Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the *Divorce Act*, 1968

Karen Pearlston*

Abstract

The Divorce Act, 1968, provided no-fault divorce for the first time. It also included a list of fault-based grounds for divorce. In addition to the traditional grounds, a spouse whose wife or husband had "engaged in a homosexual act" during the marriage could petition for divorce. This novel provision was aimed at giving husbands a way to divorce their lesbian wives. A close reading of the resulting jurisprudence and surrounding context shows not only that courts struggled to define the homosexual act between women, but also that the legal history of lesbian women differs from that of gay men in a number of respects. Notably, male homosexuality was regulated primarily through criminal law. In contrast, when parliamentarians specifically addressed lesbians, they turned their minds to the family and family law.

Keywords: divorce, history, sexuality, Divorce Act 1968, lesbianism, family law, homosexuality

Résumé

La *Loi sur le divorce de 1968* offrait, pour la première fois, le divorce sans égard à la faute, mais aussi la liste de motifs de divorce reconnus par la loi. En plus des motifs habituels, la *Loi* prévoyait qu'une personne dont l'épouse ou l'époux avait eu des relations homosexuelles durant le mariage avait un motif de divorce valable. Cette nouvelle disposition visait à donner aux maris la possibilité de divorcer de leur femme lesbienne. L'étude approfondie de la jurisprudence et du contexte qui en a découlé indique que non seulement les tribunaux ont eu beaucoup de mal à définir ce qu'est un acte homosexuel entre femmes, mais aussi que l'histoire juridique de l'homosexualité féminine est très différente de celle de l'homosexualité masculine. Par exemple, l'homosexualité masculine était abordée par le biais du

* This research has been presented at conferences of legal scholars, historians, and legal historians, all of whom provided valuable feedback. Tom Hooper and Gary Kinsman shared their insight into and knowledge of queer history in Canada. My colleagues at UNB law, Jula Hughes and Aloke Chatterjee, shared their criminal law expertise. Thanks also to Jessi Taylor for her help and encouragement. The anonymous reviewers for this journal gave me the benefit of careful reading and insightful comments that pushed me to think more deeply and rigorously. Any remaining errors are my own. This article is dedicated to the 1970s and 1980s lesbian-feminists and anarcha-feminists who worked angrily and joyously to politicize the vulva.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2017, Volume 32, no. 1, pp. 37–53. doi:10.1017/cls.2017.4

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

droit criminel, mais lorsque les parlementaires traitaient d'affaires lesbiennes, ils pensaient surtout en fonction de la famille et du droit familial.

Mots clés : divorce, histoire, sexualité, *Loi sur le divorce de 1968*, lesbianisme, droit familial, homosexualité

Introduction

The *Divorce Act*, 1968, is acknowledged as a pivotal event in the legal history of women in Canada. It made no-fault divorce available for the first time and led directly to the development of legislation mandating equal property sharing at marriage breakdown and to most of what we think of as family law today. Even so, it is important to exercise caution when claiming legal victories. Lesbians may have been winners in 1968 because they, like other women, could more easily get out of unhappy marriages, but some lesbians found themselves under particularized judicial scrutiny in a way that lesbians in Canada had never before experienced. Not only were separated and divorced lesbians who were mothers threatened with loss of custody or access, but the 1968 act included a new ground for divorce: that a spouse "since the celebration of the marriage…has engaged in a homosexual act."[1]

It is important to appreciate that 1968 saw *two* major reforms to Canada's law regulating sexuality: the partial decriminalization of homosexual conduct, and the new *Divorce Act*. The knowledge that private homosexual conduct between consenting adults would soon be decriminalized opened parliamentarians to the possibility of adding such conduct to the fault-based grounds.[2] As I argue, the addition of the homosexual act ground to the *Divorce Act,* 1968, was designed to give husbands a vehicle for divorcing their lesbian wives. This provision required the courts to define the requisite homosexual act. It forced the law to examine sexual intimacy between women during the period when lesbians were becoming more publicly recognized in Canada, but well before the trend toward equal rights for LGBT people took off.[3]

---

1 *Divorce Act,* SC 1968, c 24, s 3(b). This was the first federal divorce legislation in Canada. It included some grounds for divorce that were fault based, including s 3(b), and others that were not based on fault. Most of the fault-based grounds, including the homosexual act, were dropped when the statute was repealed and replaced in 1985. See *Divorce Act*, RSC 1985, c 3.

2 The *Divorce Act,* 1968 was passed unanimously in December, 1967. John English, "Trudeau, Pierre Elliott," in *Dictionary of Canadian Biography*, vol. 22, University of Toronto/Université Laval, 2003, accessed July 26, 2014, http://www.biographi.ca/en/bio/trudeau_pierre_elliott_22E.html. The legislation decriminalizing private homosexual acts between persons 21 or over was passed during the next session of Parliament in 1969. However, its predecessor, Bill C-195, was introduced and extensively debated in 1967, during the same session as the divorce bill. See Michel Bédard, "Omnibus Bills: Frequently Asked Questions" (2012), accessed July 26, 2014, http://www.parl.gc.ca/content/lop/researchpublications/2012-79-e.htm.

3 The 1968 *Divorce Act* was in force from July 2, 1968, to June 1, 1986, that is, from the beginning of the Gay Liberation Movement (conventionally understood as commencing with the 1969 Stonewall Rebellion) to the achievement of statutory human rights protection for sexual orientation in the first English-Canadian province to do so (Ontario, 1986).

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

The specific lesson here is that the same wave of reforms that ostensibly modernized and liberalized federal approaches to homosexuality redounded to the detriment of persons who had not previously been subject to the law specifically as lesbians. This article argues that the reform moment of the late 1960s led to the explicit regulation of lesbians through the instrument of family law.[4] The women in the cases discussed below were the guinea pigs: the first of their kind in the long road to legal recognition and the recent recuperation of lesbians and gay men into families with the attendant privatized respectability.[5]

Most studies of lesbians in Canada in the period look at the development of lesbian subjectivity through the building of visible lesbian community.[6] Divorced lesbians attracted scholarly attention in the 1980s and 1990s, when the fact of their lesbianism made it difficult for them to retain custody of their children.[7] In contrast, judicial analyses of lesbianism as a ground for divorce have not been much investigated.[8] There are several possible explanations for this lack of interest. First, there are only a few reported cases on the homosexual act ground. Second, the ground itself was a somewhat obscure legal provision that was a part of our law for only 17 years. Third, the law was repealed in the mid-80s, just about the time that legal campaigns to get sexual orientation into human rights codes made some gains and also when the legal fight for relationship recognition began to take off.

