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Volume 28, no. 2

# Content

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# Take It Like a Man:
## *The Marriage Commissioners Reference, Masculinity, and Law's Private/Public Parts*

Connor Steele, *University of Ottawa*

***Abstract***

As a way of critiquing Neo-Kantian views of an asexual and nonreligious public sphere, this paper will engage the queer theory of Eric O Clarke and Lee Edelman to expose the underlying Kantian and heteronormative jurisprudential pedagogy that informs the Canadian judiciary's disquisitions on liberal virtues and duties. This paper provides a content analysis on the three cases regarding Orville Nichols and M.J. The three cases, which culminated in a constitutional reference to the Supreme Court of Saskatchewan, concern Mr. Nichols' right to refuse his duty to perform a same-sex civil marriage based on his sincerely held conviction that same-sex sexual conduct is prohibited by the scriptures of his Baptist faith and, on this ground, immoral. In all three decisions, Mr. Nichols was denied his rights claim and exhorted to set his sentiments aside, such that he can behave in a manner befitting a public official.

Keywords: Same-sex-marriage, Freedom-of-religion, Heterosexism, Law, Masculinity.

*[I]t is better to marry than to be aflame with passion*. 1 Cor. 7. 9 NRSV

Humiliation is a strong disciplinary practice in liberal governance. Its affective power undermines the liberal value of autonomy, even as it is used to reinforce it. Perhaps one of the greatest ironies of the same sex marriage debate within Canadian legal discourse is how this debate often stiffens the boundary between a masculine, de-eroticized, secular and public sphere, and a feminine, sexual, religious and private one. [1] Critics of same-sex marriage are often correct when they contend, whether explicitly or implicitly, that it challenges the hierarchical and gendered relationships that frequently structure everyday life.

The ongoing issue of same-sex marriage proves the dictum that 'where there is power, there is also constraint.' For in order to defend queer[2] citizens against religious attack, the judiciary often employs the same oppressive techniques responsible for this attack in the first place. By employing the concepts of heteronormativity/heterosexism and the law, I do not wish to imply that either is unitary or that the 'real' purpose of law is to enforce gender and erotic conformity.

As a way of critiquing contemporary contractarian liberal views of an asexual and nonreligious public sphere, therefore, this paper will engage the queer theory of Eric O. Clarke[1] and Lee Edelman to expose the underlying Kantian and heteronormative jurisprudential pedagogy that informs the Canadian judiciary's conception of liberal virtues and duties. Kant is useful because of his clear philosophical articulation of a particularly popular strain of liberal common-sense.[3]

To demonstrate how this common-sense knowledge operates I shall perform a content analysis on the three cases regarding Orville Nichols and M.J.[4] The three cases, which culminated in a constitutional reference to the Supreme Court of Saskatchewan, concern Mr. Nichols' right to refuse his duty to perform a same-sex civil marriage based on his sincerely held conviction that same-sex sexual conduct is prohibited by the scriptures of his Baptist faith. In all three decisions, Mr. Nichols was denied his right's claim and exhorted to set his sentiments aside to fulfill his public duty. For the purpose of civil, that is, non-religious marriages, Saskatchewan has implemented a system whereby public officials are appointed as marriage commissioners and couples desirous of that service seek them out. Unlike Ontario or some other provinces, Saskatchewan does not have a single-entry-point system, in which objections to same-sex marriage can, at least theoretically, be accommodated "behind the scenes," so that persons wishing to enter same-sex marriages are not denied service. After deciding to get married M.J. and his future spouse sought out Mr. Nichols, who politely refused the couple, while offering them another service provider. This action meant that his conscientious objection did not interfere with their wedding plans; it merely caused "dignitary harm".

Thus, sacrifice, duty and benevolence to those less fortunate become the primary virtues of the good official. This public official must confine his feelings to the private sphere through cognitive dissonance. An implicit criticism of Mr. Nichols is his lack of civic maturity and intellectual sophistication. Similar to Mr. Nichols, though in different respects, the case portrays the couple denied service as feminized subjects in two senses. First, in order to incorporate them within the modified form of Kantian sexual humanism that is the implicit benchmark for the full legal legitimation of desire[5], the decisions focus on the sentimentality of their domestic life. This invocation of sentiment is used to reinforce their full humanity before and under the law. Second, the irony is that the Court also feminizes the couple by ascribing victimhood to them.

