

Sexing Citizenship, Privatizing Sex¹

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This paper explores different stories of sexual citizenship found in gay and lesbian rights struggles. It uses two recent cultural productions, Kissing Jessica Stein and Queer as Folk, to analyze the stories of sexual citizenship found in two Supreme Court decisions, M. v. H., and Little Sisters. The paper deploys these contrasting stories of sexual citizenship, of sameness and difference, assimilation and subversion, to animate a complex reading of the sexing of citizenship and the privatizing of sex. It argues that the modality of sexual citizenship produced by rights struggles has been one in which sexual subjects are privatized, de-eroticized and depoliticized. At the same time, it argues for a more disruptive reading, which unearths the public, the erotic and the politicized subject, as well as the normalizing effect of this more subversive subject.

In *Kissing Jessica Stein*, two 20-something straight girls—one curious, the other frustrated with the dating scene in New York—decide to give lesbian love a shot. And it works, at least for a while—they date, fall in love, and move in together; even Jessica's mother accepts her daughter's choice. The film is a story about exploring sexuality and accepting yourself for what you are or what you choose to become. It is a story about acceptance—self-acceptance, family acceptance and community acceptance. And it is, in part, a story about normalizing lesbian sexuality; if not the erasure of difference, then at least its reduction to a matter of personal taste. By contrast, the American version of the television show, *Queer as Folk*, follows the sexual exploits of five gay men who are unapologetically eroticized. They have sex—lots of it—with many sexual partners. They are pleasure seekers—sex and drugs and the throbbing beat of techno-pop. They have no time for monogamy, marriage or military service. The show openly mocks assimilation—it even has the characters watching a gay television soap opera which they denounce for its heterosexual normativity. It is a story about sexual difference, about bodies saturated with sex, and about the difference that this sex makes.

Both of these cultural productions tell a story about sexual citizenship. *Kissing Jessica Stein* is a story about citizenship that accommodates sexual difference within the broader matrix of familialized heteronormativity. It is a story of assimilation in which the heterosexual requirement of membership is relaxed, but in which individuals can still live happily—if not ever after—in monog-

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amous couplings, surrounded by loving families. By contrast, *Queer as Folk* is a story about sexual citizenship that refuses normalization and assimilation. It is a story about the right to be different, and about citizenship as sexual difference.

These are the contrasting stories, the fault lines of contemporary debates about sexual citizenship; stories about sameness and difference, about assimilation versus subalternity, about the values of inclusion versus its normalizing costs. The struggle for lesbian and gay rights is characterized by just such polarized stories—stories about the value of inclusion versus its normalizing costs. The struggle for lesbian and gay rights is a story about sexual citizenship. It is a story of how some sexual outlaws have been reconstituted as legitimate citizens, and incorporated into the folds of dominant modalities of sexual citizenship. And it is a story not only of the privileges of membership, but of its costs. For these sexual outlaws, sexual citizenship frequently comes at the expense of transgression (Warner, 1999; Stychin, 1998).

In this essay, I explore the impact of gay and lesbian rights struggles on sexual citizenship. The essay examines the extent to which the modality of sexual citizenship produced through these struggles is one which is privatized, depoliticized and de-eroticized. The question is the extent to which the demands for sexual citizenship challenge dominant modes of sexual citizenship, that is, sexual citizenship produced in and through privatized, familialized heteronormativity. Gay and lesbian struggles have succeeded in displacing the heterosexual requirement, but not, I argue, the broader sexual matrix. As stories of sexual citizenship, they are struggles that, on first reading, more closely approximate *Kissing Jessica Stein* than *Queer as Folk*.

Some sexual outlaws, subjects whose identities have been constructed through their sexual practices, and historically located outside of citizenship, have been assimilated into dominant sexual citizenship. In the process, these sexual outlaws have been reconstituted. The struggle for recognition—for formal equality rights as individuals, as members of relationships, and as members of community—has been successful only to the extent that sexual citizens have been prepared to reconstitute themselves as privatized, depoliticized and de-eroticized subjects. Struggles for recognition based on formal equality have created a particular modality of sexual citizenship that is successful precisely because it does not fundamentally challenge dominant modes.

These struggles for recognition have taken shape within a dynamic of the increasing privatization of citizenship. The neo-liberal state has brought a new privatized citizenship, which privileges self-reliance, self-governance, and free markets (Held, 1991; Brodie, 1996). It is a privatized citizenship that is recoding citizens as consumers, whose political participation is measured by their access to the market (Evans, 1993; Cooper, 1993). It is a privatized citizenship that is also recoding the sphere of the familial to place less emphasis on the normative structure of the family, and more emphasis on the support functions of the family; a privatized citizenship in which the family is cast as the natural site for social reproduction (Cossman and Fudge, 2002). Both of these elements of privatized citizenship are implicated in the struggles for sexual citizenship, as some lesbians and gay men are brought into the folds of, and reconstituted in the discourse of, this new consumerized and familialized citizen. The reconstitution

of outlaws as legitimate subjects in law has occurred within this dominant modality of citizenship, in which the sexing of citizenship and the disruption of heteronormativity is accompanied by this privatization of sex.

This essay explores gay and lesbian rights struggles, particularly, those pursued through the courts relying on the Canadian Charter of Rights and Freedoms. The rights struggles have been struggles of recognition, that is, challenging the denial of basic formal equality rights for gays and lesbians as individuals, and for gay and lesbian relationships. These equality rights struggles have been very successful; but, the victories are not unambivalent, for these victories have reproduced a very particular sexual citizen. I focus on two major legal cases: *M. v. H.* and *Little Sisters Bookshop*, and argue that the victories have been those that most closely reproduce dominant modalities of sexual citizenship: namely, citizenship that is privatized, de-eroticized and depoliticized. By contrast, those struggles that challenge this modality of citizenship, making claims of sexual freedom and sexual self-determination, have failed. The legal victories and defeats of lesbians and gay men, when viewed through the lens of the privatizing, de-eroticizing and depoliticizing of dominant modes of sexual citizenship, are revealed as rather more ambivalent and contradictory than they may otherwise seem at first glance.

But, in keeping with this theme of ambivalence, neither *Kissing Jessica Stein* nor *Queer as Folk*, *M. v. H.* nor *Little Sisters* should be read unequivocally as assimilationist or transgressive. *Kissing Jessica Stein* is also a story about the fluidity of sexuality that disrupts heteronormativity, while *Queer as Folk* is a story about a very essentialized American gay male culture that reifies the homo/hetero divide. *Kissing Jessica Stein* turns out to be rather more queer, and *Queer as Folk* rather less. And the legal victories and defeats can be further disrupted: the privatized, de-eroticized and depoliticized subject of *M. v. H.* does have some public subversive potential, just as the more public, eroticized and politicized subject of *Little Sisters* is also characterized by a normalizing effect. Both *Kissing Jessica Stein* and *Queer as Folk*, *M. v. H.* and *Little Sisters* tell a complex story of the sexing of citizenship, and the privatizing of sex.

Sexual Citizenship

Citizenship, as social membership in a nation state and as a set of practices defining membership in the nation state, has long been associated with heterosexuality: the sexual citizen is a heterosexual citizen (Richardson, 1998). And it is a sexual citizen whose sexuality is contained within the private realm of family and conjugality. Lesbians and gay men have historically been excluded from this citizenship; they have been denied, in varying degrees over time, civil, political, social and cultural citizenship. From the criminalization of gay sexuality through sodomy laws to the legal condonation of discrimination, lesbians and gay men have been denied civil citizenship. While not formally denied the right to vote or participate in political governance, the ability of lesbian and gay men to exercise political power has long been circumscribed. The refusal to recognize same-sex relationships, and allocate the rights and responsibilities of

the welfare state to these couples has denied lesbians and gay men social citizenship. And the virtual exclusion of lesbians and gay men from the cultural representation in popular culture has constituted a denial of cultural citizenship (Richardson, 1998).

