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Practicing Justice by Practicing Method: A Brief Rethinking of Feminist Analytics of Obscenity and Indecency Law in Canada

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Abstract

This paper briefly explores the feminist responses to several Supreme Court obscenity and indecency rulings in the Canadian context. The authors argue that the feminist academic debates, have, to some extent, been absorbed into the legal debate, and lost some of their foundational impetuses. The authors thus argue for a rethinking of the critical arguments in the context of obscenity law in Canada, and suggest that methodological approaches that are descriptive in tone might provide an interesting counterpoint to the activist debates. The authors suggest that the governmentality methodology might be one such appropriate descriptive vehicle for analyses.

Introductions

The idea of practicing justice is central to the legal obscenity and indecency debate in Canada in the context of the feminist debate that has penetrated the academy and presented as Supreme Court intervention in the last twenty years. Often these voices have been placed along the philosophy of law spectrum as agents of critical legal studies – that legal and moral doctrines are “after the fact illusions” and that what is required is disruption of the status quo in order to reconfigure dominance power relations in society (Murphy and Coleman 1990: 51). Yet we must also be cognizant that these disparate feminist voices were not entirely extra-systemic in that they sought to reorder power relationships from within an already ordered paradigm.

Internal theories tend to view the system from the positions of those within the legal system while external theories tend to view the system from an outsider's perspective (Litowitz 1997, 21). Certainly, the feminist voices in the obscenity and indecency debate brought outside perspectives to bear in the legal debate, but they have tended to do so through the internal mechanisms of the Court system, namely intervention and calls for activism based legal change. As such, many feminist voices in the Canadian debate have sought policy change and a better "normative" outcome for women. The disagreement over the nature of the women's communities has been arguably the central axis about which the Canadian feminist arguments pivot. The dominant feminist and queer legal strategies and debates in the context of the obscenity and indecency have sought to achieve social justice for women and sexual minorities (see Cossman *et al.*, 1997 for a detailed discussion of these multivalent, yet activist positions). While theory, of course, has informed such scholarship, so has the foundation of activism – i.e. the notion that a better result for a marginalized population can be achieved, in part through the use of litigation. Yet for all the rhetoric of activism there is intellectual space to supplement such scholarship with the theorizing of justice through a foundational critique of the rationalities that underpin strategies for political action. There is value in description and theory testing prior to advocacy. It is in this spirit that we write this paper, though we leave the larger descriptive project for other works in other venues.

Our analysis demonstrates that the social demands for equality and civil rights with respect to sexual expression of the 1980s and 1990s of the various feminists and gay, lesbian, bi-sexual and trans-gendered (GLBT or queer) movements have been translated into obscenity and indecency jurisprudence by the Supreme Court decision in *R. v. Labaye* (2005) in a manner that re-brands liberalism to make it feminist and queer friendly. We agree with Harris (2006: 1542), who argues that law absorbs or re-brands emancipatory claims, and that "law's client in a liberal regime is structural liberalism" (Harris 2006: 1543).

Rather than positioning normative outcomes for women as the pivot point of analysis, we describe a methodological approach to *critique* in the context of the obscenity and indecency debate. Our approach to theorizing justice has been described as “negative jurisprudence” intended to generate a critical discussion about law rather than specify particular normative outcomes by suggesting how decisions should be made in particular cases (Litowitz 1997: 39). While some have regarded this as a tendency to select for relativism and even nihilism, this descriptive project is an important point of dialogue in informing the activist project. Indeed the practice of critique provides an opportunity to rethink and problematize the effects of activist political strategies which themselves offer suggestions for particular outcomes for women and sexual minorities in the context of obscenity law. Thus we see a utility in the dialogic nature of description without arguing for a particular outcome or foundation (Fish 2008).

Rather than advocating a particular outcome in line with a particular social justice programme (such as using the obscenity law to promote women’s equality, or preventing the state from discriminating against gay and lesbian sexually explicit materials through seizure by Canada Border Services) our aim is to provide an analytic of government. In the case of obscenity and indecency law the techniques and rationalities underpinning regulation are given content, in part, by a reading of judicial text. Thus we see case law as not merely treatises of precedent, but as reflections and refractions of societal ordering. Put otherwise, we view case law, in this regard as a norm of the social, not just as a norm of the rule (Golder and Fitzpatrick 2009: 124-130).

