SILENCE THAT MATTERS:

HIV NONDISCLOSURE AND THE LIMITS OF CONSENT

SERAN GEE

A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL FULFILLMENT

OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LINGUISTICS AND APPLIED LINGUISTICS

YORK UNIVERSITY

TORONTO, ONTARIO

JANUARY 2023

© SERAN GEE, 2023

Abstract

This dissertation explores the legal and sociocultural linguistic implications of the Supreme Court of Canada's decision in *R. v. Cuerrier* (1998) where it was ruled that the nondisclosure of HIV-positive status could vitiate otherwise freely given consent, resulting in the sexual act being deemed aggravated assault or aggravated sexual assault. Specifically, I am interested in how the logic of HIV nondisclosure law is deeply interwoven with heteronormative assumptions about sexuality and how consent is negotiated in practice. To interrogate the often-unstated assumptions underlying the Court's decision, I examine how the legal imperative to speak about one's HIV status is resolved within gay sexual spaces (where consent is customarily negotiated wordlessly). My goal, in doing this, is to identify how these competing imperatives (i.e., the legal obligation to speak and a custom of staying silent) are resolved within cultural and linguistic practice.

In this study, I use autoethnography, semi-structured interviews, and legal analysis to examine the legal and political implications of the criminalization of HIV nondisclosure. My findings suggest that existing approaches to HIV nondisclosure in criminal law are insufficiently attentive to how regulatory apparatuses, including social norms, shape the interpretation of sexual practices. This often results in courts confounding sexual diversity with sexual violence, which continues a long-held tradition of criminalizing sexual minorities. Guided by these insights, my legal analysis challenges the logic of HIV nondisclosure law more directly. Specifically, I argue that privileging putatively "rational" faculties, like autonomy, in the regulation of sexualities fails to adequately capture the complexities embodied in sex and negotiations of sexual consent. As an alternative, I offer a new model—what I call bodily subjectivity—to more fully capture the visceral harm enacted by acts of sexual assault.

Dedication

In memory of those who died merely because it was politically convenient.

Acknowledgements

There are so many people who deserve to be acknowledged for their support and contributions. I feel overwhelmed by gratitude, but I will do my best to find the words to express my thanks.

First, I want to thank my supervisor, Susan Ehrlich. I truly could not have done this without you. I am so grateful for your guidance, dry wit, and unwavering support throughout the research and writing process. I cannot possibly express how indebted I am to you. There should be a footnote thanking you at the end of every well-written sentence. It has been a long journey, but I've made it to the end because of you. I will never forget your generosity, patience, and kindness.

I am similarly grateful to my committee members, Eve Haque and Philipp Angermeyer. Thank you for your lessons both inside and out of the classroom. Without your insights, this dissertation would be a shadow of what it is. I also thank my examiners, Eric Mykhalovskiy and Rodney Jones, for offering their thoughtful critiques and constructive insights at my defense. I also owe gratitude to Geoff Lawrence, the chair of my examination committee, and Rose Frezza-Edgecombe, the graduate program administrator for the department. Thank you both for assisting me in the most difficult part of my studies: the bureaucracy of the academy. I am likewise eternally grateful to my research participants. Thank you for your willingness to share your experiences and insights with me. Without your contributions, this project would not have been possible.

A special thank you to my family for always believing in me, challenging me to be better, and supporting me. Mom, thank you for raising me with the courage to choose my own path in life. Sheena, thank you for clearing that path of obstacles whenever you could. Sena and Lisa, thank you for your love and support. I would not have survived without your companionship (and your reminders to eat and sleep didn't hurt either). Martin, thank you for loving me as your own. Dad, you weren't here to see this, but you always believed in me—thank you.

To the community of scholars, writers, librarians, support staff, and activists who have helped me get here, thank you. I want to extend special thanks to a few people. Bonnie McElhinny, thank you for nurturing the spark of curiosity that you saw in me. Daniel Medwed, thank you for lending me your expertise in criminal law. Jennifer Black, thank you for over a decade of friendship, debates, and reality checks. Jila Ghomeshi and Kathleen Buddle, thank you for being my first mentors in the academy. Without your guidance and support, I wouldn't be here. Tim McCaskill, thank you for meeting with me so regularly and offering me your wisdom and wit. Tommaso Milani, thank you for so generously gifting me with your mentorship. Sarah Schulman, thank you for inspiring me to engage in this research. Sarah Williams, you've been with me since day one of this journey. I wouldn't have made it here without your encouragement, love, and compassion. Additionally, thank you to the Social Sciences and Humanities Research Council for funding my research.

Finally, I want to express my gratitude to my friends who have cheered me on during this process: Alicia, Amanda, Andrew, Andrea, Andy, Antony, Alejandra, Alexis, Ash, Caitlin, Carly, Chelsi, Chris, Caleb, Dasha, Dima, Drake, Evan, John, Jess, Karen, Kai, Kristi, Kyle, Laura, Michael, Ocean, Suanita, Tom, Tomás, Xuan, and everyone else who supported me. Thank you for bringing more love, light, and laughter into my life than you could possibly know.

