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Florence Ashley\*      Genderfucking Non-Disclosure: Sexual Fraud,  
Transgender Bodies, and Messy Identities

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*If I don't tell you that I was assigned male at birth, as a transgender person, can I go to jail for sexual assault by fraud? In some jurisdictions like England or Israel, the answer is: yes. Previous arguments against this criminalisation have focused on the realness of trans people's genders: since trans men are men and trans women are women, it is not misleading for them to present as they do. Highlighting the limitations of this position, which doesn't fully account for the messiness of gendered experiences, the author puts forward an argument against the criminalisation of (trans)gender history non-disclosure rooted in privacy. Gender identity is a private matter and people should not be forced to figure it out or communicate it to others to have an intimate life. Mobilised in this context, privacy can be understood as a refusal of the state's authority to order our gendered lives. The author argues that this mobilisation is compatible with leftist critiques of privacy. Finally, the author considers whether (trans)gender history non-disclosure is a criminal offence in Canada and concludes that it is not.*

*Si je ne dis pas que je fus assignée garçon à la naissance, en tant que personne trans, pourrai-je être envoyée en prison pour agression sexuelle par fraude? Dans certaines juridictions comme l'Angleterre ou Israël, la réponse est : oui. Par le passé, les arguments contre cette criminalisation ont placé l'accent sur le caractère réel du genre des personnes trans : puisque les hommes trans sont des hommes et les femmes trans sont des femmes, ils ne dupent personne en se présentant comme tel. Soulignant les limites de cet argument, qui ne rend pas entièrement compte du caractère désordonné des expériences du genre, l'auteur met de l'avant un argument basé sur la vie privée contre la criminalisation de la non-divulgence de l'historique (trans)genre. L'identité de genre est une question privée et les gens ne devraient pas être obligés de la comprendre ou de la communiquer aux autres pour avoir une vie intime. Mobilisé dans ce contexte, la notion du privé peut se comprendre comme un refus de l'autorité étatique d'ordonner notre vie genrée. L'auteur argue que cette mobilisation du privé est compatible avec les critiques de la vie privée provenant de la gauche. Finalement, l'auteur considère si la non-divulgence de l'historique (trans) genre est une offense criminelle au Canada ou non, et conclut que ce n'est pas le cas.*

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### *Introduction*

My first encounter with (trans)gender fraud law came in the form of an academic exploration. As a transfeminine jurist, I was seeking out academic role-models and stumbled upon the work of trans jurist Alex Sharpe. She has written various articles on the question of (trans)gender fraud. (Trans)gender fraud refers to cases where consent to sexual acts was considered to have been voided by the accused's failure to disclose their gender or the fact that they were transgender. Most cases involve trans men who did not disclose the fact that they were trans, although some involved butch women and non-binary transmasculine individuals. Because consent is held to be void, the accused are subsequently found guilty of sexual assault.

I always disclose the fact that I am trans to my partners, yet the knowledge that such a crime could exist sent a chill down my spine. There's something dehumanising in being told that one's bare existence is harmful to others. In one of the first cases of this kind—the 1991 English case of Jimmy Saunders—the trial judge harshly condemned the failure of the accused to disclose her (trans)gender history: “I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did.”<sup>1</sup> People who shun social dictates of cisheteronormativity are casually depicted as worse than rapists, an affirmation that is egregious to the extreme.

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1. Cited in Alex Sharpe, “Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent” (2014) 3 Criminal L Rev 207 at 222 [perma.cc/W8XE-45N9].

Saunders did not express clear transgender subjectivity. Saunders foregrounded lesbian womanhood as part of her legal defence<sup>2</sup> and, when asked whether she wanted to look “like a boy,” she responded that she merely wanted to look like herself.<sup>3</sup> At the time, however, genderqueer or non-binary identities were just emerging in the English-speaking world, leaving uncertainty as to whether she might have identified as genderqueer or non-binary if she had access to those conceptual resources.<sup>4</sup> Her words are certainly reminiscent of genderqueer subjectivity to contemporary ears but are equally compatible with butch womanhood. Saunders deserves protection whether or not she is transgender, whether or not she puts forward a clear, intelligible gender identity.

More recent cases have tended to feature transmasculine individuals, often in late adolescence or early adulthood. The accused in the 2013 English case *R. v. McNally*<sup>5</sup> identified as a man at the time of the offence but later appeared to identify as a woman, their gender assigned at birth. In Israel, Hen Alkobi, who was charged in 2003 on similar grounds, unambiguously identified as a man and produced clear transgender narratives that were bolstered by in-court testimonies by transgender activists.<sup>6</sup> Alkobi was twenty years old and had access to well-developed trans narratives. Saunders was seventeen and lived at a time when transmasculine identities were still emerging as separate from lesbian—especially butch—identities. McNally was also seventeen, but spoke in terms that indicated far less access to trans and queer narratives.

By speaking in terms of “(trans)gender,” I seek to resist opposing gender fraud on the grounds of the reality of trans gender identities.<sup>7</sup> “(Trans)gender” suspends judgement and refuses to force people into

2. Aeyal Gross, “Gender Outlaws before the Law: The Courts of the Borderland” (2009) 32 *Harv JL & Gender* 165 at 172; see also Anna Marie Smith, “The Regulation of Lesbian Sexuality Through Erasure: The Case of Jennifer Saunders” in Karla Jay (ed.), *Lesbian Erotics* (New York: New York University Press, 1995).

3. Gross, *ibid* at 214.

4. Seminal texts which laid the foundations for the emergence of genderqueer and non-binary subjectivities were published after the *Saunders* decision: Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come* (New York: World View Forum, 1992); Leslie Feinberg, *Stone Butch Blues* (Ann Harbor: Firebrand Books, 1993); Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (New York: Routledge, 1994); Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (New York: Firebrand Books, 1997). Since those texts emerged out of the United States transgender scene, reception in England might have taken a few years longer.

5. *R v McNally*, [2013] EWCA Crim 1051 [perma.cc/Z8A6-UBB6].

6. Gross, *supra* note 2 at 171; *Israel v Alkobi*, [2003] IsrDC 3341(3) (Haifa District Court, Israel).

7. Here, the “trans” is a modifier of “gender identities.” I am speaking of identities which are coded as trans, i.e. gender identities which differ from that corresponding to the person’s gender assigned at birth. I want to avoid the implication of identification with being transgender that is implicit in the alternative expression “transgender identities.”

identifying themselves as transgender or as cisgender-but-gender-non-conforming. (Trans)gender history is an unresolved superposition of transgender history and gender history, speaking equally of transgender lives and cisgender non-conforming lives. Whether trans people are protected from criminalisation should not depend on whether trans men and trans women are really men and women. Saunders and McNally should be no less entitled to protection than Alkobi simply because they cannot put forward a stable and uncomplicated self-understanding as trans men. To hold otherwise would be particularly dangerous for the gender non-conforming, transmasculine youth who have formed the bulk of accusations.<sup>8</sup> Distance from urban centres, and therefore to large LGBT communities and their narratives also featured in many of the charges.<sup>9</sup>

The category of being transgender “has the institutional power to order certain experiences, even as it erases their complexity.”<sup>10</sup> The operative separation of sexual orientation and gender identity, however appealing for many trans people, is a flawed and artificial one that is predicated on the assumption of privileged access to certain narratives. While the two are different, it can be difficult to distinguish whether one’s experience is one of sexual orientation or gender identity. To talk of (trans)gender is to transcend neat social categorisation schemes, refuse to exclude others who cannot provide us with palatable narratives, and delve into the underlying material conditions faced by people who are accused of (trans)gender fraud. Whether it is gender fraud or transgender fraud is immaterial.

Centering the ambiguity of identity and resistance to neat labelling schemes, this paper argues that (trans)gender fraud should be opposed not because transgender men are men, but rather because gender and gender history are a private matter. Unlike the former, privacy does not require people to express a clear identity as man or woman.

Privacy, understood as a refusal of cisnormative expectations of gender disclosure, is more responsive to the material realities of (trans)gender existence. By highlighting the importance for privacy as a ground of protection for those whose gender identities may be less than clear-cut, I call on us to enshrine a genderfuck politics into law. In trans and non-binary communities, genderfuck typically refers to politically-motivated practices of playing with or “fucking with” one’s gender identities and gender presentations in ways that overtly conflicts with mainstream norms

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8. Alex Sharpe, “Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception’: A Flawed Approach” (2016) 80:1 J Crim L 28 at 37-38 [perma.cc/4Y7B-SXHF].

9. Gross, *supra* note 2 at 225.

10. Gross, *ibid* at 216.

of gender. In describing a politics as genderfuck, I seek to describe a political approach that decentres narratives of gender identities as well-defined, clear, and stable. A genderfuck politics “fucks with” gender by rejecting the call to neatly locate ourselves within gender categories.<sup>11</sup> Though people may locate themselves consistently within those categories, they need not.

In the first part of the paper, I analyse previous legal cases from England and Israel which bore on (trans)gender fraud. In the second part, I examine the lived realities of transgender and gender non-conforming people and explore the reasons why they may not wish to disclose their (trans)gender histories. In the third part, I lay out the argument against criminalisation, put forward by Alex Sharpe, which holds that trans men and women’s genders are just as real as cisgender people’s and thus that trans men and women are not deceptive. I highlight how this argument fails to protect a wide range of trans and gender non-conforming people who are vulnerable to criminal charges of (trans)gender fraud. In the fourth part, I propose an alternative argument against (trans)gender fraud laws predicated on the notion of privacy as refusal. Under this argument, privacy as refusal succeeds in protecting this greater range of people targeted by (trans)gender fraud law while avoiding the pitfalls of gender authenticity, which reifies different but nevertheless rigid gender boundaries. In the last and final part, I consider (trans)gender fraud within the context of Canadian law, concluding that no such crime exists.

### I. *The law of (trans)gender fraud*

The 2013 English case *R. v. McNally* involved someone who identified as a trans man at the time of the offence and was accused of sexual assault because fraud vitiated consent. McNally, under the name Scott Hill, had developed a relationship with another teenager through a video game. They eventually met and engaged in consensual sexual acts. The girl’s mother became suspicious of McNally and confronted McNally about having been assigned female at birth. The police were contacted, and McNally was charged with sexual assault.<sup>12</sup>

At trial, the court emphasized the notion of active deception to find McNally guilty of sexual assault. The court characterised McNally’s behaviour as deliberate deceit which laid beyond passive omission. As Alex Sharpe astutely noted, however, the acts characterised as active deception are little more than non-disclosure of gender history against

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11. By choosing the term “genderfuck,” I also seek to “fuck with” academic norms of propriety which might deem such a term inappropriate.

12. *McNally*, *supra* note 5.

a background where gender is assumed to be cisgender.<sup>13</sup> The choice of a male-coded name, reference to having children, talk of “putting it in” and the purchase of condoms were all interpreted through a cisnormative lens that saw the distinction between non-disclosure and active deception vanish.<sup>14</sup> Transmasculine people frequently choose male-coded names either because they are men or feel more comfortable with the connoted masculinity in those names. Trans people in heterosexual relationships can have children by recourse to assisted reproduction. “It” can refer to something other than a penis, and condoms are equally necessary when sex toys are used. Thus, none of those actions communicate cisgender manhood to those aware of trans and queer realities.