But, in recent years, lesbian and gay legal struggles in Canada have begun to secure many of these rights of citizenship. Lesbians and gay men have won the right to civil and political citizenship. They have secured civil citizenship through the right to non-discrimination on the basis of sexual orientation (*Vriend*). Lesbians and gay men have achieved political citizenship through the election of openly gay politicians at the federal, provincial and municipal levels. Lesbian and gay couples have secured social citizenship through the rights to same-sex partner recognition in the allocation of state benefits and obligations (*M. v. H.*). To a very considerable extent, sexual citizenship in Canada has been transformed. It is no longer exclusively based on heterosexuality. While many of its sites remain contested, membership in the networks of communities of family, neighbourhood, school, daycare, work, health care, social services, are no longer restricted to the heterosexual citizen. While the lesbian and gay citizen may not always be welcomed with open arms, the blanket exclusion is no longer legally nor ideologically tenable. In a comparative context, this is a formidable accomplishment, since many nation states continue to associate citizenship with heterosexuality (Richardson, 1998).²

But, the struggle for lesbian and gay legal rights is a struggle marked by ambivalence and contradiction. As many commentators have observed, the struggle for inclusion comes at a cost: assimilation and respectability at the expense of transgression and subversion (Berlant, 1997; Warner, 1999; Stychin, 1998, 2001). Sexual citizenship is a disciplining and normalizing discourse. The struggle for sexual citizenship has been a struggle not only for inclusion, but for normalization. Steven Seidman for example argues it is simultaneously a politics of civic inclusion and gay purification:

Citizenship involves not only juridical enfranchisement but symbolic incorporation into a national community. Individuals aspiring to the status of citizen must claim to possess the psychological, moral and social traits that render them good and warrant their integration. ... gays have claimed not only to be normal, but to exhibit valued civil qualities such as discipline, rationality, respect for the law and family values, and national pride (Seidman, 2001, p. 323).

Normalization is a strategy for inclusion in the prevailing social norms and institutions of family, gender, work and nation. It is a strategy that neutralizes the significance of sexual difference and sexual identity, 'rendering sexual difference a minor, superficial aspect of a self who in every other way reproduces the ideal of a national citizen' (Seidman, 2001, p. 324). Normalization has the effect of de-radicalizing claims for social transformation by incorporating sexual minorities into dominant political and social norms and institutions.

Many critics have emphasized that the trouble with normalization lies in its repudiation of sex (Warner, 1999; Dangerous Bedfellows, 1996). Michael Warner, for example, argues that the gay and lesbian rights movement has in recent years yearned for the normal over the queer, for banal respectability over the abject. It is a movement for inclusion that necessarily excludes those abject subjects who embrace the shame of sex. Normalization, in renouncing sex, renounces S/M subjects, sex worker subjects, public sex subjects, transgendered subjects—all those dissident subjects who remain saturated in sex, who affirm the abject, the dignity of the indignity of sex. Normalization operates to both desexualize politics and depoliticize sex.

Other critics have emphasized the normalizing costs of inclusion in the context of the privatization of citizenship. David Evans, for example, has argued that gay men have been included within consumer citizenship. Gay sexuality is commodified and identity is marketized (Evans, 1993; Field, 1995; Bell, 1995). This consumer citizenship has been intensified with the rise of the neo-liberal state and its multiple strategies of privatization, in which citizens are being reconstituted in and through the discourse of consumerism. Lauren Berlant has similarly argued that citizenship in the United States has been re-privatized under neo-conservative politics. The sphere of privacy, intimacy, and family has become the site of civic virtue (Berlant, 1997). And it is a vision of citizenship obsessed with sex—with normalizing private, procreative, heterosexual sex, and with demonizing all others. Others have emphasized that discussions of sexual citizenship that focus on the private, intimate sphere operate to re-privatize sexual citizenship—by reinforcing the idea that sex and sexuality are naturally located with the private, not public spheres (Richardson, 1998). The family and market are re-inscribed as the natural sites of sexual citizenship.

Reflecting a number of these themes, Bell and Binnie argue in *The Sexual Citizen* that the political legacy of deploying the concept of citizenship with a sexual agenda has been an ambivalent one, marked by compromise (Bell and Binnie, 2000, p. 2). Appeals to citizenship require the ‘circumscription of “acceptable” modes of being a sexual citizen’ (p. 3). In the current political climate, this compromise of acceptability ‘tends to demand a modality of sexual citizenship that is privatized, deradicalized, de-eroticized and *confined* in all senses of the word: kept in place, policed, limited’ (*Ibid.*).

Yet, as Stychin and others have observed, citizenship is never wholly disciplined, but may simultaneously retain ‘an unruly edge’ (Stychin, 2001, p. 290). There are aspects of the struggle for sexual citizenship, and its rights and responsibilities, that are destabilizing. For example, Seidman has argued that the politics of sexual citizenship has led to ‘a weakening of a repressive heteronormative logic’ (Seidman, 2001, p. 323). There are also spin off effects of these struggles, such as the awakening of a subaltern queer movement that explicitly resists the politics of assimilation and normalization (Seidman, 2001, p. 326; Plummer, 2001). As Jeffrey Weeks has argued, the challenge of sexual citizenship involves both a moment of transgression and a moment of citizenship:

Making the claim for inclusion may seem assimilationist, but actually making demands on a culture which denies you is

extremely radical; it identifies the frontiers of the conventional, it demarcates the lines of struggle. So, you can see transgression and citizenship as simply different faces of the same moment of challenge. One is separating, the other is calling for belonging. But you can only do one with the other (Weeks, 1997, p. 323; see also Weeks, 1999).

The claim to sexual citizenship is both transgressive and normalizing; it simultaneously challenges and transforms dominant modalities of citizenship while incorporating sexual subjects into its disciplining folds.

Gay and lesbian legal rights struggles in Canada can be usefully analyzed through this lens of sexual citizenship. The legal challenges to the denial of basic formal equality rights for gays and lesbians as individuals, and for same-sex relationships have been extremely successful. Indeed, they are often held up as proof of the power of constitutional rights for historically disadvantaged groups. While these victories have been important, they are not unequivocal, but rather, like all legal struggles are marked by ambivalence and contradiction. These struggles have reproduced a very particular sexual citizen, and forged a very particular acceptable mode of sexual citizenship for gay men and lesbians. It is a mode of sexual citizenship that is highly circumscribed: gays and lesbians are recognized as subjects in law as long as they 'embrace an ideal of "respectability", a construction that then perpetuates a division between "good gays" and (disreputable) "bad queers"' (Stychin, 1998, 2001). As I will argue in the sections that follow, it is a mode of sexual citizenship that is privatized, depoliticized and de-eroticized, yet, it is a struggle for sexual citizenship that is not without its unruly edge. It is a struggle marked by contradiction and ambivalence, in which some aspects of heteronormativity are being challenged, while others are reinforced.

Same-Sex Relationship Recognition, or Divorcing Jessica Stein

Much of the focus of gay and lesbian legal challenges in Canada has been on the recognition of same-sex relationships. These challenges have focused primarily on opposite-sex definitions of spouse that apply to common law couples.³ Gay and lesbian legal challenges have argued that these extended definitions of spouse that apply only to opposite-sex couples are discriminatory. Three of these cases reached the Supreme Court of Canada during the 1990s, each of which involved a basic claim to civic and social citizenship.

In *Mossop v. Canada*, a gay man challenged his employer's refusal to grant him a bereavement leave to attend his partner's father's funeral, on the grounds that they were not members of each other's 'immediate family'. Mossop took his case to the federal Human Rights Commission, arguing that the denial of the leave constituted discrimination on the basis of family status (sexual orientation was not a prohibited ground within the federal Human Rights Act at the time). The case was dismissed by the majority of the Supreme Court on the grounds that the denial was based on sexual orientation, not family status, and that absent

of a constitutional challenge to the Human Rights Act, there was no basis for the claim.