---

4 The legal cases I examine were concerned solely with identifying the homosexual act between women, and this article is concerned with the development and regulation of the legal category of lesbian. My conception of women includes trans women. It is likely that some of the people in the cases discussed below did not identify as lesbian, and some of them may have been trans men or bisexual. These identities were not legally recognized at the time and were therefore subsumed into the category of lesbian, perhaps particularly in family law. The legal history of trans people in relation to family law is beyond the scope of this paper, but see Mossman, Bakht, Gruben, and Pearlston, *Families and the Law: Cases and Commentary*, 2nd ed. (Toronto: Captus Press, 2015), 136–144 for a partial assessment.

5 See Mariana Valverde, "A New Entity in the History of Sexuality: the Respectable Same-Sex Couple," *Feminist Studies* 32 (2006): 155–162; Angela Harris, "From Stonewall to the Suburbs? Toward a Political Economy of Sexuality," *William & Mary Bill of Rights Journal* 14 (2005–2006): 1539–1582. See also the recent changes encompassed in Ontario's *All Families are Equal Act*, SO 2016, c 23, in force January 1, 2017.

6 See, for example, Becki L. Ross, *The House That Jill Built: A Lesbian Nation in Formation* (Toronto: University of Toronto Press, 1995); Line Chartrand, "Remembering Lesbian Bars: Montreal, 1955–1975," *Journal of Homosexuality* 25 (1993): 231–269; Elise Chenier, "Rethinking Class in Lesbian Bar Culture Living 'The Gay Life' in Toronto, 1955–1965," *Left History* 9 (2004): 85–118; Liz Millward, *Making a Scene: Lesbians and Community Across Canada, 1964–1984* (Vancouver: University of British Columbia Press, 2015). But see Cameron Duder, *Awfully Devoted Women: Lesbian Lives in Canada, 1900–65* (University of British Columbia Press, 2010), whose account of lower middle-class lesbians after the second world war provides some context for the women in the cases discussed below.

7 Harvey Brownstone, "The Homosexual Parent in Custody Disputes," *Queen's Law Journal* 5 (1980): 199–240; Wendy Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent," *Canadian Journal of Women and the Law* 1 (1986): 505–31; Katherine Arnup, ""Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada," *Canadian Journal of Women and the Law* 3 (1989–90): 18–32; Susan B. Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?" *Canadian Journal of Family Law* 15 (1998): 131–152. See also Chris MacNaughton, "Who Gets the Kids?" *Body Politic* 34 (June 1977): 12–13.

8 The exception is Arnup, "'Mothers Just Like Others'." See also Mary Eaton, "Lesbians and the Law," in *Lesbians in Canada,* ed. Sharon Dale Stone (Toronto, ON: Between the Lines, 1990), 114–15.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

Because any perceived problem with the homosexual act ground was solved by the repeal and replacement of the *Divorce Act* in 1985,[9] it would not have seemed important to activists and academics who were more interested in advancing the struggle for equal rights and relationship recognition.[10]

This article begins with a brief history of fault grounds for divorce. It then turns first to the creation and structure of the homosexual act ground and second to a critical analysis of its interpretation. Judges struggled to define the requisite act, and also to assess its significance in relation to the other fault grounds for divorce.

History of Divorce Laws

Anglo-Canadian divorce law was derived from canon law. Canon law courts did not dissolve marriages, but they could grant a judicial separation upon proof of an "intolerable matrimonial wrong."[11] In England, the church's jurisdiction over divorce was eliminated by the enactment of the *Matrimonial Causes Act*, *1857*, which created a civil Court of Divorce and Matrimonial Causes.[12] The 1857 legislation codified the grounds for divorce along gendered lines. A husband could divorce his wife on proof of her adultery. A wife could divorce her husband for adultery only where his conduct was aggravated by incest, bigamy, or cruelty. In addition, a wife, but not a husband, could petition for divorce on the grounds of rape, sodomy, or bestiality.[13]

In contrast with adultery, which was considered normal albeit sinful heterosexual conduct, rape, sodomy, and bestiality were abnormal and were often grouped together as the "unnatural acts." Sodomy at canon law included, but was not necessarily limited to, sex between men. According to William Eskridge, "for centuries no English-language statute defined precisely what conduct constituted the crime against nature" but "[c]ase law specified sodomy to include anal intercourse by a man with a woman or girl, another man or boy, or a beast; women could only commit sodomy by lying with a beast…."[14] Thus, the sexual conduct denoted by the "unnatural acts" was classified as distinct from the penetration of a vagina by a penis that was required

9 See *Divorce Act*, RSC 1985, c. 3.

10 Repeal of the homosexual act and sodomy grounds for divorce was among the demands made of the federal government on Parliament Hill at "the first large-scale gay demonstration in Canada," Canadian Lesbian and Gay Archives. "We Demand, 1971," accessed March 15, 2017, http://www.clga.ca/Material/Records/docs/wedemand.htm. It was also among the gay rights demands adopted in 1977 by the federal NDP, "NDP adds gay demands to party policy," *Body Politic* 36 (September 1977): 4. However, "Reforms to the Divorce Act never caught fire as a movement issue," Canadian Lesbian and Gay Archives. "What we demanded; What we got," accessed March 15, 2017, http://www.clga.ca/Material/Records/docs/wegot.htm#div.

11 J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 493. Parliament could dissolve a marriage, but such actions were rare. See Sybil Wolfram, "Divorce in England 1700–1857," *Oxford Journal of Legal Studies* 5 (1985): 155–186.

12 *Matrimonial Causes Act, 1857* (UK), 20 & 21 Vict, c 85, s 6.

13 Ibid., s 27.

14 William D. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America 1861–2003* (New York: Viking Penguin, 2008), 2.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

to prove adultery.[15] Further, it was conduct that was seldom engaged in by women: woman who were anally penetrated by men were rarely viewed as a guilty party.