Relying on the general consent provision of the 2003 *Sexual Offences Act*, the court convicted McNally of sexual assault.<sup>15</sup> The general consent provision set out that a “person consents if he agrees by choice, and has the freedom and capacity to make that choice.”<sup>16</sup> The choice to rely on the general provision is telling, because the court chose to extend fraud vitiating consent beyond the traditional boundaries set in the same Act two sections later. Under the later, more specific provision, consent is absent due to fraud where there is an intentional deceit as to the nature or purpose of the sexual act, or where a person known to the complainant was impersonated.<sup>17</sup> The court made little of the fact that McNally seemingly identified as a man at the time, and even went so far as to claim that McNally “deceived not only others but also herself,”<sup>18</sup> sending a bleak message to all trans people. Not only is our gender not valid, but we may be sent to jail for other people’s prejudices.

The factual background of the 2003 charges laid on Hen Alkobi in Israel was similar.<sup>19</sup> Alkobi is a trans man who was accused of sexual assault following consensual relationships with three cis women to whom he hadn’t disclosed his transitude.<sup>20</sup> The court ruled on different grounds than the English court in *McNally*, however. Instead of relying on the general definition of consent to invalidate it, the court mobilised the traditional notion of sexual fraud by impersonation—which the *McNally* court mentioned but didn’t apply—finding that Alkobi had impersonated a fictional person named Kobi and, in doing so, committed sexual assault

13. Alex Sharpe, *supra* note 1 at 216-217.

14. *Ibid* at 217-218.

15. Alex Sharpe, *supra* note 8 at 30-31.

16. *Sexual Offences Act 2003* (UK), c 42, s 74.

17. *Sexual Offences Act 2003*, *ibid*, s 76.

18. *McNally*, *supra* note 5 at para 47.

19. Aeyal Gross, *supra* note 2 at 168ff.

20. The state of being trans.

by fraud.<sup>21</sup> In the alternative, the court mentioned that it would have found fraud vitiating consent under a general definition of consent.<sup>22</sup>

I chose to focus on those two cases because they are the most recent and readily available cases of criminalisation of (trans)gender history non-disclosure. By choosing cases from multiple jurisdictions, I hope to highlight how such criminalisation is not exceptional. Instead, it reflects the pervasive transantagonism in a wide range of societies. In this paper I offer a policy argument that is not tied to a specific jurisdiction's jurisprudential approach to sexual fraud.<sup>23</sup>

In both cases, it was unclear whether the accused had disclosed their gender assignment at birth. McNally claimed that the complainant knew or suspected their gender assignment for years prior to sexual intercourse, pointing out a disagreement and fallout that occurred two years before; the court, however, dismissed this claim on the grounds that it is inconsistent with the purchase of condoms.<sup>24</sup> The chronology of events suggests that the complainant might have known that McNally was transmasculine. The complaint arose when her mother found out about McNally's gender assigned at birth. Although the complainant described her sexual orientation as heterosexual before the court, it is likely that her mother was present—a reality that was also found in Saunders' prosecution.<sup>25</sup> The chronology is consistent with the suggestion that the complainant's mother was the one who pressured the laying of charges, and that the complainant only foregrounded non-disclosure out of fear of her mother. Furthermore, dildos usually feel very different from penises in terms of rigidity and heat transmission, making it all the more doubtful that she was unaware.<sup>26</sup>

Although it may seem implausible that someone would be willing to send another person to prison to avoid being unfairly seen as a lesbian, we must not underestimate the widespread and imposing nature of heteronormativity and homophobia in our societies, a danger that, in the case of family exclusion, is compounded by lack of access to LGBT

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21. Aeyal Gross, *supra* note 2 at 176-178.

22. *Ibid.*

23. For a discussion of transantagonism and its roots in cisheterosexual norms, see Florence Ashley, *infra* note 31. (Trans)gender fraud cases have also appeared in other jurisdictions, including notably the U.S.: *State of Colorado v Clark (Sean O'Neill)*, No. 1994CR003290 (Colo Dist Ct, 16 Feb 1996); *State of Washington v Wheatley*, No. 97-1-50056-6 (Wash Superior Ct, 13 May 1997).

24. *McNally*, *supra* note 5 at para 12.

25. According to Anna Marie Smith, *supra* note 2 at 174: "Saunders had had two women partners, and one of them came from a middleclass family. The parents of the latter woman played an active part in Saunders's prosecution. In Saunders's case, they were the real plaintiffs. The rape charge against Saunders was intended to rescue the social value of her middle-class partner, to restore not only her honor but that of her parents as well."

26. Author's personal experience.



community resources outside of large urban centres. Indeed, one of the original complainants in the Alkobi case wrote a letter to the trial judge asserting that she knew Hen Alkobi to be a trans man but had been forced to file a complaint out of fear of being exposed as a lesbian to her family. As this complainant now identifies openly as a lesbian, this too recalls Hen to womanhood.<sup>27</sup> The heightened risk of false accusations due to familial pressure and internalised homophobia, on top of the egregiousness of the charges in the first place, only adds to the harms of criminalising non-disclosure of (trans)gender history.

It is also noteworthy that the non-disclosure may not have been causally efficacious. Both McNally and Alkobi were involved in romantic relationships with the complainants. In *McNally*, there was talk of marriage and children. Feelings of betrayal are often associated with disclosure of gender identity, especially given this strong attachment, though it is unclear whether this amounts to voiding consent and whether the feelings of being morally wronged remain in the long-term, once potentially homophobic and transphobic attitudes are processed.<sup>28</sup> If McNally's factual assertions are correct, the couple eventually resumed dating after the complainant learned of McNally's gender history. The complainant also mentioned that had McNally "told her from the start she wouldn't have judged [them] and things might have been different."<sup>29</sup> Is it true, then, that she only "consented to the sexual acts because she believed she was engaging in them with a boy called Scott"?<sup>30</sup> Although the court assumed that the complainant was deprived of the opportunity to grant informed consent and that she would not have consented had she known, it is unclear whether those assumptions are true. People regularly sleep with trans people, especially when they are emotionally invested in the relationship, and the complainant herself said that if McNally had told her, she might have accepted it. Specific facts cast some doubt over whether the complainant knew McNally was trans, and the court unfortunately failed to adequately develop its analysis beyond its own prejudicial assumptions.

Lastly, the court in both *McNally* and *Alkobi* left open the question of whether (trans)gender fraud charges could succeed if a trans person has undergone genital reassignment surgery. This plays into mainstream conceptions of gender as grounded in genitalia.<sup>31</sup> Historically, courts

27. Aeyal Gross, *supra* note 2 at 170.

28. Florence Ashley, *infra* note 31; Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion" (2007) 22:3 *Hypatia* 43 [perma.cc/V5Z8-CYX9].

29. *McNally*, *supra* note 5 at para 10.

30. *McNally*, *ibid* at para 11.

31. For a discussion of the natural attitude about gender, see Florence Ashley, "Don't Be So Hateful:

have relied on genital-centric criteria—especially the ability to engage in cisheteronormative, pleasurable penis-in-vagina intercourse, as judged from the perspective of the cis, usually male, partner—when called to determine the gender of trans people.<sup>32</sup> Since these criteria are rooted in a desire to tame the very same homophobic anxieties found in (trans) gender fraud law, it may be that trans people who have undergone genital reassignment surgery would be exempt from the duty to disclose their (trans)gender histories. At the same time, the United Kingdom threatens marriages involving trans people with nullity should their (trans)gender histories not have been disclosed, independently of genital aesthetics, leaving us to wonder which of the two approaches would be adopted should sexual fraud proceeding be brought against a trans person who had undergone genital reassignment surgery.<sup>33</sup>

Alex Sharpe, criticising the United Kingdom law requiring disclosure of (trans)gender history prior to marriage, puts her finger on the underlying message of (trans)gender disclosure laws: “[T]his challenge to coherent gender identity serves to bolster the problematic notion that there is something of a yuck factor involved in sexual intercourse with transgender people.”<sup>34</sup> This yuk factor is explicit in the previously mentioned citation by Crabtree J. in the case against Jimmy Saunders: “I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did.”<sup>35</sup>

So egregious are the judge’s words that we can wonder to what extent the harm of (trans)gender fraud is projected by the judge onto the complainants, rather than being responsive to their appraisal of the situation. The complainant in McNally’s case claimed that “if [McNally] had told her from the start she wouldn’t have judged [McNally] and things might have been different.”<sup>36</sup> Yet, those same complainants also

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The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being” (2018) 68:1 UTLJ 1 at 12ff. Faced with trans people’s existence, it may be appealing to reject the invariability of gender in order to reaffirm the idea that gender is grounded in genitalia: this notably allows people to accept some trans men and women as truly men and women, painting themselves as friendly to trans causes, while at the same time refusing to recognise the majority of trans people’s genders.

32. Alex Sharpe, “From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence,” (2001) 8:1 Murdoch UELJ, online: <[www.murdoch.edu.au/elaw/issues/v8n1/sharpe81.html](http://www.murdoch.edu.au/elaw/issues/v8n1/sharpe81.html)> [perma.cc/BK8K-PK8U].

33. *Matrimonial Causes Act 1973* (UK), c 18, s 12.

34. Alex Sharpe, “Transgender Marriage and the Legal Obligation to Disclose Gender History,” (2012) 75:1 Mod L Rev 33 at 39 [perma.cc/6CJL-BPSB].

35. Alex Sharpe, *supra* note 1 at 222.

36. *McNally*, *supra* note 5 at para. 10.

express themselves in terms of distress, disgust, or revulsion.<sup>37</sup> In the McNally case, the complainant referred to herself as “physically sick” when she learned that McNally is trans.<sup>38</sup> The harm is also hashed out in relation to identity and self-conception: the complainant “considered herself heterosexual,”<sup>39</sup> a type of harm similarly highlighted in the Saunders case. The quote heinously suggesting that complainants would have preferred rape was preceded by the accusation that Saunders has “called into question [the complainants’] whole sexual identity.”<sup>40</sup> The suggestion is that unintentionally having one’s self-conception as heterosexual challenged creates significant psychological and emotional distress, warranting the intervention of criminal law. Would people feel so distressed if not for their belief that there is something wrong about being queer? As Anna Marie Smith writes, commenting on *Saunders*: “Certainly no British judge would have interpreted a [cis] woman’s imitation of a [cis] gay man or a [cis] man’s imitation of a [cis] lesbian as a crime that was more serious than rape.”<sup>41</sup> Since a wide range of non-disclosure cases generating psychological and emotional distress are not criminalised, we must posit that there is something uniquely wrong in the court’s eyes about challenging heterosexual self-conception.

While the judge in *McNally* does suggest that only material factors can sustain the charge of sexual assault by fraud,<sup>42</sup> the question of materiality involves a value judgement, and many lies or omissions will be insufficient even though they may indeed have caused consent.<sup>43</sup> Contrary to English courts, the Israeli court in *Alkobi* relied on the notion of impersonation,<sup>44</sup> further restricting relevant harm to that of “nonvoluntary and undesired homosexuality.”<sup>45</sup> Here again, we must ask whether the courts projected their own support of compulsory heterosexuality onto the complainants in finding that accidentally sleeping with someone in

37. Alex Sharpe, *supra* note 1 at 221.

38. *McNally*, *supra* note 5 at para 10.

39. *Ibid* at para 11.

40. Cited in Kim Shayo Buchanan, “When is HIV a Crime? Sexuality, Gender and Consent” (2015) 99 *Minn L Rev* 1231 at 1278 [perma.cc/53YA-33T9].

41. Anna Marie Smith, *supra* note 2 at 167.

42. *McNally*, *supra* note 5 at para 21: “Having rejected reliance on s. 76 of the Act, the court observed (at para. 87) that the materiality of the use of a condom could be determined under s. 74.”

