

Wolfenden in Canada: within and beyond official discourse in law reform struggles¹

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De-criminalisation, Wolfenden and Canadian social and state formation

In a perceptive critique of the Canadian state law reform process in late 1960s Canada, gay activist Doug Sanders, who was involved in homophile and gay organising at that time, argued that the 1969 reform:

Takes the gay issue and describes it in non-homosexual terms. [Decriminalisation] occurs in a way in which the issue is never joined. The debate never occurs. And so homosexuals are no more real after the reform than before ... I felt that an issue had been stolen from us. That we had forgotten that the reform issue was an issue that could have been used for public debate and it had been handled in such a way that there had been none. The only thing that had a promise of helping people was a public debate. It didn't happen. (Sanders, cited in Kinsman 1996a, p. 264)

In this chapter I focus on the influence of the 'British' Wolfenden Report (Committee on Homosexual Offences and Prostitution 1957) and the conceptual practices (D. Smith 1990) of public/private and adult/youth sexual regulation it articulated on the law reform process in Canada leading up to the 1969 criminal code reform that decriminalised same-gender sex acts in 'private' between two consenting adults. I also point to the continuing legacies of this regulatory strategy on sex political struggles within Canadian social and state formation.

It was in the context of the extension of the criminalisation of homosexuality, in the 1950s and 1960s, under pressure from legislation and social mobilisations

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in the USA and concerns generated in Canada over how to address 'sex crime' and homosexuality, that the Wolfenden report came to be used as an active text in shaping and re-organising sexual regulatory discussions towards limited law reform within the Canadian state. I use feminist sociologist Dorothy Smith's expression of an active text (D. Smith 1990) to illustrate how the Wolfenden report is not passive in this process but is activated and used by various groups of people who produce readings of it in their attempts to re-organise practices of moral regulation (Corrigan 1990; Brock 2003) and sexual regulation within Canadian state and social relations.

I highlight how this liberal regulatory strategy was able to be used by activists in a number of different social locations to open up space for law reform efforts, to facilitate popular educational discussions on lesbian and gay concerns, and to articulate an emerging sexual politics, but at the same time how hegemonic interpretations of this strategy within official politics and the professions were able to be used to restrict these efforts. As will be detailed later, this active text is able to be mobilised 'from below'² by early gay and lesbian and reform activists, like Doug Sanders. But it is also able to be mobilised 'from above' by professional and state agencies – as Sanders emphasises above – to attempt to contain this process of social transformation within a much narrower legal shift in sexual regulatory practice. Efforts by lesbian and gay activists to move against and beyond the limitations of this official discourse of liberal sexual regulation were able to be contained within it. I also extend this approach to our historical present pointing out how this historical investigation can offer us insights in dealing with the current struggles we are engaged in regarding the limitations of formal legal rights and appeals to the rights of sexual citizenship.

The Wolfenden report became a key text of liberal sexual regulation, in many Commonwealth countries, given the legal frameworks and practices of sexual regulation inherited from British colonialism.³ This report enters into the textual-mediation (D. Smith 1990; 1999; 2005) of a number of legal and social policy debates in the English-speaking world and beyond. The struggles leading up to the partial decriminalisation of homosexual sexual practices in 1969 in the Canadian state are linked to uses of the Wolfenden Report. This connection is also tied to the related law reform in England and Wales in 1967

2 'From below' refers to being raised from the grass roots and community forms of self-organisation and not from state, corporate or more professional forms of organisation. See McNally (2006) and Subcomandante Marcos and the Zapatistas (2006), 'Sixth Declaration of the Lacandon Jungle', in *The Other Campaign/la otra campana*, (San Francisco: City Lights). Also see El Kilombo Intergalactico (2008) *Beyond Resistance Everything – An Interview with Subcomandante Insurgente Marcos* (Durham, NC: Paperboat Press).

3 The Wolfenden perspective also influenced sexual law reform efforts in Australia, New Zealand, Hong Kong before it was reunited with China, and many other states around the world.

which brought about the partial decriminalisation of sex practices between men.

There is, of course, no unitary Commonwealth experience of sexual regulation and struggles for the decriminalisation of same-gender sexual practices. The situations in different countries are far more differentiated and contextualised and require specific social and historical investigations. The one common feature in the Commonwealth is the history and influence of 'British'⁴ colonialism and imperialism, including the imposition of legal regimes regarding the criminalisation of 'homosexuality' and gender and sexual regulation more generally. This is experienced unevenly and differentially depending on the historical period and character of colonisation, the strength of indigenous gender and sexual practices and the imposition of capitalist relations of 'underdevelopment' or 'development' in very different social formations. We therefore need specific investigations of different projects of social and state formation, including in the areas of gender and sexual regulation, and the movements of resistance that have developed in response to them. This is what I do here through a focus on struggles over the use of the Wolfenden report in what is now called Canada.

In this chapter I describe the impact of this significant text of sexual regulation on the debates and struggles over sexual regulation within Canadian social and state formation in the 1960s and since.⁵ In relation to homosexual practices, the Wolfenden report, with all its internal contradictions and struggles (Allen 2007), outlined a public/private and adult/youth strategy of partial decriminalisation of homosexual activities between two consenting adults (defined as age 21 and over) in private. It is important to emphasise that the Wolfenden report as a text does nothing on its own. Various activists, groups, and politicians take up the perspectives outlined in the Wolfenden report for their own reasons and use it to try to push forward certain possible tendencies of development in the 1960s.