Table of contents

Abstract ii

Dedication iii

Acknowledgements iv

Table of contents v

List of tables x

List of figures xi

1. Introduction 1

1.1 Background 1

1.2 Presentation of chapters 4

2. On the matter of consent 10

2.1 Introduction 10

2.2 What is consent? 10

2.2.1 Consent as a subjective state 12

2.2.2 Consent as an objective performative 14

2.3 Consent and sexual justice 15

2.3.1 Gendered legal discourse and the governmentality of consent 16

2.3.3 The insufficiency of consent 21

2.4 Empirical approaches to theorizing consent 27

2.4.1 Sexual script theory 27

2.4.2 Sexual consent behaviours 33

2.5 Future directions 37

3. Criminalizing HIV nondisclosure 40

3.1 Introduction 40

3.2 The traditional interpretation of sexual fraud established in *R. v. Clarence* 41

3.2.1 Sexual fraud in the *Criminal Code* 43

3.2.2 The traditional interpretation of sexual fraud upheld in *R. v. Petrozzi* 45

3.2.3 The traditional interpretation of sexual fraud tested in *R. v. Ssenyonga* 47

3.3 HIV nondisclosure as consent-vitiating fraud 50

3.3.1 The traditional interpretation of sexual fraud overruled in *R. v. Cuerrier* 50

3.3.2 HIV nondisclosure and fraud-vitiated consent 54

3.3.3 HIV nondisclosure and murder-by-deception in *R. v. Aziga* 55

3.3.4 Redefining “risk” and responsibilities 57

3.4 Chapter summary 65

4. Diffractive theory and methodology 67

4.1 Introduction 67

4.2 Theoretical assumptions 68

4.2.1 Discourse and language as material 69

4.2.2 Agential realism: a material-discursive framework 74

4.3 Methods and tools 83

4.3.1 Diffractive autoethnography 84

4.3.2 Semi-structured interviews 93

4.3.3 Case law and legal analysis 97

4.4 Ethical considerations 100

4.4.1 Troubling the distinction between pornography and ethnographic approaches 102

4.4.2 Confidentiality, consent and care 106

4.5 Chapter summary 109

5. Consent in context 111

5.1 Introduction 111

5.3 Interpreting sexual consent and silence 113

5.4 Findings 115

5.4.1 Context-specific strategies for interpreting sexual contact 117

5.4.2 “Have they already got HIV?”: condomless sex and sexual responsibility 121

5.4.3 Disclosure and the casual sexual frame of the bathhouse context 125

5.5 Discussion 128

5.6 Conclusion 131

6. Beyond words? 133

6.1 Introduction 133

6.2 Silence and nonverbal consent 135

6.3 Multimodality, embodiment, and subjectivity 137

6.4 Findings 140

6.4.1 Nonverbal negotiations 141

6.4.2 The poetics of touch 144

6.4.3 Tactics in tension 146

6.5 Discussion 151

6.6 Conclusion 156

7. Matters of bodily integrity 159

7.1 Introduction 159

7.2 Rape-by-deception—a debate 160

7.3 On the matter of bodies 168

7.3.1 The socially configured body 171

7.3.2 Sexual integrity and mind-body integration 172

7.4 Meeting the body halfway 174

7.4.1 Agential realism: a material-discursive theoretical framework 174

7.4.2 Toward a legal theory of bodily subjectivity 177

7.4.3 A three-part test 179

7.5 Application 183

7.5.1 Force 183

7.5.2 Coercion 187

7.5.3 Deception 190

7.6 Discussion 195

7.7 Conclusion 200

8. Conclusion 202

8.1 Introduction 202

8.2 Summary of findings 203

8.3 Research significance and implications 207

8.4 Future directions and final remarks 209

References 212

Cases cited 212

Bibliography 213

Appendices 240

Appendix A: Pilot study interview questions and probes 240

Appendix B: Phase II study interview questions and probes 242

Appendix C: Pilot study informed verbal consent script 244

Appendix D: Phase II study informed consent form 247

List of tables

Table 3-1: Overview of major advancements in the case law on sexual fraud..... 41

List of figures

Figure 4.1 Double-slit experiment interference pattern on detection screen 81

Figure 4.2 Double-slit light diffraction and interference 81

Figure 4.3: Ripple Tank Two-Slit Interference..... 90

Figure 7.1 A three-part test to assessing bodily violation..... 181

Figure 7.2 No consent 184

Figure 7.3 Exercising autonomy to consent to a penetration of bodily subjectivity..... 185

Figure 7.4 When consent cannot waive the right to bodily subjectivity..... 187

Figure 7.5 The feeling of willingness is present 192

1. Introduction

"Every word has consequences. Every silence, too."

Jean-Paul Sartre.[1]

1.1 Background

In response to feminist lobbying in the 1980s and 1990s, sexual assault law in Canada underwent major reforms (Comack 1999; Tang 1998). This dissertation primarily addresses the first and most substantive of these major revisions in 1983, which included a shift in how rape and indecent assault were categorized in the *Criminal Code*. The revised *Code* no longer lists rape and indecent assault as offences; it instead contains a more general assault provision,[2] which "emphasize[s] the affinity between unwanted sexual aggression and other forms of assault and battery" (Ehrlich 2001, 22).[3] Additionally, in the process of consolidating a range of offenses under the more general assault statute, adjustments were made to the language within the provisions, including the limitations on fraudulently obtained consent. Where statutory language previously specified that consent is invalid when obtained by "fraudulent representations as to the nature and quality of the act" (s. 143(b)(iii)), it now reads simply as "fraud" (s. 265(3)(c)).

