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**Unknowable Bodies, Unthinkable Sexualities:
Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse
Raidⁱ**

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ABSTRACT:

Although litigation involving sexual orientation and gender identity discrimination claims has generated considerable public attention in recent years, lesbian and transgender bodies and sexualities still remain largely invisible in Anglo-American courts. While such invisibility is generally attributed to social norms that fail to recognize lesbian and transgender experiences, the capacity to 'not see' or 'not know' queer bodies and sexualities also involves wilful acts of ignorance. Drawing from *R v Hornick* (2002) a Canadian case involving the police raid of a women's bathhouse, this paper explores how lesbian and transgender bodies and sexualities are actively rendered invisible via legal knowledge practises, norms and rationalities. I argue that *limited knowledge* and *limited thinking* not only regulate the borders of visibility and belonging, but play an active part in shaping identities, governing conduct and producing subjectivity.

KEYWORDS: visibility; embodiment; intelligibility; governmentality; queer regulation

Despite the recent proliferation of high-profile cases involving sexual orientation and gender identity discrimination claims, lesbian and transgender bodies and sexualities remain largely invisible in Anglo-American courts (Lloyd, 2005; Smith, 1997; Whittle, 2002; Boyd and Young, 2003). Even in Canada, where significant sexual orientation rights have been won, lesbians appear as disembodied, desexualized legal subjects (Valverde, 2006). Likewise, although transgender people are gaining increased legal protection from discrimination, their corporeal experiences and sexual identities remain largely unintelligible. For transgender persons, such invisibility results from federal and provincial legal frameworks that do not formally recognize gender identity as a distinct discrimination ground, and from social norms that marginalize gender variant-people (Durnford, 2005; Namaste, 2000; Ontario Human Rights Commission, 1999). For lesbians, legal invisibility is often attributed to similar social exclusion and to policing practises which historically criminalized lesbian sexuality less vigorously than gay men (Mason, 1995: 70-72; Robson, 1992; Valverde, 2007: 248). Indeed, lesbian sexuality is often assumed to fall below the radar of state surveillance. Yet the capacity to ‘not see’ or ‘not know’ queer bodies and sexualities is not simply a matter of inadvertent omission, but involves wilful acts of ignorance. Particular facts must remain unspoken, details unquestioned, lines of thinking un-pursued—especially in the legal domain where selection of evidence is crucial to case outcomes. As such, I argue that discourses of limited knowledge and rationalities of ignorance play an active part in the legal disappearance of lesbian and transgender bodies and sexualities.

Examining *R v Hornick* (2002) a Canadian case involving the police raid of a women’s bathhouse, this paper explores how lesbian, queer and transgender bodies and sexualities are actively rendered invisible via legal knowledge practises, norms and

rationalities. Resisting the temptation to see legal invisibility as simply the consequence of state indifference or repression, I suggest legal discourses and organizational rationalities constitute queer bodies and sexualities as unthinkable and unknowable. *R v Hornick* provides an important case study because lesbian and transgender bodies and sexualities were initially quite visible within the courtroom, but then dramatically disappeared in the final ruling. As such, lesbian and transgender bodies did not simply fall below the state's radar, but were actively reconfigured as non-queer disembodied subjects. Drawing from governmentality literatures which examine ways of knowing as techniques of regulation, I suggest legal forms of *limited knowledge* and *limited thinking* regulate borders of (in)visibility, and play an active part in shaping identities, governing conduct and producing subjectivity.

THE 'PUSSY PALACE' CASE

On September 15, 2000, five male officers from Toronto Police Services entered a women's sexual bathhouse at Club Toronto and proceeded to investigate for liquor licence violations and criminal sex acts. The sold-out event, known as the 'Pussy Palace'ⁱⁱ was the fourth of its kind in Toronto and attracted several hundred patrons, the majority of whom were scantily clad when police arrived. Police spent more than an hour on the premises, searching private rooms and questioning half-naked women, actions that were widely denounced by local press (Addis, 2000; Gallant, 2000; Giese, 2000; Gilbert, 2000). Two members of the Toronto Women's Bathhouse Committee were subsequently charged with several violations of Ontario's Liquor Licence Act, including disorderly conduct and serving liquor outside prescribed areas and hours. When brought to court, however, Judge Peter Hryn dismissed the charges, ruling that police had violated the women's security, privacy and equality rights under the Canadian Charter of Rights and

Freedoms. Hryn deemed the police conduct analogous to a male-on-female strip search, which, in the absence of exigent circumstances, could not be justified. The police evidence was declared inadmissible and the charges withdrawn.

Though hailed as a victory by the Bathhouse Committee, the ruling itself, as Bain and Nash (2007) argue, did not mark an entirely progressive decision for queer women's sexuality. For both judge and defence, the key concern was neither the state's efforts to monitor queer sexuality, nor the police abuse of liquor laws to do so, but simply that a search of semi-naked females was conducted by males. Why the women were naked, or what they were doing while naked was largely irrelevant to the court, as were their sexualities. In fact, nowhere in the final judgment do the words 'lesbian', 'queer' or even 'homosexual' appear (Bain and Nash, 2007: 27). Likewise, despite considerable discussion during the court proceedings about the presence of transgender persons at the event (inclusive of male-to-female transwomen and female-to-male transmen), the words 'transgender' or 'transsexual' were also nonexistent in the ruling. The absence of these terms is not trivial; such omission not only marks a gap in the legal representation of queer identities, but affects how the case is classified and read in future. If a law student conducts a Westlaw search using the term lesbian or transgender, for example, the case will not appear. The legal erasure of such identities is particularly striking in a context where promoting visibility of queer women's sexuality was a clear objective of organizers (Gallant and Gillis, 2001: 153). An event originally designed to promote a public, transgressive, queer sexuality was tamed and desexualized by legal discourse in order to produce victims worthy of state protection. 'In the end,' argue Bain and Nash, 'the classic argument of the danger of the heterosexual male gaze on the defenceless and naked female body was successfully used by the state to contain the transgressive potential of queer spaces and queer identities' (2007: 31).