This association between legal developments and sexual regulatory practices in Britain and Canada is rooted in the history of Canadian state formation, which is bound up with the colonial settler state projects of first the French and then of the British that are based on the colonisation of the original indigenous

4 I problematise the use of 'British' recognising the 'English' character of much of this state formation and social regulation and the general subordination of Scotland, Wales, and of course Ireland in this project of state formation. On this see Corrigan and Sayer 1985, especially p. 11–12.

5 This chapter is drawn from my far more detailed historical sociological work on sexual regulation, *The Regulation of Desire: Homo and Hetero Sexualities* (Kinsman 1996a), especially pp. 157–345. The analysis presented here is much more fully developed in this book and readers are referred to it as a general reference. Also see Kinsman and Gentile (2010), *The Canadian War on Queers: National Security as Sexual Regulation* on the interlinked national security campaigns against queers.

peoples. This includes quite centrally the colonisation and marginalisation of their gender and erotic practices. Eventually it is the British project which wins out, subordinating not only the indigenous peoples but also the French settlers, producing the national and linguistic oppression of the Quebecois and the Acadians which remain continuing contradictions within Canadian state formation to this day, and also subordinating and regulating the later waves of people of colour brought into Canada to provide cheap labour (Bannerji 2000; Thobani 2007; Kinsman 2001). In response to the struggles for independence in what becomes the USA there is an attempt to create an east-west based network of British colonies that creates the later basis for Canadian state formation. It is this British colonial project that leads Canadian state formation to be bound up with the history of the Commonwealth.

By the mid 20th century the major British influence in Canadian state formation is unevenly replaced by that of the USA, including in areas of sexual regulation (Kinsman 1996a, pp. 148–287). This includes legal developments, the influence of national security initiatives in the USA and how they get taken up in the Canadian context, the influence of psychiatric and psychological discourses, and the growing impact of popular cultural production from the USA in Canadian contexts (Kinsman and Gentile 2010; Chenier 2008).

The influence and struggles over the Wolfenden report occur in a broader social and political context. Sexual, gender and class relations were transformed in the post-war years setting the stage for a new series of sex-political struggles. Sexuality and sexual discussions (with important restrictions) assumed a social centrality in more people's lives. There was a shift in family formation, particularly a growing integration of married women into the wage-labour force, the development of new birth control technologies, and the generation of new sexological knowledge. The expansion of consumer capitalism led to the an increasing commodification of social life, including sexuality, with women's bodies being used to sell commodities, ways of doing gender, and discourses of femininity at the same time (Kinsman 1996a; D. Smith 1990, pp. 159–208). By the 1960s, the massive transformations of capitalist and patriarchal social relations in the postwar years led to less reliance on the centrality of the heterosexual family in capitalist and state relations in countries like Canada and this opened up spaces for struggles over sexual and gender regulation.

The focus in this chapter is on the regulation of sex between men in the broader context of shifting forms of gender, sexual, and class regulation. The oppression of lesbianism and women having sex with other women, although overlapping, is socially organised in a different fashion. There is less of a specific criminalisation of the sex practices women engage in with each other but more of a social denial of the very possibility of women engaging in actual sex and relationships with each other, in the context of a broader social denial of the economic, social and sexual independence of women (Kinsman 1996a, p. 13,

2007, pp. 96–134).⁶ Those identified as lesbians and bisexual women have experienced major forms of denial, social invisibility, the loss of custody of their children and forms of police and male violence.

The terrain of struggle over the Wolfenden report in the Canadian context is located within shifts and tensions in legal state formation and social and sexual regulation more generally in the 1950s and 1960s. A central influence in Canadian sexual regulation has been British legal and sexual regulation, especially regarding the criminalisation of sex between men from British state formation, including the criminalisation of ‘gross indecency’ in the 1892 Canadian Criminal Code. Criminal code categories derived from Britain directed sexual policing against networks of men desiring sex with other men as they emerged in Canada.

Of sexual psychopaths and dangerous sexual offenders

By the late 1940s and early 1950s this situation shifts with a growing invasion of criminal code, psychiatric and psychological practices from south of the border. This is part of a growing influence of USA state and social formation within Canadian social formation. In the postwar USA, in the context of socially organised ‘panics’ over sexual violence, numerous states passed criminal sexual psychopath legislation. This was in the context of rapid suburbanisation and the mobilisation of sexual fears that were focussed on ‘strangers’. Often during these years ‘sexual psychopath’ was code for ‘homosexual’. Basically, this legislation operated so that those convicted of specified sexual offences, coupled with ‘expert’ psychiatric testimony, could be sentenced to indefinite detention if they were determined to be a sexual ‘threat’ or ‘danger’ (Freedman 1987; Kinsman and Gentile 2010, pp. 72–4; Chenier 2008). In 1948 a criminal sexual psychopath section was added to the Canadian criminal code. In 1953 the offences of ‘gross indecency’ and ‘buggery’ were added as ‘triggering’ offences for this section, creating the possibility that men who had sex with other men could be put away indefinitely.

The major government commission engaging with sexual regulation in 1950s Britain was the Wolfenden Committee which was set up in 1954 to investigate the ‘problems’ of female street prostitution and male homosexuality. In contrast in Canada in the 1950s, the major government commission regarding sexuality was the McRuer Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, formed in 1954 and reporting in 1958.⁷ The McRuer Commission was formed in the context of official and

6 In the Canadian context the offence of ‘gross indecency’ was expanded in 1954 to include sex acts between women but it remained largely applied in practice to oral sex acts between men. See Kinsman 1996a, p. 169.

7 See Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths (Ottawa: Queen’s Printer, 1958).

media concerns over 'sex crime' and that not enough men were being sentenced as criminal sexual psychopaths.