Indeed, this history of dehumanization provides the criterion for recognizing their humanity. Consequently, not only how neo-Kantian notions of the public penetrate both religion and sexuality by appeals to virtue, but how a very masculinist conception of shame is still an implicit means by which judicial speech about the governance of religion and sexuality gains persuasive force. In doing so, my analysis problematizes common sense notions of the secular in three ways. First, if shame is a primary force in Kantian rationality, it undercuts a false divide between reason and affect. Second, the rhetorical force brought to bear on Mr. Nichols highlights that the cognitive dissonance required of 'secular' officials with sincerely held convictions that oppose the aim of the state is anything but an easy disposition to acquire. Third, it queries the extent to which Canada's purportedly secular culture has 'progressive' attitudes towards sexuality and gender.

## *He's a Top: Engendering Liberalism*

There is not a clear divide between reason and affect. The so-called Cartesian split between reason and embodied existence is a myth. It unctions as a model of and the model for heterosexist and patriarchal society, even if it is officially disavowed.[6] Simone de Beauvoir is justly famous for her comment that "one is not born a woman [or man]; one becomes one."[7] This is not to deny possible

biological differences between men and women, but to suggest that such differences only become significant, in order to reinforce power relationships.[8] If gender and sex are functions of power and not biology, masculinity and femininity cannot assuredly be assigned to men and women respectively. It also follows that sexual orientation cannot be fully parsed from heterosexist ideas of gender and power.[9]

Under this logic, to be actually or symbolically penetrated — whether one is 'biologically' male or female — is to assume a feminized role. Law deploys this logic by using metaphors of private citizens being (sexually?) sodomized by its universal and masculine will. Courts can, therefore, construct feminized or masculinized subjects, without explicitly making claims about engendered civic life and embodiment. And if gender/sex is not fixed, the liberal individual is even more historical and contingent.

To quote Ian McKay, "A liberal order is one that encourages and seeks to extend across time and space a belief in the epistemological and ontological primacy of the category 'individual.' It is important to make the analytical distinction between the liberal order as a principle of rule and the often partisan historical forms this principle has taken through 150 years of Canadian history."[10] This presumed [male][11] individual is the exclusive proprietor of himself, and from this self ownership the citizen also has the right/duty to own property, equal treatment before the law and the free exercise of reason/conscience, so long as he keeps his personal inclinations confined to the private sphere.[12]

Conscience and reason, therefore, are 'intellectual possessions' that constitute a binary that aids in the creation of public individuals who can trade their ideas in a philosophical marketplace. Yet this is only made possible by the guarantee that there is a 'domestic space' within the self, housing inviolable convictions whose alteration causes harm to the autonomous citizen. [13] This respect for conscience and other liberties traditionally associated with private conduct are born of a more primordial respect for persons and their right to make choices regarding their own conduct by having a rational will.[14]

The problem of liberal thought, however, is that this respect for persons also entails a concern for the imbalances of power engendered by the proprietary nature of the liberal system. The aspiration to universally accessible public space, made possible by the rational application of law and administered by impartial public officials, is one way of trying to resolve this conflict. Canada's adoption of the *Charter of Rights* strengthened its commitment to a liberal ideology; and, despite notable progress toward increased gender and sexual orientation equality, the court has yet to directly challenge the public-private distinction responsible for much oppression in the first place.[15]

It is now a truism that such erroneous divisions between public and private have maintained heterosexist systems of gender oppression.[16] Now the public citizen, most especially if he is acting on behalf of the state, must not only safeguard collective liberty, he must also act benevolently toward feminized private citizens, furthering the public good of equality. But the unfortunate irony of this development is that the engendering of subjects, owing to a perceived history of victimization, can undermine efforts toward equality by legitimating pre-existing power relationships and making certain constituencies vulnerable wards of the state.[17]

It is for this and many other reasons that Lori G. Beaman opposes the language of accommodation and tolerance: though neutral on its face, it often conceals injustice and systemic institutional coercion.[18] If Richard Moon and Bruce Ryder are correct, this subtle mutation in liberal governance may be gleaned from the Supreme Court's shift from freedom to equality approaches when attempting to govern phenomena often categorized as religious. Because religious identities are considered deeply held and nearly immutable, unjust interference with them constitutes discrimination as invidious as that based on gender or ethnicity. [19] The problem with this equality approach, however, is that the court has, at least officially, made the definition of religion highly subjective.[20]

Beaman argues that the subjective criteria for a test of religious freedom outlined in *Amselem* cannot achieve the goal of minimal interference with religion; for even though the decision attempts to remove the state from the position of arbiter of theology, the assessment of harm and public interests inevitably fosters judicial conservatism that maintains existing power relationships.[21] Thus, certain individuals are afforded greater liberty on the basis of religion if it can be demonstrated that their religious identities/practices are congruent with the imagined public good.[22] Beaman further argues that this common-sense idea of what religion is and, for that matter, who a good public citizen is, must be seen in relation to Canada's ongoing settler-colonialism and moderate Protestant-Catholic hegemony, which affects not only how the court appraises religion, but also how it evaluates gender and sexual expression in civic life.[23]