For the first 100 years after confederation, Canada's federal government exercised its jurisdiction over marriage and divorce only in limited ways. Consequently, the grounds for divorce, although all fault-based, varied from province to province.[16] The 1968 *Divorce Act* provided Canada with its first uniform divorce law. It also revolutionized family law by making no-fault divorce possible for the first time.[17] The importance of this paradigm shift has tended to overshadow the retention of the traditional fault grounds (albeit in gender neutral form), and especially the addition of the homosexual act ground in s 3(b):

> 3. … a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage,
> *(a)* has committed adultery;
> *(b)* has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;
> *(c)* has gone through a form of marriage with another person; or
> *(d)* has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.[18]

As Cynthia Peterson observed in 1994, the legislation had a "heterosexis[t]… structure" because it grouped the homosexual act ground "together with 'sodomy, bestiality and rape' … rather than treating a 'homosexual act' as a form of adultery."[19]

This structure was intentional. Although it could technically include bestiality, fellatio, and cunnilingus,[20] Anglo-Canadian law in the 1960s strongly associated "sodomy" with anal sex between men.[21] In the liberal atmosphere of the late 1960s,

---

15 There is no statutory definition of adultery in Canada or the UK. At common law, adultery was defined as "voluntary sexual intercourse between a married person and a person of the opposite sex other than his or her spouse," Julien D. Payne, *The Law Relating to Divorce and Other Matrimonial Causes in Canada,* 2nd ed. (Calgary: Burroughs & Co., 1964), 415. The act of adultery required at least "an attempt to commit adultery by the introduction of the male organ into the female…even though the attempt has not fully succeeded. Masturbation or other practices falling short of such penetration do not constitute adultery, but an inference of the commission of adultery may be drawn from such conduct," ibid., 417. The opposite sex definition of adultery was successfully challenged in *PSE v PDD,* 2005 BCSC 1290, 50 BCLR (4th) 34, 259 DLR (4th) 34 (SC), holding that adultery may include same-sex sexual conduct. See also *Thebeau v Thebeau,* 2006 NBQB 154, 27 RFL (6th) 430 (QB).

16 Wendy J. Owen and James M. Bumsted, "Canadian Divorce Before Reform: The Case of Prince Edward Island, 1946–67," *Canadian Journal of Law and Society* 8 (1993): 1–44.

17 In addition to the fault-based grounds, a spouse was permitted to petition for divorce on the ground of permanent marriage breakdown, which could be proved by living "separate and apart" from the other spouse for no less than three years, *Divorce Act,* 1968, s 4(e)(i).

18 *Divorce Act*, 1968, s 3.

19 Cynthia Peterson, "Living Dangerously: Speaking Lesbian, Teaching Law," *Canadian Journal of Women and the Law* 7 (1994): 327.

20 Eskridge, *Dishonorable Passions*, 2–3.

21 See Alan Milner, "Sodomy as a Ground for Divorce," *Modern Law Review* 24 (1960): 43–51, considering "whether the 'sodomy' of … the *Matrimonial Causes Act* should be interpreted as relating only to the sodomy of the husband with a third party, or also to sodomy with his wife." Ibid., 44. According to Eskridge, "in the course of the twentieth century, homosexuality became synonymous with sodomy," Eskridge, *Dishonorable Passions*, 6.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

where public discussion of sex was becoming acceptable, and in anticipation of the partial decriminalization of homosexual sex, some parliamentarians noticed that the divorce reform bill did not include lesbian sexual activity as a ground for divorce. As Robert McCleave, a Tory MP from Halifax stated during the Parliamentary Committee study of the bill:

> I believe that every other situation which could arise is covered… where [the bill] mentions adultery, rape, sodomy, bestiality, cruelty, desertion, non support, bigamy, non-consummation…. I suggest that possibly we were not exact enough to rescue men from marriages in which the female partner is a practising lesbian, but I think this can be cured by a simple amendment, if it is not already contained in the legislation before us.[22]

New Democratic Party MP Arnold Peters recognized that decriminalization made it possible to address the problem identified by McCleave, commenting that, "We will have to look at the problem of homosexuality from the point of view of at least allowing acts between two consenting adults conducted in private…."[23]

The bill was soon amended to include homosexuality. McCleave praised the amendment, stating that, "The minister has adopted as grounds for divorce adultery, sodomy, bestiality, rape, and has added homosexuality—all instances of human fault." He later added: "The minister has added the ground of homosexuality. I believe that covers cases where a man is married to a practising lesbian. The committee was not able to deal with this matter and the minister, by one magic word, has solved the problem."[24] These excerpts from the debates show that Parliament intended to include lesbian sex as a ground for divorce, yet that message did not always come through clearly. For example, New Democratic Party MP John Gilbert, a lawyer from Toronto, worried that the homosexual act language would not be understood as including lesbianism, "One would think that lesbian acts should also be included. I think that is a shortcoming with respect to this particular provision in the bill."[25]

Academic lawyers also were confused about which homosexual acts could constitute grounds for divorce. Bernard Green noted that "[w]hat adultery is in law has been made plain in the decided cases," and went on to ask, "[i]f the respondent is seen kissing and embracing a young man with passion has he engaged

---

22 *House of Commons Debates,* 27th Parl, 2nd Sess, No 5 (4 December 1967) at 5021 (Robert McCleave). McCleave had urged the inclusion of lesbianism as a ground for divorce as early as 1960. See *House of Commons Debates*, 24th Parl, 4th Sess, No 1 (8 December 1960) at 635 (Robert McCleave).

23 *House of Commons Debates,* 27th Parl, 2nd Sess, No 5 (4 December 1967) at 5024 (Arnold Peters).

24 *House of Commons Debates,* 27th Parl, 2nd Sess, No 5 (5 December 1967) at 5089, 5091 (Robert McCleave). For an intriguing account of the social and cultural background to "the problem," see Lauren Jae Gutterman, "Another Enemy Within: Lesbian Wives, or the Hidden Threat to the Nuclear Family in Post-war America," *Gender and History* 24 (2012): 475–501.

25 *House of Commons Debates,* 27th Parl, 2nd Sess, No 5 (15 December 1967) at 5501 (John Gilbert).