This commission had limited terms of reference and was not given the space to develop more innovative forms of social regulation as was provided for the Wolfenden committee. In its report the Commission argued that the 'criminal sexual psychopath' designation should be changed to 'dangerous sexual offender' to remove this designation's specialised psychiatric criteria. At the same time, the court still had to hear from at least two psychiatrists to sentence someone as a dangerous sexual offender. Rejecting the input of the one openly gay man who presented to it, the report argued for the continuation of the criminalisation of homosexual practices under this section. When the commission proposals were being addressed in 1961 the Department of Justice drafters added a new clause, 'Or who is likely to commit another sexual offence', apparently to give an alternative definition so the sentencing rate would increase. This would mean that someone convicted of consensual sex with other men, and who was likely to engage in other consensual homosexual acts, could be classified as a 'dangerous sexual offender' and sentenced indefinitely. This was three years after the release of the Wolfenden report in England in 1957 which argued for the partial decriminalisation of sex between men.

As mentioned earlier, the Wolfenden report's terms of reference mandated it to address the 'problems' of both male homosexuality and female street prostitution. In developing an approach to regulating both of these terrains the conceptual practices that were developed and refined were distinctions between the 'public' and 'private' and 'adult' and youth': constructing young people as having different social and sexual capacities and vulnerabilities compared to adults and especially constructing participation in sex with other males as a particular 'danger' for teenagers that they needed to be protected from. In particular, the Wolfenden report leads to the more specific application of public/private distinctions to the terrain of sexual regulation and policing. This approach defined 'public' rather broadly and 'private' rather narrowly. Criminalisation of sex workers and gay sex in 'public' was seen as necessary to enforce 'public decency'. At the same time 'adults' were in some circumstances to be granted a limited 'private' right to do what they wanted in the privacy of their own bedrooms behind closed doors.

The social constructions of public and private

The conceptualisation of 'public' and 'private' is key to this project of liberal sexual reform. Here I am focusing on how these concepts have been constructed in the 'north' and 'west' which have impacted on countries in the 'global south' in more limited and different ways given their differing forms of social organisation and the impacts of colonialism and imperialism.

Classifications of 'public' and 'private' are socially constructed and shift and change historically. What is 'public' can become 'private' and what is 'private'

can become 'public.' These are flexible notions that have a history and social organisation. At times the inside of a car has been considered to be a 'private' place, at other times it has legally been considered to be a public place. A police officer gazing through the kitchen window of a house at people having sex on the kitchen table could transform what was in 'private' into a 'public' act. These distinctions are bound up with relations of social power. To clarify these distinctions of public/private we need to delve further into their social histories.

The capitalist societies in which we live are based on private ownership of the means of production (factories, offices, services, information technologies). Historically, prior to the enclosure movements which helped to produce the basis for capitalist social relations, there was more access to the means of production which were more 'public' and communal in character where people often had a right of access to the land. As this ownership and control became privatised, understandings of public and private were transformed. A 'private' realm emerged in relation to the ownership of private property.

At the same time capitalist social relations led to the separation between the realms of waged work, business, and official politics (state relations and political parties) as having a 'public' character on the one hand and the increasingly privatised realms of the family, the household and domestic and reproductive labour on the other. This has different gendered, racialised and class dimensions. Women in a patriarchal society became associated with this 'private' realm, and the socially necessary work of domestic labour, child-rearing and nurturing became 'private' forms of labour that are no longer seen as work since no wage was/is attached to them (Dalla Costa and James 1972; Federici 1975). These historical practices shape the deployment and use of 'public' and the 'private' in the Wolfenden report.

Entwined with this, a sexual respectability emerged in the new capitalist and middle classes in which 'proper' sexuality began to be constructed as also 'private' in character and as only taking place in the domestic, familial realm between married couples. This also helped to fuel the social purity and moral reform efforts against public forms of prostitution and 'sex perversion' in the late 19th and early 20th centuries (Walkowitz 1980; Weeks 1977; 1981; Kinsman 1996a, pp. 111–20).

The 'privatisation' of sexual practice had a particular impact on the emerging erotic cultures of queer⁸ men. For some of these men, excluded from families and households, there was little 'private' space available for meeting other men

8 I use queer here as a way of reclaiming a term of abuse that has been used against us; as broader than homosexual, gay, and lesbian so as to include a range of erotic practices in rupture with institutionalised heterosexuality and the two-gender binary system; and as a place from which to queer (or render strange) normalised social practices. On this use of queer see Kinsman and Gentile (2010) and Jagose (1996), among others.

and for sexual liaisons and adventures. For many men having sex in 'private' bedrooms was not a possibility and the men for these erotic encounters still had to be met in more 'public' venues. This 'private' or 'personal' space became more available to middle class and elite men who had access to more money, wealth and 'personal' space as it emerges.

This general denial of 'private' space led many men seeking sex with other men to develop creative ways of cruising and meeting other men in state-defined public places (including city streets, parks, washrooms and in quasi-public places like bars and bathhouses) and elaborate rituals for engaging in intimate erotic adventures in these 'public' places. Through these efforts queer men created their own private and intimate erotic spaces in these public places. This has been an important part of the history of the formation of queer men's erotic cultures. These practices continue to transgress the attempts to confine sexualities to a very limited and narrow 'private' realm (Dangerous Bedfellows 1996; Couture 2008).

In relation to female prostitution the Wolfenden Report called for clampdowns on female street prostitutes. In the report it was the female sex workers who did the 'parading' and caused the disturbances to 'public decency' and therefore 'public' forms of prostitution needed to be restricted and eliminated – the public streets needed to be cleared of sex workers. There were clear sexist assumptions here. The women were targeted – not their clients – and women's sexuality was relegated again to the 'private' realm. While they opened up the possibility for a limited 'private' space for sex work this was never really pursued in the British or Canadian contexts (Self 2007; 2010; Brock 2009).