It is tempting to see this case as an example of deliberate state repression of queer desire. Yet such a reading is too simplistic, for it assumes the case outcome was the direct result of state intentions, and fails to interrogate the conditions that made such power effects possible. Further examination suggests the police actions were a culmination of social, institutional and political forces, rather than a singular ideological mission by a monolithic state (Lamble, 2006). Moreover, the key legal arguments that effectively contained transgressive bathhouse sexuality were not initiated by the state, but were brought forth by the lawyer representing the Bathhouse Committee, thereby raising questions about the conditions in which subjects participate (albeit strategically) in their own regulation. Such regulation arguably arose in part from appealing to a human rights framework, which, despite its benefits, relies on universal humanity claims that often erase lesbian and transgender specificities. Invisibility also emerged from right to privacy arguments, which required that queer women's bodies and sexualities find their 'proper' place in a private rather than public realm (Bain and Nash, 2007: 24-26). Given the legacy of failed privacy claims for queers (e.g. *Bowers v Hardwick*, and *R v Brown*), the successful deployment of privacy rights in the Bathhouse case is laudable, but nevertheless reinforced conservative gender norms. The court's capacity to employ liberal rhetoric while simultaneously confining queer bodies and sexualities is therefore best understood through a governmentality lens, which recognizes how regulation operates through individual freedoms (Rose, 1999/2004).

LESBIAN AND TRANSGENDER LEGAL INVISIBILITY

Despite the longstanding legal invisibility of lesbian bodies and sexualities, explanations for such absences are surprisingly under-explored. Conventional wisdom suggests that lesbian sexuality poses less threat to heterosexual norms than gay male

sexuality, such that lesbians fall below the radar of state policing. Indeed, while gay male sexuality has been historically criminalized by anti-sodomy laws, same-sex acts among women have generated less state interest.ⁱⁱⁱ In England and Wales, for example, lesbians could not be prosecuted under buggery laws that criminalized gay men.^{iv} This legacy extends to Canada (and the US), where anti-sodomy laws technically applied to women, but were rarely enforced (Valverde, 2007: 233, 248). Noting the relatively few cases of criminalized lesbianism is not to suggest that female-female eroticism has been unregulated by the state; such legal silences may constitute a deliberate attempt to regulate lesbian sexuality through denial of its existence (Mason, 1995: 71; Robson, 1992). Family law rulings, welfare provision, civil service and military employment mark other areas where lesbians have been highly regulated by the state (Millbank, 1997; Arnup, 1989; Kinsman, 1996). However, since state efforts to regulate lesbian sexuality have been largely manifest within non-criminal and non-legal domains, lesbians have made few public appearances in Canadian legal history.

Even since the enactment of the Canadian Charter of Rights and Freedoms, which ushered in a new era of gay rights litigation, lesbians are surprisingly absent. Of the thirteen Supreme Court decisions to date that reference the word 'lesbian,' only one significant case (*M. v. H*, 1999) directly involved lesbians. The remaining cases fall into one of three groupings: (1) cases that address published representations of gays and lesbians rather than embodied persons (e.g. *Surrey School District*, 2001; *Little Sisters*, 2000); (2) cases that make passing reference to the sexual orientation of suspects or witnesses in criminal proceedings (e.g. *R. v. O.N.E*, 2001; *R v. Davis*, 1999); or (3) cases that simply reference lesbians within a generic, abstract homosexuality that is indistinguishable from gay men (e.g. *Trinity Western*, 2001; *Hodge*, 2004; *North Vancouver School District*, 2005; Granovsky 2000). The key Charter cases that address

sexual orientation claims involve gay men, with rulings that impact lesbians, but do not directly represent them (e.g. *Mossop*, 1993; *Vriend*, 1998; *Egan*, 1995). Even the 2004 Supreme Court reference on same-sex marriage did not involve actual same-sex couples and the words 'lesbian,' 'gay,' or 'sexuality' were absent from the decision (*Reference Re: Same Sex Marriage*, 2004).

Where lesbians do appear before Canadian courts, they are constituted as disembodied, desexualized legal subjects (Valverde, 2006). The most prominent Supreme court case involving a lesbian couple, *M v H* (1999), made virtually no reference to the sexual aspect of the litigants' relationship. Although the key question was whether or not the same-sex couple's legal status was equivalent to a heterosexual common law relationship, the case was framed as a property dispute. The sexual nature of their relationship was not discussed (Valverde, 2006: 162). Not only was their sexuality missing; their bodies were absent too. Although customary to use initials to protect litigants' anonymity, the initials M and H did not even refer to the litigants' own names, but to their respective lawyers (M for Martha McCarthy and H for Julia Holland).^v In their extended anonymity, M and H mark another example of disembodied, desexualized lesbians.

