6] None of these approaches provides 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 one legal theory of human sexuality that cuts across the space between good sex and bad sex, public sex and private sex, dominant sexual practices and minority sexual practices, assimilation and tolerance, suffering and desire? Is there a theoretical approach that can resolve or

reconcile all of these tensions? I doubt there is such a theory. But it may be that law does not need a theory that can accomplish this. The ideas and theoretical approach developed throughout this book are not an attempt to provide *the* answer, or resolve these tensions – quite the opposite, in fact. Indeed, the sense of discomfort that has motivated me to pursue this project remains with me as I finish it. Instead, my objective, upon examining how the Supreme Court of Canada currently conceptualizes sexuality, is to suggest that so long as law is developed, interpreted, and applied in a manner that acknowledges the social contingency of sexuality, and so long as it tries to stay open to new ideas and the possibility of new meaning, there will always be trouble up ahead, and this may be a "good thing."

Pursuing a Legal Theory of Sexuality

This book focuses on Supreme Court of Canada jurisprudence in an effort to determine how the Court understands sexuality and whether this understanding changes depending on the type of legal issues that are involved. It examines the ways in which the Court's understanding of sexuality influences its reasoning, the changes in the Court's conceptual approach in recent years, and the factors that have influenced these changes. 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 have 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. There are a number of factors that make Canada, and the Supreme Court of Canada in particular, a good case study for this topic. In Canada, in the past twenty-five years, there have been at least three significant macro shifts in the relationship between law and human sexuality. The first is a shift in the law's construction, interpretation, and regulation of non-consensual sex; this includes, among other changes, replacing the criminal charge of rape with sexual assault, major changes in evidence law regarding the testimony of women and children victims of sexual assault, changes to the criminal law's definition of consent and the age of consent, recognition of vicarious liability on the part of institutions who negligently employ individuals guilty of child sexual abuse, the addition of charges under the *Criminal Code* for non-penetrative child sexual abuse (such as sexual interference and invitation to sexual touching), and some limited recognition of a right to privacy for sexual assault victims.[7] The second macro shift is a change in the relationship between law and heteronormativity, which includes recognition by the Court of a right not to be discriminated against on the basis of sexual orientation, legal recognition of gay and lesbian couples in a variety of contexts, a shift in the legal significance of sex

to legal relationship status, and modifications to the legal definition of family. The third is a shift from morality-based reasoning towards harm-based reasoning in the regulation of sexually expressive activities, which includes revisions to the definition of indecency under the *Criminal Code* and changes to the criminal law's regulation of pornography.

While my focus is mainly on public law, I have included some consideration of private law issues (such as liability for breach of fiduciary duty). The main reason for narrowing my focus in this respect was to control the scope of the project. I chose to focus on issues of public law rather than private law because the macro-level shifts in the area of law and sexuality just described have produced more jurisprudence from the Court on public law issues than on private law ones. I did examine many lower court decisions, but my primary focus is on the decisions of the Supreme Court of Canada. The Supreme Court of Canada has played, and continues to play, roles in both the formation of social policy and the complex, interrelated relationship between changing law and changing culture. One of the predominant arguments the Court has used to justify such intervention in a Canadian constitutional context – the dialogue metaphor[8] – was first discussed in *Vriend v. Alberta*, in which the Court determined that the Alberta government's failure to include sexual orientation as a protected ground under their human rights legislation was discriminatory.[9] The Court has been similarly active in cases involving a variety of sexual assault law reforms.

In general, 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 that is 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.

In this book, I have woven together the analytical observations about the jurisprudence just described, with a theoretical argument that is both grounded in the case law and that draws upon feminist, liberal, and postmodern 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. I begin Chapter 1 by outlining the theoretical frameworks that have informed this study. I clarify what is meant by the term social constructivism and explain how different queer and feminist theorists have used the concept. I also introduce the argument that a constructivist legal conception of sexuality is to be preferred over an essentialist conception.

