Sex Crimes:
Queer Engagements with the Criminal Law from the Street to the Prison

by

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Abstract

Over the past three decades, debates in Canada surrounding the introduction of human rights protections, benefits for same-sex couples, and relationship recognition have tended to invoke a new legal subject, one draped in the garb of respectability. When members of queer communities have sought access to legal protections, they have tended to predicate their claims on respectable familial arrangements. Largely absent from this turn to respectability, however, is engagement with the criminal law, particularly in cases where queer people cannot be easily read as the victims of crime. *Sex Crimes: Queer Engagements with the Criminal Law from the Street to the Prison* returns to the criminal law to examine its continued use as a tool that disciplines — and, at times, fails to discipline — those who cannot be read in terms of respectability. The project weaves together the practices of policing on the street, stories about HIV non-disclosure from the courtroom, and the experiences of queer people in prison. This project argues that when queer people become ensnared in the repressive aspects of criminal justice, the contemporary legal system stops addressing the hardships they face due to their sexual and gender identities. While norms of substantive equality are now well entrenched in the fields of human rights law, family law, and constitutional law, these standards are cast aside when it comes to the administration of punishment. The project concludes by developing a

theory of the *law and order queer movement*, arguing that when queer people code themselves as respectable victims of crime seeking protection from the punitive apparatuses of the carceral state, they run the risk of instantiating law and order agendas. As a result, they may inadvertently breathe new life into systems that continue to be used to discipline the most vulnerable members of queer communities.

Acknowledgments

Writing a dissertation is no easy task. After returning to Canada following graduate work in the United States, I was not sure what to expect from my doctoral studies. Almost immediately, I knew that the University of Toronto would be an academic community that would allow me to flourish.

I first met my co-supervisor, Brenda Cossman, in the summer of 2012 at a coffee shop near the University. We chatted about my plans for the summer and what I envisioned for my doctoral research. She then proceeded to ask me about everything I had written during my studies at Yale Law School. Much to my surprise, she then helped me develop a plan for how to submit each piece for publication. "You need to be publishing from day one," she matter-of-factly told me. From that first meeting, I knew that she would always have my back, both professionally and personally. As I begin my new role as an Assistant Professor at the University of Ottawa Faculty of Law, Brenda has modeled everything I hope to be as a scholar, public intellectual, mentor, and graduate supervisor.

I met Mariana Valverde in the summer of 2012, after she invited me to a Critical Analysis of Law workshop hosted by the Faculty of Law. Having only met for a few minutes, she quickly took me around the room, introducing me to everyone she could think of. "You need to meet folks early," she explained. Afterwards, we went for coffee, where she told me everything I could possibly need to know about the University of Toronto — from the most helpful intellectual interlopers to where the best gathering spaces were. Over the course of the past four years as my co-supervisor, she has continued this spirit of generosity by providing first-rate theoretical and methodological advice, pushing me to think past existing paradigms, and ultimately helping me become a more rigorous scholar.

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Preface

In April 2013, I attended the Bonham Centre Awards Gala in Toronto, Canada. Hosted at a downtown hotel, the event was a fundraiser for the University of Toronto's Mark S. Bonham Centre for Sexual Diversity. The attendees were there to honour two people — Dan Savage, acclaimed American author and co-founder of the *It Gets Better Project*, and Stephen Lewis, noted Canadian politician and international HIV/AIDS activist. Having started researching *Sex Crimes: Queer Engagements with the Criminal Law from the Street to the Prison* at the University of Toronto in Fall 2012, I was invited to attend the gala in order to talk about my research with other guests. As I sat down for dinner at Table 13, I met a television executive, an actor, a corporate lawyer, and a fundraiser, among others. The conversation was warm and genteel.

Eventually, our conversation turned to my research. As we ate, I explained that my research examined the role of the criminal law — police, courts, and prisons — in regulating contemporary norms of gender and sexuality. "Where?" asked the television executive, "Uganda? Russia? The Middle East?"

"Canada," I replied, perhaps underestimating the challenge he was about to pose to my project.

"Seriously? We have human rights protections. Same-sex benefits. Canada even has same-sex marriage. I don't think you're going to find much." Pausing for a moment, he then ended on a stereotypically polite, Canadian note: "But I wish you all the best with your research. It sounds really interesting."

The television executive is, of course, partially correct. The Canadian criminal justice system no longer seems interested in targeting the kinds of affluent queer people seated at Table 13 for the Bonham Awards Gala — they exemplify a new mainstream queer rights movement in Canada that has, over the past thirty years, prioritized human rights protections, same-sex benefits, and relationship recognition, often at the expense of the issues that persist in the criminal justice system. Critical engagement with the criminal law, particularly in cases where queers cannot be readily cast in the role of respectable victims of crime, has been all but relegated to the outskirts of intelligibility within the mainstream queer rights movement. When queers in Canada do attempt to challenge aspects of the criminal law, it is almost always in other parts of the world — places like Uganda, Russia, or the Middle East. Canada, the conventional story goes, no longer criminalizes queer people.

In many respects, *Sex Crimes* constitutes an extended response to the television executive's assumption that the criminal law has very little to say about the contemporary regulation of queer people in Canada. In the chapters that follow, *Sex Crimes* tasks itself with examining the contemporary role that Canadian police, courts, and prisons continue to play in regulating the contours of queer subjectivity. It ultimately ends by gesturing towards renewed engagement with efforts to challenge the everyday criminalization of our communities, and to remain deeply skeptical about the impulse to harness the apparatuses of the carceral state to punish in the name of queer equality.

Introduction
The Return to the Criminal Law

INTRODUCTION

Over the past three decades, debates in Canada surrounding the introduction of human rights protections, benefits for same-sex couples, and relationship recognition have tended to invoke a new queer legal subject,[1] one draped in the garb of respectability. Largely absent from this turn to respectability, however, is engagement with the criminal law, particularly in cases where queers cannot be easily read as the victims of crime. Given the longstanding conflation between queerness and criminality in Anglo-American legal discourse, this is an unexpected development in Canada, where events including the decriminalization of homosexuality (1969) and the Toronto Bathhouse Raids (1981) served to mobilize communities and laid the foundation for the contemporary queer rights movement.

This project draws new lines of inquiry by returning to the criminal law to examine its continued use as a tool that disciplines — and, at times, fails to discipline — those who cannot

[1] Throughout the project, I use the term "queer", to invoke the language of Judith Butler, as "an umbrella term for nonconforming genders and various sexualities, ones that d[o] not easily submit to categorization" (Sara Ahmed, "Interview with Judith Butler" (2016) 0(0) Sexualities 1 at 9). For writers working within the broadly constituted field queer theory, this is now a well-established approach (see e.g. Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham & London: Duke University Press, 2006); Tim Dean, *Unlimited Intimacy: Reflections on the Subculture of Barebacking* (Chicago: University of Chicago Press, 2009); Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham & London: Duke University Press, 2004; Heather Love, *Feeling Backward: Loss and the Politics of Queer History* (Cambridge & London: Harvard University Press, 2009)).

Still, the decision to use the term queer — as opposed to a vast array of other terms — is not without controversy. Writing about historical events, using the term in this project runs of the risk of being criticized for being anachronistic, particularly because terms such as "homosexual", "transsexual", "lesbian", "gay", "butch", "dyke", "femme", and "hair fairy", to name just a few of the myriad possibilities, were more commonly used in earlier periods. When describing particular historical events or specific figures, I endeavour to use historically accurate terms. In some moments, I revert to the term queer as a heuristic — one designed to signal the experiences of crossing borders of gender and sexuality, and often being targeted by law and society because of it. Writing about events occurring in the contemporary period, using the term also runs the risk of being criticized for failing to recognize the diverse array of experiences of trans people and other historically marginalized identities. As Butler notes,

> Many trans people, or trans advocates, have argued that queer is exclusionary, that it does not include or describe trans experience. And though certain versions of queer have been rightly criticized for being presumptively white and classist, I think that the 'queers of colour' movement has done enormously powerful work to redirect the orientation of the term, to democratize its potential, and to expose and oppose its exclusionary limits in the context of a broadening struggle, the articulating of a more complex alliance that contests some of the older versions of the 'the collective' (*Ibid*).

While it may be impossible to select a term that pleases everyone situated in all positions for all time, I use the term queer — broadly constituted — in an effort to account for a range of identities and experiences associated with crossing lines of gender and sexuality.

be read in terms of respectability.[2] In turning back to the criminal law, I am inspired by the work of Heather Love in *Feeling Backward: Loss and the Politics of Queer History*.[3] Love attempts to "resist the affirmative turn in queer studies in order to dwell at length on the 'dark side' of modern queer representation."[4] As she tells us, "It is not clear how such dark representations from the past will lead toward a brighter future for queers. Still, it may be necessary to check the impulse to turn these representations to good use in order to see them at all."[5] *Sex Crimes* constitutes an effort to turn away from the dominant images of respectability that have tended to emerge when queer legal subjects have sought inclusion within the normative social order — through human rights protections, same-sex benefits, and relationship recognition. Instead, the project explores the ways in which queer subjectivity continues to be constituted in and through engagements with the criminal law, focusing its attention on cases where queers have been cast in the role of perpetrators of crime.

The question of how the law conceptualizes identity, whether in the realm of gross indecency, criminal sexual psychopathy, human rights protections, same-sex benefits, or relationship recognition, is central to my analysis in *Sex Crimes*. As a site where identities are constituted and produced,[6] the law has the power to provide a series of foundational narratives, to regulate the borders of inclusion and exclusion, and to produce subjectivity.[7] Legal discourse, as it travels from the street to the prison, produces particular versions of subjectivity.[8] Given the

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[2] When I use the term "respectability", I rely upon the definition offered by Brenda Cossman. Writing about the new ways that queer subjects were using the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, to advance legal claims, Cossman explains:

> The new legal subject is a familialized subject. The new lesbian and gay subject lives in a monogamous and respectable relationship with responsibilities of mutual care and commitment. It is a subject constituted in and through ideologically dominant discourses of familialism at the same time as this subject reshapes these discourses (Brenda Cossman, "Lesbians, Gay Men, and the Charter" (2002) 40 Osgoode Hall LJ 223 at 247 [Cossman, "Lesbians, Gay Men, and the Charter"].

Respectability also requires constant maintenance — that is, policing the edges of which genders and sexualities are normatively acceptable, and which are not. Cossman notes:

> The respectability of the new legal subjects requires this careful policing of the borders of recognition. The new legal subject is not the erotically charged subject of the gay bars and bathhouses who remains a sexual outlaw. The inclusion of gay and lesbian subjects into law is being regulated at its margins to ensure that the "others" — the sexually promiscuous, sexually public, and sexually non-monogamous-remain outlaws (*Ibid* at 248).

[3] Love, *supra*.
[4] *Ibid* at 4.
[5] *Ibid*.
[6] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans by Alan Sheridan (New York: Vintage Books, 1977) at 36-49 [Foucault, *Discipline and Punish*].
[7] Sarah Lamble, "Unknowable bodies, unthinkable sexualities: lesbian and transgender legal invisibility in the Toronto women's bathhouse raid" (2009) 18 Social & Legal Studies 111 at 113.
[8] Jena McGill & Kyle Kirkup, "Locating the Trans Legal Subject in Canadian Law: *XY v Ontario*" (2013) 33 WRLSI 96 at 103.

extent to which historically marginalized groups are framing their demands in legal terms, Wendy Brown has underscored the importance of beginning to "map some of the conundrums of rights for articulating and redressing" inequality and subordination.[9] In light of the contemporary queer movement's engagement over the past three decades in Canada with human rights protections, same-sex benefits, and relationship recognition, what kinds of legal subjects do we find in the aftermath? What legal subjects might we find if we returned once more to the criminal law to examine cases where queers cannot be readily cast as the victims of crime? And how do competing visions of queer subjectivity, ones that have emerged in law and legal discourse, work to mutually constitute each other? These are the questions that preoccupy *Sex Crimes*.

I. BODIES OF LITERATURE: QUEER LEGAL SUBJECTIVITY AND CRITICAL CRIMINAL LAW

Sex Crimes engages in a conversation with two broadly constituted bodies of literature. The first body of literature, using the work of Michel Foucault and Judith Butler, asks questions about how law and legal discourse work to produce particular versions of queer subjectivity. The second body of literature, drawing upon the work of critical criminal law scholars such as Dean Spade, asks questions about how the contemporary expansion of the criminal justice system is used to target legal subjects who engage in practices of non-normative gender and sexuality, particularly those who dwell at the axes of race, poverty, and disability. What follows below is a brief survey of these two animating theoretical literatures.

(i) Queer legal subjectivity literature

The first body of literature, indebted to the work of Michel Foucault and Judith Butler, asks questions about how law and legal discourse work to produce particular versions of queer subjectivity. More specifically, the literature examines the ways in which non-normative gender and sexuality is disciplined within a strict, essentialist gender binary, a binary that ultimately supports a larger system of heterosexual coherence.

[9] Wendy Brown, "Suffering the Paradoxes of Rights" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (North Carolina: Duke University Press, 2002) 420 at 420. For further discussion on queer engagements with rights discourse in Canada, see e.g. Susan B Boyd, "The Perils of Rights Discourse: A Response to Kitzinger and Wilkinson" (2004) 4 Analyses of Social Issues and Public Policy 211.

The work of Michel Foucault is perhaps best known for analyzing the regimes of governance that emerge in modern institutions such as the prison,[10] along with the discursive production of "homosexuality" over the course of the nineteenth century.[11] His work, however, is less attentive to questions of how, for example, the institution of the prison might work to constitute particular norms of gender and sexuality, or how norms of gender and sexuality might be constituted in and through modern carceral regimes. *Sex Crimes* aims to bring these two fields together, asking questions about how regimes of Anglo-American criminal law work to constitute particular versions of gender and sexuality.[12]

In *Discipline and Punish*, Foucault explores the emergence of the modern prison.[13] His study of the prison, however, ends up uncovering a much larger history of the present, one that invariably renders the wills and inclinations of human subjects more docile through the predictable, ritualized surveillance of the body. Foucault's account frames the body as a site of transformation — by harnessing and training the human body, the soul becomes engulfed and controlled by regimes of power/knowledge.[14] To make this claim, Foucault uses the example of the soldier's body, which came to be refashioned over the history of modernity. While initially indocile, the soldier's body became a tool of both economic and political power, one that could be trained to stand and move in increasingly compliant ways. Put differently, the modern body became one marked by docility.[15] By harnessing the body, however, a larger project of power/knowledge emerged, one tasked with controlling the human soul, which Foucault describes as the seat of habit.[16] In *Bodies that Matter*,[17] Judith Butler elaborates on Foucault's use of the term "subjection" in this context, suggesting that he uses the term to signal a process of securing, maintaining, and constituting the subject's soul within regimes of disciplinary knowledge/power. As Butler puts it, "There the soul is taken as an instrument of power through

[10] Foucault, *Discipline and Punish*, *supra*.
[11] Michael Foucault, *The History of Sexuality: Volume 1* (New York: Vintage Books, 1990) [Foucault, *History of Sexuality*].
[12] For further discussion of bringing these two fields of thought together, see e.g. Sarah Pemberton, "Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes" (2013) 39 Signs 151.
[13] For further discussion on Foucault and the criminal law, including an extended description of the techniques of correct training outlined in *Sex Crimes*, see Kyle Kirkup, "Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law" (2009) 24 CJLS 107.
[14] Foucault, *Discipline and Punish*, *supra* at 136.
[15] *Ibid* at 135-137.
[16] *Ibid* at 30. For a discussion of Foucault's account of the soul as a seat of habit, see Pat O'Malley & Mariana Valverde, "Foucault, Criminal Law, and the Governmentalization of the State" in Markus D. Dubber, ed. *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014) at 319.
[17] Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993).

which the body is cultivated and formed. In a sense, it acts as a power-laden schema that produces and actualizes the body itself."[18]

In *Discipline and Punish*, Foucault elaborates on three techniques of correct training designed to make bodies and, by extension, souls docile — hierarchical observation, normalizing judgment, and the examination. As the first technique of correct training, hierarchical observation, refers to the constant observation of subjects. Foucault uses Jeremy Bentham's 1787 famous model of the ideal prison — the so-called Panopticon — as a way of thinking about how humans begin to self-discipline when their bodies are engulfed in systems of perpetual surveillance. Constructed with a watchtower surrounded by prisoner cells, inmates in the Panopticon never know whether or not prison administrators are watching them. Foucault explains: "The perfect disciplinary apparatus would make it possible for a single gaze to see everything constantly."[19] Put differently, those in carceral regimes begin to engage in practices of self-discipline.[20]

Normalizing judgment, a second technique of correct training, is characterized by the regularized valuation and comparison among and between subjects. A norm begins to function as a "minimum threshold" whereby those who fail to conform, perhaps even refusing subjection altogether, are rendered "abnormal".[21] Those who meet certain minimum thresholds are given access to, and included within, the normative social order, while those who refuse to assimilate are punished. As Foucault puts it, "[T]he power of normalization imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by fitting them one to another."[22]

The examination — a third technique of correct training — brings together hierarchical observation and normalizing judgment. The examination simultaneously deploys force and establishes truth on both the subject's body and soul. At the same time, disciplinary power also imposes what Foucault calls "compulsory visibility" through "highly ritualized" practices of examination.[23] To avoid the constant threat of being made visible, subjects begin to accept their positions of subjection. Foucault explains: "It is the examination which, by combining

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[18] *Ibid* at 33.
[19] Foucault, *Discipline and Punish*, *supra* at 173.
[20] *Ibid* at 173. For further discussion on regimes of self-governance within intimate relationships, see e.g. Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Redwood City: Stanford University Press, 2007).
[21] Foucault, *Discipline and Punish*, *supra* at 183.
[22] *Ibid* at 184.
[23] *Ibid* at 187.

hierarchical surveillance and normalizing judgment, assures the great disciplinary functions of distribution and classification".[24]

In *Gender Trouble*,[25] Judith Butler takes up the question of why, within Foucault's account of disciplinary regimes of the modern era such as the prison, power/knowledge appears to insist on a sharp, essentialist gender binary. This point appears not to have been readily apparent to Foucault, perhaps because administrative sites such as the prison have long been conceptualized in masculinist terms. A sharp, essentialist gender binary, Butler tells us, is used to maintain a system of heterosexual coherence. She explains that a non-normative performance of gender reveals three "contingent dimensions of significant corporality", namely sex, gender identity, and gender performance. Accordingly, drag performances work to expose the contingent nature of gender and sexuality. Butler explains: "In the place of the law of heterosexual coherence, we see sex and gender denaturalized by means of a performance which avows their distinctness and dramatizes the cultural mechanism of their fabricated unity."[26] In *Bodies That Matter*, Butler expands her analysis of discipline and power/knowledge, posing questions about the role of law and society in securing and maintaining systems of gender and sexuality. She writes:

> Given that there is no sexuality outside of power, how can regulation itself be constructed as a productive or generative constraint on sexuality? Specifically, how does the capacity of the law to produce and constrain at once play itself out in the securing for every body a sex, a sex position in language, a sexed position which is in some sense presumed by any body who comes to speak as a subject, an "I," one who is constituted through the act of taking its sexed place within a language that insistently forces the question of sex?[27]

In the pages that follow, *Sex Crimes* draws upon Foucault's account of hierarchical observation, normalizing judgment, and the examination to untangle the multiple techniques of correct training that emerge to discipline and punish those who dwell in what Butler calls positions of non-normative gender and sexuality. To do so, it analyzes three settings of the contemporary criminal justice system — police, courts, and prisons. The criminal law becomes a site, albeit a site that may not have been immediately apparent to Foucault in his work on disciplinary regimes of the modern era such as prisons, where norms of gender and sexuality are simultaneously constituted and challenged.

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[24] *Ibid* at 192.
[25] Judith Butler, *Gender Trouble, 10th anniversary ed.* (New York: Routledge, 1999).
[26] *Ibid* at 175.
[27] Butler, *Bodies That Matter*, *supra* at 95.

(ii) Critical criminal law literature

The second body of literature, one indebted to the work of critical criminal law scholars such as Dean Spade, asks questions about how the contemporary expansion of punitive practices of the criminal justice system targets legal subjects who dwell in positions of non-normative gender and sexuality — particularly those situated at the axes of race, poverty, and disability. In his recent work, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*,[28] Spade seeks to elaborate on the possibilities of what he calls critical trans politics, a politics that "demands more than legal recognition and inclusion, seeking instead seeking to transform current logics of state, civil society security, and social equality."[29] This type of broader, more far-reaching analysis, he contends, allows us to think critically about the ways in which structures of power operate in societies marked by the continued expansion of the carceral state.[30] He states:

> Understanding how the forces producing imprisonment and criminalization operate at multiple sites and registers ranging from laws and policies to education, health care, social service, media, and even our own self-conceptions helps us both account for the enormity of the significance of imprisonment and understand that addressing it is not simply a matter of appealing to one central source of power or decision-making.[31]

If we accept that power operates within multiple sites — and invariably along lines of race, poverty, disability, gender, and sexuality, then it becomes apparent that strategies aimed at reducing the everyday harms experienced by those who encounter the criminal justice system cannot be achieved simply through the individual rights framing of discrimination. A structural analysis, one attentive to how systems of subjugation work in concert with each other, is required.[32]

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[28] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) [Spade, *Normal Life*].
[29] *Ibid* at 19.
[30] When I use the term "carceral state", I am referring to the state's criminal law power, perhaps most notably police and prisons. At the same time, however, definitions of the carceral state must be equally attentive to the emergence of what Katherine Beckett and Naomi Murakawa call "more submerged, serpentine forms of punishment that work in legally hybrid and institutionally variegated ways", such as diversionary or therapeutic courts. These forms of punishment ultimately bolster the workings of the carceral state (Katherine Beckett & Naomi Murakawa, "Mapping the shadow of the carceral state: Toward an institutionally capacious approach to punishment" (2012) 16(2) Theoretical Criminology 221 at 222).
[31] Spade, *Normal Life, supra* at 22.
[32] *Ibid* at 29. For further discussion on the place of rights in the late thought of Foucault, see e.g. Ben Golder, *Foucault and the Politics of Rights* (Redwood City: Stanford University Press, 2015).

This shift away from an individual rights framework allows us to evaluate what Spade calls the "distribution of life chances". Attentiveness to the distribution of life chances, Spade argues, recognizes that "even when laws are changed to say different things about a targeted group, that group may still experience disproportionate poverty as well as lack of access to health care, housing, and education."[33] In this way, even if laws are changed to include official rules of non-discrimination, for example, they will continue to disadvantage whole subsets of the population because of a vast array of structural factors. For Spade, then, we need to begin tackling the host of administrative sites in society that continue to disempower queer people in Anglo-American society, often bringing them into direct conflict with the criminal justice system in the first place. We also need to begin moving towards analytics of decarceration.[34]

Similarly, in *Queer (In)Justice: The Criminalization of LGBT people in the United States*,[35] Joey L. Mogul, Andrea J. Ritchie, and Katherine Whitlock explore the long and misguided history of using Anglo-American criminal law to target queer communities, particularly those positioned at the axes of race, poverty, and disability. Ultimately, their work again gestures towards the inherent limits of anti-discrimination law as a source capable of protecting people who have come into conflict with the criminal justice system. As a result, they contend that we should move beyond focusing exclusively on legal approaches and, instead, begin to think more broadly about the underlying structural causes that result in the disproportionate incarceration of the most marginalized members of queer communities. They explain:

> The challenge is not only to tackle the punishment of sexual and gender deviance through the criminal legal system, but also to call into question and challenge the multiple and interlocking systems of inequality that remain, even as formal forms of discrimination begin to fall.[36]

As such, the authors of *Queer (In)Justice* highlight the importance of not simply focusing on improving the experiences of queer people *after* they have encountered the criminal justice system. Rather, we must also be attentive to the underlying factors that bring queer subjects into conflict with the criminal justice system in the first place and work to build societies that no longer use police and prisons in a misguided attempt to solve complex social problems.[37]

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[33] *Ibid*.
[34] *Ibid*.
[35] Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011).
[36] *Ibid* at 157-158.
[37] *Ibid* at 157.

Sex Crimes draws upon these two broadly constituted bodies of literature, posing questions about how the push for human rights protections, same-sex benefits, and marriage equality over the past thirty years in Canada have worked to produce particular versions of queer subjectivity. The project also examines questions about the ways in which newly minted respectable queer legal subjects have become implicated in the contemporary expansion of punitive practices of the criminal justice system by, for example, pushing for hate crime legislation at the very same time that the most marginalized queer legal subjects continue to find themselves ensnared in the repressive aspects of criminal justice.

II. SEX CRIMES IN FIVE PARTS

Sex Crimes unfolds in five parts. **Chapter 1** traces the emergence of queer subjectivity in Canadian law and legal discourse over the past thirty years. Through a careful reading of legal decisions and scholarship in the areas of human rights law, same-sex benefits, and relationship recognition, the chapter argues that we begin to see the emergence of a new queer subject, one Mariana Valverde has aptly called "the respectable same-sex couple".[38] This new respectable queer subject distances itself from the promiscuous, pathological, and predatory criminal figures of "the homosexual" and "the transsexual" as it seeks recognition and inclusion within the normative social order. To the extent that this new subject interacts with the criminal law, it almost always adopts the position of the victim of crime,[39] a position that has come to be synonymous with ideal notions of Anglo-American citizenship.[40] The new queer subject seeks to distance itself from its criminal past by policing the boundaries of respectability and thus relegating some subjects to the outskirts of intelligibility.[41]

Chapter 2 examines the ways in which contemporary policing practices on the street are used to target queer people. The story this chapter develops is one where bodies the police read as disorderly — in particular, bodies marked by non-normative performances of gender and sexuality moving through well-established "strolls" in large, metropolitan Canadian cities —

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[38] Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple" in Maureen Fitzgerald & Scott Rayter, eds. *Queerly Canadian: An Introductory Reader in Sexuality Studies* (Toronto: Canadian Scholars' Press, 2012) [Valverde, "A New Entity"].
[39] For a recent example of the construction of queers as victims of crime, see Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005).
[40] Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2009).
[41] Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms", *supra* at 236. See also Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*" (2002) 33 UBCLR 77.

become sites where the new respectable queer subject has failed, and thus require the intervention of actors in the criminal justice system. Once they come into contact with these subjects, police continue to impose disciplinary techniques on them — through use of improper pronouns, questions about names and sex-markers on government-issued identification, and frisk and strip search procedures, police participate in a larger corporeal project of governing queer subjectivity. Police target these bodies not simply because they are different, but because they symbolize a refusal to be subjugated by regimes of power/knowledge that place us into rigid categories of being either "male" or "female". This phenomenon is sometimes referred to as "walking while trans". As Morgan M. Page — the former community services coordinator at The 519 Church Street Community Centre in Toronto — explains: "In the trans community we have a phrase for it: It's called walking while trans…[W]alking while trans is definitely an in-joke within our community. It's kind of a snappy way of summing up a whole variety of experiences we're regularly [subjected] to by police."[42]

Chapter 3 moves away from policing on the street to analyze the narratives of queer subjectivity that surface in courtrooms and the judicial-decision making process. This chapter conducts a careful reading of a contemporary case involving a queer man in Ottawa alleged to have not disclosed his HIV-positive status to sexual partners. The law typically constructs this failure as an aggravated sexual assault, one of the most serious offences in the *Criminal Code*.[43] In the case study examined in this chapter, the accused person was also charged with attempted murder, along with administering a noxious substance — his semen. In examining the narratives from surface over the course of six years in this case, from the initial investigation to the sentencing decision, the chapter aims to explore the continued conflation between queerness and criminality in Canadian courtrooms.

Chapter 4 explores the historical and contemporary legal regulation of queer people within the complicated administrative world of Canada's federal, provincial, and territorial correctional facilities. This chapter argues that, by segregating people on the basis of the sex assigned to them at birth and refusing to recognize more complicated conceptions of gender, such as an individual's legal sex or their self-identification, the prison becomes a disciplinary tool, one that breathes new life into strict, essentialist, binary conceptions of gender. At the same time, the practice of segregating people in prisons on the basis of sex also casts the prison as a

[42] Priya Sankaran, "Toronto transgender people say they're targets of police" *CBC News* (28 June 2012), online: CBC News <http://www.cbc.ca>.
[43] *Criminal Code*, RSC 1985, c C 46, ss. 265, 268 and 273.

site where 'normal' heterosexual encounters are, perhaps with the exception of occasional conjugal visits, off-limits. What remains in prisons, then, is non-normative, homosexual sex — that is, sex that dwells in the shadow of criminal punishment. In this way, prison sex is simultaneously cast as non-normative and criminal. Drawing upon a number of recent high-profile cases involving queer people, the chapter analyzes the prison — both in terms of policies and carceral representations — as a site where norms of gender and sexuality are simultaneously constituted and challenged.

In **Chapter 5**, *Sex Crimes* concludes by proposing a theory of queer engagements with contemporary practices of the carceral state. This final chapter argues that a queer theory of contemporary Canadian criminal law lies in beginning to move away from what I term the *law and order queer movement* — this movement tends to legitimate "tough on crime" agendas by constructing respectable queer legal subject as victims of crime willing to punish in the name of equality, while simultaneously breathing new life into systems that continue to be used to violently target and discipline the most vulnerable members of queer communities. *Sex Crimes* ends by arguing that queering the criminal justice system entails moving away from reproducing legal frames that merely include queer people, frames that typically find expression when queers are cast in the role of victims of crime. Instead, the concluding chapter argues that challenging the operation of the law and order queer movement requires avoiding the impulse to punish in the name of a newly minted queer respectability.

III. METHODS

In order to examine questions about the discursive production of queer legal subjects in the domain of human rights law, same-sex benefits, relationship recognition, and — most centrally — contemporary practices of the criminal law, *Sex Crimes* relies upon a mixed methodology. Incorporating document analysis and open-ended interviews, each chapter draws upon methods of data collection designed to suit the chapter's particular needs and modes of analysis. What follows below is a brief overview of each chapter's methodological approach.

Tracing the discursive shift from criminality to respectability over the past thirty years, **Chapter 1** relies primarily on historical document analysis. In order to map the historical conflation between queerness and criminality in Anglo-American legal discourse, the chapter examines criminal prohibitions designed to target the figures of the "the homosexual" and "the transsexual". To examine the shift from the decriminalization of certain aspects of

homosexuality in 1969, to the Toronto Bathhouse raids in 1981, to federal relationship recognition in 2005, the chapter draws upon Supreme Court of Canada jurisprudence, Hansard debates in both the House of Commons and the Senate, news articles archived in the Canadian News Index (CNI), and secondary materials.

Examining interactions between the police and queer people on the street, **Chapter 2** draws upon both document analysis and open-ended interviews. The chapter analyzes historical materials and contemporary policies related to policing queer communities in Canada. In addition, the chapter draws upon contemporary jurisprudence in the domain of criminal law and human rights law. To supplement this document analysis, the chapter relies upon open-ended interviews with representatives from community organizations, lawyers, and police officials, which were conducted between September 2013 and August 2014 in three Canadian cities with large queer communities: Vancouver, Ottawa, and Toronto.

Tracing the production of queer subjectivity in a contemporary HIV non-disclosure case study, **Chapter 3** uses document analysis along with open-ended interviews. The chapter starts by analyzing historical materials about HIV/AIDS, queer communities, and the criminal law. The chapter then shifts to carefully read a contemporary Canadian HIV non-disclosure case spanning six years, which involved a queer man in Ottawa alleged to have not disclosed his HIV-positive status to sexual partners. The chapter also surveys the treatment of this case in news articles archived in the Canadian News Index (CNI) and secondary materials. The chapter supplements this document analysis with open-ended interviews with representatives from community organizations, lawyers, and police officials, which were conducted between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

Examining the legal regulation of queer people within Canada's federal, provincial, and territorial correctional facilities, **Chapter 4** uses both document analysis and open-ended interviews. The chapter relies upon historical materials related to sex-segregation and sexuality-segregation in Anglo-American prisons, along with contemporary prison policies and jurisprudence. I supplement this analysis with open-ended interviews with representatives from community organizations and lawyers, which were conducted between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

Chapter 5, where *Sex Crimes* concludes by situating the shift from queer criminality to queer respectability within larger punitive practices of the criminal law, uses both document analysis and open-ended interviews. In addition to drawing upon theoretical literature related to

feminist engagements with the criminal law, the concluding chapter reads historical materials about queer resistance to the criminal law against the contemporary practices of mainstream queer organizations such as Egale Canada, which currently runs a training program for police on how to investigate, prosecute, and ultimately punish queer hate crimes. The chapter supplements this analysis with open-ended interviews with community organizations conducted between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

Chapter 1
From Criminality to Respectability

> If the law on this subject matter is as interpreted in the Courts below, it means that every man in Canada who indulges in sexual conduct of the sort forbidden by s. 149 of the *Criminal Code* with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life. However loathsome conduct of the sort mentioned may appear to all normal persons, I think it improbable that Parliament should have intended such a result.
>
> Supreme Court of Canada, *Klippert v. The Queen* (1969)

> Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner… It follows that a lawful relationship which flows from sexual orientation should also be protected.
>
> Supreme Court of Canada, *Egan v. Canada* (1995)

INTRODUCTION

This chapter traces the emergence of the queer subject in Canadian law and legal discourse over the past thirty years. Through a careful reading of legal decisions and scholarship in the areas of human rights law, same-sex benefits, and relationship recognition, I argue that we begin to see the emergence of a new legal subject, one Mariana Valverde has aptly called "the respectable same-sex couple".[44] This new respectable queer subject distances itself from the promiscuous, pathological, and predatory criminal figures of "the homosexual" and "the transsexual" as it seeks recognition and inclusion within the normative social order. To the extent that this new subject interacts with the criminal law, it almost always adopts the position of the victim of crime, a position that has come to be synonymous with ideal notions of Anglo-American citizenship.[45] The new queer subject seeks to distance itself from its criminal past by policing

[44] Valverde, "A New Entity", *supra*.
[45] Simon, *supra*.

the boundaries of respectability and thus relegating some subjects to the outskirts of intelligibility.[46]

The chapter unfolds in three parts. **Part I** examines the historical conflation between queerness and criminality in Anglo-American legal discourse. With this history in place, **Part II** moves into the contemporary era by examining two seminal moments in the Canadian queer rights movement: the decriminalization of aspects of homosexuality in 1969 and the Toronto bathhouse raids in 1981. In **Part III**, the chapter turns to analyze the queer movement's shift from criminality to respectability, examining jurisprudential constructions of queer subjectivity in the domain of human rights law, same-sex benefits, and relationship recognition. Through a careful reading of the Supreme Court's contemporary jurisprudence in *Mossop*, *Egan* and *M v H*, I argue that we see the emergence of a new legal subject — one indelibly marked by notions of respectability. No longer framed in terms of pathology and deviance, the new queer legal subject accesses acceptance within the normative social order by trading in criminality for the new garb of respectability.

I. THE CONFLATION OF QUEERNESS AND CRIMINALITY IN ANGLO-AMERICAN LEGAL DISCOURSE

Queers were not always the respectable subjects they now appear to be when they transform their complicated experiences into the discourses made available to them in Canadian law. As Michel Foucault famously argues in *The History of Sexuality: Volume I*, "homosexuality" as a category of identity did not emerge in Anglo-American legal discourse until the late nineteenth century.[47] The discursive formation of homosexuals as a "species," he tells us, "made possible a strong advance of social controls into this area of 'perversity.'"[48] This new species could only take shape with the rise of modern scientific knowledges, which "began to peer into — and construct — an inner 'self', a personal identity that the nineteenth century saw as a matter of physiology and that the twentieth century regarded as fundamentally psychological."[49] This

[46] Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) 40 Osgoode Hall LJ 223 at 236. See also Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*" (2002) 33 UBCLR 77.
[47] Foucault, *History of Sexuality, supra.*
[48] *Ibid* at 101. For further discussion on this point, see Kirkup, "Indocile Bodies", *supra* at 124.
[49] Valverde, "A New Entity", *supra* at 361.

transformation meant that what individuals did with their body parts, and whom they did them with, provided a series of indicators about the type of person they were.[50]

If we accept Foucault's claim that "the homosexual" is a product of Anglo-American legal discourse that emerged over the course of the nineteenth century, then it is important to begin to sketch the contours of this historically specific figure. While we ought to be skeptical of singular, monolithic accounts of the "homosexual," a short discussion of some of the figure's key characteristics emerging in the nineteenth century may be useful at this juncture. Michael A. Smith explains that the "specter of the pathological, predatory, sexually violent deviant played a significant role in shaping discourse about homosexuality".[51] Allyson Lunny paints the figure using similarly ominous brushstrokes, explaining: "[T]here is the stereotype of the hypermasculine homosexual lacking in sexual self-control who is predatory and violent."[52] Gregory M. Herek notes the pervasive construction of queers as "pathological, predatory, and compulsively promiscuous",[53] while Francisco Valdes highlights the construction of the homosexual figure as so insatiably sexual that he or she will even prey upon heterosexuals.[54]

Given these negative descriptions, it is perhaps unsurprising that there has often been an implicit or explicit correlation between the figure of "the homosexual" and notions of criminality. Historically, Anglo-American criminal law has melded queerness with "concepts of danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, sexual predation, depravity, subversion, encroachment, treachery, and violence."[55] Throughout the nineteenth and the twentieth century, we see the conflation of queerness and criminality beginning to find expression in the creation of a series of new criminal prohibitions designed to combat the supposed problem of sexual immorality.

From its inception in 1892, the *Criminal Code* contained a number of prohibitions against same-sex sexual activities — these provisions, like the *Criminal Code* as a whole, were modeled after legislation first developed in the United Kingdom. The prohibitions covered a

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[50] *Ibid*.
[51] Michael A. Smyth, "Queers and Provocateurs: Hegemony, Ideology, and the 'Homosexual Advance' Defense" (2006) 40 Law & Society Review 903.
[52] Allyson M. Lunny, "Provocation and 'Homosexual' Advance: Masculinized Subjects as Threat, Masculinized Subjects under Threat" (2003) 12.2 Social and Legal Studies 311 at 316.
[53] Gregory M. Herek, "The Social Context of Hate Crimes: Notes on Cultural Heterosexism" in Gregory M. Herek & Kevin T. Berrill, eds. *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Thousand Oakes: Sage Publications, 1992) at 96.
[54] Francisco Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83 Cal L Rev 1 at 66.
[55] Mogul et al., *supra* at 23.

range of seemingly different criminal acts, all the way from sexual assaults on children to sex between two consenting adults of the same gender taking place in private.[56] Most notably, section 147 of the *Criminal Code* provided: "Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years." Similarly, section 149 of the *Criminal Code* stated: "Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years."[57] While these provisions were written using seemingly discretionary, gender-neutral language, they tended to only be applied to men who engaged in sexual activities with other men.[58]

As historian Steven Maynard argues, there is evidence to suggest that — at least as early as 1905 in Ontario — actors in the criminal justice system relied upon testimony of psychiatrists to frame male homosexuality as the product of a "disease of the mind."[59] Women who engaged in sexual activities with other women were often labeled as deviants,[60] but criminal justice actors appeared to be less interested in targeting them.[61] In 1948, in the early years of the Cold War, Canada developed another series of offences designed to combat what came to be viewed as an emerging social problem: the sexual psychopath. Introduced into law after a unanimous vote in the House of Commons in 1948, section 659(b) of the *Criminal Code* stated that offenders "who by a course of misconduct in sexual matters [have] evidenced a lack of power to control [their] sexual impulses and who as a result [are] likely to attack or otherwise inflict injury, loss, pain or other evil on any person" could be detained indefinitely.[62] The new

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[56] Elise Chenier, "The Criminal Sexual Psychopath in Canada: Sex, Psychiatry, and the Law at Mid-Century" in Maureen Fitzgerald & Scott Rayter, eds. *Queerly Canadian: An Introductory Reader in Sexuality Studies* (Toronto: Canadian Scholars' Press, 2012) at 173.

[57] *Criminal Code of Canada*, RSC 1953-1954, c.51. See also David Kimmel & Daniel J. Robinson, "Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949-1969" (2001) 16 CJLS 147.

[58] For further discussion on the history of sexual offences in the Criminal Code of Canada, see e.g. Kimmel & Robinson, *Ibid*, citing A.K. Gigeroff, *Sexual Deviation in the Criminal Law: Homosexual, Exhibitionistic, and Pedophilic Offences in Canada* (Toronto: Clerke Institute of Psychiatry/University of Toronto Pres, 1968) at 46-47; and G. Parker, "The Origins of the Canadian Criminal Code," in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, volume 1 (Toronto: The Osgoode Society/University of Toronto Press, 1981) at 272.

[59] Elise Chenier, *supra* at 173, citing Steven Maynard, "On the Case of the Case: The Emergence of the Homosexual as a Case History in Early Twentieth-Century Canada," in Franca Iacovetta & Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto, University of Toronto Press, 1998) at 65.

[60] *Ibid*, citing Estelle Freedman, "Uncontrolled Desires': The Response to the Sexual Psychopath, 1920-1960" in Kahty Peiss and Christina Simmons, eds., *Passion and Power: Sexuality in History* (Philadelphia: Temple University Press, 1989) at 203.

[61] *Ibid* at 173. For further historical research in this vein, see e.g. Gordon Brent Ingram, "Returning to the Scene of the Crime: Uses of Trial Dossiers on Consensual Male Homosexuality for Urban Research, with Examples from Twentieth-Century British Columbia" 10 GLQ: A Journal of Gay and Lesbian Studies 77.

[62] Canada, *Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths* (Ottawa: Queen's Printer, 1958) at 8.

provisions further provided that individuals would be released from prison only after undergoing a psychiatric assessment that declared that they were "unlikely to commit a further sexual offence."[63]

By 1953, Parliament amended the legislation to specify the types of activities that would warrant the criminal sexual psychopath designation. As we might expect, the activities at the heart of criminal psychopathy included rape, carnal knowledge, indecent assault, buggery, bestiality, and gross indecency.[64] In examining this history, Kimmel and Robinson explain: "In combination with other sections of the Code, the law allowed for the indefinite detention of persons convicted of performing homosexual acts and who were thought likely to re-offend upon release."[65] Unlike the enforcement of gross indecency laws, which had little justification in biomedical discourses, the criminal sexual psychopathy legislation was highly unusual in its attempt to incorporate notions of sexual deviance. As Chenier persuasively argues, the legislation marked a "decisive victory for forensic sexologists who, since the late 1800s, were determined to see 'perverted' sex acts treated as a medical, not criminal, problem."[66] Even so, the category of the sexual psychopath was not nearly as medicalized in practice as its drafters might have intended when they introduced the legislation in 1948. As I will explain below, a wide range of criminal prohibitions remained in force in the *Criminal Code* until 1969, when the Canadian government famously decriminalized aspects of homosexuality, along with prohibitions against abortion and contraception.

In *Sex Change, Social Change: Reflections on Identity, Institutions, and Imperialism*,[67] Viviane Namaste traces the criminalization of trans identities in Canada beginning in the 1960s. Like the figure of "the homosexual", Namaste argues that "the transsexual" came to be constituted in law and legal discourse as a criminal identity. To make this claim, Namaste focuses on three sites within the Canadian criminal justice system that targeted trans people beginning in the 1950s and 1960s. First, she notes that the police targeted trans people on the

[63] Chenier, *supra* at 173, citing Cyril Greenland, "Dangerous Sexual Offender Legislation: An Experiment that Failed" (January 1984) 26 Canadian Journal of Criminology 1; Group for the Advancement of Psychiatry (GAP), Psychiatry and Sex Psychopath Legislation: The 30s to the 80s, Vol. 8 (New York: Group for the Advancement of Psychiatry (GAP), April 1977).
[64] Kimmel & Robinson, *supra* at 152.
[65] *Ibid* at 152-153.
[66] Chenier, *supra* at 184.
[67] Viviane Namaste, *Social Change: Reflections on Identity, Institutions, and Imperialism*, 2d ed (Toronto: Women's Press, 2011).

street, often by relying upon the broad and amorphous category of vagrancy laws.[68] Second, police often relied upon criminal prohibitions against prostitution as a pretext for discriminatory, and often times violent, interactions with trans people on the street. Lastly, beginning in the late 1960s, the *Criminal Cod*e's prohibition against the removal of healthy organs and tissues started to be used to target physicians who performed gender-affirming surgeries. This was especially true in the cosmopolitan city of Montreal, where physicians were pioneering many of these procedures. As a result, the emerging practice of gender-affirming surgeries started to move underground, taking place in the shadows of criminal prohibition. Like "the homosexual" before it, a range of actors in the criminal justice system started to target the figure of "the transsexual". "The transsexual" came to be constituted as a criminal identity in both law and society.[69]

As this brief history demonstrates, the criminal justice system has been used to target same-sex sexual activities and non-normative performances of gender in Canada. As a result, criminal prohibitions have long played a significant role in disciplining those who fail to adhere to disciplinary norms of gender and sexuality. Over the course of the past three decades, we have tended to locate contemporary queer legal struggles squarely within the domain of human rights law, same-sex benefits, and relationship recognition. A short examination of the contemporary queer movement's engagement with the criminal law, however, demonstrates that this shift is by no means an inevitable one.

II. THE EMERGENCE OF THE CONTEMPORARY QUEER MOVEMENT IN CANADA

Given the historical conflation between queerness and criminality in Anglo-American legal discourse, a conflation that contributed to the development of Canada's early sexual offenses and later to the use of laws targeting trans people, the history of the contemporary queer movement in Canada is rooted in efforts to challenge and resist the criminal law on at least two fronts. First, the movement began to challenge formal aspects of the criminal law, such as existing prohibitions against sodomy. Second, the movement began to challenge queer people's everyday experiences with actors in the criminal justice system, which tended to be marked by discrimination and violence. While a full treatment of the birth of the contemporary queer

[68] For further discussion on the historical development of vagrancy laws in Canada, see e.g. Prashan Ranasinhe, "Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48 OHLJ 55.

[69] *Ibid* at 34-40.

movement in Canada is well beyond the scope of the analysis in this chapter, a short discussion of two moments in this recent history — the decriminalization of aspects of homosexuality in 1969 and the Toronto bathhouse raids in 1981 — are instructive in setting the stage for the analysis that follows in *Sex Crimes*.[70]

(i) The decriminalization of homosexuality

In 1967, Justice Minister Pierre Elliott Trudeau proposed amendments to the *Criminal Code* that would decriminalize aspects of homosexuality, along with prohibitions against abortion and contraception. Bill C-150 promised to modernize a range of offences in the *Criminal Code*, with its sweeping series of 120 amendments. Among other things, the legislation amended the *Criminal Code*'s buggery and gross indecency provisions — homosexuality would be decriminalized, so long as they took place consensually and in private between two people aged 21 years or older. Given the expansive definition of "public", which included any sexual activity committed in a public place or anywhere two or more people were present, police continued to target homosexuality as being grossly indecent.[71] Trudeau summed up the rationale underpinning the amendments with the now famous, albeit somewhat vacuous, quotation: "The state has no business in the bedrooms of the nation." Two years later, Trudeau successfully passed the amendments to the *Criminal Code*.

Scholars have provided competing accounts to explain the underlying reasons for this legislative shift, including Trudeau's lack of religious conservatism and his effort to distract Canadians from political unrest amongst Quebec Nationalists.[72] In *The Regulation of Desire: Sexuality in Canada*,[73] Gary Kinsman draws upon social theory literature to argue that the 1969 reforms are best understood as the result of a burgeoning social movement in Canada and the United Kingdom, one that set its sights on challenging, among other things, the criminalization of homosexuality, abortion, and contraception.

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[70] For further discussion of queer history in Canada, see e.g. Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002).
[71] For further discussion, see Hamish C Stewart, *Sexual Offences in Canadian Law* (Toronto: Canada Law Book, 2004); Daily Xtra!, "Stuck in Bill C-150's private realm of sin" *Daily Xtra!* (2 June 2009), online: Daily Xtra! <http://www.dailyxtra.com>.
[72] Kimmel & Robinson, *supra* at 1, citing L. Zolf, *Just Watch Me: Remembering Pierre Trudeau* (Toronto: Lorimer, 1984); W. Stewart, *Shrug: Trudeau in Power* (Toronto: New Press, 1971); M. Vastel, *The Outsider: The Life of Pierre Trudeau* (Toronto: Macmillan, 1990); and P.E. Trudeau, Memoirs (Toronto: McClelland and Stewart, 1993).
[73] Gary Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1986).