The absence of lesbian bodies and sexualities in law is partly an effect of legal strategy and partly a consequence of the legal conceptualization of 'sexual orientation.' Gay and lesbians litigants are unlikely to reveal intimate sexual details, lest such information jeopardize their legitimacy in court. Same-sex couples are desexualized or treated as heterosexual-like; any references to sexual relations are framed as evidence of long-term, stable, loving, spousal relationships (see for example, *K (Re)*, 1995). De-sexing and disembodiment function as both condition of receiving equal treatment and prerequisite for intelligibility (Cooper, 2006). Sexual orientation itself tends to be

desexualized in Canadian law, treated more like a socio-cultural group than a sexual identity (Valverde, 2006: 106; Boyd and Young, 2003).

Transgender bodies and sexualities have also remained largely invisible in Canadian law. While courts have historically scrutinized transgender bodies with respect to marriage cases (where the capacity for penile-vaginal penetration, whether functional or aesthetic, provided a key threshold for legal recognition of gender identity), such cases generally treat transgender persons as biological, medical and psychological ‘specimens,’ rather than fully-embodied legal subjects (Sharpe, 2007; Whittle, 2002). Although legalization of same-sex marriage has rendered moot the Canadian applicability of some of this older case law, it has not resolved issues of invisibility, since legal recognition of transgender relationships can conflict with couple’s self-defined identities. For example, a transgender (male-to-female) woman is now eligible to marry a non-transgender man, but the state will likely recognize the relationship as same-sex, even if the couple identifies as heterosexual (Cowan, 2005: 81). Similarly, although the 2004 UK Gender Recognition Act enables transgender persons to obtain legal status in their self-identified gender, recognition is conditional on dissolution of any previous marriage (Sharpe, 2007: 70). While these frameworks mark an improvement over other jurisdictions—such as Germany, Denmark, Sweden, the Netherlands, and some U.S. states—where sterilization is a precondition for identity recognition, UK and Canadian law nonetheless obscures transgender sexualities and relationships (Whittle, 2002: 162).

Most Canadian provinces also require evidence of sex-reassignment surgery for a legal change of sex, thereby excluding individuals who do not choose, or are unable to access, medical interventions. Further, because both federal and provincial human rights legislation in Canada (with the exception of the Northwest Territories) does not formally recognize gender identity as a specific category of discrimination, transgender persons

must graft their claims to other grounds (such as sex, sexual orientation or disability), which fail to address the specificity of transgender issues (Durnford, 2005). To date, no case specifically involving transgender issues has reached the Supreme Court of Canada, despite vital appeals by transgender persons to have their cases heard (e.g. *Nixon v Vancouver Rape Relief*, 2007).

Visibility is particularly fraught for transgender persons, adding further complexity to questions of legal erasure. For many transgender people, visibility is not in fact desirable, as it often signals a failure to ‘pass’ in one’s self-defined gender. Particularly if one has undergone the state’s arduous legal and medical requirements of transitioning, successful passing can be liberating. Passing is also a safety issue, since transpeople are at high risk of harassment and violence. Yet passing carries the burden of secrecy and fear of discovery. Visibility thus poses a dilemma for many transgender persons, as tensions arise between wanting to pass and wanting to be acknowledged (Green, 1999). These tensions become more acute as transgender issues come to court, because transpeople simultaneously experience hypervisibility, and stark invisibility, since legal narratives and media spectacle often prevent transpeople from fully representing themselves and their experiences (Whittle, 1999). For example, while transgender persons are disproportionately criminalized and imprisoned, the concerns and experiences of transgender prisoners have received scant public attention (Findlay, 1999; Mann, 2006). When transgender identities *are* acknowledged, it usually without recognizing the material, embodied experiences of transgender lives (Namaste, 2000).

R v Hornick marks both departure from, and adherence to, the standard legal treatment of lesbian and transgender bodies and sexualities. Generating mainstream news coverage and attracting sold-out crowds, women’s bathhouse events were by no means below the police radar (Gallant and Gillis, 2001: 153-4). When police entered the

premise, physical bodies were the primary target of surveillance, with officers counting each of the 330 semi-nude bodies in attendance. Likewise, lesbian and transgender bodies were initially visible in the courtroom. Defence lawyer Frank Addario asked each bathhouse witness detailed questions about her body: how exactly she was clothed ('how were you dressed that evening?'); the degree of bodily exposure ('nude or partially nude?'), the visibility of particular areas of the body; ('was your chest area covered?'); what type of material was worn ('by sheer, do you mean see through?'); and the exact position of women's towels on their bodies ('you wrapped it around below your armpit?' 'It came just to the top of your thighs?') (*R v Hornick Proceedings*, 22 Oct 2001: 22, 28, 65, 66). Police described explicit sex acts among women at the bathhouse, including 'genital rubbing' and 'penetration' (*R v Hornick Proceedings*, 23 Oct 2001: 31, 33). The physical bodies of transgender persons also garnered significant attention, with a police witness even describing in detail the genital area of one patron, referring to a 'slight bulge in the underwear' as evidence of biological maleness (*R v Hornick Proceedings*, 23 Oct 2001: 34, 54, 57). While the officer did not consider the 'bulge' in question could have been a strap-on dildo (common attire at women's bathhouses), such attention to queer corporeality nonetheless evoked a striking image in court. Although bathhouse bodies and sexualities eventually transformed into disembodied, desexualised legal subjects, they were initially visible in very explicit and corporeal ways.