This public/private regulatory distinction often has an abstract social character, given that there is no fixed definition of what is 'private' and what is 'public,' and that this distinction is capable of being deployed in different ways. This became the basic conceptualisation behind the liberal sexual reform articulated in the Wolfenden report in response to the previous wholesale criminalisation of sex work and same-gender eroticism in moral conservative approaches. Basically in this approach moral conservatism was preserved in the 'public' realm but a new and narrow 'private' realm was established, at least for consensual homosexual acts between two adults. The liberal strategy of sex regulation outlined in the Wolfenden report maintained and defended an oppressive strategy of sexual regulation, but it was also open to a number of different readings given the character of the report.

Using the report 'from below'

Early gay activists seized on the Wolfenden text and generated readings of it to attempt to actively legitimise homosexuality and open up homosexual law reform discussions. They focussed on how the report could be read as opening

up a limited realm for a 'privatised' homosexuality and they built on this and tried to expand this reading of the report. This took place in the context of the postwar expansion of gay and lesbian networks and resulting conflicts with police and other authorities. In the USA, the Mattachine Society, founded by ex-members of the Communist Party, became a more respectable homophile organisation when its early leaders were overthrown in the midst of the Cold War (D'Emilio 1983, pp. 57–125). The homophile movement, made up of people interested or concerned with homosexual issues, relied on tolerance towards homosexuality and often on liberal psychological and medical experts.

In Canada the most long-lasting homophile organisation in the 1960s was the Association for Social Knowledge (ASK) in Vancouver, which was in existence for most of the period from 1964–69. They and other homophile activists across the country used the Wolfenden report to open up and push forward debates on homosexuality and law reform in emerging lesbian and gay networks, in some churches starting off with the Quakers and Unitarians but expanding to include the United and even the Anglican and Catholic Churches in some areas, in the mainstream media which began to publish some stories on homosexuals and the Wolfenden perspective, and in the legal profession itself (Kinsman 1996a, pp. 213–87).

For instance, Doug Sanders, whose quote we started this chapter with and who was one of the central people involved in ASK, was also a lawyer who in collaboration with Sidney Simons, another Vancouver lawyer, tried in 1966 to propose changes based on the Wolfenden perspective to the Criminal Law Subsection of the British Columbia (one of the Canadian provinces) Division of the Canadian Bar Association. At the same time they also suggested an age of consent for homosexual acts set at 18 and not 21 and for decriminalising such acts between two people in private when participants were over the age of 14 provided that the differences in their ages were not more than two years (Kinsman 1996a, p. 243). They supported the public/private aspects of the Wolfenden strategy but went beyond it on the age of consent question. Their proposal was not well received but the issue was raised in these legal circles.

Sanders also prepared and circulated an ASK paper on the 'Sentencing of Homosexual Offenders' which demonstrated support for law reform by establishing that the law as it stood was only effective for cases of 'public' acts. This paper was also printed in the *Criminal Law Quarterly* in 1967 (Saunders 1967; Kinsman 1996a, pp. 243–4), where it became part of the legal discussions leading to the 1969 criminal code reform. The Wolfenden report and its perspective were also increasingly taken up by liberal reformers in the churches, in the mass media, and in the legal profession and were even raised in legal cases by the mid to late 1960s (Kinsman 1996a, pp. 213–87). Gay activists were frequently working behind the scenes to make sure the issue was raised.

In the spring of 1964, Arnold Peters, a maverick New Democratic Party (Canada's social democratic party, historically based in 'English-Canada') Member of Parliament, who identified as heterosexual, moved a private member's bill along Wolfenden lines on homosexual law reform. The bill went nowhere but it was the first time the issue had been raised in this venue. Behind the scenes Peters was also involved in the homophile-influenced Canadian Council on Religion and the Homosexual (CCRH) in Ottawa in which members of a number of churches were involved, especially Anglicans, but there were also unofficial connections with the Roman Catholic Church. The group also involved a number of gay federal civil servants, and several doctors and psychiatrists. Peters was also connected with an early and short lived attempt to set up a Homophile Reform Society in August 1964 that was influenced and pushed on by an early gay activist. This initiative also involved Sidney Katz, a journalist for *Maclean's* (a major Canadian English news magazine) who had written a series of rather liberal articles on homosexuals that were influenced by Jim Egan, an early gay activist.⁹

Gary Nichols, a gay federal civil servant who had previously established the Committee on Social Hygiene in nearby Stitsville, took the initiative in founding the CCRH in Ottawa and was also a central animator in attempts to set up the Homophile Reform Society (Kinsman 1996a, pp. 238–9, 242). Nichols was later joined by Bruce Somers who had been involved in the founding of ASK in Vancouver when he moved to Ottawa later in 1964. The CCRH collapsed in 1967, reflecting the tenuousness of much of this early organising, which often depended on the initiative of one or two gay activists.

The difficulties of this cross-country organising across the vast expanses of the Canadian state were also made clear when ASK wrote to Peters in 1964 to offer their assistance on his law reform bill which they were ready to support through a letter writing campaign. Unfortunately Peters never replied. When the early gay magazine *Two* in Toronto attempted to contact the Homophile Reform Society they likewise were unable to make any contact and had to assume it no longer existed (Kinsman 1996a, p. 242).

Nonetheless these early homophile attempts to open up discussion of gay and lesbian concerns and law reform had an impact in some of the churches, in the mass media, in the legal profession, and even within Parliament itself in initiating early law reform discussions. This helped to set the stage for a more official law reform process that would have a rather different social and political character.

