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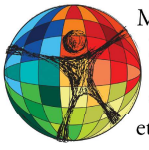

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Thank you to B.C.L./J.D. student Shona Moreau for organising and editing this series.

THE PAPERS

Article

The Unspeakable Crime: Examining the Implications of Legislative Silence in Criminalizing Homosexuality in Canada

Linnea Kornhauser

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ABSTRACT

Homosexuality has historically been regulated as an 'unspoken crime' in Canada's legislative past: implicated through charges of buggery, indecent acts and gross indecency until its alleged 'decriminalization' in 1969. In exploring how these crimes were enforced despite the legislative silence, this essay argues that courts and police implicitly understood that these provisions were meant to target homosexuality. Through the jurisprudence, gay men's sex lives were constructed to be a matter of public concern, in direct contrast to the privacy enshrined for heterosexual couples. In examining this enforcement, this paper argues that gay men's privacy was eroded both through the investigation and charging of gross indecency, and through the weaponization and enforcement of other laws. This essay proceeds in three parts. First, it establishes a historical background for Canada's legislative silence. Second, it explores how charges of 'gross indecency' were enforced and how it evolved from the early 1900s to 1969. Last, it concludes with a critique of the alleged decriminalization in 1969, explaining how the amendment, which only decriminalized sex acts committed between consenting adults in private, offered no protection for gay men because they had no privacy.

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Introduction

On February 7, 1981, hundreds of protestors marched against Toronto's police, angered by the unprecedented raid on four gays bathhouses the night before, leading to the arrest of hundreds of men for being found in alleged 'bawdy-houses'.[1] This, Toronto's gay community alleged, was a turning point, with the blatant disregard for their right to privacy (and to many, their right to exist) galvanizing the gay community.[2] This move by Toronto's police, orchestrated across four bathhouses and involving more than 150 police officers, seemed to confirm for many that the supposed 'decriminalization' of homosexuality in 1969 had been a mere headline: promising freedom to gay men much in the same way that freedom is offered to a zoo animal - permitting them to exist only in the limited spaces socially deemed acceptable and prosecuting their existence everywhere else.[3] In considering this history of criminalizing homosexuality in Canada (both leading up to the implementation of the first Criminal Code and to its supposed 'decriminalization' in 1969), it is therefore necessary to question both the limits and ideas imposed onto homosexuality through these legislation provisions, and the implications that flow from them.

Namely, homosexuality has largely remained a silent unspeakable crime in Canada's legislation. While 1969 was heralded as the year in which homosexuality was 'decriminalized', this acted as a bit of a misnomer seeing as Canada's *Criminal Code* never explicitly criminalized homosexuality.[4] Rather, Canada's history of criminalizing homosexuality followed the common law trend established by England: in criminalizing acts associated with homosexuality, through the sections criminalizing buggery, attempted buggery, and acts of 'gross indecency' between men.[5] Not only was homosexuality thus codified in silence, but the language surrounding these provisions remained notably vague as well. Leslie Moran, in speaking of these legislative silences, describes the practice as a kind of riddle, noting that "[i]n order to speak of buggery within that legal tradition, the speaker had to proceed according to a command to remain silent."[6]

Thus, those who were given the task of enforcing these provisions were left with a significant difficulty: how to understand provisions where no details about the charges were provided, and how to prosecute this 'unspeakable crime' when, to abide by morality, they could not actually identify or discuss the crime being alleged. Nevertheless, men

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[1] See "Homosexuals, lawyers claiming harassment over bathhouse raids", *The Globe and Mail* (7 February 1981) P1; Patricia Horsford & Ian Austen, "Homosexuals plan protests Evangelist critical of raids on bath houses", *The Globe and Mail* (7 February 1981) P1.

[2] See Mark Gollom, "Toronto bathhouse raids: How the arrests galvanized the gay community", *CBC News* (22 June 2016), online: <https://www.cbc.ca/news/canada/toronto/bathhouse-raids-toronto-police-gay-community-arrests-apology-1.3645926>.

[3] See Gary Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal, Canada: Black Rose Books, 1987) at 13; Horsford & Austen, *supra* note 1.

[4] See Brenda Cossman, "Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada" (2013) 21:1 Duke J Gender L & Pol'y 45.

[5] See *Criminal Code*, RSC 1927, c 36, s 203-206 (though the *Criminal Code* was notably amended in 1953-1954 to change the provision on gross indecency to criminalize acts of gross indecency between any person, not just men, see *Criminal Code*, SC 1954, c 51, s 149).

[6] Leslie J Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996) at 33.

(and it was, by and large, almost exclusively men) continued to be charged and convicted for buggery, indecency, and gross indecency. In considering this history of legislative silence, it is therefore necessary to consider how these charges were pursued, and the understandings that occurred through the policing, charging, and prosecuting of these acts.