Making queer women's sexuality visible was, in fact, a clear goal of the Pussy Palace (Gallant and Gillis, 2001: 153). Promoting such visibility not only required physical space, but also conceptual space. As two organizers describe, the bathhouse 'created new possibilities for how women could think about, organize, and enact their sexual desires. Whether or not women attended the Pussy Palace, it existed as an option, as a possibility, as a problem for how women think of themselves as sexual beings'

(Gallant and Gillis, 2001: 153). Yet the court's capacity to think, know, and see queer bodies and sexualities on such terms proved difficult. As the courtroom drama unfolded, bathhouse patrons were transformed from public, active, queer subjects to private, passive, heterosexual victims. The construction of such bodies was not simply a consequence of the judge's decision, but also the product of entrenched legal rationalities that rendered queer bodies and sexualities unthinkable and unknowable.

GOVERNING THROUGH KNOWING / UNKNOWING

Governmentality, simply stated, concerns the conduct of conduct (Dean, 1999/2006: 10; Rose, 1999/2004: 3; Gordon, 1991: 2; Foucault, 1991). As Nikolas Rose describes, governmentality includes 'all endeavours to shape, guide, direct the conduct of others' (Rose, 1999/2004: 3). Governing in this sense does not function through repressive force, but, 'seeks to shape our conduct by working through our desires, aspirations, interests and beliefs' (Dean, 1999/2006: 11). Hence, governmental power works through individual freedom (Rose, 1999/2004). This capacity to shape conduct is contingent on particular knowledge practises, since working through individual desires requires knowledge of the subject to be guided and the conditions that foster intended conduct. Mitchell Dean describes four dimensions of governing, each linked to ways of knowing: 1) forms of visibility, which emerge from particular ways of seeing and perceiving; 2) modes of thinking and questioning, which rely on specific vocabularies and rationalities for producing truth; 3) techniques of acting, intervening and directing, which are comprised of practical rationalities, expertise and 'know how'; 4) modes of forming subjects, which elicit, foster and attribute various capacities, statuses and orientations to particular agents (Dean, 1999/2006: 23, 30-32). Collectively, these modes

of knowledge shape the capacity to conduct ourselves and others (Dean, 1999/2006). In short, governing operates through knowing.

But what if *unknowing* or *limited knowing* also function as a regulatory techniques? How might discourses of ignorance works to produce certain kinds of subjects, orders, and power relations (Cooper, 2006)? No doubt, *unknowing* is inextricably bound with *knowing* as there are few clear boundaries for determining where knowing begins and ends. But what if a focus on unknowing reveals something different than what attention to knowing can yield?

Eve Kosofsky Sedgwick raises such questions in claiming that ‘ignorance is as potent and as multiple a thing there as is knowledge’ (Sedgwick, 1990: 4). Quoting Foucault, she notes, ‘there is no binary division to be made between what one says and what one does not say; we must try to determine the different ways of not saying such things. There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourse’ (Sedgwick, 1990: 3). In other words, ignorances ‘are produced by and correspond to particular knowledges and circulate as part of particular regimes of truth’ (Sedgwick, 1990: 8). Drawing from Sedgwick and Foucault, but broadening the category of ignorance to incorporate other forms of limited thought, I explore how limited knowing/thinking play a significant role in the governmentality of lesbian and transgender legal subjects. By limited knowing/thinking I refer to stoppages, gaps, limits and refusals upon thinking and knowing that occur within a particular logic or rationality, including: explicit references to what one doesn’t know; deliberate and less intentional refusals to know or think; logics and norms which render some facts as relevant and others as easily cast aside.

Limited thinking is not simply the opposite of knowing, nor a partial fragment of a more pure logic or authentic mode of thought. As Donna Haraway reminds us, all

knowledges are situated and partial, meaning they are bound by the time, place and particular location of the subject making knowledge claims (Haraway, 1991). Nor is limited thinking synonymous with irrationality. If rationality, in a governmentality sense, refers to deployments of knowledge that enable an activity to become thinkable and practicable (whether a theoretical framework, political paradigm, or pragmatic method), then limited thinking—which achieves similar results by rendering particular activities unthinkable and impractical—can be understood as a kind of inverse or hyper-rationality (Dean, 1999/2006: 211; Foucault, 1991: 96; Rose, 1999/2004: 24-28). Such limited thinking reflects what Linsey McGoey, drawing from Nietzsche, describes as the ‘will to ignorance’ within bureaucracies—a tendency to deploy ignorance strategically for highly functional outcomes (McGoey, 2007: 213, 228). Investigating the utility of limited thinking as a conceptual tool, I hope to make visible knowledge-power relations that might otherwise be taken for granted. This task should not be confused with a polemic against judicial ignorance, whereby lesbian and transgender people are positioned to enlighten judges (although I am not ruling out such a strategy either); rather, it is an attempt to interrogate the conditions which make certain kinds of ignorance possible and with what effect.