In 1957, the Wolfenden Committee on Homosexual Offences and Prostitution released what is now famously known as *Wolfenden Report* in the United Kingdom.[74] Drawing on research from psychiatrists and other experts, the report argued in favour of decriminalizing private consensual homosexual acts between adults. Influenced by this groundbreaking report, Canadian law professors such as Alan Mewett began arguing that morality and criminal law ought to be decoupled.[75] By the mid-1960s, officials at the Department of Justice were aware of Mewett's concerns about the operation of sections 147 and 149 of the *Criminal Code*, as well as the more recent sexual psychopathy offences, but were relatively slow to act.[76]

By the mid-1960s, Canada began to see the emergence of several new queer political organizations, including the Canadian Council on Religion and the Homosexual, the Committee on Homophile Reform, the Association for Social Knowledge, and International Sex Equality Anonymous.[77] In addition, two queer magazines — *Gay* and *Two* — were published. Given this significant proliferation of organizations and publications, all within the span of about five years, the stage was set to begin to challenge the criminal prohibitions against homosexuality, along with abortion and contraception. In 1964, the Committee on Homophile Reform sent a research brief to Canada's Ministry of Health and Welfare. Making references to the *Wolfenden Report*, while also raising "concerns that many people tended to conflate gays with pedophiles, masochists, and sadists", the report called upon the Canadian government to decriminalize homosexual acts committed by consenting adults in private and to outlaw the use of psychiatric detention against homosexuals.[78]

Somewhat fortuitously, in July 1967, the British Parliament passed the *Sexual Offences Act*[79] which largely adopted the recommendations that had been developed in the *Wolfenden Report* ten years earlier.[80] In response, the *Globe and Mail* — arguably Canada's most respected national newspaper — published an editorial entitled "Homosexuality and the Law." The editorial was deeply critical of the Canadian government's failure to modernize the *Criminal*

[74] United Kingdom, "Report of the Committee on Homosexual Offences and Prostitution" in Sessional Papers (1957) [*Wolfenden Report*].
[75] A.W. Mewett, "Morality and the Criminal Law" (1962) 14:2 UTLJ 213.
[76] Kimmel & Robinson, *supra* at 154.
[77] *Ibid*.
[78] *Ibid*. at 155.
[79] 1967, c. 60.
[80] Kimmel & Robinson, *supra*.

Code, even suggesting that the continued criminalization of same-sex sexual activities embodied "prejudices of another era."[81]

Later that year, the Supreme Court decided the now infamous case of *Klippert v The Queen*,[82] which again highlighted the draconian nature of Canada's criminalization of homosexuality and psychiatric detention laws. In this case, Everett George Klippert — a mechanic living in Pine Point, Northwest Territories — pleaded guilty to four charges of gross indecency under s. 149 of the *Criminal Code* after he told the police, who had been called to investigate a fire at his home, that he had engaged in consensual sexual activities with adult men in private. He was found guilty and sentenced to three years in prison. As he started to serve his sentence, the Crown made an application under s. 661 of the *Criminal Code* to have him declared a dangerous sexual offender within the meaning of s. 659(b) of the *Code*. To do so, the Crown relied upon evidence that, five years earlier, Klippert had been charged with eighteen similar offences in Calgary, Alberta. Two psychiatrists gave evidence that, as a so-called 'true' homosexual, Klippert was likely to commit further sexual offences with other consenting adult males, but that he had never caused injury, pain, or other evil to any person, and that he was unlikely to do so in the future. As a result, the judge imposed a preventive detention sentence on Klippert. The Court of Appeal for the Northwest Territories dismissed his appeal. Klippert then successfully sought leave to appeal to the Supreme Court of Canada, but was ultimately unsuccessful on the merits of the case.

Justice Fauteux, writing the majority three judge opinion of the Supreme Court, dismissed Klippert's appeal and refused to overturn the preventive detention sentence. Near the end of his opinion, however, Justice Fauteux appears to have intended to send a subtle signal to Parliament that it may be time to modernize the provisions of the *Criminal Code* related to homosexuality. He ended his decision by stating:

> Whether the criminal law with respect to sexual misconduct of the sort in which appellant has indulged for nearly twenty-five years should be changed to the extent to which it has been recently in England by the *Sexual Offences Act* 1967, c. 60, is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.[83]

Chief Justice Cartwright, writing in dissent with the support of one other judge, would have overturned the preventive detention decision altogether. In coming to this conclusion, he also

[81] *Ibid* at 155, citing "Homosexuality and the Law" *Globe and Mail* (8 July 1967).
[82] *Klippert v. The Queen*, [1967] SCR 822.
[83] *Ibid* at 836.

expressed skepticism about the wisdom of the criminalization of homosexuality, as well as the more recent invention of the preventive detention for so-called criminal psychopaths. He explained:

> If the law on this subject matter is as interpreted in the Courts below, it means that every man in Canada who indulges in sexual conduct of the sort forbidden by s. 149 of the *Criminal Code* with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life. However loathsome conduct of the sort mentioned may appear to all normal persons, I think it improbable that Parliament should have intended such a result.[84]

In the days following the release of the Supreme Court's decision, members of the House of Commons, including Liberal MP R.J. Orange and New Democratic Party leader Tommy Douglas, demanded that the government decriminalize homosexuality to avoid future cases with facts similar to those of *Klippert*. Justice Minister Trudeau, standing before the House of Commons, indicated that he would consider legislative reform in the wake of the Supreme Court's decision.[85]

Later that month, cabinet approved Trudeau's recommendation to decriminalize homosexual activity occurring between consenting adults over age 21 in private, along with prohibitions against abortion and contraception. On December 21, 1967, Justice Minister Trudeau tabled Bill C-197. Before the legislation could pass, however, Trudeau — who had just become Prime Minister after winning the Liberal leadership race — called an election. As a result, the Bill initially died on the order paper. After securing a majority government, the new justice minister John Turner reintroduced the legislation as Bill C-150 on December 19, 1968.[86] After considerable debate, the Bill passed Third Reading in the House of Commons on May 14, 1969, by a margin of 149 to 55. The Bill easily moved through the Senate and, on August 26, 1969, Canada officially decriminalized aspects of homosexuality, along with abortion and contraception.[87] The struggle within the contemporary queer rights movement, however, was not over — while queers had, for the most part, reached formal equality before the criminal law, there was still a considerable amount of work to be done in the context of policing.[88]

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[84] *Ibid* at 831.
[85] Canada, House of Commons Debates (8 November 1967) at 4036-37, cited by Kimmel & Robinson, *supra* at 156-157.
[86] Kimmel & Robinson, *supra* at 161.
[87] *Ibid* at 161-163.
[88] For further discussion of these legislative reforms, see e.g. Stuart Chambers, "Pierre Elliott Trudeau and Bill C-150: a rational approach to homosexual acts, 1968-1969" (2010) 57:2 Journal of Homosexuality 249.

(ii) Policing Canada's queers

Following the decriminalization of aspects of homosexuality in 1969, queers in Canada continued to experience discrimination and violence when they encountered the police — particularly when they gathered in public spaces. While it would be a mistake to place too much significance on a single moment in queer history, few would dispute that police violence in Canada came to a head in Toronto, Ontario on February 5th, 1981. That night, 150 police officers carrying crowbars and sledgehammers conducted a simultaneous raid on four bathhouses throughout the city. Following a sixth month investigation somewhat curiously called "Operation Soap," the police raided four establishments, purportedly in search of individuals engaged in criminal activities, including underage sex workers. As they broke into locked cubicles and sent half-nude men onto the street in the middle of winter, the police could be heard hurling epithets such as "faggot" and "queer" at the men. The police were also alleged to have made comments calling for the mass extermination of queers, including the most infamous one: "It's too bad the showers weren't hooked up for gas instead of water." Over the course of a single evening, the Toronto police arrested 286 men. Most of the men were charged under the common bawdy house provisions of the *Criminal Code* — 266 were charged as being "found ins" at a common bawdy house,[89] while another twenty were charged with the more serious offence of keeping a common bawdy house.[90] This was the largest number of arrests made during a single police investigation in Canada since 1970 when the federal government — the same government led by Prime Minister Trudeau that had decriminalized homosexuality, abortion, and contraception one year earlier in 1969 — invoked the *War Measures Act*, fearing a revolution by Quebec Nationalists.[91]

Almost immediately, the raids sparked outrage among members of the queer community, drawing obvious parallels with the Stonewall Riots that had occurred twelve years earlier in New York City. On the night following the Toronto bathhouse raids, members of the community organized a massive protest against the police. One reporter recounted the events in the following terms: "The lesbian and gay community raged and went on the warpath the next day. More than 3000 gathered at the corner of Yonge and Wellesley streets in the heart of

[89] *Criminal Code*, s. 210(2).
[90] *Criminal Code*, s. 210(1).
[91] John Paton, "Toronto Raids Drawing International Protest" *Gay Community News* 8:33 (14 March 1981) 1.

Toronto's gay district and marched to 52 division — the police unit responsible for the raids."[92] As they made their way to 52 division, the protesters were heard chanting "Gays fight back." The protesters were met by about 250 police officers who had formed a human barrier in front of the 52 division police station. Following the protest, many suspected that the issue would disappear and, for a brief period, it seemed to do just that. But when it came to light that police had been instructed to remove their hats and shoulder badges to make it more difficult for protesters to identify them, members of the community mobilized once more.[93]

On February 20th, 1981, approximately 2000 individuals organized another protest, this time with the support of the Metro Labor Council, the Canadian Civil Liberties Association, and local politicians. Tim McCaskell, a longtime community activist and contributor to *The Body Politic*, gave a particularly impassioned speech at the rally. He stated: "Something is deeply sinister in the police department. It is degenerating into an armed right-wing force...we will not rest until the cops are under control, out of bedrooms and out of politics."[94] He ended on a somewhat comedic note, reading a poem that writer Allen Ginsburg had written specifically for the event. The poem encouraged members of the police to discover what they had been missing in Toronto's bathhouses, ending on a humorous note: "Good steambaths make clean minds."[95] Another speaker at the second rally was Lemona Johnson — in 1979, Toronto Police killed her husband, Albert Johnson, a 35-year-old Black man, in front of their family. While the killing two years earlier helped mobilized members of the Black community, the officers were eventually acquitted on all charges. In speaking at the event, Johnson underscored the importance of recognizing how vulnerable communities — particularly those situated at the axes of multiple systems of marginalization — experienced the violence, discrimination, and harassment of policing.[96]

Following the 1981 raids, the Right To Privacy Committee (RTPC), formerly a small group created after the Toronto Police Service's raid of the Barracks bathhouse in December 1978, grew to become one of the largest queer organizations in Canada. The group took the liberationist position that sex between consenting adults should not be targeted by criminal prohibitions. As members of *The Body Politic* and the RTPC explained, part of the post-

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[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid*.
[95] *Ibid*. For further discussion of the aftermath of the Toronto Bathhouse raids, see *Body Politic*, Number 72 (April 1981).
[96] Tim McCaskell, "Black Lives Matter versus Pride Toronto" *Now Toronto* (12 July 2016), online: Now Toronto <www.nowtoronto.com> [McCaskell, "Black Lives Matter"],

bathhouse raids strategy was to create a legal defence fund to assist the 286 men who had been charged as found-ins and keepers of common bawdy houses. Rather than simply pleading guilty out of fear, shame, or a desire to simply make the problem go away, organizers understood challenging the charges in open court as a queer rights mobilization strategy.[97] Ultimately, the tactic proved successful. With the help of the RTPC legal defence fund, judges eventually threw out the vast majority of the "Operation Soap" charges.[98] Following the Toronto Bathhouse Raids, the group also worked with Black and South Asian organizations, along with the Law Union of Ontario, to establish the Citizens Independent Review of Police Actions (CIRPA). Understanding the threat posted posed by the police to marginalized communities, the groups came together to form the organization to serve as "Toronto's first citizen watchdog of police".[99]

For many members of the queer community, the Toronto bathhouse raids and their aftermath in early 1981 marked the second galvanizing moment in the contemporary queer movement in Canada. While queers had become, for the most part, formally equal before the criminal law in 1969, so long as they engaged in sexual activities in private, the raids demonstrated that the everyday practice of the criminal law continued to play out in ways that relied upon predictable scripts of discrimination and violence. *Sex Crimes* delves further into relationships between police and queer communities in Chapter 2.

III. TURNING AWAY FROM THE CRIMINAL LAW

(a) Human Rights, Same-Sex Benefits, Relationship Recognition, and the Making of Respectability

Having recounted the history of Canada's queer rights movement, it becomes readily apparent that the criminal law has long functioned as a site where contemporary norms of gender and sexuality are maintained, contested, and transformed. As we moved further into the 1980s, however, the contemporary queer movement started to turn away from its criminal past, instead focusing its energy on human rights protections, same-sex benefits, and — perhaps most importantly — relationship recognition. With this turn away from the criminal law, we begin to

[97] Joshua Meles, "Harnessed Anger" *Daily Xxtra!* (1 February 2006), online: Daily Xtra! <http://www.dailyxtra.com>.
[98] Nicki Thomas, "Thirty years after the Bathhouse Raids" *Toronto Star* (4 February 2011), online: Toronto Star <http://www.thestar.com>.
[99] McCaskell, "Black Lives Matter", *supra*.

witness the emergence of a new entity in the history of sexuality, one Mariana Valverde has aptly called the respectable same-sex couple.[100]

Queers, however, did not abandon the criminal altogether as they moved into the 1980s and 1990s — rather, they started to use its constitutive apparatuses in new ways. When they did engage the criminal law, queers began to reimagine themselves as victims of crime, a position Jonathan Simon has argued has come to be synonymous with ideal notions of Anglo-American citizenship.[101] Comments made by John Fisher, the former head of Egale Canada, in 2004 are instructive about an approach to queer advocacy that increasingly focused on human rights protections, benefits, relationship recognition, and hate crimes to the exclusion of supporting those ensnared in the repressive aspects of criminal justice. As he put it, "Ten years ago, sexual orientation was not included in the *Canadian Human Rights Act*, there was no protection in hate crimes legislation, and not a single federal statute recognized same-sex relationships."[102] With this shift, we see the emergence of the figure of the respectable queer legal subject, one who is no longer a *perpetrator* of crime but rather the *victim* of crime. This figure surfaces in concert with a number of legal developments in Canada, perhaps most notably the introduction of "hate crime" legislation on the basis of "sexual orientation" over twenty years ago.[103]

In 1995, Canada overhauled its sentencing regime; this overhaul included adding s. 718.2(a)(i) to the *Criminal Code*, which provides that "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor" constitutes an aggravating factor to be considered at sentencing. In order to successfully use this provision, the Crown must demonstrate beyond a reasonable doubt that the accused person was motivated by bias, prejudice, or hate on the basis of one of the enumerated identity categories or any other similar factor.[104] In enacting the bill, Minister of Justice Allan Rock seemed to suggest that s. 718.2(a)(i) was premised on using the criminal law to express a different understanding of queerness than it had in previous eras. One way queers could signal that they were full citizens

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[100] Valverde, "A New Entity", *supra*.
[101] Simon, *supra.*
[102] John Fisher, "Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill LJ 1183 at 1186 [footnote omitted].
[103] For further discussion on the discursive emergence of hate crimes in Canada, see e.g. Allyson M Lunny, *Debating Hate Crime: Language: Legislatures, and the Law in Canada* (Vancouver: UBC Press, 2016).
[104] Section 724(3)(e) of the *Criminal Code of Canada*, *supra*, provides:

> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence […]
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

was to demonstrate their eagerness to bolster the carceral state by punishing in the name of equality and justice. He stated: "This Bill makes an important societal statement…[t]hat sentences for these crimes must reflect the collective condemnation felt by Canadians of crimes not only against individuals but against groups as a whole."[105] This development allowed queers to begin to adopt a new position of respectability in relation to the criminal law — no longer perpetrators of crime in the throes of sexual psychopathy or deviants engaged in non-normative sexual activities, the new queer came to be recast as the victim of the crime; a respectable citizen targeted merely for his or her sexual identity.[106]

In an effort to have their relationships recognized by the state, queers started to highlight the multiple ways in which they were 'normal' and thus deserving of the same rights as their heterosexual counterparts. Instead of being constructed as sexual deviants, constantly posing a threat to the normative social order and needing to be curtailed by the force of the criminal law, the respectable same-sex couple came to reimagine itself as being part of a committed union and willing to reimagine the carceral state in benevolent terms. Rather than lurking in bushes, bathhouses, and bathrooms, the respectable same-sex couple starts to present in ways that are indelibly marked — and perhaps even a response to — their painful criminal past.[107] As Love reminds us, queers are a group "constituted by historical injury".[108] Given this history, there may be complicated reasons located within the realm of affect that help to explain this turn away from challenging the criminal law.[109] I further develop this point on the affective dimensions of queer hate crime legislation in the concluding chapter of *Sex Crimes*.

In mapping out this new contemporary figure of the respectable same-sex couple, it is important to notice that not everyone can — or wants to — make it to the top of what we might call the ladder of respectably. Rather, respectability is more readily available to some queers than it is to others; those who are racialized, trans, or poor are often rendered absent from the queer turn to respectability. As José Esteban Muñoz argues, respectability in the context of

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[105] Canada, Department of Justice, Press Release (15 June 1995). For a thoughtful critique of this legislative scheme, see Sean Robertson, "Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R. v. Cran*" (2005) 50 Crim LQ 482.
[106] For further discussion of the 1995 reforms, see Janoff, *supra* at 123-125.
[107] For a critique of attempts on the part of the queer community to 'normalize' homosexuality as part of the campaign for marriage equality, see e.g. Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999).
[108] Love, *supra* at 1.
[109] *Ibid*.

same-sex marriage debates relies on "normative citizen-subjects with a history of rights only afforded to some (and not all) queer people."[110]

As we begin to witness the emergence of this new subject, as well as the subjects who cannot, or do not want to, make it to respectability, a somewhat unsettling reality emerges: queer people seeking to have human rights protections, same-sex benefits, and marriage recognized by the state have, over the past thirty years, began to both implicitly and explicitly invoke and then distance themselves from their unrespectable criminal past as a strategy for legal change. Put differently, queers have started to participate in larger regimes of self-governance, donning the garb of respectability and being willing to punish in the name of equality.[111] As Tom Warner explains, there is a "growing element" of queers who:

> …see themselves as 'respectable' professionals and business people living in upscale neighborhoods. These upstanding citizens don't have to (or don't publicly admit going to) sex clubs or bathhouses or engage in sex in public places, which are presumed to be frequented by gays and lesbians who are not respectable, whose behaviour 'gives gays and lesbians a bad name.'[112]

While it might be obvious that Canadian society has played a central role in policing the boundaries of respectability, the new queer legal subject has also started to participate in this larger project. One mechanism through which this transformation has taken place in Canada is found in the turn away from the criminal law in favour of human rights protections, same-sex benefits, and relationship recognition. What follows below is an account of this turn away from the criminal law.

(b) The Turn from the Criminal Law

Sex Crimes should not be understood as suggesting that there is a singular reason for the emergence of the new respectable queer subject that has emerged in Canadian law and legal discourse over the past thirty years. Other forces — including the advent of the equality guarantee set out in s. 15 of the *Canadian Charter of Rights and Freedoms* in 1982,[113] the fact

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[110] José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York & London: New York University Press, 2009) at 20.

[111] For a discussion of the ways in which society tends to depict black men in a similar either/or fashion, see Frank Rudy Cooper, "Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy" (2006) 39 UC Davis L Rev 853.

[112] Tom Warner, *supra* at 294-295.

[113] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (*Charter*) s 15(1) provides:

that queers had almost achieved formal equality in the criminal law, the HIV/AIDs epidemic, and broader forces of privatization associated with what has come to be described as neoliberalism[114] — also played a role in this discursive shift.[115]

Rather, the goal of this first chapter of *Sex Crimes* is to carefully examine the new version of queerness that came to be told using the language of human rights law, same-sex benefits, and relationship recognition cases beginning in the 1980s. The subsequent chapters proceed to assess the influence these narratives had on future queer engagements with the criminal law. To undertake this analysis, I will survey what me might call the three greatest hits of queer Canadian familial recognition cases heard by the Supreme Court of Canada.[116] These are the foundational cases that arguably paved the way for the federal government's legalization of same-sex marriage with the introduction of the *Civil Marriage Act*[117] in 2005.[118] At the same time, these cases participated in the making of a new queer legal subject, one that bared little resemblance to the earlier criminal figures of "the homosexual" and "the transsexual".

(i) Mossop v Canada (1993)

Mossop v Canada[119] was the first s. 15 *Charter* equality case heard by the Supreme Court of Canada on issues related to sexual orientation. In this case, Brian Mossop challenged his employer's decision to refuse to grant him bereavement leave to attend the funeral of his same-sex partner's father. The employer reasoned that the two men were not members of each other's "immediate family." As a result of his employer's decision, Mossop brought his case to the Canadian Human Rights Commission. He argued that his employer's decision to deny him

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> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[114] For further discussion of the relationship between queer mobilization and neoliberalism in Canada, see e.g. Miriam Smith, "Resisting and Reinforcing Neoliberalism: Lesbian and Gay Organizing at the Federal and Local Levels in Canada" (2005) 33 Policy & Politics 75.

[115] On the trend of privatization and neoliberalism, see e.g. Susan B. Boyd, "Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in M. v. H." (1996) 13 Can Fam Law 321.

[116] For further insightful discussion of these early queer familial recognition cases and others, see Cossman 2002, *supra*; Robert Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop*, *Egan* and *Layland*" (1993-1994) 39 McGill LJ 429; and Brenda Cossman, "Same Sex Couples and the Politics of Family Status" in Janine Brodie, ed., *Women and Public Policy in Canada,* (Toronto, Harcourt Brace, 1995).

[117] RSC 2005, c 33.

[118] For further discussion regarding same-sex marriage advocacy and subjectivity, see e.g. Brenda Cossman, "Canadian Same Sex Relationship Recognition and the contradictory nature of legal victories" (2000) Cleveland State Law Review 49; and Joanna Radbord, "Lesbian Love Stories: How We Won Equal Marriage in Canada" (2005) 17 Yale JL & Feminism 99.

[119] *Mossop v. Canada*, [1993] 1 SCR 554.

bereavement leave constituted discrimination on the basis of "family status" within the meaning of the *Canadian Human Rights Act*.[120] When the case was heard, "sexual orientation" had not yet been added as a prohibited ground of discrimination under the *Canadian Human Rights Act*. Writing for the majority of the Court, Chief Justice Lamer dismissed Mossop's appeal, reasoning that the employer's decision to deny Mossop leave was based on "sexual orientation" discrimination, not "family status" discrimination. Absent a challenge to the constitutionality of the *Canadian Human Rights Act* as a violation of s. 15 of the *Charter*, Mossop's appeal could not succeed. Writing in dissent, Justice L'Heureux-Dubé would have allowed Mossop's appeal.[121]

Admittedly, in this early case, the claimant appears to have made the conscious decision to avoid framing his familial relationship in terms of respectability. He and his partner were queer liberationists who were open to sexual activities outside the four corners of their relationship. As Cossman notes, "Mossop himself refused to make arguments on the basis of sexual monogamy."[122] Indeed, Mossop's decision could be read as undercutting my assertion that contemporary queer subjects have themselves played a role in policing the boundaries of respectable expressions of gender and sexuality. Upon a close reading of the decision, however, it becomes apparent that the discourses of familial recognition seem to have compelled both Mossop's lawyers and the Court to drape the claimant's lived experiences in the garb of respectability, even if this approach did not accord with how the couple organized and understood their lives.[123]

On one level, Justice L'Heureux-Dubé's dissenting opinion usefully opens the possibility for the reconceptualization of the family outside a traditional heterosexual frame. She notes, for example, that "a large number of Canadians do not live within traditional families".[124] As we delve further into the decision, however, it becomes clear that she relies heavily on, and breathes new life into, the production of queer identity in terms of coupled respectability. She explains:

> If there is value in encouraging individuals to form stable and emotionally intimate relationships, such relationships can be forged and maintained in a wide variety of

[120] RSC 1985, c H-6.
[121] *Mossop*, *supra* at 554-600.
[122] Cossman 2002, *supra* at 227.
[123] For an analysis of the framing queer claimants in United States constitutional law case of *Lawrence v Texas*, see e.g. Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* (New York: WW Norton & Company, 2013).
[124] See, for example, the discussion in *Mossop*, *supra* at 627.

> family forms. The emotional and economic safety nets forged by same-sex couples and their families were found not to be without value to society at large.[125]

While there is much to appreciate about Justice L'Heureux-Dubé's call to challenge the traditional heterosexual family structure, her acceptance of the inherent "value" of "encouraging individuals to form stable and emotionally intimate relationships" seems to be bound up in advancing a singular version of queerness, one that implicitly adopts the turn to queer respectability.[126]

(ii) Egan v Canada (1995)

Two years later, the Supreme Court of Canada heard its next queer rights case: *Egan v Canada*.[127] In this case, James Egan and John Norris Nesbitt — a couple who had lived together since 1948 — claimed that the opposite-sex definition of "spouse" in s. 2 of the *Old Age Security Act*[128] violated s. 15 of the *Charter*. Because the same-sex couple did not meet the definition of spouse, they were denied a spousal allowance which otherwise would have been available to them under s. 19(1) of the *Old Age Security Act* when Nesbit turned 60 years old. In a heavily split decision, five judges rejected the claim being advanced by the couple and upheld the definition as constitutional, while four judges found in favour of the couple by holding that the definition of "spouse" in s. 2 of the *Old Age Security Act* violated s. 15 of the *Charter*. The violation could not be saved by s. 1 of the *Charter*.[129]

Lurking just below the surface of the decision is a broader claim about the respectability of Egan and Nesbitt. Both opinions appear to rely on what we might call a new tolerant psychological paradigm — one that no longer understands homosexuality as a deviant psychological condition, preferring to reframe it in social and cultural terms. Rather than a set of deviant sexual practices, we see the court reimagining homosexuality as a minority lifestyle. To use the language offered by influential sexologist Magnus Hirschfeld, the Supreme Court constructs homosexuality as little more than a "benign variation".[130]

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[125] *Ibid* at 631.
[126] Valverde, "A New Entity", *supra*.
[127] *Egan v Canada*, [1995] 2 SCR 513.
[128] RSC, 1985, c O-9.
[129] *Egan*, *supra* at 526-540.
[130] Mariana Valverde, *Law's Dream of a Common Knowledge: The Cultural Lives of Law* (Princeton: Princeton University Press, 2003) at 112-119.

While both opinions appear to understand homosexuality as a benign variation that a relatively small minority of people engage in, a close reading of the decision in terms of the couple's forty-year history demonstrates that the majority and minority opinions of the Court rely upon markedly different accounts of the couple's respectability to arrive at their legal conclusions.

The majority opinion authored by Justice La Forest opens with cold, lifeless prose. He briefly describes the couple as follows: "The appellants, James Egan and John Norris Nesbit, are homosexuals who have since 1948 lived together in a relationship marked by commitment and interdependence similar to that which one expects to find in a marriage."[131] In this short description, Justice La Forest seems to admit, albeit somewhat begrudgingly, that the couple bears some of the hallmarks of coupled respectability. He suggests, for example, that their relationship is "similar" to marriage. This is the single reference to the story of the couple in his decision.

The decision of Justice Cory, writing for the minority of the Court, tells the story of Egan and Nesbitt in warm prose. In comparison with the majority opinion authored by Justice La Forest, which opens with a discussion of the legislative provisions at issue in the case, Justice Cory opens with a story of intimacy, support, and respectability. He writes:

> The appellants James Egan and John Norris Nesbit are a homosexual couple. They have lived together since 1948 in what is obviously an intimate, caring, mutually supportive relationship. They have shared and continue to share bank accounts, credit cards and property ownership. By their wills they have appointed each other their respective executors and beneficiaries. To their families and friends they refer to themselves as partners.[132]

By describing Egan and Nesbit as a couple that "refer[s] to themselves as partners" at the outset of his decision, the reader immediately understands that Justice Cory is about to tell a particular story about a particular type of couple. He also signals that he will find in their favour.

Deep in the analysis, as Justice Cory is determining whether the legislative definition of the term "spouse" violates s. 15 of the *Charter*, he again returns to frame queerness in terms of partnered respectability. He writes:

> Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner…Sexual orientation is demonstrated in a person's choice of a life partner,

[131] *Egan, supra* at 528.
[132] *Ibid* at 577.

> whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected.[133]

In this statement, we see Justice Cory deploying a particular version of queerness — not only does Justice Cory tell us that queerness is bound up in being part of a presumably monogamous couple, but he also tells us that queerness is most fully expressed by an individual's "choice of a life partner". Analyzing the Court's decision in *Egan*, Cossman echoes this point, explaining: "While arguing that same-sex couples did not have to be 'just like' heterosexual couples, the argument remained one of functional equivalency. The idea of sexual monogamy seemed to creep back in implicitly to this functional equivalency."[134] To reach his conclusion that the definition of the term "spouse" in the *Old Age Security Act* the equality rights guarantee set out in s. 15 of the *Charter*, Justice Cory invokes a new version of queer subjectivity, one marked by notions of coupled respectability.

(iii) M v H (1999)

In one of the last precursor cases in the lead up to the introduction of federal same-sex marriage legislation in 2005, the Supreme Court was again tasked with weighing in on queer familial recognition issues in its 1999 decision of *M v H*. This case involved two women — their names removed from the decision to protect their privacy — who had been in a relationship and had lived together for a period of ten years. When their relationship dissolved, M. brought an application for spousal support against H. under the *Family Law Act.*[135] Section 29 of the *Family Law Act* defined "spouse" as including unmarried opposite sex couples — but not same-sex couples — who had continuously cohabited for a period of "not less than three years." M. challenged the constitutionality of this definition of the term "spouse" as a violation of s. 15 of the *Charter.* The majority of the Court held that the definition of the term "spouse" constituted discrimination on the basis of sexual orientation,[136] and could not be saved by s. 1 of the *Charter*.[137]

Early in the majority opinion, an opinion again authored by Justice Cory on this point, we see traces of the respectable same-sex couple seep into the decision. Justice Cory writes:

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[133] *Ibid* at 600.
[134] Cossman 2002, *supra* at 230, citing Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999) at 92; Carl F. Stychin, "Novel Concepts: A Comment on *Egan* and *Nesbit* v. *the Queen"* (1995) 6 Const. Forum Const 101 at 105.
[135] RSO 1990, c F 3.
[136] *M v H*, [1999] 2 SCR 3 at para 57.
[137] *Ibid* at para 87.

> M. and H. are women who met while on vacation in 1980. It is agreed that in 1982 they started living together in a same-sex relationship that continued for at least five years. That relationship may have lasted ten years, but that figure is disputed by H. During that time they occupied a home which H. had owned since 1974. H. paid for the upkeep of the home, but the parties agreed to share living expenses and household responsibilities equally. At the time, H. was employed in an advertising firm and M. ran her own company.[138]

In this opening statement, we meet a respectable same-sex couple who "met while on vacation" — one worked at an advertising firm, and the other ran her own company. At the end of his s. 15 *Charter* discussion, before Justice Iacobucci conducts the majority's s. 1 *Charter* analysis, Justice Cory concludes by shifting from the respectability of M. and H. to the respectability of the contemporary queer community as a whole. He states:

> The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the [*Family Law Act*] promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE [Equality for Gays and Lesbians Everywhere] submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.[139]

Again, we see queerness no longer articulated in terms of unbridled, insatiable criminal sexuality and, instead, framed and produced using the language of coupledom and "intimate relationships of economic interdependence." Being excluded from family benefits in law, an argument made by the queer intervener organization Egale Canada, even "contributes to the erasure of their existence." The fact that a prominent queer organization would rely so heavily upon a newly-minted respectability suggests that members of our communities started to relegate certain lived realities — the less palatable, less sexual, perhaps even less queer, ones — to the outskirts of intelligibility as a rights mobilization strategy. Cossman, writing about the case and its legacy for the contemporary queer movement in Canada writes: "[T]he very discourses within which the new legal subject was being recognized were normalizing. The lesbian and gay legal subject was a familial subject, a subject recognized in and through dominant familial discourses."[140] Thus, M. and H., as well as the contemporary queer community they came to exemplify, started to occupy a vastly different terrain from the criminal

[138] *Ibid* at para 28.
[139] *Ibid* at para 57-58.
[140] Cossman 2002, *supra* at 238.

sexual psychopath that the same Court brought to life thirty years earlier in *Klippert.*[141] Five years later, the Supreme Court would solidify this discursive shift with its decision in *Reference re Same-Sex Marriage*.[142] Shortly thereafter, the federal government would successfully pass the *Civil Marriage Act*,[143] which had the legal effect of bringing same-sex marriage to every province and territory in Canada. Within the span of three decades, the Court had discursively shifted the dominant mode of queer subjectivity from criminality to respectability. As I demonstrate in the subsequent chapters of *Sex Crimes*, this shift would forever change the future directions of queer advocacy in the domain of criminal law.

III. CONCLUSION: CRIMINAL LAW AFTER MARRIAGE EQUALITY

This chapter has examined the emergence of a new queer subject in Canadian law over the past thirty years. In doing so, it has compared this new entity to earlier versions of subjectivity in Anglo-American legal discourse, which tended to frame queerness as a criminal identity. Analyzing legal decisions and scholarship in the areas of human rights law, same-sex benefits, and relationship recognition, the chapter argued that we begin to see the emergence of a new queer subject: the respectable same-sex couple.[144] This new respectable queer subject distances itself from the promiscuous, pathological, and predatory criminal figures of "the homosexual" and "the transsexual" that emerged in and through a range of criminal prohibitions in Canadian law. As such, this newly minted queer subject distances itself from its criminal past by policing the boundaries of respectability and thus relegating some subjects to the outskirts of intelligibility.[145]

Ultimately, there were undoubtedly important strategic reasons for the emergence of the respectable same-sex couple. The subject became an instrument of social change, change that arguably cumulated with the introduction of federal same-sex marriage legislation in 2005. The developments that have occurred in the past three decades, however, are best understood as partial and uneven. The decision to frame queerness in terms of respectability has benefited some legal subjects, particularly the most privileged members of the community. But it has also relegated others — in particular, those who cannot, or do not want to, wear the garb of

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[141] *Klippert*, *supra*.
[142] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.
[143] SC 2005, c 33. For further discussion of the emergence of same-sex marriage in Canada and its aftermath, see e.g. Robert Leckey, ed. *After Legal Equality: Family, sex, kinship* (New York: Routledge, 2015).
[144] Valverde, "A New Entity", *supra*.
[145] Cossman 2002, *supra*.

respectability — to the borders of legal intelligibility. At a more fundamental level, the Canadian turn from criminality to respectability may point to broader limitations of what theorists such as Love have called the "affirmative turn in queer studies"[146]. We may also call into question the continued utility of the respectable queer legal subject in an era where same-sex marriage now seems like a foregone conclusion in most Anglo-American jurisdictions.[147]

As I demonstrate in the chapters that follow in *Sex Crimes*, the same queer legal subjects who have failed to benefit from the promise of human rights protections, same-sex benefits, and marriage equality over the past thirty years of advocacy continue to find themselves ensnared in the repressive aspects of criminal justice. By turning back to the criminal law, the goal of this project is to open up new possibilities for the future of queer legal subjectivity, possibilities that ultimately avoid "presum[ing] that lives have to follow certain lines in order to count as lives".[148] In the next chapter, we turn our attention to contemporary policing practices on the street.

[146] Love, *supra* at 4.
[147] For a discussion of same-sex marriage advocacy in the United States, see e.g. Kyle Kirkup & Brenda Cossman, "It's unstoppable: Same-sex marriage is coming to the United States" (28 April 2015), online: *The Globe and Mail* <http://www.theglobeandmail.com>.
[148] Ahmed, *Queer Phenomenology, supra* at 178.

Chapter 2
Policing Bodies

Dressed well, and looking nice, I wander the corner of St-Laurent and St-Catherine, in front of *Peep Show*, when a police car suddenly pulls to a quick halt in front of me.

"Hey you! Get over here. Do you have any ID?" I hand over my photo ID. Immediately, his colleague shouts,

"Fuck! It's a guy!" Grabbing his colleague by the arm, he shows him the picture. Pointing at it, he says:

"It's a guy, man. I swear!" They immediately turn sarcastic and insulting, launching comments that are threatening, and violent. In the face of their contempt, it becomes impossible to contain my anger, which is rising quickly. I respond:

"Listen boys, you checked my record, nothing came up, and you don't have anything against me, so may I go now?"

They respond by telling me that if I know what's good for me, I wouldn't come around here anymore. That they don't want to see me around again, or else —

"Or else what?" I reply, "You have no right to harass someone who hasn't done anything. You both seemed smarter than that. Where do you get off with this harassment?"…

In just a few seconds, several moves, and in spite of my resistance, my hands are in cuffs and I'm being pushed head first into the back of the car. When we arrive at the station, I ask what I'll be charged with.

"You are charged with having been in a public space with the intention of solicitation". Smart, isn't it? Here I was thinking that I was going to be accused of having berated two police officers for the disgust and contempt they showed for me. Apparently that wasn't going to be the case!

Audacious: The Reality of Being a Transsexual or Transvestite Sex Worker (2009)

INTRODUCTION

Sex Crimes begins its account of contemporary practices of the carceral state with the story of Audacious, a trans street-based sex worker who recounts her experiences of being targeted by the police in Montreal.[149] Far afield from the dominant representations of coupled respectability that have emerged in concert with human rights protections, same-sex benefits, and relationship recognition over the past three decades, Audacious is cast as a very different kind of queer legal subject. The police read her body, one moving through a "stroll" in downtown Montreal known to be frequented by sex workers, as a site that may be engaged in transactional sex. Accordingly, they detain her. When they ask Audacious for identification and realize that it contains a male sex-marker, one of the officers points at her and exclaims: "Fuck! It's a guy!" The two officers proceed to berate and harass her. When she asks them what crime they have reasonable grounds to suspect she has committed, they arrest her. Upon arriving at the station, the police officers inform Audacious that she was been charged with public solicitation under s. 213(1)(c) of the *Criminal Code*, one of three prostitution offences that the Supreme Court of Canada would later strike down as being unconstitutional in its landmark 2013 decision in *Canada (Attorney General) v Bedford*.[150]

The story this chapter develops is one where bodies the police read as disorderly — in particular, bodies marked by non-normative performances of gender and sexuality moving through well-established strolls in large, metropolitan Canadian cities — become sites where the new respectable queer subject has failed, and thus require the intervention of actors in the criminal justice system. Once they come into contact with these subjects, police continue to impose disciplinary techniques of correct training on them — through use of improper pronouns, questions about names and sex-markers on government-issued identification, and frisk and strip search procedures, police participate in a larger corporeal project of governing queer subjectivity.

Police target these bodies not simply because they are different, but because they symbolize a refusal to be subjugated by regimes of power/knowledge that place us into rigid categories of being either "male" or "female". Among some members of queer communities, this broad constellation of experiences with the police is usefully captured by the phrase "walking while trans". As Morgan M. Page — the former community services coordinator at

[149] Prisoners Correspondence Project, *Audacious: The Reality of Being a Transsexual or Transvestite Sex Worker* (Montreal: Prisoners Correspondence Project, 2009), online: <http://prisonercorrespondenceproject.com>.
[150] 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

The 519 Church Street Community Centre in Toronto — explains: "In the trans community we have a phrase for it: It's called walking while trans…[W]alking while trans is definitely an in-joke within our community. It's kind of a snappy way of summing up a whole variety of experiences we're regularly [subjected] to by police."[151]

The chapter proceeds in four parts. **Part I** builds upon the work of Chapter 1, delving further into the history of policing queers in both indoor locations such as bars, along with outdoor spaces such as parks. **Part II** then shifts to analyze a countermovement of sorts: The emergence of liaison committees designed to improve relations with members of queer communities beginning in the late 1970s. The section argues, however, that these liaison committees tend to be populated by the very same queer legal subjects who have benefited from the push for human rights protections, same-sex benefits, and relationship recognition over the past thirty years. These legal subjects, ones marked by notions of coupled respectability, no longer experience the police in terms of discrimination, harassment, and violence. Put differently, for members of these committees, the police are reimagined as sites capable of doling out queer equality. **Part III** builds upon Foucault's work on disciplinary power/knowledge to provide an account of how, despite the emergence of these community-based models, police continue to engage in practices of profiling bodies on the street marked by non-normative performances of gender and sexuality. Once the police have profiled queer legal subjects on the street, they continue to impose disciplinary techniques of correct training on them. Over the course of the interaction, they may employ improper pronouns, ask questions about names and sex-markers on government-issued identification, and conduct personal searches steeped in deep-seated notions of gender essentialism. **Part IV** concludes by arguing that the experiences of queer legal subjects in law enforcement settings complicates the narrative that Canada, in contrast with other countries around the world, no longer uses the criminal justice system to violently target those engaged in non-normative performances of gender and sexuality. Rather, *Sex Crimes* argues that the very same queer legal subjects who were left behind by the push for human rights protections, same-sex benefits, and marriage equality over the past thirty years continue to find themselves ensnared in the repressive aspects of the carceral state.

Methodologically speaking, this chapter draws upon both document analysis and open-ended interviews. The chapter uses historical materials about policing queer communities, along

[151] Sankaran, *supra*.

with contemporary policies and practices of Canadian police services. The chapter also uses contemporary jurisprudence in the domain of criminal law and human rights law. To supplement the analysis of these materials, the chapter relies upon open-ended interviews with representatives from community organizations, lawyers, and police officials, which were conducted between September 2013 and August 2014 in three Canadian cities with historically large queer communities: Vancouver, Ottawa, and Toronto.

I. POLICING QUEER SPACES

In examining how contemporary policing practices are used to target queer people on the street, this chapter builds upon the work of Chapter 1, delving further into the history of policing queers in indoor locations, such as bars and bathhouses, along with outdoor spaces, such as parks and bike paths. By excavating this history, a history that continues to the present, I suggest that a wide constellation of actors in the criminal justice system continue to target the queer legal subjects who cannot, or do not want to, don the garb of coupled, familial respectability. For these queer legal subjects, ones that look more like the criminal figures of "the homosexual" and "the transsexual" than they do the "respectable same-sex couple" recounted in Chapter 1 of *Sex Crimes*, being targeted by police continues to form part of their everyday lives. As Paul Johnson explains, police remain invested in targeting those who fail to comply with newfound norms of queer respectability by relying, either consciously or unconsciously, on the "performative inscription of a particular type of sexual figure who is deviant, abnormal, suspect, and in need of regulation by the criminal law."[152]

For the better part of a century, police in Anglo-American jurisdictions have targeted establishments frequented by queer people. When we analyze regimes of policing, however, it is important to keep in mind that law and order is never done solely by a discreet, monolithic entity we call "the police". Rather, as Valverde and Cirak remind us, "What the public police do when they arrest someone is only the proverbial tip of the iceberg. The fundamental role of police — a role they by no means monopolize — is the *maintenance of order and the guarantee of security*." Put differently, a vast constellation of actors — from bylaw officers targeting queers cruising for sex in public parks, to Pride parade organizers attempting to constrain the practices of nude marchers, to police moving through well-known "strolls" in large metropolitan

[152] Paul Johnson, "Ordinary Folk and Cottaging: Law, Morality, and Public Sex" (2007) 34:4 Journal of Law and Society 520 at 532.

centers in search of sex workers — all participate in the larger project of maintaining order and guaranteeing security.[153]

In the history of the queer rights movement and its ongoing encounters with the police, New York City's 1969 Stonewall Riots have been cast in the starring role.[154] Less is known, however, about earlier standoffs between queer people and the police in the United States. Three years before the Stonewall Riots, for example, the San Francisco Police Department raided Compton's Cafeteria — one of the few establishments regularly frequented by large numbers of trans people, or, to use the more common language of the period, "hair fairies" — in 1966. On the night of the riot, officers arrived to arrest a trans woman of colour who had apparently become rowdy in the late-night diner after the bars let out for the evening. When officers tried to arrest her, she resisted, throwing hot coffee in their faces. Other queers quickly joined in, throwing dishes and smashing the restaurant's windows. People in the restaurant eventually started to spill out onto the street, breaking all of the police car's windows and lighting a newsstand on fire. The following evening, members of the community gathered to protest practices of violent and discriminatory policing, along with the cafeteria's decision to refuse to allow queer people into the establishment following the riot. The demonstration ended when protesters smashed the windows the diner had just finished installing after the first riot. In the documentary *Screaming Queens: The Riot at Compton's Cafeteria*, historian Susan Stryker describes the riot as being "the first known incident of collective militant queer resistance to police harassment in U.S. history."[155]

As I suggested in Chapter 1 of *Sex Crimes*, Canada had its own Stonewall moment of sorts with the 1981 Toronto Bathhouse Raids where, in a single night, police simultaneously raided four bathhouses throughout the city, throwing close to three hundred partially-clad men onto the street in the middle of winter while hurling epithets at them. It would be a mistake, however, to position the Toronto Bathhouse Raids as an exceptional event in the history of relations between police and queer communities. As longtime Toronto-based queer activist Tim McCaskell explains,

> When I came out in 1974, one of the first pieces of lore I learned about Toronto was the "Cherry Beach express."

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[153] Mariana Valverde & Miomir Cirak, "Governing Bodies, Creating Gay Spaces: Policing and Secuirty Issues in 'Gay' Downtown Toront" (2003) 43 Brit J Criminol 102 [emphasis that of the authors].
[154] For further discussion, see e.g. David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (New York: St Martin's Press, 2010),
[155] Susan Stryker & Victor Silverman, *Screaming Queens: The Riot at Compton's Cafeteria* (San Francisco: Frameline Distributors, 2005) [film].