The Case Background

The Supreme Court of Canada, in its landmark case, *R. v. Labaye* (2005), changed the law of indecency and obscenity in Canada. The terms indecency and obscenity, used to describe sexually explicit conduct and expression respectively, are now given content by the “harm based” test. This is a shift that

completes the Court's search for objectivity, and marks the terminus point of the community standards of tolerance of harm test, which determined that conduct or expression was harmful (and illegal) by virtue of considering that which other Canadians would not tolerate. This was the test at issue in the now canonical cases of *R. v. Butler* (1992) and *R. v. Little Sisters* (2001).

The test in *Labaye* looks for harm in both nature and degree. The nature of harms contemplated by the Court includes unwanted interferences with liberty by sexual expression or conduct, attitudinal changes due to exposure to sexually explicit materials or conduct, and psychological or physical harm to participants engaged in sexual expression or conduct (para. 36). The degree of harm would be established by determining whether the material or conduct was "incompatible with the proper functioning of society" measured in relation to constitutional values (para. 52). At issue in the case was the legality of a swingers club, which on the basis of the harm based test was considered by the Court to be a legal establishment (at para. 66-71).

The test has been viewed as a victory for marginalized and disparate sexual communities and minority groups in that the harm-based test provides a measure of freedom from state intervention for unruly sexual subjects, and thus a victory for members of queer communities (Craig 2008, 2009; Boyce 2008). In this brief paper we wish to trace the development of this feminist position in the Canadian context by exploring the feminist and post feminist reactions to three leading obscenity and indecency cases (*Butler*, *Little Sisters* and *Labaye*). By examining these analytics we can understand how the current legal scholarship putatively seems to analyze *Labaye*, and we can discuss the justification for alternative analytics.

A Truncated History of the Charter Era Jurisprudence, Feminist Responses and Our Analysis

The test for obscene pornography established in *R. v. Butler* by the Supreme Court in 1992 was the first constitutional

challenge to the obscenity provision of the Criminal Code. The obscenity provision was upheld by the *Butler* Court on the grounds that 'obscene' pornography is harmful to society and therefore its criminalization is justified to protect society from various sorts of harms, including harm to men's and women's constitutional right to equality (Johnson 1995). The *Butler* Court continued to rely upon a community standards test for tolerance of undue exploitation in keeping with the case law since the 1950s when the current obscenity provision was passed. That provision criminalizes any sexually explicit materials (pornography) as obscene where "a dominant characteristic of the matter or thing is the undue exploitation of sex, violence, crime, horror, cruelty or the undue degradation of the human person." Therefore the criminal law connects obscenity with the 'undue' exploitation or the undue degradation of the human person and aims to prevent these harms on the grounds that they undermine society's proper functioning.

The feminist intervener LEAF argued for the retention of the obscenity provision on constitutional grounds (and in favour of state censorship of obscenity) in its factum to the Supreme Court. They relied on a broad array of anti-pornography feminist works. Anti-pornography feminists framed their arguments in much of the same language as moral conservatives in respect of pornographic expression; in particular, they relied on the deleterious effects of pornography and its effects on women in society as a means of prohibiting sexually explicit expression. For pro-censorship feminists, violent, degrading and dehumanizing sexually explicit materials harms women, as well as the targeted (male) audience, having a negative influence (which moral conservatives consider a corrupting influence) on society at large. Much like a conservative philosophy, this view of sexually explicit expression derives from a basic fear of the current world order (Kekes 1998). In broad terms, these feminists view the world as fraught with the potential to discriminate against women. Thus sexually explicit expression represents several threats. Sexually explicit expression is threatening because it threatens to undermine gravely the strides that feminists have made towards equality by rehash-

ing misogynistic sexual roles, and thereby discrediting certain 'radical' feminist work in respect of achieving true equality of the sexes. The threat is also narrow towards those participating in the production of sexually explicit expression. The harms to women, include "dehumanization, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment... [the harm] diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women's equal access to protected rights." (LEAF 1991a, *Factum of the Intervenor, Women's Legal, Education and Action Fund, Butler v. R.* [1992] 1 S.C.R. 452 at 7.) For such feminists, sexually explicit expression may not be merely a mirror of the unequal treatment that society fosters between men and women, it may well be one of the root causes of inequality. Therefore, these feminists seek equality for womankind, on the one hand and censoring threat to that equality on the other hand; in the case of sexually explicit expression such views may connote complete silencing of pornographic expression rather than dialogue (Dworkin 1998; Mahoney 1991; MacKinnon 1987; Michelman 1982; Moon 2000).