43. *McNally*, *supra* note 5 at paras 23, 25. Despite having rejected analysis under s. 76, the judgment seems to rely on the question of the nature of the act: “the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male” (para 26).

44. Aeyal Gross, *supra* note 2 at 178.

45. Kim Buchanan, *supra* note 40 at 1277; Aeyal Gross, *supra* note 2 at 182.

breach of cisheteronormative conceptions of sexual congress amounts to an egregious harm warranting criminalisation.

The harm of non-disclosure, it seems, only exists insofar as accidental homosexuality, seen through a cisnormative lens, is a form of psychological and emotional harm due to pervasive patterns of marginalisation in our societies. If that's the case, we should follow Aeyal Gross in asking whether "the injury that the complainants experienced [was] a product of their own transphobia and homophobia, and, if so, does such an injury warrant legal protection?"<sup>46</sup> Continuing on the same train of thought, Gross adds: "Is the injury rooted in what the complainants actually experienced, or does the social conception of the type of relations that they experienced compel them to understand the experience as injury?"<sup>47</sup>

## II. *The lived realities of trans and gender non-conforming people*

The criminalisation of non-disclosure of (trans)gender history targets vulnerable people. It criminalises sexual and romantic behaviours only because they have been engaged in by trans people. This both exacerbates and reflects the horrendous levels of stigma, discrimination, harassment, and violence to which trans people are subject.<sup>48</sup> The enforcement of cisnormativity through (trans)gender fraud law deprives trans people of whatever remaining power of gender self-definition they may have had in intimate relationships.<sup>49</sup> Having to disclose (trans)gender history is a source of emotional and psychological pain, reminding us that we don't belong, recalling us to gender dysphoria and past trauma.

Disclosure of (trans)gender history is fraught with danger. Islan Nettles,<sup>50</sup> Gwen Araujo,<sup>51</sup> and Brandon Teena<sup>52</sup> are but a few of the most well-known murders of trans people which occurred because their

46. Aeyal Gross, *ibid* at 199.

47. *Ibid* at 199.

48. Sandy E James, Jody L Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016) [perma.cc/2M4U-4YCJ].

49. This is reminiscent of Fanon's analysis of Blackness in Frantz Fanon, "L'expérience vécue du Noir" (1951) 179:5 *Esprit, Nouvelle Série* 657 at 658 [perma.cc/E49K-GUWB]: "Le noir n'a pas de résistance ontologique aux yeux du blanc." Groups which are othered in the dominant social imaginary and organisation do not have ontological resistance in the eyes of the oppressor. The meaning accorded to their bodies and existence is dictated by the dominant social imaginary and, because of hermeneutic marginalisation, they are unable to provide a resistant social imaginary to the oppressor's eyes—only within their own communities may they do so.

50. Nico Lang, "James Dixon Pleads Guilty in Death of Islan Nettles," *Advocate* (5 April 2016) [perma.cc/7RZN-TWSF]

51. Marisa Lagos, "Mistrial Declared in Teen's Killing," *L.A. Times* (23 June 2004) [perma.cc/C886-XMZZ].

52. *State v Lotter*, (1998) 586 N.W.2d 591.

transitude became known. Transfeminine people of colour are most at risk of this kind of violence, but all trans people are subject to it.<sup>53</sup> Both popular culture and daily experience expose the belief that trans folk are inherently deceptive. For example, two cis men passing by me in the street while I was in Quebec City for a conference blurted out, jokingly: “It’s a trap!” This casual association of transfeminine realities with deceit through an accessible reference to *Star Wars* allows widespread dissemination of anti-trans narratives which make disclosure hazardous. Whether or not I identified as a woman was immaterial—I did at the time, but no longer do—since I was identified as a “trap” on gender presentation alone.

Violence often flows from this ascription of deception.<sup>54</sup> In the revelatory case of Islan Nettles’ murder, the perpetrator James Dixon had initially flirted with her. When he realised she was trans, he beat her to death, later saying: “I just don’t wanna be fooled. My pride is at stake.”<sup>55</sup> For many trans people, non-disclosure laws mandate an outrageous choice between risk of prison and risk of death. Foreseeably, many choose to risk prison.

In a large metropolis, access to trans and trans-friendly communities may decrease the risks associated with non-disclosure. People in large cities tend to be familiar with a greater diversity of people and trans people tend to be more visible in urban areas. Furthermore, there is a larger trans dating pool, enabling and fostering intra-community dating. Most trans people I know date other trans people. My partner is trans; our relationship is enhanced by our shared understanding of the gendered world and never came with the risks typically associated with non-disclosure. Trans communities also tend to share tips on how to manage and navigate the difficulties of disclosure, and which signs to look out for which might preface violence or rejection. It also circumscribes access to more coherent and convincing trans narratives, and thus confidence as well as convincingness. Nonetheless, not every trans person wants to be out—transitude being an unwelcome and dysphoria-inducing fact for many trans people—and a number of those who would like to be out choose not to be due to danger. Those choices deserve respect.

The stories of Hen Alkobi and Jimmy Saunders happened outside of large cities.<sup>56</sup> Nearly all of them—McNally included—were young people at the time of the alleged offences. For trans people, age and geography

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53. For a theoretical analysis of the grounds of this gendered dimension, see Florence Ashley, *supra* note 31.

54. Florence Ashley, *supra* note 31

55. Lang, *supra* note 50.

56. Aeyal Gross, *supra* note 2 at 225. McNally lived in Glasgow.

are determinants of safety. Age, like geography, impacts access to trans narratives, access to transition-related healthcare services, and access to community support. Many transition-related services, such as bottom surgery, are inaccessible for younger people, yet have a substantial impact on the danger of disclosure due to the commonness of the association between genitals and gender: trans people who have had genital reassignment surgery are more readily accepted by prospective partners. Older trans people are disproportionately excluded from community spaces because they hold views and use a language that aren't in line with the latest community norms. Furthermore, as mentioned earlier, the general population in large urban areas tends to be better acquainted with trans realities because of the concentration of trans people migrating to metropolises, the greater population density, and the number of trans community organisations.

Alkobi's case sharply contrasted with that of McNally. Contrary to McNally—who was left to fend for themselves and didn't articulate a clear trans male identity before the court—Alkobi received testimonial support from a number of trans activists in court. Backed by trans activists, it may be much easier to set out mitigating factors for sentencing purposes, as well as put forward the defence that trans men are men and thus not deceitful—although judges have not dismissed any of the mentioned cases on that ground. Perhaps it will be at the heart of a successful defence in the future although, as I will explain later, people who are not trans men or women should not be punished for their perceived deceitfulness either.

Threats of prosecution may arise in the context of abusive and exploitative relationships. They can also arise out of a self-protective interest. We have reasons to think that both McNally and Alkobi had disclosed their (trans)gender history, contrary to what the judges found in each case, and that the complaints were in part motivated by a desire to appear heterosexual to family members. Although threats of prosecution for sexual fraud in order to keep the trans person in an abusive relationship are not well-recorded, they are common in the case of HIV non-disclosure, another form of sexual fraud.<sup>57</sup> In the Canadian case *R. v. D.C.*, the alleged non-disclosure was weaponised by D.C.'s abuser to punish her for leaving his abusive ass.<sup>58</sup> Because the presence of non-disclosure is a question of fact for the court to decide with the aid of testimony—disclosures are frequently verbal—even those who disclose may easily find themselves threatened by their partner: “If you leave me, I will tell the police you

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57. Kim Buchanan, *supra* note 40 at 1258, 1259.

58. *R v DC*, 2012 SCC 48.

didn't disclose that you had HIV and they'll arrest you." This risk is far from theoretical and threats of this kind have been recorded several times.<sup>59</sup> Given the similarities in social context between HIV non-disclosure and (trans)gender history non-disclosure, notably with regards to the stigmatisation and marginalisation of those living with HIV and transgender people, there are good reasons to think that the possibility of prosecution for (trans)gender fraud also creates significant risks of abuse.

Taking into consideration the risk of assault and murder, the psychological harm of disclosure, the risk of false accusations, and the fact that (trans)gender history is a private matter, it is unsurprising that a plurality of trans people opt not to disclose it.

### III. *Trans men are men, trans women are women*

Alex Sharpe advances the argument that (trans)gender history need not be disclosed because trans men are men and trans women are women. In her article "Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent," she argues that non-disclosure of (trans)gender history should be rejected as constituting sexual fraud because trans gender identities are authentic—trans men are men, trans women are women<sup>60</sup>—and, in any case, considerations of equality and privacy trump the desire to know (trans)gender history.<sup>61</sup> According to her, the prosecution and legal interpretation of such cases in the United Kingdom was animated by discriminatory factors.<sup>62</sup> She reasons that to treat (trans)gender history as a material fact "is to cast doubt on the authenticity of the gender identities of transgender people."<sup>63</sup> Yet, she says,

59. Alison Symington, "Injustice Amplified by HIV Non-Disclosure Ruling" (2013) 63:3 UTLJ 485 at 485-486: "[T]here have been false threats against [people living with HIV] who did disclose and also a great deal of uncertainty regarding when disclosure is legally required and how to prove that disclosure took place."

60. One might argue, however, that authenticity is distinct from truth. For instance, Talia Bettcher points out that the claim "I am a woman" among trans women is best understood as an existential commitment rather than a metaphysical claim and thus involves epistemic authority: Talia Bettcher, "Trans Identities and First-Person Authority" in Laurie J Shrage, ed, *You've Changed: Sex Reassignment and Personal Identity* (Oxford: Oxford University Press, 2009) 98. In another article, she argues that the debate over trans women's womanhood can be understood as a conflict between dominant and resistant meanings associated with specific social subgroups: Talia Bettcher, "Trans Women and the Meaning of 'Woman'" in Nicholas Power, Raja Halwani & Alan Soble, eds, *The Philosophy of Sex: Contemporary Readings*, 6th ed (New York: Rowman & Littlefield Publishers) 233. How courts would take up theories which foreground the existence of different types of claims (metaphysical versus existential), different types of definitions (descriptive versus ameliorative), and different types of meanings (dominant versus resistant) is an open question. For the most part, courts have bypassed these issues altogether by having recourse to anti-discrimination law—see, e.g., *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, [2012] OHRTD No 715.

61. Alex Sharpe, *supra* note 1 at 220-222.

62. *Ibid* at 211.

63. *Ibid* at 219.

“their gender identities [typically] manifest early in life and, as already noted, the phenomenon of transgenderism is recognised by the medical community and the state provides both public funding for treatment and provision for gender recognition.”<sup>64</sup>

As Sharpe points out, answering the question of whether one is a chromosomal man as the judge in *McNally* would have required cannot be a neutral question.<sup>65</sup> To answer ‘no,’ “involves self-diminution or repudiation” as it posits a deficiency of manhood or womanhood on the part of trans men and woman, which trans theorists and communities deny.<sup>66</sup> Suggesting people have a right to know is suggesting that trans people’s genders are less real or valid than cis people’s, and thus that they are exposing others to accidental homosexuality.<sup>67</sup> This makes no sense if trans men are just as much men as cis men.

Her claim with regards to equality is similar. Were non-disclosure of (trans)gender history found to be a material fact, it should nonetheless be judged as insufficient to establish sexual fraud insofar as it would enshrine anti-trans beliefs into law.<sup>68</sup> To hold people obligated to disclose their (trans)gender history in order to access the world of sexual pleasures creates a hierarchy with cisgender people on top and transgender people at the bottom. Already hyper-aware of the widespread belief that their genders aren’t authentic, aren’t real, trans people are further marginalised by forcing them to engage in routine acts of self-invalidation in order to have the same life as cisgender people.