> You needed to be careful leaving gay bars late at night or the cops might pick you up and take you down to Cherry Beach, which was mostly deserted back then. There they would beat you up and leave you to make your way back home on foot.
>
> Cherry Beach was on one end of a spectrum of police abuse against queers that included harassment, ID checks, entrapment and arrests on spurious charges.[156]

McCaskell's experiences with the police do not appear to be an anomaly. Rather, queer interactions with Canadian police — often marked by discrimination, violence, and harassment — did not begin with the widespread protests against the police that followed the Toronto Bathhouse Raids in 1981; and they certainly did not end with the push on the part of newly-minted respectable queer legal subjects to introduce human rights protections, same-sex benefits, and marriage equality in the years that followed. While few episodes garnered quite the same attention as the Toronto Bathhouse Raids, police continued to target queer people across Canada as they gathered in indoor locations such as bars and bathhouses, along with outdoor spaces such as parks. What follows below are a few examples of some of the better-known events in this history — these events were taking shape in the same moment that foundational queer rights cases were making their way to the Supreme Court of Canada.[157]

Between 1987 and 1993, police in Canada laid obscenity charges against a variety of queer publications, including the lesbian magazine *Bad Attitude* and the gay men's handbook *The Joy of Gay Sex*, along with bookstores that carried the materials.[158] Following one of the raids of North America's oldest queer bookstore, Glad Day Bookshop, for carrying the supposedly obscene materials, close to 500 protesters blocked Yonge Street in downtown Toronto. Unlike the Toronto Bathhouse Raids, however, "[T]here was no attempt by the gay and Black communities to build a common front against police brutality."[159]

In 1990, Montreal had its own Stonewall moment of sorts, when police raided Sex Garage — a well-known queer party — and arrested 48 people, charging most of them under the bawdy house provisions of the *Criminal Code*. As Montreal-based queer activist and journalist Richard Burnett put it, "Sex Garage politicized a generation of LGBT activists who would

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[156] McCaskell, "Black Lives Matter", *supra*.
[157] For further analysis on this history, see e.g. Steven Maynard, "Think Canada's police now have enlightened views toward Pride? Think again" *Rabble* (13 July 2016), online: Rabble <www.rabble.ca>.
[158] For further discussion of this history of censorship, feminism, and the criminal law, see Brenda Cossman et al, *Bad Attitude/s on Trial: Feminism, Pornography and the Butler Decision* (Toronto: University of Toronto Press, 1997).
[159] McCaskell, "Black Lives Matter", *supra*.

change the Quebec political landscape, uniting gays and lesbians, and francophones and anglophones, in a common front. These activists would establish the Divers/Cité Pride March and political-action groups like La Table de concertation des gaies et lesbiennes du grand Montréal to successfully fight for LGBT civil rights and improve gay life in Montreal."[160]

Fifteen years after the Toronto Bathhouse Raids, in 1996, the police raided Remington's, a gay strip club, after receiving a single complaint about an advertised event called "Sperm Attack Mondays". In an effort to draw customers into the queer establishment on a slow night of the week, advertisements promised that male strippers would manually stimulate themselves — to completion — during their routines. After carrying out an elaborate undercover operation lasting three months, the earnest heterosexual officers expressed concern that the patrons' beers might become contaminated by the widely-advertised spoils of the performances.[161]

During the Remington's raid, police laid 19 charges against staff, dancers, and customers under both the bawdy house provisions of the *Criminal Code*, along with lesser-known offence of Indecent Theatrical Performance. The offence, one most often used to target heterosexual strip clubs, provides:

> **Immoral theatrical performance**
>
> 167(1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.
>
> **Person taking part**
>
> (2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.[162]

As the wording of the provision suggests, the *Criminal Code* remains largely opaque about what constitutes an "immoral theatrical performance". In *R v Mara*,[163] the Supreme Court of Canada attempted to provide some degree of jurisprudential guidance on the issue, focusing its attention on the degree of social harm alleged to have flown from the performance. The court indicated, however, that the social harm was supposed to be assessed in accordance with the notoriously-

[160] Richard Burnett, "Sex Garage was a Turning Point in Montreal's LGBT Activism" *Montreal Gazette* (27 June 2015), online: Montreal Gazette <www.montrealgazette.com>.
[161] Vern Smith, "Remington's Found Guilt" *Daily Xtra!* (15 December 1999), online: Daily Xtra! <www.dailyxtra.com>.
[162] *Criminal Code*, *supra*, s 167.
[163] *R v Mara*, [1997] 2 SCR 630.

conservative community standard of tolerance test. Writing about the supposedly immoral activities taking place at Cheaters, a strip club in Toronto, Justice Sopinka explained:

> Putting the observations together, a performance is indecent if the social harm engendered by the performance, having reference to the circumstances in which it took place, is such that the community would not tolerate it taking place…
>
> The relevant social harm to be considered pursuant to s. 167 is the attitudinal harm on those watching the performance as perceived by the community as a whole. In the present case, as outlined in the facts, the patrons of Cheaters could, for a fee, fondle and touch women and be fondled in an intimately sexual manner, including mutual masturbation and apparent cunnilingus, in a public tavern. In effect, men, along with drinks, could pay for a public, sexual experience for their own gratification and those of others. In my view, such activities gave rise to a social harm that indicates that the performances were indecent.[164]

Applying this precedent to the Sperm Attack Mondays event at Remington's, Justice Young concluded that one of the managers — Keith McKeigan — was guilty under s. 167 of the *Criminal Code*. Justice Young reasoned: "The physical contact with the two patrons and Eric [a dancer] was a violation of the municipal by-law in force at the time and evidence that the community standard of tolerance was exceeded.[165] After citing passages from *Mara* about strip clubs being inherently degrading and dehumanizing towards women, Justice Young found that male strippers working in a queer club should be treated in precisely the same matter, stating: "In the quote above substitute 'men' for 'women'. As stated in s. 15(1) of the *Charter of Rights and Freedoms* 'every individual is equal ... under the law and has the right to equal protection ... of the law without discrimination based on ... sex'."[166] Justice Young also found McKeigan guilty of keeping a common bawdy house (s. 210(1)) and knowingly permitting the place or any part thereof to be or used for the purposes of a common bawdy-house (s. 210(2)(c)). However, most of the other charges laid against other staff, dancers, and clients, were later dropped.[167]

In 1999, the Toronto Police Service raided the Bijoux, a licensed "porn bar" where "sexual activity was tolerated, without much effort to confine sex behind partitions or other contraptions to simulate 'privacy'". [168] Following the raid, morality squad officers laid 30 charges against customers under s. 173 of the *Criminal Code*, which provides:

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[164] *Ibid* at paras 33-34.
[165] *R v Potts*, [1999] OJ No 4737, 44 WCB (2d) 433 at para 52.
[166] *Ibid* at para 49.
[167] Valverde & Cirak, *supra* at 116.
[168] *Ibid*.

Indecent acts

173.(1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months.

The vast majority of the public indecency charges, however, were later dropped after members of the queer community mobilized. Following the raid, openly-gay City of Toronto councillor Kyle Rae issued a press release stating: "It's mind boggling that police resources are wasted on these victimless crimes involving consenting adults. I will be having meetings with the police to discuss this. It is my belief that rogue officers are using their discretion to attack gay businesses."[169] A number of media outlets reported that police management subsequently asked the Crown to drop the charges, perhaps out of fear that the reputation of the Toronto Police Service would be tarnished by its continued targeting of spaces frequented by members of the queer community.[170]

This less punitive approach taken by the Toronto Police was, however, short-lived. One year later, the Toronto Police Service turned their attention to the Barn, another bar in the gay village, laying charges against members of "Totally Naked Toronto," a men's nudist group. After being targeted by plain clothes officers, owners Matt Shields and Bob Saunders decided that they would no longer host naked nights in their venue — they did not want to risk being shut down permanently.[171] In contrast with earlier raids, police deployed a new tactic of administrative governance on the men at the bar — they abandoned antiquated, morality-based *Criminal Code* offences in favour of seemingly neutrally-worded regulatory violations. The police interpreted the combination of alcohol with male nudity as constituting disorderly conduct within the meaning of Ontario's *Liquor Licensing Act*.[172]

Later in 2000, the Toronto Police Service proceeded to raid the Pussy Palace, a monthly bathhouse night open to both cisgender and trans women. Organizers hosted the event with the

[169] Vern Smith, "Bathhouse Busted" *Daily Xtra!* (12 January 2000), online: Daily Xtra! <www.dailyxtra.com>.
[170] Valverde & Cirak, *supra* at 116.
[171] Vern Smith, "Another One Down" *Daily Xtra!* (9 August 2000), online: Daily Xtra! <www.dailyxtra.com>.
[172] Valverde & Cirak, supra at 116.

goal of "having fun and exploring sexuality in a supportive safe environment". Two of the organizers, Jill Hornick and Rachel Aitcheson, obtained a Special Occasion Permit for the event, which allowed them to serve alcohol. As the evening unfolded, five male officers raided the venue, purportedly in search of liquor license violations. Two female undercover officers had told the male officers that they were about to enter a space where "most of the patrons at the event were in some state of undress in a highly sexualized environment".[173] After spending over an hour inspecting the venue, police charged both Hornick and Aitcheson with three counts of permitting disorderly conduct, one count of failing to provide sufficient security, one count of permitting liquor to be removed from the premises, and one count of serving liquor outside of prescribed hours.[174] In a pretrial motion, Justice Hyrn held that, because the event was only open to women, the act of five male officers entering the premises violated eventgoers' reasonable expectation of privacy. Accordingly, he excluded all of the police officers' evidence related to the reported liquor license infractions under s. 24(2) of the *Charter*.[175] With no evidence to ground a conviction against Hornick and Aitcheson, the Crown stayed the charges.

Following the criminal decision, the Women's Bathhouse Committee launched a human rights complaint against the Toronto Police Service, alleging that the act of five male officers entering a space open only to women, many of them in various states of undress, constituted discrimination on the basis of sex. In 2003, the parties entered into a settlement agreement, with the Toronto Police Service agreeing to a number of terms, including: providing personnel with new LGBTQ-related training; creating a policy on the safe lodging of trans people in custody; beginning to compile and publish statistics on the number of times per year that officers enter "women's only spaces" and the number of trans people they strip search each year; having the five male police officers write apology letters to the Women's Bathhouse Committee; and paying $35,000 to cover legal expenses.[176]

In 2002, members of the Calgary Police service raided Goliath's, a gay bathhouse, after undercover officers made six separate visits to the establishment, purportedly in search of underage sex workers. Following their extensive investigation, police arrested thirteen male patrons, charging them with being found-ins in a common bawdy house. Rather than going through a public trial, however, all but one of the patrons accepted a plea bargain. The managers

[173] *R v Hornick*, [2002] OJ No 1170, 93 CRR (2d) 261 [*Hornick*].
[174] *Ibid* at para 3.
[175] *Ibid* at para 151.
[176] Julia Garro, "Pussy Palace Settlement Bears Fruit" *Daily Xtra!* (16 March 2006), online: Daily Xtra! <www.dailyxtra.com>.

plead not guilty to being keepers of a common bawdy house. In 2002, the managers unsuccessfully argued that the police did not have a reasonable suspicion of criminal activity in their establishment, and therefore all of the evidence obtained over the course of the six undercover visits should be excluded or stayed under s. 24 of the *Charter*.[177] In a move that surprised many observers, the Crown stayed the charges in 2005 on the eve of the trial. In justifying the decision, the Crown told the media that community standards were becoming more tolerant towards queer people and, as such, there was no longer a reasonable prospect of conviction.[178]

Moving from indoor to outdoor locations, we continue to see contemporary illustrations of police in Canada — broadly constituted — engaging in practices that target the same queer legal subjects who have been rendered absent from the turn to a politics of coupled respectability over the past thirty years. Kevin Walby, for example, argues that contemporary surveillance practices undertaken by National Capital Commission (NCC) conservation officers in Ottawa work to police and regulate specific versions of queerness — in particular, the ones that fail to comply with emerging norms of coupled, familial respectability. The NCC is responsible for various land projects, along with the so-called 'beautification' of the National Capital Region.[179] Conservation officers are responsible for monitoring various parks and bike paths throughout the region, liaising with the Ottawa Police Service and the Royal Canadian Mounted Police about ongoing issues that require a coordinated response, and enforcing both NCC regulations and the *Criminal Code*. In policing queer sex in parks throughout the NCC, conservation officers typically rely on regulation #18 of the *National Capital Commission Traffic and Property Regulations* to justify their approach, which provides: "no person shall use any blasphemous or indecent language, or behave in an offensive manner, upon any property of the Commission".[180]

Describing his review of incident reports between 2004 and 2007, Walby notes that NCC officers investigate sexual practices in parks — particularly those involving queer men — by travelling around on car, bike, or foot. They also use online chat forums to determine sexual 'hot

[177] *R v Zakreski*, [2004] AJ No 595 (Prov CT J) (QL) at 25.
[178] Canadian Press, "Even in Alberta, Canada Becomes a More Tolerant Society" Canadian Press (3 February 2005).
[179] Kevin Walby, "'He asked me if I was looking for fags…' Ottawa's National Capital Commission Conservation Officers and the Policing of Public Park Sex" (2009) 6:4 Surveillance & Society 367.
[180] *Ibid* at 368.

spots' within the park system.[181] Ultimately, Walby finds that NCC officers participate in a larger project of governing queer subjectivity. He explains that officers most often target performances of gender and sexuality when they are framed as "problematic, monstrous, violent, predatory, or sick".[182] Put differently, conservation officers target the criminally-coded queer legal subjects who refuse to be governed by emerging norms of gender and sexuality.

As this brief, admittedly non-exhaustive history demonstrates, the assemblage of parts we sometimes call the police has long been used to target the queer legal subjects who cannot, or do not want to, don the garb of coupled, familial respectability. What has changed from the nineteenth and twentieth century to today, however, is the particular kinds of queer legal subjects who find themselves ensnared in the repressive aspects of criminal justice. For the queer legal subjects that look more like the criminal figures of "the homosexual" and "the transsexual" than they do the "respectable same-sex couple" described in Chapter 1 of *Sex Crimes*, being targeted by police continues to form part of their everyday lives. Put differently, the criminal law continues to participate in a larger project of governing queer subjectivity, disciplining those engaged in non-normative performances of gender and sexuality while rewarding those who are more readily accord with norms of respectability.

III. THE CREATION OF POLICE LIAISON COMMITTEES

At the same time that the carceral state has a long history of targeting those who dwell at the outskirts of queer subjectivity, however, we are simultaneously witnessing a countermovement of sorts: The emergence of police liaison committees designed to improve relationships with community members. In the section that follows, I briefly examine the iterative push and pull of this history, ultimately suggesting that these police liaison committees are invariably populated by newly-minted respectable queer legal subjects who no longer find themselves ensnared in the repressive aspects of the carceral state. Accordingly, these new queer legal subjects often feel compelled to reimagine the criminal justice system as a site capable of doling out queer equality. In the concluding chapter of *Sex Crimes*, I return to these emerging pro-policing dynamics, describing them as being emblematic of a broader set of practices I term the *law and order queer movement*. In the concluding chapter, I suggest that queers ought to remain deeply skeptical of wrapping institutions such as police, prosecutors, and prisons in rainbow flags —

[181] *Ibid*.
[182] *Ibid* at 378.

doing so runs the risk of providing crucial ideological support for an increasingly punitive carceral system; this system continues to be used to discipline and punish the most vulnerable members of queer communities, particularly those who dwell at the axes of race, poverty, and disability.

At the same time that the most visible and resourced members of queer communities have argued in favour of human rights protections, same-sex benefits, and relationship recognition, police organizations across Canada have started to create LGBTQ liaison committees. This concurrent shift, I argue, is not an accidental one — the two histories are mutually constitutive, exemplifying the new ways that normatively privileged queer people began to adopt a new position in relation to the criminal law as victims of crime. In constructing themselves in this manner, queer legal subjects began to comport with ideal notions of Anglo-American citizenship.[183]

In 1975, the Vancouver Police Department became the first service in Canada to create a queer liaison committee. The creation of the committee foreshadowed many of the narratives of queer respectability that would surface over the next three decades. The mandate of the group, then called the "Gay/Police Liaison Committee", was to mediate disputes between queers and the police. As Becki Ross and Rachel Sullivan explain, "In the wake of decades of strained, sometimes violent altercations between police officers and gay men, the Liaison Committee symbolized a new commitment to strengthen relations of trust and respect across historically embattled constituencies".[184] One Vancouver newspaper even reported that the predominately white, male, affluent members of the queer community who started to attend Liaison Committee meetings declared that "cruising and public sex had to be toned down".[185]

In 1991, just as the series of cases analyzed in Chapter 1 of *Sex Crimes* were making their way to the Supreme Court, the Ottawa Police Service became the first police outfit in Ontario to create a queer liaison committee. Recounting the formation of the committee, Ann-Marie Field explains:

> What started off in 1991 as informal meetings between the police and some individuals from the LGBT communities have since then been formalized into monthly meetings that attract key representatives from the police (Hate Crime Section, Partner Assault Section, etcetera) and the communities. These meetings are an opportunity for the police

[183] Simon, *supra*.
[184] Becki Ross & Rachel Sullivan, "Tracing lines of horizontal hostility: How sex workers and gay activists battled for space, voice, and belonging in Vancouver, 1975-1985" (2012) 15:5/6 Sexualities 604 [Ross & Sullivan, "Tracing lines of horizontal hostility"] at 607.
[185] *Ibid*, citing EA, "Gays and the police" (1982) 10(5) The Urban Reader 18.

> and LGBT communities to share information about hate crimes, to discuss issues that affect these communities, to network and to identify potential initiatives to solve problems and improve the safety of LGBT communities or their relations with the police. The Liaison Committee's collaboration with the Ottawa Police Service (OPS) Hate Crime Section has been key in developing an approach to police work which conceptualizes crime and safety in ways compatible with the communities' experience of targeted violence or hate crimes, rather than as strictly define[d] in law (which addresses mostly serious offences).[186]

In the formation of this committee, then, we see a new understanding of queerness being invoked and reinscribed in the context of law enforcement. Rather than constructing queerness in terms of the criminally-coded figures of "the homosexual" and "the transsexual", the formation of the LGBTQ liaison committee allowed at least some queer legal subjects to adopt a new position in relation to the criminal law. In creating a committee initially designed to "share information about hate crimes", queers legal subjects — or at least those who felt comfortable attending police community liaison committee meetings — started to reimagine themselves as respectable victims of crime. These queer legal subjects were willing to marshal the apparatuses of the carceral state and to punish in the name of queer equality. This willingness to punish, while distancing themselves from criminal elements within their communities, allowed them to be demarcated as full citizens. Field admits, however, that the committee — one designed to share community concerns with the police — has had "little if any representation" from marginalized groups who continue to find themselves in conflict with the criminal justice system, including queer people of colour and young people. She also admits that some community members were "uncomfortable with or unwilling to associate with such a committee" given the long and painful history, a history that continues to the present, of police in Anglo-American jurisdictions violently targeting queer people.[187]

In other police services in Canada, we see similar dynamics surfacing in the same historical moment as the rise of human rights protections, same-sex benefits, and relationship recognition. York Regional Police, for example, created the "Culture and Diversity Resources Bureau" in 2002, following the appointment of Chief of Police Armand La Barge. Soon after, they also created the "Police/Community Advisory Council", which meets with the Chief of Police on a bi-monthly basis to develop and maintain relationships between the police and community members.

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[186] Ann-Marie Field, "Counter-Hegemonic Citizenship: LGBT Communities and the Politics of Hate Crimes in Canada" (2007) 11:3 Citizenship Studies 247 at 252.
[187] *Ibid* at 253.

Members of Gay York Region, a community group comprised almost exclusively of white gay men, now describe their relationship with York Regional Police in wholly enthusiastic terms:

> Many people presume that York Regional Police might not be particularly gay friendly, but nothing could be further from the truth. In reality they have been incredibly committed to local LGBT affairs and extremely accommodating over the past decade…
>
> A representative of GayYorkRegion.com, who is also involved with several other local LGBT organizations and initiatives, meets regularly with officers of the Culture and Diversity Resources Bureau and is also a member of the Police/Community Advisory Council. This ensures ongoing dialogue and consideration to issues of specific importance to our region's LGBT residents.[188]

With no reference to the very-recent history of police-queer relationships, the organization then proceeds to describe the importance of turning to the criminal justice system — the same system that continues to be used to violently target the most vulnerable members of queer communities. The organization, for example, describes building relationships with the police as an equality rights mobilization strategy, explaining:

> If you have been harassed, assaulted or you are the victim of any other crime resulting from your sexuality, or perceived sexuality, we strongly recommend that you report it to York Regional Police.
>
> - Theft, damage to property and identity theft incidents can be reported online.
> - Hate incidents can be reported via the hate crime hotline on 1-877-354-HATE (4283) or by email to: hatecrime@yrp.ca
> - All types of crime can be reported by calling York Regional Police toll-free on 1866-8POLICE. Please be sure to identify the crime as a hate crime, if you believe it is.[189]

By "strongly recommend[ing]" that queer people report crimes to the police and, moreover, instructing them to "be sure to identify the crime as a hate crime, if [they] believe it is", members of Gay York Region normatively reposition themselves in relation to the carceral state. When actors in the criminal justice system are willing to treat an incident as a hate crime, and accordingly punish it more severely, queers signal that they are no longer perpetrators of crime, but rather respectable victims willing to punish in the name of a newfound equality. Put differently, queers use the carceral state's willingness to punish on their behalf as a barometer of

[188] Gay York Region, "Information: Hate Crime Reporting", online: Gay York Region <www.gayyorkregion.com>.
[189] *Ibid*.

citizenship. Similar dynamics have played out in police services across Canada, with newly-minted queer legal subjects willing to recast the police in benevolent terms.[190]

III. SUBJUGATING BODIES FROM THE STREET TO THE POLICE STATION

Having set out the history of relations between the police and queer people, along with the adjacent history of police attempting to develop better relationships with the community through the creation of liaison committees, the section that follows in *Sex Crimes* tasks itself with providing an account of how queer legal subjects who engage in non-normative performances of gender and sexuality continue to experience the disciplinary apparatuses of the carceral state. Put differently, while Canada prides itself as being a jurisdiction that no longer targets queer identities, my research suggests that the account on the ground is far more complicated.

By using the term subjugation, rather than terms such as oppression, to describe the regular, everyday experiences of queer legal subjects in law enforcement contexts, I am indebted to Foucault's account of regimes of power/knowledge.[191] As I noted earlier in *Sex Crimes*, this work has more recently been taken up by critical criminal law scholars such as Spade. Rather than understanding regimes of power/knowledge as being imposed by powerful institutions and actors from above, the use of the term subjugation helps to reorient our analysis to focus on the complex, subtle, and often mundane ways that queer legal subjects who fail to accord with disciplinary norms of gender and sexuality are governed and policed in their everyday lives — even in the same moment that police liaison committees seek to reposition the police as a newfound ally in the struggle for queer rights. As Spade puts it, "'Subjection' suggests a more complex set of relationships, where we are constituted as subjects by these systems, engage in resistance within these systems, manage and are managed within these systems, and can have moments of seeing and exploiting the cracks and edges of these systems."[192] The section below first examines police profiling on the street. It then uses the recent cases of Angela Dawson and Rosalyn Forrester, both decided in a world after same-sex marriage, to examine policing and use of pronouns, questions about identity documents, and personal searches.

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[190] Kyle Kirkup, *Best Practices in Policing and LGBTQ Communities in Ontario* (Toronto: Ontario Association of Chiefs of Police, 2013), online: Ontario Association of Chiefs of Police <www.oacp.on.ca> [Kirkup, *Best Practices in Policing*].

[191] Foucault, *Discipline and Punish*, *supra*.

[192] Natalie Oswin, "Interview with Dean Spade" *Society & Space*, online: Society & Space: <www.societyandspace.com>.

(a) Policing and "Walking While Trans"

For queer legal subjects who fail to comply with rigid, essentialist norms of gender and sexuality, the apparatuses of the carceral state continue to govern their subjectivities. Within some communities, the broad constellation of everyday experiences with police is usefully captured by the phrase "walking while trans". Perhaps more than any other, police have selectively used prostitution-related offences to target trans people, particularly when they are moving through well-known strolls in large metropolitan centers. As Amnesty International put it in a recent report, "[S]ubjective and prejudiced perceptions of transgender woman as sex workers often play a significant role in officers' decisions to stop and arrest transgender women. Community-based organizations and individuals reported that profiling of transgender women as sex workers by law enforcement officers frequently leads to arbitrary arrest and detention."[193]

The story of Monica Jones, a trans woman of colour who was arrested by police in Phoenix, Arizona in 2014 for stopping and engaging people on the street in conversation — and therefore "manifesting" an intent to engage in prostitution, to use the language of the offence — is illustrative of the regular, everyday experiences of trans people in Anglo-American jurisdictions. She explains:

> "Walking while trans" is a saying we use in the trans community to refer to the excessive harassment and targeting that we as trans people experience on a daily basis. "Walking while trans" is a way to talk about the overlapping biases against trans people — trans women specifically — and against sex workers. It's a known experience in our community of being routinely and regularly harassed and facing the threat of violence or arrest because we are trans and therefore often assumed to be sex workers.
>
> I have been harassed by police four times since my initial arrest last May. The police have stopped me for no reason when I have been walking to the grocery store, to the local bar, or visiting with a friend on the sidewalk. The police have even threatened me with 'manifestation with intent to prostitute' charge, while I was just walking to my local bar![194]

With a clear reference to the analogy of "driving while black", Jones underscores the extent to which police continue to violently target queer legal subjects — and invariably profile and

[193] Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the US* (New York: Amnesty International, 2005), online: Amnesty International <www.amnesty.org> at 22.
[194] Chase Strangio, "Arrested for Walking While Trans: An Interview with Monica Jones" *American Civil Liberties Union* (2015), online: American Civil Liberties Union <www.aclu.org>.

surveil along lines of race, poverty, disability, gender, and sexuality — in their everyday encounters with members of the public.

Turning to the Canadian experience, a recent Trans PULSE study of 433 trans people age 16 or older who lived, worked, or received healthcare in Ontario demonstrates that police continue to target those who dwell in positions of non-normative gender and sexuality. Among other things, the study found:

- One-quarter of respondents reported being harassed by the police, which they attributed to their trans identity.[195]
- One-quarter of racialized trans people reported police harassment because of their race or ethnicity.[196]
- One-third of Indigenous trans people reported police harassment because of their race or ethnicity.[197]

Over the course of my interviews in Vancouver, Toronto, and Ottawa, a number of community members and police representatives underscored the ways in which those engaged in non-normative performances and gender and sexuality, particularly trans women, experienced regular police profiling on the street. These experiences appeared to echo many of the findings of scholars of moral and legal geography[198] — trans people walking through well-known strolls in large metropolitan centers are often suspected of engaging in transactional sex, and therefore surveilled within regimes of power/knowledge; their seemingly more normatively privileged counterparts, particularly those moving through so-called 'good' neighbourhoods, are not.

In Vancouver, my interview participants suggested that police were most likely to engage in practices of trans profiling in the Downtown East Side.[199] In its landmark decision, one that had the practical effect of keeping Canada's first and only safe injection site open, the Supreme Court described the neighbourhood as "home to some of the poorest and most vulnerable people in Canada".[200]

In Ottawa, my interview participants pointed to the economically-depressed neighbourhoods of the Byward Market and Vanier as being central loci of police profiling of

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[195] R Longman et al, *Experiences of Transphobia among Trans Ontarians* (7 March 2013), 3:2 Trans PULSE e-Bulletin, online: Trans PULSE <www.transpulseproject.ca> [Trans PULSE, Experiences of Transphobia].
[196] *Ibid*.
[197] R L Marcellin et al, *Experiences of Racism among Trans People in Ontario* (7 March 2013), 3:1 Trans PULSE E-Bulletin, online: Trans PULSE <www.transpulseproject.ca>.
[198] See e.g. Paul J Manginn & Christine Steinmetz, eds, *(Sub)Urban Sexscapes: Geographies and regulation of the sex industry* (London & New York: Routledge, 2015).
[199] Interview with Dara Parker; Interview with Marie Little.
[200] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 4.

trans people suspected of being engaged in transactional sex. In my interview with Frédérique Chabot, a member of "Prostitutes of Ottawa/Gatineau Work, Educate and Resist" (POWER), for example, she noted that the criminalization of street-based sex work may result in the imposition of boundary restrictions from police or courts — sex workers sometimes refer to this practice as "red zoning".[201] When an individual fails to comply with a condition of probation by entering certain restricted "red zones", they running the risk of the imposition of a custodial sentence of up to two years.[202] In view of the limited number of trans-sensitive health and social service providers, the practice of "red zoning" may disproportionately impact trans sex workers — many of these services may only be available within the "red zone".

In Toronto, the area of Homewood and Maitland came to be synonymous with the profiling of trans woman on the street — police often referred to this intersection as Toronto's "tranny stroll",[203] capturing trans women in fields of power/knowledge as they moved through a space associated with transactional sex.

It would be a mistake, however, to assume that the police have been the only actors that have tasked themselves with subjugating trans people suspected of being engaged in practices of transactional sex. Queer legal subjects seeking to distance themselves from notions of criminality also started to engage in practices of governance, relegating those who were "visibly defined by sex" to the outskirts of intelligibility.[204] In Vancouver, for example, many of these dynamics came to a head in the early 1980s — as the same moment that mainstream queer advocacy groups were using respectability narratives to push for human rights protections, same-sex benefits, and marriage equality. Ross and Sullivan explain:

> Though some grassroots activists supported the decriminalization of prostitution as a necessary first step toward sex workers' improved safety and security, few were prepared to identify prostitutes' rights as a key plan in a broad, social justice-orientated platform for action. In the early 1980s, a consensus united residents' groups, business owners, realtors, police, and city councilors: outdoor sexual commerce had no place in the city beyond the historic red-light district in and around Chinatown in Vancouver's working-class Eastside…[205]

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[201] Interview with Frédérique Chabot.
[202] Section 161(4) of the *Criminal Code*, *supra*, provides: "Every person who is bound by an order of prohibition and who does not comply with the order is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction."
[203] Interview with Kristyn Wong-Tam; Interview with Danielle Bottineau.
[204] Becki L Ross, "Outdoor Brothel Culture: The Un/Making of a Transsexual Stroll in Vancouver's West End, 1975-1984" (2011) 25:1 Journal of Historical Sociology 126 [Ross, "Outdoor Brothel Culture"].
[205] Ross & Sullivan, "Tracing lines of horizontal hostility", *supra* at 606.

Put differently, queer activists played an active role in pushing trans people suspected of engaging in transactional sex out of their neighbourhood and, at a more conceptual level, out of their community. In doing so, they signaled a new position in relation to the criminal law as they inched closer to the promise of full citizenship embodied by human rights protections, same-sex benefits, and relationship recognition.

Similar dynamics emerged in 2011 in Toronto, when residents near the intersection of Homewood and Maitland started a campaign to rid the street of trans people suspected of being engaged in transactional sex — that is, bodies that symbolized a refusal to be disciplined by regimes of gender and sexuality. One set of meeting minutes from the Toronto Police Service's LGBT Liaison Committee, for example, starkly described community concerns in the following terms: "Prostitutes in lanes north of Wellesley north of Homewood. Concerns now that Homewood is open to Lourdes Lane that the problems with transvestites etc will move above".[206] Put differently, the kinds of respectable queer legal subjects who no longer found themselves ensnared in the repressive aspects of criminal justice started to call upon the Toronto Police Service to target, discipline, and ultimately punish trans people suspected of being engaged in transaction sex in their neighbourhood. That is, these groups sought to push out bodies that visibly associated themselves with non-normative performances of gender and sexuality.

In addition to surveilling trans people in large metropolitan centers with well-known "strolls", a recent study of sex workers in Ottawa also suggested that police engage in practices of "outing" trans people.[207] One sex worker, for example, recounted her experiences with police in the following terms:

> This one time, I got arrested. It was right on Cumberland and the cop car pulls up. I was in a trick's sports car and just sucking him off and then the cops show up, and I was like 'Oh fuck'. So 'You're under arrest' and all, and then the cop turns to the trick and tells him, 'Do you know that's a guy?' and the client goes [gagging and vomiting sounds]. He didn't know and he started puking.[208]

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[206] Toronto Police Service, Meeting Minutes of LGBT Liaison Committee (9 February 2011), online: St. Lawrence Neighbourhood Association <http://www.slna.ca/>.

[207] Use of the term "outing" is, of course, not without controversy — it runs the risk of implicitly conveying the idea that trans women are not 'really' women but can, in certain circumstances, can 'pass' for being a woman. For further discussion on this point, see e.g. Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating Of Femininity* (Berkeley: Seal Press, 2007).

[208] Chris Bruckert & Frédérique Chabot in collaboration with POWER, *Challenges: Ottawa area sex workers speak out* (Ottawa: Prostitutes of Ottawa/Gatineau Work, Educate and Resist (POWER), 2014).

These studies, both quantitative and qualitative, work to undercut the dominant narrative that Canada, unlike many other jurisdictions around the world, no longer criminalizes queerness. While laws on the books may now appear, for the most part, to be framed in non-discriminatory terms, actors in the carceral system continue to draw implicit and explicit connections between queerness and notions of criminality — police are particularly invested in targeting queer legal subjects who bear little resemblance to the forms of respectability that have emerged over the past thirty years in concert with human rights protections, same-sex benefits, and marriage equality. At the same time, the most respectable queer legal subjects also engage in regimes of policing, as they find themselves working in concert with the police to push out bodies that are visibly associated with non-normative performances of gender and sexuality.

In the United States, there is a similar body of emerging literature to support to suggestion that police target the very same queer legal subjects who have not benefited from the past thirty years of legal advocacy, particularly those subjects who dwell at the axes of race, poverty, disability, gender, and sexuality. A recent survey of over 300 queer people in Queens, New York, for example, pointed to a "disturbing and systemic pattern of police harassment, violence, and intimidation" against trans people, especially those who are racialized.[209] The study went onto suggest that trans interviewees reported being profiled by police as sex workers, experiencing frequent police abuse and harassment, and even being forced to perform sexual acts to avoid being arrested.[210] Recent studies have also pointed to the troubling police practice of using the possession of condoms by trans people as evidence they are engaged in prostitution. This approach has been rightly criticized for discouraging safer sex practices.[211]

Through a broad constellation of practices sometimes referred to as "walking while trans", the police ensnare bodies dwelling in positions of non-normative gender and sexuality within the repressive aspects of criminal justice. In many cases, these everyday experiences with the police convey the idea that bodies that fail to accord with disciplinary norms of power/knowledge will be subjugated, often in small but regularized ways, serving as a "tactic to trans-profile and mange transgender individuals of color and immigrants to mitigate the threats they pose to the dominant narrative and the maintenance of race and classed gender

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[209] Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights* (New York, 2012) at 4, online: <www.maketheroad.org> [Make the Road New York, *Transgressive Policing*].
[210] *Ibid* at 4-5.
[211] *Ibid* at 20; Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities* (Washington: Human Rights Watch, 2012) at 19, online: <www.hrw.org>.

positions".[212] At the same time, in more recent years, normatively privileged queer legal subjects have worked hand-in-hand with police to rid their neighbourhoods of bodies visibly associated with non-normative performances of gender and sexuality.

(b) Policing and Pronouns, Identity Documents, and Personal Searches

After being targeted by regimes of power/knowledge that would have individuals comply with normative performances of gender and sexuality on the street, queer legal subjects continue to be subjugated in their everyday interactions with police. In the section that follows, I use the recent human rights complaints of Angela Dawson and Rosalyn Forrester to focus my attention on three moments in these often-mundane everyday interactions. I first examine police use of pronouns, then proceed to analyze police questions about names and sex-markers on government-issued documents, and then conclude by investigating personal search procedures.[213]

(i) Policing and pronouns

Over the course of their interactions with the public, police officers often use gendered pronouns such as "sir" or "ma'am". This seemingly innocuous practice, however, may have odious consequences for queer legal subjects who fail to comply with rigid, essentialist understandings of gender and sexuality — particularly trans people.[214] When, for example, a police officer uses the term "sir" to describe an individual who identifies as a woman, this may trigger feelings of distress, mistrust, and anxiety. When this occurs — a practice sometimes referred to as "misgendering" or "mispronouning" — it may affect the remainder of the interaction between the police officer and the individual.

The recent case of Angela Dawson, a trans woman who successfully argued that her experiences with the Vancouver Police Department (VPD) constituted discrimination on the basis of sex, provides a window into the experiences of queer legal subjects who find themselves ensnared in the repressive aspects of criminal justice. Known by Vancouver locals for her love of directing traffic, along with her headphones and brightly-coloured clothing, Dawson reported that police failed to "recognize and treat her as a woman" during six separate

[212] Courtenay W Daum, "The War on Solicitation and Intersectional Subjection: Quality-of-life Policing as a Tool to Control Transgender Populations" (2015) 37:4 New Political Science 562.
[213] This section draws upon an expert report I authored for the Ontario Human Rights Commission in the case of *Jan Joseph Waterman v MCSCS & TPS*, HRTO File No: 2013-16265-1 (16 September 2015).
[214] Kirkup, *Best Practices in Policing*, *supra*.

interactions on the street. Often, this refusal to recognize and treat her as a woman expressed itself through the use of inappropriate pronouns.[215] She argued that the practice constituted a form of systemic discrimination, suggesting that "in light of the absence of any training or policies on how to deal with trans members of the public in a respectful and non-discriminatory manner, it is not surprising that the attitudes and conduct of VPB members run the gamut from entirely appropriate to offensive".[216] The British Columbia Human Rights Tribunal agreed, finding that the "interactions between Ms. Dawson and members of the VPB show that there is significant inconsistency in approach of how officers deal with and identify Dawson."[217] Making a finding of discrimination related to two of the six incidents, the Tribunal ordered the VPB to refrain from committing similar discriminatory behavior, to pay Dawson $15,000 as damages for injury to dignity, feelings, and self-respect, and to create trans-inclusive policies and training programs within one year.[218] In the subtle and often mundane treatment of Dawson at the hands of the police, we see Dawson being subjugated by regimes of power/knowledge that would have her obediently comply with norms of gender and sexuality. As her human rights complaint demonstrates, however, she too has power — power to successfully advance a claim of discrimination, and ultimately contribute to the creation of a systemic remedy. In this case, it becomes apparent that policing on the street becomes a site where norms and logics of gender and sexuality are not only constituted, but also challenged.

(ii) Policing and identity documents

Many queer people experience barriers when attempting to access government-issued identification that accords with their gender identity and gender expression. In addition to the costs associated with making changes to government-issued identification, many jurisdictions in Canada and abroad continue to impose surgical requirements on individuals seeking to change the sex-change designation on their driver's licenses, health cards, and passports.[219] Policing databases may also contain information that is no longer correct, often referring to trans people by the sex and name assigned to them at birth.

Police officers often request government-issued identification over the course of their interactions with members of the public; they may also access information using police

[215] *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54 at para 47 [*Dawson*].
[216] *Ibid*.
[217] *Ibid* at para 243.
[218] *Ibid* at paras 272-273.
[219] McGill & Kirkup, *supra*.

databases. This practice may have particularly negative outcomes for queer legal subjects carrying government-issued identification containing the name assigned to them at birth, rather than the name they currently use, and the sex assigned to them at birth, rather than reflecting their gender identity and gender expression. There may also be negative consequences if police databases have not been updated to reflect an individual's sex or name change.

Take, for example, the story of Audacious, who recounted her experience of police exclaiming "Fuck! It's a guy!" after she presented them with her identification. When the name or sex-marker on government identification does not match the individual's gender identity and gender expression, the officer may proceed to ask questions about why, for example, the individual gave a different name than the one listed, or why the individual's gender identity and gender expression do not match the listed sex-marker. The police officer may even elect to start referring to the person by the name or sex listed on the identification. Even if the police officer is otherwise respectful, this may trigger feelings of distress, mistrust, and anxiety. In view of these contemporary dynamics, a number of queer community organizations have noted the importance of addressing queer legal subjects by the name and gender they use to identify themselves.[220]

In the case of Dawson, we again see practices of policing on the street functioning as a site where disciplinary norms of gender and sexuality are simultaneously constituted and challenged. During one incident with police, one constable wrote "F(?)" on the arrest form "because he was not sure how she would be treated in jail". Despite having regular interactions with Dawson in Vancouver's Downtown Eastside, he also proceed to refer to Dawson as "Jeffery" and to use male pronouns. At the hearing, he testified that he used the name Jeffery and male pronouns because of what was listed in PRIME, a police database containing information including a person's name, any aliases, and whether they have a criminal record. The constable went on to testify that "no one told him to do this, but that this was his practice".[221] In these interactions with Dawson, we again see police placing her in regimes of power/knowledge that would have her comply with the norm that sex must necessarily accord with gender. If her name and sex lined up with the information in the database, she would not have been misgendered — indeed, she might not have been detained at all. At the same time, Dawson also had power to successfully argue in favour of a finding of discrimination, along

[220] Kirkup, *Best Practices in Policing, supra* at 16.
[221] *Ibid* at para 183.

with a systemic remedy. With the story of Dawson, then, the street functions as a site where disciplinary norms of gender and sexuality are both done and undone — the most visible events may look more like oppression, but the regularized encounters with police are better understood using the language of subjugation.[222]

(iii) Policing and personal searches

Personal searches — including frisk searches and strip searches — can also be distressing for the queer legal subjects who find themselves ensnared in the repressive aspects of criminal justice. Writing about the practices of strip searches in the case of *R v Golden*, a case involving a strip search involving a racialized accused person, the Supreme Court noted: "Women and minorities in particularly may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault".[223]

Individuals who fail to accord with rigid, essentialist norms of gender and sexuality may experience the practice of being strip searched, regardless whether the search is a less intrusive frisk search or a more intrusive strip search, in particularly acute terms.[224] Having police officers inspect their body, which may be in the process of transitioning, invariably causes intense feelings of distress, fear, and anxiety. In addition, some subjects may also be wearing personal items that support their gender or sexual identity, such as penile or breast prosthetics. Intrusive questions or inappropriate handling of these items may further compound an individual's distress, fear, and anxiety over the course of an interaction with the police.

Many of the realities experienced by queer legal subjects who fail to comply with rigid, essentialist notions of gender and sexuality are underscored by the case of Rosalyn Forrester, a trans woman of colour from Toronto. In 2006, just after the federal recognition of same-sex marriage, Rosalyn Forrester brought an Ontario Human Rights Code complaint against the Peel Police Services Board, alleging discrimination on the basis of sex. She alleged that, over a series of arrests, she experienced discrimination while being strip-searched. While Forrester repeatedly requested that female officers perform these searches, her requests were denied. During two searches, male officers performed the strip searches alone — police reasoned that, because Forrester had a penis, she was a man. On one other occasion, male and female officers performed what they called a "split search." During this search, male officers examined

[222] Butler, *Undoing Gender*, *supra*.
[223] *R v Golden*, 2001 SCC 83, [2001] 3 SCR 679 at para 90.
[224] Kirkup, "Indocile Bodies", *supra*.

Forrester's penis, while female officers inspected her upper body, which was undergoing a series of changes as a result of hormone therapy.[225] As I have argued elsewhere about the decision in *Forrester*,

> [T]rans bodies — and, by extension, trans souls — symbolize a failure of the disciplinary regimes that engulf us all. These regimes work to codify, regulate, and coerce bodies, particularly those that symbolize non-normative versions of gender and sexuality.[226]

More recently, similar dynamics have played out against a trans man named Boyd Kodak — given its focus on prison issues, the case is discussed more fully in Chapter 4 of *Sex Crimes*. In his January 2014 human rights complaint against Ontario's Ministry of Community Safety and Correctional Services, Kodak alleged discrimination on the basis of "gender identity" and "gender expression". Following his arrest, Kodak alleged that officers questioned him about what was in his underwear while completing prison intake procedures. He explained that he uses a penile prosthesis, a device designed to support his gender expression as a man. According to Kodak, the officers took the prosthesis, passed it around to each other, and then confiscated it. After completing the strip search, officers forced Kodak to be housed in a women's prison and to put on women's underwear and women's prison wear. Given his legal sex, along with his self-identification as a man, Kodak objected. Officers responded by telling him that he had no choice but to wear the women's clothing.[227] As the cases of both Forrester and Kodak suggest, search procedures again function as a disciplinary site where norms of gender and sexuality are simultaneously constituted and challenged.

III. CONCLUSION: POLICING QUEER SUBJECTIVITY

As I have suggested in this chapter, the experiences of queer legal subjects in law enforcement settings complicates the narrative that Canada, in contrast with countries around the world, no longer uses the criminal justice system to violently target those engaged in non-normative performances of gender and sexuality.

In the same moment that the most normatively privileged members of queer communities begin to provide crucial ideological support for carceral regimes, cases such as Dawson and Forrester reveal an uncomfortable truth: The queer legal subjects left behind by the

[225] *Forrester*, *supra*.
[226] Kirkup, "Indocile Bodies", *supra* at 124.
[227] Boyd Kodak, Factum, Ontario Human Rights Commission (31 January 2014) at 2-3.

push for human rights protections, same-sex benefits, and relationship recognition continue to find themselves ensnared in the repressive aspects of criminal justice, whether it be through inappropriate use of pronouns, questions about names and sex-markers on government-issued identification, or practices of personal searches. In the chapter that follows, we turn our attention from policing on the street, moving into the HIV non-disclosure courtroom.

Chapter 3
HIV Non-Disclosure on Trial[228]

> …I find that if the applicant is placed with a cellmate there is a very high risk that the applicant would manipulate the cellmate into having sexual intercourse and a high risk that this cellmate would contact HIV putting any such cellmate in a dangerous situation if placed with the applicant.
>
> Ontario Superior Court of Justice, *R v Boone* (2014)

INTRODUCTION

Moving away from policing practices, this chapter excavates a figure — one I call the Bad Gay Man — from a series of recent decisions involving Steven Boone, a queer man in Ottawa alleged to have not disclosed his HIV-positive status to sexual partners. The criminal law typically constructs this failure as an aggravated sexual assault; aggravated sexual assault is one of the most serious offences in the *Criminal Code*, carrying with it the maximum sentence of life imprisonment along with mandatory registration on Canada's Sexual Offender Registry.[229] In the six year case study I examine in this chapter, the accused person was also charged with attempted murder, along with administering a noxious substance — his semen.

In analyzing the narratives that surface over the course of this contemporary case study, one decided in a legal landscape after human rights protections, same-sex benefits, and marriage equality, the chapter aims to underscore the continued conflation between queerness and criminality in Anglo-American legal discourse. Through a careful reading of arguably the most well-known contemporary HIV non-disclosure prosecution in Canada involving a queer person, this chapter argues that actors in the criminal justice system continue to rely on a figure I call the Bad Gay Man as they construct and deploy narratives of criminality in the courtroom — this figure is overly sexualized, predatory, and pathological. Put differently, the Bad Gay Man is discursively constituted in criminal law as the contemporary iteration of "the homosexual" described in Chapter 1 of *Sex Crimes*. The well-established narrative of the Bad Gay Man influences how the accused person's appearance and actions will be interpreted in the courtroom, regardless of the individual circumstances of the case. Crown prosecutors, judges,

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[228] Part of this chapter has been published as "Releasing Stigma: Police, Journalists, and Crimes of HIV Non-Disclosure" 46:1 (2015) OLR 127.

[229] *Criminal Code*, RSC 1985, c C-46, ss 265, 268 and 273.

and juries alike end up invoking and reinscribing the figure as a potent tool that continues to draw implicit — and, at times, explicit — connections between queerness and criminality.

The chapter proceeds in four parts. **Section I** sets out Canada's history of using the criminal law to target so-called contagious sex, especially when the sex is performed by members of marginalized communities such as sex workers. The section then shifts to analyze the contemporary doctrinal framework that applies in cases where individuals are alleged not to have disclosed their HIV-positive status to sexual partners. **Section II** begins to excavate a figure — one I call the Bad Gay Man — from six years of HIV non-disclosure proceedings involving Steven Boone, an HIV-positive queer man in Ottawa. **Section III** grapples with the question of who benefits from the continued reliance upon the figure of the Bad Gay Man in a country where, as I argued in Chapter 1 of *Sex Crimes*, contemporary queer subjectivity has been reimagined in terms of coupled respectability. The chapter argues that, in the context of individual criminal law cases, Crown lawyers attempting to tell particular stories about queer people as perpetrators of crime benefit from bringing this figure, one marked by earlier versions of criminality and deviance, to life in the courtroom. These narratives resonate with judges and juries because older understandings of queerness, to use the language offered by Carl Jung, continue to dwell in society's collective unconscious.[230] That is, older narratives have not disappeared into the ether with the advent of human rights protections, same-sex benefits, and relationship recognition over the past thirty years. **Section IV** concludes by gesturing towards a broader project of undoing the archetype of the Bad Gay Man in all facets of social life, including the courtroom in contemporary HIV non-disclosure prosecutions.

In order to trace the discursive production of queer subjectivity in the Boone case, this chapter uses document analysis and open-ended interviews. In the historical section, the chapter relies upon key documents related to HIV/AIDS, queer people, and the criminal law. Moving into the contemporary period, the chapter carefully reads a series of recent Canadian HIV non-disclosure proceedings involving a queer man in Ottawa alleged to have not disclosed his HIV-positive status to sexual partners, along with the treatment of this case in news articles archived in the Canadian News Index (CNI) and secondary materials. The chapter supplements this document analysis with open-ended interviews with representatives from community

[230] See e.g. C.G. Jung, *The Archetypes and Collective Unconscious*, 2d ed (Princeton: Princeton University Press, 1981).

organizations, lawyers, and police officials, which were conducted between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

I. THE HISTORY AND CONTEMPORARY DOCTRINAL FRAMEWORK OF CRIMINALIZING SEXUAL CONTAGION

(a) History of Criminalizing Sexual Contagion in Canada

Like virtually all Anglo-American jurisdictions, Canada has a long history of attempting to use the criminal law to regulate the transmission of contagious diseases, particularly when the diseases are alleged to be sexually communicated by marginalized groups, such as sex workers. While the precise mechanisms through which sexual contact and contagious diseases have been regulated in and through the criminal law has changed over time, early approaches signal the law's deep-seated investment in targeting sex marked by notions of deviance, illness, and contagion. What follows below is a brief survey of two early precursors to the criminalization of HIV non-disclosure in contemporary Canadian law.