Through Canada's legislation codifying these crimes in intentionally broad language, leaving them 'unspeakable', police and courts were provided with two levels of flexibility: both a discursive flexibility in determining how to define the crimes identified in the Criminal Code, and a practical flexibility in choosing how to prosecute them. In considering how the crimes of 'gross indecency', 'buggery' and 'indecent acts' were enforced, this essay will argue that the legislators, police, and courts weaponized this language to specifically target homosexuals and homosexuality, and in doing so, promoted a recognition that the public/private distinction is a luxury only provided to heterosexual couples.

This essay will seek to explore this legislative silence, and the implications that flow from it, in three arenas. First, it will seek to establish a historical background for this legislative silence, considering the history of silence and shame as it pertains to homosexuality and buggery. Second, this essay will consider the ways that courts and police enforced the provisions of 'gross indecency', exploring both how courts interpreted and determined the boundaries of these provisions, and the extent to which homosexuality acted as an anchor for these charges. This will be explored both in the era prior to the Criminal Code amendment of 1954, and post, considering how the broadened scope of the gross indecency charge impacted how courts understood these charges and enforced a public/private distinction. Last, in considering the 'decriminalization' of homosexuality in 1969, this essay will explore and assess how the lack of privacy entitled to homosexuals effectively 're-criminalized' homosexuals rather than freeing them.

While Canada has largely become a more permissive and tolerant state, this history of silence speaks to the ways in which shame and social boundaries effectively contribute to the prosecution of homosexuals and outcasts more broadly, and how prosecution can occur through a redefining and interpretation of legislative silences.

1) The History of Criminalizing Homosexuality: The Love That Dares Not Speak Its Name

To appreciate this history, it is necessary to understand both how Canada's social ideas - of morality, family, decency, etc. - and the Criminal Code were grounded in English common law tradition. England was the basis not only for Canada's first Criminal Code, with most sections directly copied from their English counterpart, but also for the strong Victorian ideals of the sanctity of marriage, and of what was and was not 'moral'.[7] This context is necessary to understanding the significance of early English scholars and ideas when contemplating Canada's legislative past. English legal scholars regularly

[7] See Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto, Ont: University of Toronto Press, 2008); Kinsman, *supra* note 3 at 45-55.

referenced ideals of morality and decency in framing the groundwork for England's legislature and based many laws on attempts to either prosecute or prevent sin. England - and subsequently, Canada - had strong specific ideas about the roles men and women could and should occupy, and the dangers of indecency in leading one into sin. Thus, it is with these sensibilities in mind, that the crime of buggery (the basis for gross indecency) was discussed.

English scholar Edward Coke, writing on the Institutes of the Laws of England in 1628, referred to buggery as a "detestable, and abominable sin, amongst christians *not to be named*[.]"[8] This prompted, or perhaps simply recognized, a demand of silence pertaining to the crime of buggery, and the more frightening crime this act indicated, of homosexuality. In tracing this history, it is important to note both the ways this connection - between buggery, gross indecency, and homosexuality - was and was not recognized. The concept of homosexuality, both as a practice and identity, did not truly occur until the 1900s when the American Diagnostic and Statistic Manual of Mental Disorders (DSM) classified it as a mental disorder, eventually leading to its categorization as a 'sexual psychopath' in Canada.[9] However, leading up to this period, terms used to describe sex and relationships between the same gender ranged, "from 'crime against nature,' 'sodomy,' and 'buggery,' to the 'secret sin,' 'sex perversion,' sexual immorality,' and the 'social evil.'" [10] Thus, in framing this discussion of the history of criminalizing homosexuality, it is necessary to appreciate both the way certain terms were used interchangeably (for example, sodomite as homosexual, buggery as homosexuality) and the way these terms simultaneously obfuscated and did not appreciate the actual topic with which they were discussing. While this paper assumes that reference to buggery and gross indecency was meant to be indicative of the more heinous crime of homosexuality, it is not meant to suggest that this connection was explicit nor recognized at the time the comments themselves were made. Nevertheless, the trend of speaking around homosexuality and buggery continued well into the 1800s, with the famous legal scholar William Blackstone referring to buggery (albeit not explicitly) as "the infamous *crime against nature*", explaining to readers that he would not dwell on so disagreeable a topic, "the very mention of which is a disgrace to human nature."[11] Not only did this English history of speaking of buggery in deliberately unclear terms thus influence Canadian society, but also our legislature.

