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Legal Rites: Abjection and the Criminal Regulation of Consensual Sex

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Legal Rites: Abjection and the Criminal Regulation of Consensual Sex

Kate Sutherland*

I. INTRODUCTION

A broad range of consensual sexual practices are prohibited or regulated through criminal law. I am referring to laws relating to homosexual sex, teenage sex, intergenerational sex, commercial sex, public sex, sadomasochistic sex, and adult incest. The applicability of the term “consensual” is contested in many of these contexts—in feminist debates about prostitution, for example. But for my purposes here, I take consent at face value and use the term “consensual” to indicate any sexual practice or interaction to which all the participants consider themselves to have consented.

Let me begin by offering a snapshot of the state of criminal law with regard to consensual sex in the United States.¹

Sodomy laws render consensual and private anal and oral sex between same-sex partners criminal in half the states. A number of states also maintain criminal prohibitions against consensual heterosexual sodomy, although such prohibitions are rarely enforced. Sodomy laws have been challenged on grounds of privacy, vagueness, and equality; privacy challenges have occasionally succeeded at the state level.²

Prostitution is illegal throughout the United States, except in a few counties of Nevada where it is permitted only in a licensed “house of prostitution”.

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* Assistant Professor, Osgoode Hall Law School. The author wishes to thank Nathaniel Berman and Duncan Kennedy for their comments on an earlier version of this paper. She also wishes to thank Alice Jardine for introducing her to Julia Kristeva’s work on abjection.

Laws against public sex—that is, solicitation, vagrancy, and loitering statutes—may also be used to prosecute anyone identified by authorities as a prostitute.\(^3\) These public sex laws are also used to criminalize public expression of homosexuality.\(^4\) It bears noting here that the definition of “public” in this context is not confined to public streets and parks: it extends to cars, movie theaters, and members-only clubs.\(^5\) It may even extend to an individual’s home if more than two people are present.\(^6\) Vagueness challenges have occasionally been successful against this constellation of laws, but privacy and freedom of expression challenges have never succeeded.\(^7\)

Public nudity is criminalized in almost every state as “indecency”. Freedom of expression challenges have occasionally succeeded when nude dancing has been at issue.\(^8\)

Adult consensual incest is a felony in every state.

Sadomasochistic sex has been prosecuted as criminal assault a number of times. A consent defence, parallel to that which operates in cases involving violent sports, has never been allowed in this context.\(^9\)

Fornication, adultery, and cohabitation statutes that criminalize unmarried and extramarital sex remain on the books in many states. Although these statutes are seldom enforced, legislators sometimes face fierce opposition when they undertake to repeal them.\(^10\)

Age of consent statutes, more commonly known as statutory rape laws, criminalize intergenerational sex in every state. The party under the age of consent is deemed incapable of consent regardless of any protestation to the contrary on his or, more often, her part. Those swept up in this net include, for example, an 18-year-old Wisconsin man who had intercourse with

\(^3\) Vagueness challenges to such statutes have occasionally succeeded, but privacy and freedom of expression challenges have consistently failed (United States v. Moses, 339 A. 2d 46 (D.C. Cir. 1975)).

\(^4\) Freedom of expression challenges have failed in this context on the basis that solicitation to engage in homosexual sex constitutes “fighting” words (Ohio v. Phipps, 389 N.E. 2d 1128 (Ohio Sup. Ct. 1979) [hereinafter Phipps]).

\(^5\) P. Califia, Public Sex: The Culture of Radical Sex (Pittsburgh: Cleis Press, 1994) at 71.


\(^7\) See e.g. Phipps, supra note 4; People v. Uplinger, 467 U.S. 246 (1984); People v. Superior Court (Caswell), 758 P. 2d. 1046 (Cal. 1988).

\(^8\) See e.g. Miller v. Civil City of South-bend, 904 F. 2d 1081 (7th Cir. 1990) [hereinafter Miller].


\(^10\) For five years in a row, Massachusetts legislators have tried and failed to lift the state’s criminal sanctions against fornication, adultery, and cohabitation after divorce. See A. Walker, “Lawmakers Again Tackle a Repeal of Old Sex Law” (11 June 1997) Boston Globe, B1. The Massachusetts adultery law was upheld as constitutional as recently as 1983 on the basis that the damage that adultery does to the marital relationship justifies criminal sanction (Commonwealth v. Stowell, 449 N.E. 2d 357 (Mass. 1983)).
his 15-year-old consenting fiancée.\textsuperscript{11} In some states, the “victim” of an intergenerational affair may also be convicted as an aider and abetter of the offence. Or, he or she may be subject to sanctions as a juvenile delinquent under state law.\textsuperscript{12} In a number of states, consensual sex between youths of similar age is also illegal.\textsuperscript{13} Even in states where this is not the case, other laws may be used to criminalize such sexual interaction. In 1997, a 14-year-old Kentucky boy was convicted of kidnapping for persuading his 12-year-old girlfriend to sneak out of her parents’ house for a late-night rendezvous with him.\textsuperscript{14} And in Idaho, an enterprising prosecutor recently revived the offence of fornication in order to bring teenage mothers under the control of the criminal justice system.\textsuperscript{15}

The above makes clear that the application of criminal law to consensual sex is an arena of conflict and contest between conservative and liberal forces in the United States, with occasional feminist interventions. The same arguments tend to recur on each side of the debate. Conservatives assert the appropriateness and necessity of enforcing a particular Judeo-Christian sexual morality through law. Liberals argue for tolerance of private consensual sexual conduct. When the debate shifts from the private to the public arena, conservatives may argue privacy principles, asserting the right of bystanders to be let alone, whereas liberals may shift to freedom of expression arguments. In most cases, conservatives prevail.