The notion of using law to promote equality is one accepted feminist legal strategy. However, the Canadian feminist debate in respect of objectionable sexual expression has more recently been informed by anti-censorship, pro-sexual freedom feminist voices. While pro-censorship feminists tend to focus on the direct harm to women as a result of pornography, anti-censorship feminists point out that criminalization has historically targeted sexual minorities. Because the history of obscenity prosecutions has entrenched a heterosexual hegemony of sorts, anti-censorship feminists argue that censorship ought to be carefully considered and debated, in part because the dialogue about queer pornographies marketed towards sexual minorities in all its explicit variants (including violence) can be justified in a liberal democracy committed to freedom and equality. Like liberals who advocate more speech, rather than less speech on the grounds that 'bad' ideas flourish under the cover of censorship, anti-censorship feminists tend to emphasize the

debatable, political, and identity-affirming aspects of sexual freedom on the grounds that sexually explicit expression (or speech) can be said to serve one of the accepted justifications in Canadian constitutional law for freedom of expression (a powerful articulation of the idea is espoused by Cossman *et al.*, 1997).

Undoubtedly, the notion of equality that most feminist commentators advocate is at least apprised of the notion that women are a diverse group (See Cossman *et al.* 1997, Busby 2006, Johnson 1995). Therefore, how best to achieve equality for a diverse population has been the subject of considerable debate, particularly as this question relates to the regulation of pornography. The decision of whether to allow or censor obscene expression or indecent behaviour, was a hotly contested political issue in the early 1990s at the time when the obscenity law was being challenged on constitutional grounds in *Butler*. This debate was both academic and political because it focused on the feminist engagement with the state, and because the stakes were very high for sexual minorities who had historically been the target of police harassment. At the crux of the debate was the value of promoting equality more broadly for women as a homogeneous group whilst at the same promoting sexual freedom for queer minorities. Because queer minorities had historically been subject to criminal prosecution by the state there was considerable concern on the part of that community about relying on liberal law to achieve sexual freedom in the name of social justice. Nevertheless, anti-censorship feminists who sought to promote the value of sexual freedom framed their political objectives in the language of liberalism (the intervention of LEAF in *Little Sisters* serves as powerful example of this strategy, as does the work of Cossman *et al.* 1997). This was an argument that reached its apex in the context of the *Little Sisters* case (2001) (where LEAF reframed its feminist argument as anti-censorship) where the Court upheld the legitimacy of Customs regulations (save for reverse onus provisions) which applied the *Butler* test of tolerance in the context of the importation of sexually explicit expression (though the Court did find that Customs officials behaved in

a manner that infringed the equality rights of the queer book store) (Busby 2001).

In arguing against the community standards of tolerance test as a means of determining queer expression to be obscene, commentators like Cossman, Bell, Ross and Gotell (1997) argued that freedom of speech furthers a number of valuable feminist objectives but also liberal philosophical objectives: truth seeking through open debate (free speech), participation in social and political decision-making, and individual self-fulfilment and human flourishing (see Irwin Toy, 1989). Seating their arguments within these philosophical justifications allowed such feminists to use traditional constitutional terms as vehicles for expressing a poststructuralist feminist argument. Importantly, censoring sexually explicit materials as a means of promoting women's equality came into direct conflict with the value of sexual freedom including the freedom to consume all sorts of pornography. This tension between feminist scholars has been termed by some to be a Canadian "sex war" – where a division was evident between those who "framed sexuality primarily as a site of danger and oppression for women and those who saw sexuality more ambivalently, as also a site of pleasure and liberation" (Cossman 2004: 851; Jochelson 2009: 742).

By expressing their arguments in the language of law and in terms of a certain community's actualization, such anti-censorship feminists were able to address the practical and political concerns of anti-pornography feminists, using much of the same philosophical justifications and linguistic terms that civil libertarians utilize in answering the concerns of conservatives. Such an inclination may have had the result of diluting the equality-based concerns of anti-censorship feminists, since the libertarian language allows courts to focus on the libertarian dimensions of the argument rather than directly focusing on the equality-based concerns.

In the wake of the *Labaye* decision, Cossman's (1997) analysis, which claimed that moralism continued in a modern disguise in the obscenity provisions of the *Code* (as interpreted

by the *Butler* Court), accurately describes how we view the jurisprudence of obscenity and indecency. Cossman's (1997) analysis of the *Butler* Court's conservative sexual morality has been deepened and extended by the *Labaye* Court. We agree with Cossman (1997: 144) that "[s]ex laws that seek to impose a conservative sexual morality, in which sex is bad – such as obscenity and the criminalization of prostitution – should be abolished" and that we can be attuned to the unique way(s) in which law appropriates feminist legal discourse and put it to use with negative unintended consequences for diverse sexual communities.