In 1998, one of the consequences of this revision for people living with HIV was realized when the Supreme Court of Canada ruled that remaining silent about one's HIV-positive status prior to sexual intercourse vitiates otherwise freely given consent to the activity, resulting in the

---

[1] Jean-Paul Sartre. (1945). *Les Temps Modernes: Revue Mensuelle*, Volume 1, Number 1, *Présentation*, p. 5, Publisher: Temps Modernes, Paris, France. ("*chaque parole a des retentissements. Chaque silence aussi*.").

[2] As Canadian criminal law no longer distinguishes between the elements of rape and sexual assault and because these two crimes violate the same legal principle (i.e., sexual autonomy), I refer to these crimes interchangeably throughout my dissertation (see also, Vidler 2017, 104)

[3] This revision of the *Code* also abolished the marital exemption rule that made it possible for men to lawfully force themselves upon their wives and other rules that had made it more difficult for victims to testify against their assailants.

act being deemed as aggravated assault or aggravated sexual assault (*R. v. Cuerrier*). Prior to this ruling, since 1888, the nondisclosure of sexually transmissible infections was not viewed as capable of vitiating sexual consent. Indeed, in *R. v. Clarence*, it was ruled that because these deceptions misrepresent a secondary consequence of a sexual act rather than the nature of the act itself or the identity of the partner, they did not result in the sexual act being non-consensual.[4] In *Cuerrier*, however, the Court ruled that the changes to the *Code*'s language on fraudulently obtained consent implied Parliament's intention to expand the legal interpretation of sexual frauds. From then onward, sexual fraud would no longer be limited to instances of *fraud in the factum* (i.e., deception regarding the nature of the activity); it can now include deceptions that misrepresent the risk of serious bodily harm (and potentially others as well).

My dissertation is motivated by this reconceptualization of remaining silent about one's HIV status as a kind of fraud that vitiates otherwise freely given sexual consent. Although the consequences of HIV nondisclosure law have received significant attention in the legal and public health literature (e.g., Adam, Elliott, Corriveau, & English, 2014; Cowan, 2014; Dej & Kilty, 2014; Derlega, Winstead, Greene, Serovich, & Elwood, 2004; Galletly & Pinkerton, 2004; Grant, 2009, 2011, Mykhalovskiy, 2008, 2011; Mykhalovskiy & Betteridge, 2012; Rey, 2011), few studies have directly tackled its underlying logic of fraud-vitiated consent. And, while the more general issue of fraud-vitiated consent has received recent renewed interest in the legal literature (e.g., Dougherty, 2013, 2015; Falk, 2013; Kiel & Brennan-Marquez, 2013; Ramachandran, 2013; Rubenfeld, 2013b, 2013a; Tuerkheimer, 2013; Vidler, 2017; Yung, 2016), there is little consensus about why some forms of fraud result in rape and why others do not. In this dissertation, I adopt a

[4] *R v Clarence*, [1888] 22 QBD 23 (England and Wales), at 44. ("...the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.") (Opinion of Justice Stephens).

linguistic anthropological approach in order to better understand how sexual consent is negotiated by gay men in gay sexual spaces and what new insights into this process might reveal about the Court's construal of HIV nondisclosure as consent-vitiating fraud.

To do this, I examine the conflict between the custom of silence in gay bathhouses and a legal duty to explicitly disclose one's HIV status. By examining how bathhouse patrons negotiate these conflicting legal and cultural regulatory structures, I hope to forcefully reveal courts' assumptions about the body, consent, and gender and sexuality in HIV nondisclosure law and, in the process, expose fault lines in the arguments used to support the criminalization of HIV nondisclosure. Drawing upon insights from diverse areas of scholarship, including anthropology, the philosophy of science, legal theory, feminist studies, queer theory, the natural sciences, pragmatics, and sociocultural linguistics, I carefully explicate the mechanics of negotiating consent in spaces of sexual silence, dissect the logic of HIV nondisclosure law, develop a new model for theorizing bodily violation, and suggest avenues for decriminalizing HIV nondisclosure.

In this dissertation, I adopt a multi-pronged approach to examining the basic assumptions of HIV nondisclosure law: (1) guilty intent, (2) the negotiation of consent as an exercise of rational and autonomous faculties, and (3) the definition of rape as non-consensual sex. Firstly, I examine how courts often assume that a person's choice to not disclose her HIV status is motivated by a criminal intent to deceptively procure sexual consent. My interviews with bathhouse patrons suggest that social norms in gay sexual spaces prescribe nonverbal negotiations of consent while also providing basic operating assumptions that make the disclosure of HIV status largely unnecessary. In the second prong of my dissertation, I provide a much-needed ethnographic account of how consent is *actually* negotiated in practice (as opposed to how individuals *report* negotiating consent). I argue that my ethnographic findings suggest that theorists should reconsider

the presumption that negotiating consent is solely or primarily an exercise of rational or autonomy-based faculties. Finally, I provide a critique of existing approaches to theorizing bodily integrity (e.g., sexual autonomy and the right to self-possession), ultimately arguing that a "non-rational" model of bodily subjectivity that accounts for the physiology of the body better explains why some forms of fraud result in sexual assault or rape while others do not. In this view, consent (as a rational exercise of autonomy) plays an important but not definitive role in defining rape, which I contend is better understood in terms of affective orientations rather than exercises of autonomy.