When Canada implemented its first Criminal Code in 1892, the Members of Parliament not only drew on England's own statute, using the language of 'buggery', 'indecent acts', and 'gross indecency', but they also drew on the sentiment behind it. This is clearly illustrated in the debates that were occurring in the House of Commons in the late 1800s, with MPs alternatively wanting to clarify the legislation while simultaneously refusing to identify what exactly it was, they were prosecuting. Sir Richard Cartwright,

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[8] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London: J Flesher, 1660) at 58 (emphasis mine).
[9] See David Kimmel & Daniel J Robinson, "Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949-1969" (2001) 16:1 Can JL & Soc 147 at 152, 159.
[10] See Kinsman, *supra* note 3 at 65.
[11] William Blackstone, *Commentaries on the Laws of England: In Four Books*, 16th ed (London: A Strahan, 1825) at 214-215.

questioning the first enactment of Canada's Criminal Code provision on gross indecency, asked:

> is it not possible that the words he has used, 'gross indecency,' are not sufficiently precise, and might lead to consequences that he does not intend? Of course, I am quite aware that the particular crime which he has in mind is one which, I very much fear, has been on the increase in certain sections of society, and can hardly be punished too severely. In my opinion the words are not legal words, and it strikes me that consequences might flow from this phraseology which the hon. gentleman does not contemplate.[12]

In response to this, Sir John Thompson defended the provision, noting that it would be "impossible to define the offences any better" and that the provision was the same as that of England's.[13] However, in thus challenging the legislative provision criminalizing 'gross indecency between men', this parliamentary debate helped frame the stark complexity of this legislative riddle. While the wording was arguably justified, as it had been taken directly from the English framework, many Members of Parliament were wrestling with this silence. While some were all in favour of the silence (and of the punishment - with Mr. Blake noting, "I doubt very much whether there is any other class of cases in which there is more danger of brutalizing people than in the class of cases dealt with in this clause 3, and I would suggest that the penalty of whipping be added"[14]), others argued that no "false modesty should restrain us from protecting the liberty of the subject in a case like this."[15]

This debate did not conclude in 1890, with Mr. Davies arguing in 1892 that the current articulation of 'indecent acts' and 'gross indecency' "leaves a very large discretion in the hands of the justices of the peace […who] might put a very curious construction upon the words 'indecent act.'"[16] Mr. Laurier, responding to this statement, articulated the difficulty in "know[ing] what is a gross act of indecency, and what is not."[17] Despite Sir John Thompson even going on to recognize there had been "many petitions laid on the Table for legislation in this direction", the MPs failed to successfully implement any changes to the provisions, with the Criminal Code continuing to arbitrarily criminalize 'indecent acts' and 'acts of gross indecency' until 1969.[18] It is thus in this context that homosexuality was criminalized, and homosexual men were prosecuted.

2) Enforcing Gross Indecency and Indecent Acts: How Homosexuality Became Understood and Implicated in the Law

[12] See *House of Commons Debates*, 6-4, vol 2 (10 April 1890) at 3170 (Sir Richard Cartwright).
[13] See *ibid* (Sir John Thompson).
[14] See *ibid* at 3171 (Mr Blake).
[15] See *ibid* (Mr Mitchell).
[16] See *House of Commons Debates*, 7-2, vol 2 (25 May 1892) at 2968 (Mr Davies (PEI)).
[17] See *ibid* (Mr Laurier).
[18] See *House of Commons Debates*, 7-2, vol 2 (25 May 1892) at 2969 (Sir John Thompson); *Criminal Code*, SC 1954, c 51, s 147-149.

These legislative silences in the provisions in the Criminal Code produced predictable yet unavoidable difficulties. While the legislature had established it was of the utmost importance to prosecute - and severely punish - this 'abhorrent' crime, how could this proceed when it was not clear, first, exactly what conduct fell into this sphere, and second, how to effectively demonstrate the charge? It therefore fell to both the police and judges to determine, enforce, and effectively create who and what should be prosecuted under the charges of buggery, indecent acts, and gross indecency. In considering the ways these charges were enforced, it is necessary to draw a boundary in the timeline, recognizing that the amended Criminal Code of 1954 broadened the scope of who could be prosecuted for 'gross indecency' under section 149 from only male persons to anyone.[19]

a) Pre-1954 Enforcement: Defining the Boundaries and Targeting Homosexuality

As previously identified, the early iteration of the Criminal Code featured four morality charges which effectively targeted homosexual acts: section 202 which criminalized 'buggery', either with a person or animal, section 203 through attempted buggery, section 205 through 'indecent acts', and section 206 targeting "gross indecency with another male person."[20] Not only did these provisions thus fail to identify what exactly constituted gross indecency, an indecent act or buggery, but it also failed to clarify when an act should be classified as buggery, indecent, or grossly indecent. Gary Kinsman notes that from 1880-1920, "sodomy generally referred to anal intercourse with a human (either male or female), while bestiality referred to anal intercourse with an animal. The term 'buggery,' then, included both sodomy and bestiality."[21] Not only was this definition not explicit however, and only understood through tradition, but further this failed to clarify what acts should lead to what charges, and how one would go about proving any of the above-noted provisions, leaving a great deal of flexibility to police and judges both.