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

in the proscribed conduct? If he is participating in fellatio, either actively or passively?"[26] Similarly, D. Mendes da Costa thought that:

> The expression 'or has engaged in a homosexual act' raises … difficulty for it lacks a heretofore established meaning. It may be that this expression includes conduct which would not constitute 'sodomy'. Being available to either spouse it may, perhaps, also encompass acts of lesbianism. In any event, the precise content of these words cannot be stated with certainty."[27]

In contrast, Julien Payne was confident that the legislation covered lesbianism because the ground permitted either a husband or a wife to petition for divorce. In his view, the phrase "'engaged in a homosexual act' [was] exceedingly vague" but since "it apparently refers to conduct other than sodomy, which constitutes an independent ground for divorce," he thought that the courts would probably "interpret the clause restrictively and confine it to acts between members of the same sex which involve the surrender of the sexual organs."[28]

Payne's was the better view. First, by noting that the act was not sodomy, which was already singled out as a ground, he implicitly recognized the practice of oral and manual sex and that these were not necessarily penetrative. Second, by confining the act to conduct involving "the surrender of the sexual organs," he was able to differentiate between the guilty act itself and less serious conduct, such as Green's example of "kissing and embracing … with passion." This approach was more doctrinally coherent. It approached homosexual conduct similarly to adultery, which required proof of genital penetration. Such coherence was not, however, achieved in the reported cases.

The legal definition of the matrimonial offenses of adultery, bestiality, rape, and sodomy developed over hundreds of years. In contrast, the homosexual as a category or type of person did not emerge until the nineteenth century.[29] It was only in 1885 that the English parliament criminalized acts of "gross indecency" between men.[30] Canada followed suit in 1890.[31] Gross indecency was "never … defined in statute."[32] It "covered all sexual acts between males not already covered

---

[26] Bernard Green, "The Divorce Act of 1968," *University of Toronto Law Journal* 19 (1969): 633. He added, "[t]hese questions raise a more difficult problem: why should divorce legislation treat homosexual activity in a manner different from that of heterosexual conduct? In other words, why should a husband be entitled to a divorce if he finds his wife engaging in cunnilingus with her girl friend but be refused a divorce—unless he can prove cruelty—if he finds her performing fellatio on her male friends?" These concerns were perhaps addressed in *PSE v PDD* 2005 BCSC 1290, discussed in n. 15, above.

[27] D. Mendes da Costa, "The Divorce Act, 1968, and Grounds for Divorce Based Upon Matrimonial Fault," *Osgoode Hall Law Journal* 7 (1970): 141–42.

[28] Julien Payne, "The Divorce Act (Canada), 1968," *Alberta Law Review* 7 (1969): 10.

[29] Same-sex sexual practices had always existed, and were generally condemned, but in the "latter part of the nineteenth century" there developed a "new concern with the homosexual person, both in legal practice and in psychological and medical categorization" which "marks a crucial change," Jeffrey Weeks, *Sex, Politics & Society*, 2nd ed. (London: Longman, 1981), 102. For the similarities in Canadian social and legal history, see Gary Kinsman, *The Regulation of Desire*, rev. ed. (Montreal: Black Rose, 1996), 128.

[30] *Criminal Law Amendment Act* (UK), 48 & 49 Vict, c 69, s 11.

[31] *An Act Further to Amend the Criminal Law*, SC 1890, c 37, s 5.

[32] Alex K. Gigeroff, *Sexual Deviations in the Criminal Law* (Toronto: University of Toronto Press, 1968), 46.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

by buggery,"[33] and, by its lack of specificity, provided little guidance for the interpretation of homosexual acts between men in the matrimonial context, and none at all for women. Lesbians were almost never subject to criminal legal regulation, even after the offense of gross indecency was rendered gender neutral in 1954.[34] Further, according to the historian Elise Chenier, lesbians were rarely studied by sexologists.[35] By including lesbian conduct, the homosexual act ground in the *Divorce Act,* 1968, opened lesbian sex to the kind of medicolegal scrutiny to which gay men's sexual practices were subject. Judges were expected to define the homosexual act between women with little assistance from precedent, medicine, or sexology.

"Where There's no Penis Between Us Friends":[36] Judicial Decision-Making about Lesbian 'Homosexual Acts'

The analysis below focuses on four of eight cases citing the homosexual act ground for divorce that were published in law reports between 1968 and 1986. The cases discussed are those where the homosexual act between women was defined and its consequences considered.[37] Reported cases are selected for publication either because they make new law or because they are particularly sensational for some reason. They are usually very few in number when compared with the many cases that go through the courts but are not selected for publication. In addition, reported cases are not necessarily representative of the unreported cases.[38]

The story begins with a 1972 case from Prince Edward Island.[39] The Morrisons were married in 1965. They were childless and lived in Charlottetown. Mrs. Morrison

---

33 Kinsman, *Regulation of Desire*, 129.

34 *Criminal Code*, SC 1953–54, c 51, s 149. Although "lesbians were ignored by English law," they were subject to criminal sanction in continental Europe. See Louis Crompton, "The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791," *Journal of Homosexuality* 6 (1980–81): 19. English legislators resisted attempts to expand the gross indecency prohibition to cover lesbian conduct. See Laura Doan, *Fashioning Sapphism: The Origins of a Modern English Lesbian Culture* (New York: Columbia University Press, 2001), 31–63. But see Constance B. Backhouse, "Canada's First Capital 'L' Lesbian Sexual Assault: Yellowknife, 1955," in Backhouse, *Carnal Crimes* (Toronto: Osgoode Society, 2008), 193–226. The accused in that case was prosecuted for indecent assault, not gross indecency.

35 Elise Chenier, *Strangers in Our Midst: Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press, 2008), 27.

36 Alix Dobkin, "View from Gay Head," *Lavender Jane Loves Women* (Women's Wax Works, 1974).

37 Two of the other four reported cases involve allegations of lesbianism which were not substantiated. See *S (CE) v S (LJ)* (1980), 30 N.B.R. (2d) 458, 70 A.P.R. 458, 1980 CarswellNB 242 (QB) where the divorce was granted on the alternate ground of cruelty, with custody going to the wife. See also *Hahn v Stafford* [1985] OJ No 595, 1985 CarswellOnt 1871(HCJ). The final two reported cases involve sex between men. They are notable for their lack of discussion regarding the homosexual act. See *King v King* (1985), 47 RFL (2d) 58, [1985] OJ No 432, 1985 CarswellOnt 295 (HCJ) and *Carson v Carson* (1985), 61 NBR (2d) 351, 46 RFL (2d) 102, 1985 CarswellNB 25 (QBFD).