1.2 Presentation of chapters

In the subsequent chapter, I elaborate on interdisciplinary perspectives and approaches to theorizing consent. I first respond to the question of "what is consent?" and summarize the debate on whether consent is better understood as a subjective state of mind or as an outward, objective performative. I then précis the literature on consent and sexual justice, discussing the gendered nature of legal discourse and the debate on the insufficiency of consent as a legal and ethical standard for sexual relations. Next, I present a summary of empirical approaches to studying sexual consent behaviours, ultimately arguing, like others (e.g., Beres 2007), that there is a strong need for research that examines how consent is negotiated in contextualized practice. I close with an observation that the often-exclusionary heterosexual and cisgender framing of scholarship on sexual consent, while understandable in some respects, ultimately impedes the development of sound feminist theory and a more empowering politics for sexual justice.

In my third chapter, I provide a genealogy of how Canadian courts have treated HIV nondisclosure, detailing the shifts in thinking (reified as new precedents in the case law) that have led to the contemporary approach of criminalizing HIV nondisclosure as a form of consent-vitiating fraud that results in an otherwise consensual sexual act being deemed aggravated (sexual)

assault. I then review how legal theorists and public health researchers generally view the expanded definition of sexual fraud as both unprincipled and detrimental to public health. I close by observing that the popular public health argument against criminalizing HIV nondisclosure (i.e., that criminalizing HIV nondisclosure is an ineffective and damaging public health policy) is not likely to ever be effective in convincing courts because it does not address the logic of fraud-vitiating consent.[5]

In chapter four, I develop a "diffractive" theoretical framework and methodology for investigating how the contradictory regulatory imperatives of HIV nondisclosure law and the custom of silence in bathhouses is resolved. I begin by articulating Barad's (2007; 2003) *agential realism* to explain my paradigmatic assumptions, detailing the ways that Barad's framework resonates with poststructuralist and practice theory approaches currently used in sociocultural linguistics and how it differs in ways that offer new theoretical possibilities. Specifically, I expound upon the framework's capacity for explicating both how discourse comes to matter and how matter is itself discursive. That is, I explain how material-discursive practices enact "cuts" within an otherwise amorphous physical reality, resulting in the emergent production of knowable "subjects" and "objects" within entangled relations. I then explain my autoethnographic approach, my interviewing methods, my transcription style, and how I collected and analyzed case law data. Finally, I discuss some of the ethical issues I considered during my fieldwork and analysis.

In my first findings chapter, I examine how context-specific norms govern gay and bisexual men's negotiations of sexual consent in bathhouses, and how these subcultural practices are inconsistent with how courts conceptualize negotiations of sexual consent in Canadian law. My

[5] I observe, however, that this argument may be valuable outside of courtrooms by persuading legislators to reconsider the language surrounding fraud in sexual assault law.

study's findings indicate that HIV disclosure is dispreferred in the bathhouse because (1) it does not accord with the casual sexual frame of the bathhouse, (2) it is viewed as unnecessary given normative expectations regarding personal responsibility in gay communities, and (3) it violates the contextual custom of wordlessly negotiating consent in gay sexual spaces. Because these norms suggest that many individuals choose not to discuss HIV status due to context-specific constraints (rather than due to any mendacious intention), I argue that my proposed standard is a necessary advancement in jurisprudence if our society wishes to avoid its long-held tradition of criminalizing sexual diversity as sexual deviance.

I then compare my findings to a trial judge's opinion on a case involving a man who did not disclose his HIV status to a sexual partner who he had met in a bathhouse. Specifically, I interrogate the trial judge's decontextualized view of consent (i.e., the idea that context and cultural norms do not meaningfully shape how consent is negotiated) by demonstrating how the judge's assumptions do not accord with the normative expectations of bathhouse patrons. Relating my findings to the case, I argue that a requirement for an intention to deceive (in cases involving sexual fraud) would better reflect the diversity of social practices and norms that are used in the negotiation of sexual consent, especially within sexual minority communities (as opposed to merely requiring an intention to not disclose). This standard, I contend, would also better reflect how sexual fraud is blameworthy primarily because it is inimical to another's exercise of sexual autonomy and would result in fewer cases that confound sexual diversity with sexual violation.

In my second findings chapter, I offer autoethnographic insights alongside interview data to provide an account of the actual strategies and practices used to negotiate sexual consent in bathhouses where there is a custom of silence. I begin by identifying how the explicitly sexual context of the bathhouse enriches interlocutors' nonverbal practices in a way that helps to convey

their sexual meanings. I next discuss how individuals make use of modality-specific resources and constraints, such as how the tactile medium generally allows for less clearly legible referents (than does speech), to build physical intimacy and satisfy desire. I then identify instances where "mixed messages" are communicated—either intentionally or involuntarily. In the first instance, I build upon others' insights and observe that bathhouse patrons may intentionally convey potentially conflicting information across public and private channels using different modalities to allow others to save face in consent negotiations. In the second instance, I explain that involuntary bodily activities may communicate information that conflicts with what the individual intended to convey, arguing that this insight highlight's how the body may act as a distinct social subject in an interaction's participant framework.

Building upon my analyses of these findings, I argue that part of the legibility of nonverbal practices comes from how they embody possibilities for subsequent (sexual) activity. By concretely enabling or thwarting certain responses, these nonverbal communications index associated opportunities (e.g., physical contact facilitates subsequent sexual activity). I further contend that because these invoked relations and associations can cite familiar norms broadly (rather than just the specific ones intended), it is possible to explain how involuntary movements of the body (as discussed earlier) can conflict with what a speaker intends to convey. Specifically, because these involuntary activities may embody certain potentials, others may interpret unintended meaning from the associations that emerge in that process of embodiment.