## *Law and Leather: Humiliation and Universal Morals*

But what may an analytic *ménage* tell us about the intersection between religion, sexual expression, and ideas about the public? Here the work of Paul Saurette is helpful. In *The Kantian Imperative*, Saurette attempts to dissect and critique humiliation and common-sense recognition as normative rhetorical strategies within classical Kantian and neo-Kantian ethics (from which Canadian legal discourse draws much inspiration).[24] He argues that appeals to common sense have the five following assumptions: 1) common-sense is universally shared; 2) but it can be distorted; 3) it is possible to remove these distortions and reveal its self-evident nature; 4) the belief that this recognition justifies common-sense; 5) that it is, therefore, morally binding on all and especially on those wishing to have public trust.[25] Extensive equality and liberty, contradictory though they may be, appear apodictic in much Canadian legal discourse, but this is, in part, owing to the discursive force of humiliation. Saurette says that humiliation, as a primary means of modern control, has three main characteristics — publicity, the correction of someone's pretensions to a position/prerogative he does not possess and the denunciation of him against a common standard of conduct, especially with respect to his official duties. [26]

The publicly accessible and privately apprehended moral law (or, more appropriately, convention), embodied in schedules of rights like the *Charter*, and expressed through their attending jurisprudence, makes demands of citizens; when authors of laws implicitly conceive of them as sources of civic cohesion, failure to comply with both the spirit and the letter of the law places one outside the imagined communities of laws by virtue of shame.[27] An implicit misogyny powers this liberal-Kantian conception of common-sense motivated shame; for failure to exercise public reason in the restraint of passion is to act like a woman, thereby proving one does not belong in the public sphere as a full legal agent. It is true: non-mainline religious/ethnic groups and other historically disenfranchised constituencies have gained greater degrees of publicity, but this has largely been through putting on the garb of public, white, bourgeois, able-bodied, cisgender and heterosexual men, for which the Constitution was designed and which, despite considerable and hard-won gains, the Constitution still serves.[28]

It is in this context that one may best understand the emergence of new Canadian queer legal subjectivities in the fight for and recognition of same-sex civil marriages. By way of an analysis of Kant's ethics, Eric O. Clarke offers an insightful distillation of liberal sexual humanism. In order to argue that human morality is not dependent on nature and on that ground contingent, Kant emphasizes the freedom of the rational will. To prove that human beings cannot have a price, he argues that they have dignity, yet this requires *absolute* obedience to the moral law. Because the rational will is the only thing free in humankind, only a truly moral person can liberate himself from the bondage of nature.[29]

Religion is permissible so long as it leads to civility, and sexual intercourse is permissible if procreative within the context of marriage. Then both partners respect each other's dignity; for although they often treat each other as means and not ends, marriage is a free contract, whereby both partners alienate their rights to the other with the promise of faithfulness. Though Kant condemns non-procreative erotic action (particularly sodomy and masturbation)

as 'self-abuse,' his ethical system can easily be adapted to a kind of generic sexual humanism — one that still privileges monogamy as the best, most socially useful, emotionally fulfilling, or some other analogous term, form of sexuality.[30]

Hence, ideal and privileged relationships are private/sentimental, and do not radically question the initial forms of 18th-century propriety. The good citizen, especially when he is performing the ideology of the liberal state as a public official, is able to control his passion, for the sake of the common good and his own moral development. Public sex and public religion, are therefore troubling because they are particularly strong instances of passion that incline individuals towards private interest and, therewith, to oppose the public good. These common-sense values do much to explain Canada's history of violence towards sexual minorities and the jurisprudential reasons given to legitimate this hostility[31], the continuing restrictions on anal and public sex,[32] the denial of the importance of erotic expression to certain forms of queer culture,[33] disproportionate penalties for HIV nondisclosure,[34] the emergence of the respectable same-sex couple, and the innumerable forms of quotidian and draconian violence visited on queers daily.[35]

As Michael Cobb argues, this seemingly contradictory development should be seen in the light of struggles between queer citizens and their religious opponents. In order to gain recognition, much of the queer rights movement has co-opted the language of martyrdom. They are misunderstood victims of prejudice whose experience of suffering offers sanctity and the recognition of which ought to change our common sense from condemnatory disgust to accepting repentance.[36] Such a strategy is very limited, however. By dint of subtle and not-so-subtle application of shame, both queer and religious subjects cooperate in their own government by surrendering to liberal notions of domesticity. And these tactics of governance obfuscate radical politics for the sake of the mythic image of the child, whose ghostly specter provides emotional potency and rhetorical appeal, even if it is not explicitly invoked. Lee Edelman labels this strategy "reproductive futurism," whereby conflicts in the present are

perpetually deferred for the sake of the maintenance of an imagined organic domestic order that nourishes the public body.