38 There were 38,116 divorce petitions filed during the first year of the new Divorce Act's operation, with 87 of those petitions stating the homosexual act as a ground, see Mendes da Costa, "The Divorce Act 1968," 118. I have sampled approximately 4,000 divorce case files for the province of New Brunswick and for the York Judicial District (Toronto) in Ontario and found 16 files in which a spouse committing a homosexual act was a ground for the petition. Of these, twelve are about men and only four involve lesbians. In contrast, six of the eight reported cases are about lesbianism. Arguably, the editors of the law reports were more interested in the cases involving sex between women, either because the definition of the homosexual act between women was the issue of legal significance, or because they were more sensational.

39 *Morrison v Morrison*, 1972 CarswellPEI 5, 2 Nfld & PEIR 465, 24 DLR (3d) 114 (*sub nom M v M*) 7 RFL 384) (SC).

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

probably met Mrs. G in 1969, when they both played on a "ladies' softball team" that traveled to Halifax in association with the Canada Games.[40] It was then that their relationship began, or at least became visible to Mr. Morrison. He testified at the divorce trial that Mrs. G (who lived thirty-five kilometres away) stayed at the Morrison home the night before the two women left for Halifax. On that occasion: "They were having a few drinks and Mrs. G made out she was drunk and she laid in our bed. When it was time to go to bed I couldn't get her up so I had to sleep on the couch and my wife and Mrs. G slept in the bed."[41] After that, the two women were together as often as possible. They left Prince Edward Island and moved together to Ontario in the summer of 1971.

Mr. Morrison served his wife with a divorce petition in November of that year. The relationship between the two women seems to have broken off at that point. Mr. G did not wish to separate from his wife and, as the judge at the divorce trial put it, "Apparently Mrs. G motivated, among other things, by the fact that she had three children, took psychiatric treatment and has remained with her husband and family."[42] Mrs. Morrison appears to have been unrepentant. She did not contest the divorce or deny the allegations.

Mr. and Mrs. G and Mr. Morrison testified at the trial. Nicholson J listened to evidence that the two women were intimately involved with each other for almost two years. They spent long periods of time at each others' homes. Both husbands said that they had seen their wives doing what all described as "kissing and petting each other's body" on numerous occasions. On some of those occasions, according to Mr. Morrison, "they did not have any clothes on, bare naked."[43] The Morrisons sought help from a physician but, according to Mr. Morrison, the doctor advised them that Mr. Morrison should, "Take her and Mrs. G by the back of the neck and throw them to hell out the door if I could stand to touch her."[44] On the same occasion, Mrs. Morrison "explained" to the doctor that "she was in love with Mrs. G. and Mrs. G. in love with her and both of them tried to break up, meaning the relationship, but they couldn't…"[45] Mr. Morrison initially forgave his wife, but it eventually got to be too much for him, especially after she left the province with Mrs. G, which precipitated the divorce petition.

Mr. Morrison also provided a letter sent by Mrs. G to his wife. The following portion was excerpted in the judgment:

> No way do I stop loving you. I told him nobody will change my mind. I told him I can't help it and he will just have to learn to accept it. I am not the one in Ontario you had, that used you, I am B., remember I happen to love you for the sweet understanding sexy beautiful nice shaped little Peanut you are not for what you can buy me or what you are always doing for me. It is your love, your lips and body I want not your money or what I can get from you, one kiss from your lips one hug or squeeze of your hand cannot be replaced

40 Ibid., at para 12.
41 Ibid.
42 Ibid., at para 18.
43 Ibid., at para 12.
44 Ibid.
45 Ibid.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

> with all the things you say I use you for. Always remember I love you for who you are not for what you have, miss you, love you, need you, want you, desire you, and I hope and pray you will always love me.[46]

According to the judge, "It need hardly be said that this is a most unusual letter to pass between two married women and, in my opinion, bears out the petitioner's evidence that these two women were engaged in a most unusual relationship."[47]

However, proof of the relationship, even one that was most unusual, could not provide grounds for the divorce: there had to have been a provable homosexual act. Here, the judge was helped by Mrs. G's testimony. She admitted that what the petitioner's lawyer referred to as "these homosexual acts"[48] had happened many times. Then the following exchange occurred:

> Q. What type of acts were performed between you that would be homosexual acts?
>
> A. I find it very difficult to explain, it is between two women.
>
> Q. In which you were sexually aroused by each other?
>
> A. Yes …
>
> Q. Did any person reach a climax if you may use that word in these relations?
>
> A. Yes.
>
> THE COURT: Am I to understand your conduct with the Respondent, Mrs. M., would result in each of you reaching a sexual climax or orgasm?
>
> A. Yes.[49]

This line of questioning, with its emphasis on sexual arousal to orgasm, reveals Nicholson J's anxiety to develop a legal definition of "homosexual act."

In contrast to Mr. Morrison, Mr. G was happy to have reconciled with his wife. He testified that, "…she told me herself what happened and I knew from that time on it was going on. She on numerous occasions during 1969 tried to terminate the relationship between herself and Mrs. M. However it was too strong for them. They kept going back to seeing each other."[50] Mr. G's view of his marriage, which he insisted on sharing with the court, is striking. He loved his wife and he was willing to accept her relationship with Mrs. M and her presence in the family home: "I had always loved my wife and I still do and mainly the fact we had three sons and I didn't want … my wife to leave and for the sake of the children as much as the fact I wanted her to stay with me, I did allow [Mrs. Morrison] to come in and live with us in our home."[51] He was afraid that his wife would leave him and he blamed the pressure from "outsiders" for her eventual departure, "… there was too much interference in it, too many

46 Ibid., at para 14.
47 Ibid., at para 15.
48 Ibid., at para 16.
49 Ibid.
50 Ibid., at para 17.
51 Ibid.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

people … not giving in to the fact this happens …. They left P.E.I. because of too much interference."[52]

When questioned, Mr. G said that he had seen Mrs. G and Mrs. Morrison sleeping together on more than one occasion, that he had "seen them kissing and embracing each other" and that "there were discussions to the fact they slept together and they kissed and petted each other and things like this but nothing any deeper than that."[53]

After reviewing the testimony, Nicholson J quoted at length from the book *Sex and the Law*, by the lawyer and New York City magistrate Morris Ploscowe.[54] Ploscowe wrote that "specific kinds of sexual behavior usually indulged in by homosexuals are prohibited. However, such behavior as fellatio, sodomy, and cunnilingus is not confined to homosexuals. It may also be indulged in by heterosexual individuals, both married and single,"[55] and, although the law historically considered such practices to be "serious perversions" and "comparatively rare," they are in fact engaged in quite widely, and often by people who are married to each other. He argued that "acts of sodomy and crimes against nature occur in widely different social situations, and these social situations must be understood before there can be any judgment with respect to the offense or the persons involved." Finally, Ploscowe identified "the usual techniques of the female homosexual" as "[m]utual masturbation, clitoral and vaginal stimulation, and cunnilingus."[56]