I have not undertaken a systematic survey of such laws in Canada, but the same dynamic appears to be at work here, with conservatives and liberals fighting on the same terrain, albeit with more liberal victories in the realm of private consensual conduct. For example, private and consensual anal sex was decriminalized in Canada in 1969, but the definition of private is very restrictive (only two people present) and there remains a differential age of consent (18 as opposed to 14).\textsuperscript{16}

In this paper, I am seeking to find a new way of understanding the criminal regulation of consensual sex that transcends this conservative-liberal

\textsuperscript{11} State v. Gillson, 222 Wis. 2d 218 (1997).
\textsuperscript{12} See e.g. Gammons v. Berlat, 144 Ariz. 148 (1985); In Re Frederick 622 N.E. 2d 762 (Ohio Com. Pl. 1993).
\textsuperscript{13} See e.g. in Arizona, where a 16-year-old boy was convicted of sexual abuse for touching the breasts of a 14-year-old girl with her consent (Matter of Pima County Juvenile Appeal No. 74802-2, 790 P. 2d 723 (Ariz. 1990)).
\textsuperscript{14} Interview with a Kentucky public defender, December 1997.
debate. I do so by turning to an element that threads through both sides of the debate, though it is deployed to very different effect. That element is abjection.

In tracking the debate through courts, legislatures, and academic literature, I noted that regardless of who was arguing, or which side was winning in any particular context, the discussion was peppered with references to disgust or revulsion. These were not incidental, throw-away references. An examination of the theory behind the opposing arguments reveals that disgust plays a central role in determining for each camp which consensual sexual practices should or should not be regulated through criminal law.

Disgust is deployed by conservatives to argue for prohibition of various consensual sexual practices. On the other side, one might expect liberals to keep their disgust under wraps in the interest of pluralistic tolerance. This proves not to be the case. Liberals do argue that the generation of disgust by any given practice is not a sufficient basis for criminalizing consensual conduct, but nevertheless frequently invoke disgust to justify confining such conduct to the private realm.

Drawing upon literary and psychoanalytic theory, the above references can be characterized as abjection responses and linked to anxiety about the maintenance of boundaries. I am speaking here of boundaries between a variety of cherished classifications, such as human/animal, male/female, adult/child, and citizen/foreigner, the existence of which impose a semblance of order and hierarchy in society. Making this link helps to explain why many are so strongly invested in regulating the private and consensual conduct of others.

II. ABJECTION

I take the term "abjection" from psychoanalytic theory, in particular from Julia Kristeva's work.\textsuperscript{17} The abject is alien, taboo, unclean. It provokes abjection—a rejection, a casting out, the creation of a barrier between the subject and the abject.

Let me illustrate by attempting a phenomenology of abjection, an exploration of emotional and physical responses to the abject. I begin with Kristeva's discussion of food loathing, "the most elementary and most archaic form of abjection."\textsuperscript{18} She speaks of the visceral bodily response one has to the skin on sour milk. One feels disgust and consequent nausea at the sight or touch of this skin. This sense of disgust or repulsion, this feeling of

\textsuperscript{18} Ibid. at 2.
nausea, signals the presence of the abject. In order to be rid of it, one retches, one vomits.

Jean-Paul Sartre's discussion of sliminess in *Being and Nothingness* provides another example of the abject. According to Sartre, slime is disturbing because it is an aberrant fluid. It is neither liquid nor solid. When one touches it, it sticks: "It is a soft yielding action, a moist and feminine sucking, it lives obscurely under my fingers and I sense it like a dizziness; it draws me to it as the bottom of a precipice might draw me." Sliminess provokes fear because on touching it, one fears one might be lost in it. Unlike water, which simply slides off the body, slime does not let go.

A flip side of disgust that might also be characterized as an abjection response is sexual arousal. Disgust and desire may be closely connected. This connection has been unwittingly made by a number of American judges in grappling with the question of whether the operative obscenity test—"appealing to the prurient interest"—requires that the material at issue be sexually arousing to the average member of the community. If so, what happens to pornography that, according to the court, repulses the average member of the community—for example, gay porn or pornography involving bestiality? Must the jury try to imagine what would be sexually arousing for the average gay man or the average practitioner of bestiality in order to determine if such material is obscene, or does it escape the law altogether? Ultimately, this line of cases determined that the repulsive as well as the arousing appeals to "the prurient interest." Thus, some state codes define the prurient interest as including "a shameful or morbid interest in nudity, sex or excretion."

Drawing on the above, abjection, while clearly tied to emotion, is experienced very viscerally, perhaps in a more "embodied" way than many other emotions. Indeed, it might be mistaken for an involuntary physical response. A catalogue of abjection responses would include disgust, revulsion, nausea, horror, fear, and anxiety. Such responses may manifest physically in a gag reflex or in sexual arousal.

According to psychoanalytic theory, the power of abjection derives from its connection to early experiences of separation and the attainment of subjectivity. I will focus here on two stages in childhood development that

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20 Ibid. at 609.
21 See e.g. *Ripplinger v. Collins* 868 F.2d 1043 (9th Cir. 1989).
22 Ibid. at 1053.
have preoccupied psychoanalytic theorists from Freud to Kristeva and beyond. The first is the anal stage, when the child begins to experience a distinction between the inside and the outside of its body, connected with the expulsion of feces. This is the "first material separation that is controllable by the human being." As such, defecation is a source of pleasure. Ultimately however, the mother regulates the oral and anal drives of the child, overseeing what goes into and comes out of the child's body. These are the child's first lessons of social regulation. It learns that feces are dirty and not to be touched. Defecation becomes a source of shame.

The second stage of particular interest for my purposes is the child's initial psychic separation from the mother. Kristeva speaks of the child's need to abject the mother's body in order to separate from her. At this early stage, the child is not yet a subject and the mother is not yet an object. The child experiences itself and its mother as one, rather than as two distinct entities. Abjection divides the child and the mother into subject and object, self and other. It is a necessary precursor to the child's entry into the symbolic order and the consequent attainment of language and subjectivity. Note the importance here of the sexed position that the child must take up in the symbolic order, and the different consequences, depending on whether the child is male or female, of abjecting the mother's body, the female body.