Sharpe draws an analogy to non-disclosure of race: the idea of convicting White-passing Black people of sexual fraud for not disclosing that they are Black is abhorrent. Even if race was considered material, we would object to non-disclosure of race being found to constitute sexual fraud. By analogy, Sharpe argues, we should also reject sexual fraud on the basis of (trans)gender history non-disclosure. Although the history of regulation of trans bodies and racialised bodies differs in many ways, notably given the history of slavery and anti-miscegenation laws, the analogy holds some weight insofar as the criminalisation of non-disclosure in both cases involves discriminatory and dehumanising attitudes towards race and or transitude. The argument is strengthened by the findings of

64. *Ibid* at 219.

65. Alex Sharpe, *supra* note 8 at 44.

66. For a discussion, in French, of how notions of chromosomal or biological sex subordinate trans people to cis people, see Florence Ashley, “XY” in Suzanne Zaccour & Michaël Lessard, eds, *Dictionnaire critique du sexisme linguistique* (Montreal: Somme Toute, 2017).

67. Alex Sharpe, *supra* note 34 at 40.

68. Alex Sharpe, *supra* note 1 at 221-222.



the court in *McNally* which seemed predicated on the belief that McNally was female. Considering the statements made by McNally before the court about their own gender, Sharpe resolves the apparent inconsistency by pointing out that at the time of prosecution McNally identified as male and intended to undergo genital reassignment surgery, and that the subsequent repudiation of this male identity was likely caused by the psychological pressure of prosecution.<sup>69</sup>

With regards to privacy, Sharpe correctly notes that an obligation to “disclose gender history to sexual partners requires the disclosure of highly personal and private information.”<sup>70</sup> Since disclosure creates physical risks as well psychological difficulties, it outweighs the harm to the complainant, which is understood in terms of disgust, revulsion, and challenge to one’s self-conception as a heterosexual person.<sup>71</sup> Unfortunately, she does not extensively develop her analysis in terms of privacy rights.

Although Sharpe’s paper concludes by discussing Jimmy Saunders, she does not centre Saunders’ case and how it may challenge and undermine some of her arguments. As noted earlier, Saunders foregrounded lesbian womanhood in court but had adopted a masculine name and masculine gender expression. It is doubtful that Saunders was a trans man, though in more contemporary terms may have understood herself as genderqueer or non-binary. Or, as claimed at the time, she might simply identify as a woman. With either option, contrary to Alex Sharpe’s claim that “gender identity is already in the open” in the case of transgender people, Saunders’ gender identity was not out in the open.<sup>72</sup>

With the exception of her underdeveloped discussion of privacy, it is not altogether clear if Sharpe’s arguments would have saved Jimmy Saunders from prosecution, given that she never overtly claimed a male or non-binary identity. Her focus on McNally’s being actually a man at the time of the alleged offence confirms the suspicion that protection is owed in large part because trans people are the gender they claim—something which, although true, would leave a number of people vulnerable to prosecution.<sup>73</sup> What of people who, like me, have a gender that is neither

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69. Alex Sharpe, *supra* note 8 at 40-41.

70. Alex Sharpe, *supra* note 1 at 220.

71. *Ibid* at 221.

72. *Ibid* at 222.

73. In an article where she places herself in the role of a dissenting judge in the *McNally* case, she ends her proposed judgment with: “Ultimately, law, and especially criminal law, ought to respect the self-determination that is implicit in gender identity claims unless it can be clearly established that they are fabricated.” This seems to somewhat undermine her earlier assertion that a conviction would, in any case “implicate law in unnecessary and unwarranted state intrusion and regulation of gender and sexuality.” (Alex Sharpe, “Queering Judgment: The Case of Gender Identity Fraud” (2017) 81:5 J

man nor woman?<sup>74</sup> To cite C. Jacob Hale, we must be careful not to produce “a representation of someone more solidly grounded in gendered social ontology than the subject (recon)figured by that name actually might have been.”<sup>75</sup>

To be sure, given the prevailing social discourses around (trans)gender fraud and transgender people more generally in the United Kingdom, foregrounding the authenticity of trans gender identities is politically warranted. Nevertheless, it is important to move beyond the claim of gender authenticity and foreground a politico-legal discourse that can protect all those who need protection including Saunders and non-binary folks. To do so, it is necessary to centre the lives of those who inhabit a contentious, uncertain space in the gender imaginary.

#### IV. *Genderfuck privacy*

##### 1. *Centering privacy*

Federal and provincial governments in Canada have shown perfunctory support for trans people in recent years. Toby’s Act<sup>76</sup> in Ontario—my demiboy<sup>77</sup> kitten’s<sup>78</sup> namesake—added gender identity and expression to the Ontario Human Rights Code equality provisions, making explicit protections that have been extended to trans people by the courts as early as 1998.<sup>79</sup> All provinces have since followed suit. Federally, gender identity and expression were added to human rights law by Bill C-16 in 2017.<sup>80</sup>

Support in Canada has been growing in recent years, and as people grow more aware of trans identities and begin seeing them more and more as part of normal human variety, I suspect that readers will share the intuition that there is something horrendous in punishing (trans)gender non-disclosure. “It’s not anyone’s business” is slowly becoming the Canadian credo regarding transitude, a clear appeal to the right to be left alone, which falls under the right to privacy.

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Crim L 417 [perma.cc/4TVC-D6E6].

74. Genders that are neither exclusively man nor exclusively woman are known as non-binary genders and people who have non-binary genders are known as non-binary people or enbies.

75. Jacob Hale, “Consuming the Living, Dis(re)membering the Dead in the Butch/FTM Borderlands” (1998) 4:2 GLQ 311 at 314 [perma.cc/QJ68-8GDF].

76. *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, SO 2012, c 7.

77. Demiboy is a specific non-binary identity that is used by individuals identifying partially, but not entirely, as a boy or man.

78. Yes, my actual cat. I mean, if cats can be cisgender, why couldn’t they be transgender?!

79. *Commission des droits de la personne et des droits de la jeunesse c Maison des jeunes A...*, [1998] RJQ 2549, 33 CHRR 263 (Quebec), subsequently applied in *Sheridan v Sanctuary Investments Ltd. (c.o.b. B.J.’s Lounge)*, [1999] BCHRTD No 43 (British Columbia).

80. *An Act to amend the Canadian Human Rights Act and the Criminal Code*, SC 2017, c 13.

Understanding (trans)gender non-disclosure as privacy reflects the thickness of privacy rights. They're not just abstract protections desirable for their own sake. Privacy rights are a vehicle of trans people's safety, emotional wellbeing, and substantive equality. This contrasts with a thin view of privacy which would reduce privacy rights to a mere entitlement to control some information for the sake of control.

The thickness of privacy is evident in its expression in Canadian constitutional law. The right to privacy is not mentioned explicitly in the *Canadian Charter of Rights and Freedoms*,<sup>81</sup> but rather has been interpreted by courts as being part of section 7 rights to life, liberty, and security of the person.<sup>82</sup> In rooting privacy rights with regards to liberty and security of the person, highlighting its relationship to psychological wellbeing, and in linking it with human dignity,<sup>83</sup> the Supreme Court acknowledges the thickness of privacy in our constitutional landscape.

(Trans)gender history is one of the most personal types of information. Disclosure of (trans)gender history exposes the individual to rejection, impeding the development of romance and friendship,<sup>84</sup> and exposes them to psychological distress and physical violence. It also forces them to foreclose their gender identity in ways they may not be ready for or willing to.

Non-disclosure also has positive aspects. “[R]elationships between self and others are based on an individual’s ability to share and control personal information,”<sup>85</sup> prompts Alex Sharpe. The delayed and progressive disclosure of personal information symbolises developing trust and is integral to its development.<sup>86</sup> By sharing information freely, guided by our own emotional pace, we express growing intimacy and trust, fostering the development of the relationship. Protecting privacy by refusing to criminalise non-disclosure not only protects people from the breaking down of relationships, but positively empowers the flourishing of new relationships.

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81. *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.

82. *AM v Ryan*, [1997] 1 SCR 157 (L’Heureux-Dubé J, dissenting in part) at para 80.

83. *Ibid.*

84. Alex Sharpe, *supra* note 34 at 51. In Anna Marie Smith’s interpretation of the *Saunders* case, “[Saunders’s] masquerade was indeed the condition of possibility of her relationships—not because of the impossibility of lesbian sexuality in and of itself, but because of the fact that with the tremendous pressures of homophobic bigotry which Saunders faced, she had had to conceal her lesbianism, and the lesbianism of her partners, behind her gender masquerade” (Anna Marie Smith, *supra* note 2 at 174).

85. *Ibid.*

86. Kim Buchanan, *supra* note 40 at 1335-1336.

The privacy argument against criminalising non-disclosure does not turn on individual motive. Rather, it is that the non-disclosure as a practice gives rise to privacy concerns, unlike poking holes in condoms or stealthing.<sup>87</sup> Because no significant privacy interest arises with regards to the latter two practices, we are provided with a principled reason to distinguish between the two from a criminal law perspective.

We can express the difference as that between deception and secrecy. Moral philosopher Sissela Bok reminds us that “while all deception requires secrecy, all secrecy is not meant to deceive.”<sup>88</sup> Sometimes secrecy is a matter of restricting the flow of personal information and thereby safeguarding ourselves against harm. In cases of protective secrecy, it will be “hard to conclude [...] that a decision to control personal information, and in the process retain some sense of personal autonomy, is in any significant sense unethical.”<sup>89</sup>

By introducing privacy, non-disclosure is faithfully portrayed as a self-protective measure that, while acknowledging the psychological distress of complainants, is justified by overarching concern for the wellbeing of trans and gender non-conforming people, a heavily stigmatised group. It further recognises that they deserve love, friendship, family, romance, and sex just as much as the general population, undermining the notion that those who don’t fulfill the promise of cisheteronormative dating and, later, marriage are less worthy of sex and love.

## 2. *Privacy as refusal*

During the trial process, McNally began expressing a cisgender female identity. A number of factors make it unclear whether this identification was a genuine expression of shifting gender identity. Gender identity is not fixed and although very few trans people detransition, it does happen. Further, people’s gender identity can evolve in other ways, such as a trans man growing to identify as a non-binary transmasculine person. However, it may be also be true that McNally has “sublimated identity and desire in the face of a legal and cultural world in which transgender and deception

87. Stealthing refers to the practice of non-consensual condom removal during intercourse. Alexandra Brodsky suggests the creation of a new tort of stealthing in order to provide a remedy against this practice, all the while recognising and resisting the further criminalisation of HIV non-disclosure and other forms of non-disclosure: Alexandra Brodsky, “‘Rape-Adjacent’: Imagining Legal Responses to Nonconsensual Condom Removal” (2017) 32:2 Colum J Gender & L 183 [perma.cc/J97S-9SQF].

88. Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books: London, 1998) at 7.

89. Alex Sharpe, *supra* note 34 at 52, in the context of non-disclosure of (trans)gender history prior to marriage.

are viewed as synonymous,<sup>90</sup> as Sharpe believes. Foreshadowing their guilty plea, their father mentioned that McNally said that they “may as well plead guilty.”<sup>91</sup> This defeatist outlook was replicated at the time they signed their statement, saying that they “just wanted it to be over.”<sup>92</sup> But it could also be that McNally indeed came to identify as a woman.