In *Egan and Nesbitt v. Canada*, a gay couple who had been together for 42 years challenged the federal government's refusal to grant a spousal pension benefit, on the grounds that they were not spouses. The Court held that sexual orientation was a prohibited ground of discrimination under section 15 of the Charter even though it was not listed as an enumerated ground. The majority of the Court, in a five to four opinion, held that the opposite-sex definition of spouse in the federal *Old Age Security Act* discriminated on the basis of sexual orientation, and therefore constituted a violation of Egan and Nesbitt's equality rights. However, a differently constituted majority also held that the violation was a reasonable limit on equality rights within the meaning of section 1 of the Charter. Mr Justice Sopinka, who cast the deciding vote, held that since the idea of equating opposite-sex and same-sex relationships was a relatively novel concept, the government should be given some latitude in deciding when and how to extend legal protections. He was also cautious about imposing costs on governments. As a result, the basic claim to social citizenship, that is, the claim to a government pension, was denied.

M. v. H. involved the breakdown of a 10 year lesbian relationship. M. brought an action against H. seeking, amongst other things, spousal support under the Ontario Family Law Act (hereinafter, FLA). Section 29 of the Act defined spouse, for the purposes of spousal support, beyond married persons to also include unmarried opposite-sex couples 'who had cohabited ... continuously for a period of not less than three years' (FLA, section 29). M. challenged the constitutionality of the definition of spouse, arguing that the exclusion of same-sex couples violated section 15 of the Charter of Rights and Freedoms.

In *M. v. H.*, the majority of the Supreme Court recognized the spousal status of same-sex couples. The Court held that section 29 discriminated on the basis of sexual orientation by excluding same-sex couples from the definition of spouse. The principal majority judgment of Cory and Iacobucci JJ. held that the section denied gay men and lesbians the right to apply for spousal support from a same-sex partner. According to the Court, section 29 violated the right to equality guaranteed by section 15 of the Charter, and was not a reasonable limit within the meaning of section 1.⁴

Justice Cory, writing the section 15 portion of the joint opinion, held that same-sex relationships may be a conjugal within the meaning of section 29 of the FLA. In his view, 'same-sex couples will often make long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other' (*M. v. H.*, 58). According to the Court, the exclusion of these couples from section 29 draws a distinction on the basis of sexual orientation, an analogous ground under section 15. Cory J. concluded that the distinction in section 29 was discriminatory. Section 29 of the FLA violates the human dignity of lesbian and gay couples by promoting the view that they are 'less worthy of recognition and protection' and 'incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples' (para 73). Further, the exclusion of same-sex couples in the Act further 'perpetuates the disadvantages suffered by

individuals in same-sex relationships and contributes to the erasure of their existence' (para 73). Cory J. concluded that the definition of spouse in section 29 of the FLA violated section 15 of the Charter.

Justice Iacobucci, writing the section 1 portion of their joint opinion, held that the denial of equality was not a reasonable limit on this right. The Court held that the objectives of the spousal support provisions of the FLA of promoting 'the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down' and the alleviating of 'the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals' would only be furthered if same-sex couples were included within the definition of spouse. The Court declared section 29 to be of no force and effect, with a suspension of the operation of the declaration of invalidity for six months to allow the legislature to bring this provision into conformity with the equality rights in the Charter.

The decision in *M. v. H.* was ground breaking. For the first time, the Supreme Court recognized the rights of same-sex couples, declaring these couples to be entitled to the same protections as opposite-sex couples. In the aftermath of the ruling, federal and provincial governments have moved to reform their laws to impose a range of rights and responsibilities on same-sex couples.⁵ It is a ruling that has challenged and begun to displace the heterosexuality of sexual citizenship.

In *M. v. H.*, the lesbian legal subject that was recognized was a highly privatized subject—a subject who sought the recognition and enforcement of the private obligation of her partner. It can be seen as part of a re-privatizing trend enlarging the category of persons with private support obligations (Cossman, 2002). Indeed, the Court recognized the privatizing objective of the spousal support provisions as one of alleviating 'the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals' (*M. v. H.* at para 93. See also at para 106). The victory for gay and lesbian legal subjects, as narrowly construed, was the right to sue each for spousal support once their relationships break down. It was a highly privatized right and a highly privatized responsibility. The ruling reflects a privatized conception of citizenship, in which the family is being recast as the natural site for the care and support of dependent persons, responsible for bearing the costs of social reproduction.

The lesbian legal subject recognized in *M. v. H.* was also a de-eroticized subject. Not only did it involve lesbians in a 10-year relationship, it was after the relationship had broken down. There was no sex anywhere to be found. This was not a highly sexually charged subject, but rather, a de-eroticized subject. Indeed, the Court seems to begin to desexualize the very requirements of conjugality. In a brief discussion emphasizing the wide variety of spousal relationships and the need for a flexible approach to the meaning of conjugality, the Court noted that 'an opposite-sex couple may, after many years together, be considered to be a conjugal relationship although they have neither children nor sexual relations' (*Ibid.*, at para 59). In this brief passage, the Court can be seen to be removing the focus on sexual relationships as a marker of conjugality. While this is a

positive development, since presence or absence of a sexual relationship is a poor indicator of whether cohabitants should be entitled to legal rights and responsibilities, it has made the meaning of conjugality that much more elusive (Cossman and Ryder, 2001). However, it is at least worth observing that this desexualization of conjugality has begun in the context of the first legal recognition of same-sex relationships. Lesbians and gay men are recognized as legal subjects, and accorded rights of social citizenship at the same moment as sex is removed from the conjugal equation. The process is sexually sanitizing, recognizing lesbian and gay relationships at the same time as it takes the sex out of them.

Finally, the legal subject recognized in *M. v. H.* was a depoliticized one. The litigants were closeted—only their initials appeared.⁶ This was not a litigant who was on the front lines of a political movement. She wanted financial support and an equitable resolution of her financial affairs on the breakdown of her intimate relationship. On a more substantive level, the case did not present a significant challenge to dominant notions of family and conjugality, beyond the opposite-sex definition that these dominant notions have traditionally deployed. There was no challenge to the idea that rights and responsibilities are appropriately distributed on the basis of conjugality (see Cossman and Ryder, 2001). Rather, the challenge implicitly accepted the familial terrain for the allocation of rights and responsibilities, arguing only that lesbians and gay men should be entitled to inhabit the same terrain. Both the litigants and the substantive legal challenges in *M. v. H.* were private, de-eroticized and depoliticized. This case [there is no referent to ‘It’ in the last sentence] has enlarged and reinforced the idea of private financial responsibility, desexualized lesbian and gay relationships, and depoliticized broader demands for decentring the conjugal. It has recognized a space of intimate citizenship for lesbian and gay men that is privatized, desexualized and depoliticized.

Freedoms too Queer

While the same-sex spousal rights cases are demands for social citizenship, other gay and lesbian challenges rooted in demands for sexual freedom have raised a very different kind of citizenship claim. These are claims to cultural citizenship, that is, to the right to participate in national culture. Claims to cultural citizenship come from those excluded from cultural representations, and denied cultural space. It includes the right to self-representation and visibility, as well as the right to propagation of identity and lifestyles (Pakulski, 1997). As Pakulski argues, cultural citizenship includes ‘the right to be “different”, to re-value stigmatised identities, to embrace openly and legitimately hitherto marginalised lifestyles and to propagate them without hindrance’ (p. 83).