23 Kristeva, supra note 17 at 108.

24 To those familiar with the work of Jacques Lacan, this will be recognizable as a reworking of his version of the Oedipal crisis that propels the child from the imaginary into the symbolic order, into subjectivity, signification, and submission to the "law of the father". In Lacanian theory, at this stage, the father splits up the dyadic unity between mother and child, and forbids the child's further access to the mother's body. The phallus here represents the law of the father (the threat of castration), signifying separation and loss to the child—the loss of the mother's body. The "primary repression" occurs: the repression of desire for the mother's body and for imaginary unity with her. The primary repression opens up the child's unconscious. This entry into the symbolic order is linked with the acquisition of language. A child learning to say "I am" is admitting that it has given up imaginary identity with the mother/the other and thereby taken up its allotted place in the symbolic order. The speaking subject comes into existence as a result of repression of the desire for the mother. From this point, the child's desire moves from object to object, or from signifier to signifier, never finding full satisfaction as it can never attain ultimate desire (lost imaginary harmony with mother and the world). See E. Grosz, Jacques Lacan: A Feminist Introduction (New York: Routledge, 1990); J. Mitchell & J. Rose, eds., Feminine Sexuality: Jacques Lacan and the École freudienne (New York: W.W. Norton, 1982).

For those who prefer Freudian psychoanalysis, the rough parallel is with Sigmund Freud's original articulation of the Oedipal complex and its ultimate dissolution, that is, the renunciation of the mother as a love object in response to fear of castration and the consequent submission to the authority of the father. In this version, the child thereafter internalizes the father's authority in the form of the superego as a facet of the unconscious. See S. Freud, "Three Essays on the Theory of Sexuality" (1905); "Some Psychical Consequences of the Anatomical Distinction Between the Sexes" (1925); "Femininity" (1931) in E. Young-Bruehl, ed., Freud on Women: A Reader (New York: W.W. Norton, 1990) at 89, 304, 342.
Until now, I have spoken of abjection in visceral terms. The child's initial psychic separation from the mother occurs at a very young age, at which point abjection is not experienced this way. Clearly, the young child does not regard its mother's body as repulsive. If we revisit this scene in adolescence, however, when the child is reenacting the process of separation and asserting independence, I think we can speak of a visceral abjection as well as a psychic one. Suddenly, the mother's body or, at least, the idea of the mother as a sexual being, of the parents having sex, is repulsive. The child gags.

Abjection is thus linked to anxiety about boundaries: boundaries between the inside and the outside of the body maintained through, yet threatened by, the ingestion of food and the expulsion of feces; boundaries between self and other, first between mother and child, then subsequently between male and female; and, on a collective level, boundaries between one community and another, between citizen and foreigner. One needs an "abject" to define oneself against. Abjection is necessary; it is constitutive of selves and of communities, even as it threatens the destruction of both. Abjection responses are invoked in service of boundary maintenance—to maintain wholeness and purity.

Ultimately, Kristeva asserts:

[A]bjection is coextensive with social and symbolic order, on the individual as well as on the collective level. By virtue of this, abjection, just like prohibition of incest, is a universal phenomenon; one encounters it as soon as the symbolic and/or social dimension of man is constituted, and this throughout the course of civilization. But abjection assumes specific shapes and different codings according to the various 'symbolic systems'.

In a 1966 anthropological study, from which Kristeva draws extensively, Mary Douglas articulates some of these shapes and codings through exploration of rituals and religious practices that serve to delineate and exclude the abject in various cultures. In some of the cultures which Douglas studies, bodily boundaries are closely policed through food taboos; for example, strict avoidance of readmitting to the body anything that has issued therefrom. The body here is clearly a symbol for society as a whole—"[i]ts boundaries can represent any boundaries which are threatened

25 Supra note 17 at 68 [emphasis in original].
or precarious."27 In other cultures, taboos on male contact with menstrual blood are observed. Menstrual blood is regarded as a pollutant that threatens social divisions between the sexes.

Douglas asserts that "ideas about separating, purifying, demarcating and punishing transgressions have as their main function to impose system on an inherently untidy experience. It is only by exaggerating the difference between within and without, above and below, male and female, with and against, that a semblance of order is created."28

I contend that the establishment and enforcement of criminal laws that prohibit consensual sexual conduct function similarly. The creation of a class of deviants through law operates to strengthen the conventional morality of the group. It provides something for the community to define itself against. Law provides a formal point of contact between "normal" and "deviant"; it offers a tangible boundary. I am borrowing from Emile Durkheim here in suggesting that law and deviance perform this function,29 but hopefully with a more critical spin. That is, I do not simply accept community morality as a given which is then expressed through law—power has to be taken into account. Laws operate as tangible boundaries to keep out the abject, but at the same time, create categories of the abject by the classifications thereby privileged. And abjection, the visceral emotional and physical response, is invoked over and over again in the legal arena to maintain those boundaries and those categories.

III. CONSERVATISM AND ABJECTION

In 1957, the Wolfenden Committee released a report to the British Parliament recommending the decriminalization of private homosexual practices between consenting adults. The Committee explicitly situated its recommendations within a liberal framework, declaring at the outset that "it is not the function of the law to intervene in the private lives of its citizens, or to seek the enforcement of any particular pattern of behaviour."30

Lord Devlin disagreed in a 1959 lecture that responded to the Wolfenden Report.31 In the published version of the lecture, he asserts that criminal

27 Ibid. at 116.
28 Ibid. at 4.
law has always concerned itself with morality and that it is its proper role to continue to do so. Law does not simply exist for the protection of individuals; crimes are crimes because they offend society, so there is no reason why consent of the victim should ever be determinative. He defines immorality as "what every right-minded person is presumed to consider to be immoral." He goes further, however, to say that it is not enough for the majority simply to dislike a practice; there must be "disgust" which "is deeply felt and not manufactured"—"a real feeling of reprobation." In his view, this requirement protects the fragile balance between the rights of the individual and the interests of society.

Lord Devlin concedes that the source of this reprobation, and therefore much of the criminal law, is Christian morality. He does not, however, suggest that the religious credentials of any given prohibition justify its codification in the criminal law. He does not say that that which is condemned in the Bible, or by any particular church, can properly be criminalized. His test is that which provokes "deeply felt disgust" or "a real feeling of reprobation". The reach of this test is not coextensive with religious condemnation; it is simultaneously narrower and wider than this. It is narrower in that religious condemnation cannot ground a criminal prohibition unless that condemnation is combined with "deeply felt disgust". Yet it is wider, in that a practice that is not condemned by any religious tenet may be criminalized on the grounds that it nonetheless provokes "deeply felt disgust".

Lord Devlin's test appears to be grounded in abjection. That which is experienced as abject by a majority of the population may properly be cast out of society through the mechanism of the criminal law.