This period led to two notable practices. First, while the code was not explicit, most police officers and judges interpreted the law as meant to largely, if not exclusively, apply to homosexuality, and gay men in particular. Second, in prosecuting gay men and gay sex acts, the need for legislative silence gave way to a paradoxical need for explicit detail, with the specifics of the sex acts being discussed by both the police and the judges in convicting persons under these provisions. This helped enact a recognition that privacy was a luxury not afforded to homosexuals.

i) Interpreting Gross Indecency Through Policing and Courts

In policing 'gross indecency', police came to understand and enforce the idea that homosexuality should be criminalized. This was, of course, limited to prosecuting gay men, who increasingly had come to be seen as dangerous through their "uncontrollable

[19] See *Criminal Code*, SC 1954, c 51, s 149.
[20] See *Criminal Code*, RSC 1927, c 36, s 202-206.
[21] See Kinsman, *supra* note 3 at 65.

and indiscriminately aggressive and/or predatory sexuality."[22] Steven Maynard, writing on the history of policing gay sex in Toronto, argues that "the police did more than simply clamp down on men engaged in criminalized sexual activities, they played an active role[.]"[23] A judge in 1913, observing this trend while prosecuting yet another man for a charge of gross indecency is recorded as saying "I don't know whether it is the Morality Department that is stirring these things up or whether it is that the teaching of morals is lax, but the fact is that there is a tremendous increase in this kind of crime. I am thoroughly sick of it."[24] Beyond merely acting as passive players, the police can be viewed as responsible for increasing public awareness of the supposed 'threat' homosexuality posed, and for actively seeking out and charging men for their homosexual acts.

Judges, on the other hand, had to walk a fine line in prosecuting gross indecency: they needed to give detail as to the charges laid despite a tremendous lack of clarity provided by the Criminal Code, while also abiding by the social pressure for silence on this 'unspeakable crime'. The responsibilities of judges were made all the more difficult in that compliance "with the injunction that buggery is 'not to be named 'threatens to make that naming impossible and thereby threatens to undermine the operation of law."[25] Thus, a compromise had to be enacted: judges often sought to make explicit the actions themselves, while nevertheless remaining silent as to the nature of the crime itself: homosexuality.

Notably, it is only from observing cases following 1954 that we can observe judges truly begin to define what constituted an 'indecent act' and 'gross indecency'. In the 1957 case of *R v K*, the judge defined it as,

> an act which is not inherently indecent may become so by reason of the circumstances surrounding its performance, but an act which is inherently grossly indecent, according to the concepts and morals of our times, cannot become decent by reason of the circumstances surrounding its performance. I cannot believe that buggery, or acts akin thereto, can ever be anything but grossly indecent, whatever the circumstances under which they are performed.[26]

In reaching this conclusion, the judge considered the facts: the police noticed an automobile standing idling, and in examining the scene observed "the bare buttocks of a man (who turned out to be one of the accused) and that he was in motion and lying on the rear seat on top of something which turned out to be the other accused."[27] These facts were essential in contributing to the judge's finding that the act here was grossly indecent. In further articulating this definition, the judge noted that the law was meant to

[22] See Diana Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7:2 Can J Women & L 286 at 293.
[23] See Steven Maynard, "Through a Hole in the Lavatory Wall: Homosexual Subcultures, Police Surveillance, and the Dialectics of Discovery, Toronto, 1890-1930" (1994) 5:2 J History Sexuality 207 at 209.
[24] See *ibid* at 207.
[25] See Moran, *supra* note 6 at 33.
[26] See *R v K*, [1957] 118 CCC 317, 26 CR 186 (ABSC) at para 7.
[27] See *ibid*.

be a reflection of society's morals, and thus while "in other lands and at other times, for example Ancient Greece, such an act would not be considered indecent", the act was nevertheless grossly indecent per current standards.[28]

Yet, it is notable that the case of *R v K*, despite still not truly identifying what it is that qualifies an act as grossly indecent, is one of the clearest in offering somewhat of a definition. Further, it is notable that this case at no point identified the accused as a homosexual, nor discussed homosexuality in any manner, a common trend across charges of gross indecency during this time. This case also highlights another common aspect across cases both pre- and post-1954, recognizing that a change for gross indecency often created a paradoxical need for explicit detail in proving the crime of gross indecency beyond a reasonable doubt. This practice points to a recognition among judges and police that they recognized homosexuality as the basis for these charges despite abiding by the unspoken demand not to speak of the crime itself, and highlights the ways in which gay men's lives and sex acts were made public, undermining any right to privacy they could claim.