In Chapters 2 and 3, I demonstrate that across different legal contexts courts have tended towards an essentialist conception of sexuality. These chapters examine the Supreme Court of Canada's jurisprudence (as well as some lower court decisions operating on the tension ostensibly structured by the Court's judgments) in four different legal contexts – human rights complaints regarding sexual harassment, sexual minority claims under section 15 of the *Canadian Charter of Rights and Freedoms,* the use of similar fact evidence in sexual assault trials, and the criminal regulation of child pornography.[10] The cases that I discuss 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 behaviour.

Chapters 4 and 5 consider the Court's shift towards a more constructivist account of sexuality in the context of adult sexual violence. In Chapter 4, I demonstrate the way in which the Court has adopted a radical 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 more constructivist perspective. Chapter 4 examines how the concept of sexual integrity has been incorporated into sexual assault law. I consider the ways in which feminist-influenced changes to sexual assault laws have resulted in a legal conception of sexual violence that better accounts for its social contingency. The old essentialist legal understanding of sexual violence – that is, the notion that sexual violation is a function of male sexual arousal gone awry – focused either on the perspective and (hetero)-sexual motives of the accused or on the sense of sexual propriety of the community. The complainant's perspective did not figure prominently in legal analysis under this approach. Under this new, more constructivist conception of sexual violence, both the legal definition of what constitutes a sexual assault and the legal test for consent to sexual touching have undergone change. Both now focus more on power dynamics, context, and the perspectives of all sexual actors involved and less on (hetero)sexual gratification, body parts, and community propriety. Chapter 4 suggests that sexual integrity be thought of as both the freedom from unwanted, or not chosen, bodily violation and

the conditions for sexual fulfillment, sexual diversity, and sexual literacy. I argue that the law ought to recognize sexual integrity as a social good, like language, that individuals require in order to be autonomous.

Chapter 5 examines the laws prohibiting obscenity and indecency. I consider how this feminist-influenced constructivist perspective towards sexual violence adopted by the Court has encouraged legal reasoning that, in the obscenity context, regulates sexual conduct and assesses sexual depictions on the basis of political morality rather than sexual morality. This shift was instigated in *R. v. Butler* with the Court's radical feminist-influenced definition of obscenity.[11] It culminated in the Court's rejection of the community standards of tolerance test in *R. v. Labaye* thirteen years later.[12] The outcome of this change is a legal definition of indecency that is based on the political morals of our society (as reflected in the Constitution) rather than an assessment of the community's sexual morals. It is a legal approach to the regulation of obscenity and indecency that is more concerned with protecting sexual actors than with protecting one particular (essentialist) moral account of sex itself. Chapter 5 concludes by demonstrating how this change in the law's moral compass has the capacity to better protect individual sexual actors by suggesting how this shift ought to be applied to the interpretation of criminal laws regulating sex work.

In Chapter 6, I examine the Court's analytical approach to the tort of sexual battery and to the criminal regulation of gay pornography. This chapter reveals that a legal approach that conceptualizes sexuality from a partially constructivist perspective, while maintaining an essentialist foundation, will continue to rely on sexual morality. It will do so in a way that fails to adequately protect interests such as the sexual autonomy of women or to accommodate the specificity of diverse sexual choices and preferences that exist.

Chapter 7, the final chapter, further expands on the suggestion that the Court ought to continue its shift towards a constructivist conception of sexuality. 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. It concludes by exploring the concept of iconoclasm and suggesting how it might be used in this context to deploy the insights of postmodernism while accommodating the reality of law's judgment.

There are two key themes that run throughout all of these chapters. The first 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 acknowledgment that the legal regulation of sexuality, for it not to be arbitrary, requires criteria by which to distinguish good sex from bad sex. I have suggested one account of how a legal conception of sexuality as socially constructed might attempt to accommodate this tension. It is an account that considers 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 aim is to pursue a legal theory of sexuality that conceptualizes sexuality as socially produced – one in which sexual integrity is considered a common good and in which the law is oriented towards protecting this common good through an open-ended and infinite re-evaluation and reconstitution of the relationships and interactions that constitute, promote, and threaten it.