In reproductive futurism, argues Edelman, the only way queer subjects can gain a shadow of recognition is by erroneously repudiating their association with the death drive (non-reproductive erotic experience) and to devise strategies to incorporate themselves into the proprietary economy of contemporary civic and domestic reproduction.[37] I think we can use Edelman's analysis as a telescope to examine how metaphors of reproduction work to propagate law and religion as well. 'Private' citizens have feminized bodies that must bear and reproduce the laws begotten in the minds of masculinized legislatures, who purport to represent citizens' best interests, having accepted the prescriptions of reproductive publicity. Likewise, phenomena constructed as religious are permitted considerable freedoms, so long as they remain in the imagined feminine realm created by Kantian/Calvinist notions of decorum and common sense. The public official, therefore, is an interesting mediating term in this dialectic because his proper performance of duty ought to harmonize the two spheres. It remains to be seen, however, whether or not this dialectic can actually achieve synthesis.

## *Anything but(t) Promiscuity: Gay Domesticity*

With this theoretical framework in mind, one can better appreciate the complexities of the series of cases. Let us first turn to the presentation of the gay male couple in question, both by the two men themselves and by the courts. M.J. and B.R. are constructed as model Canadian citizens. Though B.R. had never married, this is M.J.'s second marriage because it took until midlife for him to come to terms with his sexual orientation, on account of being raised Catholic.[38] He and the court go on to suggest that coming to terms with his sexual orientation was very difficult, and that being married was important in overcoming this trauma.[39] Getting married, and having this union condoned by public officials, therefore, is important steps in the process of personal healing.

Indeed, the couple is depicted as heterosexual in all but name. We are treated to a touching description of B.R.'s romantic proposal to M.J., which we are told made the fellow patrons of the restaurant cheer; we are told the charming story of how the couple chose the auspicious day of May 5, 2005 for their wedding, since they have always had trouble remembering anniversaries.[40] There is a subtle suggestion of traditional gender roles. M.J. receives the proposal, plans the wedding (while his spouse works at his business), is more deeply affected by the actions of Mr. Nichols, and is generally the more feminized and irrational partner[41]. Moreover, despite considerable evidence to the contrary, M.J argues that he is "not a gay activist" and "has not even been to gay pride," as though these two things would call into question his claims to equality before the law. He simply wants to be treated as a human being. He, therefore, separates sexual orientation from an ontologically prior humanity and his identity as a citizen.[42]

Knowingly or not, this is a successful strategy. By arguing for gay marriage on the grounds of universal equality between human beings with simultaneous appeals to images of common sense, sentimental, asexual and heteronormative narratives of romance, the court attempts to render same-sex marriage innocent. This discourse, in turn, shames anyone who repudiates this institution; for they do not have the proper emotional response. Were they able to exercise their reason with full humanity, they would realize how queer citizens, at least within heteronormative limits, can be a shining rainbow tile in the Canadian mosaic and a source of national pride for everyone.[43]

Consequently, this vignette demonstrates the fusion of reason and affect in judicial rhetoric quite well. The power of the decision rests not so much on *Charter* issues as it does on the innocence of the couple and their desire for healing. Owing to these facts, the courts criticize religious opposition to same-sex marriage for illuminating an implicit politics of disgust,[44] The courts question the motivation of Mr. Nichols and his supporters by pointing out that he himself had been divorced, and that he also did not make any other non-legal distinction with respect to persons for whom he would perform a marriage other than the gender of the spouse.

This is because "God hates homosexuals," according to Mr. Nichols. Realizing that this kind of blatant and categorical animus will not help his case, however; Nichols later invokes the status-conduct distinction to preserve his respectability,[45] (that is, love the sinner, hate the sin approach). Yet it is quite unclear, to the purportedly rational court, why he, acting as a public official, would choose this religious criterion among innumerable others if he were not motivated by specific feelings of antipathy. And it is especially troubling to the court that Mr. Nichols, as well as other marriage commissioners desirous of the same exception, cannot bracket their private sentiments for the sake of neutrality. Such actions are necessary to reverse the history of queer discrimination;[46] for all citizens, most especially those who have been historic victims of discrimination, must be equal before the law.