ii) Gross Indecency as a Public Right: Detailing the Explicit Facts

Both police and courts seemed determined to speak about the facts giving rise to the charge of gross indecency itself once it had been laid. Leslie Moran recounts that there was a "determination on the part of the agents of law to hear homosexuality spoken about", with the "machinery of policing bring[ing] into play a demand to speak of homosexuality and homosexual behaviour through explicit articulation and through the accumulation of detail." [29] This need for detail can be observed through a police constable's testimony from 1913, who is recorded as observing two men, George J and George C engage in homosexual activity. After watching them "awhile", police constable McCoy testified that "George J. ordered George C. to keep his leg higher up. When within 20 feet, George J. got up. George C. was laying on the ground with his pants open, his shirt up, his penis was slimy and had an erection" at which point, the officer arrested them and brought them to the station.[30]

Notably, the opposite practice can be observed in the case of *R v White*, where a 'police recorder', Mr. Garner, testified to driving down the street with his wife when he observed a group of men committing "the act of indecency […] on the sidewalk" with the judge explicitly stating that he deemed it "[un]necessary to discuss their evidence in detail."[31] The Court of Appeal overturned Mr. White's conviction in this case, accepting the appellant's evidence that he and his fellow seamen were drinking, joking and laughing and the police recorder observed them as a friend fell and he accidentally fell himself while he endeavoured to bring him to his feet. In finding this, Ritchie JA stated that he could not "picture the act of gross indecency described by the Garners being committed

[28] See *ibid* at para 6.
[29] See Moran, *supra* note 6 at 125.
[30] See Crown Attorney Case Files (1913), York County, Archives of Ontario (case 9) cited in Maynard, *supra* note 23 at 211.
[31] See *R v White*, [1964] 44 CR 75 (NBCA) at para 10 [*White*].

on the sidewalk of a busy street in full view of anyone passing by. *That just does not happen*."[32] This finding and incredulousness highlights the duality at play within the courtroom for charges of gross indecency. There was either an abundance of detail, as in the above case and *R v K*, in which case the judge stated that the act could not be "anything but grossly indecent."[33] Alternatively, as in the case of *R v White*, where there is a scarce lack of details, the judge would dismiss the charges, finding that such acts of gross indecency 'just do not happen'.[34] These stark distinctions highlight the importance in grounding charges for gross indecency in explicit detail, and the disregard for privacy in the case of alleged homosexual activity.

b) Post-1954 Enforcement: Enacting the Public-Private Divide

The confusion over what exactly gross indecency was meant to include became all the more notable with the amendments to the Criminal Code in 1954, bringing with it a 'modern recognition of equality between the sexes' through criminalizing gross indecency between any person rather than just men.[35] Yet, once again, this shift was less specific than the judges would have liked, and many struggled with the changes this amendment had brought about, both in permitting certain heterosexual practices to be criminalized, and in suddenly crossing the public-private divide that had previously existed for heterosexual couples. Commenting on these changes in 1955, Mr. Joseph Sedgwick, a Quebec lawyer, writing for the Canadian Bar Review, articulated this struggle:

> A change I find difficult to understand is effected by the new section 149. This is based on old section 206, amended most radically however in that the new section makes it an offence 'to commit an act of gross indecency with another person,' whereas the former section restricted the offence to acts of gross indecency committed by a male person with another male person. I do not know what an act of gross indecency between a man and woman is, but, whatever it may be, it is now an offence. Nothing in the section requires that the act take place in public and thus what two lovers — or man and wife — may do in the privacy of their own apartment may turn out to be an offence. To some narrow minds all acts of sex are grossly indecent. And what a potent weapon of blackmail is thus provided for a woman who is loved possibly too vigorously, and later scorned![36]

This critique provides a very interesting framework and highlights the way the previous articulation of gross indecency had been meant to criminalize exclusively homosexual acts and to vitiate any sense of privacy gay men might have felt entitled to. Now, however, that the new amendment targeted heterosexual acts as well, this reaction to the invasion of privacy was severe. Judges were forced to reckon with this new understanding that the

[32] See *ibid* at para 13 (emphasis mine).
[33] See *R v K*, *supra* note 26 at para 7.
[34] See *White*, *supra* note 31 at para 13.
[35] See *R v P*, [1968] 3 CCC 129, 3 CRNS 302 (MBCA) at 146; Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Irwin Law, 2008) at 223-224.
[36] See Joseph Sedgwick, "The New Criminal Code: Comments and Criticisms" (1955) 33:1 Can Bar Rev 63 at 70.

time and place of an offence were now understood to be an essential element in determining whether an act was 'grossly indecent' per the new articulation.[37]

Even with this new understanding, many judges wrestled with this seemingly new charge which allowed heterosexual couples to be arrested in the privacy of their own home. In the case of *R v P*, where a heterosexual couple was arrested after being observed committing an act of fellatio in their brightly lit kitchen at night, the trial judge found that the combination of the act itself and the circumstances in which it occurred allowed it to qualify it as an act of 'gross indecency'.[38] In overturning this decision, the Court of Appeal posited that

> it would require words much plainer than appear in s. 149 to persuade me that Parliament suddenly decided to enter the portals of the home and to require Courts to sit in judgment upon what passes in private between consenting adult spouses or persons living together, whether married or not, or, for that matter, upon *any heterosexual sex act* (save, of course, that described in s. 147) done in private between consenting adults.[39]

This distinction - between public and private acts, and between heterosexual and homosexual acts - demonstrate a consistent element of the cases in which only heterosexual acts done in public, or homosexual acts done anywhere, were considered to be grossly indecent, theoretically up until the 'decriminalization' of 1969.