I locate limited thinking within the realm of social practise, rather than individual psyches. Limited thinking of individual agents (e.g. police, lawyers, judges) for example, is not simply the product of an autonomous rationality, but is sculpted and invoked by specific governing regimes (e.g., administrative rules, bureaucratic culture, duties and obligations) that compel agents to self-identify in particular ways, to ask some questions and not others, and to use particular forms of knowledge that foreclose upon others. Such techniques structure a field of vision that illuminates certain objects, while shadowing and obscuring others (Dean, 1999/2006: 32).

Multiple forms of limited thinking/knowing were deployed throughout the bathhouse case: lack of thought; refusal to know and think; self-proclaimed ignorance; limited reasoning. These manifestations of limited thinking were not uniform, but served different purposes and created varied effects, whether providing a means to avoid self-reflexivity, evade responsibility, claim innocence, provide distance from dangerous knowledge, maintain norms, or perpetuate hierarchies. Limited knowing was not a sporadic imperfection in logic, but played a vital role in the police capacity to carry out the raid, the lawyer's capacity to defend and the judge's capacity to rule. Below, I examine three examples: first, *careless thinking* on the part of the police officers carrying out the raid, second, *limited thinking* of both judge and defence lawyer in upholding the ban on cross-gender strip searches; and third, the judge's *refusal to know* when determining matters of relevance.

Queerly Unthinking Cops: The Privilege of Unknowing

Discourses of limited thinking played a key role in the police justification for using male officers to search a women's bathhouse. As Lead Detective Dave Wilson testified in court, *it did not occur to him* that using male officers might be upsetting for bathhouse patrons; he simply assumed entitlement to gaze upon semi-naked bodies (*R v Hornick Proceedings*, 23 Oct 2001: 82, 90, 118). Here, lack of thought denotes carelessness. Wilson's actions reflect lack of attentiveness, failure to deliberate, negligence, and obliviousness. Whether Wilson actually failed to consider the feelings of bathhouse patrons or simply dismissed them, he used discourses of careless thought as an alibi (i.e., 'I didn't know I was causing harm'). These claims of ignorance, which Sedgwick calls 'the privilege of unknowing,' are not simply a lack of knowledge, but an

epistemological position which enables otherwise unacceptable practises to occur (Sedgwick, 1990: 5; Howe, 2000).

Wilson's ignorance also blurred into wilful unknowing. When asked why he did not seek additional female officers to conduct the raid, Wilson again claimed limited knowledge:

Addario [Lawyer]: Would you agree with me that the investigation conducted by the men on your crew could have been conducted equally well by qualified female members of the Toronto Police Service?

Wilson: I don't think so

Addario: Why not?

Wilson: I knew the capabilities of these officers that were with me at the time. I couldn't certainly speak to the officers that you're speaking of, somebody's who's qualified, that doesn't necessarily mean they've got the same professionalism, integrity that my officers did.....

Addario: Are you telling us that there were no female members of the force who would qualify to conduct the type of investigation that was done that evening?

Wilson: Qualified, no I wouldn't know. There may have been.

Addario: You don't know because you didn't call around to see who was - - available.

Wilson: Correct...

Addario: --what I'm asking you about is whether or not you're suggesting that there aren't woman on the Toronto Police Service who are capable of behaving professional and with integrity on an investigation?

Wilson: Perhaps.

Addario: You just don't know?

Wilson: That's right. (*R v Hornick Proceedings*, 23 Oct 2001: 90-91, 95)

Wilson's limited knowledge serves multiple functions in this exchange. Wilson relies on his own ignorance (not knowing if there were qualified female officers) to justify using male rather than female officers. His logic is also contingent upon an association between uncertainty and risk; Wilson claims that choosing male officers he 'knows' is a better guarantor of professionalism than seeking female officers who he 'doesn't know.' Uncertainty serves another function in this passage: evasiveness. Claiming to be unaware if there were qualified female officers, Wilson attempts to sidestep Addario's accusations of sexism.

Wilson's reliance on tensions between knowing and unknowing proved crucial to the rationale that officially governed his actions. When further questioned on his decision to conduct the raid with male officers, Wilson testified that his officers had a 'special knowledge' of the Church Wellesley Community, an area in downtown Toronto known as the 'gay village' (*R v Hornick Proceedings*, 23 Oct 2001: 91).^{vi} Wilson noted his officers had several years experience in the community, having undertaken previous investigations at local establishments, namely the Bijou Club and the Barn (men's sex bars). Wilson claimed this experience gave his officers special 'expertise,' 'where other qualified...officers, scholastically might be prepared to do a liquor inspection, [but] practically speaking they wouldn't do as good a job' (*R v Hornick Proceedings*, 23 Oct 2001: 90, 93). Yet Wilson's logic was spectacularly circular, revealing a striking combination of naïve ignorance and blind hubris. According to Wilson, if women went to a bathhouse where there is sex but no men, they must be lesbians; if they were lesbians, they must be from the Church and Wellesley community; if from Church and Wellesley, then expertise about gay male residents in the area applies (*R v Hornick Proceedings*, 23

Oct 2001: 90-93). It did not occur to Wilson that non-lesbian-identified women might have sex with other women, that lesbians (or other bathhouse patrons) reside outside the Church Wellesley area, or that lesbians might require different policing tactics than gay men. For Wilson, the ability to conduct a proper investigation came not simply from knowing the law, but from knowing his target subjects, even if that knowledge was blatantly spurious.