In *Little Sisters Bookstore and Art Emporium v. Canada*, a gay and lesbian bookstore in Vancouver made just such a claim to cultural citizenship, challenging the practices of Canada Customs for denying lesbians and gay men a cultural space in which to explore their sexual identities. For 15 years, Canada Customs had been detaining, delaying and seizing shipments on route to the bookstore. In a protracted legal battle, Little Sisters argued that Canada Customs was unfairly

targeting gay and lesbian materials headed to gay and lesbian bookstores. The bookstore challenged both the administrative practices of Canada Customs, as well as the provisions of the Tariff Code which empower customs officials to detain obscene materials at the border, arguing that both the practices and the law violated the right to freedom of expression in section 2(b) and the right to equality in section 15 of the Charter.

Little Sisters involved the right to cultural citizenship—the right to participate in cultural representations, the right to represent one’s self and one’s community through expressive material, and the right to access sexual representations as a crucial dimension of cultural identity. *Little Sisters* and many of the organizations that intervened in support of the constitutional challenge argued that the customs regime discriminated against lesbian and gay men, denying them access to expressive materials that were fundamental to lesbian and gay identity and community. In arguing that the customs regime violated Charter rights of expression and equality, some emphasized the discriminatory impact of the regime, while others emphasized the procedural defects of the regime.⁷ Some focused on the evils of a regime of prior restraint, while others argued that it was time for the Supreme Court to reconsider its controversial and much derided decision in *R. v. Butler* that established a harms-based test for obscenity.⁸ But, underlying many of these disparate arguments was a basic claim about the denial of cultural citizenship. The customs regime violated the rights to freedom of expression and equality of lesbians and gay men, denying the importance of this form of cultural expression in lesbian and gay identity.

The *Little Sisters* challenge was both a claim to sameness and difference. As an equality claim, it was an argument about an equal right to cultural citizenship; but, as an expression claim, *Little Sisters*’ assertion of the right to a sexualized cultural citizenship was also an assertion of the right to be different. It was an assertion of lesbian and gay sex—the very aspect of gay and lesbian identity that marks difference. The constitutional challenge was an assertion of that marker of difference.

Many of the arguments made in the *Little Sisters* challenge attempted to translate that difference into law. For example, *Little Sisters* tried to limit the applicability of the *Butler* harms-based test to heterosexual material, arguing that lesbians and gay men are different (*Little Sisters Book and Art Emporium*, 1999, submissions 61–73).⁹ ‘Gay and lesbian pornography can be distinguished from mainstream pornography in many ways. The entire framework of production, exhibition and consumption is different’ (submission 62). The intervenor EGALE (Equality for Gays and Lesbians Everywhere) also tried to distinguish *Butler*:¹⁰

The *Butler* analysis of the harmful effects of mainstream pornography is so embedded in a heterosexual context that it does nothing to elucidate the effects of lesbian, gay, and bisexual pornography. There is no sound basis to assume that the harm perceived to be caused by mainstream pornography is also caused by lesbian, gay, and bisexual pornography. Not only is the substance and imagery and text significantly different insofar as

homo-eroticism, by definition, does not involve heterosexual representation and thus cannot eroticize a gendered power imbalance of male domination over women, but the entire framework of production and consumption is also different (EGALE, 1999, submission 40, see also submissions 37–42).

The Women's Legal Education and Action Fund (LEAF), although defending the general principle of the applicability of a harms-based approach to gay and lesbian material, nevertheless also argued that the distinctive context of lesbian materials needed to be taken into account: 'Simple extrapolations from assumptions about harm deemed relevant in cases involving heterosexual materials ... are insufficient to justify prohibition of lesbian and gay s/m depictions or descriptions' (LEAF, 1999, submission 34). These were arguments that lesbian and gay sex is different, and that lesbian and gay sexually explicit material is different. It was an argument of sexual difference; that this difference mattered—indeed that this difference was so fundamental to gay and lesbian identity that it ought to be translated into and instantiated in law.

But, the claim to cultural difference found little resonance with the court. Binnie, J., writing for the majority, rejected the argument that the *Butler* harms-based test for obscenity was problematic when applied to gay and lesbian materials. The court held that there was nothing in the harms-based test that discriminated against the gay and lesbian community, and that it would be entirely inappropriate to carve out an exception for gay and lesbian materials. The court agreed with the trial judge that while sexually explicit material may play a more central role in gay and lesbian culture than in heterosexual culture, the *Butler* test should apply to both. Since the *Butler* test did not criminalize all sexual expression, but only harmful expression, and since there was no reason to believe that gay and lesbian sexually explicit material could not also cause harm, there was no reason to restrict the *Butler* test to the heterosexual community.¹¹

But, as an equality claim, Little Sisters also asserted their entitlement to equal treatment, arguing that the customs regime operated with disproportionate and discriminatory effect on the gay and lesbian community, thereby denying the right to equality. The trial record was replete with examples of materials that had been detained and prohibited simply because of its gay and lesbian content. But, the trial court concluded that although the administrative practices of customs clearly targeted Little Sisters and thereby violated their rights to equality, there was nothing on the face of the legislation itself that violated section 15.

The Supreme Court agreed. The court was of the view that Little Sisters did suffer differential treatment when compared to other bookstores that imported heterosexual sexually explicit material, and that this differential treatment was discriminatory: '... the adverse treatment meted out by Canada Customs to the appellants and through them to Vancouver's gay and lesbian community violated the appellants' legitimate sense of self worth and human dignity. The customs treatment was high-handed and dismissive of the appellants' right to receive lawful expressive material' (Little Sisters, 1999, para 123). In commenting on 'overzealous censorship' of Canada Customs, the court held that 'Little Sisters

was targeted because it was considered different' (para 124). But, the court then concluded that there was nothing on the fact of the legislation itself that encourages this discriminatory treatment. The discrimination occurred at the administrative level of implementation. The customs' legislation was, in the court's view, capable of being implemented in a manner that did not violate Charter rights.

The Supreme Court concluded that Little Sisters' rights under both sections 2(b) and 15 had been violated, in so far as they were targeted, they suffered 'excessive and unnecessary prejudice in terms of delays, costs and other losses', that customs officers were inadequately trained, that customs failed to establish appropriate deadlines and criteria, and that customs failed to provide Little Sisters with timely notices of detentions. But, notwithstanding these findings, the majority of the court provided no further remedy. The court noted that many changes have been made by customs over the last six years, and that in the absence of more detailed information, it was not prepared to conclude that these changes were inadequate, and therefore, provided no additional remedy. The court noted that appellants could always launch a further action in the courts if they considered such action necessary.¹²

In contrast to the challenge in *M. v. H.*, the claim to sexual citizenship in *Little Sisters* was more public, highly eroticized and deeply political, each of which contributed in no small part to the defeat. Unlike the private legal subject recognized in *M. v. H.*, the legal subject in *Little Sisters* was more public in nature, although admittedly not unequivocally so. Little Sisters Book Store and Art Emporium—although a private business—represents an important institution in the lesbian and gay community in Vancouver. It is a place around which lesbian and gay life revolves—it is a meeting place, a place of information dissemination; a kind of public agora in a world of increasingly privatized public space. As EGALÉ argued 'all sexual representations are part of an inherently political discourse about such fundamental issues as identity, humanity, passion, power, control, vulnerability, trust, respect, intimacy, and, of course, sexuality. Lesbian, gay and bisexual materials make an important contribution to that discourse. They thereby operate as a socializing force, provoking informed discussion about lesbians, gays, and bisexuals through which we create networks, forge social and political ties, and develop vibrant communities' (EGALÉ, 1999, submission 9). The claim in *Little Sisters* was a claim to public space, that is, a discursive space of deliberation and meaning creation, or perhaps more specifically, to what Nancy Fraser calls a subaltern counter public, 'a parallel discursive arena where members of subordinated social groups invent and circulate counter-discourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs' (Fraser, 1997, p. 81).