Lord Devlin asserts that societies are constituted through "shared ideas on politics, morals and ethics"—common agreements as to "what is good and what is evil". If this agreement falls apart, society disintegrates. He concludes that if "a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence." In this context, Lord Devlin likens moral transgression to treason—each endangers the very existence of society and thus "the suppression of vice is as much the law's business as the suppression of subversive activities."

32 Ibid. at 15.
33 Ibid. at 17.
34 Ibid. at 10.
35 Ibid. at 11.
36 Ibid. at 13-14.
Lord Devlin invokes abjection to justify laws that maintain boundaries and counter social disintegration. For him, law ideally serves the same function as many of the rituals Douglas describes in her anthropological study. Criminal law here operates to demarcate the limits of tolerance, and police those limits. Symbolically and in actuality, law bolsters the moral structure of society.

Turning back to American sex law, does a survey of cases bear out this analysis? Certainly, references to abjection responses are plentiful among a range of lawmakers and enforcers. The same year that the Wolfenden Report was released, a Ninth Circuit appellate judge deemed the magazine of a gay organization to be obscene and therefore unmailable on the ground that a poem published therein depicting gay male sexual activity “pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and repulsion.”

In 1973, Justice Fogelman of the Arkansas Supreme Court began a judgment upholding the constitutionality of a sodomy statute as follows: “it will be unnecessary for us to set out the sordid testimony about the act, which appeared so revolting to one of the two deputies sheriff, who stated they observed it while patrolling the area, that he vomited thrice during the evening.” The act in question turned out to be one man performing fellatio on another in an automobile parked in a rest area adjacent to a highway.

In 1986, Senator Jesse Helms voiced his objection to safe sex materials which described “satisfying erotic alternatives to high risk sexual practices” for gay men, saying: “There is no mention of any moral code...Good Lord, Mr. President, I may throw up.” Senator Helms was subsequently successful in introducing an amendment which forbade publicly funded AIDS education materials from advocating homosexuality.

Thus we have a judge, a policeman, and a senator each disgusted to the point of illness by acts of consensual sex. Does the language of abjection here indicate an underlying anxiety about boundaries in line with the psychoanalytic and existential theory discussed above? Is abjection invoked to justify the maintenance of those boundaries through law? Before addressing these questions, I will turn, for a moment, to a consideration of the role of abjection in liberal theory.

37 One, Inc. v. Olesen, 241 F.2d 772 at 777 (9th Cir. 1957), rev’d 355 U.S. 371 (9th Cir. 1958).
40 Ibid. at 45-46.
IV. LIBERALISM AND ABJECTION

Until now, it may have seemed as if conservatives have a monopoly on abjection. What about the liberals in the debate? They may claim to eschew boundaries in the name of pluralistic tolerance, but they too draw boundaries, most notably between public and private conduct. Most of the liberal victories with respect to decriminalizing consensual sexual practices have relied on privacy arguments. In the context of decriminalizing homosexual sodomy while maintaining prohibitions against public homosexual expression, Larry Cata Backer notes that tolerance of private conduct is a small price to pay to keep what liberals regard as disgusting conduct out of their view, out of the public view. A boundary is being drawn and fortified around the perimeters of the closet. The closet becomes a prison rather than a refuge of gay men and lesbians.

In this connection, it must be noted that in cases where judges advocate the liberal solution of decriminalization of private consensual conduct, they often feel compelled nonetheless to register their own disgust and disapproval. For example, in the House of Lords decision in *R. v. Brown* that upheld the convictions for criminal assault of a number of participants in sadomasochistic sex, Lord Mustill prefaced his dissenting opinion as follows:

> Fortunately for the reader my Lords have not gone on to describe other aspects of the appellants behaviour of a similar but more extreme kind which was not the subject of any charge on the indictment. It is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions—perhaps horror, amazement or incomprehension, perhaps sadness—very few could read even a summary of the other activities without disgust. The house has been spared the videotapes which must have been horrible.

Disgust is invoked to justify a legal boundary between public and private—not the same boundary as conservatives wish to erect and maintain, but a boundary nonetheless.

A sophisticated analysis of the appropriate role for disgust in liberal theories of criminal regulation can be found in the work of Joel Fainberg. He devotes the second volume of his four-part series on *The Moral Limits of the Criminal Law* to a consideration of when it is appropriate to criminalize...
conduct that causes “Offence to Others”. Fainberg attempts to develop “mediating principles” to determine which sorts of offensive conduct ought to be so curbed. Ultimately, he adopts a “public nuisance” approach that weighs the seriousness of the offence against the reasonableness of the offender’s conduct.

This still constitutes an exercise in line drawing, though liberals may thereby draw the line in a different place than conservatives. Justice Posner provides an example of this kind of liberal line drawing in his judgment in *Miller*:

The harm done to public order by a performance of *Salome* in which Salome ends the Dance of the Seven veils clad only in a transparent body stocking and therefore nude under Indiana law—as in a performance last fall at the Lyric Opera in Chicago—is not of the same order of magnitude as the harm (in fright, disgust or embarrassment), slight as it may be, caused by a person who runs down the middle of a busy street stark naked or urinates in an alley. Only in the latter cases does the concept of public decency supply a persuasive rationale for punishment.

In striking down Indiana’s ban on nude dancing as a violation of freedom of expression rights, Justice Posner rejects the line conservatives have drawn between obscene and non-obscene nude dancing that could distinguish a performance of *Salome* from the bump and grind of the Kitty Kat lounge. However, he goes on to draw a distinction between nude dancing and public urination or streaking.

There is another liberal abjection to consider—the liberal abjection of their conservative rivals. In his recent book, *The Anatomy of Disgust*, William Miller notes a species of disgust generated by the overly fastidious, “because the fastidious call attention to the disgusting by being so zealous to avoid it.... The fastidious person calls attention to himself with regard to just those facets of life which decorum requires that we must publicly pretend do not exist.” There is something of this at work in the disgust that liberals express

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44 *Supra* note 8 at 1103.
for conservatives' sensitivity to disgust. For example, in the case discussed above, Justice Posner says of the conservative faction who wish to prohibit nude dancing in Indiana: "Many of us do not admire busybodies who want to bring the force of the law down on the heads of adults whose harmless private pleasures the busybodies find revolting." 46

V. POLICING THE BOUNDARIES
Andrea Dworkin has said of obscenity law that the operative test appears to be that whatever gives the judge an erection qualifies as obscene. 47 With respect to the legal regulation of consensual sex, might it now be said that whatever makes the judge or the legislator throw up can rightfully be criminalized? Are the above isolated incidents of U.S. lawmakers utilizing the language of abjection or are they indications of a logic of abjection underlying U.S. sex law?