9 On Arnold Peters see Kinsman (1996a, pp. 238–42). On Sidney Katz and his 1964 articles in *Maclean's* see Kinsman (1996a, pp. 242, 251–2). On the Homophile Reform Society see Kinsman (1996a, p. 242).

Shifting 'from above'

In a shifting of these efforts 'from above' there is the creation of a particular professional and regulatory reading of the Wolfenden report. In the USA and Canada, the Wolfenden report was also taken up as part of a project by medical and psychiatric/psychological professionals to extend and expand their professional areas of 'expertise' in conflict with other ruling institutions, especially the fields of criminal justice and policing. This reading of the Wolfenden report placed more weight on the sickness or mental illness conceptualisation of homosexuality than was often there in the ambiguous formulations in the actual report. In the introduction to the 'authorised American edition' of the Wolfenden report, Karl Menninger, MD writes:

From the standpoint of the psychiatrist, both homosexuality and prostitution ... constitute evidence of immature sexuality and either arrested psychological development or repression ... there is no question in the minds of psychiatrists regarding the abnormality of such behaviour. Not all such abnormalities can be cured, but some homosexuals ... can be and are benefited by treatment. (Menninger 1963, p. 7)

This sets out a 'sickness' framing of the report for North American audiences. The chain of reason went as follows: if homosexuals are mentally ill, they should be under a doctor's or therapist's care and should not be simply addressed as a criminal problem. This reading of the public/private strategy of sexual regulation shifted the medicalisation of homosexuality away from the extending criminalisation of homosexuality approach and towards this reform strategy. By the mid to late 1960s, a general professional consensus within the psychiatric, psychological and medical fields was established in support of Wolfenden-type reforms, although there were still many supporting the wholesale criminalisation of same-gender sexual activity. While this reading of the Wolfenden report at times overlapped with more homophile-influenced readings, it shifted this in the direction of professional power and regulation, especially regarding the sickness framing of homosexuality.

Of course, there was a vociferous response to even these limited law reform measures from the police and moral conservatives. The Canadian Association of Police Chiefs voted at their 1968 conference to oppose the reform legislation because it would lead to depravity, robbery and murder, continuing their association of homosexuality with criminality (Kinsman 1996a, p. 264).

This emphasis on psychiatric and psychological knowledges in the homosexual law reform discussions was also associated with the extension of medical and psychiatric regulations over the bodies of transsexual and transgendered people. After the gender/sexual disruptions of the Second World War mobilisations there was a growing, if uneven, revolt against the two-gender system which no longer fitted with a growing number of people's lives and experiences. The generation of theories of a 'core gender identity' which

can conflict with the genitalia one is born with led to various attempts to 'fix' transgendered individuals by attempting to fit them back into the two-gender binary system and institutionalised heterosexuality as well as movements of resistance to this (Ireland 2009, pp. 313–19; Irving 2007; Namaste 2000; Kessler and McKenna 1978).

Towards official law reform: partial decriminalisation

By the 1960s, the transformations of capitalist and patriarchal social relations in the postwar years had a major impact on sexual and gender regulation. As part of a broader composition and cycle of social struggle, gay and lesbian organising was shaped by a series of social revolts. This included the emergence of a new wave of feminism raising the need for access to birth control and abortion services in the context of women's right to control their own bodies and reproductive freedom more generally; the rising militancy of the black liberation, anti-war, and new left movements; and youth movements that challenged the sexual oppression of young people. In this contested context, older moral conservative strategies of the total criminalisation of queer sex, sex work, abortion, and the distribution of birth control information were no longer working. There was a need for a new approach to try to handle these social contradictions. It is in this context that the Wolfenden strategy of public/private regulation became a cogent strategy for managing and containing these social pressures (Kinsman 1995, pp. 80–95).

A Supreme Court decision in November 1967 played a key part in facilitating this law reform process on the official level. Everett George Klippert was sentenced as a dangerous sexual offender to indefinite detention for a series of consensual same-gender sex acts and Klippert and his lawyers appealed this all the way to the Supreme Court of Canada.¹⁰ The Supreme Court majority, in a literalist reading of the dangerous sexual offender section, decided that since Klippert was likely to engage in further homosexual acts, he was a 'dangerous sexual offender'. The implication was that all sexually active homosexuals were 'dangerous sexual offenders'. This decision came down ten years after the release of the Wolfenden report and after the government had adopted its recommendations on the partial decriminalisation of homosexuality for England and Wales in the Sexual Offences Act of 1967. This set up a major disjuncture between homosexual law reform which was proceeding in England and Wales and the legal situation in Canada which seemed to be moving in a very different direction continuing the strategy of the extension of the criminalisation of sex between men.

10 On the Klippert case see Kinsman (1996, pp. 257–64) and the video documentary *History's Courtroom: The Bedrooms of the Nation* (Episode 1001), on the Everett George Klippert case. Leading Cases Productions Limited and Screenlife Productions Limited, (Toronto), April 2002.

As Doug Sanders put it, this decision ‘wiped out any middle ground in the debate’ since the ‘most sophisticated argument for retaining the anti-homosexual laws was that changing the law was some form of approval’ of homosexuality and that those opposed to changing the laws were ‘happy with not enforcing the laws but in leaving them on the books’ (Sanders cited by Kinsman 1996a, pp. 257–8). This position became quite untenable with the Klippert decision, which suggests that continuing engagement in sex with other men could lead to life imprisonment. This was the continuing legal resilience of the strategy of extending the criminalisation of homosexuality that now came sharply into conflict with the partial decriminalisation strategy.