In thus observing these distinctions, it is important to highlight how judges framed, enforced, and effectively created the charge of gross indecency from 1954 onwards. While most understood that the new charge for gross indecency could theoretically target heterosexual couples and lesbians, this practice was rarely enforced. For the former, many judges, similar to Mr. Sedgwick, believed that heterosexual couples were entitled to privacy and thus unless the act was performed in 'grossly indecent' manner, for example through being performed in a highly visible and public manner, it was outside of criminal jurisdiction.[40] For the latter, lesbians were rarely, if ever targeted for a multitude of reasons. First, most lesbians, unlike men of this era, were unlikely to engage in sex outside of their home, leaving them much less likely to be observed by the police.[41] Second, lesbians, as women, "were generally seen as being beneath the law and therefore ignored", with no charges brought against a woman for gross indecency until 1981.[42] Last, many refused to believe that women could engage in homosexual or indecent practices with each other, continuing the lore that "criminal law had neglected

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[37] See *R v J*, [1957] 118 CCC 30, 21 WWR 248 (ABSC) at para 15.
[38] See *R v P*, *supra* note 35 at 143.
[39] See *ibid* at 146 (emphasis mine).
[40] See *ibid* at 148; *R v J*, *supra* note 37 at para 15.
[41] See Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991) at 12; Karen Duder, *The Spreading Depths: Lesbian and Bisexual Women in English Canada, 1910-1965* (PhD Dissertation, University of Victoria, 2001).
[42] See Mary Eaton, "Lesbians and the law" in Sharon Dale Stone, ed, *Lesbians in Canada* (Toronto, Ont: Between the Lines, 1990) 109 at 113; Faderman, *supra* note 41 at 58.

lesbians because when asked, Queen Victoria replied that 'ladies did not do such things.'" [43] These ideas thus continued and propagated the interpretation and understanding that these provisions had indeed been meant to criminalize male homosexuality specifically.

This understanding was reflected and affirmed in the caselaw itself. In the case of *R v Lupien*, in which a man was charged for gross indecency after being found with another man in a hotel room, he argued in his defence that, because of the other man's dress, he "had honestly believed [him] to be a woman and arranged with him to go to a hotel room for normal heterosexual commerce[.]"[44] The accused's principle defence, therefore, was that he had had "no intention or desire at any time of committing any act of a sexual nature with a male person" and that, as a "normal man he would be instinctively repelled by and recoil from a homosexual act."[45] This case helps make explicit the understanding that had only been implicitly articulated previously: that the provisions for gross indecency, though now able to target heterosexual practices of gross indecency theoretically, were nevertheless to be applied as targeting mostly (if not solely) homosexual practices. Further, through arresting and convicting Mr. Lupien for an act committed in the privacy of a hotel room, the judges and police were both contributing to an articulation that gross indecency could target *homosexual* practices in private, directly against the recognition noted earlier that the provision could not be weaponized against *heterosexual* practices in private.[46] Thus, the public/private distinction noted earlier became more overtly identified and propagated against homosexual men.

c) Post-1954 Articulation of the Criminal Sexual Psychopath

The 1954 amendment to the Criminal Code was significant not only for its broadening the scope of who could be charged for gross indecency, but also for the changes it brought about regarding 'Criminal Sexual Psychopaths'. First, this amendment widened the crimes which could lead to a charge of 'criminal sexual psychopath' being laid, including convictions for buggery and gross indecency.[47] Second, this provision was then further amended in 1961, changing the definition for who could be classified as a criminal sexual psychopath, pursuant to the *report on criminal sexual psychopaths* published by the Royal Commission in 1958.[48] The prior articulation identified a criminal sexual psychopath as "a person who, (i) by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who (ii) as a result is likely to attack or otherwise inflict injury, pain or other evil on any person."[49] The new section, however, changed this definition to explain that,

> 'dangerous sexual offender' means a person who, (i) by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and (ii) who (*a*) is likely

[43] See Backhouse, *supra* note 35 at 215.
[44] See *R v Lupien*, [1969] 1 CCC 32, 64 WWR 721 (BCCA) at 34 [*Lupien*].
[45] See *ibid* at 36, 38.
[46] See *R v Lupien*, [1970] SCR 263, [1970] 2 CCC 193; *R v P*, *supra* note 35 at 146.
[47] See *Criminal Code*, SC 1954, c 51, s 659-661; Kimmel & Robinson, *supra* note 9 at 152.
[48] *Report of the Royal Commission on The Criminal Law Relating to Criminal Sexual Psychopaths* (Ottawa: Queen's Printer, 1958).
[49] See *Criminal Code*, SC 1954, c 51, s 659(b).