So well did Wilson ‘know’ the bodies of the bathhouse patrons, he claimed not to be looking at them at all. Indeed, Wilson and his officers did not consider the investigation to be equivalent to a strip search; officers claimed to be searching a space rather than bodies (*R v Honick*, 2002: para 61). Wilson described himself as undertaking a ‘verbal liquor inspection’ as though he questioned women without looking at their bodies (*R v Hornick Proceedings*, 23 Oct 2001: 71). Evident here are key tensions between knowing and not knowing: Wilson emphasized his ‘expertise’ regarding the Church-Wellesley community to justify the inspection, but simultaneously claimed not to know what would occur at the bathhouse to counter the argument that he should have known to send female officers. Both his expertise and his ignorance served as the ‘rational’ foundation to justify his actions.

Limited Thinking in the Courtroom: Upholding the Cross-gender Search Ban

The crux of the final ruling in *R v Hornick* lays in a simple legal ban on cross-gender searches, whereby men cannot strip search women and vice versa. Yet the capacity to apply this principle in the bathhouse case required wilful ignorance of the rationale behind such a ban, as well as deliberate bracketing of sexual and gender identities. Judge Hryn never elaborated on the reasons for the ban; he simply proclaimed ‘policy and law clearly sets out that a male on female strip search is wrong’ (*R v Hornick*,

2002: para 83). The policy and law referenced by Hryn offers little elucidation; neither the acts, case law nor academic articles provide any explanation for the ban on cross-gender searches (*R v Mattis*, 1998, *R v Flintoff*, 1998, Newman, 1999). Even the Arbour Inquiry, which dealt specifically with male-on-female searches, provides no clear rationale, other than a vague reference to societal intolerance for the presence of ‘non-intimate members of the opposite sex during the performance of private functions’ (*Arbour Inquiry*, 1996: section 2.4).^{vii}

Only one case sheds light on the reasons for the prohibition, but it noted within a Toronto Police Services report, and not directly cited by Hryn (Lyons, 1999: 4-5). In *Conway v. Attorney-General of Canada* (also cited as *Weatherall*), the Supreme court recognized differential power relations among men and women as well as the ‘historical trend’ of male violence against women as a justification for prohibiting men from searching women in prison, but not vice versa (*Weatherall*, 1993). However, *Weatherall*, is not considered authoritative on searches, as it concerned ‘pat-down’ searches (rather than strip searches, which were the issue in *Hornick*) and it involved prisoners who have reduced privacy rights. Moreover, the strip-search policies applicable in *Hornick* were implemented subsequent to the *Weatherall* decision and prohibit *all* cross-gender strip searches, not just searches of women by men.

On the surface then, ‘gender’ functions as the official regulatory boundary for the strip-search policy. Yet, as Judge Hryn’s comments made clear, ‘sexuality’ is also at stake. Hryn not only ruled that the bathhouse raid constituted the ‘functional equivalent of a strip search’ but likened male officers’ conduct to ‘visual rape’ (*R v Hornick*, 2002: para 45, 80). Hryn did not denote a particular way of looking as the source of the rights breach (e.g., police ogled patrons); rather, the violation arose simply because male officers had seen semi-nude women without consent. Implicit in the rape analogy is a

presumed heterosexuality; the male gaze upon the female body is deemed dangerous because it is sexualized. Hence, it is not simply gender that governs the ban on cross-gender searches, but also sexuality.

Yet this sexuality-based rationale is limited in so far as it cannot reconcile non-heterosexualities. If, for example, the male officers were gay and sexuality uninterested in the women, would the gaze be considered benign and the search considered lawful? Conversely, would the gaze of a lesbian police officer upon a lesbian body constitute a similar form of ‘visual rape’? One of the undercover officers who investigated the bathhouse prior to the arrival of the male officers, did in fact identify as lesbian, thus disrupting the ban’s heteronormative logic (Millar, 2002). Here a paradox emerges, for the court draws upon sexuality to justify the ban on cross-gender searches, but cannot consider sexuality outside of heteronormativity, lest its logic unravel. Applying the ban thus requires that non-heterosexuality become invisible and unintelligible.

The application of the cross-gender ban is further challenged by presence of transgender men at the bathhouse. If the ban is taken seriously, then male officers could not conduct the search as it would violate the rights of female patrons, and female officers could not conduct the search, as it would violate the rights of male-identified transgender patrons. Since both male-to-female transwomen and female-to-male transmen were present at the bathhouse, the search paradox arises regardless of how one legally recognizes transgender identity. Hence, even if sexuality is set aside, a purely gender-based prohibition is troubled by the presence of transgender persons.^{viii} Accordingly, the court could not formally recognize the presence of transgender men at the bathhouse; transmen had to be absorbed into the female social body.^{ix}

Unpacking the ban on cross-gender searches reveals what feminists, transgender and queer theorists have long argued: namely that sex, gender and sexuality are not

discrete categories, but are inextricably bound up with one another, each concept relying on the others for its logic. The rationale of ban thereby functions only when given coherence through a male/female binary governed by a presumed heterosexuality. Queer and transgender identities exceed the ban's logic, thereby becoming legally unintelligible.

Matters of legal 'relevance': Refusing to know, Unwilling to think

Don't ask; You shouldn't know. It didn't happen; it doesn't make any difference; it didn't mean anything; it doesn't have interpretive consequences. Stop asking just here; stop asking just now...it makes no difference; it doesn't mean (Sedgwick, 1990: 53).