In response, Wolfenden became very useful as the official response to these pressures. It allowed Canadian state formation to be moved away from the extending criminalisation of homosexual acts approach and aligned it more clearly with legal developments in England and Wales. Then Justice Minister and soon to be Prime Minister Pierre Trudeau stated, in response to the Klippert decision both supporting sexual law reform proposals and borrowing from the Wolfenden approach, that ‘there is no place for the state in the bedrooms of the nation’.¹¹

The official ‘from above’ use of the Wolfenden perspective to limit and to contain sexual/social transformation that Trudeau developed was an omnibus criminal code reform bill.¹² This brought together homosexual law reform (actually the partial decriminalisation of ‘buggery’ and ‘gross indecency’ in ‘private’ between two ‘consenting adults’ defined as aged 21 and older), the decriminalisation of the dissemination of birth control, and the very partial and limited decriminalisation of abortion through providing a ‘private’ ‘right’ of access to abortion services on ‘health’ grounds if approved by a therapeutic abortion committee in a hospital that had established such a committee (Kinsman 1996a, p. 267; Brody et al. 1992).

For those supporting the homosexual law reform dimensions of the bill in the parliamentary debates, many arguments were taken directly from the Wolfenden Report but the debate was also inflected with the ‘sickness’ framing of homosexuality. The debate in the House of Commons was largely divided into two camps – those in favour of the reform including the NDP, the governing Liberals and some Conservatives, and those opposed, which included most Conservatives and the Creditistes, a rural Catholic based social credit party from Quebec who conducted a filibuster against the sections of the omnibus bill dealing with abortion, gross indecency and buggery (Kinsman 1996a, pp. 264–78).

11 This is reported as ‘the state has no place in the bedrooms of the nation’ in *The Globe and Mail* (Toronto), 22 Dec. 1967, p. 1. It is also quoted as ‘the government has no place in the bedrooms of the nation’.

12 This omnibus bill was known as the Criminal Law Amendment Act, 1968–69. It was introduced as Bill C-150 by then Minister of Justice Pierre Trudeau on 21 Dec. 1967.

One of the central terrains of the debate was over who could successfully articulate their position to the then socially hegemonic 'sickness' framing of homosexuality. While those supporting the continued total criminalisation of homosexuality attempted to link their argumentation to 'sickness' theories of homosexuality, this debate was won by those supporting the partial decriminalisation strategy who derived their arguments from a 'sickness' reading of the Wolfenden Report. In this official debate no one spoke out in defence of lesbians, gay men, bisexuals and other queer people. As George Smith suggests, the record of this debate may be the most heterosexist document in Canadian governmental history (G. Smith 1982).

Supporters of the parliamentary reform concentrated on the need to make a distinction between homosexuality in 'public' and 'private' and that privatised homosexual expression was most likely 'sick' and therefore was a medical, psychological, or counselling problem and not a criminal one. This was at the very same time that homophile activists with the influence of the social movements of the 1960s were moving far beyond 'sickness' theories of homosexuality.

Attempting to move beyond the limitations of the Wolfenden approach, Doug Sanders and ASK challenged the discriminatory age restriction of 21 placed on participation in homosexual sex imposed by the reform. Sanders forwarded to Prime Minister Trudeau a resolution from the North American Conference of Homophile Organizations (NACHO), a network of homophile and gay groups that ASK was involved in and which was also increasingly influenced by the rising militancy of the black civil rights and black power movements as well as the student and anti-war movements. In this resolution adopted at a conference in Chicago in 1968 NACHO stated that they wished to express their:

sharp disappointment that Mr Pierre Elliot Trudeau ... has seen fit to introduce the limited and inadequate provisions of the English homosexual law reform bill ... which makes 21 the age of consent for homosexual acts ... the Conference encourages the Canadian government to ... enact provisions for age of consent which are identical for homosexual and heterosexual acts. (cited in Kinsman 1996a, p. 265)

Sanders, informed by the perspective we started this chapter with, also suggested that one way to increase gay and lesbian visibility in the lead up to reform was for ASK members and supporters to go door to door with petitions supporting the law reform measures. This was reluctantly accepted at one meeting and then killed at the next one by people who felt that if they rocked the boat they might hurt the chances of reform. The attempts by homophile activists to use the Wolfenden approach to open up space for popular education on homosexual issues and concerns was undermined by this shift to the official use of the report in the 1969 criminal code reform. The reform process gets

trapped and contained within a managerial and administrative reading of the Wolfenden text by politicians and legal experts.

Two years later, in August 1971, the first cross-country gay and lesbian rights demonstration took place in Ottawa on Parliament Hill, organised by activists inspired by the gay and lesbian liberation movements emerging out of the Stonewall riots in New York City. The impact of the black civil rights, and black power movements was very clear here, as were connections made between lesbian and gay struggles and those of other oppressed groups that characterised early gay liberation and lesbian feminist struggles. A series of demands were issued in a declaration titled 'We Demand' calling for the recognition of lesbian and gay rights including direct challenges to sexual policing and the national security campaigns against lesbians and gay men.¹³ The cover letter produced for the statement for the event read in part:

In 1969 the Criminal Code was amended so as to make certain sexual acts between consenting adults, in private, legal. This was widely misunderstood as 'legalising' homosexuality and thus placing homosexuals on an equal basis with other Canadians. In fact, this amendment was merely a recognition of the non-enforceable nature of the Criminal Code as it existed. Consequently its effects have done but little to alleviate the oppression of homosexual men and women in Canada. In our daily lives we are still confronted with discrimination, police harassment, exploitation and pressures to conform which deny our sexuality.¹⁴

Here early gay and lesbian liberation activists in pointing to the major limitations of the 1969 reform moved far beyond the confines of the Wolfenden strategy of limited decriminalisation and public/private and adult/youth regulation.