(i) The Contagious Diseases Act (1865-1870)

Following the passage of a similar law one year earlier in the United Kingdom, the united provinces of Upper and Lower Canada enacted the *Contagious Diseases Act* in 1865.[231] Brought into force almost three decades prior to the enactment of the *Criminal Code* in 1892, legislators created the act as a way of attempting to protect military men from the supposed public health threat posed by female prostitutes carrying venereal diseases. Among other things, the law authorized prostitutes alleged to be carrying venereal diseases to be detained for up to three months in a hospital certified by the government. Moreover, the law allowed any individual to go before a justice of the peace and swear an oath that a prostitute with a venereal disease had been plying her trade in one of the areas captured by the act. Unlike the United Kingdom's iteration of the law, which applied only to shipping towns in the south where there had been an outbreak of venereal diseases, the Canadian version applied to all major urban centres in Upper and Lower Canada. After being detained by a police officer, the law made it clear that the prostitute had two options: she could either voluntarily submit for a physical

[231] 29 Vict (1865), c 8 (Province of Canada).

examination to determine whether or not she was indeed carrying a venereal disease, or be arrested on the spot.[232]

After enacting the legislation, however, government officials found it virtually impossible to enforce. Perhaps most notably, the government failed to certify any hospitals as facilities that could be used to detain, inspect, and treat prostitutes alleged to be carrying venereal diseases. In addition, the legislation specified that the provision would only remain in force for a period of five years. With no certified hospitals in sight, and therefore no possibly of enforcement, the legislation expired in September 1870 and was never re-introduced. Writing about the government's decision not to re-enact the legislation, legal historian Constance Backhouse explains,

> That Canadian legislators chose not to reenact the law or enforce it probably reflected their ambivalence over its efficacy. They may also have been affected by the bitter controversy that raged in England over the parent country's counterpart legislation, in which middle- and upper-class women attacked the acts as state recognition of vice and profoundly discriminatory against women and the lower classes. [233]

While the legislation was never enforced, the passage of the *Contagious Diseases Act* in 1865 foreshadowed the extent to which Canadian criminal law would endeavour to regulate sex marked by notions of deviance, illness, and contagion — particularly when the sex was undertaken by members of marginalized communities such as sex workers. Indeed, the creation of the *Contagious Diseases Act* signals Canadian law's early investment in criminalizing sex dwelling at the margins of society.

(ii) Criminal Code: Communicating a venereal disease (1919-1985)

Following World War I, and the outbreak of venereal diseases such as syphilis and gonorrhoea that went hand-in-hand with the migration of people across jurisdictions,[234] Canada again attempted to criminalize and contain the practices of contagious sex.[235] While the transmission of venereal diseases had never before been an offence at common law, the Canadian government introduced a new *Criminal Code* offence in 1919 designed to target the

[232] Constance B Backhouse, "Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society" (1985) 18:36 Social History/Histoire sociale 387 at 390-3 [Backhouse, "Prostitution"].
[233] *Ibid* at 392.
[234] For further discussion of this history, e.g. AM Brandt, "The syphilis epidemic and its relation to AIDS" (1988) 239:4838 Science 375.
[235] For further discussion of the emergence of this Criminal Code offence, see e.g. Janice Dickin McGinnis, "Law and the Leprosies of the Lust: Regulating Syphilis and AIDS" (1990) 22 OLR 49.

spread of sexual contagion.[236] The law made it an offence, punishable on summary conviction, to communicate a venereal disease to another person knowingly or with culpable negligence. The act defined a venereal disease as "syphilis, gonorrhoea, or a soft chancre".[237] Reasonable grounds of belief on the part of the accused person that they were "free from venereal disease in a communicable form" worked as a complete defence, and individuals could not be convicted upon the uncorroborated evidence of only one person about an alleged venereal disease. The offence was punishable by a fine not exceeding $500, a term of imprisonment not exceeding six months, or both.[238] The government made minor amendments to the offence in 1927,[239] 1953-54,[240] 1970,[241] and 1985[242] to reflect the increasing punishments for a wide range of summary

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[236] *An act to amend the Criminal Code*, SC 1919, c 46, s 8. Section 316A of the *Criminal Code* provided:
(1) Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.

Provided that a person shall not be convicted under this section if he proves that he had reasonable grounds to believe that he was free from venereal disease in a communicable form at the time the alleged offence was committed.

Provided, also, that no person shall be convicted of any offence under this section upon the evidence of one witness, unless the evidence of such witness be corroborated in some material particular by evidence implicating the accused.
(2) For the purposes of this section, "venereal disease" means syphilis, gonorrhea, or soft chancre.
[237] *Ibid* at s 316A(2).
[238] *Ibid*.
[239] *Criminal Code*, RSC 1927, c 36. Section 317 of the *Criminal Code* provided:
Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment:

Provided that a person shall not be convicted under this section if he proves that he had reasonable grounds to believe that he was free from venereal disease in a communicable form at the time the alleged offence was committed:

Provided, also, that no person shall be convicted of any offence under this section upon the evidence of one witness, unless the evidence of such witness be corroborated in some material particular by evidence implicating the accused.
2. For the purposes of this section "venereal disease" means syphilis, gonorrhea, or soft chancre. 1919, c. 46, s. 8.
[240] *Criminal Code*, SC 1953-54, c 51. Section 239 of the *Criminal Code* provided:
(1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.
(2) No person shall be convicted of an offence under this section where he proves that he had reasonable grounds to believe and did believe that he did not have venereal disease in a communicable form at the time the offence is alleged to have been committed.
(3) No person shall be convicted of an offence under this section upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.
(4) For the purposes of this section, "venereal disease" means syphilis, gonorrhea or soft chancre.
[241] *Criminal Code*, RSC 1970, c C-34. Section 253 of the *Criminal Code* provided:
(1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.
(2) No person shall be convicted of an offence under this section where he proves that he had reasonable grounds to believe and did believe that he did not have venereal disease in a communicable form at the time the offence is

conviction offences across the *Criminal Code*. However, the offence remained virtually unchanged until Parliament repealed it in 1985.[243]

During the almost seven decades where communicating a venereal disease remained a *Criminal Code* offence, however, there appears to have been only one reported case.[244] In the 1926 decision of *R v Leaf*, the criminal act of communicating gonorrhoea was not even the central focus of the Crown's case. Rather, in this case, the accused person was charged with "unlawful act" manslaughter after his sexual partner died of complications related to acquiring gonorrhoea. The Crown used the offence of communicating a venereal disease to secure a manslaughter conviction. In a brief reported decision affirming the conviction, the Saskatchewan Court of Appeal noted: "The prisoner was shown by the evidence to have been guilty of the offence dealt with by sec. 316a of *The Criminal Code,* namely, communicating venereal disease by culpable negligence. The woman to whom he communicated the disease died, and according to the medical evidence her death was directly attributable to the disease so communicated."[245] While Parliament may have signalled a desire to punish practices of contagious sex, the dearth of reported cases, an admittedly imperfect measure, suggests that enforcement remained notoriously illusive.

With virtually no enforcement, Parliament repealed the offence in 1985 — in the early days of the HIV/AIDS epidemic. While the record is somewhat opaque on this point, Parliament appears to have repealed the offence for two reasons. First, the legislature concluded that the transmission of venereal diseases was better understood as a public health issue than as a criminal law issue. Second, the legislature pointed to the ineffectiveness of the prohibition —

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alleged to have been committed.
(3) No person shall be convicted of an offence under this section upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.
(4) For the purposes of this section, "venereal disease" means syphilis, gonorrhea or soft chancre. 1953-54, c. 51, s. 239.

[242] *Criminal Code*, RSC 1985, c C 46. Section 289 of the Criminal Code provides:
(1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.
(2) No person shall be convicted of an offence under this section where he proves that he believed on reasonable grounds that he did not have venereal disease in a communicable form at the time the offence is alleged to have been committed.
(3) No person shall be convicted of an offence under this section on the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.
(4) For the purposes of this section, "venereal disease" means syphilis, gonorrhea or soft chancre. R.S., c. C-34, s. 253.

[243] RSC 1985, c 27 (1st Supp), s 41.

[244] For an extended discussion of this history, see e.g. Richard Elliott, *Criminal Law and HIV/AIDS: Final Report* (Montreal: Canadian HIV/AIDS Legal Network and Canadian AIDS Society, 1996).

[245] *R v Leaf*, [1926] 1 WWR 888, 45 CCC 236 (CA) at para 3.

there had not been a standalone conviction for communicating a venereal disease for the better part of a century.[246] In addition, two different Parliamentary committees tasked with examining the issue, along with other criminal law matters, recommended that the offence be repealed altogether. Both committees concluded that the current criminal law approach was ineffective, counterproductive, tended to drive sexual practices further underground, and undermined the important work being done by public health experts to combat the spread of sexually transmitted infections.[247]

Despite this signal of Parliamentary intent in 1985 — one of turning away from the criminalization of sexually transmitted infections in favour of public health approaches — Canadian courts would spend the next three decades moving in the opposite direction as they invented new criminological techniques to govern people living with HIV/AIDS who failed to disclose their status, or where they put others at risk of contracting the disease.

(b) Contemporary Approaches to HIV Non-Disclosure in Canada

In the contemporary Canadian criminal law, there are no specific HIV non-disclosure or HIV transmission offences set out in the *Criminal Code*. While it would have been open to Parliament to enact new criminal offences in the wake of the HIV/AIDS epidemic in the early 1980s, it declined to do so.[248] Instead, after Parliament repealed the offence of communicating a venereal disease in 1985, courts started to apply existing *Criminal Code* offences — most notably, aggravated sexual assault — in cases where individuals failed to disclose their HIV-positive status, or where they put others at risk of contracting HIV.

This sweeping list of *Criminal Code* offences now includes common nuisance,[249] administering a noxious substance,[250] criminal negligence causing bodily harm[251] and, in the

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[246] Canadian Bar Association Ontario, *Report of the Committee to Study the Legal Implications of AIDS* (Toronto: The Association, 1986) at 61.
[247] Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (Ottawa: Minister of Supply & Services Canada, 1985); and Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children* (Ottawa: Minister of Supply & Services, 1984).
[248] Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-Disclosure of HIV" (2008) 31 Dal LJ 121 at 126.
[249] *Criminal Code*, s 180(1)(b). See e.g. *R. v. Thornton*, [1989] OJ No 1814 (Ontario District Court) (QL), aff'd (1991) 1 OR (3d) 480 (CA), aff'd [1993] 2 SCR 445; *R. v. Summer* (1989), 98 AR 191, AJ No 784 (Alta Prov Ct); and *R. v. Williams*, 2001 NFCA 52 (Newfoundland and Labrador Court of Appeal).
[250] Criminal Code, s 245. In the Ottawa case, the noxious substance was the accused person's semen.
[251] *Criminal Code*, s 221. See e.g. *R. v. Wentzell*, [1989] NSJ No 510 (N.S. Co. Ct.) (QL); and *R. v. Ssenyonga* (1993) 81 CCC (3d) 257 (Ont Ct (Gen Div)).

most serious cases, murder.[252] As we might expect, most individuals who have been charged for not disclosing their status in Canada are men. Given the prevalence of HIV among queer men,[253] it is surprising that the majority of individuals charged with offences related to their failure to disclose their HIV-positive status, particularly in the 1990s and early 2000s, were men who engage in sexual activities with women. A recent empirical study authored by Eric Mykhalovskiy and Glenn Betteridge suggests that, by the end of 2010, heterosexual men accounted for 65% of all individuals accused of failing to disclose their HIV-positive status in Canada.[254] The authors further suggest that their data points to a "potential centering of criminal charges on Black heterosexual men".[255] Recently, however, empirical evidence suggests that there have been an increasing number of prosecutions against gay men. In Ontario, for example, 13 of 48 men charged by the end of 2010 allegedly failed to disclose their status before engaging in sexual relations with other men.[256]

In light of scientific advancements over the past three decades, HIV is no longer the fatal condition it was when the epidemic emerged in the early 1980s, nor when the Supreme Court decided its landmark decision in *Cuerrier* in 1998.[257] As Martha Shaffer, Isabel Grant, and Alison Symington note:

> There have been significant changes with respect to our knowledge about HIV prevention and transmission since *Cuerrier*, as well as ongoing development of effective treatments, which have transformed HIV from a fatal diagnosis into a chronic, manageable condition for most people with access to treatment. Yet much of the public still believes that HIV is highly infectious, is inevitably fatal, and is associated with immoral activities. As a result, not revealing HIV status to sexual partners is a charged issue.[258]

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[252] *Criminal Code*, s 229.
[253] Gay and bisexual men accounted for 57% of HIV-infected people in Ontario as of 2008. See *Ontario HIV/AIDS Infection Rates*, online <http://www.health.gov.on.ca>.
[254] Eric Mykhalovskiy & Glenn Betteridge, "Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada" (2012) 27 CJLS 31 at 40.
[255] *Ibid* at 41. For a discussion about the tropes of race and sexuality at work in HIV non-disclosure cases, see e.g. James Miller, "African immigrant damnation syndrome: The case of Charles Ssenyonga" (2005) 2:2 Sexuality Research and Social Policy 31.
[256] *Ibid*.
[257] *R v Cuerrier,* [1998] 2 SCR 371.
[258] Grant, Shaffer, and Symington, *supra* at 463.

Despite these advancements, prosecutors have recently tended to move away from less serious charges such as common nuisance and toward more serious charges such as aggravated sexual assault, attempted murder, and murder in cases involving heterosexual and queer men alike.[259]

(i) Sexual assault provisions

The sexual assault provisions of the *Criminal Code*, which are most often used in cases of alleged HIV non-disclosure, have been applied inconsistently over the past three decades. A person who knows that he or she is HIV-positive has a duty to disclose their status before engaging in conduct that poses a "significant risk of serious bodily harm" of transmitting the virus to another person, a standard the Supreme Court of Canada first developed in *Cuerrier*.[260] Where this duty exists, not disclosing one's status constitutes fraud within the meaning of s. 265(3)(c) of the *Criminal Code*. The fraud renders the sexual partner's consent to that activity legally invalid. To establish fraud on the part of the accused person that renders the sexual partner's consent legally invalid, the Crown bears the burden of proving, beyond a reasonable doubt, that: (1) the accused committed an act that a reasonable person would see as dishonest; (2) a harm, or a risk of harm, to the complainant resulted from that dishonesty; and (3) the complainant would not have consented but for the accused's dishonesty.[261] Within this paradigm of consent, it is irrelevant whether or not the complainant actually contracted HIV.

Since the Supreme Court released *Cuerrier* in 1998, there has been considerable confusion about which sexual acts meet the "significant risk of serious bodily harm" test — the result has been that people living with HIV run the risk of being charged and convicted anytime they fail to disclose their status during a sexual encounter, regardless of the specific sexual activities in question and the level of risk associated with the activities. As Shaffer explains, "Research has shown that the risk of HIV infection is mediated by many factors, including stage of the infection, type of sexual activity, whether the person living with HIV/AIDS (PHA) is the insertive or receptive partner, condom use, viral load, anti-retroviral treatment, circumcision, and whether either partner has an STI."[262] To use a concrete example, the vast majority of scientific evidence suggests that there is a qualitative difference in terms of risk of HIV transmission between condomless anal intercourse and condomless oral sex. The Canadian

[259] Grant, Boundaries, *supra* at 124-126. More empirical research examining the underlying causes of this shift in prosecutorial trends in Canada may be useful to fully understand this trend.
[260] *Cuerrier, supra.*
[261] *Ibid* at para 116.
[262] Shaffer, *supra* at 471.

AIDS Society classifies condomless anal intercourse as carrying a "high risk" of HIV transmission. Conversely, it classifies performing oral sex without a condom as carrying a "low risk" of HIV transmission and classifies receiving oral sex without a condom as carrying a "negligible risk" of HIV transmission.[263] It was unclear whether these sexual activities, which carry vastly different risks, would be treated similarly under the "significant risk of serious bodily harm" analysis developed in *Cuerrier*.

To their credit, the Supreme Court in *Mabior* recently acknowledged and attempted to address the questions left unanswered by *Cuerrier*. McLachlin C.J., writing for a unanimous Court, noted at the outset of the decision: "While *Cuerrier* laid down the basic requirements for the offence, the precise circumstances when failure to disclose HIV status vitiates consent and converts sexual activity into a criminal act remain unclear. The parties ask this Court for clarification."[264] Purporting to add clarity to the decision in *Cuerrier*, the Court restated the test as follows: "Where there is a *realistic possibility of transmission of HIV*, a significant risk of serious bodily harm is established, and the deprivation element of the *Cuerrier* test is met."[265] The Court explained that HIV-positive people were required to disclose their status unless they had a low viral count and a condom was used.

While a full treatment of the limitations of *Mabior* goes beyond the scope of this chapter, scholars have lodged considerable criticism at the decision since its release in 2012. In a recent article, for example, Shaffer points to four fundamental weaknesses of the Court's discussion of the doctrine of fraud in the context of sexual assault law. First, she argues that the "realistic possibility" standard developed in *Mabior* is a misleading — rather, the test is now "more akin to holding that disclosure is required if there is more than a negligible risk of transmission."[266] Second, the requirement that an accused person have a low viral count raises serious evidentiary issues. In particular, the Court fails to specify when a viral count should be treated as "low" and provides no guidance about how frequently people living with HIV need to be tested in order to prove that they were not legally required to disclose their status before engaging in sexual

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[263] Canadian AIDS Society, *HIV Transmission*: *Guidelines for Assessing Risk*: *A Resource for Educators, Counsellors and Health Care Providers*, 5th ed (Ottawa: Canadian AIDS Society, 2004) at 26, 29, online: <http://librarypdf.catie.ca/pdf/p25/22303.pdf>. A thorough discussion of the scientific literature regarding HIV transmission goes beyond the scope of this paper. For further analysis, see Eric Mykhalovskiy, Glenn Betteridge & David McLay, "HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario" (August 2010), online: <www.catie.ca>.

[264] *R v Mabior,* 2012 SCC 47, [2012] 2 SCR 584 at para 3.

[265] *Ibid* at para 84 [emphasis that of the Court].

[266] Shaffer, *supra* at 473.

activities.[267] Third, the Court fails to provide guidance about how the "realistic possibility" standard applies in the context of non-vaginal sexual intercourse, including oral and anal sex.[268] Finally, the Court offers virtually no analysis on the disclosure obligations imposed on people living with other serious sexually transmitted infections, including antibiotic resistant strains of gonorrhea and genital herpes.[269] As a result, Shaffer concludes that the decision in *Mabior* "fails to help us consider whether *Cuerrier*'s 'significant risk' test sets out a notion of sexual fraud that promotes a full conception of sexual autonomy and sexual consent."[270]

Writing in a similar vein, Grant argues that there are at least three underlying problems with the Court's aggravated sexual assault analysis in *Mabior*. First, the Court simply asserts, without making the argument, that any possibility of transmitting HIV endangers the complainant's life, regardless of whether HIV is actually transmitted. Grant explains: "While sexual assault is not a crime that is measured by the degree of harm caused to the complainant, aggravated sexual assault is …[A]ggravated sexual assault applies to situations where that autonomy is negated *and* further serious harm is caused. The judgment in *Mabior* trivializes the significance of such harm when it does occur."[271] Second, Grant argues that, by proceeding on the assumption that the complainant's life has been endangered unless a condom is used and the accused person had a low viral load at the time of the sexual activities, the Court appears to have made it easier for the Crown to prove endangerment.[272] Third, she criticizes for the Court for conflating the *mens rea* for sexual assault with the *mens rea* for aggravated assault — while aggravated sexual assault usually requires objective foreseeability of harm, the Court remains silent about the application of this standard in the context of HIV non-disclosure.[273] She notes, for example, that an accused person with an undetectable viral load could marshal strong empirical evidence to support the argument that they reasonably believed that the complainant's life was not endangered — the risk of transmission is significantly lowered when a viral count is present.[274] Beyond criticizing the Court's doctrinal analysis, Grant also rejects the Court's contention that *Mabior* constitutes an attempt to limit the parameters set out in *Cuerrier* and avoid over-criminalizing people living with HIV. She writes: "It is beyond dispute that *Mabior*

[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid* at 474.
[270] *Ibid*.
[271] Grant, "Over-Criminalization", *supra* at 478-9, citing *R v Hutchinson* [emphasis that of the author].
[272] *Ibid* at 480, citing Shaffer, *supra* at 472.
[273]Grant, "Over-Criminalization", *supra* at 480, citing *R v Ford*, 2006 NLCA 70, 262 Nfld & PEIR 165 at para 16; *R v Godin*, [1994] 2 SCR 484 31 CR (4th) 33 at para 2.
[274] *Ibid*.

expands the scope of criminal liability beyond *Cuerrier*. Strangely absent from *Mabior* are the passages from the majority and minority opinions in *Cuerrier* which strongly suggested that condom use would negate a 'significant risk'".[275]

Beyond the doctrinal weaknesses Shaffer and Grant identify, the Supreme Court's decision in *Mabior* also warrants criticism for its deep and uncritical heteronormativity. While the test purports to focus on the realistic possibility of transmitting HIV, the Court offers no analysis about sex that goes beyond the paradigm of penile-vaginal sex. It is curious that, while the Court purports to reframe the nature of the inquiry around the "realistic possibility of the transmission of HIV", it remains silent about the application of the test in the context of non-normative sexual encounters.[276] In particular, the decision fails to engage difficult questions surrounding the risks associated with anal sex, oral sex, or even sex among queer communities. Indeed, the decision never uses the words "anal sex", "oral sex", "gay", "lesbian", "bisexual", "transgender", or "queer" at all. Rather, the sexual encounter imagined by the Court appears to be an opposite-sex one — as a result, clarity about what the "realistic possibility of the transmission of HIV" standard might look like for same-sex partners remains illusive.

(ii) Murder and attempted murder

Before 1999, homicide charges were rarely used against individuals who failed to disclose their HIV-positive status prior to engaging in sexual activities. While there are different theories about this shift in charging patterns, Grant has suggested that this change may have resulted from the rule repealed in 1999 that prosecutors had to prove that the victim's death occurred within one year and a day from when the acts in question took place.[277] The key mental elements of murder are the intention to cause the requisite degree of bodily harm, coupled with the necessary recklessness as to its effect.[278] A person "who attempts by any means to commit murder" is guilty of attempted murder.[279]

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[275] *Ibid* at 482 [emphasis that of the author].
[276] As of 2008, 57% of HIV-infected people in Ontario are gay or bisexual men: *Ontario HIV/AIDS Infection Rates*, *supra*.
[277] Grant, "Boundaries", *supra* at 132, citing *Criminal Code*, s 227, as rep. by Bill C-511, *An Act to Amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Releases Act*, 1st Sess., 36th Parl., 1998, cl. 9 (assented to 11 March 1999), SC 1999, c 5, s 9.
[278] Subsection 229(b) deals with the situations where an unintended victim is killed as a result of the accused acts, while s 229(c) deals with homicides occurring while a person commits another unlawful act. Neither of these subsections relate to prosecutions for HIV transmission and exposure.
[279] *Criminal Code*, s 239(1)(a).

In recent cases, Crown prosecutors have laid charges of murder or attempted murder where individuals have not disclosed their HIV-positive status prior to engaging in sexual activities. For example, in a 2009 Canadian case before judge and jury, Johnson Aziga was convicted of two counts of first-degree murder for failing to disclose his HIV status before having penile-vaginal sex without a condom. He was also convicted of ten counts of aggravated sexual assault and one count of attempted aggravated sexual assault following sexual encounters with eleven women. Seven of the complainants later tested positive for HIV following their encounters with the accused, and two subsequently died of cancer that was alleged to have been related to contracting HIV. Aziga was sentenced to life imprisonment with no possibility of parole for 25 years — the mandatory minimum sentence for first-degree murder. To date, however, Aziga is the only person in Canada to have ever been convicted of first-degree murder for failing to disclose his HIV-positive status.[280]

II. THEORIZING THE BAD GAY MAN AND THE GOOD GAY MAN

Having examined the historical and contemporary criminal regulation of contagious sex, this section proceeds to examine how notions of queerness and criminality surface in the context HIV non-disclosure proceedings. To do so, the chapter excavates a figure — one I call the Bad Gay Man — from a contemporary HIV non-disclosure case involving a queer man from Ottawa. All aspects of the case, from the initial police investigation to the sentencing of the accused person, were decided in a legal landscape after the creation of human rights protections, same-sex benefits, and marriage equality for queer people in Canada.

Actors in the criminal courtroom, including accused persons, victims, lawyers, judges, and juries, invariably end up relying upon deep-seated tropes as part of the process of legal storytelling. As Anthony Alfieri explains, storytelling is at "the core of the lawyering process", and requires the use of "multiple narratives of diverse origins, signaling a wide range of social meanings, values, and images".[281] In the process of telling a legal story in the courtroom,

[280] Sandra Chu & Richard Elliott, "Man convicted of first-degree murder sets disturbing precedent," (2009) HIV/AIDS Policy & Law Review 14(2) at 42-3. See also Barbara Brown, "Life Term for Aziga: Murder Verdicts in HIV Transmission Case Make History" *The Hamilton Spectator* (6 April 2009), online: The Spec.com <http://www.thespec.com>. For further discussion, see *R v Aziga*, [2005] OJ No 5983 (Ont Ct J) (QL); and *R v Aziga* (2006), 42 CR (6th) 42 (Ont S Ct J).

[281] Anthony V. Alferi, "Defending Racial Violence" (1995) 95 Colum. Law Rev. 1301 at 1303-4. For further discussion, see e.g. Richard K Sherwin, "The Narrative Construction of Legal Reality" (1994) Vermont L Rev 681.

however, actors have the capacity to do more than simply restage well-established narratives — they also have the capacity to reimagine the narratives altogether.[282]

As I argued in Chapter 1 of *Sex Crimes*, the stories told about queer people have not always been those of human rights, same-sex benefits, marriage, and coupled respectability. Rather, as Foucault famously argues in *The History of Sexuality: Volume I*, the category of "the homosexual", a term that tended to refer to male subjects, did not emerge in Anglo-American legal discourse until the late nineteenth century.[283] I term the contemporary iteration of the figure of the sexually-deviant homosexual the Bad Gay Man. The Bad Gay Man, as I conceptualize him, is a promiscuous, pathological, and predatory figure, one who lurks in bushes, bathhouses, and bathrooms as he awaits his next sexual conquest. Perhaps unsurprisingly, society has tended to draw implicit and explicit correlations between the figure of the Bad Gay Man and notions of criminality.

As we move into the latter half of the twentieth century, however, we also begin to witness the emergence of a new contemporary figure. In this chapter, I call him the Good Gay Man.[284] The figure of the Good Gay Man distances himself from the promiscuous, pathological, and predatory criminal figure of the Bad Gay Man by donning the garb of couple respectability. Instead of challenging the established normative social order, the Good Gay Man seeks recognition and inclusion within it. Instead of being constituted as a sexual predator, one constantly posing a threat to the heterosexual men around him, the Good Gay Man is a committed, perhaps even married, monogamist. Instead of lurking in bushes, bathhouses, and bathrooms, the Good Gay Man and his Good Gay partner are just like heterosexual couples — they share their lives together, they participate in familial, privatized forms of self-governance, and when they have sex, they have it with each other. [285] The Good Gay Man is a figure steeped in the politics of respectability, one that has been constituted in and through law and legal discourse.[286]

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[282] Patricia Ewick & Susan S. Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative" (1995) 29 Law & Soc'y Rev 197 at 211.
[283] Foucault, *History of Sexuality, supra.*
[284] Michael A Smyth, "Queers and Provocateurs: Hegemony, Ideology, and the 'Homosexual Advance' Defense" (2006) 40 Law & Soc'y Rev 903 at 904.
[285] Cossman, *Sexual Citizens*, *supra*.
[286] Warner, *supra.*

As legal historian William N. Eskridge put it in *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*,[287] for some advocates, same-sex marriage held the promise of erotically domesticating queerness. He writes:

> It should not have required the AIDS epidemic to alert us to the problem of sexual promiscuity and to the advantages of committed relationships…Whatever its source, sexual variety has not been liberating to gay men. In addition to disease costs, promiscuity has encouraged a cult of youth worship and has contributed to the stereotype that homosexuals are people who lack a serious approach to life…A self-reflecting gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.[288]

Queerness, the story went, could be transformed through marriage equality from a status marked by promiscuity to a status marked by coupled respectability. To use the language giving rise to the title of Eskridge's book, queerness could transformed from sexual liberty to civilized commitment.

Thirty years of victories for queer people in the fields of human rights law, same-sex benefits, and relationship recognition have not, however, replaced the Bad Gay Man altogether. Rather, contemporary representations of queer men — as expressed in a series of proceedings involving a case of criminal HIV non-disclosure from Ottawa — are best understood in bifurcated terms.[289] When it comes to legal storytelling in the courtroom, there is little room for more complicated versions of subjectivity that dwell in the spaces that exist between the poles of the Bad Gay Man and the Good Gay Man.[290] Actors in the criminal justice system may not even be consciously aware that they are relying upon well-established established scripts as they tell legal stories, develop arguments, make decisions, and determine fit sentences in the courtroom — rather, calling upon the work of Jung, these narratives tend to be located in society's collective unconscious.[291]

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[287] William N Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996).
[288] *Ibid* at 9-10.
[289] Bruce Ryder, "Straight Talk: Male Heterosexual Privilege" (1991) 16 Queen's LJ 287 at 293.
[290] For a discussion of the ways in which society tends to depict black men in a similar either/or fashion, see Frank Rudy Cooper, "Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy" (2006) 39 UC Davis L Rev 853.
[291] Jung, *supra*.

In *Troubling Sex: Towards a Legal Theory of Sexual Integrity*,[292] Elaine Craig explores the operation of criminal figures in the Supreme Court of Canada's recent sexuality jurisprudence. In Canadian law, the dangers associated with deploying what we might call archetypal thinking in criminal cases are supposed to be constrained by the law of similar fact evidence — evidence of an accused person's past misconduct proffered to demonstrate that he or she is a particular type of person is presumptively inadmissible.[293] The doctrine is premised on a simple proposition: "[I]ndividuals 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."[294] Despite the doctrine of similar fact evidence, however, Craig argues that actors within the criminal justice system continue to rely upon propensity-based reasoning as they construct figures such as "the pedophile" in the courtroom.[295]

To support this claim, Craig examines a series of recent Supreme Court decisions, perhaps most notably *Morelli*.[296] In this case, the court evaluated the basis for a warrant used to search the accused person's personal computer for child pornography. The police pointed to two pieces of evidence suggesting that they had reasonable grounds to suspect that the accused person possessed child pornography — the first was testimony from a computer technician who noticed the accused person's computer icons labeled "Lolita XXX" and the second was the "expert opinion" of a police officer about the so-called "hoarding" practices of those who collect child pornography.[297] While the majority opinion authored by Justice Fish found the search and seizure to be unconstitutional within the meaning of s. 8 of the *Charter*, Craig argues that his reasoning proceeds from the problematic assumption that there is a particular type of person who collects child pornography — and, moreover, that this type of person is wholly different from individuals who access pornography depicting adults. In *Morelli*, Justice Fish simply concluded that the police did not have enough evidence to determine that the accused person was this type of person.[298]

This chapter draws upon Craig's constructivist analysis of figures such as "the pedophile" to explore the operation of a similar type of archetypal thinking when it comes to

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[292] Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012) [Craig, *Troubling Sex*]. For further discussion on similar fact evidence, see *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908. *Handy* is the Supreme Court's leading decision on the issue of similar fact evidence.
[293] *Ibid.* at 25.
[294] *Ibid.*
[295] *Ibid*. at 38-44.
[296] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 [*Morelli*].
[297] Craig, *supra* at 40.
[298] *Ibid* at 41.

queer men accused of failing to disclose their HIV-positive status. Using a recent Ottawa prosecution as a contemporary case study, this chapter argues that the criminal law ends up reconstituting and breathing new life into the well-established, criminally-code figure of the Bad Gay Man. In the aftermath of the emergence of a new politics of respectability in Canadian law and legal discourse over the past thirty years, one that has gone hand-in-hand with human rights protections, same-sex benefits, and marriage equality, this chapter suggests that there is little room in the criminal courtroom for more complicated accounts of queer subjectivity, accounts that might dwell in the unstable, permeable spaces that exist between the poles of the Bad Gay Man and the Good Gay Man.

III. CONSTITUTING THE BAD GAY MAN IN THE HIV NON-DISCLOSURE COURTROOM: R v BOONE (2010-2016)

In the section that follows, I carefully examine a contemporary case study involving a queer man accused of failing to disclosing his HIV-positive status prior to engaging in sexual activities. With the proceedings spanning from 2010 to 2016, each part of the case study has been decided in the aftermath of marriage equality.

As part of the background research for *Sex Crimes*, I have also done an exhaustive review of every HIV non-disclosure prosecution involving queer men in Canada — a full treatment of each case, however, goes beyond the scope of my analysis in this chapter. In April 2014, the Canadian HIV/AIDS Legal Network shared their confidential database of every known Canadian HIV non-disclosure case involving queer people with me — these cases included men who have sex with men (MSM), along with one known case involving a trans woman. There were no cases involving cisgender queer women alleged to have failed to disclose their HIV-positive status. The database included a total of 36 cases, which spanned from 1989 to the present. The Canadian HIV/AIDS Legal Network became aware of these cases through a variety of different channels, including media reports, lawyers, and HIV/AIDS community members.[299]

[299] Email with database from Cécile Kazatchkine, Senior Policy Advisor, Canadian HIV/AIDS Legal Network, dated April 18, 2014 [on file with author]. The database includes the following information:

- Last name, first name
- Province, City of charge
- Charge (e.g. aggravated sexual assault)
- Year of charge
- Year of disposition
- Court

Given the focus on contemporary narratives about queerness and criminality that surface over the course of the judicial decision-making process, this chapter conducts a careful reading of Canada's most well-known contemporary HIV non-disclosure prosecution involving a queer man, tracing the case from the initial police investigation and press release, to pretrial proceedings, to narratives from the trial itself, to two *habeas corpus* decisions, to sentencing. While the larger set of cases that became known to the Canadian HIV/AIDS Legal Network through various channels are important to understanding contemporary dynamics of HIV non-disclosure, they go beyond the scope of this project. Accordingly, further research may be required to determine whether my analysis of the Ottawa case study is representative of other prosecutions across Canada involving queer communities.

(a) Police investigation and press release (2010)

In May 2010, Steven Boone, a 29-year-old queer man in Ottawa who had recently been diagnosed as HIV-positive, was arrested and initially charged with one count of aggravated sexual assault and one count of breach of probation. One month earlier, the Ottawa Police Service received a single complaint that the accused person had failed to disclose his HIV-status prior to engaging in sexual activities with a young man he met online. Two days after the witness came forward, the police made the decision to arrest Boone, noting that there was reason to suspect that he had put other men at risk of contracting HIV. The police obtained a *Feeney* warrant, and officers attended the Ottawa man's residence, but he was not home. Just before midnight on the same evening, the investigating officer called the accused person on his cell phone. She requested a meeting, and the two agreed to meet at a local Tim Horton's restaurant. When he arrived, Boone did not immediately see the officer and decided to order a coffee and wait in the parking lot. His friend, who was driving the vehicle, entered the drive through lane to place their order. At this point, two police vehicles immediately blocked their

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- Disposition charge
- Sentence
- Sex
- Age
- Race/ethnicity of accused
- Race/ethnicity of complainant
- Whether or not there was HIV transmission
- Sexual orientation
- Other information (e.g. particular circumstances of the alleged sexual encounters)
- Whether the police issued a press release
- Reasons for Decision/Sentence.

passage into the drive through and several officers then conducted a high risk takedown. The accused was placed under arrest, initially for one count of aggravated sexual assault and one count of breach of probation.[300] As the investigation proceeded, the police increased the number of aggravated sexual assault charges and added new charges for attempted murder and administering a noxious substance — his semen.

Two days later, with Boone already in custody, the Ottawa Police Service issued a press release to the public. Entitled "Ottawa Police seeking further victims following an Ottawa man being charged with Aggravated Sexual Assault," the press release included a large colour photo of the accused person along with his name, age, medical information, and details about his sexuality. The text of the press release stated:

> Yesterday, the Ottawa Police Service has charged an Ottawa male with nine counts of Aggravated Sexual Assault as a result of incidents that occurred in late January and early February 2010.
>
> An investigation was commenced on April 30, 2010 after a male victim complained to police after contracting an infectious disease from a male. The male knowingly failed to disclose details to the victim regarding his infectious medical condition.
>
> Steven Paul Boone, age 29, of Ottawa appeared in court on May 6, 2010 and remains in custody.
>
> "The Ottawa Police is releasing the picture of the charged man — an extraordinary measure — to ensure that all sexual partners are informed that medical follow-up is warranted," noted Acting Chief Gilles Larochelle.
>
> It is estimated that [the accused] has had multiple sexual partners over the past months, approaching them using the internet for the most part.
>
> The Ottawa Police Service urges all those who have had sexual contact with [the accused] to contact the Ottawa Police Sexual Assault/Child Abuse Unit at 613-236-1222, ext. 5944 or phone Crime Stoppers at 613-233-8477 (TIPS) or toll free at 1-800-222-8477.
>
> Individuals who have had sexual contact with this individual are also being urged to seek appropriate medical follow up either through their own health care provider or through Ottawa Public Health at 613-580-6744.
>
> "Ottawa Public Health offers free and anonymous testing for sexually transmitted infections," said Dr. Isra Levy, Medical Officer of Health, Ottawa Public Health.[301]

[300] These facts are recounted more fully in a related case: *R v Boone and Bowland*, 2012 ONSC 51.
[301] Ottawa Police Service Press Release, *supra.*

The extended press release, which was sent out on an email listserv of the Ottawa Police Service's Liaison Committee to the Gay, Lesbian, Bi and Trans Community, went one step further. Harkening back to my analysis of the earlier, criminally-coded figure of "the homosexual" described in Chapter 1 of *Sex Crimes*, the extended press release referred to Boone as a "sexual predator."[302]

Given that Boone had cooperated with the investigation and was already in custody when the police issued the press release, there was no ongoing threat to the public. While it can take up to three months from the moment of transmission of HIV until an individual will test positive for the condition, the Ottawa Police Service issued a press release for a man they already had in custody, one who had cooperated with their investigation. As a result, this scenario is not comparable to one where an alleged rapist remains at large and the police issue a warning to the public that includes a sketch or picture of the suspect.[303] Instead, in the Ottawa case, the police argued that they had taken the extraordinary measure of releasing the photo "to ensure that all sexual partners are informed that medical follow-up is warranted."

In explaining the underlying reasons for issuing the press release, Staff Sgt. John McGetrick of the Ottawa Police Service stated:

> A lot of thought went into this decision, and ultimately the release of the photo was a necessity for public safety. We have reason to believe [the accused person] has knowingly failed to disclose details to multiple persons in the community, and we felt it was paramount to notify the public to seek proper medical attention.[304]

The Ottawa Police Service did later admit, however, that they could have done a better job of reaching out to members of Ottawa's queer communities and service organizations before issuing the press release. Two months following the press release — and after receiving considerable backlash in both Canada and abroad — Inspector Joan McKenna, co-chair of the Ottawa Police Service Liaison Committee to the Gay, Lesbian, Bi and Trans Community, stated: "We would still have put out his picture, but there would have been more consultation with the community. Because again, our role is public safety, so we felt there was a concern to the

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[302] *Ibid*. For further discussion of the email describing the accused person as a "sexual predator," see Noreen Fagan & Neil McKinnon, "Nine more aggravated sexual assault charges laid against accused" *Daily Xtra!* (17 May 2010), online: Daily Xtra! <http://www.xtra.ca>.

[303] For further discussion on the relationship between issuing warnings to the public, see in particular *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697 [*Jane Doe*]. For commentary on the important issues raised by the case, see e.g. Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Vintage Canada, 2004).

[304] Aeden Helmer, "Courting HIV Confusion: Controversy surrounds outing those who don't tell sex partners about HIV status" *Ottawa Sun* (15 May 2010), online: Ottawa Sun <http://www.ottawasun.com>.

community at large, to be aware of, that this person was engaged in unsafe sex."[305] In 2012, Staff Stg. John McGetrick of the Ottawa Police Service refused to elaborate on the underlying rationale for issuing the press release, noting that the case was currently before the Courts.[306]

Immediately following the Ottawa Police Service's distribution of the press release, the *Ottawa Sun* published a story recounting the details of the case in salacious terms. The story appeared on the front page of the tabloid-style newspaper and included a colour photo of Boone. The online version of the story included the title "Have You Had Sex with This Man? If so, Police Say You Need to See Your Doctor."[307] Both versions opened using the following language:

> They met on a gay dating website, chatted and agreed on a place. The first rendezvous went so well in late January they agreed to meet up again and did so every day — sometimes twice — eight more times. Several weeks later one of the men tested positive for HIV. What he didn't know was the man he met and had unprotected sex with, was infected with the deadly disease the whole time. Angered and seeking justice, he contacted police on April 30. "I had to come forward. I couldn't let this happen to anyone else," the 18-year-old said Friday. "It had to stop."[308]

After including a series of quotations from a single complainant, the article delves into the precise circumstances of the sexual encounters, repeatedly using Boone's name. The article states: "Police allege Steven Boone found partners on websites such as squirt.ca, gay411.com and plentyoffish.com and then had sex with them. Boone allegedly told police there were at least several more men in Ottawa he had slept with."[309] The article then goes further by noting that, during one of the sexual encounters, "Boone and another man met up with two others for a foursome."[310]

Similarly, coverage of the case by *CTV Ottawa* — a local television station that also publishes short news stories online — relied on many of the same well-established tropes of the overly sexualized, promiscuous HIV-positive Bad Gay Man. The online version of the story is

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[305] Marcus McCann, "Unacceptable: Sod's Opera/Police recommendations on HIV case are not credible" *Capital Xtra!* (23 July 2010), online: Capital Xtra! <http://www.xtra.ca> [McCann, "Unacceptable"].
[306] In an email to the author dated April 25, 2012, Staff Sgt. McGetrick responded to a request for an interview as follows: "Thank you for your correspondence. The file in question is currently before the courts and I am unable to provide any further comments at this time. I would be more than willing to discuss the issues upon the conclusion of court proceedings. However, the trial is not scheduled until the Fall of 2012." This correspondence is on file with the author.
[307] Kenneth Jackson, "Have You Had Sex with This Man? If so, Police Say You Need to See Your Doctor", *Ottawa Sun* (7 May 2010), online: Ottawa Sun <www.ottawasun.com>.
[308] *Ibid*.
[309] *Ibid*.
[310] *Ibid*.

entitled "Ottawa man's sex partners urged to come forward."[311] Again, the coverage highlights the existence of "multiple sexual partners" who the accused "made contact with…on the Internet."[312] Beyond the one photo contained in the Ottawa Police Service's initial press release, the article includes two additional pictures of Boone, which he had originally posted on his personal Facebook account.[313] While the article acknowledges that "[p]olice will not say what disease the man may have passed on", it then goes onto discuss the *Aziga* case.[314] As noted above, in the *Aziga* case, the accused person was found guilty of first-degree murder after two women died as a result of cancer allegedly related to contracting HIV. By referencing this case, the article strongly implies that Boone is HIV-positive.

Both articles tap into the deep-seated trope of the overly sexualized, promiscuous HIV-positive Bad Gay Man that came to be synonymous with HIV/AIDS coverage in the early 1980s and, as I suggested in Chapter 1 of *Sex Crimes*, queerness itself. The *Ottawa Sun* article includes a series of quotations from one of the complainants, the precise details of the websites Boone allegedly used to meet gay men, and salacious details about the alleged sexual encounters. Both stories, however, fail to reach out to members of Ottawa's queer communities and service organizations, other than a single complainant, for comments and reactions. They also fail to include a discussion of safer sex practices, such as the careful and consistent use of condoms and regular testing for sexually transmitted infections. Ultimately, while both articles purport to participate in a larger project of public health by encouraging gay men who engaged in sexual activities with the accused to get tested, their articles are counterintuitive to this stated goal. One could argue that the journalists who authored the articles simply got carried away in portraying the sensational elements of the story from the perspective of the young complainant. But there appears to be something deeper going on: both articles suggest that the accused — and the broader communities he represents — are overly sexualized, promiscuous, and perhaps even pathological. Put differently, the stories construct Boone as a contemporary iteration of the criminally-coded, hypersexualized homosexual.

Given that the police's initial decision to issue the press release and the subsequent media coverage surrounding the Ottawa story focused primarily on why covering the story was important for men in the region, it is important to examine how the story was treated by the

[311] Melissa Juergensen, "Ottawa man's sex partners urged to come forward" *CTV Ottawa* (7 May 2010), online: CTV Ottawa <http://ottawa.ctv.ca>.
[312] *Ibid*.
[313] *Ibid*.
[314] *Ibid*.

small queer press. A careful reading of these pieces suggests that the outlets framed the story in vastly different terms. For example, in an editorial entitled "Epic Privacy Fail,"[315] Marcus McCann, then managing editor of *Capital Xtra!*, states: "There are days when I am embarrassed to be a journalist. Usually, it's because of pack journalism, personality assaults or lowest common denominator fear-mongering. All three converged on May 8, when the face of a gay man appeared on the cover of the *Ottawa Sun*." He explains that, unlike mainstream media outlets in Ottawa, *Capital Xtra!* made the editorial decision to decline reporting any details that would identify the accused. As he puts it, "The name of the accused ought not to be released in cases like this — and certainly not photos."[316] To support this claim, McCann draws an analogy to other cases of a "highly personal" nature, such as those involving intimate partner violence and sex work. He explains:

> Police and media tend to tread lightly on cases of a highly personal nature. Ottawa Police respond to more than 3,000 cases of domestic abuse a year and don't announce what's going on. In most solicitation cases, police don't release the names of hookers or johns. And the media plays along, a tacit acknowledgement that splashing those kinds of personal and sexual details around can lead to ostracism and depression — in short, it can ruin lives.
>
> If police and the mainstream press can muster that kind of sensitivity elsewhere, why not here?[317]

In comparison with mainstream news outlets, *Capital Xtra!* sets out the facts of the Boone case using measured, careful prose. It also avoids dwelling upon the dramatic elements of the case, particularly the sexual activities in question. Rather, *Capital Xtra!* notes, albeit somewhat imprecisely, that an Ottawa man is "accused of having consensual sex with someone he met online but failing to disclose his HIV status."[318] It also highlights the steps that *both parties* may consider taking to avoid contracting HIV. Unlike the mainstream press, *Capital Xtra!* resists the impulse to rely on well-established, deep-seated tropes of queer men as predatory, promiscuous, and pathological.

At the conclusion of their investigation, and after the widespread media attention associated with the case, the police charged Boone with a series of offences related to four complainants he met online during a four-month period in early 2010. The arrest and press

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[315] Marcus McCann, "Epic Privacy Fail," *Capital Xtra!* (13 May 2010), online: Capital Xtra! <http://www.xtra.ca> [McCann, "Epic Privacy Fail"].
[316] *Ibid*.
[317] *Ibid*.
[318] *Ibid*.

release, however, were just the beginning of a six year saga where a wide range of actors in the criminal justice system would construct Boone as a Bad Gay Man.