McNally was young and did not seem to have a well-developed knowledge of trans issues. Nothing in the case suggests an acquaintance with trans community narratives, which have been developed over decades to understand trans subjectivities. Young and unable to provide a convincing explanation of how they could be a man despite their gender assignment at birth, it would have been hard to resist simply accepting their fate and taking up the cisnormative narrative put forward by the judge. Indeed, it can be hard to resist even for people with access to trans community knowledge such as Hen Alkobi, who mentioned in interviews that he referred to himself “in the feminine form, but that this is out of respect for his parents.”<sup>93</sup> McNally’s age is also the age teenagers start having more freedom and independence, which for many trans people means beginning to explore their gendered feelings. Trans identities at this point may not be solidly entrenched or confidently embraced, creating the risk of a retreat to cis narratives in the face of conflict. However Jimmy Saunders’ identity may have developed, “[g]iven her comments on her prison experience, it is highly probable that her nine-month incarceration in Styal Prison—a detention which was meant to block further lesbian imitations—actually reconstructed her lesbian identity after the trauma of the first trial.”<sup>94</sup> Internalised transphobia is a common theme in most trans people’s experiential histories.<sup>95</sup> If this explanation of McNally’s behaviour is correct, then (trans)gender fraud law is to blame for their detransitioning and the risk of depression and self-harm that comes along with it—a risk that is all the more palpable given McNally’s history of self-harm.<sup>96</sup>

Alex Sharpe’s solution to (trans)gender fraud law, in the form of arguing that trans men are indeed men, falls short of responding to the concerns raised in the McNally and Saunders cases. Jimmy Saunders identified as a lesbian and spoke in ways that suggested a fluid relationship

90. Alex Sharpe, *supra* note 8 at 40.

91. *McNally*, *supra* note 5 at para 31.

92. *McNally*, *ibid* at para 40.

93. Aeyal Gross, *supra* note 2 at 168, fn 1.

94. Anna Marie Smith, *supra* note 2 at 177-178.

95. Alex Sharpe, *supra* note 1 at 209.

96. *McNally*, *supra* note 5 at para. 47.

to gender identities. She resisted norms of femininity and wore masculine-coded clothes not in order to appear as a man, but to be herself. Speaking of Saunders, Sharpe recognises that “gender queer is precisely the identity position that [Saunders] occupies and lives. She should not be punished because a sexual partner mistakenly assumes her to be male.”<sup>97</sup> While Sharpe’s argument does point to cisnormative assumptions underlying judges’ qualification of certain behaviours and presentations as deceptive, it is unclear how it would defeat a claim of (trans)gender fraud, unlike her central argument that trans men are men. Jimmy Saunders was not a man, as far as we know. How, then, do we avoid her punishment?

The centering of trans men’s manhood and trans women’s womanhood in Sharpe’s work is what Aeyal Gross calls, as noted in the introduction, the “institutional power to order certain experiences, even as it erases their complexity”<sup>98</sup> that the category of transgender holds. While this narrative of transitude is growing in mainstream knowledge and acceptance, it is being increasingly resisted by trans people and fails to acknowledge the complex history of transgender identifications through time.

The pressure to provide a coherent gender narrative as evidence of the “reality” of one’s gender is steeped in cisnormativity. It is the reaction of a system that stringently orders people in well-delineated categories of male and female. Butch lesbians are expected to be distinguishable from trans men and from transmasculine non-binary people. Yet the reality of gendered subjectivity, expressed in queer narratives, is one that blurs gender categories. While many people will be able to clearly set out whether they are a cross-dressing gay man or a trans woman, many won’t be able to. The queering<sup>99</sup> of trans, which elicits the anxiety of a number of trans theorists such as Jay Prosser, refuses necessity of clarifying trans identities. Aeyal Gross attributes to Jay Prosser the belief that “[q]ueer theory erases [...] the genuine experiences of the transsexual and transgender subjects.”<sup>100</sup> Responding to this claim, Aeyal Gross recalls Judith Halberstam’s queering of trans:

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97. Alex Sharpe, *supra* note 8 at 42.

98. Aeyal Gross, *supra* note 2 at 216.

99. The verb “to queer” is used in a wide range of ways in academia that may or may not be consistent. I use it here to refer to practices of destabilising binary, well-delineated conceptions of trans identities, making room for messy, unclear identifications that resist the cis/trans binary. To queer trans does not privilege non-binary identities, which are oftentimes clear and well-delineated or look unfavourably on individuals who do have clear, well-defined understandings of their own gender. Rather, it seeks to question the belief that we *must* have such a clear, well-defined understanding of our own gender.

100. Aeyal Gross, *supra* note 2 at 222.

The queer mapping that Prosser rejected recognizes hybrid categories and gives legitimacy and visibility to the hybridity of those who never have a home, who cannot cross gender boundaries, who prefer to be “gender-queer,” and who live with the instability of their identities. Indeed, under the new transgender model, or the “gender-queer” model that extends it, we see people who are challenging the boundaries of gender not by crossing to the other side but by living in the borderland, refusing to identify as belonging to one of the genders or identifying as belonging to both or, sometimes, even rejecting completely the idea of gender.<sup>101</sup>

Yet, the experiential differences between the trans subjects contemplated by Prosser and Halberstam can be illusory. Early in my coming out, I identified as transfeminine because I did not feel fully at home in womanhood. In order to present a coherent narrative that would ease my access to gender-segregated spaces and to transition-related health services, I sublimated the complexity of my gendered subjectivity and began identifying publicly as a trans woman. Only recently did I begin to identify publicly as transfeminine and non-binary again, empowered with social capital as a prominent activist and secure in my access to women-only spaces because of my ability to pass as a cis woman. Even though I am largely indistinguishable in most people’s eyes from a trans woman, I do not wish to find a home in gender terms and if the law would so let me, I would gladly opt for a gender marker reading “∩(∪)∩”.<sup>102</sup> I often opt to describe my gender metaphorically, calling myself a “cyborg witch with flowers in her hair.” Of course, in the face of criminalisation, I would expeditiously reframe myself as a trans woman, if only to avoid jail. Though this is possible in my case, it is not for everyone: reliance on the authenticity of trans manhood and womanhood is an inadequate response to (trans)gender fraud laws because it leaves out those who are non-binary or have a messy, difficult-to-characterise relationship to gender, forcing them to either misrepresent their gender identity before the court or face the risk of penal sanctions. We must account for all ways of being, whether we wish to “carve out a borderland domain” for ourselves or establish “a habitus located more firmly within social categories.”<sup>103</sup>

101. Aeyal Gross, *supra* note 2 at 223.

102. I have recently lodged a complaint with the Quebec Human Rights Commission which, although it does not request emoticon gender markers, does request making all letters available as a gender marker so non-binary people may represent their unique gender identities rather than the umbrella category of non-binary. Maybe one day we can have scratch and sniff gender markers and then I can have lavender smell as my gender.

103. Jacob Hale, *supra* note 75 at 340.

Refusal, as an alternative to recognition, has been theorized by Indigenous thinkers and activists. In her seminal work on the strategy of refusal employed by Kanien'kehá:ka communities, *Mohawk Interruptus*, Audra Simpson identified refusal as an alternative to the politics of recognition.<sup>104</sup> The settler colonial state does not know how to govern alterity and seeks to impose rigid categories upon which are predicated its response of apology and recognition, in the face of the cultural genocide of Indigenous people in Canada.<sup>105</sup> Yet, as Simpson reveals, recognition is only granted if the demand for inclusion does not challenge settler colonial norms too much.<sup>106</sup> Indigenous refusal is a refusal to acknowledge the primacy of settler sovereignty and the authority of the settler state to order Indigenous experiences.<sup>107</sup>

Recognising the emancipatory power of refusal is rife with solidarity potential, insofar as it acknowledges the legitimacy of Indigenous refusal and encourages us to show up for Indigenous people living on Turtle Island. As we seek to refuse gender norms, we must recognise the urgency of anti-colonial movements.

In the realm of gender, refusal operates as a rejection of the norms of respectability which oppose protected trans men and women to undeserving queers.<sup>108</sup> By calling on privacy, we can refuse to “choose between being transgender and being “butch” lesbians.”<sup>109</sup> We also refuse the contemporary surveillance into our private sexual lives. We can refuse to live in a comfortable, defined gender identity, and relish in the tense comfort of the borderlands.<sup>110</sup> We must make the borderlands safe.

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104. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) at 11.

105. *Ibid* at 16, 19-20.

106. *Ibid* at 20.

107. *Ibid* at 11.

108. The notion of politics of respectability was first articulated by African-American History professor Evelyn Brooks Higginbotham in *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1880-1920* (Cambridge, MA: Harvard University Press, 1993). The term was also adopted within queer and trans critical discourse: Mariana Valverde, “A New Entity in the History of Sexuality: The Respectable Same-Sex Couple” (2006) 32:1 *Feminist Studies* 155; Susan Stryker, “Transgender History, Homonormativity, and Disciplinarity” (2008) 100 *Radical History Rev* 145. It also stands in close relationship to the notion of homonationalism, coined by Jasbir K. Puar in *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007). The work of Dean Spade is also enlightening on this matter: Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law*, revised ed (Durham, NC: Duke University Press, 2015).

109. Aeyal Gross, *supra* note 2 at 228-229.

110. The understanding of identity borderlands was developed and popularised by the Chicana feminist Gloria Evangelina Anzaldúa in her book *Borderlands/La Frontera: The New Mestiza* (San Francisco: Aunt Lute Books, 1987), and has since had an indisputably massive influence on queer and trans feminist thought.



We can make the borderlands safe(r) by opposing the state-imposed mandate of having clear and well-defined gender identities; by refusing the state's authority and legitimacy in policing gender categories; by refusing the idea that gender is and ought to be well-defined. Through the right of privacy, refusal operates the political-juridical claim that the state has no business regulating how we navigate our own gender in the context of consensual sexual relationships.

Unlike Audra Simpson's conceptualisation of Kanien'kehá:ka refusal which operates solely from outside of the settler state and in opposition to it, refusal in the context of disclosure of (trans)gender history operates through the language and power of the settler state, namely by articulating a claim for privacy rights before the courts. Though this choice is pragmatic, motivated by the need to avoid criminalisation, it does not and cannot claim to be a decolonizing force, as it could be mobilised in furtherance of colonial projects. Aeyal Gross' work highlights the relationship between the policing of gender boundaries and national boundaries in the context of the Israeli colonisation of Palestine helps us understand how refusal to recite one's (trans)gender history can challenge the "sexual-gender-national order" on which neo-colonialism partly rests.<sup>111</sup> Yet, genderfuck politics do not suffice to challenge settler colonialism and must be complemented with concrete and active acts of support toward Indigenous communities.

Privacy as refusal is a transfeminist response to the cisheteropatriarchal need for well-defined, binary gender categories. It is a feminist refusal of the state's authority to order our gendered experiences. When the state's protection of sexual autonomy is grounded in a cisnormative and homophobic narration of non-disclosure, the most feminist move may well be to refuse to involve the state in our sexual life.

### 3. *Navigating critiques of privacy*

Privacy is a controversial notion. In this section, I seek to demonstrate how my vision of privacy as refusal, located within a transfeminist project, can be sustained despite the various critiques of privacy appearing in feminist and queer scholarship. An argument for privacy as refusal argues not from the premise of an irreducible core of personal freedom from investigation and interference, but rather sees privacy as a means of shielding vulnerable populations from at least some of the violence they face in a society defined by its inequities. By seeing the value of privacy in terms of harm-reduction, my conception of privacy as refusal limits the risks of mobilising privacy rights in favour of trans lives.

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111. Aeyal Gross, *supra* note 2.