Justice Richards makes an analogy between discrimination based on 'race' and discrimination based on sexual orientation to underscore this point. To be denied service from a public official based on an irrelevant characteristic is deeply damaging to one's self-worth because these actions send the message that one is not entitled to equal respect and concern. Such stereotypes trap citizens in distorted identities and do not accord them the full recognition owed to human persons.[47] Though Richards gives lip service to Nichols' sincerely held religious belief that he cannot participate in an action that he considers to be immoral, the former appears to be at a loss to understand the latter's behavior. Though I am leery of making false inferences, from the general tenor of his judgement, Justice Richards seems to be anxious about the possible heterosexist oppression that devout Christians may cause in public office because they have allegiance to God prior to state authority. From the general tenor of his judgement, Justice Richards seems to fear that

He further suggests that such treatment would not only offend queer citizens, but also all those who love them and, by implication, all decent members of society. This discrimination would, in turn, have larger socially deleterious consequences. It sends a message that public neutrality may be undermined by prejudice and that strong, masculine and public actors can exploit feminine, weak

and private ones through an unjust abuse of power.[48] Consequently, to allow this contravention of statute law — even if it is for *bona fide* religious reasons — would constitute "a retrograde step". In the phrase 'retrograde step', one again can hear the faint echoes of gendered enlightenment discourse. Man progressively moves from the state of self incurred immaturity to Reason.[49] And 'the living tree' metaphor that governs constitutional jurisprudence is the primary structuring myth which reinforces this enlightenment teleology.[50] The irony of some of the feminist arguments that made same-sex marriage possible, therefore, is that they still often rely on notions of equality that construct religious belief as dangerous precisely because the passion it engenders is said to position one closer to womanly sentimentality, or worse, hysteria .[51]

Richards tries to bring a contested problem into the realm of common-sense by dint of invoking indubitable ethical benchmarks. In so doing, he circumscribes religious opposition by means of a masculinist discourse that simultaneously appeals to shame and benevolence to preserve the idea that law is apodictic, and not a historically contingent cultural system.[52] Indeed, the very position of marriage commissioner was created so that citizens wishing to avail themselves of the public legal benefits of having their private conduct recognized by the state, but not desirous of accomplishing this through a religious institution, could have their conjugal relationships solemnized.

To deny the citizens this opportunity based on religion is to expressly contravene the intention of the act, which is to create a secular marriage option.[53] Consequently, it is necessary to circumscribe Mr. Nichols' freedom of religion such that the fundamental rights and freedoms of others are protected. The duty of accommodation does not rest with the claimants, and the burden on the state is too great, owing to uncertainty as to how many commissioners would opt out of performing same-sex or other objectionable unions and questions of equal access based on geography.[54] In order to implement the ideal of equality, therefore, state actors must practice the virtues of kindness, justice, and forbearance and they must yield to the general will as embodied by the Constitution.

## *Don't be Anal: Masculine Judicial Pedagogy*

In so doing, at least for this short time, marriage commissioners must exhibit the traditionally imagined masculine virtues of forbearance and magnanimity to their fellow citizens. And the citizens are, in turn, figured as feminine, particularly within the context of private sexuality and domestic relationships, because they are perpetually at risk of state violence. Justice Smith, in a concurring but more forceful opinion, takes this line of reasoning even further, suggesting that to grant an exemption to performing same-sex marriage within the civil context based on religious grounds is ludicrous; for the majority of prejudice towards queer persons is born of religious opprobrium.[55] He therefore employs the "public religion may lead or has led to systemic injustice" trope in the common-sense stock of legal narratives so as to shame religion into the closet in a manner similar to the ways in which the "public sex may lead or has led to moral decay" trope is employed by some in the legal system, in order to define intimacy in light of bourgeois proprietary standards with a twenty-first century facelift.[56]

Yet as with rants against sodomy and bath houses, questions of harm are ambiguous. Though suffering the indignity of being denied service based on a personal characteristic, Mr. Nichols was in no way unpleasant, found the couple a service provider within the same area, and because of this, the couple was able to have the wedding on the desired day. Affronts to dignity notwithstanding, nothing bad came of Mr. Nichols' actions. Moreover, he assisted the couple in acquiring what they desired. Hence, to fine Mr. Nichols $2500 when he is a pensioner with decades of exemplary public service merely because M.J. took his actions extremely personally appears disproportionately punitive.[57] Similar to the continuing restriction and/or redefinition of queer subjectivities, however, it is impossible to understand legal decisions free from their pedagogical function or, in this particular instance, the co-imbrication of constitutional frameworks with heterosexist systems of power.