Essentialism and Constructivism in Law 1

> I believe that there are no innate, intrinsic differences among a human being, a baboon or a grain of sand.
>
> – OLIVER WENDELL HOLMES, JR.

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 and race (with which it is often married), the concept of nature is likely the most common framework through which law has approached issues of sexuality. Whether informed by natural law concepts, God's law, or the scientific pursuits of sexual enlightenment, the notion that sexuality is a force of nature has deeply 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. Sexual essentialism refers to "the idea that sex is a natural force that exists prior to social life."[1] It is the notion that sexuality is innate, unchanging, ahistorical, and pre-cultural. Queer theories, in contrast to sexual essentialism, adopt 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 labour, types of entertainment, processes of production, and modes of oppression."[2] The most significant contributions

to the theorization of sexuality made by queer theories are the challenges to, and disruptions of, the concept of sexuality as natural or pre-social.

One issue that has received more attention than any other in the constructivist/essentialist debate is the "cause of homosexuality." This issue is sometimes manifested as 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 my fault – again depending on one's perspective) argument. To interpret the argument that homosexuality is socially constructed as asserting that homosexuality is chosen is to fail to grasp the entirety or complexity of constructivist theories. To argue that an aspect of human behaviour or human "nature" is a product of social construction and not mother nature is not necessarily to suggest that it is mutable or unstable. Many queer theorists and pro-gay scholars argue that the causation question is not the correct question anyway.[3] Instead of concerning ourselves with the cause of "homosexuality," we ought to be concerned with the broader social and legal implications of labelling someone, or being labelled, homosexual.

Regardless, the notion of social constructivism and its implications for understanding sexuality are much broader than simply establishing "the cause of homosexuality." To understand how law regulates sexuality, it is important to identify how conceptions of sexuality inform legal reasoning and legal outcomes. In order to understand how conceptions of sexuality inform law, it is first necessary to ask whether courts understand sexuality as immutable and essential or as fluid and contextually contingent. It is necessary to ask what aspects of sexuality are considered pre-social by courts and whether this determination depends on the legal issue the court is addressing. 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 the regulation of, sexual conduct, sexual identity, and sexual safety. These distinctions can significantly impact how a court addresses, for example, the legal definition of indecency or the admission of similar fact evidence in sexual assault trials. The significance of such distinctions extends far beyond simply the issue of sexual orientation. As Jeffrey Weeks argues, "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."[4]

A constructivist perspective provides insight into the ways in which meaning, constituted in and through particular social contexts, allows 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, the analytical frameworks engendered by constructivist theories are useful for any examination of the legal regulation of sexuality – aspects of which have often been understood through a discourse of deviation (from "the norm") or diacritical modes of knowing (that is, female means not male, woman means not man, and gay means not straight). Constructivist arguments provide a powerful critique of laws, institutions, social practices, and beliefs premised on models of essentialism. They do so by identifying many of the "naturalized" assumptions about sexuality underpinning the Supreme Court of Canada's jurisprudence. As such, social constructivism provides an analytical lens through which to both examine the Court's conceptions of sexuality and to understand how these conceptions influence legal outcomes and legal reasoning.

Queer theories are premised on one specific articulation of this constructivist conception of sexuality. Constructivist accounts of sexuality have also been developed by feminist theories such as radical feminism and postmodern feminism. Indeed, the queer 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 a naturally occurring and essential element of the self.[5] In the 1970s and early 1980s, feminist writers, such as Gayle Rubin and Catharine MacKinnon, began to develop social constructivist theories of both gender and sexuality. Rubin makes the argument that the biological distinctions between male and female (such as reproductive capacity) have been transformed, through social practice and systems, into gender.[6] She argues that the division of labour and the sexual hierarchy present in both family life and the economic and political spheres are premised on gender differences – a cultural construct – and not on sex (as in male/female) differences. In other words, it is the cultural interpretation of the biological differences between male and female (that is, gender) that has led to the systemic oppression of women. Equality-seeking feminists, she stresses, ought to be concerned with reconstituting the meaning of gender. Like Rubin, MacKinnon also argues that the categories of woman and man are not a thing of nature.[7] She suggests 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 that correspondingly perpetuates women's oppression.