(b) Pretrial proceedings – Ontario Superior Court of Justice and Ontario Court of Appeal (2010-2012)

Two years after the police investigation, the Boone case eventually made its way to the preliminary inquiry. Following the hearing, Justice Wake discharged Boone on four counts of attempted murder. In essence, Justice Wake found that because HIV merely reduces an individual's life expectancy, rather than causing immediate death, the evidence was incapable of supporting an inference that Boone had the specific intent to kill required for an attempted murder conviction, even if there was some evidence to suggest that he intended to infect his sexual partners. Justice Wake reasoned:

> I agree with [defence counsel]'s assessment of the evidence that while death is a possible consequence of contracting HIV, it is not an inevitable consequence, nor even a probable consequence. If death comes, it will not be immediate, it will likely occur at a point far off in the future. In these circumstances, I have concluded that it would not be a reasonable finding for a trier of fact to make that death is a predictable consequence of being infected with HIV so as to equate an attempt to infect with a specific intent to kill required to sustain a conviction for attempted murder.[319]

Accordingly, Justice Wale discharged Boone on the attempted murder conviction, but committed Boone to stand trial on the remaining counts of sexual assault and breach of probation.[320]

The Crown then brought an application seeking *certiorari* and *mandamus* related to Justice Wake's order on the four attempted murder counts. The defence brought a similar application to quash the committal of the accused to stand trial on the remaining counts of sexual assault and breach of probation related to instances of condomless mutual masturbation and oral sex. On the return of the Crown application, Justice Roy quashed the order discharging Boone on the attempted murder charges and directed Justice Wake to commit Boone for trial on those counts. In arriving at this conclusion, Justice Roy found that the preliminary inquiry judge erred in focusing solely on the scientific research related to HIV. In particular, he held that Justice Wake failed to consider the whole of the evidence, including the extent to which text messages and chat logs Boone sent to a variety of queer men in the Ottawa region could be

[319] Unreported decision cited by *R v Boone*, 2011 ONSC 5889, 102 WCB (2d) 603 at para 4 [*Boone 2011*].
[320] *Ibid* at para 10.

capable of supporting a finding that Boone possessed the specific intent to kill required for an attempted murder conviction.[321]

Turning to the defence's application, Justice Roy found that the "trier of fact could reasonably infer that the complainants did not consent to engage in sexual activity with someone who was HIV positive and that no consent was given" within the meaning of s. 273.1 of the *Criminal Code*. Accordingly, Justice Roy committed the accused to stand trial on the counts of attempted murder, sexual assault, and breach of probation.[322]

In 2012, the Ontario Court of Appeal heard Boone's appeal from the judgement of Justice Roy.[323] While there was disagreement at the Court of Appeal between Justice Simmons and Justice Hoy on the issue of whether the complainants' consent could be determined under s. 273.1 of the *Criminal Code*, without reference to the test for fraud vitiating consent developed in *Cuerrier* under s. 265(3)(c), the Court was unanimous in its treatment of the attempted murder issue.[324]

Writing about the attempted murder issue, Justice Simmons explained that the preliminary inquiry judge erred in failing to consider the whole of the evidence, including the text messages and internet chat logs Boone sent to queer men in the Ottawa region. In her view, these messages were capable of showing that Boone had the specific intent to kill necessary to ground a conviction for attempted murder, even if there was scientific evidence to suggest that becoming HIV-positive is no longer the death sentence it was when the epidemic emerged in the early 1980s. She explained:

> If the appellant believed that by infecting his sexual partners his conduct would, in the absence of intervening circumstances that might cause their death, inevitably kill them, in my view, it would be open to a trier of fact to find that he possessed a specific intent to kill. In such circumstances, the fact that death might not ensue for many years would be irrelevant.[325]

Thus, Justice Simmons and Justice Hoy agreed that Boone should be committed to stand trial on the attempted murder charges because the messages could be used to show he had the specific intent to kill.

Turning to the issue of the interplay between s. 273.1 and s. 265(3)(c) of the *Criminal Code*, Justice Simmons appears to have preferred a more robust interpretation of consent to

[321] *Boone 2011, supra* at paras 1-10.
[322] *Ibid* at paras 21-22.
[323] *R v Boone*, 2012 ONCA 539 [*Boone-2012 ONCA*].
[324] *Ibid* at 102.
[325] *Ibid* at 36.

sexual activities and, in doing so, appears to have invoked and reinscribed the figure of the Bad Gay Man. As I suggested earlier in the chapter, s. 273.1(1) defines consent in the context of sexual assault as "the voluntary agreement of the complainant to engage in the sexual activity in question". In view of the complaints' testimony that they would not have consented to the "sexual activity in question" — namely, mutual masturbation and oral sex without a condom — had they known Boone was HIV-positive, Justice Simmons agreed with the Crown that non-disclosure could be fit within the general analytic framework for sexual assault, which the Supreme Court developed in *Ewanchuk*.[326] This would allow her to bypass the risk-based fraud analysis for aggravated sexual assault under s. 265(3)(c), which the Supreme Court established in *Cuerrier*. When the Court of Appeal heard the Boone case in March 2012, the Supreme Court had not yet released its decision in *Mabior*.[327] In coming to this conclusion, Justice Simmons reasoned: "As with identity, it seems to me that a sexual partner's HIV status is an inseparable component of consent to sexual relations…Unlike extraneous factors, such as a false promise of marriage or gifts, or a false representation concerning the partner's professional status, a false representation concerning HIV status changes the very character of the sexual conduct".[328] As a result, Justice Simmons concluded that it would be open to the trier of fact to find that a person who considered their partner's HIV-status prior to engaging in sexual relations, and who believed the person was HIV-negative, was not consenting to the "sexual activity in question" within the meaning of s. 273.1 of the *Criminal Code*. Relying on this more expansive interpretation of consent, which sidesteps the risk assessment developed in *Cuerrier*, Justice Simmons concluded that even the one count involving mutual masturbation, where every expert in the case agreed that the risk of transmission was virtually zero, could fit within the analytic framework offered by s. 273.1.[329] As a practical consequence, Bad Gay Men such as Boone would be legally required to disclose their HIV-positive status in virtually all sexual encounters — even those where the risk of transmission was essentially zero. Otherwise, they would constantly run the risk of being ensnared in the repressive aspects of criminal justice.

In contrast, Justice Hoy, with support from Justice Cronk, adopted a narrower approach, concluding that the issue of consent in the context of HIV non-disclosure ought to be resolved within the Supreme Court's *Cuerrier* framework under s. 265(3)(c). She offered three reasons

[326] [1999] 1 SCR 330.
[327] *Mabior*, *supra*.
[328] *Ibid* at 96.
[329] *Ibid*.

for this less expansive interpretation of consent. First, Justice Hoy suggested that the "evidence that the complainants would not have consented if they had known the appellant was HIV-positive does not reasonably support an inference that the complainants did not voluntarily agree to engage in the specific sexual activity in question at the time that it occurred, based on their beliefs, at the time of the sexual activity, as to the appellant's HIV status".[330] Put differently, the sexual activity in question was consensual in the sense that, at the moment of the encounter, the complainant was subjectively consenting. Second, she suggested that s. 265 and s. 273.1 should be read in concert with each other. Accordingly, for a lack of consent to be based solely on dishonesty, the elements of fraud developed in *Cuerrier* must be made out.[331] Third, Justice Hoy found that failing to conduct the kind of risk analysis developed in *Cuerrier* "could result in the criminalization of almost any dishonest behavior in the context of sexual relations". That is, many sexual encounters are fraught with lies, misrepresentations, and half-truths — Justice Simmons' approach would have the practical effect of criminalizing them all.[332] As a result, Justice Hoy disagreed with Justice Simmons' interpretation, finding that HIV non-disclosure and the issue of consent should be resolved within the four corners of the *Cuerrier* decision, rather than by resorting to a more searching interpretation of the phrase "sexual activity in question" under s. 273.1 of the *Criminal Code*.[333]

Applying this narrower interpretation to the facts of the case, Justice Hoy allowed Boone's appeal from the *certiorari* judge's ruling on the count of sexual assault arising in the context of the mutual masturbation, along with the related count of breach of probation. In arriving at this conclusion, Justice Hoy focused primarily on the testimony of the Crown's medical expert, who explained that the risk of transmitting HIV during mutual masturbation is "essentially zero".[334] Turning to the two counts related to condomless oral sex, however, Justice Hoy concluded that there was still evidence from which a reasonable jury properly instructed could conclude there was significant risk of serious bodily harm and, thus, find Boone guilty of sexual assault. In her view, the evidence of even a one in 909 risk of HIV transmission associated with oral sex was dispositive of the issue. As a result, she dismissed Boone's appeal

[330] *Ibid* at 104.
[331] *Ibid* at 105.
[332] *Ibid* at 106.
[333] *Ibid* at 107-108.
[334] *Ibid* at 140.

of the *certiorari* judge's ruling on the two counts of sexual assault involving oral sex, along with the related counts of breach of probation.[335]

(c) Trial decision – Ontario Superior Court of Justice (2012)

Following the media's unceremonious introduction of Boone to the public in 2010, along with an acrimonious set of appeals lasting two years, the stage was finally set for a courtroom drama that would see the accused constituted as a promiscuous, pathological, and predatory Bad Gay Man — as a subject who engaged in sex marked by notions of deviance, illness, and contagion. Unlike the queer legal subjects of human rights law, same-sex benefits, and marriage, actors in the courtroom could not wrap Boone in the garb of coupled respectability. Rather, he was discursively constituted as a contemporary iteration of the criminal figure of "the homosexual".

In October 2012, after a three week trial, Boone was convicted by a jury of three counts of attempted murder, three counts of aggravated sexual assault, two counts of administering a noxious substance — his semen — and one count of attempting to administer a noxious thing to four complainants. The jury acquitted Boone of two counts of aggravated sexual assault against two additional complainants. When the verdict was announced, Boone broke down in tears, telling his lawyer Ian Carter: "There was no way I was trying to kill anyone."[336]

At trial, the Crown's evidence consisted primarily of the testimony from four complainants, along with others who had interacted with Boone online between January and May 2010. During her opening statement, Crown prosecutor Louise Tansey-Miller signaled to jurors that she was about to tell a particular story about a particular type of queer legal subject — a criminally-coded Bad Gay Man, one bearing little resemblance to the newly-minted queer legal subjects that have surfaced in law and legal discourse over the past thirty years. Repeatedly referring to him as a "poz vampire", Tansey-Miller told jurors that Boone relied on "sex, his own toxicity and deceit" in order to commit his crimes. She later suggested that Boone was "aroused by and deeply committed to achieving his goal of spreading HIV to his sexual partners". The prosecution, however, was careful to underscore that the prosecution was not targeting Boone because of his sexual orientation, nor because he was HIV-positive, explaining: "This case is not about pointing the finger at someone because of their sexual orientation or

[335] *Ibid* at 141-142.
[336] Bradley Turcotte, "Boone found guilty of attempted murder in HIV trial" *Daily Xtra* (29 October 2012), online: Daily Xtra <www.dailyxtra.com> [Turcotte, "Boone found guilty"].

because they have a terrible and terminal disease."[337] In a new Canadian legal landscape where queer legal subjects are no longer singularly constructed as "the homosexual" or "the transsexual", such a strategy would prove unwise.

To bolster their construction of Boone as a "poz vampire", one who had committed the serious crimes of aggravated sexual assault, attempted murder, and administering a noxious substance, the Crown relied upon a voluminous record of chat logs and text messages that Boone had sent and received between 2009 and 2010. In their view, these often graphic text messages demonstrated that Boone intended to infect others with HIV. In one of the text messages relied upon by Crown lawyer Meaghan Cunningham, for example, Boone wrote: "My DNA is in your veins forever. Whenever I summon you, you must come." In other messages, Boone reportedly told sexual partners that he was "clean", intending to convey the idea that he was HIV-negative, or that he posed no risk because his viral load was "undetectable".[338] The Crown's theory of the case was that, when read together, these text messages demonstrated that Boone did not simply fail to disclose his HIV-positive status during risky sex, namely condomless anal intercourse, but that he had the intent to infect others — this specific intent to infect and kill, the Crown's theory went, moved Boone's conduct from the terrain of aggravated sexual assault to the even more serious offence of attempted murder.

During her closing remarks, Cunningham rejected the suggestion that many of the sexual activities in question posed a low risk of HIV-transmission. In one of the more curiously-reasoned parts of her statement, she stated:

> We all know the chance of being struck by lightning is very small. However, we all get out of the swimming pool and pull our kids off the soccer field when it starts, even though the risk is very, very small. We act because the potential consequence is so severe.[339]

Under this more searching account of disclosure, it would be difficult to imagine a scenario where a person living with HIV would not be legally required to disclose their status prior to engaging in sexual activities.

Over the course of the trial, Boone's defence lawyer unsuccessfully argued that the text messages were best understood as sexual fantasy, rather than as the expression of Boone's

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[337] Megan Gillis, "Steven Boone tried to spread HIV, Crown alleges" *The Belleville Intelligencer* (11 October 2012), online: The Belleville Intelligencer <www.intelligencer.ca>.
[338] Megan Gillis, "Man accused of spreading HIV gave details in online chats, court hears" *Ottawa Sun* (12 October 2012), online: Ottawa Sun <www.lfpress.com>.
[339] Turcotte, "Boone found guilty", *supra*.

intent. During his closing remarks, for example, Carter suggested that the messages were little more than "charged-up sexual talk". To make this argument, Carter pointed to the evidence of one witness, who was already HIV-positive. The two men had met online, often discussing sexual fantasies. When the two met, however, none of the sexual activities took place as described. Accordingly, Carter suggested that the text messages pointed to little more than an active sexual imagination on the part of Boone. Ultimately, the jury disagreed, finding Boone guilty of the attempted murder of three men, three counts of aggravated sexual assault, two counts of administering, and one count of attempting to administer, a noxious substance— his semen.[340] That is, Boone was a Bad Gay Man.

(d) *Habeas corpus* decision – Ontario Superior Court of Justice and Ontario Court of Appeal (2014-2016)

After being placed in indefinite administrative segregation for the better part of four years, Boone brought a *habeas corpus* application in 2014.[341] Dating back to the sixteenth century, the writ of *habeas corpus* permits the court to require that the Crown bring a detained person before it in order to determine whether the deprivation of the person's liberty is unlawful. In contemporary Canadian law, *habeas corpus* finds expression in s. 10(c) of the *Charter*, and is frequently invoked by prisoners seeking to challenge conditions of confinement.[342]

In order to make out a successful *habeas* application, Boone was required to show that there was a deprivation of liberty, and that the deprivation was unlawful.[343] Had the application been successful, the order would have required the Superintendent of the Ottawa-Carleton Detention Centre (OCDC) to remove Boone from administrative segregation and place him in the general population — perhaps most contentiously, removing him from segregation also would have given him access to a cellmate.

Following Boone's transfer back to OCDC in May 2013, after a brief stint at Maplehurst jail, prison administrators immediately placed him into administrative segregation while they "investigated allegations of prior sexual activity by the applicant with other inmates at OCDC". In coming to the conclusion that Boone "engaged in sexual relations with various other inmates in the institution", prison administrators pointed to evidence that Boone had requested condoms

[340] *Ibid*.
[341] *R v Boone,* 2014 ONSC 370 at para 16 [*Boone Habeas 2014*].
[342] For one of the earliest examples of Supreme Court jurisprudence interpreting *habeas corpus* and s. 10(c) of the *Charter*, see *R v Miller*, [1985] 2 SCR 613.
[343] *May v Ferndale Institution,* [2005] 3 SCR 809 at para 74; *Mission Institute v Khela*, 2014 SCC 24 at para 30.

and lubricant from a public health nurse at OCDC on four occasions — these materials are supplied to inmates as a harm reduction strategy designed to combat the spread of HIV and other sexually transmitted infections. As Justice Smith explains, "The Institution does not permit sexual relations between inmates, but the nurses do provide the inmates with condoms and lubricant if requested."[344] Prison administrators concluded that, because Boone had requested safer sex materials on four occasions — materials freely distributed by public health nurses to encourage safer sexual practices, it was "most likely that he was engaged in sexual activities with other inmates".[345]

Beyond the evidence that Boone had requested safer sex materials from public health nurses, prison administrators also pointed to a series of love letters sent between Boone and another inmate, M.D., which "confirmed that there had been consensual sexual relations between the two men in 2012".[346] Given the back-and-forth nature of the letters, administrators could not credibly suggest that the sexual activities in question had been anything other than consensual. Accordingly, they tapped into the deep-seated archetype of the Bad Gay Man, arguing that the letters revealed that Boone is predatory, promiscuous, and pathological. In their estimation, Boone is a "highly manipulative character" because he simultaneously "professed to love" his sexual partner, but also suggested that "no girl would want to be with such a person".[347]

In view of this evidence, Boone made two central arguments in his *habeas* application. He argued that the Superintendent of the OCDC failed to review his segregation every five days as required by section 34(3) of regulations promulgated under the *Ministry of Correctional Services Act*.[348] He also argued that he had been denied procedural fairness because the Superintendent failed to allow him to make submissions and failed to advise him of the reasons for his continued segregation from general population without a cellmate.

At the hearing, prison administrators offered arguments related to both the placement decision and the procedural fairness issue. On the placement decision, the Deputy Superintendent testified that Boone had been placed in segregation to "protect other inmates from his manipulative sexual behavior and possible infection with HIV". Prison administrators argued that they had made the placement decision after becoming "aware of incidents of sexual

[344] *Boone Habeas 2014, supra* at para 16.
[345] *Ibid* at para 17.
[346] *Ibid* at paras 11-12.
[347] *Ibid* at 15.
[348] Regulation 788, RSO 1990, c M-22.

activities between the applicant and other inmates while he was being held at the OCDC." Recognizing that this decision was likely to be criticized as being equal parts homophobic and serophobic, administrators "denied that the applicant's sexual orientation or the fact he is HIV positive was the reason he has been placed in administrative segregation", an argument Justice Smith unequivocally accepted.[349]

Turning to the procedural fairness claim, prison administrators first suggested that Boone had been given an opportunity to make submissions for his prolonged segregation every five days, and had been advised of the reasons for this decision.[350] Moreover, they argued that even if Boone's procedural fairness rights had been breached, the remedy of directing the Superintended to place Boone in the general population with a cellmate would be "inappropriate because it would be very unsafe for a cellmate to be placed with the applicant."[351]

Ultimately, Justice Smith agreed with prison administrators on both the factual issues and the remedy. He did, however, conclude that administrators had failed to comply with principles of procedural fairness. On the factual issue related to Boone's multiple sexual partners, the judge explained that he was "satisfied that the Superintendent was aware that the applicant had been engaged in a sexual relationship with M.D., had heard rumours that the applicant had engaged in sexual activities with other inmates, and was aware that the applicant had previously requested and been provided with condoms and lubricant on four other occasions."[352] As a result, the *habeas* judge held that the Superintendent had "reasonable grounds to believe that the applicant was engaging in sexual activities with other inmates while he was detained at OCDC."[353]

On the administrative law issue, Justice Smith found that the procedure did not comply with the principle of procedural fairness — the administrative segregation form should not have been completed before providing Boone an opportunity to make submissions related to the placement decision every five days, a summary of the submissions should have been recorded, and Boone should have been given reasons for his continued segregation. In addition, Justice Smith found that the reasons for placing Boone in segregation — namely, that there was

[349] *Boone Habeas 2014* at para 6.
[350] *Ibid* at 7.
[351] *Ibid* at 8.
[352] *Ibid* at 18.
[353] *Ibid*.

evidence to suggest he was engaging in consensual sexual relations with other inmates — should have been more detailed.[354]

After finding that the processes failed to comply with the principles of procedural fairness, Justice Smith refused to order the remedy of placing Boone back into general population, reasoning:

> I find that if the applicant is placed with a cellmate there is a very high risk that the applicant would manipulate the cellmate into having sexual intercourse and a high risk that this cellmate would contract HIV putting any such cellmate in a dangerous situation if placed with the applicant.[355]

By invoking the language of manipulation — because there was no evidence to suggest that the sexual relationship was anything other than consensual, we again see the judge constructing Boone as a promiscuous, predatory, pathological Bad Gay Man. This deep-seated figure continues to dwell in society's collective unconscious, and has the capacity to serve as a potent agent in constructing punitive narratives in the courtroom. After constructing Boone as the type of figure capable of seducing other men into having sex with him, as evidenced by a series of love letters, along with condoms and lubricant he requested from public health nurses, Justice Smith has paved a clear analytic path to the finding that Boone ought not to be housed in general population. Rather, Justice Smith concludes that Boone ought to be housed in administrative segregation for an indefinite period of time, with a vague promise on the part of prison administrators to endeavor to provide opportunities for meaningful social interaction.[356]

Boone then took his *habeas* application to the Ontario Court of Appeal, where he was again unsuccessful. Writing for a unanimous Court, Justice Blair begins by briefly reciting the history of the writ of *habeas corpus*. He then notes that there has been "growing recognition over the last half-century that solitary confinement is a very severe form of incarceration, and one that has a lasting psychological impact on prisoners".[357]

Justice Blair then proceeds to signal that he is about to tell a particular type of story about a particular type of queer legal subject — this legal subject is far afield from the respectable images that have surfaced over the past thirty years with the advent of human rights protections, same-sex benefits, and relationship recognition. In the fourth paragraph of the

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[354] *Ibid* at paras 29-31.
[355] *Ibid* at 43.
[356] *Ibid* at 44-46.
[357] *Boone v Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515 [*Boone Habeas Appeal 2014*].

decision, Justice Blair appears to describe Boone as the Bad Gay Man, writing: "The appellant is an HIV-positive inmate with a predisposition towards having sexual relations with other male prisoners — sometimes without their knowledge of his condition, and sometimes with it."[358] In this description, Justice Blair constructs Boone as, to borrow from the Foucaultian analysis developed in earlier chapters of *Sex Crimes*, a homosexual species, one who bears little resemblance to his newly-minted respectable queer counterparts. That is, Justice Blair positions Boone as the type of person who has a "predisposition towards having sexual relations with other male prisoners".

While Justice Blair seems to construct Boone's "predisposition" as an exceptional status at OCDC, the fact that public health nurses freely supply inmates with both condoms and lubricant would seem to suggest that same-sex sexual activities are a regular occurrence within the institution. Rather than being constituted as a so-called situational homosexual, however — one who engages in same-sex sexual activities merely because of the absence of women in the institution, not because of any sort of inner essence of being — Justice Blair understands Boone as what we might call a "true" homosexual. To support this claim, he notes that Boone "even requested specific cellmates"[359] and that "rumours were circulating in the institution that the appellant was engaged sexually with other inmates as well".[360] By pointing to Boone's requests for specific inmates, along with rumours of other sexual encounters, Justice Blair seems to be suggesting that Boone is a Bad Gay Man. That is, Boone is constructed as a queer legal subject who predatorily targets other men, promiscuously engages in sexual activities with multiple partners, and pathologically fails to disclose his HIV-positive status — even when he is not legally required to do so, because of his low viral count and use of condoms, based on the risk-factors developed by the Supreme Court in *Mabior*.[361]

Having positioned Boone as a Bad Gay Man, one who is likely to continue engaging in sexual activities with other men unless he is housed in administrative segregation for an indefinite period of time, Justice Blair has paved a clear path to uphold the decision of Justice Smith not to issue the writ of *habeas corpus* and dismiss the appeal. Downplaying the lack of procedural protections afforded to Boone, Justice Blair explains:

> Prisons are not administrative tribunals and, although inmates are entitled to the benefits of natural justice and administrative fairness, to impose on prison officials the fully

[358] *Ibid* at para 4.
[359] *Ibid* at para 5.
[360] *Ibid* at para 10.
[361] *Mabior*, *supra*.

> panoply of requirements for what is, in effect, an administrative hearing every five days is not realistic, notwithstanding the severe impact of administrative segregation on the inmate.[362]

While the decision is clearly one steeped in deference to the wisdom of prison administrators, something more insidious appears to be undergirding Justice Blair's analysis. In particular, one wonders whether the construction of Boone as a Bad Gay Man made the prospect of keeping him in administrative segregation, based on his requests for condoms and lubricant, along with rumours about multiple sexual partners, more judicially palatable. Indeed, the Supreme Court dismissed Boone's application for leave to appeal in 2014.[363]

(f) Sentencing decision – Ontario Superior Court of Justice (2016)

Following a lengthy process spanning six years from Boone's arrest in 2010, Justice Warkentin finally sentenced Boone in March 2016.[364] In the decision, we again see Boone been constituted as a Bad Gay Man, one who is promiscuous, predatory, and perhaps pathological. Throughout the sentencing decision, Justice Warkentin constructs Boone not as a respectable queer legal subject — the kind seeking protection from the state. Rather, Boone is both implicitly and explicitly constructed as a criminal queer legal subject, one marked by notions of deviance, illness, and contagion. Put differently, Boone dwells in a position far away from the kinds of respectable queer subjects that have surfaced in law and legal discourse over the past thirty years.

Early in the sentencing decision, Justice Warkentin signals that she is about to tell a particular kind of story about a particular kind of archetypal subject, one that continues to dwell in society's collective unconscious. She notes that Boone "used various social media chat rooms to meet and connect with other gay men", going on to suggest that he "presented himself as an individual seeking a relationship or a sexual interaction".[365] After making plans to meet up with the men he went online, she suggests that he "either claimed to be 'clean'; meaning he had no sexually transmitted infections or diseases (STIs or STDs), that he was HIV negative or he did not mention his HIV status."[366] While presenting himself as being "clean" and "seeking a relationship or a sexual interaction", however, Justice Warkentin then zeroes in on how Boone

[362] *Boone Habeas Appeal 2014* at para 55.
[363] *R v Boone*, [2014] SCCA No 430.
[364] *R v Boone*, 2016 ONSC 1626 [*Boone Sentencing Decision*].
[365] *Ibid* at 13.
[366] *Ibid* at 13.

presented his identity in chat rooms for so-called "bug-chasers". She spends several paragraphs delving into the "much more explicit chat rooms" where seemingly perverse, predatory, pathological queer subjects like Boone "discussed their sexual exploits as well as their expectations from sexual liaisons".[367] Rejecting the defence's argument that these chat rooms were in the "nature of sexual fantasy discussions only", Justice Warkentin positioned Boone as a Bad Gay Man, one who engages in non-normative sexual activities far afield from the most respectable queer legal subjects.[368]

Later in the decision, as she is assessing the likelihood Boone — now positioned as a Bad Gay Man — will reoffend, Justice Warkentin relies upon a similar chain of reasoning to the judge who considered Boone's *habeas corpus* application in 2013. While Boone has maintained an anti-retroviral regimen for a period of five years, such that he has an undetectable viral load, she turns her attention to the evidence suggesting that he has continued to engage in sexual activities while in prison. Indeed, to establish this fact, prison administrators adduced evidence that Boone, in a move that would appear to remove his legal duty to disclose his HIV-positive status at all,[369] uses the condoms and lubricant when he engages in consensual sexual activities in prison. Indeed, public health nurses provide these supplies as part of a larger harm reduction strategy designed to combat the spread of HIV and other sexually transmitted infections among people in prisons. Given that Boone has seemingly self-governed his sexuality, such that he now uses condoms and lubricant while maintaining an undetectable viral count, it seems odd that the sentencing judge would use this evidence against him.

Justice Warkentin, however, treats this evidence not as signaling that Boone has started to engage in the regimes of self-governance and actuarial risk imagined by the Supreme Court in *Mabior* but, rather, as signaling that there is a substantial likelihood that he will reoffend. The underlying assumption seems to be that Boone would be less likely to reoffend if he was not engaging in sexual activities at all. She explains:

> I am not persuaded that Mr. Boone's conduct during his incarceration is sufficient to demonstrate that he is not a substantial risk for reoffending upon his release. The evidence about Mr. Boone's incarceration is that he has been kept in a form of solitary confinement and is handed his medication every day, making compliance with taking his medication easy for him.

[367] *Ibid* at 14.
[368] *Ibid* at 18.
[369] *Mabior*, *supra*.

> Mr. Boone has not accepted responsibility for the conduct that has resulted in his incarceration. **The evidence from the correctional facility was that he desires to have intimate relationships with other inmates. This conduct, even with the consent of the other inmates and with his viral load at a low or undetectable measure, does not reassure me that his risk to reoffend is not substantial.**
>
> Similarly, I am not convinced that being compliant with his antiretroviral medication and abstaining from alcohol while incarcerated is a good predictor of what his conduct will be when released.[370]

In this passage, we see the figure of the Bad Gay Man surface in the reasoning of Justice Warkentin — Boone is promiscuous in the sense that he continues to engage in sexual activities, predatory because he seduces or manipulates other men into having sex with him, and pathological because he is HIV-positive. Put differently, Boone is positioned in strikingly similar terms as Klippert[371] — both men were likely to continue engaging in sexual activities with other men and, as a result, ensnared in the repressive aspects of criminal justice.

At least two of the underlying propositions embedded in Justice Warkentin's reasoning on this point require further scrutiny. First, the sentencing judge proceeds from the assumption that, because prison administrators have placed Boone into indefinite administrative segregation, this makes "taking his medication easy for him". Rather than understanding administrative segregation as a troubling and potentially unjustifiable deprivation of liberty, Justice Warkentin seems to use this placement decision as evidence that it is easier for Boone to maintain his medical regime under the watchful eye of prison administrators and medical professionals. Second, she treats the evidence that Boone "desires to have intimate relationships with other inmates" where there is consent, condom use, and an undetectable viral load as "not reassure[ing her] that his risk to reoffend is not substantial." Given that his sexual practices conform with the four corners of the *Mabior* decision, one wonders whether there is something more insidious going on in the reasoning of Justice Warkentin — she appears to have used Boone's queerness and HIV-positive status to discursively constitute him as a criminological figure, one who is likely to continue engaging in promiscuous, predatory, and pathological sex at any given moment.[372] Rather than a new respectable queer legal subject, Boone is positioned as a Bad Gay Man.

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[370] *Boone Sentencing Decision*, *supra* at para 138-140 [emphasis added].
[371] *Klippert*, *supra*.
[372] *Boone Sentencing Decision* at paras 138-140.

Having constructed Boone as a Bad Gay Man, Justice Warkentin paves a clear analytic path to sentencing Boone to 14 years in prison.[373] She also concludes, beyond a reasonable doubt, that Boone poses as "serious risk" of reoffending. Accordingly, she finds Boone to be a long-term offender, and imposes a five-year supervision order on him following his period of incarceration.[374] She also "strongly recommend[s]" the imposition of a number of conditions attached to the long-term supervision order, including the requirement that Boone be required to continue a regime of HIV treatment.[375] She ends the decision by ordering that Boone be placed on the National Sex Offender Registry for life.[376]

Over the course of a process lasting six years from his arrest in 2010, a vast assemblage of actors in the criminal justice system have worked to constitute Boone as a promiscuous, predatory, pathological Bad Gay Man — one who engaged in non-normative sexual practices, described himself as a "poz vampire", and even asked the public health nurse for condoms and lubricant so that he could engage in consensual sexual practices with other men while in prison. For queer legal subjects like Boone, who cannot be readily cast as respectable victims seeking protections from the state, the last thirty years of activism focused on human rights protections, same-sex benefits, and marriage equality have done little to change their positions in law and society. To use the language offered by Valverde, Boone looks much more like figure of "the homosexual" recounted in Chapter 1 of *Sex Crimes* than he does the respectable same-sex couple.[377]

III. THE BAD GAY MAN IN THE HIV NON-DISCLOSURE COURTROOM

Having excavated the figure of the Bad Gay Man from a recent series of HIV non-disclosure cases, I will now begin to grapple with the difficult questions raised when considering who benefits from the continued use of this deep-seated archetype as part of the process of legal storytelling. Recent scholarship in the area of masculinity studies reveals that figures such as the Bad Gay Man ultimately work to maintain a system of heterosexual coherence.[378] Lunny explains:

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[373] *Ibid* at para 145.
[374] *Ibid* at para 142.
[375] *Ibid* at para 149.
[376] *Ibid* at para 153.
[377] Valverde, "A New Entity", *supra*.
[378] For an extended discussion of the emerging literature in the area of masculinity studies, see e.g. Frank Rudy Cooper & Ann C. McGinley, eds., *Masculinities and Law: A Multidimensional Approach* (New York: New York University Press, 2011); Nancy E. Dowd, *The Man Question: Male Privilege and Subordination* (New York: New

> The figure of the hypermasculine homosexual poses a direct threat to masculinity in so far as it is a figure that penetrates…To the male subject who penetrates is conferred masculinity, activity, dominance and power. To the male subject who is penetrated is conferred femininity, passivity, subjugation and powerlessness. In effect, the penetration of a male subject emasculates that very subject. Moreover, the effect of this emasculation signifies that masculine identities are constructed, conferred and precariously unstable. Herein lies the threat to the masculinized subject.[379]

Put differently, the Bad Gay Man has many of the same characteristics as the 'ideal' heterosexual man — he is strong, aggressive, and constantly on the lookout for his next sexual conquest. The problem, however, is that the Bad Gay Man's sexual attraction is misguided. Instead of directing his attention at women, the Bad Gay Man targets other men. By contrast, the respectable queer legal subject, one that surfaces in concert with the introduction of human rights protections, same-sex benefits, and relationship recognition, does not pose the same threat to the coherence of heterosexual masculinity. As a committed, perhaps even married, monogamist, it is not that the respectable queer legal subject is entirely desexualized. Rather, this subject directs its sexual attention at the 'right' target, namely their partner and, by extension, not heterosexual men.

One way we might account for the problem posed by the Bad Gay Man, then, is that he unmasks the contingent nature of male heterosexuality.[380] While male heterosexuality has, in Anglo-American legal discourse, been described in largely essentialist terms, the Bad Gay Man exposes its instable, contingent nature. All that is required to destabilize male heterosexuality, it seems, is a sexual advance from another man. Conversely, the respectable queer legal subject does not threaten to expose the fragile nature of male heterosexuality because, as a committed, perhaps even married, monogamist, he directs his sexuality at the 'right' target. As the foregoing analysis demonstrates, the criminal law ends up playing a central role in maintaining and reconstituting a system of heterosexual masculinity as part of the legal storytelling process.

IV. CONCLUSION: UNDOING THE BAD GAY MAN

York University Press, 2010); Michael S. Kimmel, "Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity" in *The Gender of Desire: Essays on Male Sexuality*, Michael S. Kimmel, ed. (Albany: State University of New York Press, 2005) at 23; Michael S. Kimmel, *Manhood in America: A Cultural History*, 3rd ed. (Oxford: Oxford University Press, 2011); and Camille A. Nelson, "Lyrical Assault: Dancehall Versus the Cultural Imperialism of the North-West" (2008) 17 S. Cal. Interdis. L.J. 231.

[379] Lunny, "Provocation," *supra* at 316.

[380] For a discussion of the instability of male heterosexuality within Western thought, see e.g. Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

Through a careful reading of a series of contemporary HIV non-disclosure decisions from Ottawa, this chapter has demonstrated that the criminal justice system reproduces two poles of queer subjectivity, one marked by earlier notions of criminality and the other marked by the new version of respectability. In the face of a series of punitive sanctions lodged against people living with HIV, the response from a number of legal reformers has been that HIV non-disclosure should not be targeted by the criminal law. As a result, they have argued that the fraud provision of section 265 of the *Criminal Code* should either by removed altogether, or that the Supreme Court should reinterpret the existing provisions in a way that no longer criminalizes people living with HIV who fail to disclose their status.[381] If we accept that the relationship between law and society is constitutive, one where society constitutes legal discourse and legal discourse constitutes society, then it becomes apparent that reforming what the law says about a particular group of people will not be enough to undo figures such as the Bad Gay Man in Canadian courtrooms. Rather, this figure must be undone in all facets of social life — including by the normatively privileged queer legal subjects who no longer find themselves ensnared in the repressive aspects of criminal justice.

This chapter has demonstrated that the archetype of the Bad Gay Man is simply one device in the toolkit used by actors in the criminal justice system, as well as the larger society the system reflects, to tell particular stories about queers who reject or complicate the narratives of coupled, respectable queer legal subjects that have emerged over the past thirty years in Canadian law and legal discourse. Indeed, this recent series of HIV non-disclosure decisions from Ottawa demonstrates the perils of narrowly framing queer subjectivity in terms of coupled respectability. Those who cannot or do not want to be constituted as deserving, respectable queer legal subjects in need of human rights protections, same-sex benefits, and relationship recognition, including those accused of failing to disclose their HIV-positive status prior to engaging in sexual activities, are pushed to the outskirts of legal intelligibility in favour of more promising political subjects.

[381] See e.g. Elliott, *supra*.

Chapter 4
Prisons and Regimes of Segregation

> The prison environment can, in some ways, provide an even better real life experience than can the outside community…Inmates are under much closer observation in prison, and thus in a better position to be assessed in relation to the consistency and spontaneity of the manifestations of their male or female gender identity.
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> Canadian Human Rights Tribunal, *Kavanagh v Canada* (2001)

INTRODUCTION

Having moved from policing on the street to constructing narratives of queerness in the courtroom, *Sex Crimes* now arrives at its last stop in the criminal justice process: The prison. As sites where subjects are invariably segregated on the basis of sex, prisons are disciplinary institutions of the modern era. In light of the rigid sex-segregation of modern prisons, the central goal of this chapter is to move away from policing and the courtroom, turning *Sex Crimes*' attention to the historical and contemporary practices of the administration of punishment. In doing so, this chapter aims to explore the underlying norms and logics that permeate prison administration in Canada, analyzing the ways in which prisons participate in a larger project of drawing lines of inclusion and exclusion on the basis of gender and sexuality.[382]

This chapter argues that, by segregating people on the basis of the sex assigned to them at birth and refusing to recognize more complicated conceptions of gender, such as an individual's legal sex or their self-identification, the prison becomes a disciplinary tool, one that breathes new life into strict, essentialist, binary conceptions of gender. At the same time, the practice of segregating people in prisons on the basis of sex also casts the prison as a site where 'normal' heterosexual encounters are, perhaps with the exception of occasional conjugal visits, off-limits. What remains in prisons, then, is non-normative, homosexual sex — that is, sex that dwells in the shadow of criminal punishment. In this way, prison sex is simultaneously cast as non-normative and criminal.[383] As historian Regina Kunzel explains, "Much of what was at

[382] See e.g. Dean Spade, *Normal Life, supra;* Eric A. Stanley & Nat Smith, eds. *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Edinburgh, Oakland, Baltimore: AK Press, 2011); Mogul et al, *Queer (In)Justice, supra.*

[383] Mogul et al., *supra* at 95.

stake in the anxiety over homosexuality in prison concern[s] its potential to reveal heterosexual identity as fragile, unstable, and, itself situational."[384]

To examine the underlying norms and logics of gender and sexuality at work within the prison itself, along with their attendant representations in law and culture, this chapter is organized in four parts. **Section I** briefly traces the history of sex-segregation in Anglo-American prisons, with a particular focus on the Canadian regime. **Section II** sketches the contemporary legal framework in federal prisons that determines whether inmates will be placed in a men's facility or a women's facility. **Section III** surveys the patchwork, often-piecemeal contemporary legal framework that exists in provincial and territorial jails. Having analyzed the ways in which underlying norms and logics of gender and sexuality are constituted in Canadian prisons, **Section IV** then considers how these systems might be undone.

Methodologically speaking, this chapter draws on both document analysis and open-ended interviews. The chapter relies upon historical materials related to the sex-segregation and sexuality-segregation in Anglo-American prisons, along with contemporary prison policies and jurisprudence. The chapter supplements this analysis with open-ended interviews with representatives from community organizations and lawyers, which were conducted between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

Before delving further into this chapter's study of the norms and logics of gender and sexuality within carceral systems, a general comment about the number of trans people currently incarcerated within Canadian prisons is in order. As one might expect, there are numerous methodological difficulties associated with determining the precise number of trans people currently in the Canadian system. For example, it is unclear whether the Correctional Service of Canada (CSC), the government agency responsible for administering Canada's federal prisons, should only count those who have requested trans-related medical treatment while in prison, or whether it should also count the number of people who self-identify as trans regardless of whether they have sought out medical intervention. While the CSC does not publish statistics about the precise number of trans prisoners within the federal system, an expert witness who testified on behalf of the CSC in a landmark 2001 human rights complaint brought by a trans woman named Synthia Kavanagh[385] estimated that the number of trans women who have not

[384] Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago, University of Chicago Press, 2010) at 8-9.

[385] The expert is Jane Laishes, a Senior Project Manager for Mental Health at the CSC who manages a group of psychologists and social workers. Ms. Laishes is responsible for policy development and consults on complex

"completed" sex reassignment surgery — and are thus housed in men's institutions — was approximately 23 out of a total of 12,500 inmates.[386] In arriving at this number, the witness did not include the number of trans women who had "completed" sex reassignment surgery, those who might have made the decision not to disclose their identity while in prison, or those who might self-identify as trans without seeking out medical care.

There are similar methodological issues in determining the precise number of trans people in provincial and territorial correctional facilities in Canada. My correspondence with Ontario's Ministry of Community Safety and Correctional Services revealed that, as of June 11, 2014, 45 out of the 818,911 discrete client profiles in their inmate database had "transgender alert(s) present."[387] Again, it is unclear if, from a methodological standpoint, only those who have sought out trans-related medical care while in the Ontario correctional system are captured by these statistics in Canada's largest province. No other provinces or territories in Canada appear to keep similar types of statistics about the number of trans inmates.

The work of Trans PULSE, a research project funded by the Canadian Institutes of Health Research (CIHR), provides further empirical insight into the experiences of trans people in Canadian prisons. Between 2009-2010, Trans PULSE surveyed 433 trans people age 16 or older who lived, worked, or received health care in Ontario. The study asked participants to report whether they had "spent any time in prison while presenting in their felt gender". Of the 407 participants who answered the question, 26 did so affirmatively.[388] While this is an admittedly small sample, one where few definitive conclusions can be drawn, this appears to be the only quantitative study to date examining the experiences of trans people in correctional facilities in Canada.

Of the 26 respondents who reported having been in prison while presenting in their felt gender, two indicated that they had served time in federal prison, 18 indicated that they had served time in provincial prison, and two indicated that they had served time in both provincial and federal prisons. Nine respondents indicated that they had been in prison within the past year.

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mental health cases. During her career with the CSC, Ms. Laishes has been involved in the development of the CSC's policy dealing with trans inmates. See *Kavanagh v Canada (Attorney General)* (2001), 41 CHRR 119 [*Kavanagh*] at para. 29.

[386] The witness, however, did not specify the convictions for these 23 inmates. Empirical research, focusing exclusively on the Canadian experience, is required to assess whether the crimes trans people commit appear to differ from distributions within the general population.

[387] Email to the author from Ontario's Ministry of Community Safety and Correctional Services dated January 24, 2014.

[388] Trans PULSE, "Joint Effort: Prison Experiences of Trans PULSE Participants and Recommendations for Change" (Trans PULSE E-Bulletin, Volume 3, Issue 3, April 22, 2013).

The study also found that two-thirds of the respondents reported that they "usually did not feel safe while in prison". In addition, two-thirds reported experiencing hostility or verbal harassment, and about one-third had experienced physical violence they attributed to their trans identity. 61% of respondents indicated that they had been placed in a prison that did not accord with their felt gender, some or all of the time. At the time they completed the survey, most of the 23 respondents were trans women over the age of 25 years old who had at least some post-secondary education, were living in poverty, and had personal incomes below $15,000 per year. Almost half of the respondents indicated that they had ever done sex work, with similar numbers indicating that they were homeless or precariously housed.[389]

Even if we accept that, as a result of methodological difficulties, there may be larger numbers of trans people than prison administrators or research organizations such as Trans PULSE can accurately capture, this is an admittedly small population. That said, trans people are a population that experiences high rates of discrimination, harassment, and violence within a rigidly segregated carceral system. As Spade persuasively argues, the relatively small size of the trans population in prison should not undermine the profound importance of issues of gender and sexuality that permeate carceral logics and settings.[390]

I. A BRIEF HISTORY OF SEX- AND SEXUALITY-SEGREGATION IN ANGLO-AMERICAN PRISONS

(i) Sex-segregation in Anglo-American prisons

In contemporary Anglo-American society, we tend to assume that prisons have always been segregated on the basis of sex. We also tend to assume that the existence of men's prisons and women's prisons are little more than an unremarkable fact of modern life.[391] An examination of carceral histories, however, quickly unravels this assumption, instead highlighting the historically contingent nature of the now seemingly axiomatic, well-established practice of segregating inmates on the basis of sex. The work of Elise Chenier, for example, traces the historical development of sex-segregation in Anglo-American prisons. She finds that most prisons were not segregated until the late nineteenth century. When prisons did become segregated, it was not always on the basis of sex. Rather, Chenier explains:

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[389] Trans PULSE, "Joint Effort: Prison Experiences of Trans PULSE Participants and Recommendations for Change" (Trans PULSE E-Bulletin, Volume 3, Issue 3, April 22, 2013).
[390] Spade, *Normal Life, supra*; and Stanley & Smith, *supra*.
[391] Foucault, *Discipline and Punish*, *supra*.

> In the late nineteenth century, social reformers' concern with the corrupting influence of degenerate inmates over less dissolute prisoners led to demands for the segregation of different types of inmates. By the early twentieth century, most prisons and courts were beginning to separate the sane from the insane, women from men, the merely poor from the criminal, and the children from adults. However, while systems of classification were aspired to, rarely were they fully implemented.[392]

This account demonstrates that, while we may be tempted to view sex-segregated prisons as self-evident, they are actually historically specific inventions of the modern era. To call upon the language of Foucault, they invariably become sites of correct training — that is, hierarchical observation, normalizing judgement, and the examination.[393] As spaces that rigidly segregate inmates of the basis of sex — with either the stated or unstated goal of curtailing certain kinds of 'normal' heterosexual activities — the prison becomes a site where underlying norms and logics of gender and sexuality are constituted, but where these norms and logics also have the capacity to be refashioned.

In Canada, the federal government did not have a freestanding prison for women until 1934. As Justice Louise Arbour explains in the *Inquiry Into Certain Events At the Prison for Women in Kingston*, "The history of Canada's treatment of women prisoners has been described as an amalgam of: stereotypical views of women; neglect; outright barbarism and well-meaning paternalism."[394] Before the Prison for Women (P4W) opened in Kingston, Ontario in 1934, women were housed with their male counterparts in the Kingston Penitentiary, an institution that was originally known simply as the Provincial Penitentiary. The first three women arrived at the Provincial Penitentiary in 1835, and were initially housed in the prison's hospital.[395] Within the Provincial Penitentiary, women regularly encountered male prisoners during their daily activities, and were often required to work in the kitchen or the laundry room. In addition, prison wardens occasionally employed matrons to manage the relatively small numbers of women in the institution.[396] In 1839, prison administrators moved the women to a section of the

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[392] Chenier, *supra* at 70.
[393] Foucault, *Discipline and Punish*, *supra* at 170-194.
[394] Louise Arbour, *Commission of inquiry into certain events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) [*Arbour Report*].
[395] The legislation establishing the Provincial Penitentiary is *An Act to Provide for the Maintenance by the Government of the Provincial Penitentiary,* [1834], 4 Will. IV, c. 37. Drawing upon the language of the *English Penitentiary Act* of 1779, the Preamble explained the rationale behind opening the prison in the following terms:

> If many offenders convicted of crimes were ordered to solitary imprisonment, accompanied by well-regulated labour and religious instruction, it might be the means under providence, not only of deterring others from the commission of like crimes, but also of reforming the individuals, and inuring them to habits of industry.

[396] Arbour, *supra* at 127.

North Wing of the Provincial Penitentiary, making it the first prison for women in Canada, albeit a somewhat haphazard one. Once the women moved to the North Wing, they interacted far less with their male counterparts than they had in the early years of the Provincial Penitentiary.

As one might expect, conditions in the Provincial Penitentiary were abysmal. As a result, in 1848, the government established the Brown Commission to investigate a number of controversial practices of the institution, perhaps most notably growing public anger about the reported practice of flogging women and children. Beyond condemning the practices of the prison's first warden,[397] the Brown Commission also recommended that the government construct a separate women's prison. For sixty-five years, however, this recommendation would remain almost entirely unanswered.[398] At the time of Canada's Confederation in 1867, there were approximately sixty women housed in the North Wing of the Provincial Penitentiary. The federal government assumed jurisdiction of the Provincial Penitentiary at Confederation, eventually renaming it the Kingston Penitentiary.

In 1913, the federal government made the decision to build a women's prison within Kingston Penitentiary.[399] The *Arbour Report* notes that two commissions — the Briggar, Nickle and Draper Commission and the Nickle Commission — were both instrumental in the federal government's ultimate decision to build a separate women's prison. In contrast, the Macdonnell Commission recommended that, rather than being housed centrally in Kingston, women should be moved closer to their homes and placed under the jurisdiction of the provinces. The federal government ignored the Macdonnell Commission's recommendation, ultimately opening the first freestanding federal prison for women in 1934 and forcing incarcerated women throughout the country to be moved to Kingston.[400] As this short account demonstrates, while the history of federal prisons in Canada is largely an uneven and perhaps even accidental one, men and women were not so rigidly segregated prior to the opening of P4W.[401] As an institution, the prison did not have an essential, gendered character.

(ii) Sexuality-segregation in Anglo-American prisons

[397] Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) at 28-29.
[398] Arbour, supra at 127.
[399] Arbour Report, *supra* at 127.
[400] *Ibid* at 127-128.
[401] Corrections Service of Canada, "Women in Prison in Canada: the Early Years", online: <http://www.csc-scc.gc.ca>.