To review the criteria that Saurette outlines for political humiliation in the neo-Kantian model, Mr. Nichols is denounced publicly, disabused of his pretensions to radical subjectivism, and presented as callous

against the common moral standard of public benevolence in the execution of official duty.[58] This requires him to practice forbearance, prudence, and respect such that he refrains from inserting his own views. Though he has a conscience, as a public official, he must keep it to himself and leave his religion in the domestic sphere where it belongs.[59]

Strictly speaking, when he enters this public space, he is not entirely himself; his freedom must give way to the will of the state, if he desires recognition and privileges.[60] Indeed, the marriage commissioner's case states this point even stronger, saying that public officials act *only* on the state's behalf and *no one* else's. So forceful is this proclamation that one is tempted to add the subordinate clause: "not even God's."[61] Mr. Nichols had the option to only solemnize religious marriages. Instead, he chose to be a public official. As such, he has no right to complain now.[62] He ought to, therefore, 'suck it up and take the changes in law like a man;' for to do less is dishonorable. Owing to his feminine dishonor, he is unworthy of the illustrious tradition of (imagined masculine) public officeholders, who apparently — against the historical record — always uphold the ever elusive 'rule of law.'[63] His actions are made all the more egregious because, prior to these cases, he was refused a requested exemption several times. Despite being told no, he petulantly defies the state, like a bad boy who needs a spanking. These cases, and same-sex marriage discourse more broadly, therefore, illuminate many simultaneous and often contradictory modes of state paternalism. In this pedagogical schema, the courts suggest, such emotional display benefits integrated, sentimental, and domestic homosexuals, not heterosexual, male, and religious public officials, who have the duty to embody the philosopher's stone of heteropatriarchal liberalism — an objective perspective.

## *Power Bottom: Against Legal Sodomy Metaphors*

Though the goal of equality is of paramount importance to a democratic society, this implicitly shaming and gendered rhetoric is unjustified and unhelpful. Though Mr. Nichols may have erroneously applied law, section 2(a) of the *Charter* protects freedom of religion,

and the very same section that prohibits discrimination on the basis of sexual orientation also prohibits discrimination on the basis of religion. Many scholars of religion, notable among whom is Robert Orsi, see the distinction between public conduct and private belief as ideological and emerging from a specific historical period of Protestant state reorganization, rather than actually describing religion's functions in everyday life.[64] Seen in this light, therefore, the distinction between public and private, especially as this pertains to religion and erotic and romantic behavior, is proscriptive rather than descriptive. In order to enforce this divide, shame and humiliation are brought to bear on public officials and private queer citizens who do not conform to the newly revamped heteronormative ideal of the sexually and religiously restrained, virtuous, and masculine citizen. While this may be an effective strategy in the short-term, I question both its long-term utility and intrinsic justice.

## *Notes*

1 Eric O. Clarke, *Virtuous Vice: Homoeroticism and the Public Sphere*, Series Q. (Durham, N.C.: Duke University Press, 2000) 2.

2 I have chosen to use queer as a term which marks certain subjectivities as deviating from a normative conception of sexuality and/or gender. I find the term LGBTQI+ reifies the kind of cultural politics that I am trying to avoid. Likewise, I have chosen not to capitalize queer. It does not mark a fixed identity but rather is a generic term for the signification of difference. David M Halperin, *St. Foucault: Towards a Gay Hagiography* (Toronto: Oxford University Press, 1995) 121.

3 Antonio Gramsci, *Selections from the Prison Notebooks,* trans. & eds. Quentin Hoare and Geoffrey Nowell Smith (London: Electronic Books, 1999) at 508-518, 603-615. For a discussion of rationalism in the Canadian judiciary see Mark Witten, "Rationalist Influences in the Adjudication of Religious Freedoms in Canada," 32 *Windsor Rev. Legal & Soc. Issues 91*, No. 1 (2012): 91-122. For a Kantian interpretation of Canadian legal theory in general see Luc Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal: McGill-Queens University Press, 1997) at 186. T.R.S. Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (Oxford: Oxford University Press, 2001). David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

4 *MJ v Nichols,* 2008 SK HRT 90182, [2008] 63 CHRR 145 (CanLII) [*HRT Decision*]; *Nichols v MJ,* 2009 SKQB 29, [2009] 10 WWR 513; 71 RFL (6th) 1149, (CanLII) [*Queens Bench*]; *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011 SKCA 3, [2011] 327 DLR (4th) 669; 366 Sask. R 48 (CanLII) [*Marriage Commissioners*].