While Detective Wilson relied on discourses of 'ignorance' to justify his actions, the judge could not make similar claims. Since the presence of transgender persons and the sexuality of bathhouse patrons were explicitly discussed during the witness proceedings, the court was well-informed of these facts. To exclude these matters, however, the court need not render them unintelligible; the judge could simply dismiss such details as irrelevant. To render sexuality as inconsequential rather than inappropriate sidesteps controversies over imposed morality and reinstalls claims of judicial objectivity. Perhaps seeking to avoid potential accusations of homophobia (under the assumption that if one does not acknowledge identity-based differences, one cannot be accused of discriminating against them), the judge did not want to utter the word lesbian in court (Valverde, 2003: 71, 82, 97). Indeed, Hryn expressed discomfort stating aloud the words 'Pussy Palace', perhaps symptomatic of another kind of unknowing – a deliberate distancing from knowledge that 'one doesn't know because one shouldn't know' (Cooper, 2006: 934). Such epistemological distancing also characterises the rationale of 'relevance' albeit in less moralistic terms. Deciding something is irrelevant

marks an intentional setting aside of knowledge, a deliberate refusal to know or consider. Irrelevant details are purposefully cast aside lest they confuse, complicate or contaminate more significant facts. Accordingly, the curious absence of references in the final ruling to transgender, lesbian and queer sexuality would seem perfectly reasonable to the court: such details were simply inconsequential.

Indeed, one might argue that the presence of trans people at the bathhouse was legally irrelevant because the individuals charged were not (according to the court) trans-identified. The crown made a similar claim, arguing the defendants were never seen by male officers in a state of undress and therefore could not to seek remedy under the Charter. However, Judge Hryn rejected this argument, stating that the expectation of privacy was not limited to the organizer's personal state of dress, but extended to the event as a whole. According to Hryn, the event 'by definition would have nude or partially nude women present exploring their sexuality with the expectation that men were excluded' (*R v Hornick*, 2002: para 54). Hryn's language choice is significant; he carefully extends privacy rights to other patrons, while sidestepping any reference to transgender persons. Whether Hryn deliberately excluded transgender people here, or simply failed to consider their presence, the effect is the same; transgender bodies were located outside the realm of thinkability, and thereby rendered invisible.

No doubt the judge would deny he had engaged in any form of censorship. In one sense this is correct, for the judgment does not constitute conventional repression of queer gender and sexuality. Ultimately, the ruling chastised police rather than bathhouse patrons. However, the court's refusal to speak about queer bodies and sexualities reflects a more subtle kind of prohibition, one perhaps more insidious. Limited thought did not take the form of 'irrational' homophobia or explicitly transphobic logic, but arose within carefully argued legal rationalities. The very act of sorting through evidence, a crucial

component of any judgment, marked a form of limited thinking that is deeply imbedded within legal processes. Such modes of thinking foreclose upon particular questions before they are even asked. The danger of such epistemological prohibition lies in its apparent reasonableness.

CONCLUSION

R v Hornick provides an important case study for examining the legal regulation of bodies and sexualities through modes of invisibility and unthinkability, particularly because Canada is frequently revered for its embrace of lesbian, gay and (to a lesser extent) transgender rights. However, these trends arguably persist elsewhere. The West Australian Gender Reassignment Act 2000, for example, offers legal protection to post-operative transgender persons, but excludes those who are pre- and non-operative, thus rendering them legally invisible (Sharpe, 2002: 189). The UK's Gender Recognition Act 2004 does not necessarily demand surgery, but requires 'permanent crossing' from one gender to another, thereby denying recognition to transgender persons who shift between or contest the male/female binary (Sandland, 2005: 48-50; Sharpe, 2007: 71). In the US, current federal prison policy refuses to recognize *any* gender change (such that transgender men are placed in women's prisons and transgender woman are placed in men's prisons at huge risk to their safety) signalling a particularly violent form of denial (Spade, 2008 forthcoming). The numerous jurisdictions that have annulled marriages involving transgender persons provide further examples of wilful ignorance. Unlike divorce, which declares the end of a marital relationship, annulment denies one ever existed (Flynn, 2006: 39). The UK Civil Partnership Act 2004 extends a marriage model to same-sex couples, but does so on the condition of sexual erasure; the act removes the consummation requirement and excludes adultery as grounds for divorce. The

government noted that consummation and adultery each have ‘a specific meaning within the context of heterosexual relationships and it *would not be possible* nor desirable to read this across to same-sex civil partnerships’ [my emphasis] (quoted in Stychin, 2006: 907). Although the absence of sex in the Act may be politically desirable for other reasons (see Barker, 2006), the legal ‘impossibility’ of same-sex consummation and adultery arguably marks a refusal to think sex beyond heterosexual penetration (Stychin, 2006: 907). These examples suggest that despite winning important legal gains, lesbian and transgender bodies and sexualities often remain unthinkable in law.