Social constructivist theories have taken many forms. There are those who claim that sexual orientation and biological sex are fixed and predetermined and that, while these categories can be found across cultures and historical

periods, the meanings attached to them and their attendant range of activities will differ across culture and history. 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 uplifting. There are those who recognize that acultural sexual orientation categories may exist but that they are not necessarily defined by gender-of-object choice. They suggest that "some other form or forms of human variance are primary."[8] Eve Kosofsky Sedgwick, for example, argues that social categorization (erotic speciation) based on same sex versus opposite sex desire is a cultural construct. Other orientations – such as those that are 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.

Some constructivists claim that the capacity for erotic pleasure is constitutive of the individual but that the manifestation of that capacity into a coherent sexual subject is culturally determined.[9] They argue that sexual object choice, behavioural repertoire, social meaning, and emotional meaning are all socially determined. The most radical social constructivists assert that "culture supplies the very terms for understanding bodily sex."[10] They argue that sexuality and gender are prior to sex (as in male/female). So, for them, even the category of sex is constructed. Judith Butler, for example, asserts that it is impossible to think about, or understand, sex (as in male/female) outside of a cultural framework. How we think about sex is always through a cultural lens. The concept of pre-social is itself a social concept.[11] Butler has been criticized by some for what they perceive to be a rejection of the materiality of the body. However, I think that at its most basic what she is suggesting is that there are cultural forces at work that preclude us from ever being able to disaggregate culture from concept. In other words, there is no Archimedean seating at the local drag show.

The view of sexuality as a key component of our "true selves" – our essence – is often described in Freudian terms. It is the notion of sexuality as a turbulent sexual drive under which a healthy conscience is charged with guarding against the sexual excesses of our subconscious.[12] Under this notion of sexuality, those that deviate from sexual norms are either unhealthy or lacking in self-control. Until recently, this conceptual approach to sexuality underpinned much of the Supreme Court of Canada's jurisprudence in the context of sexual assault. Relying on an understanding of sexuality that is similar to the one advanced by MacKinnon, feminist constructivists have successfully challenged this essentialist understanding of sexual violence. In the Canadian context, the impact on sexual assault law and the criminal regulation of obscenity and indecency affected by this particular feminist understanding

of sexuality and gender has been profound. In many other legal contexts, the notion of sexuality as an essential element of our "true selves" remains the predominant legal understanding of sexuality.

Just as feminist scholars have theorized a constructivist conception of sexual violence as produced by a sexist society rather than a perverted or uncontrollable sexual subconscious, a central theme of queer theory is also a rejection of Freud's repressive hypothesis.[13] Queer theories typically have three main themes. They seek to re-conceptualize power, re-conceptualize knowledge and its relationship to power, and re-conceptualize identity and subject formation. These objectives are not dissimilar to the objectives of radical and postmodern feminist theories.

Queer is a relational concept. It is a positionality in relation to a norm.[14] 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 the notion of queer theory resists definition, and the breadth of scholarship that typically falls under its label is significant, queer theories do tend to share at least one assertion – sexual identity, rather than the expression of an innate human libido, a natural urge, or predisposition, is produced socially through norms and discourse. Foucault, for example, contends that objects of discussion and investigation come into existence only as the ability to discuss them is born.[15] In this way, a discourse produces the subjects of which it speaks. This would include the formation of new sexual identities and sexual subjects.[16] What arises from these theories 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. Social constructivists argue that this process – what Rubin calls erotic speciation – produces all sorts of erotic individuals who are then hierarchically aggregated "into rudimentary communities."[17] This notion of "erotic speciation" (that sexual subjectivity and sexual hierarchies are produced through discourse) is revealed in legal contexts such as the criminal law's approach to pedophilia and the justifications relied upon for granting equality protection to some sexual minorities but not to others.