Beyond the uneven history of sex-segregation in Canadian prisons, another striking example that highlights the different ways that prisons have long participated in larger systems of gender and sexuality is found in the practice of segregating men who displayed signs of effeminacy from the general adult male prison population. Like the protracted and uneven account of P4W, this forgotten history again suggests that it is not inevitable that prisons came to be segregated solely on the basis of sex. At a conceptual level, this history also underscores the extent to which the prison has played a role in constituting particular notions of gender and sexuality. Prisons in both Canada and the United States dedicated special wings and cellblocks to effeminate men in prisons, which came to be known variously as "Lover's Lane", "Queen's Row", and "Gunzil's Alley".[402] In addition, prison administrators segregated so-called "true homosexuals," a term used to describe effeminate men who had sex with other men outside the carceral context, from their heterosexual counterparts. Practices of sexuality-segregation served both a protective and preventative function. As Chenier explains, "Celled apart from the main inmate population, segregation ostensibly prevented them from engaging in wanted sexual contact while at the same time protecting them from unwanted advances."[403]

In the contemporary era, we see the reemergence of the longstanding logic of sexuality-segregation coming to express itself in the creation of K6G, a unit created to house queer inmates in the Los Angeles County Jail.[404] K6G opened a decade after the creation of a similar unit at Rikers Island in New York City, which segregated queer inmates in pretrial detention starting in the late 1970s until its closure in 2005.[405] K6G formally opened at the Los Angeles County Jail in 1985 after the American Civil Liberties Union (ACLU) of Southern California launched a lawsuit on behalf of queer men in the jail. Among other things, the ACLU's lawsuit alleged that prison administrators failed to keep "homosexual inmates" in their custody safe — inmates regularly experienced violence, discrimination, harassment, and sexual assault at the hands of both other inmates and prison guards. Ultimately, the Los Angeles County Jail and the ACLU entered into a settlement agreement, with the jail agreeing to institute a series of safety measures to better ensure the safety of queer inmates. The centerpiece of the settlement was the

[402] Chenier, *supra* at 71.
[403] *Ibid* at 71-72.
[404] For further discussion in the K6G Unit in Los Angeles, see e.g. Russell K Robinson, "Masculinity as Prison: Sexual Identity, Race, and Incarceration" (2011) 99 Cal Law Rev 1309 [Robinson, "Masculinity as Prison"]; Sharon Dolovich, "Strategic Segregation in the Modern Prison" (2011) 48 Am Crim L Rev 1; and Dean Spade, "The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's 'Masculinity as Prison'" (2012) 3 Cal Law Rev Circuit 184 at 184 [Spade, "The Only Way"].
[405] Los Angeles Times, "Closure of Gay Housing Unit at Rikers Draws Complaints" *Los Angeles* (30 December 2015) online: Los Angeles Times < http://articles.latimes.com>.

formal establishment of the K6G unit, a unit exclusively for what we might call 'truly' homosexual prisoners.[406]

In determining who constitutes a 'true' homosexual for the purposes of placement and admission within K6G, we see the prison again serving as a site where norms and logics of gender and sexuality are constituted. Put differently, the prison operates as a space that draws lines of inclusion and exclusion around what constitutes 'real' queer subjectivity. The consent decree giving rise to the settlement between the ACLU and the jail establishes a two-part classification process required to gain entry into K6G. At the first step in the process, all inmates in the jail are asked "if they are homosexual."[407] Inmates who answer affirmatively are then immediately transferred to segregated housing units. Self-identification as a homosexual, however, is not the end of the story. In order to gain access into K6G, two classification staff arrange a meeting, peering into the inmate's soul to look for clues that will help them ascertain the 'truth' of the inmate's sexuality.

While the administrators have not been given any instructions on how they might ascertain whether a person is a 'true' homosexual, one administrator, a heterosexual man, proudly described himself as being "self taught" in what we might call the art of queer culture.[408] In practice, prison administrators determine suitably for placement in K6G after asking prisoners a series of questions about their familiarity with gay subcultural terminology, including knowledge of figures such as Judy Garland, along with their familiarity with well-known gathering places in West Hollywood, a neighborhood frequented by mostly affluent, white queer men.[409] Once admitted into K6G, prisoners wear special powder blue uniforms, which again mark them as being separate and apart from their counterparts. In contrast, inmates in the other units of the jail — those who are presumably heterosexual, or at least not fluent in the language of queer culture — wear dark blue uniforms.[410]

In examining the underlying norms and logics embedded in the screening procedure, we again see prison administrators invoking and re-inscribing particular versions of queer subjectivity. The question of whether an individual is suitable for K6G appears to be designed to determine whether inmates are practicing homosexuals outside the four walls of the prison. As a

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[406] Sharon Dolovich, "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail" (2012) 102:4 Journal of Criminal Law and Criminology 965 at 978 [Dolovich, "Two Models"].
[407] Stipulation and Request for Dismissed Order at 4. *Robertston v Block*, No 82-1442 (CD Cal July 17, 1985).
[408] Robinson, "Masculinity as Prison", *supra* at 1324.
[409] Spade, "The Only Way", *supra* at 184.
[410] *Ibid*.

result, the screening procedure reflects an essentialist theory of sexuality — there really are 'true' homosexuals, those who form bonds of sexuality, intimacy, and kinship with other men in their everyday, non-carceral lives. These men are wholly different from so-called 'situational' homosexuals — those who are heterosexual in the outside world but who have sex with other men because 'normal' sexual encounters are impossible. 'Situational' homosexuals, we learn from the K6G screening mechanisms, have sex with other men not because they really want to, but because there are no other options available to them.[411] As Russell Robinson explains, "The Jail's K6G Unit provides a striking case study in how law and society mutually construct and enforce dominant notions of male identities, including gay identity. Moreover, K6G shows that these norms regulate men of various sexual orientations, inside and outside of jail, channeling them into preordained identities."[412]

Like the uneven history of Anglo-American prison administrators segregating inmates on the basis of sex, the practice of segregating inmates on the basis of sexuality underscores a key point: There is no essential character to the prison. By briefly exploring this history, the goal of this section of *Sex Crimes* is not to suggest that it would be possible, nor even necessarily beneficial, to return to earlier prison practices in Canada. Rather, the goal in examining this history is to highlight the contingent nature of sex- and sexuality-segregated prisons and, in the process, to destabilize largely essentialist accounts of how prisons are *necessarily* structured today. In the contemporary era, it is not inevitable that Canadian prisons are — with the exception of risk assessments made by prison administrators once inmates are already placed in men's facilities or a women's facilities — only segregated on the basis of sex. As an institution, the prison becomes a disciplinary site in Anglo-American law and legal discourse where norms and logics of gender and sexuality are constituted. As the chapter will explain below, however, these norms and logics are increasingly becoming sites of contestation.

II. CONTEMPORARY LEGAL FRAMEWORK: FEDERAL PRISONS

Having briefly analyzed the uneven history of sex- and sexuality-segregated prisons in Anglo-American jurisdictions, the chapter will now sketch the contemporary legal framework that determines whether an inmate will be placed in a men's facility or a women's facility within Canada's federal system. Under Canada's *Constitution Act, 1867*,[413] inmates are housed in

[411] Dolovich, "Two Models", *supra* at 978-979.
[412] Robinson, "Masculinity as Prison", *supra* at 1313.
[413] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

federal institutions if they have been sentenced to two or more years in prison. Inmates serving sentences of less than two years are placed in provincial and territorial institutions. This chapter's account of Canada's federal system is organized into three parts. First, it describes the era before the groundbreaking 2001 human rights decision in *Kavanagh*, where the CSC had a policy of 'freezing' trans people at their stage of transition when they first entered the prison system. Second, it examines the *Kavanagh* decision itself, which held that the former policy constituted discrimination on the basis of sex and disability. Third, it analyzes the post-*Kavanagh* era, where the CSC created a new policy allowing trans people who had completed a 'real life' test — where they lived outside the prison in their gender for a period of one to two years — to qualify for sex reassignment surgery and then be transferred to a facility that accorded with their gender identity.

(a) The Pre-*Kavanagh* Era

In *Prisoner of Gender: A Transsexual and the System*,[414] Katherine Johnson recounts her thirty years as a trans woman in Canada's federal prison system. Her descriptions of the federal system — where she was housed starting in the 1960s and ending in the early 1990s — provide an unprecedented, first-hand window into the experiences of trans women in Canadian prisons.

After being placed in foster care at the age of ten, Johnson ran away from home and soon after started committing petty thefts. She was eventually caught stealing and, as a result, was sent to Brannan Lake Correctional School near Nanaimo, British Columbia at the age of 11.[415] After repeatedly coming into conflict with the criminal justice system over the next few years, she was convicted of armed robbery and admitted into the British Columbia Penitentiary in New Westminster, a federal facility, at the age of 20.[416] From an early age, Johnson describes identifying as a woman, a fact she repeatedly communicated to prison administrators and physicians at the British Columbia Penitentiary. As she had not undergone sex reassignment surgery at the time of her admission to the British Columbia Penitentiary in 1968, however, administrators deemed Johnson to be male for admission and placement purposes.

While in prison, Johnson describes experiencing violence, discrimination, and harassment as a result of her gender identity and gender expression. In some instances, she

[414] *Ibid*.
[415] Katherine Johnson & Stephanie Castle, *Prisoner of Gender: A Transsexual and the System* (Vancouver: Perceptions Press, 1997) at 10-11.
[416] *Ibid* at 17.

would decide to take what is colloquially in prison as a "husband"— a stronger, more dominant inmate who would agree to protect her physical safety in exchange for unlimited sexual encounters. Johnson's only alternative to taking a husband in prison was to be placed in solitary confinement, where she reports spending the better part of a decade. She starkly describes her experiences within a rigidly segregated prison system in the following terms: "Aside from injuries self-inflicted from suicide attempts and injuries occurring from beatings and gang rapes, my general health was good. The one thing which maintained a constant presence was my ever-present transsexualism."[417]

After encountering prison administrators and physicians who failed to recognize her identity as a trans woman, Johnson felt she had no choice but to castrate herself. She explains,

> This was in no way a suicide attempt, but I had to get someone's meaningful attention. I did the deed with the aid of a suitable tourniquet, a knife which I had managed to sterilise and then with surgical precision carefully cut through the scrotum from bottom to top. I got dressed having used a towel folded and worn through and under the crotch to absorb blood, and then walked to the front of the range and flushed the two testicles down the toilet, thinking to myself that I did not want prison staff to find them and try to reattach them in some way![418]

Following this incident, Johnson notes that prison administrators and physicians started to take her gender identity and gender expression more seriously. The institution's psychiatrist, for example, arranged for Johnson to have a series of meetings with two specialists who would later go on to found the Vancouver Hospital Gender Dysphoria Clinic.[419] Despite the promise of these initial meetings, however, Johnson continued to encounter physicians within the prison who either simply refused, or were reluctant, to provide her with gender-affirming healthcare, such as hormones treatments.

With very limited and uneven access to gender-affirming healthcare, and continuing to experience violence, discrimination, and harassment at the hands of inmates and guards, Johnson started a letter writing campaign to senior officials within the CSC beginning in the early 1980s. Somewhat fortuitously, she wrote to the Honourable Robert Kaplan, who served as Canada's Solicitor General from 1980-1984. According to Johnson, Kaplan sent her a reply, attaching a letter he sent to the Director General of Health Care for Corrections Canada. The Director General of Health Care had previously indicated to Johnson that there was no policy related to the treatment of trans people in federal custody. In his letter to the Director General of

[417] *Ibid* at 22.
[418] *Ibid* at 47.
[419] *Ibid* at 49.

Heath Care, Kaplan wrote: "If you have transsexuals in prison, then there must be a policy formulated in regard to the treatment of transsexuals."[420]

After being reprimanded by Kaplan in his official capacity as Solicitor General, the CSC began to study the issue of gender identity, a process that ultimately cumulated in a report that made three central recommendations. First, the report recommended that no form of sex reassignment surgery be initiated while inmates were incarcerated. Second, it suggested that inmates who had already started taking hormone therapy prior to being incarcerated should be dealt with on an individual, case-by-case basis.[421] Third, the report recommended that sex reassignment surgery should only be permitted near the end of an inmate's sentence, in anticipation for release back into the public.

After receiving the report, the CSC issued its first trans inmate policy in 1981. The first iteration of the policy mandated that each trans person should be dealt with on an individual, case-by-case basis. Further, the policy stipulated that sex reassignment surgery should not be initiated while an inmate was incarcerated. Physicians could, however, administer hormones to trans inmates who were already being treated for Gender Identity Disorder at the time of incarceration — but only if it appeared that they would seek out sex reassignment surgery after being released from prison.[422] Over time, however, the policy became a moving target, the CSC would commission a new report and then issue a slightly revised policy.[423]

In the same year, for reasons that are again entirely unclear, the CSC requested another report. This report recommended that trans inmates should be 'frozen' at the stage of feminization or masculinization they were at when they were first incarcerated. It further recommended that administrates make decisions about where inmates should be placed solely on the appearance of the inmate's genitals. The report also explained that hormone treatment could be provided to inmates, but clarified that sex reassignment surgery would not be performed during an individual's period of incarceration.[424]

In 1987, again for reasons that are quite opaque, the CSC revised its policy, making it even more restrictive. The 1987 version permitted prison officials to administer hormones to

[420] *Ibid* at 53.
[421] *Kavanagh*, *supra* at para 30.
[422] *Ibid* at para 31.
[423] *Ibid*.
[424] *Ibid* at para 32.

trans inmates only in the nine-month period leading up to their release. The policy was silent about the availability of sex reassignment surgery in prison.[425]

Five years later, the CSC commissioned yet another report, again for reasons that are unclear based on the available historical records. The report recommended that trans inmates not receive any medical treatment related to their gender identity and gender expression within the federal prison system. While the report did not elaborate on this point, it suggested that the behavioural results of treatment, including the use of hormone therapies, might cause difficulties in managing trans people in custody. The same year, the CSC consulted with several other experts in the field. After the consultation period ended, the CSC again revised its policy in 1993 to permit hormone therapy throughout the entire period of incarceration. For reasons that are again uncertain, the 1993 policy also permitted "sexual reconstructive surgery", a term that had never appeared in earlier iterations of the policy, nor in the medical literature. Even more strangely, the new policy made no express reference to "sex reassignment surgery" at all. Two years later, the CSC revised this policy to expressly permit "sex reassignment surgery" with the approval of the Regional Deputy Commissioner and the Commissioner of the CSC.[426]

The CSC again amended its policy in 1997.[427] In essence, the policy would 'freeze' trans people at the stage they were at when they first entered the prison system. For example, trans people who were not being supervised by a certified gender specialist before they were imprisoned were unable to access gender-affirming treatment such as counseling and hormone therapy. The relevant sections of the policy provided:

> **Gender Dysphoria**
>
> 29. If an inmate has been on hormones prescribed through a recognized gender program clinic prior to incarceration, they may be continued under the following conditions:
>
> > a) that the inmate be referred to and reassessed by a recognized gender assessment clinic; and
> > b) that continuation of hormone therapy is recommended by the gender assessment clinic.
>
> 30. Unless sex reassignment surgery has been completed, male inmates shall be held in male institutions.

[425] *Ibid* at para 33.
[426] *Ibid* at para. 34.
[427] Corrections Service of Canada, Health Service Policy, Directive 800 (1997).

31. Sex reassignment surgery will not be considered during the inmate's incarceration.[428]

Section 30 of the policy made it clear that, unless sex reassignment surgery had been "completed" prior to incarceration, trans women would be indefinitely held in men's institutions. In essence, this policy of "completion" required trans women who had penises to be housed with male inmates, regardless of their gender identity or gender expression. Further, s. 31 of the policy made it impossible for inmates who had taken steps to undergo sex reassignment surgery before becoming incarcerated to "complete" the process while in prison. As a result, trans women who had not undergone sex reassignment surgery before being incarcerated were not permitted to be housed in facilities that accorded with their gender identity and gender expression. Rather, they were housed indefinitely with men, making them uniquely vulnerable to discrimination, harassment, and violence.

(b) The *Kavanagh* Decision

While the often-overlooked advocacy of Katherine Johnson was central in compelling the CSC to create its first set of trans-related policies in the early 1980s, trans women continued to experience discrimination, harassment, and violence within a carceral system predicated on sharp, essentialist gender binaries. In essence, the story of Synthia Kavanagh, a trans woman who initiated a landmark human rights complaint against the CSC in the early 1990s, picks up where Johnson's account leaves off.

Like Johnson, Kavanagh's story is one of being caught in a prison system that was never designed to accommodate her. Doctors identified Kavanagh as male at birth, but she self-identified and lived as a woman from the age of 13. She legally changed her name at 19 and, soon after, doctors diagnosed her with Gender Identity Disorder. By the time she was sentenced to life imprisonment for second-degree murder in 1989,[429] she had already commenced hormone therapy treatment but had not "completed" sex reassignment surgery. As a result, she had an intact penis. The judge in her murder case recommended that she be allowed to serve her sentence in a prison for women. He explained that "simple humanity would justify making such arrangements as will accommodate [her self-identification as a woman]".[430] In the face of this

[428] There was no comparable provision in the CSC policy dealing with the placement of trans men. However, trans men appear to have been held in women's institutions.
[429] *R v Kavanagh*, [1989] OJ No 2620.
[430] *Ibid*.

recommendation, however, the CSC denied Kavanagh's repeated requests to be transferred to a women's prison.

While being housed in a men's institution, Kavanagh found it difficult to access the gender-affirming treatment she required and was also sexually assaulted on a number of occasions by male prisoners. Like Johnson, Kavanagh even attempted to cut off her own penis in desperation, hoping that it would force administrators to recognize her gender identity and transfer her to a women's facility. Shortly after cutting off her own penis, Kavanagh submitted three complaints to the Canadian Human Rights Commission in 1993 alleging discrimination on the basis of sex and disability — gender identity and gender expression had not yet been added as protected categories of discrimination. In May 2016, however, the new Liberal government introduced legislation adding gender identity and gender expression as expressly protected grounds of discrimination in Canada's federal human rights system.[431]

In her human rights complaint, Kavanagh sought three things: reinstatement of her hormone therapy, consideration for sex reassignment surgery, and accommodation in a correctional facility for women. Before her case reached the Canadian Human Rights Tribunal, however, the CSC entered into a settlement agreement with Kavanagh. The settlement allowed her to undergo the surgery at her own expense in 2000, and then permitted her to transfer to a women's facility. Given the public interest issues at stake, however, the Tribunal decided to hear the case, ultimately ordering the CSC to develop a new sex reassignment policy within six months of the decision.[432]

Kavanagh's claim was successful in part. In terms of Kavanagh's challenge to the placement of trans people in prison who had not "completed" sex reassignment surgery, the Tribunal first held that the CSC's policy requiring that prisoners with penises be held in male institutions clearly had an adverse, differential effect on trans women. Non-trans inmates are placed in prisons that accord with both their sex and their gender. Trans inmates, however, are placed in prisons according to their sex, but not their gender. As such, this policy constituted *prima facie* discrimination on the basis of both sex and disability.[433]

Having found a *prima facie* case of discrimination on the basis of the enumerated categories of sex and disability, the onus then shifted to the CSC to establish that it had a *bona*

[431] For further discussion on this recent legal development, see e.g. Kyle Kirkup, "A new bill is a good start. But gay and trans people need much more" *The Globe and Mail* (17 May 2016), online: The Globe and Mail <www.theglobeandmail.com>.
[432] *Kavanagh, supra.*
[433] *Ibid* at para 141.

fide justification for its trans-exclusionary placement policy. Under Canadian human rights law, there are three elements that must be established in order to demonstrate the existence of a *bona fide* justification — rational connection, good faith, and undue hardship. Counsel for Kavanagh conceded that there was a rational connection between the placement of trans inmates and the overarching goal of promoting safety in the prison population[434] and further conceded that there was no evidence to suggest that the CSC failed to act in good faith.[435]

As such, the central issue for the Tribunal was the third branch of the analytic inquiry, which focuses on whether the CSC's policy is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.[436] After balancing the safety concerns expressed by trans women such as Kavanagh against the impressionistic safety concerns that prison administrators had about cisgender women, the Tribunal concluded that placing trans people in prisons in accordance with their gender identity and gender expression constituted undue hardship.[437] The Tribunal reasoned: "Having regard to the unique nature of the [prison] setting and the needs of the female inmate population, it is not possible to house pre-operative male to female transsexuals in women's prisons."[438] In essence, the prison officials' perceptions of the safety of the cisgender women already housed in prisons trumped the safety concerns expressed by trans women such as Kavanagh about being placed in men's facilities.

While the Tribunal concluded that refusing to place trans people who had not "completed" sex reassignment surgery in prisons for their targeted sex was reasonable, it noted the importance of the CSC accommodating this vulnerable group.[439] After reviewing the evidence, the Tribunal concluded: "[P]re-operative transsexuals are a particularly vulnerable group of inmates, who require special consideration concerning their placement within the prison setting."[440] The Tribunal then connected the vulnerability of trans people to the creation of a non-discriminatory policy for trans inmates, stating:

> In our view, CSC has not justified its policy with respect to the placement of transsexual inmates in its current form, as the policy fails to recognize the special vulnerability of the pre-operative transsexual inmate population…Any policy dealing with this uniquely vulnerable group must recognize the differential effect that housing inmates in

[434] *Ibid* at paras 143-144.
[435] *Ibid* at para 145.
[436] *Ibid* at para 146.
[437] *Ibid* at paras 147-159.
[438] *Ibid* at para. 160.
[439] *Ibid* at paras 161-164.
[440] *Ibid* at para 165.

> accordance with their anatomy has on transsexual inmates. The policy also needs to acknowledge their susceptibility to victimization within the prison system. Finally, it must require the individualized assessment of each transsexual inmate by corrections officials, in consultation with qualified medical professionals, as to the appropriate placement of the individual within the various types of facilities available in the male prison system, and the steps that are necessary to ensure their safety.[441]

The most robust aspect of this statement appears to be the requirement that trans people should be assessed individually by prison officials, in consultation with expert medical professionals, to determine appropriate available facilities and steps that may be taken to ensure their safety.

Having analyzed the placement issue, the Tribunal then considered whether the CSC's sex reassignment surgery policy constituted discrimination of the basis of sex and disability within the meaning of the *Canadian Human Rights Act*. The structure of this analysis is identical to the first issue. Again, the bulk of the discussion turned on the third step of the analysis: The issue of undue hardship.[442] Under this branch of the analysis, the Tribunal was tasked with determining whether the CSC had successfully established that its policy of prohibiting sex reassignment surgery was reasonably necessary to accomplish its overarching goal of providing health care for inmates — in the sense that it could not accommodate persons with the characteristics of the complainant — without incurring undue hardship. Under the undue hardship analysis, the Tribunal rejected the CSC's blanket prohibition against sex reassignment surgery for inmates. Instead, it suggested that a contextual, case-by-case approach was required to bring the CSC's policy into compliance with the *Canadian Human Rights Act*.

In order to qualify for sex assignment surgery, however, the Tribunal agreed with the CSC's experts about the importance of the so-called "real life" test, which requires trans people to live "full-time" in their anticipated gender for a period of one to two years before accessing sex reassignment surgery. In a curiously reasoned part of the decision, the Tribunal explained that life in prison is not "real life":

> We agree with the experts called by CSC that the real life experience requirement of the treatment protocol cannot be satisfactorily fulfilled within the [prison] setting. It appears from all of the evidence that pre-operative transsexuals need to be able to interact with *both* men and women in their day to day lives in order to properly fulfill the requirements of the real life experience. We have already concluded that it is not appropriate to place pre-operative male to female transsexuals in women's prisons. Can these individuals then obtain an appropriate real life experience while incarcerated in male penitentiaries? We think not.[443]

[441] *Ibid* at para 166.
[442] *Ibid* at paras 168-174.
[443] *Ibid* at para 178.

The Tribunal ultimately held that the CSC's blanket prohibition against sex reassignment surgery, even for trans people who had already completed all necessary "real life" steps prior to being incarcerated, constituted discrimination on the basis of sex and disability.[444] It further explained that, if the trans prisoner's physician deemed sex reassignment surgery to be an essential procedure, then the CSC would be expected to cover the costs of the surgery, as they would for any other essential treatment.[445] The Tribunal ordered the CSC to amend its sex reassignment surgery policy within six months of the decision.[446]

This decision, one that the Federal Court ultimately upheld after the CSC unsuccessfully launched a judicial review application,[447] makes three contributions to the emerging body of jurisprudence on trans human rights in carceral settings. First, when it was decided, *Kavanagh* was the only decision in Canada to highlight the lived realities of prison life for trans people. Many of the concerns raised by Katherine Johnson between the 1960s and the early 1990s had created change at the policy level, but had never been litigated in the courts. Second, the decision concludes that the CSC's blanket prohibition of sex reassignment surgery constitutes discrimination on the basis of sex and disability within the meaning of the *Canadian Human Rights Act*. Third, the decision calls for an individualized approach to determining where trans prisoners should be placed after they have "completed" sex reassignment surgery.

There are, however, profound conceptual weaknesses embedded in the *Kavanagh* decision. While the decision rightly notes that the CSC's policy has an adverse impact on trans inmates because it fails to recognize their particular vulnerability and their need for accommodation in prison,[448] it refuses to order the CSC to cease applying the policy of housing trans women who have not "completed" sex reassignment surgery in male institutions. In arriving at this conclusion, the Tribunal invokes prison officials' impressionistic understandings of the mental and physical health of cisgender women already housed in Canadian prisons, reasoning:

> The difficulties that female inmates have in dealing with men are based, in part on lack of knowledge, but are also based on painful life experience. It appears from the evidence that many of these women are psychologically damaged, as a consequence of the physical, psychological and sexual abuse they have suffered at the hands of men…

[444] *Ibid* at paras 175-183.
[445] *Ibid* at paras 184-191.
[446] *Ibid* at para 198.
[447] *Canada (Attorney General) v. Canada (Human Rights Commission)*, 2003 FCT 89 (Fed Ct).
[448] *Kavanagh*, *supra* at para 197.

> There is also no guarantee that pre-operative male to female transsexuals will be unable to function sexually, notwithstanding their ingestion of female hormones. As a result, pre-operative male to female transsexuals pose a potential risk to female inmates. In our view, this is a factor to consider, although its significance should not be overstated: The unfortunate fact is that non-consensual sexual activity already occurs in the prison setting, although the evidence suggests that it happens less frequently in women's prisons than it does in male institutions.[449]

Having deferred to prison officials' mental and physical health arguments in absence of an evidentiary foundation, the decision merely requires that the CSC "formulate a policy that ensures that the needs of transsexual inmates are identified and accommodated" within six months of the decision being released.[450]

In addition, the decision orders the CSC to cease applying the blanket prohibition against sex reassignment surgery.[451] The weakness with this part of the Tribunal's analysis, however, is that it seems difficult to imagine a scenario where a trans person could actually meet the stringent requirements developed by the Tribunal. To access sex reassignment surgery while in prison, the trans person imagined by the Tribunal would have had to seek out expert medical advice long before ever coming into conflict with the criminal justice system. Moreover, she would have had to carry out her daily activities for one to two years as a woman in order to meet the so-called "real life" test. At this point, the trans person imagined by the Tribunal could then access sex reassignment surgery. Once doctors performed the sex reassignment surgery and the CSC, in consultation with medical professionals, conducted an individualized assessment, the trans person imagined by the Tribunal could then be housed in an appropriate women's facility. This chain of events, it seems, is highly improbable to occur.

Moving beyond a strict doctrinal reading of the case, metaphor analysis is also helpful in pulling apart and untangling the multiple messages about carceral life embedded in the *Kavanagh* decision. Donald A. Schön argues that metaphor constitutes the "task of accounting for our perspectives on the world: how we think about things, make sense of reality, and set the problems we later try to solve." As such, metaphor simultaneously refers to a frame through which we view the world, along with the series of unstable processes in which new frames come into existence. He calls this iterative process the "generative metaphor."[452] Given that social

[449] *Ibid* at paras 158 and 161.
[450] *Ibid* at para 198.
[451] *Ibid* at para 199.
[452] Donald A. Schön, "Generative metaphor: A perspective on problem-setting in social policy" in Andrew Ortony, ed, *Metaphor and Thought* (Cambridge: Cambridge University Press, 1993), 137-163.

policy tends to be framed as an exercise in problem solving, Schön encourages us to "become critically aware of these generative metaphors, to increase the rigor and precision of our analysis of social policy problems".[453] In the *Kavanagh* decision, the Tribunal invokes the "prison setting" as a generative metaphor eighteen times in the span of its forty-five-page decision. For example, the Tribunal writes:

> Given our finding that the real life experience cannot properly be carried out in the prison setting, the only way that a transsexual inmate could be a proper candidate for sex reassignment surgery would be if they had already completed the real life experience component…prior to their incarceration.[454]

Bringing Schön's account into conversation with the work of Jean Baudrillard, the invocation of "real life" immediately followed by the generative metaphor of the "prison setting" subtly conveys a message to readers: The prison is neither reality, nor a representation of reality. The prison exists in space we might, to call upon the language of Baudrillard, even call the hyperreal.[455]

There may be good reasons to remain skeptical about the attempt on the part of both the Tribunal in *Kavanagh* and the CSC in policies to draw bright lines around what constitutes "the real". According to Baudrillard, it was possible in the modern era to distinguish between the represented and the real, "between the 'sign' and the actual 'thing' in reality it referred to — the referent."[456] Moving into the contemporary era, however, "signs and referents no longer have any clear or logical connection as sign systems become recodified and detached from the modernist logic that previously connected them."[457] While neither the Tribunal nor the CSC ever fully explains why the prison does not constitute "real life", Baudrillard's account opens up space to think about the prison in ways that go beyond the binary of either "real life" or "prison life". Perhaps the prison does not constitute "real life" because it dwells in a liminal space — somewhere between the real and the represented. We might even call this terrain that exists between established categories the "hyperreal." The precise wording of the decision in *Kavanagh* supports the claim that the Tribunal may implicitly understand the prison this way. The Tribunal, for example, explains:

> The prison environment can, in some ways, provide an even better real life experience than can the outside community…Inmates are under much closer observation in prison,

[453] *Ibid* at 139.
[454] *Kavanagh*, *supra* at para 185.
[455] Chris Greer, ed. *Crime and Media: A Reader* (New York: Routledge, 2009), citing Jean Baudrillard at 70.
[456] *Ibid* at 69.
[457] *Ibid*.

> and thus in a better position to be assessed in relation to the consistency and spontaneity of the manifestations of their male or female gender identity.[458]

According to the Tribunal, the prison constitutes the "hyperreal" for trans people because it provides them with an "even better real life experience than can the outside community" — one that is more routinized, disciplined, and "closer observation" — for those wishing to transition from life in one gender to life in another. To use the language offered by Baudrillard, "Simulation is no longer that of a territory, a referential being or a substance. It is the generation by models of a real without origin or reality: a hyperreal."[459]

At the same time that the *Kavanagh* decision attempts to draw lines of carceral inclusion and exclusion around something we might call "real life", it implicitly creates a troubling hierarchy among trans people. This hierarchy proceeds from the essentialist assumption that gender must *always* accord with sex. It also appears to encourage trans people to "fix" themselves by seeking out surgical intervention.[460] The Tribunal explains, for example, that the only juncture at which a trans woman can properly be moved to a women's prison is after sex reassignment surgery has been "completed." This means that the trans person who self-identifies as a woman but, for a variety of complex reasons, cannot or does not want to "complete" sex reassignment surgery — including the prospect of forced sterilization — will be indefinitely housed in a men's institution.

Given her gender identity and gender expression as a woman, however, the trans woman imagined by the Tribunal is likely to experience significant levels of violence, discrimination, and harassment at the hands of her male counterparts if she remains in a men's facility.[461] If the trans woman makes the decision to report the abuse to prison officials, it is likely that she will be placed in solitary confinement as a so-called precautionary safety measure. There is a growing body of empirical evidence to suggest that the mental health implications associated with solitary confinement, particularly over long periods of time, are severe.[462] Given the

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[458] *Kavanagh*, *supra* at para 51.
[459] Greer, *supra* at 70.
[460] For further discussion on this point, see e.g. Kirkup, "Indocile Bodies", *supra* at 121.
[461] For further discussion on this point, see e.g. David Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (Southern Cross University Press, 1998); Neer Korn, *Life Behind Bars: Conversations with Australian Male Inmates* (New Holland Press, 2004); Lee Bowker, *Prison Victimization* (Elsevier Press, 1980); and David Cooley, "Criminal Victimization in Male Federal Prisons" (1993) 35 Canadian Journal of Criminology 479.
[462] A complete analysis of solitary confinement and its mental health implications for inmates goes beyond the scope of this chapter. For further discussion, see e.g. Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Douglas & McIntyre, 2002); Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement," (2003) 49 Crime & Delinquency 125; Jennifer R. Wynn & Alisa Szatrowski, "Hidden

Tribunal's strict, essentialist understanding of the relationship between sex and gender, the trans woman who has not "completed" sex reassignment surgery is left to make an impossible decision: Does she value her physical safety over her mental health, or her mental health over her physical safety? The decision in *Kavanagh*, it seems, requires trans women who have not "completed" sex reassignment surgery to make this impossible decision on a regular basis.[463] In sum, the decision of *Kavanagh* is perhaps best understood as a very partial victory, one that poses a minor challenge to the ways in which norms of gender are constituted in carceral settings but ultimately retains the *status quo* of strict gender essentialism.

(c) The Post-*Kavanagh* Era

After unsuccessfully appealing the decision in *Kavanagh*, the CSC had no choice but to enact a new "Gender Identity Disorder" policy.[464] The CSC's new policy largely codified the central findings of the Tribunal. Most usefully, s. 36 of the updated policy requires prison administrators to conduct individual, case-by-case assessments about trans housing requirements and expressly notes the vulnerability of trans people. It states: "For all placement and program decisions, individual assessments shall be conducted to ensure that offenders diagnosed with gender identity disorder are accommodated with due regard for the vulnerabilities with respect to their needs, including safety and privacy."[465] In further keeping with the decision in *Kavanagh*, s. 37 of the updated policy provides that, in order to qualify for sexual reassignment surgery in prison, trans prisoners must complete the "real life" test where they live openly in their desired gender for one year. The policy specifies that the environment of the prison does not meet the requirement of the test. As discussed above, the practical implication of this policy

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Prisons: Twenty-Three House Lockdown Units in New York State Correctional Facilities" (2004) 24 Pace L. Rev. 497; and Stuart Grassian, "Psychiatric Effects of Solitary Confinement," (2006) 22 Wash. U.J.L. Pol'y 325.

[463] Critics of my approach may suggest that the goal of punishment is — by definition — to restrict inmates from their preferred life paths. For example, should prison officials deny a prisoner's request to remove his or her tattoos? There are two answers to this question. The easy answer to this question is that, as the Tribunal rightly notes in *Kavanagh*, *supra*, the CSC already allows inmates to request "non-essential" medical procedures such as tattoo removal. At para 170 of the decision, it states:

> Consideration of the treatment accorded to non-transsexual inmates seeking non-essential medical treatment demonstrates that it is the inmate's status as a transsexual that gives rise to the differential treatment: An inmate who wants to have an elective procedure such as a tattoo removal can obtain a letter from his or her doctors, and will be able to have the tattoo removed at his or her own expense. The same is true of any other type of elective medical treatment, with the exception of sex reassignment surgery.

The more difficult answer to this question is that, at a fundamental level, access to medical treatments such as sex reassignment surgery differs from tattoo removal because of its centrality to the trans person's identity. For a thought-provoking discussion of the complex relationships between sex reassignment and identity, see e.g. Laurie J Shrage, ed., *You've Changed: Sex Reassignment and Personal Identity* (Oxford: Oxford University Press, 2009).

[464] Corrections Service of Canada, Health Service Policy, Directive 800 (2001), online: <http://www.csc-scc.gc>.

[465] *Ibid*.

is to make transitioning difficult, if not impossible, for a large number trans people in prison. The new policy also makes it virtually impossible for trans people to be transferred to prisons that accord with their gender identity and gender expression unless they have taken a number of steps in the transition process long before ever becoming incarcerated.

In April 2015, the CSC again made minor revisions to the policy.[466] Despite recommendations from organizations calling on the federal government to improve access to sex reassignment surgery and move towards a system of self-identification for placement and admissions purposes, rather than gender essentialism, the CSC's most significant revision was to replace the now outdated medical term "Gender Identity Disorder" with "Gender Dysphoria".[467]

III. CONTEMPORARY LEGAL FRAMEWORK: PROVINCIAL AND TERRITORIAL JAILS

Like the legal regulation of trans people in Canada's federal prison system, the story in Canada's provincial and territorial jails is another study in uneven and haphazard policies — and of trans people being caught in a system that, at almost every turn, constitutes and breathes new life into sharp, essentialist understandings of gender. What follows below is a survey of current approaches of provincially administered jails in Ontario and British Columbia, along with jurisdictions where there are currently no policies: Saskatchewan and Nova Scotia.

(i) Ontario

Unlike the federal system, where Katherine Johnson mobilized policymakers to develop polices for trans inmates and Synthia Kavanagh spent the better part of a decade litigating many of the systemic human rights concerns raised by trans people, we know far less about what we might call both the 'formal' and 'informal' story of trans people in Ontario's jails. Prior to January 2015, when Ontario's Ministry of Community Safety and Correctional Services introduced a new policy allowing trans people to self-identify their gender for placement and admissions purposes, what we are left with is an assemblage of largely disparate pieces of the Ontario story; together, these pieces point to a system that aspires to consistently manage trans inmates, but where consistency remains illusive at every turn.

[466] Corrections Services of Canada, Gender Dysphoria policy, Directive 800, online: <http://www.csc-scc.gc.ca>.
[467] British Columbia Prisoner Legal Services, "Transgender Prisoners – Access to Sex Reassignment Surgery" (20 March 2014), online: <http://prisonjustice.org>.

In a 2014 interview with Mooky Cherian,[468] Program Manager with the Toronto-based Prisoners with HIV/AIDS Support Action Network (PASAN), he repeatedly underscored the contingent and uneven application of rules about the placement and admission of trans people in the province's jails. While PASAN's formal mandate is to support people living with HIV/AIDS, the organization also has a long history of supporting queer people in carceral settings. Describing the era before Ontario enacted a formal policy in January 2015, Cherian noted that trans people often had uneven and, in many instances, unpredictable experiences within the provincial prison system. He suggested that this lack of consistency was primarily due to individual administrative decisions about whether an inmate should be placed in a men's facility or a women's facility. These decisions were often made at the discretion, and perhaps even the whim, of the warden responsible for the jail. In an era dominated with what scholars such as Wendy Brown have aptly called the turn to neoliberal rationality,[469] we might be tempted to view this inconsistency and inability to systemically manage trans people in carceral systems in wholly negative terms.

In our interview, however, Cherian recounted a number of his trans-identified clients' experiences at the Central East Correctional Centre in Lindsay, Ontario in relatively positive terms. Colloquially known as the Lindsay Superjail, this medium- and maximum-security jail contains both a men's unit and a women's unit. In Cherian's experience, wardens at Lindsay Superjail had developed a relatively flexible approach to the admission and placement of trans women. Rather than relying on any explicit policy imposed by the Ministry of Community Safety and Correctional Services, administrators in the Lindsay Superjail appear to have allowed trans women to be admitted and placed within the general population of the women's unit, without requiring them to undergo any form of sex reassignment surgery. He suggested that there may have even been an informal policy of allowing trans women to be moved to the Lindsay Superjail from other provincial institutions because of the prison administrators' specialized knowledge about issues related to gender identity in the carceral context.

A Proposal for a "transgender unit" at the Vanier Centre for Women

[468] Interview with Mooky Chernian.
[469] For further discussion of the emergence of neoliberal rationality in statecraft, the workplace, jurisprudence, education, and culture, see e.g. Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Brooklyn, NY: Zone Books, 2015).

While conducting research for *Sex Crimes*, I also uncovered parts of another untold story about the administration of trans people within Ontario's jails. Before the introduction of a new policy in January 2015, Ontario's Ministry of Community Safety and Correctional Services contemplated opening what they had tentatively called a "Transgender Unit" at the Vanier Centre for Women in Milton, Ontario. In our interview, Cherian noted that the ministry had initiated a quiet consultation process to explore the possibility of creating a wing exclusively for trans women. While he was unsure whether the ministry had contacted other organizations, he explained that the ministry had reached out to the late Kyle Scanlon, along with Morgan M. Page, at Toronto's LGBTQ community centre, The 519. After a series of delays and cancelled meetings, however, Cherian indicated that the ministry never ended up meeting with representatives from PASAN or The 519.

Cherian's account of the existence of a so-called "Transgender Unit Committee" is also corroborated by a 2011 reported labour relations case,[470] along with a series of redacted emails I retrieved using the province's *Freedom of Information and Protection of Privacy Act*[471] in summer 2015. In the reported case, Nancy Hart-Day — a two-spirited correctional officer who worked at the Vanier Centre for Women — filed several grievances against her employer, Ontario's Ministry of Community Safety and Correctional Services. Among other things, she alleged that the requirement that she perform strip searches on offenders of the same sex constituted discrimination on the basis of sexual orientation because it "placed her in a compromising position".[472]

In response, the ministry offered to transfer Hart-Day to Maplehurst Correctional Complex, the adjacent men's facility. Moving her to the men's facility would mean that she would no longer be required to conduct strip searches on members of the same sex. In response, Hart-Day argued that the ministry's proposed accommodation was unreasonable. As the arbitrator put it, Hart-Day did not want to be transferred to Maplehurst Correctional Complex because she was "particularly passionate about her role as a member of the Transgender Unit Committee at Vanier, because that committee was involved in the planned establishment of a transgender unit at Vanier, which would be the first such facility in the Ontario correctional

[470] *OPSEU v Ontario (Ministry of Community Safety and Correctional Services*, 2011 CarswellOnt 7338, 210 LAC (4th) 350 [*Hart-Day*].
[471] RSO 1990, c F-31.
[472] *Hart-Day*, *supra* at para 2.

system".[473] Like the larger story of the legal regulation of trans people in Canadian prisons, the underlying reasons why the ministry considered building a trans unit — only to abandon the plan before ever admitting a single inmate — remain opaque.

Recently, two high-profile human rights complaints against the Ontario government have further underscored the experiences trans people in the province's jails: Boyd Kodak and Avery Edison. While the experiences of Kodak, a trans man, and Edison, a trans woman, are qualitatively different, both human rights complaints tell a similar story of the norms and logics of gender identity that play out on a daily basis within Ontario's correctional system. This system invariably ends up constituting gender in rigid, essentialist terms, while simultaneously failing to recognize more fine-grained considerations, such as an individual's legal sex or their self-identification. Carefully delving into the underlying norms and logics that emerge in these two contemporary human rights complaints is instructive in telling a larger story about the emergence of carceral norms and logics in Ontario's jails.

Body Kodak's human rights complaint

On December 6, 2012, the York Regional Police Services arrested Boyd Kodak, a trans man from Toronto who transitioned approximately twenty years ago, for criminal harassment. At the time of the arrest, Kodak told the officer that he had a life-threatening illness, and that he required medication regularly. He was taken to the Fairview Mall parking lot on the outskirts of Toronto, where officers from York Police handed Kodak off to two officers from the Toronto Police Service. One of the Toronto Police Service officers asked if Kodak was a 58-year-old male. He responded affirmatively. The officers then took him to an unspecified downtown police facility, again informed him of the charges, and told that he would be strip-searched. The officer's stated reason for conducting the search was to ensure Kodak did not have any weapons on him. At this point, Kodak provided the police with government-issued identification, which identifies him as male. Officers then asked whether he wished to be searched by a male officer or a female officer. Kodak initially indicated that it did not matter, but later said he would prefer to be strip searched by a woman.[474]

After two female officers conducted the strip search, administrators placed Kodak in a segregated cell in the women's area of the facility. Given his legal sex and self-identification as

[473] *Ibid* at para 21.
[474] Boyd Kodak, Factum, Ontario Human Rights Commission (31 January 2014) at 1-2.

a man, Kodak asked the officers why they were placing him in the women's area of the facility. According to materials filed before the Ontario Human Rights Tribunal, officers told Kodak that they were simply following ministry policy.[475]

For reasons that remain unclear, police subsequently moved Kodak to another police facility. Despite never having been out of police custody, Kodak was strip searched again upon admittance to the new facility. Following the strip search, Kodak was taken to a segregated cell in the women's area of the facility, where he remained until his first court appearance. After making his first court appearance, where the criminal harassment charges were formally read against him, the judge denied Kodak's request for release on his own recognizance. He was subsequently taken back to the same cell and eventually transferred to the Vanier Centre for Women in Milton, Ontario.[476]

Upon arrival at the Vanier Prison for Women, and despite never having been out of police custody, Kodak was strip searched yet again by female officers. At this point, officers questioned Kodak about what was in his underwear. He explained that he uses a penile prosthesis, a device that supports his gender expression as a man. According to Kodak, the officers then took the prosthesis, passed it around to each other, and then confiscated it. After completing the strip search, officers forced Kodak to put on women's underwear and women's prison wear. Given his legal sex, along with his self-identification as a man, Kodak objected. Officers responded by telling him that he had no choice but to wear the women's clothing.[477]

The next morning, a male officer came to retrieve Kodak from his cell, instructing him that he would again be taken downtown for a bail hearing. At this point, Kodak requested that they return his prosthesis and male clothing. Contrary to assurances that were reportedly made by one of the desk staff that Kodak would not be required to appear in court in women's clothing, the officer indicated that neither item would be returned to him at the moment. After being taken to a police facility downtown, Kodak was detained and again placed in segregation within the women's side of the facility.[478]

Later that day, Kodak attended the bail hearing dressed in women's clothing. He was released into the custody of his cousin and placed under house arrest. Following the bail hearing, police released Kodak from their custody. At this point, he requested his penile

[475] *Ibid*.
[476] *Ibid* at 2-3.
[477] *Ibid*.
[478] *Ibid* at 3-4.

prosthesis and male clothing. Given that his items had not been moved downtown, however, Kodak was forced to return to the Vanier Center for Women to obtain his clothing and prosthesis, along with his house keys, car keys, and wallet. As a result, he was forced to go out in public dressed as a woman.[479] A few months later, in April 2013, the Crown withdrew all of the charges against Kodak.

In view of these experiences, Kodak filed a human rights complaint against Ontario's Ministry of Community Safety and Correctional Services, along with the Toronto Police Service, in January 2014. In his complaint, Kodak describes his experiences with police and correctional officials as causing him to lose "self-respect" and to "feel insecure" when he goes out in public. He has since been diagnosed as having post-traumatic stress disorder as a result of the incidents. He also explains that the events caused other health issues, including anxiety, nightmares, lack of sleep, and high blood pressure.[480] In June 2016, on the eve of the start of the tribunal hearings, Kodak settled his human rights complaint with both the Ministry and the Toronto Police Service. The parties agreed to develop and revise polices and training for "interaction with trans people" from personal detention. The trainings will be developed and implemented by members of the trans community, along with the Ontario Human Rights Commission. After entering into the settlement agreement, Kodak described his experiences in the following terms:

> I feel a mix of emotions. I'm pleased with the remedy we got. Everything was dealt with and there's a willingness on their part to make changes and involve the community in doing so…I will never forget the humiliation. I am still suffering from post-traumatic stress disorder and depression. I am still paranoid when I hear sirens and see people in uniforms. But we felt we have moved mountains.[481]

Despite the seemingly positive result of a systemic remedy designed to improve relations between police, corrections, and members of the trans community, Kodak continues to describe the apparatuses of the carceral state in disciplinary terms — he suggests that he is "still paranoid" when he "hear[s] sirens and see[s] people in uniform". Again, we see the criminal justice system being used to create disincentives for those engaged in non-normative performances of gender and sexuality.

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[479] *Ibid* at 4-5.
[480] *Ibid* at Schedule "B".
[481] Nicholas Keung, "Toronto police, province settle transphobia complaint amid Pride Month" *Toronto Star* (3 June 2016), online: Toronto Star <www.thestar.com>.