As noted earlier, abjection is linked to the drawing and patrolling of boundaries—bodily boundaries, boundaries within communities, and boundaries between communities. The following exploration of the way in which criminal law, historically and presently, has established and policed such boundaries in the arena of consensual sex suggests that there is indeed a preoccupation with boundaries underlying the language of abjection discussed above.

A. BODILY BOUNDARIES: THE INVIOLABLE MALE BODY
As previously stated, sodomy laws criminalize anal and oral sex between consenting adult same-sex partners in half the states. This prohibition sometimes applies to heterosexual partners as well. In Bowers, the U.S. Supreme Court found that sodomy laws which target homosexual sex do not violate constitutional privacy and equality guarantees. What was at work there?

Certainly Judeo-Christian moral tenets were invoked. In an opinion concurring with the majority, Chief Justice Burger states of homosexual sex: "Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards.... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." 48 Justice White, delivering the majority opinion, does not make such a naked appeal to religious morality, but asserts that there

46 Miller, supra note 8 at 1100.
47 "Against the Male Flood: Censorship, Pornography, and Equality" (1985) 8 Harv. Women's L.J. 1 at 8.
48 Bowers, supra note 2 at 196-97.
can be no fundamental right to consensual homosexual sodomy because “proscriptions against sodomy have very ancient roots.”

Is this an example of the straightforward use of criminal law to enforce religious, specifically Christian, morality? In other cases, indeed in other privacy cases, the full weight of the criminal law was not thought necessary to protect the edifice of Christian morality. Access to birth control and abortion were held to be protected by privacy doctrine, despite religious prohibitions. Individual rights were in those contexts thought to outweigh religious morality; if the use of birth control and the performance of abortions are sins, sanctions are left to religious, not legal, authority.

Indeed, the ancient proscriptions to which Justice White refers were no less violated by access to birth control and abortion. Anne Goldstein has tracked the roots of sodomy laws back to colonial New England and found that they were not originally aimed at punishing homosexual sexual practices. They were part of a constellation of laws aimed at punishing any non-procreative sexual activity. If these ancient proscriptions could be relaxed to allow access to birth control and abortion, why not to allow consensual homosexual sex? What independent threat could consensual homosexual sex pose?

Criminal prohibitions of sodomy might be characterized as a ritual policing of bodily boundaries calculated to protect the symbolic figure of the inviolable male body. In a book titled *Intercourse*, Andrea Dworkin grounds female subordination in women’s penetrability: “in being fucked, [woman] is possessed: ceases to exist as a discrete individual: is taken over.” Possession achieved through sexual penetration exiles woman from the human condition—she is left with no sovereignty, no self. In Dworkin’s view, sodomy laws serve to protect men from this fate: “The sodomy laws are important, perhaps essential, in maintaining for men a superiority of civil and sexual status over women. They protect men as a class from the violation of penetration; men’s bodies have unbreachable boundaries.”

Certainly, in practice, sodomy laws do not serve to protect the male body from penetration. First, they are not solely directed at the activities of men.

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52 (New York: The Free Press, 1987) at 64.
Although frequently absent from legal discourse on the question, lesbians are also prosecuted under sodomy statutes. Second, such laws do not protect homosexual male bodies from violation; on the contrary, they provide for state and state-sanctioned harassment and terrorization of gay men.

But returning to Douglas, ritual is about symbolization, not about achieving practical results. If penetrability is antithetical to maleness and therefore to subjeffect, maintaining a prohibition against penetration of the bodily orifices which men and women have in common—the mouth and the anus—may well serve as a symbolic safeguard of individual subjectivity.

Further, if the male body represents not just the self, but society more broadly, sodomy laws may also serve as a symbolic safeguard of national security. Remember the connection Lord Devlin made between moral transgression and treason. I will return to this point later when I take up the question of boundaries between communities.

B. BOUNDARIES WITHIN COMMUNITIES: THE STRANGER WITHIN

Douglas theorizes pollution behavior as "the reaction which condemns any object or idea likely to confuse or contradict cherished classifications." She illustrates her point through a reconsideration of the dietary rules articulated in Leviticus. She concludes that each of the forbidden species in some way defies conventional classification—for example, sea creatures that do not swim, or winged creatures that do not fly. This defiance of classification threatens order and therefore denotes a lack of purity, of holiness: "By rules of avoidance holiness was given a physical expression in every encounter with the animal kingdom and at every meal."

58 See H. Charlesworth, "The Sex of the State in International Law" in N. Naffine & R. Owens, eds., Sexing the Subject of Law (North Ryde, NSW: LBC Information Services, 1997) 251. Charlesworth says: "The state constituted by international law is a bounded, self-contained, closed, separate entity that is entitled to ward off any unwanted contact or interference... Like a heterosexual male body, the state has no 'natural' points of entry, and its very boundedness makes forced entry the clearest possible breach of international law... Images of orderly national domestic spaces separated by state boundaries from exterior dangerous (female) chaos and anarchy, to be found in the literature on international security, similarly reflect the male sex of the state" Ibid. at 259.
59 Supra note 26 at 36.
60 Ibid. at 57.
Carefully bounded classifications of male and female operate to maintain social hierarchy in the United States, as elsewhere. A legal expression of the importance accorded to purity in these classifications can be found in the laws against cross-dressing that proliferated across the country in the form of city ordinances throughout the late-nineteenth and early-twentieth centuries. These ordinances prohibited anyone from appearing in public “in a dress not belonging to his or her sex.”