The legal subject in *Little Sisters* was a highly erotically charged subject. *Little Sisters* was, after all, all about sex. It was about the right to access sexually explicit materials. It was all about the importance of sexually explicit materials in the very identity of the lesbian and gay community: '... gay and lesbian sexual imagery and text, including that which has been prohibited entry, is vital to gay and lesbian identity, dignity, self worth, community formation, health and

education' (Little Sisters, 1999, submission 41). LEAF similarly asserted the importance of sexual expression for lesbian identities, lesbian sexualities and lesbian communities (LEAF, 1999, submissions 14–20). EGALE emphasized the empowering role of sexually explicit lesbian, gay and bisexual materials (EGALE, 1999, submissions 5–10). Little Sisters and some of the intervenors asserted the importance of S/M sexuality, explaining the theatrical and consensual nature of S/M scenes, with tops and bottoms, with 'roles, dialogues, fetish costumes and sexual activities [all] part of a drama or ritual' (Little Sisters, 1999, submission 72, citing Califia, 1994, pp. 167–8). The record was replete with testimony not only about the value and importance of lesbian and gay sex, but with sexual bodies, sexual desire, and sexual pleasure. *Little Sisters* was a claim that the sexual body was entitled to citizenship; to belonging; that the body marked as sexually different had an equal entitlement to cultural citizenship; to access the materials that constituted that difference.

Finally, the legal subject in *Little Sisters* was a very political legal subject. It was a challenge to dominant modes of sexual citizenship. Little Sisters, for example, emphasized the transgressive character of pornography (Little Sisters, 1999, submission 50). EGALE argued, 'sexually explicit lesbian, gay and bisexual material challenge the dominant cultural discourse' (EGALE, 1999, submission 5). LEAF argued that these sexually explicit materials are important because 'they may challenge sexism, compulsory heterosexuality and the dominant, heterosexist sexual representations' (LEAF, 1999, submission 24). The demand for recognition in *Little Sisters* represents a fundamental challenge to the dominant mode of sexual citizenship. The constitutional case represented a challenge not only to the heteronormativity of citizenship, but further, to the de-eroticization of citizenship. Little Sisters contested the idea that the sex in citizenship is best restricted to the private, monogamous, familial sphere. The case was ultimately a challenge to the dominant ideologies of sex and sexuality.

The claim to sexual citizenship in *Little Sisters* contested the dominant modes of sexual citizenship. In contrast to the arguments recognized in *M. v. H.*, the arguments in *Little Sisters* did not neutralize the significance of sexual difference or sexual identity. Rather than 'rendering sexual difference a minor, superficial aspect of a self who in every other way reproduces the ideal of a national citizen' (Seidman, 2001, p. 324), the legal subject in *Little Sisters* was demanding that this sexual difference be affirmed and accommodated, not denied and assimilated.

But, it was an argument that was not recognized in law. These sexually charged bodies, these sexual outlaws, remained outside of the claim to citizenship. These bodies were too sexed, too sexually marked, too sexually marked as difference, to fall within the borders of belonging. These bodies were promiscuous, public, and engaged in sexual activity that resisted the dominant mode of sexual citizenship. The bodies were partially recognized—just not for the part that counts. The majority of the Court seemed to recognize, reluctantly, that sexual expression is important for lesbian and gay communities. But, not so important as to require a rethinking of the laws regulating the repression of sexual expression, which is precisely what these bodies demand. Sexual citizenship, for queer bodies, requires a redrawing of the boundaries between good and

bad sex, between obscene and onscreen.¹³ Sexual citizenship for these erotically charged bodies requires that the inside of citizenship no longer demand that the pulsating, promiscuous, pleasure-driven body be checked at the door. It requires a transformation of the inside of citizenship—away from the privatized, de-erotized, and depoliticized sexual citizen, to one that can accommodate a citizen whose sex is public, eroticized and political. It requires a rethinking of citizenship that the law was not prepared to embrace.

The Unruly Edges—Rereading the Normal/Transgressive in the Sexual Citizen

M. v. H. and *Little Sisters* together tell a story about the nature of sexual citizenship, a story about the disruption of dominant modalities of sexual citizenship and about the limits of this disruption. While the heteronormativity of sexual citizenship has been displaced, its privatized, de-erotized and depoliticized character has not. But, this story of sexual citizenship remains too unequivocal. All of the stories of sexual citizenship can be read more ambivalently. The assimilationist and disciplinary character of sexual citizenship always has its unruly edges. And the more transgressive challenges to dominant modalities of sexual citizenship are not without their normalizing elements.

While *Kissing Jessica Stein* can be read as a story of the normalization of sexual difference, it also tells a story of the malleability of sexuality, sexual attraction and intimacy. In an exchange with her two gay best friends, one accuses Helen of trying on lesbianism like a new fashion and reprimands Helen for the idea that she can just choose her sexuality. But, the other is more open minded, encouraging Helen in her new pursuits. The vision of sexuality that infuses the film is one of the fluidity of sexuality, in which attraction and intimacy are not reducible to stable identity categories. *Kissing Jessica Stein* is then also a story of the socially constructed nature of sexuality; a story that challenges the more essentialist approaches that posit sexuality as a fixed category of identity. Jessica and Helen have a rather more fluid sexuality, and their identities are not derived from these sexualities. The sexual politics of the film has a rather more queer sensibility, destabilizing the lines between heterosexual and homosexual, suggesting those lines are rather more porous, and rather less important than those policing the borders would suggest. The private intimacies of Jessica and Helen are metamorphized into a more public transgression of stable sexual categories.

So too is the story of sexual citizenship in *M. v. H.* rather more unruly than its initial reading would suggest. As in *Kissing Jessica Stein*, the sexual citizen of *M. v. H.* is not unambiguously private and depoliticized. The ruling represents a public recognition of same-sex relationships, which led to a full-scale public rewriting of legislation to impose both public and private rights and responsibilities on same-sex couples. New sexual citizens have been brought onto the legal and political stage, displacing the insistence on the heteronormativity of citizenship claims. Further, the decision has contributed to the destabilization of the meaning of conjugality (Cossman and Ryder, 2001), and a broader rethinking of the legal regulation of adult personal relationships (Law Commission of

Canada, 2002). In *M. v. H.*, the Supreme Court observed that a couple may be in a conjugal relationship, even in the absence of a sexual relationship. This passing remark begins to question the very distinction between conjugal and non-conjugal couples, and challenges the exclusion of non-conjugal from a range of public and private rights and responsibilities which have long been imposed on the basis of a marriage or marriage-like relationship (Cossman and Ryder, 2001).

M. v. H. has thus contributed to broader public deliberations about the appropriate scope of legal regulation of adult relationships, challenging the extent to which rights and responsibilities should be imposed on the basis of a sexual relationship. On the one hand, this destabilization of conjugality has been opposed by some within the gay and lesbian legal rights movement as a desexualization of social citizenship that attempts to evade the full recognition of same-sex relationships. Rather than destabilize conjugality, these gay and lesbian advocates seem to favour its reification through the achievement of same-sex marriage.¹⁴ But, this is an instance where desexualization may be quite desirable. There is nothing inherently progressive or transgressive about allocating rights and responsibilities on the basis of a sexual relationship. Indeed, there is much to be said in favour of rethinking whether these rights and responsibilities should be allocated on the basis of a relationship at all. And if relationships are relevant for some government objectives, then characteristics other than sex—such as emotional and economic interdependency—are likely to be far more relevant (Cossman and Ryder, 2001).