Continuing struggles over public and private: shifting the terms of sexual regulation

As in other jurisdictions, following public/private law reform the police were now more specifically directed at queer sex in state-defined 'public' places. This clearer direction for police response led to a major increase in the numbers

13 On the 40th anniversary of the 'We Demand' demonstration in Ottawa a conference called 'We Demand, History/Sex/Activism' was held in Vancouver, Canada, 26–28 August 2011. The Roundtable discussion called 'We Demand: Remembering as Resistance' focussed on the organising and politics of the 1971 demonstration. This session was held on 26 August 2011.

14 The 28 August Gay Day Committee, 'We Demand,' (Jackson and Persky 1982, p. 217). The demonstration came under the surveillance of the Canadian security police, the Royal Canadian Mounted Police or RCMP. While many of these demands have been met in some form many still have not been adequately addressed (Kinsman and Gentile 2010, pp. 255–69).

of men arrested for having sex with other men in England and Canada (Greenwood and Young 1980, p. 166; Weeks 1977, p. 11). After the Wolfenden perspective was extended to Northern Ireland in 1982, there was also increased police activity against all forms of homosexual 'public display'. One observer expressed the police position as 'now that you are legal, this should be done in your homes' (Kerrigan 1984, p. 15). In the 1970s this limited 'private' space was used by queer movements and community formation to seize more public and quasi-public space for gay communities and erotic cultures with more people coming out and with a growing commercialisation of gay ghettos or sections of cities. In response the police mobilised against this public visibility as mandated by the Wolfenden approach.

Across the Canadian state there was an escalation of sexual policing against gay bars and baths from 1975 on beginning with the 1975–6 Olympic 'clean-up' campaign centered on Montreal and continuing through the massive bath raids in Toronto in the early 1980s with hundreds of men being arrested. In these raids the police began to use the bawdy-house legislation which not only covered acts of prostitution but also 'acts of indecency'. Sexual activities within bars and bathhouses were claimed as sex acts in 'public' (G. Smith 1988; 2006; Kinsman and Gentile 2010, pp. 302–17, 332–5). George Smith, a leading Canadian gay activist and researcher, referring to the situations established after the 1969 criminal code reform wrote that:

The Criminal Code defines 'public' first in terms of a 'public place.' According to Section 138, a public place is 'any place to which the public has access by right or invitation, expressed or implied.' Secondly, section 158 of the Code ... goes on to say that not only is a sexual act public and therefore illegal if it is committed in a public place, but it is also a public act if more than two persons take part or are present. What this means is that what is 'public,' and again illegal as far as sex is concerned, is very broadly defined. It covers all possible situations but one – two individuals behind a locked door. This essentially relegates all sexual activity to the bedroom ... Another important feature of the government's definition of 'public' is that it treats the relation between 'public' and 'private' as proportional, like pieces of a pie. Thus the larger the slice given to the public, the smaller the piece left over for private. (G. Smith 1982)

These raids led to massive resistance in Montreal following the raid on the Truax bar in 1977 and in Toronto in response to the 1981 bath raids. In Toronto, the Right To Privacy Committee (RTPC), the defence organisation formed for those who were charged, fought back in the streets and in the courts with much success (McCaskell 1988). The police were pushed back and became more wary of using the bawdy-house laws for large arrests for fear of provoking mass resistance. The RTPC transformed and expanded the liberal and narrow notion of the right to privacy to include the social making of intimacy and privacy in state-defined 'public' places. It shifted the right to privacy from a narrow,

liberal, individualist usage where it participates in 'privatising' our sexualities which can easily be accommodated with neo-liberalism. Instead it transformed our right to privacy into a more collective and social way of securing our claims to 'private', 'intimate', *and* social space.

What became crucial were the social practices that people engaged in and not the state defined boundaries of 'public' and 'private'. This transformed the previously narrow right to privacy into part of securing our right to the world. This expanded and transformed use of the right to privacy requires that one looks at sexual practice and social life from the standpoint of queers, and this moves us beyond the boundaries of state-defined categories. From this perspective it is quite possible to engage in a private act in a place defined by state agencies as public (for example, a washroom with no one else present or a deserted or secluded part of a park). As George Smith put it 'Privacy is something that is socially constructed in this society ... Indeed, in the middle of the night, when it is absolutely pitch dark, a park might be a very private place ...' (G. Smith 1982). This kind of approach is radically subversive of the strategy of public/private regulation set out in the Wolfenden report, pointing towards new forms of potentially non-oppressive forms of sexual regulation.

Shifting social regulation away from whether sexual acts occur in 'public' or 'private' or whether they are 'deviant' or 'normal' directs our attention towards the social character and context of erotic practices and the social character of relationships between people. The problem is when violence, coercion, or social power are used in sexual contexts and not whether the practices occur in 'public' or 'private' or whether they are 'homosexual' or 'heterosexual'. This begins to develop a radical pluralist perspective that moves far beyond liberal pluralism to get at expanding the social possibilities for control over people's own bodies and lives, both individually and collectively, and needs to be linked to broader projects of social and sexual transformation (Weeks 1985; Kinsman 2007).

While the mass mobilisations and mass organisation after the bath raids were largely successful in pushing back police efforts to criminalise consensual sex between men in large police raids, when this mass organising subsided it was largely middle class white men who rose to the top in gay communities. I refer to this as a shift in class formation with the emergence of a new, professional/managerial strata within gay communities which also developed intimate connections with gay business sectors. Due to their credentials and training this social strata was able to speak the languages of ruling relations in society and was therefore often able to successfully claim to be the 'legitimate' representatives of the gay community. Given the commonalities this social strata shared with the broader white middle class in society, the radical and transformative dimensions of the gay movements began to be subordinated to a politics that was more defined by a certain 'respectability' and 'responsibility' (Kinsman 1996b) that asked simply to be let into dominant social institutions.