> to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or (*b*) *is likely to commit a further sexual offence*[.][50]

This represented a marked shift in the understanding and prosecution of 'dangerous sexual offenders,' and, in connection with the changes brought about in 1954, was especially significant for homosexuals. Because the Criminal Code provisions on buggery and gross indecency were largely interpreted and applied as targeting homosexuals and homosexuality, and because the new articulation of a 'dangerous sexual offender' included persons who had been convicted of these charges and were *likely to commit a further sexual offence*, homosexuals were thus able to be charged and convicted essentially for the very fact of being a homosexual.[51] This was, perhaps obviously, of great concern to the homosexual community, and led to a number of cases where this very eventuality occurred.

Notably, even before the legislative shift in 1961, the provision on criminal sexual psychopaths were used to target homosexuals. In the case of *The Queen v Neil*, the accused had been convicted of gross indecency in relation to two separate incidents with men. Pursuant to this, the judges found that the accused was a 'criminal sexual psychopath' in that he was likely to "inflict injury, pain or other evil on any person" through persuading other men and boys to engage in acts of gross indecency with him.[52] This connection was made all the more stark following the amendment of 1961.

Perhaps the most famous case which made explicit this impact on homosexuals was the Supreme Court case of *Klippert v The Queen*. In this 1967 case, Mr. Klippert, a 40 year old man, had pleaded guilty to four counts of gross indecency with four separate men, and the trial judge had imposed a 'preventive detention' order for life upon finding that he qualified as a 'dangerous sexual offender'.[53] A central question in this case was whether violence should be interpreted as a necessary aspect of the provision, or whether Parliament had intended for it to extend to individuals, like Klippert, who had never acted violently but had, by his very nature of being a homosexual, acted contrary to the Criminal Code and was likely to repeat this behaviour.[54] While the dissent firmly argued against this latter interpretation, noting that this interpretation would enable courts to sentence any man convicted of 'gross indecency' to "incarceration for life", the majority nevertheless affirmed this interpretation.[55] Despite finding that the amendment forced them to find that the new section pertaining to dangerous sexual offenders did not necessitate a finding of violence, the majority appeared frustrated with the finding, writing that,

> 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,

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[50] See *Criminal Code*, SC 1960-1961, c 43, s 659(b) (emphasis mine).
[51] See *Criminal Code*, SC 1960-1961, c 43, s 659(b).
[52] See *The Queen v Neil*, [1957] SCR 685, 11 DLR (2d) 545 at 687, 688, 699.
[53] See *Klippert v The Queen*, [1967] SCR 822, 65 DLR (2d) 698 [*Klippert*].
[54] See *Klippert*, *supra* note 53 at 823.
[55] See *ibid* at 831, 836.

> c. 60, is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.[56]

This judgement predictably sparked outrage, with newspapers spouting headlines such as “Supreme Court Ruling Makes Homosexual Liable for Life”.[57] In one article, a 30-year-old homosexual revealed, "The court decision scares me. It makes me feel like a criminal. The decision is an open invitation to the police to go breaking into private homes where adults are minding their own business.”[58]

This judgement is thus extremely important for two reasons. First, it made explicit the previously implicit understandings that the Criminal Code provisions were meant to target and prosecute homosexuals, and that they could now be liable for life imprisonment for the very fact of being homosexual. Second, it affirmed the idea that homosexuals were not entitled to privacy in the way that heterosexual couples were. While the caselaw up to this point had indicated this finding, the reaction to this case points to a widespread recognition that homosexuals could and would be targeted for homosexual acts committed in private, and further, that the police were likely to target suspected homosexual individuals. In thus considering this case and its impact, it is necessary to appreciate the way this case forced a consideration of the public/private debate, and whether homosexuals could rightfully claim this fundamental right.