Queer theory has been particularly occupied with examining and challenging the heterosexual biases implicated or manifested through binary understandings of sex, sexuality, and gender. As such, queer theorists often focus their critique on diacritically constituted knowledge and its implications for sexual identity and subject formation. For example, queer theorists have argued that heterosexuality is an incoherent identity category that relies completely on the presence of a homosexual identity category for its existence.[18] To put it simply, the existence of homosexuality is indispensable to

those who define themselves as against it. According to these queer theorists, categories of gender, sex, and sexuality are socially constructed through the reiterative citation of dominant gender, sex, and sexuality norms – norms that are constituted through exclusion, through the discursive creation of binaries in which a norm's meaning stems from that which it is "not," and through the power that comes from the ability to define that "not." Sedgwick, for example, notes 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 countertransference."[19] Underpinning queer theory is this suggestion 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.[20] Queer theorists suggest that hegemonic sex, sexuality, and gender norms are created through this process of exclusion and then deployed to both constitute and regulate subjects. Examples of the manner in which this process operates may be found in the social, political, and legal responses to bisexual identity claims and transgender expressions or identity claims. In identifying what he describes as bisexual erasure by both heterosexuals and gays and lesbians, Kenji Yoshino offers as one motivating factor for this erasure their shared investment in stabilizing group identities by eradicating the threat to these identities that he suggests is posed by bisexuality.[21]

Not unlike the perceived threat to sexual identity posed by the bisexual, the existence of transgenderism challenges the 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 a 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.[22] 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 him or her or "the opposite" of him or her disrupts the affirmation of one's own gender categorization. This internal disruption is ultimately reflected in one's awkward, uncomfortable, and at times negative outward response to transgressive gender expressions. In this way, gender conformity is subtly, constantly socially rewarded. Correspondingly, gender transgression is subtly (and often not so subtly), constantly socially discouraged. This is an example of the way in which diacritical modes of knowing socially construct, and then proceed to regulate, the very dyads that they ostensibly describe. As will be revealed throughout the remaining chapters, legal reasoning that adopts an essentialist conception of sexuality reveals this dyadic method of knowing by relying heavily on the distinctions between natural (moral) and unnatural (immoral). While the focus of queer

theories has often been on sexual orientation, this work is significant in any discussion regarding the distinctions, legal or otherwise, between natural and unnatural.

Sexual essentialism understands sexuality as unchanging, ahistorical, and asocial or pre-social. Essentialists maintain that sexuality is a property of individuals and that it is without social determinants. For an essentialist, because it is understood as pre-social, the source of sexuality must be nature. This assumption "that our sexuality is the most natural thing about us" is deeply embedded in the social consciousness, at least in the modern Western world.[23] Whether founded on Christian doctrine or on sexual science, an essentialist approach understands sexuality as spontaneous and natural.[24]

However, there are problems when law adopts this naturalistic understanding 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. This 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.'"[25] As a result, every sexual act, desire, or identity becomes understood through, and measured against, a particular heterosexual paradigm.

Some sexual minorities have also invoked the natural/unnatural dichotomy. They point to evidence of same sex sexual behaviour within other species to contest the assertion that homosexuality is unnatural. To date, this has not been a particularly persuasive line of argument. When the natural/unnatural dichotomy is invoked, the distinction continues to be understood in the manner that Weeks suggests. Underpinning an essentialist conception of sexuality tends to be a heterosexist conception of sexuality, which leads to an assumption that same sex desire is not simply abnormal but also unnatural.