Critiques of privacy, though often couched in abstract terms, cannot be divorced from the socio-judicial context within which they were voiced. They were made in specific contexts and oftentimes appeared in conversation with influential legal cases, notably in relation to sodomy laws, abortion rights, and partner violence. Tempting as it may be to read their exhortation to abandon the ideal of privacy in a universalist fashion, it would be an eminently uncharitable reading of critics' work. Kendall Thomas, in an article critiquing privacy right's failure to address public discrimination against queer people, began his critique of privacy in the context of anti-sodomy laws litigation. He poses two questions: "In theoretical discourse, does the language of privacy provide an adequate vocabulary for critically assessing the Court's reasoning and result in *Hardwick*? In political discourse, does it permit a sufficiently precise articulation of the concrete social interests for which *Hardwick* served as a constitutional flashpoint?"<sup>112</sup> While he ultimately concludes that it is inappropriate to rely on privacy rights to overturn U.S. anti-sodomy laws, these questions intimate an openness to the potential of privacy, which may be well-suited as a policy rationale in a different case.<sup>113</sup>

According to Catharine A. MacKinnon, the "privacy doctrine reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split."<sup>114</sup> The right to privacy relies on a distinction between the public sphere and the private sphere, with the home as the quintessential example of the private sphere. According to the feminist critique put forward by MacKinnon, precluding state interference in the private sphere harms women because it grants men a licence to engage in sexual and intimate partner violence. "This right to privacy is a right of men 'to be let alone' to oppress women one at a time."<sup>115</sup> Whereas the right to privacy purports to be gender neutral, it relies on a distinction between public and private spheres which reflects a gendered division of society. Accordingly, a feminist approach to law ought to reject privacy rights and instead welcome incursions into the private sphere in the hopes of preventing violence against women.

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112. Kendall Thomas, "Beyond the Privacy Principle" (1992) 92:6 Colum L Rev 1431 at 1435.

113. As for those who are less explicit with regards to the contextual contingency of their arguments, their work is no more divorced from historical context than mine. But even working from a distinct socio-historical context, their critiques may reveal tensions and fault lines operating along different frontiers of advocacy—including the one at which this paper is situated.

114. Catharine A MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade (1983)" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 93 at 93.

115. MacKinnon, *ibid* at 102.

Such critiques tend to play on a universalising, white—and perhaps, ironically, patriarchal—logic which depicts rights as all-good or all-bad.<sup>116</sup> However, it is possible to acknowledge that privacy rights can be deployed in harmful manners without committing to the view that they are always bad. Most dangerously, such abstract arguments against privacy risks perpetuating injustices against marginalised groups by depriving them of effective-but-unrevolutionary legal tools while granting more discretionary powers to oppressive state agents like the police and prosecutors.<sup>117</sup> Critical race theorists and especially Black feminist scholars such as Patricia Williams have convincingly shown that theoretical arguments against rights can fail to account for the ways in which rights being withheld from certain groups necessitates rights-granting as a form of harm-reduction and on the path to equality.<sup>118</sup>

Foregrounding privacy as refusal is compatible with feminism insofar as it is a harm-reduction argument mobilised to protect a vulnerable group: in this respect, it is less akin to an abuser using privacy as a shield from state involvement, and more akin to a shelter refusing to give personal information on its users. This latter refusal also relies on privacy.<sup>119</sup> If privacy is about the allocation of power, as Anita L. Allen argues, then the contestability of privacy rights becomes a matter of whether the proposed distribution of power increases and undermines justice.<sup>120</sup> Many feminists have adopted more nuanced critiques of privacy rights which focus on its problematic aspects in concretely enabling violence.<sup>121</sup> It is important to ask *who* is benefitted by privacy. Who is accorded sight and who is rendered invisible? In answering those questions, we must keep in mind the role of state surveillance in perpetuating state violence and reifying

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116. Jennifer C Cash has highlighted the whiteness of those critiques and foregrounded the need to move away from a politics of purity in order to more adequately address intersectional harm: Jennifer C. Cash, “From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory” (2005) 11 *Cardozo J L & Gender* 303.

117. The oppressive functioning of policing in Canada has been thoroughly detailed from a racial perspective in Robyn Maynard’s *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017).

118. Patricia Williams, “The Pain of Word Bondage” in *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991), 149; see also Cash, *supra* note 116.

119. Anita L Allen, “Coercing Privacy” (1999) 40 *Wm & Mary L Rev* 723 at 745-746; Elizabeth M Schneider, “The Synergy of Equality and Privacy in Women’s Rights” (2002) 1 *U Chicago Legal F* 137 at 152.

120. Allen, *supra* note 119 at 749-750.

121. Allen, *supra* note 119; Williams, *supra* note 118 at 164; Schneider, *supra* note 119; Taunya Lovell Banks, “Women and AIDS—Racism, Sexism, and Classism” (1989-90) 17 *NYU Rev L & Soc Change* 351; Jennifer C Cash, *supra* note 116; Jodi Dean, “From Sphere to Boundary: Sexual Harassment, Identity, and the Shift in Privacy” (1993) 6:2 *Yale JL & Feminism* 349.

disciplinary norms. I hope that no feminist will cheer on the construction of the panopticon.

Although the public-versus-private spheres has been a dominant conception of privacy, notably in the U.S. legal system, a new vision of privacy as informational rather than geographical has been growing in prominence and is reflected in the approach of privacy as refusal. Although Allen portrays this shift as a “rapid erosion of expectations of personal privacy and of the taste for personal privacy,”<sup>122</sup> it may be more accurate to depict it as a shift towards a conception of privacy as control of information. I may not care if specific people know I am trans, but I do care about being the one to let them know. This shift in conception was perhaps inevitable in the age of social media when geographical location matters little and information sticks around for what seems like forever.

The mobilisation of privacy in a sexual context may invite fears that feminist gains on implied consent and intimate partner violence are at risk of erosion. However, any impact on such gain is mitigated by the fact that privacy is being used in the current case to empower vulnerable partners rather than powerful ones, unlike the usual scenario where privacy protects the more powerful partner. Accompanied by a clear delineation of tangible and identifiable harm to a marginalised group—people have been murdered for being trans, to speak only of the most evident harm—privacy as refusal avoids eroding feminist efforts against violence, unlike individualising views of privacy as a geographical sphere free from state interference. Privacy as refusal is a narrow, targeted cognizance of the social context within which trans people operate and does not lend itself—or at least, doesn’t as much lend itself—to the specter of patriarchal perversion.

Queer critiques, including that of Kendall Thomas, have similarly highlighted the problematic underpinnings of the public/private spheres dichotomy. Defending people who engage sexually and romantically with partners of the same sex on the basis that what happens in the bedroom is no one else’s business fails to capture the public nature of same-sex relationships. “Don’t ask, don’t tell” exemplifies this concern. Cathy A. Harris points out: “If an attorney argues that her client’s sexuality is private, and therefore constitutionally protected from state regulation, she reinforces societal notions that homosexuality should be hidden.”<sup>123</sup>

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122. Allen, *supra* note 119 at 729.

123. Cathy A Harris, “Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights” (1997) 65 *Geo Wash L Rev* 248 at 250.

Cathy A. Harris, in the context of the U.S. challenge to anti-sodomy laws in *Bowers v. Hardwick*,<sup>124</sup> rightly claims that “the privacy strategy imposes severe limitations on how attorneys portray lesbians and gays in the courtroom.”<sup>125</sup> In arguing that private acts should remain private, protection is accorded to those whose queerness is essentially private. Those who are visibly read as queer in everyday life or who engaged in acts which aren’t unambiguously private—for instance acts occurring outside the home—are left vulnerable to homophobic judges and juries. Queer people are required, in a way, to be “straight-passing.”

Moreover, focus on privacy erases the context of the privacy violation, which is often public. As Kendall Thomas points out, “*Hardwick* is not just a story about private homoerotic acts and their interdiction; it is also an account of the harassment, the humiliation, and the violence that await the mere assertion or imputation of homosexual identities and existences in the public sphere.”<sup>126</sup> The defendant, *Hardwick*, had been identified as gay because he worked at a gay bar. Following this initial identification, *Bowers* acted under the colour of law to harass *Hardwick* and may have even incited others to beat him up. The discriminatory elements of the case story were vacated by the chosen constitutional angle.

Focusing on privacy risks ignoring the discriminatory context within which putative violations of privacy operate. However, I do not believe that this is necessarily the case. We should be wary of extending Kendall Thomas’ arguments to other jurisdictional contexts and other types of charges. His argument is essentially that privacy was ill-suited to capturing the wrong that occurred in *Hardwick* and, by extension, other cases involving anti-sodomy laws. But, it may be better suited in other contexts.

Privacy as refusal in the context of (trans)gender history non-disclosure differs from the privacy-based attack on anti-sodomy laws. It is not tied to the home as a zone of privacy where sexuality runs free. Trans scholars and activists advocate for the abolition of the obligation to declare one’s gender identity in most contexts.<sup>127</sup> Thus, the expansion of privacy to the sexual fraud context relies on a pre-existing narrative of privacy and does not imply a rigid distinction between public and privacy spheres. Indeed, it would be difficult to argue that public identification documents fall within

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124. (1986) 478 U.S. 186, 106 S. Ct. 2841.

125. Harris, *supra* note 123 at 249.

126. Thomas, *supra* note 112 at 1442.

127. Heath Fogg-Davis, *Beyond Trans: Does Gender Matter?* (New York: NYU Press, 2017); Spade, *supra* note 108; *Saskatchewan Human Rights v Saskatchewan*, 2018 SKQB 159; Allison Tierney, “This Person Just Received Ontario’s First Non-Binary Birth Certificate”, *VICE News* (7 May 2018) [perma.cc/6GWT-V6JJ]. In consultations with the federal government in 2018, many activists and scholars expressed the opinion that gender should generally not be asked on government forms.

the private sphere. A “don’t ask, don’t tell” policy is incompatible with a view of privacy as control over informational flow.

Although the queer critique highlights pitfalls of privacy discourse, notably as it encourages coercive privacy, which sees the private sphere as an area free not just from governmental interference but from disclosure altogether, seeing privacy as control over sensitive information<sup>128</sup> in the context of unequal relationships doesn’t similarly risk legitimating policies such as “don’t ask, don’t tell.” Privacy is about the distribution of power, as Allen highlights.<sup>129</sup> When framed as a form of corrective or protection for vulnerable people, and especially marginalised groups, we shift toward understanding privacy less as a sphere and more as control over information. Control over information, unlike spheres, necessarily implies a right to freely disclose just as much as it implies the right not to.

In arguing that Alex Sharpe’s equality-centric arguments are overly narrow, my argument isn’t that equality should be thrown out the window but rather that it shouldn’t be the sole or primary right around which to articulate a defence against (trans)gender fraud charges. But implicit in my discussion of why privacy rights are warranted is the recognition that privacy can serve the underlying value of equality and is mutually constituted with equality rights. Firstly, the idea that “accidental homosexuality” is a form of legitimate harm reeks of unquestioned heteronormativity. But second, the idea that forcing people to disclose their (trans)gender history may harm them requires an understanding of the marginalisation of trans people and the pervasiveness of transantagonism. Because privacy is, in this case, a corrective against oppression, it is ineluctably constituted in pair with equality, even if equality isn’t the primary right being raised.