The legacy of *M. v. H.* for sexual citizenship can then be recast in more ambivalent terms. While the ruling itself seems to create and recognize a space of intimate citizenship for lesbian and gay men that is privatized, desexualized and depoliticized, the broader political and discursive implications of the ruling at least partially challenge this vision of citizenship. The heteronormativity of dominant modalities of intimate citizenship has been displaced, as the state reluctantly moves to publicly recognize same-sex relationships. The private support obligation translates into a broad range of public and private rights and responsibilities, and the familialized terrain of conjugality is increasingly challenged. While the transgressive potential of this rethinking of conjugality should not be overstated, in so far as it might only result in a broadening of the terrain of the familial and the reprivatization of the costs of social reproduction, its subversive potential is significant. *M. v. H.*, like *Kissing Jessica Stein*, tells a rather more complicated story of the contradictory nature of the claims to sexual citizenship; claims that have both a normalizing and a transgressive dimension.

The same must be said of *Queer as Folk*, and *Little Sisters*. While both have been told as a story of the transgressive nature of demands for sexual citizenship, neither is unequivocally so. While *Kissing Jessica Stein* can be retold as a story of the fluidity of sexuality that challenges the homo/hetero binary, *Queer as Folk* can be retold as a rather essentialist story about gay identity. As Michael explains in the opening narration of the pilot, 'The thing you need to know is, it's all about sex'. Gay male identity is conflated with sex—public, anonymous, excessive sex. Straight folks are discussed with derision, representing all that these queer boys are not. Despite its name, *Queer as Folk* runs

contrary to a queer politics. It does not challenge gay and lesbian identity categories, nor does it attempt to displace the hetero/homo binary. *Queer as Folk* is all about gay male identity, American gay male identity. It is all about asserting the homo side of the hetero/homo binary. *Queer as Folk* posits an essentialized gay identity, a fixed identity constituted in and through sex, constructing itself in opposition to heterosexuality.

The pleasure driven sexual subject of *Queer as Folk* is a highly gendered subject—it is a male subject, it is about gay male sexual desire. The lesbian characters, Lindsay and Mel, are represented in strikingly different terms. Lindsay and Mel are a couple raising a child together, (with Brian as sperm donor) with all the trappings of familial domesticity. Lindsay wants desperately to get married, but her (very wealthy) parents will not recognize her relationship. At first, Mel is against the idea of marriage, as a meaningless heterosexual ritual (the ‘real’ queer position, endorsed by Brian). But, when she comes around and they decide to go ahead with the wedding, they are hopelessly disorganized, rescued at the last moment by Brian and boys. And sex is noticeable for its absence. Mel wants to have sex and Lindsay doesn’t. Or they both want to have sex and the baby cries. Or Lindsay wants to have sex, and Mel doesn’t because Lindsay admits to liking porn. While gay boys are defined by sex, lesbian sexuality is not. The lesbian subjects may not be as desexualized as the lesbians in *M. v H.*, but sex is not their defining feature. And they are more assimilationist than any of the characters in *Kissing Jessica Stein*. Their lifestyle is about family, marriage and monogamy.

The transgressive sexual subject of *Queer as Folk* is then a male subject. Further, it is a subject relatively unencumbered by relationships or responsibilities. They may look out for each other, but only to the point that it doesn’t get in the way of sex. While the gay thematic of ‘friends as family’ runs through the narrative, these are not subjects encumbered by familial or civic or community responsibilities. They eschew activism and politics. While the show preaches against discrimination, the main characters themselves are politically unengaged. Only Michael’s mother, Debbie, is political. But, in a not entirely flattering and deeply gendered depiction, Debbie is a caricature of political activism—earnest, caring, open, accepting, adorned with pro-gay buttons and rainbow accessories. She makes politics seem uncool. The boys on the other hand epitomize gay chic. Their existence is defined in and through sex. And in this respect, the subject is a very partial one as a model for citizenship—sexual or otherwise. The sexual subject of *Queer as Folk*, like the sexual subject of *Little Sisters* is performatively transgressive, injecting a much needed dose of sexual desire into dominant modalities of sexual citizen. But, as a stand alone model of sexual citizenship, its essentialized notion of gay identity and disavowal of political engagement leaves much to be desired.

Nor is *Queer as Folk* unapologetically transgressive. The gay men in *Queer as Folk* are consumers. Brian’s apartment is exquisitely modern, adorned with all the accoutrements of stylish living. His car, his clothes, his cell phone are always the best, the latest, the most beautiful. While the others in the posse are not as rich, they are no less consumption oriented. Indeed, these gay men inhabit a

universe of private enterprise: from the glitzy bars to the small comic shop to the online live sex site, the gay counterpublic is a deeply privatized space. In *Queer as Folk*, the gay male subject comes into being as a privatized consumer of these sexualized spaces and services.

It is a sexual citizen with considerable parallels to the citizenship claims in *Little Sisters*. The sexual citizen in *Little Sisters* can similarly be seen as cast in an essentialized lesbian and gay identity. The assertion of lesbian and gay difference—the idea that lesbian and gay sexualities and sexual representations are different, and that this difference is crucial in the formation of identity and community—does not challenge the hetero/homo divide, but rather, reifies it. While the sexual citizen in *Little Sisters* is less overtly gendered, attempting instead to capture both lesbian and gay identity, much like *Queer as Folk*, the claim to cultural citizenship in *Little Sisters* is all about asserting the homo side of the hetero/homo binary. It posits an essentialized lesbian and gay identity, a fixed identity constituted in and through the difference of sexuality, constructing itself in opposition to heterosexuality. It is a claim rooted in identity politics, not queer politics. It is a claim that normalizes sexual difference; not disrupts it. It is a claim that reinforces heterosexuality as norm and homosexuality as difference.

The demand in *Little Sisters* was also a demand that the lesbian and gay public be entitled to access sexual materials. It was a claim to citizenship as consumerism, a right to public access to private goods, a right to buy and consume (see Evans, 1993; Bell and Binnie, 2000). It is a claim to citizenship that fits all too well with shifts in the prevailing conception of citizenship, from social citizen to neo-liberal citizen, now defined as a consumer of goods and services, in the public and private sector alike. It resonates with the neo-liberal precept that goods and services are best allocated by the market, not the state. In *Little Sisters*, the collective choices of individual gays and lesbians through the market should determine the allocation and availability of gay and lesbian cultural goods and services. It was, effectively, a demand that the market should dictate access, not border guards. Ultimately, the legal claim in *Little Sisters* sits uneasily on the public/private divide, as does the gay and lesbian subaltern counter-public (Stychin, 2001). It has elements both public and private—a discursive political space, a public demand, a private enterprise servicing private consumer demands.

The sexual citizen is, in part then, a highly privatized consumer citizen. It is a citizen constituted in and through the discourses of neo-liberalism, in which citizenship is being reconstituted in privatized, marketized terms. It is a citizen whose public visibility and political viability are brought into being in and through the private sphere of consumer choice. It is a citizen that has much in common with the sexual citizen of *M. v. H.*—that is, a privatized citizen who is constituted in and through the private sphere of market and family. These are flip sides of the new neo-liberal citizen of the post-welfare state, reflecting the strategies of commodification and familialization (Brodie, 1997). The citizen in *M. v. H.* is a citizen that recognizes the responsibility of families to take care of their own, a responsibility that is no longer restricted by sexual identity. The citizen in *Little Sisters* is a citizen that recognizes the primacy of the market—

indeed, it is a citizen that demands the commodification of services inappropriately cast as public.

Conclusion

The story of sexual citizenship is a story of both the sexing of citizenship and the privatizing of sex. And it is a story about both assimilation and subversion, normalization and transgression. Lesbian and gay legal struggles in Canada have succeeded in displacing the heterosexual requirement for citizenship. Once cast as sexual outlaws, many lesbians and gay men have been brought in from the cold, and recognized as legitimate citizens. But, in the process, they have been reconstituted in the image of dominant modalities of legal subjectivity. The closer the sexual subject can cast itself in the image of the private, de-eroticized, depoliticized citizen, the greater the chances of legal recognition. At the same time, even this normalized sexual citizen has its unruly edge. Private rights translate into broader public sphere deliberations and public policy initiatives. De-eroticized subjects may rightly cast doubt on the relevancy of sex and sexuality in the allocation of rights and responsibilities.