While these ordinances likely originated in response to the first wave of the women’s movement—the spectre of women in trousers signifying women’s movement claims to greater freedom and participation in society—ultimately, they were most often used to harass butch lesbians and gay female impersonators. State “disguise” laws were put to similar purpose. Prosecutions under cross-dressing laws continued into the 1970s; the first cross-dressing ordinance to be enacted, in St. Louis in 1864, was the last to be removed from the books when it was ruled unconstitutionally vague in 1986.

Despite the demise of cross-dressing ordinances, law continues to bolster the power of other societal institutions to police the gender divide in a similar fashion. In Harper v. Edgewood Board of Education, Judge Rubin held that Edgewood school had not violated the rights of two teenagers in having them forcibly removed from their Junior-Senior prom by a police officer after they arrived “dressed in the clothing of members of the opposite sex.” The school board’s gender specific dress regulations were deemed by the court to be “reasonably related to the valid educational purposes of teaching community values and maintaining school discipline.”

The case of Doe v. Boeing provides a workplace parallel. The plaintiff, an employee of Boeing Company, was a male-to-female transsexual. She was forbidden to wear “feminine” clothing to work until after reassignment. Boeing considered clothing to be “feminine” if it would likely cause complaint if worn in a men’s restroom. A blouse, earrings, lipstick, and nylon stockings passed this test, but a strand of pearls did not. Boeing deemed the necklace
“excessively feminine” and fired the employee. The Court held that Boeing Company had not discriminated against the plaintiff.

The enforcement of public sex laws to suppress public expression of homosexuality yields another example of the will to police the boundaries between male and female. An invitation to participate in sexual conduct made by a man to a woman or by a woman to a man only qualifies as solicitation under public sex laws if money is involved. An invitation to participate in same-sex intimacy is deemed solicitation regardless. Expressions of same-sex intimacy falling far short of the conduct criminalized under sodomy statutes—for example, kissing—may well be prosecuted as “lewd” or “indecent” under public sex laws. Same-sex dancing in gay bars has lead to “disorderly conduct” charges under liquor licensing provisions. Further, even if not prosecuted, such expressions make individuals vulnerable to surveillance and potential subsequent arrest under sodomy statutes.

The justifications for this network of regulation of homosexual expression are various. For example, in Phipps, Justice Locher held that the state has ample reason to suppress homosexual propositions in the interest of achieving a workable degree of social organization and harmony as such propositions have proven likely to provoke a violent response. General appeals to public decency and morality are also common in this context. It is not simply the sexual nature of the conduct that offends public order; if that were the case, a similar range of heterosexual expression would be prohibited as well. Rather, the public expression of homosexual desire disrupts the all-important classification of people into the categories of male and female in a society in which heterosexual orientation is regarded as a definitive characteristic of gender.

This brings us back to sodomy statutes. John Stoltenberg suggests that in this culture, male biology is not sufficient to constitute maleness; one must also act like a man and part of acting like a man is “having” a woman. A man must “have sex” to have gender. Dworkin provides the other half of this picture. Intercourse—that is, being penetrated—is what defines woman and also what keeps her in her place: “Intercourse is supposed to be natural and in it a man and a woman are supposed to show and do what each is by nature.”

67 Eskridge, supra note 62 at 722.
68 Thomas, supra note 57.
69 Supra note 4.
71 Supra note 52 at 149.
Thus laws that confine permissible sex to male penetration of women (coupled with laws which make it difficult for women to resist penetration) have a central role in creating and maintaining the social order. They ensure that men become men and women become women, and that the boundaries between the sexes are transgressed only literally, on heterosexual male terms:

Law steps in where nature fails: virtually everywhere. Laws create nature—a male nature and a female nature and natural intercourse—by telling errant, unnatural human beings what to do and what not to do to protect and express their real nature—the real male, the real female, the real hierarchy that nature or God created putting man on top.\(^7\)

C. BOUNDARIES BETWEEN COMMUNITIES: THE STRANGER WITHOUT

Noelle McAfee asserts:

By applying the notion of abjection to the formation of nation-states, we can explain the fascination and horror a nation-state develops toward foreigners. A nation-state constitutes its own boundaries by excluding what is other. But insofar as the other (someone who constitutes/threatens identity) resides within the nation-state, the foreign object becomes the foreign abject. The foreigner must be abjected, if not physically, then psychically.\(^7\)

Both these processes operate in the United States vis-à-vis those sexualities and sexual practices deemed "other". In the U.S., national boundaries have been constructed to exclude sexual others by, for example, drafting or interpreting immigration laws to deny homosexuals and prostitutes entry into the country, whether on the basis of criminal conviction, psychiatric label, or a vaguely defined standard of "good moral character". At the same time, deportation laws have been similarly construed to expel non-citizens who have engaged in these practices.\(^7\)

Exclusion of homosexuals from citizenship on psychiatric grounds ended in 1990 when the policy behind it was revoked in an amendment to

\(^7\) Ibid.


\(^7\) Eskridge, supra note 62 at 740-42.
the *Immigration Act*. To some extent, however, a new health-based exclusion had already superseded it. In 1987, Senator Helms sponsored a directive adding AIDS—and subsequently “HIV disease”—to the list of infectious diseases which precludes non-citizens from entering the United States. William Eskridge and Nan Hunter suggest: “To the extent HIV infection is associated with gay and bisexual men, the HIV infection exclusion becomes a partial replacement for the gay exclusion.”

The sexual “other” residing within the country has also been, in McAfee’s terms, abjected psychically, if not physically. In 1950, “homosexuals and other sex perverts” were deemed by the U.S. Congress “to be an enemy of the state because of their threat to American youth, public morals, and national security.” Thus, throughout the Cold War, gay men and lesbians were purged from the civil service, fired from teaching jobs, and expelled from schools. Surveillance of gay men and lesbians was, of course, stepped up, so that those to be fired and expelled could be identified. The FBI joined local law enforcement agencies in this quest. I shift in focus here from criminal prosecution for homosexual conduct to civil sanction for homosexual conduct or status. But the importance of the criminalization of homosexual conduct to the witch hunts and purges of the McCarthy years cannot be overstated. The legal infrastructure was already in place through which the effort could be undertaken and subsequently legitimated. Eskridge states that, during the 1950s:

Homosexual panic...paralleled Communist panic, and the two intermixed, during which charges of homosexuality were confused with or even dominated charges of political subversion.... Even more than conquest by an external enemy, the American nightmare was conquest from within—a nation of pod people (homosexuals) who had taken over the bodies of real people (heterosexuals).