5 Korey Schaff, "Kant, Political Liberalism, and the Ethics of Same-Sex Relations." *Journal of Social Philosophy* 32, no. 3 (2001): 446-462.; Matthew C Altman. "Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate." *Kant-Studien* 101, no. 3 (2010): 309-330.

6 William E Connolly, *Why I Am Not a Secularist* (Minneapolis: University of Minnesota press, 1999) at 175; Talal Asad, *Formations of the Secular*, Cultural Memory in the Present (Stanford: Calif.: California University press, 2003) 184.

7 Simone de Beauvior, *The Second Sex,* trans. H. M. Parshley (New York: Vintage Books, 1989) at 301; Thus, following Eve Sedgwick, I see feminist/queer theory as an intrinsically philosophic and critical practice whose task it is to resist the regulatory power of binaries. Moreover, I contend that an understanding of "[v]irtually any aspect of modern culture is incomplete without understanding the crisis of homo/hetero definition…" in which sexual and gender variations are understood as problems facing particular constituencies as well as a universal problematic of subjectivity. Eve Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990) 10-5.

8 Judith Butler, *Bodies That* Matter*: On the Discursive Limits of Sex* (New York: Routledge, 2011) 115-135.

9 Leo Bersani, *Is the Rectum a Grave? And Other Essays* (Chicago: Chicago University Press, 2010) 18.

10 Ian McKay, "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History" (2000) Canadian Historical Review 81 617: 623.

11 This is why I have chosen to use the masculine pronoun throughout this essay, not because I have an intrinsic preference for one pronoun or believe that women do not count politically. Rather, I wish to call attention to the ongoing implicit sexism that characterizes Canadian legal discourse even now. I realize that I run the risk of reifying the process I merely purport to describe, but I think this is defensible, nonetheless.; Carol Smart, *Feminism and the Power of Law*, Sociology of Law and Crime (London: Routledge, 1989)10–20.

12 C.B. Macpherson*, The Political Theory of Possessive Individualism: Hobbes to Locke* (London: Oxford University Press 1962) 264.

13 Edward C. Andrew, *Conscience and its Critics: Enlightenment reason, Protestant Conscience in the Making of Modern Subjectivity* (Toronto: University of Toronto Press, 2012) 30-50.

14 For example, political theorists such as John Rawls and Ronald Dworkin use Kant's idea of the categorical imperative, especially his idea that one should respect the humanity in persons as an end in itself and never merely as a means in order to provide a baseline from which they construct their political theories. Ronald M Dworkin, *Taking Rights Seriously* (Cambridge: Mass.: Harvard University Press, 1978) at 180; John Rawls, *A Theory of Justice* (Cambridge [Massachusetts]: Harvard University Press, 1971) 54; John Rawls, *Political Liberalism* (Cambridge [Massachusetts]: Harvard University Press1987), 421-48; Immanuel Kant, Groundwork for the Metaphysics of Morals, Trans. Allen W. Wood. (New Haven and London: Yale University Press, 2002). 35 [Ak 4:419].

15 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772; [*BCCT*]; *Chamberlain v Surrey School District No 36*, 2002 SCC 86. [2002] 4 SCR 710; Lori G Beaman, "Between the Public and the Private: Governing Religious Expression" in Lori G Beaman and Solange Lefebvre, eds. *Religion in the Public Sphere: Canadian Case Studies* (Toronto: University of Toronto Press, 2014) 44: 45.

16 Lauren Berlant, and Michael Warner, "Sex in public." *Critical inquiry* 24, no. 2 (1998): 547-566.

17 Lauren Berlant, *The Queen of America Goes to Washington: Essays on Sex and Citizenship*, Series Q (Durham: NC.: Duke University Press, 1997) 10.

18 Lori G. Beaman, "Deep Equality: As an Alternative to Accommodation and Tolerance." (2014) Nordic Journal of Religion and Society 27 89: 96-8.

19 Richard Moon, *Freedom of Conscience and Religion*: Essentials of Canadian Law (Toronto: Irwin Law, 2014) at 23.; Bruce Ryder, "The Canadian

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20 *Syndicate Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

21 Lori G Beaman, " Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard moon, ed. *Law and Religious Pluralism in Canada*, Law and Society (Vancouver: UBC Press, 2008) 192 at 201; idem. *Defining Harm: Religious Freedom and the Limits of the Law*, Law and Society (Vancouver: UBC Press, 2008) 25.

22 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

23 Lori G Beaman, "The Myth of Religious Pluralism, Diversity and Vigour: The Constitutional Privileging of Protestantism in the United States and Canada" (2003) Journal for the Scientific Study of Religion 43 311: 317.