But, both the de-eroticization and privatization of sexual subjects present ongoing challenges to sexual citizenship for lesbians, gay men and other sexually charged bodies. Sexual citizenship for queer bodies still requires a further redrawing of the boundaries of inside and out, of good sex which allows membership, and bad sex which does not. Sexually charged bodies should not have to desexualize themselves, nor marginalize their sexuality to the private sphere. Sexual citizenship must be transformed to welcome the sexual, to embrace the pleasurable, the erotic, the desirous, as a legitimate dimension of membership. Sex and sexuality must be valued, as a crucial component of one's subjectivity and citizenship. At the same time, a model of citizenship constructed entirely around the citizen as a sexually desiring body would be an inadequate basis for re-imagining membership for lesbians, gay men and other sexually charged bodies. Such a model of citizenship risks essentializing lesbian and gay identity and fetishizing sex, much like in *Queer as Folk*.

The privatization of sex, in either the familialization or commodification of citizenship, similarly presents an inadequate basis for rethinking sexual citizenship (Stychin, 1998, p. 15). Sexual citizenship should not be based exclusively on private marketized choice, nor on familial responsibility. A sexual citizen based on neo-liberal citizenship would, for example, always value individual choice over ethical judgments, and market over government allocations. It would endorse a sexually libertarian model of citizenship, in which sexual free choice and individual desire triumphed over any competing considerations; in which there would be no limits on the pursuit of the pleasurable. While the dominant modality of sexual citizenship is in need of a healthy dose of sexual libertarianism that would recognize a broader array of sexual desires, it need not be displaced by this neo-liberal consumerized citizen.

Nor should an alternative model of sexual citizenship be premised exclusively on the familialization of social responsibility. Contrary to the imagery of sexual citizenship in *Queer as Folk*, many lesbians and gay men are encumbered with

relationships and familial responsibility, and wish to have these encumbrances recognized and valued. An alternative model of sexual citizenship need not eschew the recognition of the familial. At the same time, lesbians and gay men should not have to base their citizenship on their willingness to reinforce the re-privatization of the costs of social reproduction. An alternative model must find a way of affirming both familial and social responsibility, rather than equating sexual citizenship with the neo-liberal citizen of familial self-reliance.

An alternative model of sexual citizenship must encompass both the sexual outlaw and the encumbered subject, but need not conflate either with the neo-liberal citizen. It must continue to displace not simply the heterosexual requirement of citizenship, but also the heteronormativity of sex, sexuality and sexual citizenship. It will not be enough to posit an essentialized gay and lesbian citizen to stand in contrast with the heterosexual one. Challenging the heteronormativity of the sexual citizen requires the deconstruction of the hetero/homo divide; it requires a recognition of the fluidity of sex and sexuality, and a revisioning of sexual ethics. An alternative model of sexual citizenship must accommodate those citizens whose sex is public, eroticized and political; it must embrace not only the drag queens and leather dykes, the bar boys and the high femmes, but the erotically charged bodies of other communities: the S/M body, the sex worker body, the transgender body. It must embrace those bodies whom David Bell has referred to as 'citizen-perverts', who 'act as markers of the limits of the moral economy of citizenship', who 'inhabit the space of neither/nor transgression' (Bell, 1995, pp. 144, 150) and whose inclusion will then challenge the limits of the moral economy they are supposed to mark. The sexual performances of these bodies—which have long cast them on the outside of citizenship—must be recognized within the public sphere of citizenship. For these sexual performances are also political performances, they are part of a political conversation about the importance and diversity of sex and sexuality. As political performances, these bodies seek to disrupt dominant modalities of citizenship and sexual ethics, and facilitate a more radical exploration of the role of sex and sexuality in our lives.

These bodies challenge the heteronormativity of the sexual citizen, and unlike the private, the de-eroticized, the depoliticized subject, assert a different kind of publicity to sex and sexuality. In this revisioning of sexual citizenship, the idea of sex as public does not mean that it should be regulated. Nor does it privilege public sex. Rather, it is an assertion of the political nature of sex and sexuality; an assertion of a public sphere in which sex and sexuality is negotiated and performed. It means, for example, that sexual expression should be recognized not as marginal to the values of freedom of expression, but rather, as going to its very core: the telling of truths, politics and selfhood. It means that sex and sexuality should be recast—not as abject and shameful, but as positive and enabling. Like gender or ethnicity or religion, sex and sexuality should be revisioned as a contested, constructed and contingent dimension of who we are in the world.

The revisioning of sexual citizenship would also assert a different kind of privacy. The idea of privacy would no longer mean that only private sex was legitimate. Nor would privacy be cast in the neo-liberal terms of commercializa-

tion and familialization. Privacy would still mean a sphere of activity that is protected from interference by the state and other citizens: consensual sexuality would not be subject to state regulation. But, the sphere would be broadened—neither geographically confined to private homes nor ontologically confined to heterosexual, monogamous couplings. The zone of privacy once cast in these exclusively heteronormative terms would be exploded. This revisioning would ‘radicalize the idea of privacy to defend an idea of sexual citizenship that includes an expansive concept of sexual intimate choice and variation’ (Seidman, 2001, p. 327). The sexual citizen would continue to ‘sit uneasily on the public/private divide’ (Stychin, 2001, p. 294; Bell, 1995), asserting sex and sexuality as simultaneously public and private while recasting the meaning of both.

Finally, the alternative model of sexual citizenship is one that envisages a rethinking of sexual ethics. It would embrace the sexual ethic of Gayle Rubin who, in seeking to displace the hierarchies of good sex/bad sex, has argued that we should ‘judge sex acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of the pleasures they provide’ (Rubin, 1984, p. 283). As Steven Seidman has argued, it would include a ‘communicative sexual ethic’, which instead of focusing on whether a specific sex act is normal, ‘would focus on the moral features of the social exchange ... does it involve mutual consent, are the agents acting responsibly and respectfully, is there erotic intimacy reciprocity?’ (Seidman, 2001, p. 327).

Glimpses of such a vision of sexual citizenship are found in *M. v. H.* and *Little Sisters*, in *Kissing Jessica Stein* and *Queer as Folk: M. v. H.* affirms the importance of relationships and responsibilities to the dignity of legal subjects, while *Little Sisters* affirms the centrality of sexuality to the identity and well being of these subjects; *Kissing Jessica Stein* reminds us of the ambivalence and fluidity of sexuality, while *Queer as Folk* proselytizes that sex is a worthy pursuit in its own right, that need not be sanitized or privatized. But, an alternative model of sexual citizenship must move past the limits of each: past the privatization and desexualization of *M. v. H.*, and the commodification of *Little Sisters*; past the gendered and essentialized identity of *Queer as Folk*. It is perhaps the little story of *Kissing Jessica Stein* that comes the closest to this alternative model—a model which recognizes the gendered nature of sexual citizenship, challenges static and fixed notions of sexual identity, and recognizes the encumbered nature of the sexual citizen, who must forge her way through a web of relationships and responsibilities. It comes closest to challenging the hetero/homo divide, and recognizing sexuality as a more fluid continuum that does not privilege any one sexual citizen, or any one sexual outlaw, but makes room for all. And it perhaps comes closest to embracing the sexual ethic of judging sex and sexuality according to norms of respect, consent and pleasure.