Later legal changes in Canadian state formation led to the abolition of the offence of gross indecency (which had largely but not entirely been used to cover oral sex between men) in 1988 which was combined with the lowering of the age of consent for anal intercourse in 'private' to 18 even though the general age of consent was at the same time lowered to 14. It continued to be argued that the age of consent for anal sex needed to be higher to protect young men from homosexual advances. This differential age of consent has been successfully constitutionally challenged in a number of provincial jurisdictions but is still in place. In 2006 as a result of moral conservative organising the general sexual age of consent was raised to 16, despite the opposition of AIDS educators and organisations of queer youth, while the higher age of consent for anal sex was maintained (Kinsman 2007).

The shifts in class formation within gay and lesbian communities, and the gaining of formal legal rights, has been facilitated by a crucial legal shift in Canadian state formation with the Canadian Charter of Rights and Freedoms enacted in 1982 which allowed laws to be challenged if they violated equality rights. The equality rights section of the Charter which came into effect in 1985 was eventually, after major legal battles, interpreted to include sexual orientation protection. This has created the basis along with social and legal struggles for major advances in formal legal rights for lesbians and gay men regarding spousal rights, familial rights, the right to join the military and same-sex marriage rights. While some of these struggles have had important transformative dimensions, they have largely been defined by asking for the right to be let into and included within existing institutional relations, and have not challenged the social forms of these institutions. There have been major legal advances using this approach which have made important differences in many people's everyday lives (Herman 1994; M. Smith 1999; 2008; Rayside 1998; 2008).

At the same time this shift in state legal formation oriented gay movements much more towards formal legal equality and legal rights as opposed to trying to establish substantive social equality with heterosexuals and the overcoming of heterosexual hegemony and the two-gender binary system. These advances have created the paradoxical situation in which even though the gay community have achieved many of their stated aims at the level of formal legal rights, major substantive forms of oppression, inequality and violence remain, including heterosexist violence and abuse against queer young people in high schools and on city streets. There can also still easily be major mobilisations of opposition to queers who are certainly not understood as being 'normal' by moral conservatives and those they can appeal to and mobilise. The social roots and basis for heterosexism have not been substantively challenged despite these important legal victories.¹⁵

15 On my description and analysis of the terrains of struggle – both the possibilities

Some conclusions: avoiding containment and pushing forward social transformation

Early gay activists in Canada were able to both use and at times move beyond the official text of the Wolfenden report. This was a process of creative engagement and transformation from below. At the same time, these readings of Wolfenden from below were able to be contained within the textual practices of sexual rule of the 1969 criminal code reform which was based on a hegemonic reading of Wolfenden from above. Later struggles over public and private regulation and sexual policing allowed queer activists to challenge and move beyond this regulatory strategy.

In our historical present, these historical investigations help us clarify more generally the limitations of formal legal equality and sexual 'citizenship' claims that are often made in our movements and communities. In the Canadian context this clarifies both the potential and the limitations of the use of the Charter in which the transformative moment of inclusion into existing social forms of state citizenship or into the 'citizenship' of the marketplace has often been subordinated to integrationist, middle class and neo-liberal strategies. Initially transgressive demands for the transformation of spousal, family, marriage, military and national security relations (amongst others) can be tamed and limited from above so that what we end up accomplishing is the integration of some white middle class queer people into existing capitalist and patriarchal (and racist) social forms and we remain ensnared in new strategies for the management of our lives. This social and political process is sometimes now referred to as 'homonormativity' and 'homonationalism',¹⁶ although I find these perceptive terms in need of far more concrete social and historical grounding.¹⁷ We need to always ask on whose terms are we being accepted or integrated and who is being excluded through this process of incorporation? This has meant that white, middle class gay men and to a lesser extent lesbians have gained the most from these legal victories. And those being excluded are often working class queers, lesbians, queers of colour, trans people, queer youth and queers living in poverty. Some have gained far more than others from our formal legal victories.

and limitations – opened up by the Charter see Kinsman (1996a, pp. 360–5) and Kinsman and Gentile (2010, pp. 391–401). On the current terrain of queer struggles within Canadian social and state formation see Kinsman (1996a, pp. 375–409) and Kinsman and Gentile (2010, pp. 429–58).

16 On the use of 'homonormativity' see Duggan (2003) and the 'Queer Futures' issue of *Radical History Review*, (Durham, North Carolina: Duke University Press/MARHO: The Radical Historians' Organization, 2008). Also of relevance is Hennessy (2000). On 'homonationalism' see Jasbir K. Puar (2007).

17 This is a project I am currently beginning for the Canadian context from the late 1960s to the present. The tentative title is *The Social Making of the Neo-Liberal Queer*.

We need to avoid these strategies of containment and to always challenge heterosexist, racist, patriarchal, and capitalist social forms. This requires always pushing forward the transformative and transgressive dimensions of our struggles while at the same time avoiding getting trapped within the textual strategies of ruling from above like the strategy of sexual regulation mobilised through official readings of the Wolfenden Report. In the historical past this included challenging public/private and adult/youth strategies of sexual regulation, and in our historical present this requires a refusal to simply be assimilated into existing social forms or institutional relations. We need to move beyond the confines of sexual rule to establish control over our own bodies and lives and to see our liberation as bound up, as the early gay liberation movement affirmed, with the social liberation of other oppressed and marginalised peoples.

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