The broader issue is that the natural/unnatural distinction is, like all binaries, structured on a model of exclusivity. Natural defines itself as against unnatural. The natural/unnatural binary is not the best way to distinguish between good sex and bad sex. A more contextual approach to regulating sexuality may be more inclusive – at the very least, its criteria for exclusion is less likely to be premised on "majoritarianism." Not only does a conceptual framework, which at its core understands sexuality through a heterosexual paradigm, entrench same sex desire and identity as unnatural, but it also entrenches the notion of sex (as in male/female) difference. Entrenching the notion of sex polarizes the distinction between men and women.[26] As feminists recognized decades ago, legal conceptions of gender and sex differences

as innate, biologically driven, and "natural" have not tended to promote women's equality.

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 that contribute to the regulation of sexuality. It does so by overemphasizing biology, heterosexual arousal, romance, and sexual morality (rather than political morality). Legal conceptions of sexuality that are founded on essentialism tend to focus the law's moral compass on sexual acts rather than on sexual interactions. It is not that acts are irrelevant. It is rather that the meaning and moral significance of any particular act is constituted by the context and relationships in which it occurs. The law (including the criminal law) often focuses on relationships rather than on acts. Think, for example, of the sexual exploitation provisions in the *Criminal Code*.[27] 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 the legally imposed obligations to provide the necessities of life to one's child but not to one's neighbour's child. Think of the age of consent laws under the *Criminal Code*. A fourteen-year-old cannot consent to have sex with a forty-year-old – unless that forty-year-old is her husband. There is nothing to suggest that the criminal law could not accommodate a principled approach oriented predominantly, if not solely, towards relational interests.

A final difficulty with an essentialist understanding of sexuality is that it evinces an air of inevitability. It suggests a concession that changes to gendered and sexualized hierarchies are, and will always be, bounded by parameters that are beyond, or external to, the choices, practices, beliefs, and *epistemes* that presently operate in this society. Legal conceptions of sexuality that reflect this essentialism tend to reinforce the status quo. As will be demonstrated by a discussion of the criminal regulation of sex work in Chapter 5, this is not a circumstance that should appeal to most women, children, and sexual minorities. 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."[28]

This is not to suggest that biological and mental factors, or the materiality of the body, do not contribute to the concept of sexuality. As Weeks explains,

"[a]ll 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."[29] Rather, it is to suggest that sexuality is as much a social product as is food, language, or familial structure. Sexual behaviour, 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 large amounts of alcohol are consumed from cultures that tend to imbibe less. Changes to economic and political structures will bring changes to sexual practices and sexual identities.[30] 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. Sexual practices and identities may vary depending upon the availability and knowledge of birth control, the prevalence of sexually transmitted infections, or the male-to-female ratio.

In light of all of these factors, the essentialist assertion that sexuality is something more than the product of social patterns, normative distinctions, and the development of meaning though choices, discourses, and practices seems almost less intuitive. In fact, it may not be a particularly radical claim to assert that sexuality is particularized and that it is a socially contingent product of discourse and a function of social practices. What is perhaps a more significant claim is my assertion that the law ought to conceptualize, and correspondingly treat, sexuality as a contextually contingent, social good. Nevertheless, a legal approach that adopts this perspective would better enable the law to remain open to the infinite re-articulation of sex, gender, and sexuality norms while, at any given moment, drawing distinctions and making judgments about how best to protect individual sexual integrity. Unfortunately, a review of the Supreme Court of Canada cases in different legal contexts – the section 15 equality claims of sexual minorities, the sexual harassment cases, the admission of similar fact evidence in sexual assault trials, and the criminalization of child pornography – demonstrates that the Court typically does not embrace such a perspective.

The cases discussed in the next two chapters reveal a Court that 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." They also show that, when the Court operates under this essentialist understanding of sexuality (including, but also beyond, the assumption of innate 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 norms of ostensible monogamy and immutable sexual object choice; it precludes a more radical re-valuing of same sex desire; and it obscures the contextual factors that produce child sexual abuse. 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) of sexual violation invisible, and reify problematic social distinctions between men and women. This focus on the biological, on genitals, and 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 on sexual actors. A moral focus on sexual acts, rather than on sexual actors, is less capable of promoting and protecting sexual integrity as a common good.

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