More recently, some feminist scholars have attempted to reclaim this multiplicity and seat it in a new foundationalism. Craig has written that the *Labaye* harm test is rooted in a political morality apprised of equality rather than sexual moralism (Craig 2009: 363). While apprised of a positive morality, she nonetheless argues that the positivism is informed by group toleration and iconoclasm (372). For Craig, the majority decision:

...sets a standard of tolerance for the community; a standard which our constitution dictates is necessary to avoid being tainted by membership in an intolerant society. [This]... demands a standard of tolerance from the community that is in the common good or interest of each of us to pursue, and that is incumbent upon any state dedicated to acting in the interests of the community to maintain (375).

Further, Craig contends that the Court's majority construction of the harm test represents iconoclasm in action. She advocates for this iconoclastic analytic by arguing that:

An iconoclastic approach to the legal regulation of sexuality, unlike a queer approach, acknowledges the inevitability of judgment; it recognizes the social fact that an icon, once shattered, will undoubtedly and expediently be replaced by a new icon. For this reason, an iconoclastic approach is better able to account for, contest, and at times work within the liberal political context in which

the legal regulation of sexuality operates in Canada's constitutional democracy (377)

Craig ultimately concludes that the *Labaye* decision makes way for the potentiality of a pleasure principle (Week, 2003; Valdes 1995). Since the *Labaye* majority allows that "[s]exual activity is a positive source of human expression, fulfillment and pleasure." (*Labaye* 2005: para 48), Craig argues that there is now "a legal recognition of sexual desire in cases involving the exchange of money for sexual contact where sexual desire is presumably not experienced by both or all of the sexual participants" (Craig 2009: 382). Craig dismisses the pragmatism of the anti-censorship feminists and post-feminist accounts of obscenity in the Canadian contexts by arguing that such accounts have not served the foundational imperative of a positive jurisprudence (Litowitz, 1997) – she argues that the failure of these approaches is a result of their nihilistic, pessimistic, abjectly relativistic, and amoral premises (Craig 2009: 377). Craig argues that the iconoclastic approach allows for standards of excellence of sex to be set and for the inevitability of judgment to be claimed and worked in the service of setting new value systems in place (377). Craig willingly admits that the iconoclastic approach is set within a new and progressive liberal state apparatus, and relies on the works of Raz to buttress her claims (375-377; Raz 1993). In short, she provides a legal format by which feminist activists can place their concerns in order to achieve the ends they may seek.

However, this reclaimed iconoclasm may misinterpret the value of post-feminist analytics. The anti-censorship feminist debate in Canada was never a foundational as it sought a certain result from the Court. For instance, in the case of *Little Sisters* certain interveners sought a decision that would hold that the community standards of tolerance test was a violation of the equality interests of queer communities. Indeed, those equality seekers as part of their legal strategy attempted to employ the same pleasure principle for which Craig advocates.

In the context of the *Little Sisters* case, according to LEAF, the equality rights of heterosexual women are actually

enhanced by the dissemination of lesbian materials because such materials may challenge “sexism, compulsory heterosexuality and the dominant, heterosexist sexual representations which often portray “normal” heterosexuality as men dominating women and women enjoying pain and degradation” (LEAF’s Factum, *Little Sisters*, 2000: paragraph 24). LEAF argued that certain principals of equality ought to be incorporated into obscenity law since “obscenity law is constitutionally valid only if it is anchored in a fully developed equality analysis which acknowledges both the liberatory and oppressive possibilities of sexual materials for and about adults” (paragraph 25). LEAF contended that a more constitutionally sensitive application of *Butler* was now required. Mere assumptions about harm and merit without an evidentiary foundation, therefore, are insufficient to justify a violation of *Charter* rights; rather the materials must be shown to increase propensity for violence etc (paragraphs 27, 29). A harm based approach must, according to LEAF, consider:

...the sex, race, age, disability, and sexual orientation of the participants, characters, and the creators; the purposes of the materials; the intended audience; real or apparent violence; consent and dialogue; the nature of the publication, including the relationship of the impugned materials to the entirety of the publication; the framework and manner of production, distribution and consumption, and the benefits to viewers/readers from the production and dissemination of the materials (paragraph 30)

Hence the iconoclasm that Craig argues is novel has always been the legal strategy of certain post-feminist (primarily queer) interest groups who have claimed the language of liberalism to seek normative gains. Just as importantly, such accounts were informed by the pleasure principle although they attempted to provide meaning for “harm” in the context of obscenity.