This brings Lord Devlin’s parallel between moral transgression and treason vividly to life. Homosexual men and lesbians were clearly viewed as a moral danger in this context—homosexuality was analogized to a

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75 Eskridge & Hunter, *supra* note 61 at 189.
76 *Ibid.* Given the current demographics of AIDS, this exclusion can also be interpreted to, in some measure, stand in for racist immigration policies which have historically excluded people of colour from citizenship.
77 Eskridge, *supra* note 62 at 766.
pollutant, a contagious disease. But politicians took the crusade further than this. They were not simply worried about moral decay (disintegration from within) but with national security (dangers from without): “Already believed to be morally enfeebled by sexual indulgence, homosexuals would readily succumb to the blandishments of the spy and betray their country rather than risk exposure of their sexual identity.”

Here we are not talking about the actual foreigner, or the stranger without, but rather about the conflation in social and legal consciousness of the stranger without and the stranger within. Eskridge asserts: “Many anti-homosexual Americans, including closeted homosexuals, viewed the closet as a Trojan Horse whose secluded occupants were a fifth column threatening to destroy the United States, morally and politically.”

To some degree, the same analysis holds today in connection with the expulsion of gay men and lesbians from the military and the denial of security clearances to gay men and lesbians to work in federal agencies such as the FBI. For example, Retired General Norman Schwarzkopf grounded his opposition to lifting the ban on homosexuals in the military on the need for “unit cohesion” and the disastrous consequences of a failure of that cohesion in the face of battle. Once again, the homosexual man is cast as the abject whose return threatens disintegration. The FBI’s exclusionary policy was upheld as recently as 1987 on the basis that homosexuals and bisexuals are potential security risks. Once again, the stranger without and the stranger within are conflated.

VI. LEGAL AND POLITICAL IMPLICATIONS
If the foregoing analysis is correct, what are its legal and political implications? Does grounding the law in abjection, articulated as necessary to and a universal feature of both the individual psyche and the collective consciousness that establishes communities, require acceptance of the boundaries that have been drawn, of the uses to which abjection has been put?

I think not. First, while abjection has been theorized as necessary and universal, the forms it takes, the “specific shapes and different codings” that it assumes, are culturally specific and therefore open to transformation. Harlon Dalton points out: “Little of what disgusts us is absolute, rooted in

81 Ibid. at 293.
82 Supra note 62 at 709.
83 Cited in Eskridge & Hunter, supra note 61 at 388-89.
84 Padula v. Webster, 822 F. 2d 97 104 (D.C. Cir. 1987).
human nature, or divinely ordained. Rather, our sensibilities are, in general, culturally contingent and surprisingly plastic.\textsuperscript{85} Further:

\begin{quote}
[I]t is worth underscoring that our sensibilities change. Some changes are relatively small. I have nearly gotten to the point where I can eat everything at my local sushi bar without gagging. But the big stuff changes as well—how we approach sex and sexuality, race, gender, God, country, our bodies, our planet—and that is true for societies as well as for individuals, over periods briefer than a human lifetime.\textsuperscript{86}
\end{quote}

Second, the link between abjection and law does not simply run one way. Thus far, I have emphasized the way the law mirrors and enforces the abject as already psychologically or socially conceived. But the law does not simply reflect social norms; it is also constitutive of them. Recall that for Lord Devlin, the limits of tolerance, at which point law may rightfully intervene, were marked by disgust that was “deeply felt and not manufactured”. In fact, even deeply felt disgust is manufactured and law may play a role in its manufacture. Clearly then, law is an important site from which to reconceive the abject.

Finally, even if we accept abjection as necessary and universal, we need not accept its codification in law, especially in criminal law. On this point, Dalton concludes: “That which prompts us to register disgust is uncertain, arbitrary, and changeable. As such, it is poor soil in which to root the criminal law.”\textsuperscript{87}

Having identified the link between abjection and law, we can work to dismantle it in particular contexts. Douglas points out that it is precisely at the points where collective endorsement of a boundary, of an abject category, breaks down, that ritual comes into play to bolster the existing social structure. Pollution rules may be invoked to marshal “moral disapproval when it lags.”\textsuperscript{88} Arenas of legal struggle intersect with arenas of social struggle. Legal boundaries may serve to cement social boundaries. Alternatively, shifting social boundaries may shift legal boundaries and shifting legal boundaries may shift social boundaries. Thus, even accepting the necessity of abjection,

\textsuperscript{86} Ibid. at 903.
\textsuperscript{87} Ibid.
\textsuperscript{88} Supra note 26 at 133.
law can be embraced as a site of transformation, a place from which the boundaries of abjection may be shifted, the abject reconceived.

VII. STRATEGIES FOR RECONCEIVING THE ABJECT

A. SHIFTING THE BOUNDARIES

In a recent article, Chai Feldblum revisited Lord Devlin with an eye toward creating a new paradigm through which to challenge discrimination based on sexual orientation.\(^8\) She argues that traditional liberal strategies have been short-sighted in failing to engage directly on the issue of the morality of homosexuality with conservative opposition.\(^9\) She is willing to accept Lord Devlin’s premise that “the state may legislate on the basis of a community’s positive conventional morality”, but argues that even now conventional morality can embrace same-sex intimacy as a positive good.\(^10\) She maintains that even if this is not yet the case, only direct argument on moral grounds will afford the “opportunity to change society’s moral view of homosexuality.”\(^11\)

Feldblum speaks of the “substantive moral goods” embodied in gay relationships in the following terms:

For many gay people, these relationships replicate the institution society has come to denote and value as marriage. It means a relationship that is ‘for better or for worse, in sickness and in health.’ It means a relationship in which each person is primary for the other; in which one partner paces the floor if and when the other is in surgery; in which two people nurse each other when they are sick and celebrate with each other when good fortune strikes. And for many gay people, this relationship means raising children of choice in a family marked by love and commitment.\(^12\)

Feldblum asserts that many of those who now believe that homosexuality is immoral may be expressing “disgust with the idea of promiscuous sex or sex without love” which they “mistakenly identify as equivalent to homosexual life.”\(^13\) They may be persuaded to the contrary if “an explicit

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\(^10\) Supra note 89 at 314-15. Indeed, she argues that Lord Devlin himself believed that his disgust test would not be met in England at the time of the Wolfenden Report.