In my last analysis chapter, I return to the issue of fraud-vitiated consent, arguing that "non-rational" models of bodily subjectivity (and, not autonomy) can better explain which forms of fraud result in sexual assault or rape (e.g., pretending to be a gynecologist to assault a woman under the pretense of performing an examination) and which do not (e.g., HIV nondisclosure and

false declarations of love). After reviewing positions in the debate on rape-by-deception, I demonstrate how an increased attentiveness to the materiality and animacy of the body might provide a new perspective on the issue. By accounting for the body's concrete physiology and anatomy (as I did in the previous chapter), I draw upon Barad's more general framework for theorizing material agency to develop a bodily subjectivity model of mind-body integration that can explain, in concrete terms, the mechanism of bodily violation enacted by rape. In doing so, I provide an alternative to the principle of sexual autonomy, which, if applied in a principled way, results in all deceptions, including the nondisclosure of material facts (e.g., false professions of love), having the potential to result in rape. I also argue that my proposed model is preferable to the principle of self-possession, which posits that rape requires force. Supporting this position, I demonstrate how my bodily subjectivity model can consistently adjudicate issues of rape-by-force, unconscious sex, coercion and deception without either too significantly extending or reducing the scope of sexual assault law.

In my final chapter, I conclude my dissertation by summarizing my findings, explaining their contribution to sociocultural linguistics and legal feminist theory, and by offering suggestions for further research. When characterizing my findings, I discuss how Chapters 5 through 7 reflect my desire to (incrementally) demonstrate the value of incorporating a posthumanist perspective in sociocultural linguistic research. Chapter 5 relies largely on commonly used approaches and theoretical frameworks, including interviews and an analytic perspective grounded in an attentiveness to the relationship between cultural norms and linguistic practices. Chapter 6, by contrast, expressly interrogates the materiality of communicative modalities, contexts, and social actors (while also presenting alternative ways of viewing these elements of discursive practices). This account of the materiality of things, practices, social actors, and bodies builds upon

contemporary research in sociocultural linguistics to explain how taking materiality (including bodies) seriously highlights the importance of rethinking who or what we consider to be agents within speech events. Chapter 7 more fully adopts a posthumanist perspective to explicate the ontology of the body and its delimitations. This attentiveness to the body's concrete physiology and anatomy is what makes it possible for me to theorize sexual assault and the mechanism by which those boundaries are violated.

2. On the matter of consent

Interdisciplinary perspectives and approaches

2.1 Introduction

In this chapter, I review the literature on consent, discussing the ontology of consent, its ethical significance, and the mechanics of its negotiation. I begin by discussing the varied ways that moral philosophers and legal theorists have defined consent, detailing the two main perspectives: (1) consent as a subjective mental state, and (2) consent as an outwardly observable expression. Following this discussion, I review the literature on consent and sexual justice, detailing the gendered nature of legal discourses surrounding consent, the ways that these discourses enact a form of governmentality that shapes understandings of sexuality, and the debate on consent's (in)sufficiency in sexual ethics and law. I then review empirical approaches to studying consent, briefly outlining survey-based approaches to identifying the social norms or "sexual scripts" that individuals use to navigate negotiations of sexual consent and the interdisciplinary approaches used to investigate how people negotiate consent in practice. Finally, I end my review of the literature by considering possible future directions for the literature on sexual consent, ultimately concluding that theorists have both a scholarly and ethical obligation to be more attentive to queer and trans perspectives when theorizing consent.

2.2 What is consent?

It seems fitting to begin our discussion by first defining consent. The Canadian *Criminal Code* currently defines sexual consent as "the voluntary agreement of the

complainant to engage in the sexual activity in question."[6] Potentially complicating this definition of consent as a kind of agreement, Victor Tadros (2006, 520) notes that "[a]greement is broader than consent… I can agree with something as well as [agree] to something, but I can only consent to, not consent with." Peter Tiersma (2007, 91) similarly contrasts "consent" with the verb "agree," contending that the former implies submitting to another's direction or will while the latter connotes an alignment of objectives or wills. Given this complication, let us say, for now, that "consenting" is like "agreeing" but it is merely reduced in scope; it is a specific kind of "agreeing." If we take for granted this superordinate-subordinate taxonomy, then, the precise meaning of "agree" becomes a necessary second question because "there are two ways in which agreement might be understood: either subjectively, as a meeting of minds, or objectively through the communications of the parties" (Tadros 2006, 521). In the first interpretation of "agreement," the communications are *indicative* of an agreement "whereas in the latter they are *constitutive* of an agreement" (Tadros, 2006, p. 521; emphasis in original). If consent is a kind of agreement (and we've agreed that it is for the time being), then it must be decided which meaning of agreement we refer to when we talk about consent.