Avery Edison's human rights complaint

Like Kodak, Avery Edison launched a human rights complaint against Ontario's Ministry of Community Safety and Correctional Services — alleging discrimination with respect to services on the basis of disability, gender identity, and gender expression — in 2014.[482] On February 10, 2014, a month after Kodak launched his human rights complaint, Avery Edison arrived at Toronto's Pearson International Airport from London, England. She was carrying a passport issued by the United Kingdom that identified her as a woman. Like Ontario and a growing number of jurisdictions around the world, the United Kingdom no longer requires individuals to undergo any form of sex reassignment surgery in order to change the sex marker on government-issued identification, such as a driver's license or passport.[483] In May 2015, Citizenship and Immigration Canada indicated that it intended to remove the requirement for proof of sex-reassignment surgery to change an individual's sex marker on their citizenship certificate.[484]

When Edison arrived at Pearson Airport, Canada Border Services Agency (CBSA) officers detained her. Edison eventually learned that their stated reason for the detention was that she had overstayed a previous student visa in 2013. Before she could claim her baggage, a CBSA officer directed Edison to a secondary inspection area to conduct a further interview. At the secondary inspection area, another officer reviewed Edison's personal information, her travel itinerary, and the purposes of her visit to Canada. The officer then instructed her to remain in the waiting area. About a half an hour later, another officer met with Edison to continue the interview. The officer asked Edison if she had ever gone by another name, at which point Edison disclosed her identity as a trans woman. After another delay, two additional CBSA officers appeared to question Edison, eventually advising her that she would be detained until a CBSA supervisor had an opportunity to further review her case. Later that evening, a CBSA supervisor informed Edison that because she had overstayed a student visa in 2013 officials had deemed her inadmissible for entry into Canada. The supervisor also indicated that Edison's admissibility to Canada would be subject to a hearing before the Immigration and Refugee

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[482] *Ontario Human Rights Code*, RSO 1990, c H 19, s 1.
[483] In *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 [*XY v Ontario*], a trans woman successfully argued that section 36 of the *Vital Statistics Act*, RSO 1990, c V-4 constituted discrimination with respect to services. The offending provision required individuals seeking to change the sex marker on their birth certificate to produce two medical certificates that independently confirmed that they had undergone so-called "transsexual surgery".
[484] Citizenship and Immigration Canada, Citizenship Policy (CP3), "Establishing Applicant's Identity", online: <http://www.cic.gc.ca>.

Board of Canada. The supervisor explained that Edison would be transferred and held in an immigration detention centre pending her hearing. According to documents filed with the Ontario Human Rights Tribunal, officials told Edison that the immigration detention centre was "like a hotel" and assured her that she would be safe. The officer specifically asked Edison if she wanted to be detained in a women's facility. She responded affirmatively.[485]

Despite initially telling Edison that she would be held in an immigration detention centre, officials eventually indicated that the plan had changed. Perhaps using data accessed using the Canadian Police Information Centre (CPIC) database,[486] officials eventually discovered that Edison had attempted suicide during her previous stay in Canada.[487] Citing the risk that she might try to commit suicide again, officials informed Edison that she would be placed in administrative segregation within a correctional facility. They assured her that she would be admitted to a women's facility. After being photographed and fingerprinted, Edison told officials that she had not undergone sex-reassignment surgery. Shortly after midnight, officers arrived to transport Edison to the Vanier Centre for Women in Milton, Ontario. A few minutes later, for reasons that are entirely unclear, officials advised Edison that she would not be transported to Vanier until the following day.[488]

About an hour after telling her that she would not be transported to Vanier until the next day, officials advised Edison that they would immediately transport her to Maplehurst Correctional Complex, the men's facility adjacent to Vanier. Upon learning that she would be placed in a men's facility, Edison objected and broke down crying. According to materials filed before the Ontario Human Rights Tribunal, officials advised her that, after being admitted to Maplehurst, prison administrators would determine whether she should remain at Maplehurst or be moved to Vanier. According to Edison's materials filed with the Ontario Human Rights Tribunal, "The supervisor explained that a 'policy' dictated that Ms. Edison should be detained

[485] Avery Edison, Factum, Ontario Human Rights Commission (2 July 2014) at 1-2.
[486] Robert Cribb, "Privacy commissioner attacks police regarding disclosure of mental health records" *Toronto Star* (8 June 2014), online: Toronto Star <http://www.thestar.com>; Ann Cavoukian, *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials Via CPIC: A Special Investigation Report* (Ontario: Information and Privacy Commission, 2014), online: Information and Privacy Commission <http://www.ipc.on.ca>.
[487] Indeed, there is a growing body of empirical literature to demonstrate the pervasive rates of discrimination, harassment, and violence tend to contribute to high rates of suicide among members of trans communities. For example, a 2010 Trans PULSE study found that 43% of trans respondents had attempted suicide, 20% had been targets of physical or sexual assaults and 34% had been verbally harassed or threatened: Greta Bauer et al, "Who are Trans People in Ontario?" (26 July 2010) 1:1 Trans PULSE e-Bulletin, online: TransPULSE.
[488] Avery Edison, *supra* at 1-3.

in a men's facility 'because [she hadn't] had the surgery'."[489] As Edison put it on Twitter as events were unfolding, "Change of plan AGAIN. Will be moved, soon, to Maplehurst correctional facility and assessed by a nurse before placed in male or female cell."[490] Officials also advised her that, as a result of her identity as a trans woman who had not undergone sex reassignment surgery and who had previously attempted suicide, she would be placed in administrative segregation at Maplehurst.

Two hours later, officials admitted Edison to Maplehurst. Despite her legal sex and self-identification as a woman, Edison alleges that prison administrators repeatedly referred to her as "he", "him", or "sir". Contrary to the initial suggestion that a nurse would determine Edison's suitability for admission to either Maplehurst or Vanier, the nurse conducted a standard intake checkup and then left Edison in administrative segregation on suicide watch. The next morning, a physician attended to Edison's cell in order to assess her risk of suicide. Determining that there was no real risk, officials offered Edison more comfortable clothing and a nicer mattress — but left her in administrative segregation at Maplehurst.[491]

During the course of these events, Edison's partner — who resides in Toronto — attempted to obtain information about Edison's whereabouts from both immigration detention centers and correctional facilities throughout the province. According to materials filed before the Ontario Human Rights Tribunal, an official at Maplehurst told her partner that "under Ontario law, everyone with male genitalia must be placed in men's facilities and that Ms. Edison was held in isolation at the men's only correctional facility lest she 'get beat up, or worse.'"

After outcry in both the Canadian and international press, a senior official at Maplehurst attended Edison's cell to discuss her case. As Edison's materials put it, "The official explained that Ms. Edison had attracted significant attention because she had posted messages online about her impending detention at Maplehurst while waiting at the airport the day before. The official asked if Ms. Edison would be more comfortable in a women's only facility. Ms. Edison said she would be more comfortable in a women's only facility."[492] Later that evening, officials transferred Edison to Vanier, where she alleges that officials reportedly told her that the

[489] Avery Edison, *supra* at 3.
[490] Avery Edison, "Literally going to jail. Actual jail. Because they don't know what to do about my junk" (11 February 2014 at 1:19 am), online: Twitter <www.twitter.com/aedison/status/433123084222089523 2. For further discussion on the experiences of Avery Edison, see e.g. "What Canada's legal system can do to respect transgender people" *The Globe and Mail* (28 February 2014), online: The Globe and Mail <http://www.theglobeandmail.com>.
[491] Avery Edison, *supra* at 3.
[492] *Ibid* at 5.

misgendering and misplacement of trans people in Ontario's jails happens "far too frequently".[493] On February 12, 2014, Edison appeared before the Immigration Division of the Immigration and Refugee Board for her detention review hearing. The Board ordered that she remain in detention until her removal from Canada the next day.[494]

The Ministry of Community Safety and Correctional Service's treatment of Edison raises a series of larger questions about the operation of norms and logics of gender identity within carceral settings. Echoing many of the themes of Kodak's complaint, Edison described her experiences in Ontario's jails as a "humiliating and terrifying experience." In addition, she explains that her feelings of "humiliation, panic and fear increased when she was informed that she would be sent to a men's only correctional facility."[495] Her materials also point to a larger systemic problem within carceral systems, one of officials not having received training about the unique concerns of trans people. For Edison, the fact that her "lived gender identity was not recognized at one of the most vulnerable moments in her life" had particularly insidious consequences. As she put it, she "feared for her physical safety, and felt exposed and victimized."[496] On a number of occasions, Edison was referred to as "sir", despite both her legal sex and her self-identification as a woman. For her, these repeated acts of misgendering "triggered historic feelings of low self-esteem, depression and anxiety."[497] Again, these experiences, all occurring in a legal landscape of human rights protections, same-sex benefits, and marriage equality, again underscore the extent to which the carceral system continues to play an active role in constituting particular norms of gender and sexuality.

Launch of new "Admission, Classification, and Placement of Transgender Inmates Policy"

Following international attention related to the human rights complaints of Kodak and Edison, the Ministry of Community Safety and Correctional Services launched a new "Admission, Classification and Placement of Transgender Inmates" to much fanfare and considerable media attention at The 519, Toronto's LGBTQ community centre, on January 26, 2015. In addition to new trans-sensitivity training, the policy replaces the *ad-hoc*, case-by-case process that had previously existed in Ontario's jails. The central policy shift is a significant one: Ontario has become the first jurisdiction in North American to allow trans people to self-

[493] *Ibid*.
[494] *Ibid*.
[495] *Ibid* at 6.
[496] *Ibid*.
[497] *Ibid*.

identify their gender for admission, classification, and placement purposes regardless of whether they have undergone sex-reassignment surgery.

At the launch event for the new policy, the government's Minister of the Environment and Climate Change, Glen Murray, served as an openly gay master of ceremonies of sorts. Deploying a narrative of human rights progress across Canada, Murray briefly spoke about the homophobia he had encountered in Winnipeg, Manitoba while serving as Canada's first openly gay mayor. In her remarks, The 519's Executive Director Maura Lawless spoke about the emergence of a new era in the often-fraught relationship between queers and the criminal justice system.

Yasir Naqvi, the Minister of Community Safety and Correctional Services, who was responsible for introducing the new policy on the heels of the two human rights complaints — spoke about the consultation process with civil rights organizations, law enforcement and correctional working groups, stakeholder groups, trans advocates, and community partners in three Ontario cities: Toronto, Ottawa, and Sudbury.[498] In his remarks, Naqvi also repeatedly invoked narratives of progress in Ontario, suggesting that the policy was easily the most progressive in North America. At the same time, he underscored the dignity and human rights of trans people, noting in materials available at the press conference:

> This new policy for trans inmates is an important step forward to ensure that all inmates are treated with dignity and respect when in our care and custody. It ensures the human rights of the individual is respected by protecting a person's gender identity and gender expression, while promoting fairness and safety of all correctional staff and inmates.[499]

Relying upon similar human rights discourses, Barbara Hall, the Chief Commissioner of the Ontario Human Rights Commission, applauded the policy. Like the other speakers, she framed trans subjectivity in terms of vulnerability and marginalization. In materials available at the press conference, Hall explained:

> Trans Ontarians are among the most vulnerable members of society and we all are responsible for respecting and protecting their rights. I congratulate Minister Naqvi and his staff for this innovative policy, and their continued work with the OHRC to make human rights lived rights for all of us — everywhere in Ontario.[500]

[498] In November 2014, the ministry contacted me to provide feedback on an earlier draft of the policy. I provided feedback to the ministry in late 2014 about the policy.
[499] Ontario, "Respecting Trans Inmates: New Policy Recognizes Gender Identity and Gender Expression" (Press release dated 26 January 2015).
[500] *Ibid*.

Susan Gapka, a well-known trans activist who has, among other things, served on the Toronto Police Service's LGBT Consultative Committee for several years, spoke about the need to foster better relationships between members of trans communities and members of law enforcement. None of the speakers mentioned in their glowing remarks, however, that neither Kodak nor Edison's human rights complaints had been settled when the ministry launched its new policy in the ballroom of The 519 in January 2015.[501]

Summary of "Admission, Classification, and Placement of Transgender Inmates Policy"

The new policy makes six central changes to Ontario's admission, classification, and placement of trans inmates. First, the policy develops a new case management system, tasking a multi-disciplinary team comprised of health care and social workers, operational staff and community supports, with creating a plan of care for each trans-identified inmate.

Second, the policy extends and builds upon the already-established procedure for strip-searching trans people in Ontario's jails. Trans inmates can choose to be searched by a male correctional officer, a female correctional officer, or undergo what the ministry calls a split search, where different officers search different parts of the body. This policy now applies to frisk searches. With what appears to be a direct response to Kodak's human rights complaint, inmates must also be given the opportunity to provide input into the search process, including how devices such as penile prosthetics are handled. The policy also requires that inmates be afforded privacy during the search.

Third, while inmates used to be housed according to their so-called "primary sexual characteristics", the new policy moves away from essentialist understandings of gender, noting that inmates should be housed according to their self-identified gender "unless it can be proven there are overriding health or safety risks which would amount to undue hardship under the *Human Rights Code*". In another shift in the underlying norms and logics of the prison, which tended to suggest that all decisions should be made by prison administrators, not inmates, the policy requires that inmates be involved in decisions about where they will be housed.

Fourth, the policy attempts to constrain, albeit somewhat unconvincingly, the use of administrative segregation — or solitary confinement — against trans inmates. The policy

[501] Kodak's human rights complaint was settled on June 3, 2016. On March 12, 2015, Edison announced that she had settled her human rights complaint with the ministry. The new terms of the settlement agreement have not been disclosed to the public. For further discussion, see e.g. Nicholas Keung, "Settlement reached in transgender detainee's complaint" *The Toronto Star* (12 March 2015), online: The Toronto Star <http://www.thestar.com>.

provides: "Wherever possible (and subject to inmate preference), inmates will be integrated into the general population and not isolated." Seeming not to want to abandon the prospect of segregating trans inmates altogether, however, the policy states:

> In some cases, inmates may need to be temporarily separated from the general population in order to ensure their health and safety and that of other inmates pending an individualized assessment of their needs and circumstances…Inmates housed outside the general population must be afforded as many socialization and programming opportunities possible, short of undue hardship.[502]

Fifth, the policy requires that prison administrators respect the preferred names and gender pronouns of trans inmates, both in verbal interactions and in written documents. Before the creation of this policy, prison administrators would often refuse to use any other name or gender pronoun than the one listed on government-issued identification, such as a driver's licence or birth certificate. In addition, officials would maintain records of the inmates' legal name and sex, refusing to recognize the inmate's preferences.

Sixth, the policy attempts to develop a more consistent approach to both the search and return of inmates' personal items. Seemingly again in direct response to Kodak's human rights complaint, where prison administrators allegedly confiscated his prosthetic device, the new policy provides: "Inmates will be permitted to retain personal items, including prosthetics, necessary to express their gender, except where they present an overriding health and safety risk that would amount to undue hardship under the Human Rights Code."[503]

In the formation of this new policy, we see old carceral logics — logics that invariably constitute gender in rigid, essentialist terms — being replaced by what appear to be more enlightened understandings that prioritize self-identification for admission, classification, and placement purposes.

It would be too simple, however, to assume that simply because Ontario's Ministry of Community Safety and Correctional Services announced a new policy to much fanfare, there will be a trans human rights revolution in the province's jails. As my interview with Mooky Cherian from PASAN demonstrates, we ought to be careful about underestimating the promise of informal practices that existed in places such as the Lindsay Superjail before the new policy, and overestimating formalized approaches that seek to impose new techniques of governance

[502] Ontario, "Ontario's Policy for the Admission, Classification and Placement of Trans Inmates" (Backgrounder dated 26 January 2015).
[503] Ontario, "Ontario's Policy for the Admission, Classification and Placement of Trans Inmates" (Backgrounder dated 26 January 2015).

onto prison administrators. Rather, the Ontario story signals that the iterative push and pull between what we might call 'informal' procedures and 'formal' policies for trans people in carceral systems may well be far more complex than they appear, at first blush, to be.[504]

(ii) British Columbia

The British Columbia story largely mirrors the uneven account of the regulation of trans people in Ontario's jails. Through a series requests made under British Columbia's *Freedom of Information and Protection of Privacy Act*,[505] my research has revealed that the province enacted its first policy related to the placement and admission of trans people in the province's jails in 1994. The earliest version of the policy, set out in the British Columbia Corrections Branch's *Manual of Operations – Adult Institutional Services*, provides:

> **Introduction 10.01:** Transsexuals are persons genetically of one gender with a psychological urge to belong to the other gender. These persons are characterized by their feeling of discomfort and inappropriateness about their anatomical gender and by persistent behaviour generally associated with the other gender. There is usually a desire on the part of the individual to alter his or her sex organs in order to function as a member of the other sex.
>
> After a psychological, psychiatric, physical, and social assessment, a transsexual living in the community in a stable environment would normally progress through a treatment program as follows:
>
> 1. Psychological/psychiatric evaluation to assess the degree of the person's transsexuality;
>
> 2. The person lives as a member of the other gender (e.g. dress, hairstyle, etc.) for a period of time (e.g. a few years).
>
> 3. Hormonal therapy is initiated (causing changes in facial hair and body hair growth, breast structure, etc.);
>
> 4. Surgical removal of sex organs (e.g. castration; removal of testes or ovaries, hysterectomy: removal of uterus, etc.);
>
> 5. Surgical reconstruction of sex organs (e.g. penis, vaginal cavity, etc.); and
>
> 6. Application is made to the courts and Vital Statistics Branch of the Ministry of Health for official sex change on birth certification.

[504] Kyle Kirkup, "Ontario's welcome move on rights shows reality of trans people in Canadian prisons" *The Globe and Mail* (26 January 2015), online: The Globe and Mail <http://www.theglobeandmail.com>.
[505] RSBC 1996, c 165.

New Admissions 10.02: Inmates claiming to be transsexuals, who are admitted to provincial correctional centres without previous medical assessment, may request a medical assessment in order to determine:

1. The validity of a claim of transsexualism; and

2. Appropriate placement in a male or female correctional centre.

Such assessment may also be requested by correctional centre staff.

Readmissions 10.03: On re-admission, where a previous medical assessment had been carried out, a reassessment shall be performed to determine the extent of the inmate's progress in the treatment program outlined in 10.01, steps 1-6.

Treatment 10.04: As the required levels of personal support may not be present in a correctional centre setting, it is not expected that progression in the treatment program will occur while the inmate is in custody. However, the inmate will be maintained at the current level of treatment (e.g. if the inmate was taking hormones in the community, the medication will be continued in custody).

Refusal to Consent to Medical Assessment 10.05: If an inmate refuses to consent to a medical assessment, the inmate shall be placed in a male or female correctional centre according to the best judgment of correctional centre and/or medical staff based on the extent of the inmate's apparent progress in the treatment program outlined in 10.01, 1-6 in accordance with the criteria set out in 10.07.

Procedure for Medical Assessment 10.06: Upon request for a medical assessment, nurse shall be informed and arrangements shall be made for the inmate to be assessed by a medical doctor and psychologist and/or psychiatrist as soon as possible.

While awaiting such assessment, the inmate shall be held separate from the general population in the correctional centre to which the inmate was admitted.

Following the assessment, the medical doctor shall inform the correctional centre director of the recommended appropriate placement.

Treatment of those inmates confirmed as transsexuals shall follow established medical practice.

Placement 10.07: Transsexuals who have no progressed beyond step 3 in the process as set out 10.01 shall be placed in a correctional centre consistent with their originating gender.[506]

[506] British Columbia Corrections, *Manual of Operations – Adult Institutional Services* (approved 25 April 1994), reproduced in *Prisoner of Gender*, *supra* at 228-231.

For reasons that remain unclear, the British Columbia Corrections Branch made a series of minor amendments to the policy in April 2005. The structure and substance of the policy, however, remains unchanged.[507]

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[507] British Columbia Corrections, Chapter 9: Inmate Health Care Services (revised April 2005). The policy provides:

9.17. Transsexual Inmates

9.17.1. Introduction

1. Transsexuals are individuals genetically of one gender with a psychological urge to belong to the other gender.
2. These individuals are characterized by discomfort about their anatomical gender and by behaviour associated with the other gender.
3. There is usually a desire to alter sex organs to function as a member of the other gender.

9.17.2. Transsexual treatment

After a psychological, psychiatric, physical and social assessment, a transsexual living in the community in a stable environment would normally progress through a treatment program as follows:

1. Psychological/ psychiatric evaluation to assess the person's transsexuality.
2. The person lives as a member of the other gender (e.g. dress, hairstyle) for a few years.
3. Hormonal therapy is initiated (causing changes in facial and body hair growth, breast structure).
4. Surgical removal of sex organs (e.g. castration—removal of testes; hysterectomy—removal of uterus, ovaries).
5. Surgical reconstruction of sex organs (e.g. penis, vaginal cavity).
6. Application is made to the courts and Vital Statistics Branch for official gender change on birth certificate.

9.17.3. New admissions

1. Inmates claiming to be transsexuals, who are admitted to provincial correctional centres without medical assessment, request an assessment to determine:
   - Validity of claim of transsexuality; and
   - Placement in a male or female correctional centre.
2. Correctional centre staff may request an assessment.

9.17.4. Re-admissions

On re-admission, when a previous medical assessment occurred, a reassessment is done to determine the inmate's progress in the treatment program (outlined in section 9.17.2, steps 1 to 6).

9.17.5. Treatment

1. Because the required levels of personal support may not be present in a correctional centre, progression in the treatment program is not expected while the inmate is in custody.
2. The inmate is maintained at the current level of treatment. For example, if the inmate is taking hormones in the community, the medication continues in custody.

9.17.6. Refusal to consent to medical assessment

An inmate who refuses to consent to a medical assessment is placed in a male or female correctional centre. This placement is made according to the best judgment of the correctional centre and/ or medical staff, based on the inmate's progress in the treatment program (outlined in section 9.17.2, 1 to 6 in accordance with criteria set out in section 9.17.7).

9.17.7. Procedure for medical assessment

1. Upon request for a medical assessment, the nurse is informed and arrangements are made for the inmate to be assessed by a medical doctor and psychologist and/ or psychiatrist as soon as possible.

In British Columbia's policy, we again see the correctional system participating in a larger project of constituting gender in terms of a strict, essentialist gender binary. Section 10.01 of the policy, which tells a story of trans identity formation that starts with a psychological assessment, then moves to hormone therapy, then to the "real life" test, then to sex reassignment surgery, and finally ends with making a change to the sex marker on a provincially-issued birth certificate, implicitly relies upon what we might call a trans progress narrative. This narrative again proceeds from the essentialist assumption that gender must *always* accord with sex — even if the trans person's gender does not accord with their sex, at least they are making progress on their six-step journey towards sex reassignment surgery. Ultimately, the policy appears to encourage trans people to "fix" themselves by seeking out surgical interventions.

As s. 10.07 of the policy demonstrates, trans people who have not undergone what the policy curiously calls "surgical reconstruction of sex organs" must be "placed in a correctional centre consistent with their originating gender." As a result, there is a strong incentive for trans people to seek out medical interventions in order to bring their sex and gender in line with each other. Those who do not seek out surgical intervention will be forced to indefinitely remain in a facility that accords with the sex assigned to them at birth, ultimately making them more vulnerable to violence, discrimination, and harassment at the hands of both guards and inmates.

With s. 10.02 of the policy, which establishes a procedure for "[i]nmates claiming to be transsexuals", we again see the prison being cast as a site where norms of gender identity are constituted. When individuals disclose their trans status to prison administrators, administrators are entitled to request a medical assessment in order to assess the "validity of a claim of transsexualism". Put differently, the prison becomes a site that marks lines of inclusion and exclusion, one that ultimately participates in a larger project of making decisions about who constitutes a "valid" trans person, and who does not.

In a 2013 interview with Jennifer Metcalfe, Executive Director of Burnaby-based British Columbia Prisoners' Legal Services, she noted that she has worked with a number of trans people who have been incarcerated in both provincial and federal institutions within

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2. While awaiting such assessment, the inmate is held separately from the general population in the correctional centre where the inmate was admitted.
3. Following assessment, the medical doctor informs the warden of the recommended placement.
4. Treatment of inmates confirmed as transsexuals follows established medical practice.

9.17.8. Placement criteria
Transsexuals who have not progressed beyond step 3 in the process, set out in section 9.17.2, are placed in a correctional centre consistent with their original gender.

British Columbia over the course of her eight years with the organization. Metcalfe suggested that her organization had been advocating for policies in British Columbia that move away from essentialist conceptions of gender and, like Ontario's 2015 policy, towards a process of self-identification.[508]

In November 2015, the government of British Columbia finally announced a new policy. The policy introduces a number of changes to how trans inmates experience conditions of confinement in the province's jails. As British Columbia Prison Legal Services notes, the key changes include:

- Placing trans inmates according to gender, unless there are overriding health or safety concerns that cannot be resolved;
- Affording trans inmates the opportunity to choose the gender of officers performing frisk or strip searches;
- Allowing trans inmates to retain personal items necessary to express their gender and to be provided preferred institutional clothing;
- Integrating trans inmates into the general population, rather than in solitary confinement, unless there are proven overriding health and safety concerns which cannot be resolved;
- Giving trans inmates private shower and toilet facilities;
- Addressing trans inmates by their preferred names and gender pronouns verbally and in written documents;
- Providing training and education for staff on issues related to gender identity and expression;
- Prohibiting double bunking (sharing a cell) if a trans prisoner is ever housed according to the sex assigned to them at birth;
- Allowing prisoners to order canteen items used to support their gender identity and gender expression; and
- Providing training to prisoners on their legal rights, if appropriate.[509]

While the policy cannot address the myriad ways that trans people continue to be targeted by the apparatuses of the carceral state, including through practices of over-policing and profiling, British Columbia Prisoners' Legal Services suggests that the policy "may be the best example of any jurisdiction in Canada and the world for the accommodation of transgender prisoners".[510]

(iii) Other provincial and territorial jurisdictions

In comparison with Ontario and British Columbia, the story in other provincial and territorial jurisdictions appears to be one of indifference and inaction in equal parts. My research

[508] Interview with Jennifer Metcalfe.
[509] British Columbia Prisoners' Legal Services, "Prisoners' Legal Services Applauds BC Corrections' New Trans Policy" *West Coast Prison Justice Society*, online: <www.prisonjustice.org>.
[510] *Ibid*.

has revealed that, as of August 2016, no other provincial and territorial jurisdictions in Canada have created formalized policies related to the admission and placement of trans people in jails under their jurisdiction. My interactions with officials in Saskatchewan and Nova Scotia are instructive about the dearth of policies related to the admission and placement of trans people that currently exist in provincial and territorial jurisdictions across Canada.

While conducting research for *Sex Crimes* in January 2014, I reached out to the Legislation, Policy, and Planning section of Saskatchewan's Ministry of Justice for information about their current policy on the placement and admission of trans people in the province's jails. In February 2014, Fred Burch, Director of Legislation, Policy and Planning replied to my request. He acknowledged the current lack of policies in Saskatchewan's jails, making reference to the case of Avery Edison, which had been making headlines around the world. He also suggested that the province was interested in developing and implementing a new policy. In an email responding to my research request, Burch wrote:

> Saskatchewan does not have a policy on transgender and/or transsexual people (housing, healthcare, etc) nor do we keep statistical information or track the number of sex reassignment surgeries that have been performed.
>
> Admissions to custody of transgender and/or transsexual people is, to date, an extremely rare event. In the absence of written policy each case would be assessed and we would make placement decisions based on the recommendation of a medical doctor and or a psychiatrist. This begs the question "*Where is the individual to be housed until that happens?*" - an issue that came up in the detention of Avery Edison in Ontario earlier this month, a case widely covered by the media.
>
> If your research comes up with a best practice evidence based approach we would be quite interested.[511]

In light of this response from Saskatchewan's Ministry of Justice, it seems likely that, over the next several years, provincial and territorial jurisdictions across Canada will continue to move away from strict, essentialist conceptions of gender as they enact policies that attempt to better prioritize an individual's self-identification for admission, classification, and placement purposes. As a result, it seems likely that the prison will continue to serve as a site where norms and logics of gender and sexuality are constituted and challenged.

My interaction with Nova Scotia Correctional Services is also illustrative of the current lack of policies in provincial and territorial jails. In response to my December 2013 request for information about policies related to the admission, classification, and placement purposes of

[511] Email from Fred Burch to Kyle Kirkup dated February 21, 2014 [on file with author].

trans people in the provinces jails, Diana L. Mackinnon, Director of Nova Scotia Correctional Services, replied via email:

> Our approach to transgender offenders in custody in provincial facilities in Nova Scotia is to make decisions on housing based on the individual circumstances of the offender, giving consideration to their gender and to the best possible appropriate housing for him or her. We do not keep any statistics on this matter. The provision of health services to persons in custody is the responsibility of the Capital District Health Authority (adults) or the IWK Heath Centre (youth). Health information is confidential and not normally shared with Correctional Services staff; having said that we have no record of any escorts of offenders in hospital for surgeries.[512]

In this response, a typically polite, Canadian way of saying that there is no current policy in the province's jails, it remains entirely unclear whether prison administrators are provided with any guidance about how they ought to give "consideration to [offenders'] gender and to the best possible appropriate housing". As my interactions with both Saskatchewan and Nova Scotia demonstrate, norms and logics of gender and sexuality within Canada's carceral system will continue to be simultaneously constituted and challenged with the advent of 'informal' procedures and 'formal' policies. Put differently, the prison promises to continue to be a site where gender is both constituted and challenged.

III. UNDOING SYSTEMS OF GENDER AND SEXUALITY

Having analyzed the contemporary legal framework that applies to trans people in federal, provincial, and territorial correctional facilities across Canada, the chapter will now suggest that the move towards self-identification for legal purposes, and away from essentialist conceptions of gender, is consistent with recent Canadian human rights jurisprudence. Most notably, in the April 2012 decision of *XY v Ontario (Government and Consumer Services)*,[513] the Ontario Human Rights Tribunal held that a provision of the *Vital Statistics Act*[514] requiring individuals to undergo "transsexual surgery" in order to change the sex designation on their birth certificate constituted discrimination on the basis of sex and disability within the meaning of the *Ontario Human Rights Code*.[515] The Commission ordered the Ontario government to cease requiring trans people to have "transsexual surgery" in order to change their sex designation. Ontario was required to revise its criteria for changing sex designation on birth certifications within 180 days

[512] Email from Diana L. MacKinnon to Kyle Kirkup dated December 21, 2013 [on file with author].
[513] *XY v Ontario, supra.*
[514] RSO 1990, c V 4.
[515] RSO 1990, c H 19.

of the decision. The new criteria could not include the requirement of surgery.[516] As *XY* demonstrates, across Canada, jurisprudential understandings in Canadian human rights law are moving away from anatomy-based inquiries, instead prioritizing self-identification for legal purposes.

This approach, one that rejects essentialist conceptions of gender in favour of self-identification, also finds expression in recent Canadian legal academic literature. In "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon,"[517] Lori Chambers provides a thoughtful critique of *Nixon v Vancouver Rape Relief and Women's Shelter*.[518] In this case, one that sharply divided feminists, a trans woman argued that she had been discriminated against on the basis of sex and disability when she was excluded from volunteering at a rape crisis shelter open to "women only". Writing about self-identification as a strategy for reform, Chambers states: "If women-only space is to survive, 'woman' must be left open to determination. Otherwise, we are engaging in policing and exclusion that is detrimental to the promotion of universal human rights."[519]

Admittedly, the strongest argument militating against self-identification within Canadian carceral systems is the suggestion that the introduction of trans women into "women's only" space threatens to undermine the mental health and physical safety of cisgender women already housed in prisons. As the forgoing analysis demonstrates, these concerns led the Canadian Human Rights Tribunal in *Kavanagh* to conclude that trans women who had not "completed" sex reassignment surgery did not accord with essentialist norms of gender in a way that would allow her to be placed in a (presumptively cisgender) women's institution.[520] The claim put against approaches of self-identification is that, given that we continue to live in a society where cisgender women experience systemic discrimination and violence, the presence of a trans woman who has not "completed" surgery threatens to render prisons less safe. Put differently, ensuring safety in women's prisons requires officials to be able to clearly demarcate who is and is not a woman — and the only relevant inquiry ought to be whether or not the individual has a penis or a vagina. This claim, however, is not supported by sound empirical evidence and is largely impressionistic.

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[516] *XY*, *supra* at para 300.
[517] Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon" (2009) 19 CJWL 303.
[518] [2002] BCHRTD No 1.
[519] Chambers, *supra* at 333.
[520] Kavanagh, *supra* at paras 158 and 161.

In many ways, the epistemological — and perhaps ontological — standoff about who constitutes a woman is an old one. Indeed, some trans-exclusionary radical feminists have explicitly accused trans women such as Katherine Johnson, Synthia Kavanagh, Avery Edison, and Kimberly Nixon of engaging in what we might call a version of stealth gender politics. Margaret Denike, Sal Renshaw, and cj Rowe articulate the concerns voiced by radical feminists who suggest that allowing trans women to self-identify for legal purposes will undermine women's equality. They explain:

> In some circles…women may speak as though extending rights to transsexual women could pose a "threat" to the integrity of "women-only" spaces — or as [though] the rights and needs of these groups are antagonistic or mutually exclusive. Of particular concern is the question of whether self-identification can be definitive of gender identity, and whether, for example, women's groups, spaces and services should be fully accessible to anyone who identifies themselves as female; and more generally, when recognition should be sanctioned in law.[521]

While it is important to recognize that we continue to live in a society where cisgender women are subjected to systemic discrimination and violence, trans women tend to describe their own lived experiences in similarly stark terms — they too experience deep-seated discrimination and violence at the hands of a society dominated norms and logics of sexism and misogyny. There is strong empirical evidence to suggest that trans women experience disproportionate rates of discrimination, unemployment, poverty, harassment, and violence in all facets of social life. They also experience barriers when attempting to access healthcare and social services, including homeless shelters. For example, a 2010 Trans PULSE survey of 443 trans people in Ontario found that 43% of respondents had attempted suicide, 20% had been targets of physical or sexual assaults, and 34% had been verbally harassed or threatened.[522]

It is also important to recognize that traditional "women's only" arguments only stand up to scrutiny if we implicitly understand gender in essentialist terms. Such essentialist arguments should, it seems, be made with considerable caution. Historically, the kinds of essentialist arguments now being deployed in an effort to maintain one version of "women's only" space

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[521] Margaret Denike, Sal Renshaw, and cj Rowe, "Transgender Human Rights and Women's Substantive Equality," National Association of Women and the Law (NAWL), 2003, online: <http://www.nawl.ca> at 5.

[522] Greta Bauer et al, "Who are Trans People in Ontario?" (26 July 2010) 1:1 Trans PULSE e-Bulletin, online: TransPULSE http://www.ohtn.on.ca/Documents/Publications/didyouknow/july28_10/E-Bulletin.pdf. For further discussion of the systemic discrimination and violence experienced by trans people generally, see e.g. FORGE, *Transgender Sexual Violence Project: Raw Data Graphs* (Milwaukee: FORGE, 2005); Kyle Scanlon, "Where's the Beef? Masculinity as Performed by Feminists," in *Trans/Forming Feminisms: Trans-Feminist Voices Speak Out*, ed. Krista Scott-Dixon (Toronto: Sumach, 2006), 87-94 at 89; Emilia L. Lombardi, Riki Anne Wilchins, Dana Priesing, and Diana Malouf, "Gender Violence: Transgender Experiences of Violence and Discrimination," (2001) 42 Journal of Homosexuality 89.

have been used to justify the subordination of women from all facts of social life. As such, not only are essentialist arguments "socially deterministic", but they may even be "inimical to feminist progress."[523] In addition, it is important to underscore the problematic implications associated with attempting to draw simple comparisons between traditional "women's only" spaces at the heart of feminist organizing efforts, such as rape crisis centers, and the violence of "women's only" carceral spaces — comparison between these two sites should be made, it seems, with considerable caution.

IV. CONCLUSION: BEYOND THE PRISON

To summarize, the central goal of this chapter of *Sex Crimes* has been to provide an account of the underlying norms and logics that exist in federal, provincial, and territorial Canadian prisons after queer people have been tried, convicted, and sentenced within the criminal justice system. As sites that are rigidly segregated on the basis of sex, prisons constitute disciplinary institutions of the modern era. In light of the sex-segregation of modern prisons, this chapter has sought to explore the underlying norms and logics that permeate prison administration in Canada, analyzing the ways in which prisons invariably participate in a larger corporeal project of drawing lines of inclusion and exclusion on the basis of gender and sexuality.[524] By segregating people on the basis of the sex assigned to them at birth and refusing to recognize more fine-grained conceptions of gender, such as an individual's legal sex or their self-identification, the prison becomes a disciplinary tool, one that breathes new life into strict, essentialist, binaries. At the same time, the practice of segregating people in prisons on the basis of their sex also casts the prison as a site where 'normal' heterosexual encounters are, perhaps with the exception of occasional conjugal visits, off-limits.

In the challenges posed by Katherine Johnson, Synthia Kavanagh, Boyd Kodak, Avery Edison, then, we see the prison functioning as a disciplinary tool, one where strict, essentialist norms of gender and sexuality have the capacity to be both done and undone. Building upon the analysis offered in the proceeding four chapters, the concluding chapter develops a theory of contemporary queer engagements with the criminal law.

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[523] Chambers, *supra* at 328.
[524] See, for example, Spade, *Normal Life, supra;* Stanley & Smith, *supra*; Mogul et al, *supra*; and McGill & Kirkup, *supra*.

Conclusion
Law and Order Queers: Respectability, Victimhood, and the Carceral State

> Any criminal offence committed against a person or property which is motivated by hate, bias or prejudice can be deemed a hate crime at the time of sentencing. However, with the exception of hate propaganda, police cannot lay specific hate crime charges. If hate or bias motivation is proven at trial, it will result in an increased sentence. It is extremely important that you report to police any evidence of hate that you saw or heard when the offence was committed (for example, racist, homophobic, or anti-Semitic language being used during an assault). This will enable police to thoroughly investigate all aspects of the offence and present this evidence to the prosecution.
>
> Hate crimes tend to be more violent than other crimes and are often committed with the intention of scaring an entire community. They increase feelings of vulnerability, victimization and fear for everyone. They are particularly horrible because they often occur in places where you feel safest: at home, school or religious institutions. Left unchallenged, hate crimes can easily lead to copycat incidents. For all of these reasons, Canadian law provides for an increased penalty at sentencing.
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> *Report Homophobic Violence. Period.*, Egale Canada (2012)

INTRODUCTION

Over the course of the proceeding three chapters of *Sex Crimes*, I have examined contemporary practices of the criminal law in cases where queer people have been cast in the role of perpetrators of crime — starting with interactions between police and queer people on the street, moving to analyze stories of HIV non-disclosure in the courtroom, and then exploring the practices of sex- and sexuality-segregation in Canada's prisons. Somewhat paradoxically, this concluding chapter returns to where *Sex Crimes* began — to queer activists' early challenges to the everyday practices of criminalization.

As I argued in Chapter 1, these early challenges to the criminal law are perhaps best embodied by two pivotal moments in Canadian queer history: The decriminalization of homosexuality in 1969 and the Toronto Bathhouse Raids in 1981. Put differently, the queer rights movement in Canada did not start with the respectable images of queer subjectivity that have surfaced over the past thirty years in concert with human rights protections, same-sex benefits, and relationship recognition. Rather, queer subjectivity emerged as an identity constituted in and through discourses of the criminal law, and early queer activist interventions

invariably focused on efforts to challenge practices of criminalization by building allegiances with other marginalized groups ensnared in the repressive aspects of the criminal justice.

This return to the logics of early engagements with the criminal law animates the remaining analysis in *Sex Crimes*, where I task myself with proposing a theory of queer interactions with actors in the contemporary Canadian criminal justice system. This final chapter argues that a queer theory of contemporary Canadian criminal law lies in beginning to move away from a theoretical concept I develop called the *law and order queer movement*. The *law and order queer movement* runs the risk of legitimizing larger law and order agendas by relying on three normative devices: a new version of respectable queer subjectivity, a deep-seated attachment to victimhood, and a reimagined relationship with the state. This discursive shift from being constituted as a perpetrator of crime to being reimagined as a victim of crime, however, may have the unfortunate consequence of instantiating a criminal justice system that continues to violently target and discipline the most vulnerable members of queer communities — the same subjects who were left behind by the last thirty years of activism focused on human rights protections, same-sex benefits, and relationship recognition. The previous three chapters underscored how the criminal law continues to be used to regulate contemporary versions of queer subjectivity, moving from practices of the criminal law on the street, to the courtroom, to the prison.

Ultimately, the concluding chapter of *Sex Crimes* argues that queering the criminal justice system entails moving away from reproducing legal frameworks that merely include queer people, frameworks that typically find expression when queers are conceptualized as victims of crime. Instead, I argue that a queer approach to contemporary Canadian criminal law begins to account for the underlying forces in both law and society that often bring our most vulnerable into conflict with the system in the first place. As I have suggested, the subjects who find themselves in conflict with the criminal justice system tend to dwell at the axes of race, poverty, disability, gender, and sexuality. Challenging the law and order queer movement involves resisting impulses to harness the apparatuses of the state to criminalize and punish in the name of a newfound queer respectability, at least for the legal subjects who have increasingly gained access to normatively privileged positions over the past thirty years of activism.

The chapter is organized in four parts. **Part I** draws on contemporary literature related to feminist engagements with the criminal law, most notably Elizabeth Bernstein's theory of

carceral feminism and Janet Halley's recent scholarship in the field of governance feminism. **Part II** turns a queer eye on this body of literature to develop a new theoretical concept, one I call the *law and order queer movement*. **Part III** then uses this theory to help explain the recent work of mainstream queer organizations. With increasing fervor, these organizations are beginning to punish in the new of queer equality — Egale Canada, for example, is now delivering a training program to police across the country called *Report Homophobic Violence. Period.* The program teaches police services how to better investigate and prosecute queer hate crimes — the ultimate result is the prospect of increased custodial sentences. **Part IV** concludes *Sex Crimes* by offering a critique of the turn to respectability, a deep-seated attachment to victimhood, and a new relationship to the state. This approach of draping police, prosecutors, prisons, and other criminal law actors in rainbow garb, I argue, may have the unfortunate effect of bolstering contemporary law and order agendas. Instead, *Sex Crimes* ends by gesturing towards more complicated versions of queer subjectivity and renewed engagement with efforts to challenge practices of criminalization.

Methodologically speaking, this chapter relies upon both document analysis and open-ended interviews. In addition to the burgeoning body of theoretical literature related to feminist engagements with the criminal law, the concluding chapter reads historical materials about queer resistance to the criminal law against the contemporary programs of mainstream organizations such as Egale Canada. The chapter supplements this analysis with open-ended interviews conducted with representatives from police services and community organizations between September 2013 and August 2014 in Vancouver, Ottawa, and Toronto.

I. CARCERAL FEMINISM, GOVERNANCE FEMINISM, AND CONTEMPORARY ENGAGEMENTS WITH THE CRIMINAL LAW

This chapter begins by analyzing the emerging body of critical literature on feminist engagements with contemporary practices of the criminal law. It starts by surveying the recent scholarship of Elizabeth Bernstein on the relationship between feminism and anti-trafficking campaigns, where she describes the practice of harnessing apparatuses of the criminal law in the name of gender equality *carceral feminism*. The section then shifts to examine Janet Halley's recent critique of the growing feminist reliance on powerful apparatuses of the state. She calls this diverse set of contemporary engagements with historically masculinist institutions *governance feminism*.

(i) Carceral feminism

The recent scholarship of Elizabeth Bernstein seeks to examine the increasingly connected — and often fraught — relationship between feminism and punitive agendas of the contemporary state. Bernstein's work is interested in examining the ways in which "neoliberalism and the politics of sex and gender have intertwined to produce a carceral turn in advocacy movements".[525] Using contemporary feminist engagements with the Anglo-American anti-trafficking movement as a case study, Bernstein develops a theory she calls carceral feminism. Carceral feminism, she tells us, constitutes "a cultural and political formation in which previous generations' justice and liberation struggles are recast in carceral terms".[526] Put differently, Bernstein is critical of some feminists for their increasing reliance on historically conservative, masculinist institutions — most notably, police, prosecutors, and prisons — in order to attempt to achieve the goal of gender equality.

Drawing on the theoretical interventions of David Garland,[527] Loïc Wacquant,[528] and Jonathan Simon,[529] Bernstein examines the relationship between contemporary modes of punishment and a broad series of neoliberal structural transformations taking shape in Anglo-American law and society. While each theorist's work touches upon questions of how the increasing reliance on carceral practices is constituted in and through the specter of sexualized violence,[530] Bernstein argues that this body of theoretical literature never explains *why* the threat of sexual violence constitutes such a useful cultural tool in bringing about increasingly punitive carceral logics, practices, and policies.[531]

As a result, Bernstein's work poses provocative questions about the role of the contemporary carceral state, the analytics of neoliberalism, and the politics of sex and gender. She asks: "Why have carceral feminist frameworks gained prominence while previous welfarist and liberationist visions have declined? How do feminist versions of sexual and carceral politics

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[525] Elizabeth Bernstein, "Carceral politics as gender justice? The 'traffic in women' and neoliberal circuits of crime, sex, and rights" (2012) 41 Theor Soc 233 at 235 [Berstein, "Carceral politics"].
[526] *Ibid* at 236.
[527] David Garland, *The culture of control: Crimes and social order in contemporary society* (Chicago: The University of Chicago Press, 2001).
[528] Loïc Wacquant, *Punishing the poor: The neoliberal government of social insecurity* (Durham: Duke University Press, 2009).
[529] Simon, *supra*.
[530] Bernstein, "Carceral Politics", *supra* at 239.
[531] *Ibid* at 239-240.

get conjoined to drown out other social visions?"[532] As she examines Anglo-American feminist engagements with anti-trafficking campaigns, Bernstein finds a strange set of bedfellows — moral conservatives invested in promoting agendas of neoliberal carceral politics and a "family values" version of sexual politics are now working in hand-in-hand with predominately white, liberal, professional middle class feminists.[533] She argues that both constituencies have become increasingly reliant on masculinist institutions such as the state, police, prosecutors, and prisons to advance their goals. Rather than being understood as sites that pose threats to vulnerable women, such as migrant sex workers, feminists are reimagining these institutions as allies — and perhaps even saviours — in the struggle for gender equality.

Instead of focusing their attention on the underlying structural factors and institutional realities that may limit the types of labour choices certain migrant women have, a powerful group of feminists invariably attempt to explain "the problem" of sex work as little more than a practice of violence against women, one perpetrated by individual, racially coded criminal men.[534] Reworking Gayatari Spivak's account of gender, postcolonial politics, and alterity,[535] Bernstein explains that it is "white women who have joined forces with key sites of institutional power in order to save brown women from brown men."[536]

While Bernstein uses feminist engagements with the anti-trafficking movement as a case study, she contends that her theory has far more wide-reaching implications. Recent transformations within feminism, she argues, have played a central role in the expansion of the carceral state and its attendant punitive agendas in Anglo-American jurisdictions. As she puts it,

> Via successive encodings of issues such as rape, sexual harassment, pornography, sexual violence, prostitution, and trafficking into federal and now international criminal law, mainstream feminists have provided crucial ideological support for ushering in contemporary carceral transitions.[537]

Ultimately, Bernstein suggests that, with their reliance on punitive logics to advance the goal of gender equality, white, middle class, liberal feminists have bolstered carceral regimes — these regimes are far more invested in targeting people of colour and the working poor than they are

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[532] *Ibid* at 240.
[533] For a thoughtful account of the relationship between moral conservatives and feminists during the "sex wars", see e.g. Brenda Cossman et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto, University of Toronto Press, 1997).
[534] Bernstein, "Carceral Politics", *supra* at 244.
[535] Gayatari Spivak, "Can the subaltern speak?" in Cary Nelson & Lawrence Grossberg, eds. *Marxism and the interpretation of culture* (Urbana: University of Illinois Press, 1988) at 271-313.
[536] Bernstein, "Carceral Politics", *supra* at 245.
[537] *Ibid* at 253.

in promoting women's equality. She ends her work by calling for further theoretical accounts of the rise of the carceral state in concert with the feminist analytics of neoliberalism, suggesting that these explanations must be "cognizant of how mutually reinforcing sexual and carceral strategies have come to circulate together."[538]

(ii) Governance feminism

Writing in a similar vein as Bernstein's account of carceral feminism, Janet Halley examines a broadly constituted set of practices that she, along with Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, term *governance feminism*.[539] Examining the new ways that certain feminists, along with a particular set of feminist ideas, now find themselves in positions of institutional power, Halley explains governance feminism in the following terms:

> It is, I think, an underrecognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want — far from it — but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.[540]

With a nod to the Foucaultian distinction between *sovereign* forms of power imposed from above and *managerial* or *governance* forms of power that more insidiously emerge from below,[541] Halley's use of the term governance feminism is designed to signal "multiplicity, mobility, fragmentation, a regulatory or bureaucratic legal style, as well as ready facility with non-state and para-state institutional forms".[542]

While governance feminism may appear, on its face, to harness the sovereign power of the state from on high, Halley argues that techniques of governance feminism are far more complex in their range of approaches. Accordingly, she argues that governance feminism is better understood as an "assemblage of strategies" that "piggyback[] on existing forms of power, intervening in them and participating in them in many, simultaneous, often conflicting, and, in

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[538] *Ibid* at 255.
[539] Janet Halley et al, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism" (2006) 29 Harvard Journal of Law and Gender 335 [Halley, "Governance Feminism"].
[540] *Ibid* at 340.
[541] Citing Michel Foucault, "Governmentality" in *The Essential Works of Foucault, 1954-84, Volume 3: Power* (James D. Faubion ed., Robert Hurley trans., The New Press 2000) at 211.
[542] Halley, "Governance Feminism", *supra* at 341.

many examples anyway, highly mobile ways."[543] Under Halley's account, a wide constellation of actors — ranging from non-governmental organizations to law professors to media pundits — have installed some feminists and certain feminist ideas within both legal and institutional fields of power. Halley's central point is an important one: A movement that emerged as a critique of masculinist institutions has, little by little, found itself beginning to walk the halls of power. With this shift, Halley argues, the movement has become increasingly invested in the practices of punishing in the name of gender equality. In the section that follows, I build on these theoretical interventions to provide an account of similar emerging dynamics within mainstream queer rights organizations.