The judge also reviewed the 1968 amendments to the *Criminal Code*, which rendered an act of "gross indecency" no longer criminal when it was committed in private between consenting adults.[57] He observed that "the Parliament of Canada in 1968 (incidentally the same year that the *Divorce Act* was enacted) met some of the criticism of the law which has been made not only by Morris Ploscowe in the book referred to above but other writers on the same subject."[58]

The divorce was granted on the basis of the judge's finding that Mrs. Morrison and Mrs. G "engaged in mutual fondling" of each other's "naked body … to such an extent that each woman would reach a sexual climax or orgasm. This being so, I find that from my understanding of the conduct of homosexuals that the respondent has engaged in a homosexual act since the celebration of her marriage."[59] Nicholson J did not specify which of "the usual techniques of the female homosexual" amounted to the requisite act, but his emphasis on the fact that the fondling resulted in orgasm implies that he was taking a restrictive approach similar to Julien Payne's focus on "surrender of the sexual organs." Further, his use of passages from Ploscowe's book to show that married heterosexuals might engage in

---

52 Ibid. For more on married lesbians in the period, see Lauren Jae Gutterman, ""The House on the Borderland': Lesbian Desire, Marriage, and the Household, 1950–1979," *Journal of Social History* 46 (2012): 1–22.

53 *Morrison*, at para 17.

54 Morris Ploscowe, *Sex and the Law,* rev. ed. (New York: Prentice-Hall, 1962).

55 *Morrison*, at para 19.

56 Ibid., at para 22.

57 *Criminal Code*, RSC 1970, c 34, ss 157, 158.

58 Ibid., at para 27.

59 Ibid., at para 28.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

the same sexual practices as same-sex partners, along with his focus on the recent reforms to the definition of gross indecency, seem to indicate that he was looking at the issue as a matter of family law, and not as a criminal offense. From the family law perspective, the problem with the homosexual act was its effect on the marital relationship. The old ideas about the crime against nature should have been abandoned, especially in view of the recent amendments to the criminal code. The judgment in *Morrison* might have pushed the jurisprudence in that direction, but it was not followed.

In the next case, *Gaveronski* (1974),[60] MacPherson J of the Saskatchewan Queen's Bench held that the homosexual act requirement was satisfied when Mrs. Gaveronski admitted that she and another woman had caressed each other's breasts. He reasoned that "Such an act by a male person to a female is unquestionably sexual. It follows that between females it is a homosexual act where their relationship is, as here, strongly suggestive of a mutual homosexual attraction,"[61] and added: "The four acts adultery, rape, sodomy or bestiality each require penetration by the male organ to some degree. Sodomy is frequently an act between male persons. Parliament could have left it there as was done in England and Australia, but it did not. It added 'or has engaged in a homosexual act.'"[62] With no explanation of what he thought significant about this legislative choice, MacPherson J referred briefly to *Morrison*, noting that he agreed that the requisite homosexual act "is something different from sodomy and bestiality," but that the circumstances in *Morrison* were different because there was "evidence of homosexual gratification or orgasm between the women" in that case.[63] He held that evidence of orgasm was not required because "proof of gratification is not essential to any other sexual offence, matrimonial or criminal. Nor do I see any reason to require that there must be proof of vaginal contact. The test must be: Was the act homosexual? In some cases, perhaps, a friendly caress of the bosom of one female by another may not be homosexual, but in the present case it was."[64] Although it is sensible to acknowledge that whether someone has an orgasm does not in itself define an act as sexual, MacPherson J leapt directly from that acknowledgment to the proposition that there is no "reason to require proof of vaginal contact." This judicial slippage from the penis that was required for adultery, sodomy, bestiality or rape to the absence of a penis between women, and then to the jettisoning of any requirement for genital contact, is perhaps a typical erasure of lesbian sexuality. But it also had deeper legal implications.

The test posited in *Gaveronski* marked a significant yet subtle shift. *Morrison* took a step away from viewing homosexual acts as criminal, and toward looking at them through a family law lens. In this, Nicholson J was persuaded by Ploscowe's arguments and also by the fact that Parliament had decriminalized homosexuality.[65]

---

60 *Gaveronski v Gaveronski*, 1974 CarswellSask 57, 45 DLR (3d) 317, [1974] 4 WWR 106, 15 RFL 160, (QB).
61 Ibid., at para 4.
62 Ibid., at para 6.
63 Ibid., at paras 7 and 8.
64 Ibid., at para 8.
65 *Morrison*, at paras 23–27.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

In contrast, the judge in *Gaveronski* held that orgasm (and by extension, genital contact) was not required. His reasoning did not focus on the family law context. Instead, he treated the homosexual act as part of the category of "sexual offense, matrimonial or criminal." This approach was contrary to Ploscowe's urging that such conduct be understood within its social context, which here was matrimonial and not criminal. It also bypassed the legal distinction between the standard of proof in criminal and in civil law. Although adultery was referred to as a marital crime or offense, the Supreme Court in *Smith v Smith* (1952) clarified that it should be proved on the civil standard.[66] The standard was the same for all matrimonial offenses.[67] Thus, conceptualizing and reasoning from a category of "sexual offense, matrimonial or criminal," broke with the established approach to assessing matrimonial offenses.

Gaveronski also represented a legal shift because it made a homosexual act *easier* to prove than adultery. Adultery was confined to instances where a penis entered a vagina. Other sexual conduct was viewed as circumstantial evidence on the basis of which it might be reasonable to infer that adultery had occurred. In contrast, *Gaveronski* stated that touching another woman's breast was itself the homosexual act that justified granting a divorce. When Julien Payne thought that the meaning of homosexual act should be interpreted restrictively and involve the surrender of the genital organs, he was probably thinking about adultery as well as sodomy. The judge in *Morrison* followed that standard, but *Gaveronski* departed from it. Finally, and without providing reasons, MacPherson J ordered that Mr. Gaveronski would have custody of the couple's two sons and Mrs. Gaveronski would have custody of their daughter, with maintenance ordered for the daughter but not for the wife.