Although I have mapped the ways in which limited thinking and knowing produce invisibility as both effect and mode of regulation, I do not wish to suggest that promoting visibility is a necessary or desirable antidote. Indeed, queer visibility in the legal domain has often led to criminalization and social stigma. The infamous *R v Brown* (1993), which involved private consensual acts of sadomasochism among gay men, provides a UK case in point, where the hypervisibility of gay male sexuality not only invoked a pathologized queer body, but resulted in job loss, social hardship and imprisonment (Moran, 1995: 225; Stychin, 1995: chapter 7). Even when legal visibility does not invoke punishment, recognition-based politics can facilitate other undesirable consequences, such as assimilation of transgressive practises or entrenchment of new normative hierarchies. In this sense, ‘Visibility is a trap; it summons surveillance and the law; it provokes voyeurism, fetishism, the colonialist/imperial appetite for possession’ (Phelan, 1998: 6). More importantly, as Evelyn Hammonds argues, ‘visibility in and of itself does not erase a history of silence nor does it challenge the structure of power and domination, symbolic and material, that determines what can and cannot be seen’ (Hammonds, 1994: 141). Accordingly, a bathhouse judgment that recognized the embodied, sexual identities

of lesbian and transgender patrons may not have been more politically advantageous than the judgment that was delivered.

Moreover, the boundaries between visibility and invisibility, and between thinkability and unthinkability are highly fraught, with unpredictable and often conflicting effects. The bathhouse raid generated public attention, which furthered the organizers' goal of making queer sexuality more visible, even though the terms of that visibility were considerably 'flattened' by both court and media (Bain and Nash, 2007: 27-30). Similarly, the ruling will likely deter future raids, even though it ultimately affirmed the state's right to intrude upon queer sexual spaces. Just as increased visibility of queer identities can usher in new forms of political freedom *and* enable more intensive regulation, discourses of 'limited thinking' have contradictory and unpredictable effects.

The remedy for 'limited thinking' is not 'better thinking,' but rather a critical interrogation of the conditions that make such rationalities possible. The task is not only to expose the process by which discourses of ignorance are mobilized as techniques of governance, but to provide a basis upon which to challenge the socio-political consequences and 'truth effects' of such modes of thought (Valverde, 2003: 7). If, as Michael Taussig argues, 'knowing what not to know' is one of the most powerful forms of social knowledge, then paying attention to discourses of unknowing is crucial for contesting normative power-relations (Taussig, 1999: 2). The challenge then, is to seek new ways of disrupting the conditions of knowing and unknowing, to continuously unsettle the terms by which law claims both knowledge and ignorance.

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ⁱⁱ The Toronto Women's Bathhouse Committee was founded in 1998 by a group of queer activists who wanted to create spaces for women to have 'casual, kinky and public sex' with other women. The Committee has since hosted several events each year, renting gay male bathhouses (which have existed for decades in Toronto) for use by women and transgender persons. Similar women's bathhouses have been hosted in other Canadian cities, including Hamilton and Halifax. See Gallant, Chanelle and Lorelee Gillis (2001) 'Pussies Bite Back: The Story of the Women's Bathhouse Raid', *Torquere: Journal of the Lesbian and Gay Studies Association* 3: 152-167.

ⁱⁱⁱ This is not to diminish the significance of cases where same-sex acts among women were punished by criminal law in Europe and North America. See, Crompton, Louis (1981/2) 'The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791', *Journal of Homosexuality* 6 (1/2): 11-25, Robson, Ruthann (1990) 'Lesbianism in Anglo-European Legal History', *Wisconsin Women's Law Journal* 5: 1-42, Sorainen, Antu (2006) 'Productive Trials: English and Finish Legislation and Conceptualisations of Same-Sex Sexualities in Course of Trials of Oscar Wilde, Maud Allan, Radclyffe Hall and Herb Grove, from 1885-1957', *SQS - Journal for Queer Studies in Finland* 1 (1): 17-38.

^{iv} The legal history of sodomy in Britain is itself characterized by wilful ignorance. Not only was sodomy described as 'a crime not fit to be named' but the decision to exclude women from the statue arose from a fear that verbalization of such acts would make

otherwise ignorant women aware of, and thereby more prone to engage in, such behaviour. See, Valverde, Mariana (2007) 'Bodies, Words, Identities: The Moving Targets of the Criminal Law', pp. 224-251 in M. Dubber & Farmer, L. (eds), *Modern Histories of Crime and Punishment*. Stanford, Stanford University Press, Arnup, Katherine (1989) "'Mothers Just Like Others": Lesbians, Divorce, and Child Custody in Canada', *Canadian Journal of Women and the Law* 3: 18-32.

^v Thanks to Mariana Valverde for bringing this point to my attention.

^{vi} The Toronto neighbourhood at the intersection of Church and Wellesley Streets is home to many gay-owned businesses, residences and community organizations, as well as the city's annual Gay Pride Parade. While associated with the broader lesbian, gay, bisexual and transgender community, the area is primarily populated by gay men, particularly those who can afford its increasingly high rents.

^{vii} The report notes concerns about sexual harassment and assault by male guards against female prisoners, but nowhere is a direct reason given for the cross-gender ban.

^{viii} Police searches of transgender persons have been subsequently addressed in Ontario law; transgender persons can now choose between male or female officers for search purposes, see Chung, Matthew (2006) 'Ontario upholds transsexual rights', *Globe and Mail* May 25: A2.

^{ix} Curiously enough, the term 'trans' appears once in the ruling, perhaps another case of careless thinking, for it suggests the judge did not fully appreciate the implication of recognizing transgender identities. Significantly, it is 'trans' and not 'transgender' or 'transsexual,' as the latter terms would challenge more directly the search policy logic. 'Trans' arguably functions as an empty signifier: a place-holder which denotes formal inclusion, but lacks substantive meaning.

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