24 See n. 4 and n7

25 Paul Saurette, *The Kantian Imperative: Humiliation, Common Sense, Politics* (Toronto: University of Toronto Press, 2005) 47.

26 Saurette, at 12-14.

27 Saurette, at 10; Benjamin L Berger, "Belonging to Law: Religious Difference, Secularism and the Conditions of Civic Inclusion" (2015) Social and Legal Studies 24 48 at 59; Benedict Anderson., *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), 4.

28 Himani Banerji. *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender.* (Toronto: Canadian Scholars' Press. 2000). Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada.* (Toronto: University of Toronto Press. 2007) 75. For an analysis with how this interacts with queerness, see the essays in the volume Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging, Sexuality Studies Series (Toronto UBC Press, 2015) edited by OmiSoore H. Dryden and Suzanne Lenon.

29 Clarke, 103.

30 Clarke, at 104-6.; Immanuel Kant, *Lectures on Ethics,* trans. Peter Heath, eds. Peter Heath and J.B. Schneewind (Cambridge: UK: Cambridge University Press, 1997) 160 [27:390-2].

31 Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto University of Toronto Press, 2005); Bruce McDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press, 2000):10-24; Gary Kinsman and Patrizia Gentile, *The Canadian War on Queers National Security as Sexual Regulation*, Sexuality Studies (Vancouver: UBC Press, 2010).

32 *Criminal Code*. RSC 1985 c C-46 s 159; Sarah Lamble, "Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid" in Maureen FitzGerald and Scott

Rayter, eds. *Queerly Canadian: An Introductory Reader in Sexuality Studies* (Canadian Scholars Press/Women's Press, 2012) 88:95; *R.v Hornick*, [2002] O.J. No. 1170.

33 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120; Brenda Cosman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) Osgoode Hall Law Journal 40 224:241.

34 R. *v.* Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584; Alison Symington, "Injustice Amplified by HIV Nondisclosure Ruling " (2013) University of Toronto Law Journal 485:492.

35 Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple" in Maureen FitzGerald and Scott Rayter, eds. *Queerly Canadian: An Introductory Reader in Sexuality Studies* (Canadian Scholars Press/Women's Press, 2012) 361:366.

36 Michael Cobb, *God Hates Fags: the Rhetorics of Religious Violence*, Sexual Cultures: New Directions for Lesbian and Gay Studies (New York: New York University Press, 2006): 38.

37 Lee Edelman, *No Future: Queer Theory and the Death Drive*, 2nd ed. (Durham: NC: Duke University Press, 2004): 29.

38 HRT Decision, para 13

39 Ibid., para 27

40 Ib., para 23

41 Ib., para 28 and 109

42 Ib., para 9

43 Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, New Wave: New Directions for Women's Studies (Durham: NC: Duke University Press, 2007) at 39; *Vriend v Alberta*, 1998 SCC [1998] 1 S.C.R. 493.

44 Martha C Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, Inalienable Rights (Toronto: Oxford University Press, 2010): xvi.

45 *HRT Decision* para 52

46 *Queen's Bench* para 67

47 Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed. *Multiculturalism*, (Princeton, New Jersey: Princeton University Press, 1994), 25: 25.

48 *Marriage Commissioners* para 96

49 Immanuel Kant, "An answer to the question: What is enlightenment? (1784)" in Mary J. Gregor trans. and ed. *Immanuel Kant: Practical philosophy*, 1st ed. (Cambridge: Cambridge University Press, 1996): 12.

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51 William Cavanaugh, *The Myth of Religious Violence: secular ideology And*

*the Roots of Modern Conflict* (Toronto: Oxford University press, 2009), esp. 10-25, 230-250. And Timothy Fitzgerald, *Religion in International Relations: The Modern Myth* (New York: Continuum, 2011), esp. 120-135, 210-233.

52 *Marriage Commissioners*, para 41; *Charter* 15.1. Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) Osgoode Hall Law Journal 45. 306: 312; *Canadian Charter of Rights and Freedoms,* Part I of *the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

53 *Marriage Commissioners* para 9.

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55 *Marriage Commissioners* para 132

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57 *HRT Decision* para 109

58 Ib., para 92

59 Ib., para 104

60 *Queen's Bench* para 42

61 *Marriage Commissioners* para 48

62 *Queen's Bench* para 53

63 *Marriage Commissioners* para 98

64 Robert Orsi, *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (Princeton, NJ: Princeton University Press, 2005):112; Brad Gregory, *Salvation at Stake: Christian Martyrdom in Early Modern Europe*. (Cambridge: Mass.: Harvard University Press, 1999):345-52, among innumerable others.

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