\(^11\) Ibid. at 312.

\(^12\) Ibid. at 333.

\(^13\) Ibid. at 335.
educational endeavour is undertaken, designed to demonstrate the substantive moral values manifested in thousands of same-sex couplings across the country." The boundaries of abjection would shift.

B. DOING AWAY WITH BOUNDARIES

Clearly, there are dangers in Feldblum's approach. Feldblum offers a boundary shift wherein monogamous same-sex partners whose relationships resemble heterosexual marriages are welcomed in, but those who enjoy promiscuous sex or sex without love remain on the outside. Shifting the boundaries does not do away with the boundaries. There is always an inside and an outside with the abject howling at the margins.

Gayle Rubin warns against redrawing boundaries in ways that fragment marginalized communities, turning members against one another. She points to the political strategies of some gay rights activists who have sought inclusion and respectability at the cost of jettisoning practitioners of other marginalized sexualities from the gay community—in particular, those who practice sadomasochism or engage in intergenerational affairs. She would do away with the boundaries, at least insofar as consensual sex is concerned. Of course, Rubin is not doing away with boundaries altogether. She is placing her boundaries, in the context of criminal law, between consensual and non-consensual conduct—another sort of liberal boundary.

C. PLAYING BOTH SIDES OF THE LINE

We cannot get rid of abjection; we need to separate from others to become selves. In psychoanalytic parlance, to refuse separation is to enter psychosis: "Somehow we have to learn to live with and perhaps even use abjection." We need to figure out how to maintain boundaries but play both sides of them, to reconceive the relationship between subject and abject, to reconceive the very nature of boundaries.

Judith Butler offers a place to begin. She reminds us that while the abject is, by definition, on the outside, it is also "'inside' the subject as its own founding repudiation." She notes the erotic character of the abject: "Sexuality is as much motivated by the fantasy of retrieving prohibited objects as by the desire to remain protected from the threat of punishment

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95 Ibid.
97 McAfee, supra note 73 at 124.
that such a retrieval might bring on." Remember that in order to attain subject status, the child abjects the mother, its first love object, and thereafter, desire is constituted in reference to that lost object. Thus, the possibility exists of "a pleasurable insurrection against the law or an erotic turning of the law against itself." According to Butler, the realm of the abject can serve as a site for resistance and as such, empowerment:

For an occupation or a reterritorialization of a term that has been used to abject a population can become the site of resistance, the possibility of an enabling social and political resignification. And this has happened to a certain extent with the notion of 'queer.' The contemporary redeployment enacts a prohibition and a degradation against itself, spawning a different order of values, a political affirmation from and through the very term which in a prior usage had as its final aim the eradication of precisely such an affirmation.

William Eskridge offers a parallel example of the subversion of legal categories of abjection. He highlights the Foucauldian paradox that the legal effort to suppress homosexual expression in the 1950s actually instigated homosexual expression.

Suspected homosexuals were lured into conversations with state actors, including decoy cops, army shrinks, military commanders and investigators, the FBI, PHS doctors and INS agents, federal civil service and security clearance officials, local and state boards of education, state bar associations and other professional review boards, censors, customs officials, and alcoholic beverage control boards and their undercover agents. These conversations themselves often intensified people's perception of their perverse sexual feelings.

The same paradox operated on a collective scale: "Ironically, the American anti-homosexual terror helped create a homosexual rights movement."

99 Ibid. at 100.
100 Ibid. at 110.
101 Ibid. at 231.
102 Supra note 62 at 753-54.
103 Ibid. at 770.
This is not to say that enforcing conservative formulations of the abject through criminal law is therefore a positive, but rather to suggest that this is one of the ways that abjection can be used, one of the ways that law can be turned against itself.

The key to maintaining the boundaries of abjection is that that which is cast beyond them becomes unintelligible, unsymbolizable. If the boundaries that divide subject from abject are reformulated, if they become more porous and bridgeable such that the abject can return, speak, and be heard, change may be wrought within the symbolic order itself. Abjection can be reworked into political agency.  

VIII. CONCLUSION

The invocation of disgust is an extraordinarily powerful rhetorical tool. A description of misery may cause listeners to empathize, but will not likely cause them to feel misery. A description of disgust however, may well provoke listeners to experience disgust themselves. For this reason, disgust is difficult to argue with. It appears to be an involuntary physical response and we tend to take it at face value.

The foregoing analysis suggests that we ought not to do so. We have to look behind disgust. I do not mean that we have to ask whether or not individuals honestly feel the disgust they express in particular circumstances, although we can ask that too. Rather, we have to figure out where disgust stems from and what it means, in order to determine what political agenda it serves in any given context.

In The Expression of the Emotions in Man and Animals, Charles Darwin described disgust as follows:

The term 'disgust,' in its simplest sense, means something offensive to the taste. It is curious how readily this feeling is excited by anything unusual in the appearance, odour, or nature of our food. In Tierra del Fuego a native touched with his finger some cold preserved meat which I was eating at our biovac, and plainly showed utter disgust at its softness; while I felt utter disgust at my food being touched by a naked savage, though his hands did not appear dirty.  

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104 Butler, supra note 98 at 21.
105 Cited in Miller, supra note 45 at 1.
It is likely that the disgust of both parties to this interaction was honestly felt, but that does not mean it should go unquestioned. The cultural conditioning that produced these responses must be analyzed. And, given the very different positions of Darwin and the Tierra del Fuegan in a colonial context, the potential consequences of their responses must be weighed. Each party may abject the other, fortifying the cultural boundary that divides them. But if that abjection takes a legal form, which party is likely to end up on the inside and which on the outside of that boundary?

In relation to the criminal regulation of consensual sex in contemporary American society, disgust is deployed to fortify boundaries that oppress marginalized actors and communities. In this context, we cannot allow expressions of disgust to prematurely shut down analyses. The discussion must begin there, not end. If disgust is operating through law as a mechanism to abject oppressed communities, we have to make that link and attempt its transformation.