Notes

1. I would like to thank Engin Isin, Daiva Stasiulis, and Joanne Pickel for their engaging comments.
2. Canada remains in the forefront of the recognition of lesbian and gay citizenship. The Netherlands has gone

- further recognizing same-sex marriage, with almost all the same rights and responsibilities as marriage (there is an exception regarding the presumption of parenthood for the partner of a woman who gives birth, as well as some immigration and survivor pension rights). The state of Vermont, in recognizing civil unions, extends all the rights and responsibilities of marriage to same-sex couples. While Denmark, Norway, Sweden, Greenland, and Iceland have extended a broad range of rights and responsibilities to same-sex couples through domestic partnership regimes, these regimes are limited in terms of adoption and parental status. Canada, while varying from province to province, has extended most rights and responsibilities to same-sex couples, including adoption and custody rights (see Wintemute and Andaneas, 2001).
3. Gay and lesbian legal strategies did initially target marriage, but in the aftermath of the failure of the challenge in *Layland v. Ontario*, lesbian and gay litigants shifted their litigation strategy to the opposite definitions of spouse that applied to unmarried cohabitants. It was the view at the time that these definitions would be easier to challenge, and that the legal legacy of successful litigation in this area would set the necessary precedent for an eventual challenge to marriage laws. By way of contrast, the United States has very little recognition of unmarried cohabitation, thus leaving very little space for gay and lesbian litigation strategies for same-sex relationship recognition to challenge anything other than marriage.
 4. In Canadian constitutional law, any Charter challenge is a two-step process. First, the Court must determine if the specified right has been violated. If the answer is affirmative, then according to the second step, the Court must determine whether the violation is a reasonable limit within the meaning of section 1 of the Charter. Section 1 of the Charter reads: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.
 5. The federal government passed the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 extending the same rights and responsibilities to same- and opposite-sex couples who have cohabited in a conjugal relationship for at least a year. The provinces have similarly amended their legislation, extending rights and responsibilities to same-sex couples on much the same basis as opposite-sex couples: British Columbia: *Definition of Spouse Amendment Act, 2000*, S.B.C. 2000, c. 24; Alberta: Bill 30, *Adult Interdependent Relationships Act*, 2nd Sess., 25th Leg., Alberta, 2002; Saskatchewan: *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, S.S. 2001, c. 50 and *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)* S.S. 2001, c. 51; Manitoba: *Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, S.M. 2001, c. 37; Quebec: *An Act to Amend Various Legislative Provisions Concerning de facto Spouses*, S.Q. 1999, c. 14 and *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6; New Brunswick: *An Act to Amend the Family Services Act*, S.N.B. 2000; Nova Scotia: *Law Reform (2000) Act*, S.N.S. 2000, c. 29; Newfoundland: *An Act to Amend the Family Law Act*, S.N. 2000, c. 29.
 6. In 'A Statement from M.', issued on 19 May 1999, after the Supreme Court ruling, M stated that it was not her decision to remain anonymous, but rather, that of her partner H. 'When I entered into this, I was prepared—eager even—to go public. It was "H" who insisted that we remain anonymous, and the case be reported under the initials of our attorneys'. At the same time, she defended her decision to preserve her privacy.
 7. Much of the argument regarding the freedom of expression claim focused on the procedural defects of the customs regime. Little Sisters argued that the procedures used by customs were fundamentally flawed and that parliament should have ensured adequate safeguards to ensure that government action would not infringe constitutional rights. The majority of the Court, however, was of the view that the problem was not with the customs legislation itself, but simply with its implementation. Further, parliament was entitled to provide only a broad outline in the legislation, and leave its implementation to regulation or departmental procedure. According to the Court, any failure at the implementation level should be addressed at the implementation level. The Court was, however, of the view that one of the provisions in the legislation which effectively imposed a reverse onus on the importer to prove that material was not obscene was inappropriate, and declared that the provision should not be interpreted in this manner. The Court declared that the onus of proving obscenity should rest on the Crown, not the importer.
 8. In *R. v. Butler* [1992] 1 S.C.R. 452, the Supreme Court of Canada upheld the criminal law of obscenity from a constitutional challenge. In the process, the Court reformulated the law of obscenity. According to the Court, pornography could be divided into three categories: (1) sexually explicit materials with violence, that will almost always constitute the undue exploitation of sex and thus be obscene; (2) sexually explicit materials that are degrading and dehumanizing, which will constitute the undue exploitation of sex if they result in harm; and (3) sexually explicit materials that are not violent, not degrading nor dehumanizing, and

- do not involve children in the production, which will not be held to be the undue exploitation of sex. According to the Court, although the law of obscenity violated the right to freedom of expression guaranteed by section 2(b) of the Charter, it was a reasonable limit on this right within section 1. The objective of the obscenity law—the prevention of harm, particularly harm towards children, was sufficiently important to justify the restriction of this marginal speech. The ruling in *Butler* has been subject to extensive criticism by legal scholars, civil libertarians, gay and lesbian rights advocates and anti-censorship feminists, who feared that it would be used against sexual minorities and continue to repress alternative sexual representations. Critics have argued that the revised test in *Butler* remains a highly subjective test that, despite the language of preventing harm, is premised on a conservative sexual morality (Cossman *et al.*, 1997; Moon, 1993).
9. In *Butler*, the Court was concerned with the alleged harm to women that results from mainstream heterosexual pornography. The analysis of harm adopted by the court, heavily influenced by the radical feminism of Catharine MacKinnon was based on a very particular understanding of the oppressive nature of heterosexual sexuality, of the harms that men do to women in and through sex (Cossman *et al.*, 1997).
 10. However, EGALE was not arguing that an exception should be carved out of the *Butler* test. Rather, it was arguing that *Butler* could be distinguished for the purposes of the section 1 analysis. According to EGALE, in determining the legislative objective under the customs legislation, the *Butler* reasoning regarding the prevention of the harmful effects of pornography should not be applied, since there was no evidence of harm in the gay and lesbian context. Similarly the *Butler* reasoning regarding the rational connection between this objective and the legislative scheme should not be determinative. According to EGALE, there is no rational connection between the government's stated objective of preventing harm 'and the means used to achieve that objective, namely, the enactment of a draconian legislative regime, which suppresses a disproportionately large amount of homo-erotic publications' (EGALE, 1999, submission 38).
 11. The Court appeared to pay little attention to EGALE's arguments attempting to distinguish *Little Sisters* from *Butler* for the purposes of the section 1 analysis. The Court followed the section 1 reasoning in *Butler* quite closely, and without much elaboration.
 12. The dissenting opinion of Justice Iacobucci, writing on behalf of Justices Arbour and LeBel, reached very different conclusions. Although the dissenting opinion agreed that there was no problem with the *Butler* harm-based test for obscenity, it was of the view that the customs legislation itself violated both the right to freedom of expression and the right to equality and that these were not justifiable under section 1. The dissenting opinion concluded that the flaws in the customs regime were not simply on the level of administration, but rather, 'flow from the very nature of prior restraint itself' (para 237). In his section 1 analysis, Iacobucci J. recognized the importance of gay and lesbian literature. 'In a society which marginalizes sexual difference, literature has the potential to show individuals that they are not alone and that others share their experience. To ban books carrying these messages can only reinforce the existing perceptions gay, lesbian and bisexual individuals have of their marginalization in society' (para 247). He concluded that customs legislation made only the 'most meagre of efforts to accommodate expressive rights', and that it could not survive constitutional scrutiny. He was of the view that structural reform was required to the customs process, and as a result, would have struck down the provisions of the Tariff Code.
 13. As Linda Williams, among others, has noted, 'one possible etymology of the word obscene is the literal Latin meaning of "off scene"—those things which are, or should be, kept off (ob) the scene or stage of public representation' (Williams, 1993, p. 59).
 14. This is partially due to the political strategies of neo-conservative opponents to same-sex struggles, who have increasingly cast the issue in these terms. Rather than opposing the imposition of rights and responsibilities on same-sex couples, many neo-conservatives now argue that if rights and responsibilities are going to be extended to same-sex couples, then these rights and responsibilities should similarly be extended to other non-marital or non-conjugal couples. The strategy is one that attempts to dilute the equivalency of same-sex and opposite-sex conjugal relationships.

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