Fortunately, moral philosophers have discussed this matter in considerable detail, providing a rich literature for defining consent as either a subjective state or an objective performative (or maybe some combination of the two). Generally speaking, proponents of the subjective-state view contend that consent is the exercise of one's will and that it need not be outwardly articulated. By contrast, supporters of the performative view generally hold that *only*

[6] This definition is found under the provision for sexual exploitation of person with disability (s. 153.1). https://laws-lois.justice.gc.ca/eng/acts/C-46/page-35.html#s-153.1 Retrieved: May 14, 2019.

an ostensible expression of consent could effectively render an otherwise transgressive act morally acceptable.[7]

2.2.1 Consent as a subjective state

The two strongest proponents of the subjective state view of consent are undoubtedly Heidi Hurd and Larry Alexander who wrote companion articles about consent's moral "magic" in a special issue of *Legal Theory*. They both argue that consent is meaningful because it is an exercise of autonomous will and autonomy defines one's individual rights to non-interference and violation. Although both view consent as "magically transforming" the ethical nature of an activity,[8] they differ on how they theorize the mechanism by which that occurs. For Hurd (1996; 2016), consent's mechanism of action is identifiable in how a person mentally forms the intention for another to transgress some sort of social or bodily boundary. By contrast, Alexander (2014; 1996) contends that one cannot *intend* another's actions; thus, consent is better characterized as forming the intention to waive one's own objection to the transgression of a physical or social boundary. In either case, the outward expression of that will is not necessary because the ethical character of the act is defined through the consenter's rational will and not her objectively observable actions.

Although legal theorists have not always defined consent explicitly in these terms (i.e., as a subjective mental state or as an objective performative), many have asserted views that

[7] There is also a hybrid view but it does not differ much from the performative view because proponents of the hybrid view generally place significantly more emphasis on the role of the performative (see, Kazan, 1998; Sherwin, 1996; Wertheimer, 2003).

[8] Although I refer to consent as "morally transformative" in this review (because this is how philosophers have referred to it), I personally find this phrasing distasteful because, as Melanie Beres (2007, 102) convincingly argues, it seems to imply that sex is morally bad and in need of fixing even though "violent sex makes up the minority of sexual activity."

imply the subjective state view. Jack Vidler (2017, p. 110; emphasis added), for instance, states that safeguarding sexual autonomy is the objective of sexual assault and rape laws, and "consent is the *index* of whether [sexual autonomy] has been exercised or violated." In defining consent as an *index* (i.e., a sign that "points to" something), he implies consent to be *indicative* of autonomy rather than *constitutive* of autonomy (see, Tadros 2006). Tiersma, a scholar of both law and linguistics, similarly (although more explicitly) argues that consent is primarily a state of mind and not a performative, observing that while one can say, "I consent," it is possible to consent without saying so. That is, consent can be a performative, but it is not necessarily one. By contrast, he notes, a true performative cannot be enacted without articulation—a promise, for instance, cannot be completed (with its attendant social functions) without a performative expression (e.g., "I promise" or pinky-swearing) (Tiersma 2007, 91). Tiersma concludes, like Alexander and Vidler, that the expression of consent is meaningful mostly because it *indicates* a person's rational decision to waive her rights.

Importantly, defining consent as primarily a state of mind does not mean that it need be entirely a subjective matter where the law is concerned. As Tiersma (2007, 97) contends, even if consent is primarily a mental state, the law should make sexual actors responsible for ensuring that it is present (as indicated in the behaviour of their partners). This does not imply that sex lacking an explicit expression of consent is (by that very absence) an instance of rape; rather, it simply makes sexual partners responsible for their failure to correctly ascertain a partner's unwillingness to sex. So, if both sexual participants are consenting (in their minds), the absence of some objective indication of consent does not itself make the ensuing sexual act unlawful. Conversely, by imputing a legal responsibility on individuals to ensure their partners are consenting, the crime of rape is identified only when the absence of an outward expression

of consent reflects a victim's non-consenting state of mind. Stated another way, he argues that so long as both partners mentally waive their rights to autonomy for a particular sexual act, that act cannot constitute rape even if they make no outward indication that they have waived their rights. In this view, it is not the communication of one's consent but the presence of that state that matters.

2.2.2 Consent as an objective performative

By contrast, proponents of the performative and hybrid views argue that it is the outward expression of consent that is (most) important. Alan Wertheimer (2003) and John Simmons (1979), for instance, contend that while in common parlance "consent" may refer to either the subjective state or the performative expression, only consent as a performative can generate social obligations or legitimize another person's actions respective to the consenter's individual rights. Likewise, Richard Healey (2015, 363), responding to Alexander's (2014) trenchant critique of the performative and hybrid views, argues that:

> Consent does not just serve to communicate information about an agents' will, but rather to manage normative relations between autonomous agents by allowing them to interact in a range of valuable ways whilst maintaining control over the spheres protected by their autonomy rights. For consent to play this role, it must be communicated.

In saying this, Healey argues that consent performatively establishes and negotiates social relations between subjects—something he does not view a mental action as capable of accomplishing. Emily Sherwin (1996) and Patricia Kazan (1998) similarly support the performative position in the debate, but concede that there is a subjective dimension to consent evident in the performative's felicity conditions. In other words, the performative is necessary to configure social and ethical relations and the subjective state of the consenter is important

for ensuring the validity of the expression (e.g., coerced expressions of consent would be invalid).