Craig Willse and Dean Spade take a more radical view in assailing the mobilisation of privacy, this time in the context of the successful U.S. case against anti-sodomy laws, *Lawrence v. Texas*.<sup>130</sup> They adopt a view of privacy as legitimating regulatory norms that dictate how lives should be lived. In *Lawrence*, the majority struck down Texas’ anti-sodomy law “by addressing homosexuality in terms of ‘coupled’ behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more

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128. Jodi Dean has suggested that our conception of privacy should be determined discursively by inquiring into facts and activities which are constitutive of our identity: Dean, *supra* note 121 at 380. However, I am concerned that such a view relies on the abstraction of identity and de-emphasizes the underlying rationale for privacy protection, which is rooted in the potential effects of proliferation of information and intrusion upon seclusion on concrete, tangible lives. This is why my argument is primarily rooted in material conditions, and more specifically the identifiable, real harms that lack of control over information brings about.

129. Allen, *supra* note 119 at 749-750.

130. (2003) 539 US 558, 123 S Ct 2472.

parallel to incentivized heterosexual family norms.”<sup>131</sup> Willse and Spade are deeply critical of the court’s failure to challenge the mechanics of discipline, notably as it incentivises certain family structures and pictures of citizenship. By focusing on the private, the majority chose a pictorial avenue which directly legitimated the distribution of life-chances around marriage as a site of personal flourishing, reflecting a heteronormative assumption that queer lives, if they are to be acceptable lives, must be arranged by the state in the same manner as heterosexual lives. The struggle against anti-sodomy laws through privacy rights, and later the struggle for same-sex marriage, reflects “an acceptance of existing criminal and civil incentives for compliance with regulatory norms regarding sexual practices and family structures,”<sup>132</sup> something of which we should be critical. I wholeheartedly agree with this critique.

My argument is not incompatible with this view, however. Willse and Spade’s work is rooted in the specific context of U.S. caselaw around gay rights. There is no clear parallel to disciplinary norms of marriage at play in (trans)gender fraud. Quite the contrary, the argument for privacy de-emphasises the assumptions of committed monogamous coupling, insofar as it requires full and forthcoming exchange of information to foster lifelong companionship through marriage. I instead begin from the assumption that people have sex in all sorts of contexts, not all of which are conducive to safe disclosure. Although disclosure of (trans)gender history is frequently unsafe even within the context of marriage and long-term committed relationships, it is even more fraught outside of them. Privacy as refusal is a stance against state-mandated social ordering and against state violence through criminalization.<sup>133</sup> We do not have to fit ourselves into well-delineated gender boxes so the state can better order our lives.

By emphasizing the vulnerability of transgender and gender non-conforming people in interpersonal relationships, privacy as refusal reflects a shift away from patriarchal conceptions of the individual as autonomous, independent, and self-sufficient.<sup>134</sup> This is the assumption found in liberal conceptions of privacy, which leads to the belief that “so

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131. Craig Willse & Dean Spade, “Freedom in a Regulatory State: *Lawrence*, Marriage and Biopolitics” (2005) 11 *Widener L Rev* 309 at 314 [perma.cc/E4EG-7495].

132. Willse & Spade, *ibid* 131 at 324.

133. For a discussion of abolitionism as a goal of critical trans politics, see Morgan Bassichis, Alexander Lee & Dean Spade, “Building An Abolitionist Trans and Queer Movement With Everything We’ve Got,” in Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland: AK Press, 2011) 16.

134. Erinn Cunniff Gilson, “Intersubjective vulnerability, ignorance, and sexual violence” in Matthias Gross & Linsey McGoey, eds, *Routledge International Handbook of Ignorance Studies* (New York: Routledge, 2015) 228 at 230.

long as the public does not interfere, autonomous individuals interact freely and equally.”<sup>135</sup> The patriarchal view of privacy ignores the banality of vulnerability. We are always vulnerable and vulnerability “both makes it possible for us to be undone, often by one another, and be harmed or violated, and makes it possible for us to take care, be empathetic, and forge relationships.”<sup>136</sup> Trans and gender non-conforming people are, of course, especially vulnerable, but our potential for vulnerability comes from the fact that we’re human like everyone else.

This vision is sharply distinct from the patriarchal conception critiqued by Catharine Mackinnon, which sees people as relatively invulnerable.<sup>137</sup> When we see people as fundamentally vulnerable, our view of privacy must shift accordingly because we can no longer rely on the assumption that they’re best left alone until relatively-rare harms concretise. Unlike the wholesale rejection of privacy, which acknowledges the banality of vulnerability while ignoring its constructive aspects and thus readily proposes that trans and gender non-conforming people abstain from sexual relationships altogether if that is the cost of avoiding non-disclosure,<sup>138</sup> privacy as refusal recognises the necessity to distribute control over information to both prevent harm—an equality-driven and materially-grounded exercise rather than an abstraction—and foster conditions under which lives and relationships can flourish.

In this respect, we have much to learn from Critical Race Theory and more specifically from Patricia Williams, who teaches us that:

The task for Critical Legal Studies, then, is not to discard rights but to see through or past them so that they reflect a larger definition of privacy [...]: so that privacy is turned from exclusion based on self-regard into regard for another’s fragile, mysterious autonomy [...]<sup>139</sup>

Though elaborated in a different context, Williams’ teaching seems emphatically applicable to (trans)gender fraud. Trans bodies are overtly and routinely scrutinised if not surveilled. The ideal trans subject is naked. Applying privacy to (trans)gender history non-disclosure doesn’t shield

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135. MacKinnon, *supra* note 114 at 99.

136. Gilson, *supra* note 134 at 231.

137. MacKinnon, *supra* note 114 at 99.

138. An example of such de-contextualised conceptions of harm can be found in the concurrent judgement of Justice L’Heureux-Dubé in the HIV non-disclosure case *R v Cuerrier*, [1998] 2 SCR 371. Professing a vehemently feminist if perhaps misguided spirit, she depicts the harms of sexual fraud in such abstract terms that she would make non-disclosure of any material fact a criminal offence garnering up to 14 years in jail as well as lifetime registration as a sexual offender, independently of the complainant’s subjective experience of harm or the consequences of requiring disclosure.

139. Williams, *supra* note 118 at 164.



structures of dominance. It undermines them. At last, trans bodies are allowed clothing.

#### V. *Privacy and (trans)gender fraud in Canadian law*

Asking how Canadian courts may respond to charges laid for (trans)gender history non-disclosure is uncomfortable. First, because it contemplates the possibility of such criminalisation occurring—a scary thought for a scholar who is transgender and does not benefit from emotional distance to the topic. Second, because the law not only makes abstract debates out of a flesh-and-blood case, but also tends to isolate that case from the broader social dynamics and structures of oppression which gives rise to cases like the one before the court. And third, it's uncomfortable because engaging with the courts seems to confer some legitimacy—however little of it—to their interposition in transgender lives. I view courts as both ideological and repressive state apparatuses, meaning that they play an integral part in perpetuating oppression through state-sponsored violence and the policing of disciplinary norms.<sup>140</sup> Yet in a bid precisely to oppose conditions of violence fostered by the state, engagement with law may be a necessity—multiple consciousness inevitably comes forth when violence is so near:

There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.”<sup>141</sup>

In *R. v. Hutchinson*,<sup>142</sup> the Supreme Court of Canada was faced with charges of aggravated sexual assault by sexual fraud after Hutchinson poked holes in the condom. The complainant became pregnant. Prior to *Hutchinson*, the sexual fraud provisions had been interpreted in the context of HIV non-disclosure cases.<sup>143</sup> The court developed a two-steps test for sexual fraud cases.<sup>144</sup> First, the Court inquired into whether the complainant voluntarily consented to the sexual activity in question. Second, the Court turned to whether the consent had been vitiated due to fraud.

At the first step, focus is placed on the two traditional forms of sexual fraud, namely the sexual nature of the act—whether it is a sexual act as

140. Louis Althusser, “Idéologie et appareils idéologiques d’État (Notes pour une recherche)” in *Sur la reproduction* (Paris: Presses Universitaires de France, 2011) 263. See also Spade, *supra* note 108.

141. Mari Matsuda, “When The First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11:1 *Women’s Rts L Rep* 7 at 8.

142. 2014 SCC 19.

143. *R v Cuerrier*, *supra* note 138; *R v Mabior*, 2012 SCC 47; *R v DC*, 2012 SCC 48.

144. *Hutchinson*, *supra* note 142 at para 6.

opposed to, say, a medical examination—and identity of the partner.<sup>145</sup> Harm is not required for consent to be vitiated where the deceit goes to the sexual nature of the act or the identity of the partner.<sup>146</sup>

Fraud comes in two elements: dishonesty and deprivation.<sup>147</sup> Thus, consent will be vitiated where there is both dishonesty, including non-disclosure of important facts, and harm as serious as the “significant risk of serious bodily harm” standard established in HIV non-disclosure cases.<sup>148</sup>

The law bears striking similarity to the English law under which *McNally* was judged. Both Canada and England recognise that consent may be vitiated by deceit as to the nature of the act or the identity of the person.<sup>149</sup> Both also recognise a residual category of sexual fraud beyond those two types. However, the line surrounding the boundaries of this residual category differs in the two jurisdictions: Canada requires a threshold degree of harm or risk thereof whereas England requires active deception.<sup>150</sup> However, as Alex Sharpe has detailed, stereotypes and prejudices play a significant role in establishing whether deception is active, such that (trans)gender fraud can be established quite passively.

The *McNally* decision cannot be transposed into Canadian law without identifying a relevant type of harm which would serve as anchor to sexual fraud. It is unclear what precisely the harm would be that is elevated to the level of “significant risk of serious bodily harm.” In *Hutchinson*, the complainant became pregnant against her will, and in HIV non-disclosure cases the risk was couched in physical terms. For the Supreme Court in *Cuerrier*, writing in 1998 prior to widespread availability of highly-active anti-retroviral therapy, the danger was “terrible suffering and death.”<sup>151</sup> By contrast, the alleged harm of (trans)gender history non-disclosure is solely psychological and grounded in homophobia. That the perceived harm is rooted in homophobia is relevant since “it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance.”<sup>152</sup> Although neither the ordinary nor the reasonable person standard are applied in sexual fraud cases, the Supreme Court’s reluctance to give weight to

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145. *Ibid* at para 22.

146. *Ibid* at para 42.

147. *Ibid* at para 67.

148. *Ibid* at para 70.

149. *McNally*, *supra* note 5 at para 17. A number of other relevant circumstances to determining the presence of consent is set out in *Sexual Offences Act 2003*, *supra* note 16, s 76.

150. *McNally*, *supra* note 5 at paras 19ff.

151. Unfortunately, the Court failed to give due weight to the currently high quality of life of people living with HIV when, in 2012, it was faced with *Mabior*, *supra* note 143 and *DC*, *supra* note 143.

152. *R v Tran*, 2010 SCC 58 at para 34.

prejudicial attitudes as well as its commitment to the value of equality under the *Charter*<sup>153</sup> makes it nearly inconceivable that non-disclosure of (trans)gender history would be seen as sufficiently harmful to lead to charges of sexual fraud under the second part of the test.

However, dismissing the existence of (trans)gender fraud as a crime in Canada requires us to turn to the question of impersonation and deceit as to the sexual nature of the act.