Despite the differences in the reasoning, there was evidence of a close and passionate relationship between the women in both *Morrison* and *Gaveronski* and, in both of them, at least one of the women involved admitted to the homosexual act that provided grounds for the divorce. The next case to be reported was quite different. The wife in *T v T* (1975)[68] left her husband of fifteen years to live with a woman she met when she took some community college courses. There was evidence that the women shared a bed for at least part of the time that they lived together but they both denied that they were sexually involved. Dewar CJQB found that Mrs. T left her marriage because of her attachment to the woman in her life, but refused to grant the divorce on the homosexual act ground. He defined the "homosexual act" as including "any act of physical conduct between two persons of the same sex having as an object gratification of the sexual impulses or drives of either or both participants, the sexual quality of the act being the determining ingredient." In this case, however, there was "no evidence of specific acts or conduct that could be compared with a catalogue of female homosexual practices, if one exists."[69]

---

66 *Smith v Smith*, [1952] 2 SCR 312 at para 32.
67 Ibid., at para 10.
68 *T v T*, 1975 CarswellMan 22, 24 RFL 157 (QB).
69 Ibid., at para 16.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

Citing the Supreme Court in *Smith*, Dewar CJ held that the standard of proof for "engagement in a homosexual act" was the same as the standard for adultery.[70] He then quoted a passage from that judgment indicating that the civil standard requires a court to be "reasonably satisfied and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding."[71] Evidence for adultery is usually circumstantial because there is rarely a witness to the adulterous act. Where there is proof of opportunity for adulterous conduct and of inclination toward it, the burden shifts to the defendant to offer proof that no adultery occurred. The husband in *T* argued that there was evidence of opportunity and familiarity on the basis of which an inference of adultery could be made, and the judge should therefore infer that the parties had engaged in a homosexual act. The judge refused because the inference that, "as between male and female, natural or normal sexual conduct will probably occur … does not operate in proved circumstances of familiarity and opportunity involving two persons of the same sex where the sexual conduct to be inferred is unnatural or abnormal."[72] Although such an inference could be drawn, "the gravity of the consequences of a finding that the attachment between the respondents is homosexual or that they have engaged in homosexual acts … demands cautious scrutiny of the circumstances disclosed by the evidence."[73] He did not detail what those grave consequences might be.

In the heterosexual context of adultery, the potentially grave consequences appear to have been material in nature and to have flowed from the gendered nature of divorce law in the period.[74] Mendes da Costa was in accord with this approach to adultery,[75] but he took a different approach to the homosexual act ground. In his view, "the nature and gravity of the consequences which flow from a finding of adultery are of a quite different order from those which follow upon a finding that the respondent was 'guilty of' sodomy, bestiality or rape—or that the respondent had 'engaged in' a homosexual act. As the degree of social repugnance varies, so also should the degree of probability required to establish proof …."[76] He suggested that the courts might adopt this approach. However, his article is not cited in the judgment in *T v T*, so we have no way of knowing whether his assessment influenced the court in that case.

In contrast to *Gaveronski,* the approach in *T v T* would make a homosexual act *harder* to prove than adultery. We see this in Dewar CJ's comment that *Morrison* and *Gaveronski* were "decisions founded upon evidence, an important part of

70 Ibid., at para 18.
71 Ibid., at para 17, quoting *Smith* at para 36.
72 Ibid., at para 22.
73 Ibid.
74 For example where the parties' separation agreement included a clause stating that the wife's maintenance would continue only as long as she refrained from sexual relations, "the existence of such a clause and the penalties attached to its violation might be considered as relevant evidence for the defence, tending to show the improbability that the offence alleged has occurred," Payne, *Law & Practice Relating to Divorce*, 427.
75 Mendes da Costa, "Divorce Act, 1968," 138, n. 131.
76 Ibid., 142–43.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

which was direct. That circumstance sets them apart from this case."[77] However, the legal approach of inferring adultery from evidence of familiarity and opportunity within a context that is persuasive on the evidence was developed precisely because evidence for adultery was rarely direct and the guilty act must therefore be inferred from circumstantial evidence.[78] The approach in *T v T* therefore departs from *Gaveronski,* where the judge, by defining a caress of the breast as the homosexual act, established a level of scrutiny that was not more but *less* cautious than that demanded by allegations of adultery. Despite denying the divorce in *T v T*, Dewar CJ awarded custody of the couple's three sons to their father, including a fourteen-year-old who had been living with his mother. The judge thought the boys to be "at an age where male supervision" would be beneficial, and he declined to award joint custody to the mother, who had "abandoned her sons and … has been attempting to redeem herself."[79]

The last of this set of cases, *Guy v Guy* (1982),[80] addressed the impact of a wife's homosexual act on her request for spousal maintenance. Mrs. Guy denied that she and the other woman were sexually involved, but there was ample circumstantial evidence to the contrary and Clements LJSC granted the divorce. He then turned his mind to Mrs. Guy's application for maintenance. While the 1968 *Divorce Act* did not bar the spouse whose marital fault provided grounds for the divorce from receiving maintenance, it permitted the court to take the parties' conduct into account, along with their "condition, means and other circumstances."[81]

Clements J began by explaining that "Marriage is a heterosexual, legal relationship.… Homosexuality, however, is an antithesis of marriage and it is an obvious repudiation of the marital state. There is an abhorrence in our society to this unnatural conduct." However, this attitude "must be viewed against the reality of social conventions and mores of today as well as the lifting of the criminal sanctions between consenting adults."[82] On this basis, he concluded that he should apply the same standard to homosexual acts as to adultery. He went on to explain that, where the marital fault was adultery, there was a spectrum of circumstances. For example, maintenance would be denied where the wife's adultery "broke up the marriage, where it is continuing and where she is being supported by her paramour." However, it would likely be granted where "a wife, after doing all she can to persuade her deserting husband to return to her and their children, in her loneliness lapses and commits two isolated acts of adultery."[83]

By analogy, there is also a spectrum where a homosexual act provides the ground for divorce:

> There may be the situation where one of the parties entered into the marriage state knowing of a strong but concealed homosexual preference and thus created a sham relationship. In other situations both parties may be

---

77 Ibid., at para 25.
78 M.C. Kronby, *Divorce Practice Manual*, 2nd ed. (Toronto: Butterworths, 1977), 102.
79 *T v T,* at para 28.
80 *Guy v Guy*, 1982 CarswellOnt 794, 25 OR (2d) 584 (SC).
81 *Divorce Act*, 1968, s 11.
82 *Guy,* at para 21.
83 Ibid., at para 22, quoting *Iverson v Iverson*, [1967] Pr. 134, at page 138.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

> aware of one's propensity for homosexual conduct and yet enter into a marriage. As appears in this case the marriage partner may be ambivalent as to preference, with homosexual tendencies eventually becoming dominant. In other cases, after marriage one of the partners may engage in homosexual experimentation and yet also engage in a heterosexual relationship with the other partner. All these variables will be looked at by the court ….[84]

He found that Mrs. Guy's conduct was in the middle of the spectrum, which would not in itself exclude maintenance, but he denied maintenance because of several other factors, most prominently the husband's inability to pay.