Regardless of whether one is arguing for the post-feminism of LEAF’s factum in *Little Sisters* (and arguably the works

of Cossman *et al.*, 1997) or the iconoclasm of Craig, both are focused on disposition. The former sees *Labaye* as laudable because the disposition allows for acceptance of unruly sexualities while the latter sees the case as laudable because it embraces political morality, equality and opens the door for desire based legal norms. The approaches, in either case, are rooted in the foundationalism of activism – seeking “normatively desirable” social change. Thus regardless of whether we speak of the anti-pornography strategy of LEAF in *Butler*, its anti-censorship strategy in *Little Sisters*, or Craig’s iconoclasm post-*Labaye*, feminist rationalities for governing sexuality see a role for the state to play in preventing or mitigating against various different conceptions or degrees of social harm in the context of a particular interest group. Neither strategy seeks to understand the analytics of regulation as something that can be described or critiqued as a norm of the social; rather, these feminisms seek to harness the power of law as a norm of the rule, to seek certain political ends.

We suggest a reorientation of the critical analysis of the obscenity and indecency debate. We argue that one approach might be to locate the examination in the broader ‘governmentality’ literature which builds upon the work of Foucault (1980, 1991, 1997) who developed the concept of ‘governmentality,’ or ‘governmental rationalities’ as a way of understanding and critiquing successive forms of government or power relations. According to Rose, O’Malley and Valverde (2006:2) for Foucault ‘governmentality’ is in a “broad sense about the techniques and procedures for directing human behaviour. Government of children, government of souls and consciences, government of household, of a state, or of oneself” (citing Foucault 1997: 82).

According to Lemke (2000: 13; 2004), the strength in this approach “consists in the fact that it construes neo-liberalism... above all as a political project that endeavors to create a social reality that it suggests already exists.” When we use the governmentality framework to understand neoliberalism as a political project (or projects) it is possible to take account of the different ways in which the courts render their knowledge of society

as “real” and to take into account the possible consequences of these “truths” (Lemke 2000: 14). By examining the “truth effects” that are produced when the Court justifies state power to protect society from the dangers of obscenity or indecency we are able to bring into sharper focus the constituting forces and relationships of power amongst and between subjects of the state. The issue we confront with respect to the legal rationalities underpinning criminalization of pornography and bawdy houses strikes at the centre of what Dean (1999) characterizes as the central responsibility of the state in a liberal regime. The “... state’s responsibility is to protect this freedom, by refraining from intervention in the spheres of social life considered ‘private,’ such as the family and the market, without good reason” (Harris 2006: 1562 citing Dean 1999).

Concluding Thoughts and Future Projects

In our forthcoming works then, we see a descriptive analytic rooted in governmentality as a foundational from an activist perspective. The embrace of political morality and unruly sexuality by government may be desirable, deleterious or benign. To the extent we endorse foundations, our sole foundation is understanding the nature of techniques of governmentality such as harm and risk. The feminist and queer discourses preceding us, in the context of obscenity and indecency law, have been interested in disposition and effect on disparate communities. They have sought destabilization, but they have also advocated for political change. The change advocated has on occasion resulted in controversial results within feminist and queer communities (one need only read the ensuing scholarship after *Butler* and *Little Sisters* to confirm this conclusion).

We too are interested in disposition but also wish to examine discourse and to study in depth what each line of decision making might reveal about the rationales behind governmental techniques. This method may reveal the tools and the objectives behind the legal means through which we regulate our sexuality. As Dean argues, we wish to undertake a form of criticism which “seeks to make explicit the thought that,

while often taking a material form, is largely tacit in the way in which we govern and are governed and in the language, practices and techniques by which we do so” (Dean 1999: 36). We may thus uncover deviations or similarities with past legal practice. Hence we are less interested in the explosion of hidden meanings than describing those meanings. Based on our findings, we will be happy to leave those with activist foundations to achieve whatever goals they wish. When they are done we would be pleased to then problematize their analytic and start the process afresh.

In our forthcoming works, then, we will examine the *Labaye* decision, placing it in its jurisprudential history. We will unpack the rationales that inform the judicial decisions to understand the rules of the social that the Court creates. We will place these rules in their iterative place, understanding that common law is a dialogic project that both makes law, but more importantly creates meaning and influences societal ordering. The analysis will help inform us about the way the way justices of the Supreme Court conceive a ‘properly functioning society’ and the place of sexually explicit materials in that society. The analysis will also reveal the way sexual subjects have governed themselves in response to the judicial prose. This article serves as notice of this new project of judicial analytics. We imagine the project as a practice of justice.

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