Conclusion: The Fallacy of Decriminalization Post-1969

Perhaps it was the widespread criticisms following the Supreme Court decision in *Klippert* that led to the ‘decriminalization’ of homosexuality in 1969, with Pierre Trudeau famously telling Canadians ‘there was no place for the state in the bedrooms of the nation.’[59] No matter what inspired the move, 1969 led to the significant amendment to the Criminal Code, newly permitting acts of gross indecency between two persons over the age of 21 who consented to the acts and committed them in private.[60] Yet, despite general praise for this shift by the Canadian populace, many of whom believed that while perverted, homosexuality should not be criminalized, and that the law “enshrine[d] the prejudices of another era”, the amendment was far from the decriminalization many sought.[61]

First, it is important to recognize that merely rendering certain kinds of homosexual acts non-criminal is a “far cry from saying such conduct is legalized.”[62] Second, homosexual acts were only decriminalized if they were committed in private, a luxury which many did not deem extended to homosexuals. Not only was this true discursively,

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[56] See *ibid* at 836.
[57] See Kinsman, *supra* note 3 at 163.
[58] See Sidney Katz, “‘We’re society’s scapegoats’: Homosexuals shocked by life term ruling”, *Toronto Star* (11 November 1967) 5.
[59] See Rae Correlli, “State Leaves Bedrooms but Little Has Changed”, *Toronto Star* (27 August 1969) 7.
[60] See *The Criminal Law Amendment Act, 1968-1969*, c 38, s 149A(1)(b) & (2)(a).
[61] See “Homosexuality and the law”, *The Globe and Mail* (8 July 1967) 6.
[62] See *House of Commons Debates*, 28-1, vol 7 (17 April 1969) at 7636 (Mr Turner); Robert Leckey, “'Repugnant': Homosexuality and criminal family law” (2020) 70:3 UTLJ 225 at 230.

in observing this historical obsession with the details of gay men's sex lives in the caselaw, but practically as well, as police sought to circumvent the privacy of gay men, even in their own homes, through bawdy-house laws.[63] This leads directly to the third critique of the 1969 'decriminalization': that they, somewhat ironically, "led to the largest mass arrests of gay men in the country's history."[64]

Indeed, far from freeing gay men from the purview and surveillance of police officers, many authors recounted that police began targeting homosexuals in increasing numbers following the 1969 amendments, weaponizing laws ranging from bawdy-house laws to vagrancy laws to arrest and charge gay men.[65] Tom Hooper reported that more than 1,300 gay men were arrested under bawdy-house laws from 1968-2004, and documented an astronomical increases in charges for 'indecent acts' being laid against gay men, with 577 charges recorded during the 16-month period from July 1982 to October 1983.[66] This is the context in which tensions between Canada's gay community and police rose to such a degree to spark massive protests and riots in the wake of yet another raid and wave of arrests on gay men in 1981.[67] Despite the 'decriminalization' of homosexuality in 1969 therefore, it is clear that gay men continued to be targeted and penalized, with no entitlement to their privacy being recognized, regardless of what the legislation actually said.

Canada has historically pursued the trend of legislative silences in criminalizing homosexuality, and this flexibility has, perhaps paradoxically, enabled homosexuals and homosexuality to be more effectively targeted. Through the charges of buggery, indecent acts, and gross indecency, homosexuals were often recognized, implicitly and explicitly, as the target. Through the evolving legislation of the criminal sexual psychopath, and the increased scrutiny of gay men through bawdy-house laws following the 'decriminalization' of 1969, gay men continued to be targeted and prosecuted, effectively for the very fact of being homosexual.[68] Society's perception and treatment of homosexuality as a crime against nature, too abhorrent to be spoken of, was and continues to be engrained in the legislation, proving that mere silence is not enough to guarantee freedom from prosecution.[69] This historical trend of vague legislation has led to the criminalization of homosexuality, whether in implicit or explicit terms, time and time again. Therefore, there can be no trust in the legislation, even when an alleged 'decriminalization' occurs.

The riots of 1981, viewed in the context of homosexual men being actively targeted and prosecuted through bawdy-house laws, are unsurprising. But moreover, looking back on these riots through this framework of legislative silence points to perhaps a greater

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[63] See Brenda Cossman, "The 1969 criminal amendments: Constituting the terms of gay resistance" (2020) 70:3 UTLJ 245 at 259 [Cossman, "1969 Amendments"].
[64] See George Michael, "In Defence of Privacy: Or Bluntly Put, No More Shit" (1983) 3:1 Action! (Publication for the Right to Privacy Committee) 1.
[65] See Tom Hooper, "Queering '69: The Recriminalization of Homosexuality in Canada" (2019) 100:2 Can Historical Rev 257; Cossman, "1969 Amendments", *supra* note 63; Leckey, *supra* note 62.
[66] See Hooper, *supra* note 65 at 260, 264-65.
[67] See Gollom, *supra* note 2.
[68] See generally *Klippert*, *supra* note 53; Cossman, "1969 Amendments", *supra* note 63.
[69] See Blackstone, *supra* note 11 at 215; Coke, *supra* note 8 at 58.

historical uneasiness between homosexuals with Canada's justice system more broadly. This history teaches us that, more than merely being critical of the laws themselves, it is necessary to consider what silences are being left over and how laws are being interpreted and enforced. Homosexuality has long been considered an 'unspeakable crime' and in that vein, it is perhaps essential to be skeptical of the legislation in truly assessing what freedoms are granted and when.

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