For Wertheimer (2003), consent is interesting not for its ethical metaphysics (as is the case for Hurd and Alexander) but instead due to the concrete mechanism by which an otherwise reprehensible activity is made morally acceptable through consent. This, he claims, can only be achieved through the performative's function of authorizing or legitimizing an activity *for another*. For example, he observes that if two people are in the process of making an arrangement on the phone and the call is dropped due to technical issues before consent is explicitly given, it would not generally be acceptable for one of the individuals to proceed as if the agreement had been made (Wertheimer 2003, 146).[9]

2.3 Consent and sexual justice

While defining consent as primarily either a subjective state or as an objective performative might not seem to have a readily evident applied value, the endeavour has very concrete consequences for theorizing sexual justice and adjudicating sexual assault allegations. For example, if consent is primarily a performative and sexual assault is defined as sex without consent, we encounter some troubling logical implications. Specifically, if performatives are meaningful through their conformance to normative expectations, a woman quietly acquiescing to another's sexual advance could be understood by some as embodying the normatively expected script for consent, implying that the sexual act is consensual when she is an unwilling participant. While empirical studies indicate that it is likely that both men and

[9] I note that, as a matter of law, it is often acceptable for someone to proceed as if an agreement had been implied by one's conduct and prior engagements with the other person. The context of the would-be agreement matters significantly for how a court would decide what duties have or have not been contracted.

women generally define consent as either mutual agreement to sex or granting permission to have sex (e.g., Jozkowski, Peterson, Sanders, Dennis, & Reece, 2014), if consent is understood primarily as a performative and a performative's intelligibility is derived through regulatory social norms irrespective of the intentions of interlocutors (see, Derrida 1977; Kulick 2000), the ethical difference between unwillingly acquiescing to sex and consenting to sex becomes a matter of public opinion rather than a person's willingness to engage in sex.

2.3.1 Gendered legal discourse and the governmentality of consent

Importantly, however, the legal definition of consent is not wholly subordinated to public opinion or social norms; indeed, feminist theorists and legal scholars have long observed that although the law is shaped by social norms, it also shapes social realities and understandings. That is, as Susan Ehrlich (2001, 18—19) puts it, "the law generates definitions and categories that discursively regulate and control social life in addition to imposing sanctions (e.g., fines, imprisonment, executions) to ensure compliance with certain social norms." For example, as Ehrlich (2001, p. 20; emphasis added) notes, "the 'discourses' that surround the prosecution of [stranger rape] and [date rape] cases in the criminal justice system… *bring into being* definitions and categories of what constitutes a 'legitimate' or believable victim and a 'legitimate' perpetrator." Stated in another way, the differential treatment of cases constructs stranger rape as "real rape" (see, Estrich 1987) while "filtering" out more common instances of rape (e.g., "date rape") as illegitimate examples (because they do not conform to the this constructed standard of "real rape").

Similarly recognizing the power of gendered legal discourse, there is a large body of research that indicates that rape victims' attempts to seek justice are often thwarted by heteronormative gendered discourses. Nicola Gavey (1999), for instance, contends that myths

about rape encoded in legal practices (e.g., court decisions) largely constrain how women's refusals or expressions of non-consent might be interpreted. Specifically, rape cases involving men intimidating women through progressively more extreme attempts at seduction could be reframed using heteronormative tropes to describe courtship in terms of men seducing women whose refusals, in these myths, are a test of men's persistence and romantic skill. Ehrlich (1998) similarly argues that heteronormative assumptions about gendered language—specifically, the belief that women are insufficiently assertive in their communicative tactics—"frames" the proceedings of sexual assault tribunals, allowing defendants and sexual assault policy adjudicators to discursively reconstruct women's accounts of sexual refusal as "deficient" and the encounters as consensual. Sally McConnell-Ginet (1989) and Don Kulick (2003) likewise observe that cultural narratives that represent women's refusals as token expressions meant to indicate their respectability and modesty rather than their unwillingness to have sex thwart women's attempts to say no, resulting in the interpretation of these refusals as encouragements to "try harder" or "keep trying." As Kulick concludes, this results in only the most extreme forms of refusal (e.g., slapping the aggressor or kneeing him in the balls) being viewed as sufficiently unequivocal.

Others have observed that even when statutory language and legal discourse ostensibly offer greater protections for women, the forms of rationality embodied in these discourses ultimately serve to render some victims unintelligible (as rape victims), making it more difficult for them to seek justice. Lisa Gotell (2009, 872), for example, remarks that although "affirmative consent standards are capable of providing enhanced legal recognition of women's sexual autonomy," feminist legal theorists cannot ignore the "broader shifts in governance and the new privileged forms of citizenship they produce." Specifically, she argues

that the standard of affirmative consent "infuses normative sexuality with entrepreneurial logic" (Gotell 2009, 874), often resulting in women who fail to meet standards of "responsible" neoliberal entrepreneurial subjects (e.g., homeless women who use drugs or sex workers who meet with clients while they are intoxicated) "falling through the cracks of affirmative consent" and being the new faces of "the new negative pole of the good victim/bad victim dichotomy" (Gotell 2009, 898). This neoliberalism-infused understanding of sexuality is perhaps especially evident in the way that some feminist scholars refer to sex as a "legally relevant *transaction*" (Pickard, 1980, p. 76; emphasis added).

It is important to note that Gotell is not levying a trenchant critique of affirmative consent or arguing that it is untenable as a sexual assault policy. Rather, she simply cautions readers to be vigilant about how conceptualizing consent in neoliberal terms imbues the consent with neoliberal logic. While affirmative consent provides greater protections for vulnerable persons in some cases, Gotell contends that we cannot forget that it also prescriptively defines the intelligibility of sexual actors in heteronormative and neoliberal terms, potentially resulting in some rape victims being viewed as illegitimate exemplars (see also, Ehrlich 2001; Estrich 1987; MacKinnon 2003). Thus, although the requirement for affirmative consent might no longer rigidly define legitimate and illegitimate victims of rape in terms of whether the instance involved a man jumping out from the bushes who forces himself upon a woman (see, Estrich 1987), women who engage in "risky" behaviours (largely defined by white male judge's interpretations of what a reasonable person would consider risky) (see also, Matoesian 1993) might no longer be viewed as "credible" because they do not embody prescriptive neoliberal and heteronormative "sensibilities." Gotell thus argues that the standard of affirmative consent might ultimately serve to discursively regulate women's

sexualities by censuring choices that do not sufficiently conform with neoliberal standards for "responsible" behaviour.