False impersonation grounded the Israeli charges against Hen Alkobi. Appealing to a dictionary definition, the Haifa District Court “stressed that, from a linguistics perspective, the expression ‘impersonating another person’ can encompass impersonating a person of another sex.”<sup>154</sup>

This interpretation of “false impersonation” clashes with the history of the concept. Both sexual fraud as to the sexual nature of the act and as to the identity of the person are grounded in a puritanical and conservative sexual morality which centres married sex. Sexual fraud was only recognised where the complainant could be depicted as morally innocent of sex outside of marriage or committed relationship. This led to the notions of fraud as to the sexual nature of the act, which could be applied where, e.g., a doctor touched the complainant for a sexual purpose while presenting it as a medical procedure, and fraud as to the identity of the person, notably in cases of impersonating the husband of the woman.<sup>155</sup> Although the notion must evolve as our conceptions of sexual morality thankfully also shift, this history is relevant to understanding why false impersonation was seen as wrong and why the Supreme Court of Canada chose to define sexual fraud due to impersonation “in the narrow sense of the specific identity of a partner who is personally known to the complainant.”<sup>156</sup> Replaced in its historical and moral context, impersonation seems unlikely to ground charges of aggravated sexual assault by virtue of (trans)gender fraud.

Such an analysis also challenges the possibility of laying charges based on deceit as to the sexual nature of the act. As the Supreme Court states in *Hutchinson*, establishing deceit as to the sexual nature of the activity involves asking whether “the act was sexual in nature as opposed to being for a different purpose, such as a medical examination.”<sup>157</sup> This is much narrower than the view articulated in *McNally*, which claims that “while, in a physical sense, the acts of assault by penetration of the vagina

153. *Canadian Charter*, *supra* note 81.

154. Gross, *supra* note 2 at 175.

155. Jed Rubenfeld, “The Riddle of Rape-By-Deception and the Myth of Sexual Autonomy” (2013) 122 Yale LJ 1372 at 1397 [perma.cc/M6FB-G8SV].

156. *Hutchinson*, *supra* note 142 at para 57.

157. *Ibid* at para 57.

are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.”<sup>158</sup>

The greatest risk of criminalisation, in my opinion, lies not in any of those forms of vitiating of consent but rather in the notion that consent involves consent to the sexual activity in question. Would using a strap-on dildo instead of a flesh penis change the very sexual activity in question? This seems to be the case in the Supreme Court’s view, for whom the sexual activity in question refers to the “physical act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys).”<sup>159</sup> This would shift the question from (trans)gender fraud to whether sex toys were knowingly used. I submit that this is most appropriately considered at the second step of the analysis—where harm is considered—when the sex toy is of a similar shape and is used in a similar manner as flesh penises. The primary differences between flesh penises and strap-on dildos is the potential for harm are pregnancy and STI transmission: both are lower with strap-on dildos.<sup>160</sup>

Turning our mind to privacy allows us to understand (trans)gender history non-disclosure as an act which does not warrant criminal sanction independently of the step at which the analysis of (trans)gender fraud is held.

Criminal law is a blunt and dangerous instrument. Thus, it is the Court’s role to draw “a line between conduct deserving the harsh sanction of the criminal law, and conduct that is undesirable or unethical but ‘lacks the reprehensible character of criminal acts.’”<sup>161</sup> It was consciousness of this role which led the Supreme Court to establish the harm threshold in sexual fraud cases. This is done by balancing a number of factors, including *Charter* values.<sup>162</sup> As the Supreme Court makes clear, “Quebec legislation must be interpreted in accordance with the principles of the Quebec *Charter*.”<sup>163</sup> The same is true of all Canadian legislation and the Canadian *Charter*.

158. *McNally*, *supra* note 5 at para 26.

159. *Hutchinson*, *supra* note 142 at para 54.

160. The same cannot be said of vibrating dildos, inflating dildos, butt plugs, and other sex toys which are experientially very different from flesh penises. My comment on heat transfer notwithstanding, this is likely what allowed confusion as to the referent when McNally spoke of “putting it in,” with McNally referring to the strap-on dildo and the complainant interpreting the expression as referring to a flesh penis: Sharpe, *supra* note 1 at 217.

161. *Hutchinson*, *supra* note 142 at para 18.

162. *Mabior*, *supra* note 143 at para 58; *Hutchinson*, *supra* note 142 at para 72.

163. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté*

Autonomy is a core value and is the most directly applicable to cases of sexual fraud, but privacy is also an important value of the *Charter* and has been underappreciated in this context.

The applicability of privacy can be easily understood when considering the notion of fraud. Vitiating of consent by fraud at the second step of the *Hutchinson* analysis requires not only deprivation but dishonesty. Dishonesty, like deception, isn't purely behavioural. The Oxford English Dictionary's definition of deceit is informative in this respect: deceit refers to the "concealment of the truth in order to mislead."<sup>164</sup> More than just a concealment of truth, it must be done with a dishonourable and morally questionable intention. The definition of dishonesty similarly highlights the moral evaluation inherent in the term: "Discreditable as being at variance with straightforward or honourable dealing."<sup>165</sup>

We don't typically consider that, say, an employee who allows employers to think they are straight out of fear of discrimination is being dishonest or deceitful. Their motivations are understandable. The same cannot be said of an employee who conceals their sexual orientation—being straight—to benefit from a scholarship reserved for queer students. Intention and context matter when evaluating whether something amounts to dishonesty and deception and is therefore sufficiently morally condemnable to warrant criminalisation.

Although the first step of the analysis in *Hutchinson* does not explicitly require deceit or dishonesty—the Court specifies that "mistaken belief about the identity of the partner or the sexual nature of the act" precludes consent "whether or not that mistake is the result of a deception"—this requirement becomes implicitly reintroduced when considering the *mens rea* of sexual assault since an honest and reasonable but mistaken belief as to consent negates the *mens rea* necessary for sexual assault.<sup>166</sup>

Removing the requirement of deceit or dishonesty is typically reasonable precisely because the defence of honest and reasonable mistake of fact provides an exculpatory mechanism for morally innocent defendants, especially in the context of sexual fraud where honest and reasonable yet mistaken beliefs can relatively easily be imagined.

Removing the requirement of deceit or dishonesty, however, fails to account for other forms of relative moral innocence such as those involving and omission which, although deliberate, is done in a legitimate spirit of

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*urbaine de Montréal*, [2004] 1 SCR. 789 at para 20, affirmed in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at para 32.

164. *Oxford English Dictionary Online*, sub verbo "deceit," online: <[www.oed.com](http://www.oed.com)>.

165. *Oxford English Dictionary Online*, sub verbo "dishonesty," online: <[www.oed.com](http://www.oed.com)>.

166. *Criminal Code*, RSC 1985, c C-46, s 265(4).

self-preservation. Faced with charges of (trans)gender fraud, however, it will be necessary for courts to address this gap in the law. Refusing to consider and balance the privacy interests of those accused with (trans) gender history non-disclosure would run contrary to the *Charter*<sup>167</sup> insofar as legislation must be interpreted in light of it or be constitutionally deficient.

Privacy, understood co-constitutively with equality, provides us with a principled standard to distinguish between cases like that in *Hutchinson* where the accused's intention was to cause pregnancy and those like *McNally* where the accused's privacy interests were strongly implicated, given the immense psychological and material risks of disclosing (trans) gender history. In a world where people get murdered for flirting while trans, can we blame people for wanting greater control over the timing and context of disclosure?

Privacy and equality are interpretive guides and must be balanced against the value of autonomy. Balancing privacy, equality, and autonomy recognises that complainants can experience subjective harm despite the absence of criminal conduct.

When balancing those values, the duality of autonomy must be recognised. Whereas it can be impinged on by deceit, we should be careful not to vitiate expressed consent too readily lest we fail to take consent sufficiently seriously. Consent as a subjective state of mind is all-or-nothing. The same cannot be said of vitiation which involves a moral evaluation which is a matter of degrees. Consent is an act by which we take on moral responsibility, deliberately positioning ourselves as the source of the act and making it ours in a deep moral sense. To vitiate it too readily would be infantilising.

Sexual autonomy is a crucially important value. It should be handled with utmost seriousness. Nonetheless, cast in concrete terms, the privacy interests of transgender and gender non-conforming people in contexts of sexual fraud outweigh the interest in sexual autonomy of their sexual partners. Transgender and gender non-conforming people face extreme stigma due to their relationship to gender norms. They are typically the most vulnerable partner in relationships and are frequently subjected to intimate partner violence. To force disclosure of their (trans)gender history puts them at significant risk and runs contrary to the private character of that history. That gender identity and gender history are private is a relatively uncontroversial claim.<sup>168</sup> This approach merely incorporates into

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167. *Canadian Charter*, *supra* note 81.

168. Florence Ashley, "Qui est-ille? Le respect langagier des élèves non-binaires, aux limites du

the criminal law context the insight that (trans)gender history is a private matter and makes good on the Supreme Court's promise not to "stigmatize and criminalize an already vulnerable group."<sup>169</sup>

Although the legal contexts are different, the notion of privacy is also helpful in the English and Israeli contexts, especially given the two jurisdictions' reliance on deceit in establishing sexual fraud. The judges in *McNally* and *Alkobi* failed to adequately inquire into the moral content of the notion of deceit.<sup>170</sup> Understanding (trans)gender history as quintessentially private information forces us to acknowledge that non-disclosure does not necessarily amount to deceit, especially when the stakes are so high.

Transgender and gender non-conforming people are vulnerable in intimate relationships and must be granted the tools necessary to protect themselves against the routine weaponization of prejudice. Privacy is such a tool. Our ability to distinguish (trans)gender fraud from poking holes in a condom as was the case in *Hutchinson* using the notion of privacy further demonstrates its power as an analytical device. Given the current state of Canadian sexual fraud law, with the requirement of harm and the constitutional entrenchment of privacy and equality interests, courts should reject (trans)gender history non-disclosure as justifying charges of aggravated sexual assault.

### *Conclusion*

We are all navigating the unruly sea of desires on which relationships float. To turn fucking into a crime because the person's gender challenges the sexual identity of their consenting partners is an attempt to further entrench a cisheteronormative social order. It returns sex to its puritanical theorisation under the spectre of marriage and procreation, inhibiting the full blossoming of queer and genderfuck intimacies.

The law is both vessel and architect of public opinion. Where the law lends the state's power in support of stigma, it risks not only causing more harm than it prevents but also creating the very harm it seeks to prevent. By sending the message that disgust toward trans bodies and queer sexualities garners state protection, it validates and reproduces that very disgust in those who are listening. Yet, if we answer that this disgust is invalid because trans genders are authentic, we devalue the lives of those whose identities aren't so neatly defined and leave disgust toward

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droit" (2017) 63:2 *Service social* 35 at 39-40; *Order F2016-26 (Re)*, 2016 CanLII 82100 (AB OIPC). See also *The Gazette c Valiquette*, [1997] RJQ 30 (C.A.).

169. *Hutchinson*, *supra* note 142 at para 94 (minority); *Mabior*, *supra* note 143 at paras 66-67.

170. Israeli law even requires the "intent to deceive": Gross, *supra* note 2 at 176.

queer sexualities untouched. By foregrounding the existence of those who challenge neat gender identity categorisation, we can better recognise the messiness of everyday life and protect those whose lives are gloriously, beautifully messy. Instead of a politics of respectability, I hope we can rally around a genderfuck politics.

Mobilising the notion of privacy in law allows us to refuse state interference in our sexual lives as we navigate gender and struggle to make sense of ourselves in a rigidly ordered social world.<sup>171</sup> Far from the individualism of liberal conceptions of privacy, privacy as refusal resists the gender confinement imposed on us by patriarchal institutions. I have high hopes that reframing our arguments around privacy as refusal can blossom into change for the better.

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171. A similar argument from privacy could perhaps be mobilised in the context of HIV non-disclosure. I am not aware of privacy rights ever being considered in such a manner by a Canadian court. However, the balancing of privacy and autonomy would necessarily differ to the extent that avoidance of harm is part of the underlying value of autonomy.