II. LAW AND ORDER QUEERS

Turning a queer eye on the contemporary body of literature on feminist engagements with the criminal law, I use this section to develop a new theoretical concept, one I call the *law and order queer movement*. As I will explain, the theoretical framework has three central dimensions. First, the movement relies on a newly-minted version of queer respectability. As I argued in Chapter 1 of *Sex Crimes*, this new version of queerness has emerged over the last thirty years, and has surfaced in concert with the advent of human rights protections, same-sex benefits, and relationship recognition. Second, the movement is marked by a deep-seated attachment to an identity mediated in and through discourses of victimhood. Third, the movement recasts the apparatuses of the carceral state in benevolent terms — at least for the most privileged queers, the state comes to be reimagined as a site capable of doling out equality. With the turn to state-recognized human rights protections, benefits, and marriage, I argue, also comes a turn to increased support for violent systems of policing, prosecution, and punishment. I elaborate on these three interrelated concepts below, suggesting that the recent historical shift from being constituted as a perpetrator of crime to a victim of crime may have the unfortunate consequence of breathing new life into a criminal justice system that continues to target and discipline the most vulnerable members of queer communities — particularly those who dwell at the axes of race, poverty, and disability.

[543] *Ibid* at 340-341.

(i) Turning to respectability

First, as I noted in Chapter 1, we are witnessing the emergence of a new version of queer respectability, one that has surfaced over the past thirty years of advocacy. It would be a mistake, however, to assume that there have not been collateral consequences associated with this remaking of queer subjectivity mediated in and through legal discourses. Moving laterally across the criminal justice process over the course of the past three chapters, I have demonstrated that the new framing of queer subjectivity has had very tangible, and often troubling, consequences for those who continue to find themselves ensnared in the repressive aspects of criminal justice. The subjects who have been left behind by the turn to respectability are the same subjects who continue to be targeted by the apparatuses of the carceral state — those profiled by police on the street, those targeted for failing to disclose their HIV-positive status during intimate encounters, and those inappropriately housed in a prison system predicated on strict, essentialist gender binaries.

At the very same time that we see a shift towards human rights protections, same-sex benefits, and relationship recognition, however, we also see a movement turning away from advocacy that seeks to support those who are accused of committing and, in some instances, convicted of criminal offences. Historically, queer organizations were invested in supporting those targeted by the criminal justice system. As they inched closer to realizing the goal of marriage equality, however, groups could no longer risk being seen as associating with criminal elements — this meant that support for those targeted by the police, by the overreach of the criminal law, and by practices of incarceration, quickly started to disappear from mainstream advocacy groups. Those ensnared in punitive practices of the criminal law were pushed to the sidelines in favour of more favourable legal subjects, ones who could be fit more readily into the model of respectability politics — and ultimately deliver on the promise of marriage equality.

This changing dynamic is perhaps best illustrated by way of example — the disappearance of queer prison advocacy in Anglo-American jurisdictions beginning in the 1980s. Prison activism requires organizers to advocate on behalf of legal subjects who, as perpetrators of crime, tend to dwell in far more complicated positions than their wholly respectable counterparts. Starting in the 1960s, in the early days of the queer rights movement, organizations regularly advocated on behalf of people in prisons. During New York City's first pride march in 1970, for example, organizers crafted a parade route that would take participants past the Women's House of Detention. The march, which began as a way of commemorating

the Stonewall Riots against police violence, discrimination, and harassment that had taken place one year earlier, demonstrated that early queer activists saw their work as being intimately connected to supporting and advocating for people in prisons. Indeed, many activists at the centre of the queer liberation movement had themselves spent time in custody.[544] Similarly, the early women's liberation movement also understood the Women's House of Detention as a site of contestation and protest.[545]

As the queer liberation activists moved past the jail during their 1970 march in New York City, they chanted: "Free our Sisters! Free ourselves!"[546] The next year, representatives from a number of queer liberation groups gathered outside the Men's House of Detention in lower Manhattan, again protesting what they called the "routine brutality" experienced by queer people at the hands of prison administrators. In 1972, during Boston's Gay Pride Week, activists organized a candlelight march to the Charles Street Jail, where they chanted and sang in solidarity with incarcerated queer people. Similarly, activists in Chicago organized a demonstration at the Cook County Jail in 1973 to support queer people in prison.[547] In these early examples, we see Anglo-American queer activism being intimately connected with supporting people ensnared in the repressive aspects of criminal justice.

In the early 1980s, however, when activists started to trade criminality for respectability as they inched closer to marriage equality, early examples of solidarity with people in prison started to disappear. The turn away from challenging the criminal law and supporting those accused of committing crimes is evidenced by a range of changing dynamics, including dwindling coverage of prison issues in the queer press and the end of queer prison pen-pal projects.[548] In 1987, for example, the editors of *RFD: A Country Journal for Gay Men Everywhere*, a quarterly newsletter published in the United States that had previously devoted sections of the publication to prison issues, signaled its new position in relation to the criminal law. The piece cautioned readers to avoid "elevat[ing] the criminal to the rank of hero". As the editors put it, "The simple truth is that most men in prison are there because they belong there".[549] This shift away from supporting people in conflict with the criminal law "coincided with the transmutation of a movement for sexual liberation into a movement dedicated to

[544] Regina Kunzel, "Lessons in Being Gay: Queer Encounters in Gay and Lesbian Prison Activism" (2008) 100 Radical History Review 11 [Kunzel, "Lessons in Being Gay"].
[545] Karla Jay, *Tales of the Lavender Menace: A Memoir of Liberation* (New York: Basic Books, 1999) at 103-105.
[546] Kunzel, "Lessons in Being Gay", *supra* at 12.
[547] *Ibid* at footnote 7.
[548] *Ibid* at 29.
[549] *Ibid*, citing "Joint Venture," RFD 13 (1987) at 65.

pursuing equal rights and reflected a corresponding shift in the movement's commitments and priorities".[550] Put differently, one way that queer activists started to gain legitimacy within the normative social order was to distance themselves from criminal elements within their communities. This tactic eventually lead some activists to begin publically supporting law and order agendas on at least two fronts: dissociating themselves from those accused of committing crimes and suggesting that people in prison deserved to be there — in doing so, queer activists started to trade in criminality for a newly minted respectability, engaging in regimes of self-governance that they thought would make the prospect of human rights protections, same-sex benefits, and marriage equality more likely.

(ii) Attaching to victimhood

Second, I theorize the ways in which queer identity is constituted in and through a deep-seated attachment to victimhood, and the consequences this has for contemporary engagements with the criminal law. Queer legal subjects — at least those who can be read in terms of familial respectability — have become increasingly willing to reimagine law and order movements in terms of equality. In doing so, they have solidified their new positions as ideal subjects. This shift, I argue, is indelibly marked by painful, affective histories with criminalization.

In *States of Injury: Power and Freedom in Late Modernity*, Wendy Brown examines the fraught relationship that marginalized groups have with law, legal discourse, and the state. She asks, "What kind of attachments to unfreedom can be discerned in contemporary political formations ostensibly concerned with emancipation?"[551] She argues that, when we organize political communities around historically marginalized categories of identity, we run the risk of engaging in the compulsive, painful restaging of our subjugation. Brown describes the process of framing political demands around claims of identity-based injury *wounded attachments*. Subjects invariably attempt to redress these wounds, often with unsatisfying results, by seeking recognition from from law, legal discourse, and the state, among others.

In developing this argument, Brown is most indebted, perhaps with the exception of Friedrich Nietzsche, to the work of Sigmund Freud. As Freud argues in *Beyond the Pleasure Principle*,[552] humans may feel drawn to compulsively restage traumatic life events. By repeating certain painful events over and over again, humans mistakenly believe that they will eventually

[550] *Ibid* at 29.
[551] Brown, *supra* at xii.
[552] Sigmund Freud, *Beyond the Pleasure Principle* (New York: WW Norton Company, 1990).

gain control over — and perhaps even master — them. The problem with this dynamic, one Freud aptly called *repetition compulsion*, however, is that it allows the painful event to continue to have psychic power over individual subjects in the present, rather than relegating the event to something that occurred in the past. Freud reminds us that it is a fiction to think that we will ever be able to gain mastery over an event that caused us pain. Rather, the patient who turns to repetitive maladaptive behaviour is, as Freud explains, "obliged to repeat the repressed materials as a contemporary experience instead of, as the physician would prefer to see, *remembering* it as something belonging to the past".[553] As the past event is played out over and over again in the present, it is allowed to continue to govern not only our conduct and actions, but also the contours of our subjectivity.

With parallels to the work of Brown, Love underscores the often-fraught relationship queers have with the injurious past. As she observes, "The history of Western representation is littered with the corpses of gender and sexual deviants".[554] Given these histories, ones where the apparatuses of the carceral state have often been used to punish gender and sexual minorities, queers are a group that have organized their psychic and material lives around historical injury. She writes:

> Insofar as the losses of the past motivate us and give meaning to our current experience, we are bound to memorialize them ("We will never forget"). But we are equally bounded to overcome the past, to escape its legacy ("We will never go back"). For groups constituted by historical injury, the challenge is to engage with the past without being destroyed by it. Sometimes it seems it would be better to move on — to let, as Marx wrote, the dead bury the dead. But it is the damaging aspects of the past that tend to stay with us, and the desire to forget may itself be a symptom of haunting. The dead can bury the dead all day long and still not be done.[555]

In view of this history, there may be complicated affective reasons why queers — or, at least, the more privileged members who are no longer experiencing violence at the hands of the criminal justice system — may feel compelled to frame themselves as victims and, consequentially, restage the violence that they have experienced in the past by targeting others in the present. As we turn to carceral systems in an effort to heal us from our wounded attachments to victimhood, we run the risk of restaging historical dynamics and, consequently, punishing the most vulnerable members of our communities. In doing so, we also bring these

[553] *Ibid* at 18:18 [emphasis that of the author].
[554] Love, *supra* at 1.
[555] *Ibid*.

historical wounds into the present — as Freud might suggest, we never gain mastery over the events but, rather, simply restage our own subjugation over and over again.

(iii) Recasting the state

Third, I argue that, over the past thirty years, we have witnessed a discursive shift — one where respectable queer subjects, subjects who have become increasingly invested in wounded attachments to victimization and vengeance — recast the state in benevolent terms. In the debates in Canada around human rights, benefits, and marriage equality, queer activists made the implicit argument that the state could be harnessed as a site capable of affording full equality. It would be a mistake, however, to assume that this decision to frame queer legal subjectivity did not have collateral consequences in other areas of law — perhaps most notably, the criminal law in cases where queer people are cast as perpetrators, rather than victims, of crime.

As a number of commentators have rightly observed, queer legal subjects in Anglo-American jurisdictions now draw both implicit and explicit connections between hate crime protections and ideal notions of citizenship. Put differently, one way that historically marginalized groups gauge equal rights protections is by asking "whether the state is willing to imprison other people on their behalf."[556] As the most privileged members of queer communities have slowly moved from gender and sexuality outlaws to in-laws, the implicit message has been that the state has the capacity to be harnessed as a tool capable of doling out equality — the more criminalization the better, the misguided story goes, because it sends a message that members of society are finally taking homophobic and transphobic violence seriously. As Sarah Lamble observes:

> As the more race- and class-privileged members of LGBT communities are ushered into new forms of neoliberal citizenship — where buying power, respectability and nationalism are the price of welcome — 'lesbian and gay rights' discourse has marked a striking shift away from previous critiques of the carceral state and towards a growing desire for punitive politics.[557]

Put differently, the theory of the state at work in the context of the 1981 Toronto Bathhouse Raids bears little resemblance to the theory of the state held by supporters of marriage equality — and even less of a resemblance to the theory of the state held by those who uncritically

[556] Sarah Lamble, "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment" (2013) 24(3) Law & Critique 229.
[557] *Ibid*.

support increased punishments for hate-motivated violence. The older theory recognizes the long history of policing and punishing gender and sexual minorities and seeks to challenge the operation of carceral regimes, while the emerging theory reimagines the state in benevolent terms, welcoming it into the lives of the most normatively privileged queer legal subjects.

Rather than conceptualizing the state as an arbiter of punishment, one that has a long history of violently targeting the most vulnerable members of queer communities, particularly those situated at the axes of race, poverty, and disability, respectable queer legal subjects begin to reconfigure the state as a site where equality can be handed out through increasingly punitive sanctions. Accordingly, queer people may seek recognition from the punitive apparatuses of the carceral state in an effort to be reconstituted in law and legal discourse as respectable citizens, rather than as the criminally-coded figures of "the homosexual" and "the transsexual".[558]

While this dynamic — one of punishing in the name of queer equality — may be understandable, the desire to seek recognition from the state is not without troubling collateral consequences. By yearning for recognition from the carceral state, queer subjects may have the unfortunate effect of lending legitimacy to a system that continues to be use to target the most vulnerable members of our community — the same subjects who were left behind in the push for recognition in the field of human rights protections, same-sex benefits, and relationship recognition.

III. PUNISHING IN THE NAME OF QUEER EQUALITY: HATE CRIME LEGISLATION

Having set out the three central propositions of the law and order queer movement, I now use the theory to help account for a new iteration of queer engagements with the criminal law — the push to have crimes motivated by hatred on the basis of sexual orientation and, more recently, gender identity and gender expression, treated as an aggravating factor at sentencing. While I use hate crime legislation as a case study, my framework's theoretical purchase has larger implications for a range of queer engagements with contemporary practices of the carceral state, including recent support for abolition of the "homosexual advance" provocation defence, which has the practical effect of triggering the mandatory minimum sentence of life in prison for

[558] For further discussion of the punitive state in the context of sex offender laws, see e.g. Roger N Lancaster, *Sex Panic and the Punitive State* (Berkeley: University of California Press, 2011).

second-degree murder,[559] along with recent attempts to have police and corrections vehicles included in Pride parades across Canada.[560] I use queer support for hate crime legislation as a case study because it provides a concrete example of the misguided logics, and troubling consequences, of harnessing the power of the criminal law in order to punish in the name of newfound version of queer respectability, a deep attachment to victimhood, and a reimagined relationship with the carceral state.

What follows below is a brief survey of the history of adding "sexual orientation", along with advocates' more recent attempts to add "gender identity" and "gender expression", to the sentencing provisions of the *Criminal Code*. With this history in place, I proceed to analyze the new techniques that Egale Canada, arguably this country's most well-known national queer rights organization, is using when it comes to contemporary practices of policing, prosecution, and punishment.

(i) Hate crime legislation in Canada

"Hate crimes" did not enter the lexicon, let alone Anglo-American jurisprudence, until the 1980s.[561] The recognition of the harmful effects of hate-motivated violence appears to be rooted in the experience of the two World Wars, along with the perception beginning in the 1980s that instances of hate-motivated acts were on the rise.[562] In the United States, a number of states initially based their hate crime provisions on model legislation drafted by the Anti-Defamation League.[563] The model set out two distinct hate crimes. Institutional vandalism offenses were designed to respond to hate-based graffiti in places such as religious sites or schools, while intimidation offences were premised on the idea that crimes motivated by hatred were more serious than other offenses and deserved a greater level of punishment.[564] Over time,

[559] See e.g. Scott D. McCoy, "The Homosexual-Advance Defense and Hate Crime. Statutes: Their Interaction and Conflict" (2001) 22 Cardozo L Rev 629; Christina Pei-Lin Chen, Note, "Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic,' and the Non-Violent Unwanted Sexual Advance Defense," (2000) 10 Cornell JL & Pub. Pol'y 195; and Smyth, *supra*.
[560] See e.g. Alex Migdal, "Toronto police chief explains LGBTQ-outreach efforts to Pride organizers" *The Globe and Mail* (3 August 2016), online: The Globe and Mail <www.theglobeandmail.com>.
[561] Terry A. Maroney, "The Struggle Against Hate Crime: Movement at a Crossroads" (1998) 73 NYU Law Rev 564 [Maroney, "Struggle"]; Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Cambridge: Harvard University Press, 2002) [Lawrence, *Hate*].
[562] Lawrence, *Hate*, *supra* at 20-22.
[563] This model statute was published in 1981. For further discussion, see Lawrence, *Hate*, *supra* at 20.
[564] The model statute for Intimidation provides:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section __ of

the Anti-Defamation League's model expanded to include crimes motivated by the perceived sexual orientation of the victim.[565]

There are a number of overlapping theoretical accounts of the criminal law that help to explain the emergence of hate crimes in Anglo-American legal discourse. A brief survey of two of the most commonly articulated theories in support of hate crime legislation may be useful at this juncture.[566] A first theory is rooted in conceptions of proportionality — it is a well-established principle of criminal law that an individual's conduct should be proportional to the punishment they receive.[567] Under this account, proponents of hate crime legislation contend that the harm caused by hate crimes is more severe than other crimes, both for the victim and the broader community they represent. This increased level of harm justifies greater punishment from the apparatuses of the carceral state.[568]

A second theory used to justify the emergence of hate crimes in Anglo-American legal discourse is that of expressive condemnation.[569] Under this account, hate crime laws operate largely at the symbolic level — the expressive power of the criminal law is harnessed, or so the story goes, in order to send messages to members of the public that, among other things, racism, sexism, homophobia, and transphobia are no longer tolerated in contemporary society.[570] Thus, while there is no singular theoretical account, notions of proportionality and expressive condemnation inform the emergence of hate crimes in Anglo-American legal discourse.

As I suggested in Chapter 1 of *Sex Crimes*, hate-motivation is considered as an aggravating factor at sentencing. This is a relatively recent development in the history of

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the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault, and/or other statutorily proscribed criminal conduct.)

B. Intimidation is a __ misdemeanor/felony (the degree of criminal liability should be at least one degree more serious than that imposed for the commission of the offense.)

[565] An in-depth analysis of the historical dimensions of the emergence of hate crimes legislation goes beyond the scope of this article. For further discussion, see e.g. Carter, *supra*; Martha Shaffer, "Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough" (1995) 41 McGill L.J. 199 [Shaffer, "Hate-Motivated Violence"].

[566] For a review of these underlying theories, see e.g. McCoy, "Homosexual-Advance" *supra* at 650-5.

[567] See e.g. *Criminal Code of Canada*, s. 718.2.

[568] Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Cambridge: Harvard University Press, 2002) [Lawrence, *Hate*] at 45-63; Alon Harel & Gideon Parchomovsky, "On Hate and Equality" (1999) 109 Yale L.J. 507 at 507-508; Elizabeth A. Pendo, "Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act" (1994) 17 Harv. Women's LJ 157 at 160.

[569] See e.g. Jean Hampton, "The Retributive Idea," in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988) at 111; Dan M. Kahan, "What Do Alternative Sanctions Mean?" (1996) 63 U. Chi. L. Rev. 591; and Dan M. Kahan, "Two Liberal Fallacies in the Hate Crimes Debate" (2001) 20 Law and Philosophy 175 [Kahan, "Two Liberal Fallacies"].

[570] McCoy, *supra* at 655; Lawrence, *Hate*, *supra* at 163-169. For a discussion of sociological accounts of criminal law, including expressivist theories, see e.g. David Garland, "Sociological Perspectives on Punishment" (1991) 14 Crime and Justice 115.

Canadian criminal law. In 1995, the federal government overhauled its sentencing regime, which included adding s. 718.2(a)(i) to the *Criminal Code*. The subsection provides that "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor" constitutes an aggravating factor at sentencing. During debates in the House of Commons and the Senate, the most controversial of these enumerated categories was, perhaps unsurprisingly, sexual orientation.[571] Introducing this provision, however, did little to change the sentencing landscape in Canada — judges had already been treating hate-motivation as an aggravating factor at sentencing for almost twenty years.[572] The amendments simply codified this judicial trend, and a cynical observer might even suggest that the amendments allowed the government to be seen as being responsive to the perceived rise of hate-motivated violence in Canadian society without introducing meaningful changes.[573]

Under this recent framework, the Crown must demonstrate, beyond a reasonable doubt, that the accused person was motivated by bias, prejudice, or hate on the basis of one of the enumerated identity categories.[574] Over the last twenty years, courts have at times struggled to develop a consistent set of factors in order to assess whether the accused person has, both in fact and in law, been motivated by hatred. For example, in the recent case of *Kandola*, Justice Groves suggested that, in the context of crimes motivated by sexual orientation animus, the following factors have emerged in the jurisprudence:

> [W]hether there was anti-homosexual language uttered before, during, or after the offence was committed; whether the offence was committed in a high-visibility, for lack of a better term, location where homosexuals are known to frequent; the lack of provocation; any lack of prior interaction between accused and victim; extreme or

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[571] Bill C-41, SC 1995, c 22, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*. The Bill received Royal Assent on July 13, 1995. Most of the provisions came into force on September 3, 1996.

[572] See e.g. *R v Ingram*, (1977) 35 CCC (2d) 376 (a case involving racial motivation as an aggravating factor at sentencing); and *R v Atkinson*, (1978) 1 WLR 425, 143 CCC (2d) 342 (a case involving homophobia as an aggravating factor at sentencing).

[573] Shaffer, *"*Hate-Motivated Violence*"*, *supra* at 245. Shaffer surveys reasons why the government may find criminal responses to hate crime appealing. She contends that: (1) enacting criminal legislation often makes it relatively easy for the government to claim that it is addressing a social problem; (2) criminal legislation may be comparatively inexpensive, rather than tackling more ambitious social programs; and (3) the process of enacting criminal provisions regarding hate crime attracts considerable media attention, giving the government free political mileage.

[574] Section 724(3)(e) of the *Criminal Code of Canada* provides:

> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence […]
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

> disproportionate violence; and finally, absence of any possible alternative explanation or motivation given the presence of some or all of the above-noted factors.[575]

The application of these factors, and the increased punishment that comes with it, allows queer people to begin the transformation from being constructed as perpetrators to victims of crime — to use the language of Simon, as victims of crime willing to harness the punitive power of the carceral state, queers started to better accord with ideal notions of Anglo-American citizenship.[576]

More recently, mainstream queer rights organizations have pushed the federal government to add "gender identity" and "gender expression" to the enumerated categories set out in s. 718(a)(i) of the *Criminal Code*. Indeed, in May 2016, the federal government introduced legislation that, when it passes through the House of Commons and the Senate, will do just that.[577]

One of the most enthusiastic supporters of Bill C-279, the precursor to the current legislation that ultimately failed to pass before the start of the 2015 federal election and thus died on the order paper,[578] was Egale Canada. The organization is arguably Canada's most prominent national queer rights organization. In the FAQ section of its website on Bill C-279, Egale Canada rejects the argument that the phrase "or any similar factor" contained in s. 718(a)(i) could apply to instances of violence motivated by anti-trans bias. The group then expresses concern that they cannot find any reported instances where offenders had been punished more severely in response to violence that had been motivated by a victim's gender identity or gender expression, explaining:

> In the history of Canada's hate crime provisions, there is no apparent evidence of a case in which the provisions have been applied to a hate crime based on gender identity, even where such evidence has been presented to the court and recorded in the ruling. The *Criminal Code*, as it stands, is not effective in addressing hate crimes against trans people in Canada and it does not provide trans people with protections equal to those afforded to other members of society.[579]

Despite the long history of actors in the criminal justice system violently targeting queer people, a history that I have demonstrated over the past three chapters of *Sex Crimes* continues to the

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[575] *R v Kandola*, 2010 BCSC 841 at para 11 [*Kandola*].
[576] Simon, *supra*.
[577] For further discussion, see e.g. Kyle Kirkup, "Legislation is a good start", *supra*.
[578] Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*, 41st Parl, 2013.
[579] Egale Canada, "Bill C-279, the Gender Identity Bill: Frequently Asked Questions", online: Egale Canada <www.trans.egale.ca>, citing *R v Gunabalasingam*, 2008 CanLII 19232 (ON SC).

present, Egale Canada's statement signals a desire to adopt a new position in relation to the criminal law. For this mainstream queer rights organization, trans identity is better understood as being a respectable victim of crime, rather than a perpetrator.

While there is a dearth of empirical literature on how often s. 718(a)(i) is being applied in instances of hate motivated violence, mainstream queer rights organizations have, in concert with the push for human rights protections, same-sex benefits, and relationship recognition over the past thirty years, started to provide crucial ideological support for a criminal justice system that continues to violently target queer people, particularly those who dwell at the intersection of multiple categories of identity and experience. As I will suggest, there are important reasons to remain deeply skeptical of this newfound relationship to practices of the criminal law — and of the impulse of the most normatively privileged members of queer communities to drape police, prosecutors, and prisons in rainbow garb.

(ii) Case study: Egale Canada's Report Homophobic Violence. Period. program

After the federal recognition of same-sex marriage in 2005, Egale Canada started to look for new places it could turn its attention. Some recent initiatives include attempting to eradicate youth bullying and inclusion in sport. Eventually, the organization also turned to the criminal law, entering into an agreement with the Toronto Police Service's LGBT Consultative Committee. The agreement allowed Egale Canada to serve as the national and international dissemination partner of a new queer hate crimes program, which delivers training and materials to police services in Canada and abroad. This post-marriage equality training program teaches police services how to investigate, prosecute, and ultimately more severely punish those who commit queer hate crimes.

In a section of its promotional website entitled "Bring RHVP to my Community", Egale Canada describes the potential outcomes and learning objectives of the program in the following terms:

> Build a safer atmosphere for victims of hate crime.
>
> Gain a sustained confidence in your police service.
>
> Brainstorm and recommend helpful services and interventions of hate crime in your community.

> Help identify and report anti-LGBTQ bullying and violence in your schools and neighbourhoods.[580]

At the same time that the program speaks enthusiastically about developing relationships between queer people and the police, the program remains silent about the number of ways queer people, at least those who dwell in the most marginalized positions, continue to be targeted by the carceral state. The underlying normative narrative conveyed by the program is that the Canadian criminal justice system no longer targets queer people — the apparatuses of the carceral state have been reimagined in far more benevolent, perhaps even queer-positive, terms.

Moving from its description of the benefits of building relationships with the police to the benefits of punishing in the name of equality, promotional materials for the program note that there are a number of reasons why Canadian law provides for an increased penalty at sentencing. They state:

> Any criminal offence committed against a person or property which is motivated by hate, bias or prejudice can be deemed a hate crime at the time of sentencing. However, with the exception of hate propaganda, police cannot lay specific hate crime charges. If hate or bias motivation is proven at trial, it will result in an increased sentence. It is extremely important that you report to police any evidence of hate that you saw or heard when the offence was committed (for example, racist, homophobic, or anti-Semitic language being used during an assault). This will enable police to thoroughly investigate all aspects of the offence and present this evidence to the prosecution.
>
> Hate crimes tend to be more violent than other crimes and are often committed with the intention of scaring an entire community. They increase feelings of vulnerability, victimization and fear for everyone. They are particularly horrible because they often occur in places where you feel safest: at home, school or religious institutions. Left unchallenged, hate crimes can easily lead to copycat incidents. For all of these reasons, Canadian law provides for an increased penalty at sentencing.[581]

Again, while the promotional materials articulate an enthusiastic vision of increased penalties at sentencing for hate motivated violence, they remain silent about the consequences of lending the rainbow stamp of approval to a carceral system that continues to target the most vulnerable members of queer communities — as I have demonstrated over the course of the past three chapters, those situated at the axes of race, poverty, disability, gender, and sexuality continue to find themselves ensnared in the repressive aspects of criminal justice.

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[580] Egale Canada, "Bring RHVP to my Community", *Report Homophobic Violence, Period*, online: RHVP <www.rhvp.ca>.

[581] Egale Canada, "RHVP: Hate Crimes", *Egale Canada*, online: Egale Canada <www.egale.ca>.

Since developing and implementing the program, those in leadership positions with Egale Canada have started to speak, in increasingly positive terms, about the benefits of investigating, prosecuting, and punishing in the name of queer equality and justice. For example, when Statistics Canada released a study in July 2015 on the increase in reported incidents of hate-motivated violence against queer communities, Helen Kennedy, the executive director of Egale Canada, viewed these statistics as a positive development, noting that her organization had been encouraging queer communities to have hate-motivated crimes punished more severely through its training program for a decade. Indeed, she drew causal connections between the work of *Report Homophobic Violence, Period.* and the increased number of criminal punishments, explaining:

> Reports of incidents have gone up and I think that's directly related to some of the training we're doing with the police and to engage the community to try and encourage people to report these incidents…We've known for years and years that we have a big problem with violence against the LGBT community . . . and I don't think the government can continue to sweep this under the carpet and say that we have great legislation in Canada to protect LGBT communities (when) the reality is that we're not.[582]

While we can all agree that homophobic and transphobic violence is a serious problem, one that needs to continue to be eradicated in all facets of social life, there are good reasons to be critical of Egale Canada's suggestion that queer people should support increased penalties at sentencing for hate crimes. There is a large body of literature demonstrating that incarcerating individuals for longer periods does virtually nothing to deter individuals from committing hate motivated violence.[583] At the same time, supporting longer sentences may have the unfortunate consequence of lending queer support to a system that continues to be used to targeted the most vulnerable members of queer communities. Egale Canada may have turned to the criminal law with the best of intentions, but it seems unlikely that it will be effective in eradicating homophobic and transphobic violence.

In this program, we see the operation of the three interrelated concepts of the law and order queer movement being brought to life — respectability, victimhood, and a reimagined relationship with the state. First, the program relies upon a newly minted version of queer respectability. The new version of queerness has emerged in the last thirty years, and has

[582] Tobi Cohen, "Hate crimes against gays doubled in Canada" *Canwest News Service* (13 April 2015), online: Canwest News Service <www.canada.com>.
[583] For further discussion on the lack of correlation between hate crime legislation and deterrence, see e.g. Kahan, "Two Liberal Fallacies", *supra*.

surfaced in concert with the advent of human rights protections, same-sex benefits, and relationship recognition — the same queer legal subjects who now have access to privileged positions in the normative social order are urging actors in the criminal justice system not only to take homophobic and transphobic violence more seriously, but to impose larger sentences on their behalf.

Second, the program is marked by a deep-seated attachment to victimhood — the program implicitly casts queer legal subjects as victims, rather than perpetrators, of crime. In the documentary that accompanies *Report Homophobic Violence, Period.*, participants are described as having "courage in the face of hate".[584] The implicit message of the documentary is that queer legal subjects who have experienced violence should demonstrate courage by coming forward to police, having their experience labeled as a hate crime and, ultimately, punished for severely by the criminal justice system. The documentary remains silent, however, about the violent ways that the most vulnerable members of queer communities experience police, prosecutors, and prisons in their everyday lives. Rather than understanding carceral regimes themselves as being a threat to vulnerable queer people, the documentary seeks to reimagine queerness as being an identity marked by notions of victimhood.

Third, the program recasts the apparatuses of the carceral state in benevolent terms — for the privileged queers, those who now have access to human rights protections, benefits, and relationship recognition, the state is reimagined as a site capable of doling out equality and justice. The state signals its new relationship with queer subjects, or at least those normatively-positioned as respectable victims of crime, by demonstrating its willingness to marshal more policing, more prosecution, and more punishment. While we can all agree that homophobic and transphobic violence ought to be challenged in all facets of society, the new tactics of Egale Canada warrant criticism for implicitly wrapping criminal punishments in rainbow garb — as I have suggested over the past three chapters of Sex Crimes, there are important reasons to remain deeply skeptical about the dominant narrative that the Canadian state, in contrast with other jurisdictions around the world, no longer violently targets queerness.

(iii) Beyond the law and order queer movement

[584] Egale Canada, "Courage in the Face of Hate", *Report Homophobic Violence, Period*, online: RHVP <www.rhvp.ca>.

As I have suggested, there are important reasons to remain critical of the new ways that respectable queer legal subjects are contributing, either implicitly or explicitly, to the law and order queer movement. In his recent scholarship on hate crime legislation in the United States,[585] discussed more fully in Chapter 1, Spade expresses deep concern about the approach taken by mainstream organizations such as the Human Rights Campaign in the United States. These organizations, like their Canadian counterparts, are beginning to adopt a new position in relation to practices of the criminal law — that is, they are begin to convince actors in the criminal justice system to punish in the name of queer equality. Spade explains:

> The fundamental message of hate crime legislation is that if we lock more bad people up, we will be safer. Everything about our current law enforcement systems indicates that this is a false promise, and it's a false promise that targets people of color and poor people…Many might hope that queer and trans people would be unlikely to fall for this trick, since we have deep community histories and contemporary realities of experiencing police violence and violence in prisons and jails, and we know something about not trusting the cops…By desiring recognition within this system's terms, we are enticed to fight for criminalizing legislation that will in no way reduce our experiences of marginalization and violence.[586]

Engaging the tropes of respectability, victimhood, and a new relationship with the state, activists pushing for more punitive hate crimes laws participate in a larger normative project, one I term the law and order queer movement.

After criticizing contemporary queer engagements with the criminal law, Spade considers alternative approaches. Rather than attempting to punish in the name of queer equality, Spade proposes three types of strategies that may be more effective than criminal punishments in reducing instances of hate-motivated violence. First, Spade points to the work of a number of community-based organizations seeking to support the survival of queer people who are vulnerable to violence. Among other things, these groups are organizing letter-writing campaigns for incarcerated queer people, and providing them with supports as they reenter society upon the completion of their sentences.[587] This approach, it seems, turns back to the queer approaches examined earlier in this chapter of supporting those ensnared in the repressive aspects of criminal justice. Second, Spade highlights the work of organizations seeking to "dismantle the systems that put queer and trans people into…dangerous and violent situations" in the first place. This may include advocating for the decriminalization of sex work and the

[585] Dean Spade, "Their Laws Will Never Makes Us Safer" in Ryan Conrad, ed. *Against Equality: Queer Revolution Nor Mere Inclusion* (Oakland: AK Press, 2014).
[586] *Ibid* at 169-70.
[587] *Ibid* at 170.

HIV non-disclosure, and the end of racial profiling.[588] Again, this shift marks a return to earlier queer analytics — those that advocated for decriminalization, not more punitive carceral sanctions. Third, Spade points to the work of organizations engaged in building alternatives to systems that criminalize certain types of conduct. For example, Spade highlights the work being done to eradicate violence within communities and familial structures — these versions of accountability may not necessarily involve resorting to systems of policing and imprisonment at all.[589]

Ultimately, Spade rejects the claims being developed by mainstream organizations such as the Human Rights Campaign — nearly identical to those of Egale Canada — that suggest we ought to redress violence by turning to hate crime laws and the apparatuses of the carceral state. As Spade puts it,

> The most well-funded and widely broadcast lesbian and gay rights narratives tell us that the state is our protector, that its institutions are not centers of racist, homophobic, transphobic, and abelist violence, but are sites for our liberation. We know that is not true. We are naming names — even if you wrap it in a rainbow flag, a cop is a cop, a wall is a wall, an occupation is an occupation, a marriage licence is a tool of regulation.[590]

Spade's provocative work opens up critical space to imagine systems of accountability that move beyond replicating the violent logics of the carceral state — that is, to resist the law and order queer impulse to want to punish in the name of a reimagined version of respectability, victimhood, and a new relationship with the state when our most vulnerable members continue to find themselves in conflict with actors in the criminal justice system.

V. CONCLUSION: THE REEMERGENCE ANALYTICS OF QUEER DECRIMINALIZATION

Over the course of the proceeding four chapters, *Sex Crimes* has attempted to draw new lines of inquiry by returning to the criminal law to examine its continued use in regulating the contours of queer subjectivity. In doing so, I have challenged the conventional narrative that Canada, unlike other countries around the world, no longer criminalizes queer people. By troubling and complicating this story we tell ourselves about the Canadian carceral state, the goal of the project has been to turn away from the dominant images of respectability that have tended to

[588] *Ibid* at 171.
[589] *Ibid*.
[590] *Ibid* at 173-4.

emerge when queer legal subjects have sought inclusion within the normative social order — whether through human rights protections, same-sex benefits, or relationship recognition. Instead, *Sex Crimes* has attempted to move contemporary scholarship and activism in new directions by analyzing the ways in which queer subjectivity continues to be constituted in and through the discourses of the criminal law by focusing its attention on the more difficult, less straight-forward cases — the cases where queers have been cast not as victims of crime, but rather as its perpetrators.

In order to develop the account of the discursive shift from criminality to respectability — or, perhaps more colloquially, from the police cruiser to the marriage altar, **Chapter 1** traced the emergence of a new version of queer subjectivity, one mediated in and through Canadian law and legal discourse over the past thirty years. By carefully reading a series of legal decisions and scholarship in the areas of human rights protections, same-sex benefits, and relationship recognition, the chapter argued that we begin to see the emergence of a new queer subject, a queer subject that distances itself from the promiscuous, pathological, and predatory criminal figures of "the homosexual" and "the transsexual" as it seeks inclusion within the normative social order. When this new subject interacts with the criminal law, it almost always adopts the position of the victim of crime, one willing to marshal the punitive apparatuses of the carceral state in order to punish in the name of equality. The new queer subject also seeks to distance itself from its criminal past by engaging in regimes of self-governance — by policing the borders of respectability while distancing itself from earlier, deep-seated associations with criminality.

In **Chapter 2**, *Sex Crimes* analyzed the ways in which contemporary policing practices on the street are used to target queer people. The story this chapter developed is one where bodies the police read as disorderly — in particular, bodies marked by non-normative performances of gender and sexuality moving through well-established strolls in large, metropolitan Canadian cities — become sites where the new respectable queer subject has failed, and thus require the intervention of actors in the criminal justice system. Once they come into contact with these subjects, police continue to impose disciplinary techniques on them — through use of improper pronouns, questions about names and sex-markers on government-issued identification, and frisk and strip search procedures, police participate in a larger corporeal project of governing queer subjectivity. Police target these bodies not simply because they are different, but because they symbolize a refusal to be subjugated by regimes of

power/knowledge that place us into rigid categories of being either "male" or "female". This phenomenon is sometimes referred to as "walking while trans".

In **Chapter 3**, *Sex Crimes* moved into the courtroom to analyze narratives of queer subjectivity that have emerged in a contemporary Canadian case spanning six years involving a queer man alleged to have not disclosed his HIV-positive status prior to engaging in sexual activities. The chapter argued that, in order to secure convictions for offences such as aggravated sexual assault and attempted murder, Crown prosecutors often rely upon a figure I call the Bad Gay Man — the Bad Gay Man, as I conceptualize him, is the contemporary iteration of the promiscuous, pathological, predatory criminal figure of "the homosexual" described in Chapter 1. In examining the use of this foundational narratives in this recent case, the chapter tasked itself with exploring the continued conflation between queerness and criminality in the Canadian courtroom. Despite the advent of a new version of respectable subjectivity in the domain of human rights law, same-sex benefits, and relationship recognition over the past thirty years, older versions of criminal subjectivity have not disappeared into the ether altogether. Rather, the case study suggested that they reemerge in cases where queer people cannot be readily cast as the victims of a seemingly ever-expanding criminal justice system.

In **Chapter 4**, *Sex Crimes* tasked itself with examining the historical and contemporary legal regulation of queer people within Canada's federal, provincial, and territorial correctional facilities. This chapter argued that, by segregating people on the basis of the sex assigned to them at birth and refusing to recognize more complicated conceptions of gender, such as an individual's legal sex or their self-identification, the prison becomes a disciplinary tool, one that breathes new life into strict, essentialist, binary conceptions of gender. At the same time, the practice of segregating people in prisons on the basis of sex also casts the prison as a site where 'normal' heterosexual encounters are, perhaps with the exception of occasional conjugal visits, off-limits. What remains in prisons, then, is non-normative, homosexual sex — that is, sex that dwells in the shadow of criminal punishment. In this way, the chapter argued that prison sex is simultaneously cast as non-normative and criminal. Drawing upon a number of recent high-profile cases involving queer people, the chapter analyzed the prison — both in terms of policies and carceral representations — as a site where norms of gender and sexuality are simultaneously constituted and challenged.

In this concluding chapter, *Sex Crimes* has proposed a new theory to account for the ways that queer communities are beginning to engage contemporary practices of the carceral state. This closing chapter has argued that a queer theory of contemporary Canadian criminal law lies in beginning to move away from a theoretical concept I developed called the *law and order queer movement*. This movement, one that has taken shape over the past three decades in Canada in concert with human rights protections, same-sex benefits, and relationship recognition, may have the unfortunate effect of instantiating law and order agendas by constructing the respectable queer subject as the victim of crime that seeks protection from the state. The problem with this newfound relationship with carceral regimes, however, is that it legitimates the very apparatuses that continue to be used to violently target and discipline the most vulnerable members of queer communities — in particular, those who dwell at the intersection of multiple categories of identity and experience.

Ultimately, *Sex Crimes* has suggested that a queer theory of the criminal law entails moving away from strategies that seek inclusion within the increasingly punitive logics of the carceral state. This system is functioning precisely as it was always intended to — targeting and punishing along the axes of race, poverty, disability, gender, and sexuality. Instead of legitimating this system by placing the rainbow stamp of approval on police, prosecutors, and prisons, it may well be time, at this moment in our history, to begin to turn back to the earlier queer logics and techniques that resisted the criminalization of our communities and built coalitions with other historically marginalized groups. It may well be time to initiate the long and arduous process of resisting the law and order turn, refusing to act on the impulse to punish in the name of a newly constructed queer respectability. The queer legal subjects who rushed to the wedding altar as soon as they were no longer targeted by the carceral state may well consider resisting the turn to systems of policing, prosecution, and punishment in the name of equality.

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Appendices

Appendix A: Interview list, Letter of Information/Informed Consent, and Interview Guide

I. INTERVIEW LIST

Baxter, Bryonie	Executive Director, Elizabeth Fry Society of Ottawa, Ottawa, Canada
Bottineau, Danielle	LGBTQ Community Liaison Officer, Toronto Police Service, Toronto, Canada
Chabot, Frédérique	Member, Prostitutes of Ottawa/Gatineau Work, Educate and Resist (POWER), Ottawa, Canada
Champ, Paul	Lawyer, Champ & Associates, Ottawa, Canada
Cherian, Mooky	Program Manager, Prisoners with HIV/AIDS Support Action Network (PASAN), Toronto, Canada
findlay, barbara	Lawyer, The Law Office of barbara findlay, Q.C., Vancouver, Canada
Law, Joanne	Trans Activist and Former Capital Pride Grand Marshall, Ottawa, Canada
Leger, Gary	Former Co-Chair, Ottawa Police Service GLBT Liaison Committee, Ottawa, Canada
Little, Marie	Chair, Trans Alliance Society, Vancouver, Canada
Metcalfe, Jennifer	Executive Director, Prisoners' Legal Services, Vancouver, Canada
Parker, Dara	Executive Director, QMUNITY, BC's Queer Resource Centre, Vancouver, Canada
Pepper, David	Former Director, Community Development, Ottawa Police Service, Ottawa, Canada
Snoddy, David	Director, Community Development, Ottawa Police Service, Ottawa, Canada
Thomas, Meaghan	Lawyer, Bayne, Sellar, Boxall, Ottawa, Canada
Wong-Tam, Kristyn	City of Toronto Councilor (Toronto-Centre), Toronto, Canada

II. LETTER OF INFORMATION/INFORMED CONSENT

Dear [*insert name*],

My name is Kyle Kirkup, and I am a doctoral candidate in the Faculty of Law at the University of Toronto. I am a 2013 Trudeau Scholar and a Social Sciences and Humanities Research Council Canada Graduate Scholar. I am also affiliated with the Mark S. Bonham Centre for Sexual Diversity and the Centre for Criminology and Sociolegal Studies at the University of Toronto. My work is supervised by Professors Brenda Cossman (Faculty of Law) and Mariana Valverde (Centre for Criminology and Sociolegal Studies). I am writing to ask for your assistance in researching the relationship between Canadian criminal law and lesbian, gay, bisexual, transgender, and queer (LGBTQ) communities. Your participation in the form of an interview will assist me in understanding this relationship both historically and in its contemporary context.

These interviews will form the basis of my doctoral dissertation in the Faculty of Law at the University of Toronto. In this project, I examine the relationship between criminal law and LGBTQ communities in Canada. Weaving together policing on the street, stories from the courtroom, and experiences in prison, my research explores Canadian criminal law as a site for maintaining, contesting, and transforming contemporary norms of gender identity and sexuality. In the years to come, I hope to turn the dissertation into a book.

If you agree to participate in this research project, I will be contacting you over the coming week to schedule an in-person or telephone interview in [*insert city*], to take place between [*insert date*] and [*insert date*]. The interview should take between 45 and 90 minutes. Interviews, with prior permission, may be audio recorded and will be saved on paper and on a digital file.

Every effort will be made to keep your full responses confidential. I will be the only researcher with access to your responses. All digital recordings will be password protected, and transcripts will be kept in locked storage. The records and transcripts will not be released to any third party.

Given the nature of the project, its focus on oral history, and the relatively small LGBTQ community in Canada, however, anonymity cannot be guaranteed. You have the right to refuse an interview, withdraw from an interview at any time, or refuse to answer specific questions. Should you decide to withdraw, you may decide at that time if I may use the information you have provided or you may request that it be destroyed.

Follow-up interviews may be requested up to August 2016. Research findings, once complete, will be made available to all interested participants.

By participating in this study, I believe that you will be contributing to our understanding of the historical and contemporary relationship between criminal law and LGBTQ communities in Canada. This work may also encourage other researchers to explore this field.

As this is a longstanding area of research interest for me, I may also choose to launch another research project based on similar themes in the future. In this case, it will be helpful to have the original interview results for reference. Your consent will be requested in this instance.

This research project has been reviewed and received ethics clearance by the University of Toronto's Research Ethics Board, which can be reached at ethics.review@utoronto.ca. Please contact this organization should you have any questions or concerns about this research.

I can be reached at kyle.kirkup@mail.utoronto.ca or at (647) 938-5253. In addition, you may also contact my supervisors Brenda Cossman and Mariana Valverde at the University of Toronto for further information. Brenda Cossman can be contacted at b.cossman@utoronto.ca

and Mariana Valverde can be contacted at m.valverde@utoronto.ca.

Please see below for consent information.

Sincerely,

Kyle Kirkup

CONSENT:

I _____ have read and understood the above information, and consent to voluntary participation in the aforementioned research project conducted by Kyle Kirkup.

Signature: _____

Date: _____

III. INTERVIEW GUIDE

Open-ended interview

1. How did you become involved in [*insert name of organization*]? When did your involvement begin?

2. What is [*insert name of organization*]'s mission? What are its goals? How have they changed over time?

3. What motivated you to become involved in issues related to Canadian criminal law and LGBTQ communities?

4. Historically, what types of activities related to Canadian criminal law and LGBTQ communities has [*insert name of organization*] undertaken?

5. Today, what types of activities related to Canadian criminal law and LGBTQ communities does [*insert name of organization*] undertake?

6. What are [*insert name of organization*]'s greatest achievements? What are your biggest challenges?

7. What impact has [*insert name of organization*] had on issues related to Canadian criminal law and LGBTQ communities?

8. How has the LGBTQ rights movement in Canada changed over time?

9. Are there any issues related to Canadian criminal law and LGBTQ communities that remain unresolved today?