Conclusion

The above overview of the cases defining the homosexual act between women shows that judges were ill equipped to grapple with the practices of sexual love between women. It was easy to define the act where the definition could be focused on the penis. This was impossible for sex between two women, and the judges failed to come up with a sound alternative approach. For all his openness to accepting homosexual acts as common variants of human behavior, the judge in *Morrison* failed to specify which part of "kissing and petting all over the body from head to toe" or "mutual fondling" of each other's "naked body" led Mrs. G and Mrs. Morrison to "reach a sexual climax or orgasm." Indeed, it seems likely that the question was never asked, at least not during the trial. The lacuna in *Morrison* made it possible for the judge in *Gaveronski* to hold that vaginal contact is not required to prove a homosexual act between women (it also raises the question of whether the judge understood the difference between vagina and vulva). This jurisprudence left lesbians vulnerable to a high level of scrutiny of their sexual conduct. That this was not a worse problem is due only to the 1985 repeal of the *Divorce Act* and its replacement with a legislative scheme that virtually eliminated the fault grounds for divorce.[85]

It is more difficult to come to any conclusions regarding the significance of the homosexual act in relation to corollary relief. The judge in *Guy* held that it should be treated in the same way as adultery in the context of an application for spousal maintenance, which meant that there was a spectrum of faulty conduct which would be considered along with other factors. The reasoning leading to this conclusion reveals something about the judge's attitude to both homosexuality and marital fault but, because it stands alone, it cannot be said to represent any trend. Regarding custody and access, it is striking that MacPherson J awarded custody of the Gaveronski sons to their father and of the Gaveronski daughter to her mother, a result that seems to contradict the general trend in the period of refusing custody to a lesbian or gay parent. This is all the more striking because the same judge awarded custody to the father later that year in *Case v Case*,[86] which according to Arnup was "the first reported Canadian decision to deal specifically with the issue of lesbian custody."[87]

---

84 Ibid., at para 25.

85 Marriage breakdown is the sole ground for divorce in the 1985 legislation. Marriage breakdown may be proved by adultery, cruelty, or living separate and apart for one year. *Divorce Act*, RSC 1985, c 3, s 8.

86 *Case v Case* (1974), 18 RFL 132 (Sask QB).

87 Arnup, "Mothers Just Like Others," 26.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press

This article shows that the legal history of gay men cannot be equated with that of lesbians and lesbianism. The 1969 *Criminal Law Amendment Act*[88] created an exception to the offense of gross indecency for acts committed in private between a husband and wife or any two persons aged twenty-one or older.[89] It is lauded in both popular consciousness and some strands of the scholarly literature for ushering in a progressive approach to the regulation of sexuality in Canada. A more critical strand of the literature, however, criticizes this reform for refocusing law enforcement attention on a newly defined type of homosexual conduct and opening a battle over the criminalization of "public" sex that is still being fought today.[90] Although the circle of homosexual respectability has widened since 1969, many people remain excluded from it by inclination, life circumstances, or both.

This article extends the work of critical scholars by showing that, in the same reform wave, women who had sex with other women were regulated not by the changes to the gross indecency provisions in the *Criminal Code*, but rather by the inclusion of the homosexual act ground for divorce in the *Divorce Act,* 1968. In 1967, when Parliament debated divorce reform, public lesbian identity and community as it would come to be understood in the 1970s and 1980s was still over the horizon. Male homosexuality was identified as a public problem,[91] but lesbianism was seen as problematic only within the quintessentially private context of the family.[92] In that context, divorce reform, like the reform to gross indecency, focused attention on a newly defined type of homosexual conduct. The new ground for divorce, which was intended "to rescue men from marriages in which the female partner is a practising lesbian," did so by reaching into the "private" sphere of the family. In the process, women who were categorized as lesbian were brought under the gaze of the law in a new way, the effects of which are still experienced today.

Karen Pearlston
Associate Professor
Faculty of Law
University of New Brunswick
kpearl@unb.ca

88 *Criminal Law Amendment Act, 1968–69*, SC, c 38.

89 *Criminal Code*, RSC 1970, c 34, ss 157, 158.

90 On recent episodes in the battle over public sex, I refer to the November, 2016 police undercover operation in an Etobicoke, Ontario park, see http://www.dailyxtra.com/toronto/news-and-ideas/opinion/project-marie-the-latest-chapter-in-toronto-police%E2%80%99s-long-history-targeting-queer-sex-211210#. On the "two persons" restriction in the 1969 reform, see Thomas Hooper, "'More Than Two Is a Crowd': Mononormativity and Gross Indecency in the *Criminal Code*,1981–82" *Journal of Canadian Studies* 48 (2014): 53–82. See also Kinsman, *Regulation of Desire*, 164–178.

91 Kinsman, *Regulation of Desire*, 214.

92 Lesbian conduct had never been criminalized in Anglo-Canadian law. Although the amendments to the law of gross indecency formally applied to women, it was not until the 1980s that prosecutions of lesbians for gross indecency began to be reported. The jurisprudence in the family law cases may have influenced law enforcement and judicial approaches to lesbianism and gross indecency. The characterization of the grossly indecent act in *R v* C [1981] NJ No 207, 30 Nfld & PEIR 451, 84 APR 451, rev'd *R v Clancey* [1982] NJ No 1, 39 Nfld & PEIR 8 (CA) is similar to the judicial attempts to define the homosexual act between women in the family law context. This is the earliest case I have found where a woman was prosecuted for gross indecency for sex with another woman.

https://doi.org/10.1017/cls.2017.4 Published online by Cambridge University Press