Some have advanced this critique of sexual assault law's governmentality in directions that challenge some widely accepted feminist positions on sexual justice. Janet Halley (2006), for example, draws upon queer theoretical perspectives (e.g., Bersani 1987) to critique what she refers to as "governance feminism" (i.e., increasing governmental interventions to support feminist objectives). Specifically, she argues that feminism has too often been uncritical of the power it wields (often at the expense of communities of colour and sexual minorities). For Halley, feminism's insistence on asserting woman's position within systems of power ultimately results in women reinscribing systems of power rather than subverting them (see also, Gruber 2016). Wendy Brown (1995) similarly argues that further depending on the state to organize sexual ethics through criminal law ultimately comes at the expense of emphasizing a system of punishing (generally people of colour) rather than preventing sexual harm.[10]

While Halley's call for a "break" from feminism is somewhat contentious (see, Huffer 2013),[11] it echoes some of queer theory's most important contributions to the literature on sexual justice. Fischel's (2010) argument on sexual offenders, for instance, reminds us to not forget that while Foucault provides a sound critique of the gendered nature of legal discourse, so too does his theory of knowledge/power incisively reject the discursive production of the figure of the pervert and the use of carceral power to punish deviance and install obedience in

[10] Although I have so far shown fairly nuanced feminist perspectives on the gendered nature of legal discourse, the predominance of "governance feminism" in the debate on the (in)sufficiency of sexual consent should become clearer in the following section.

[11] Although Lynne Huffer is unconvinced by some of Halley's theoretical claims, she, like other queer (feminist) theorists, seems supportive of Halley's critique of "governance feminism" and the movement's sometimes uncritical "siding with" disciplinary power.

citizens (Foucault 1976; 1995). For Fischel, society's increased dependence on criminal law (as a proxy for sexual ethics) has discursively materialized an abject sexual subject: a figure that has been exhaustively constructed, expanded upon and vilified in juridical discourse to allow legal institutions to easily dismiss the constitutional rights of a class of abject persons without challenge or sympathy.

This figure of the "sexual offender," Fischel argues, fulfills society's need (following the emancipation of the homosexual) for a figure of sexual deviance that allows for an unnuanced (often binary) system of adjudicating harmful and not harmful sex. While Fischel (2010, 310—11) accepts that the law necessarily must play a role in protecting people from sexual harm, he contends that:

> a more robust and attuned judicial and social vocabulary is required to address the array of sexually unjust and harmful practices that does not collapse into adjudicating, with wrongheaded certainty, between the normal everyday sexually ethical citizen and the unstoppably evil predator, between the transcendent and free homosexual and the dangerous sex offender.

Ultimately, Fischel's argument is that the legal dichotomy between good/ethical and bad/unethical sex protects us from only the vilest of offenses and, in doing so, prevents a more nuanced and context-aware process for promoting sexual justice. In this way, his work contributes to the growing body of literature in which queer feminists have argued that a better politics of sexual justice should provide a nuanced way of talking about sexual harm and pleasure that does not rely purely on forms of governance and disciplinary power (Huffer 2013; Halley 2006; e.g., Fischel 2019). In what follows, I discuss the debate on consent's capacity for achieving this objective.

2.3.3 The insufficiency of consent

In recent years, consent has increasingly become a rallying point for sexual justice discourse, especially on college campuses. Although feminist and queer legal scholars are generally approving of a legal requirement for consent, many have expressed concern with the increasingly robust standards for consent that are becoming more frequently used in sexual education campaigns and college sexual assault policies. While at first glance a greater emphasis on consent might seem like a good thing, some have remarked that by defining consent as necessarily enthusiastic, excited, and full of desire, universities' sexual assault policies have become disturbingly reminiscent of traditionally romanticised and heteronormative conceptions of sex (Gersen and Suk 2016). Moreover, these campaigns have progressively "thickened" the definition of consent, gradually inflating it until it has become represented as "everything" in discussions about sex (Fischel 2019). Indeed, the #Consentiseverything campaign quite explicitly adopts this position; it is seemingly earnest in its assertion that consent is everything that matters for sexual ethics.

For Fischel, this radical expansion of consent's scope is worrying because it seems to elide or obscure other important elements of a fulfilling sexuality. Specifically, he notes that the campaign gives very little advice about *how* to negotiate consent when exploring new sexual experiences, arguing that overly "robust" definitions of consent seem to imply that consent cannot be meaningful when an individual feels hesitant or reluctant to participate in a (new) sexual activity. For example, Fischel refers to the University of Wyoming Dean's Office's definition of rape being sex without *enthusiastic consent*, contending that this kind of standard for consent fails to recognize the value of sexual exploration and challenging one's sexual social conditioning (e.g., feeling hesitant to have sex with someone who is living with

HIV despite knowing that there is almost no risk of transmission because one's partner has an undetectable viral load). If enthusiastic consent is the standard, instances of sexual discomfort necessary for individuals (especially queer and questioning individuals) to fully explore their sexualities become viewed as "bad" or even violent. While Fischel doesn't have a problem with consent *per se*, he is critical of the way in which consent is made to do all the work of sexual ethics and, in doing so, becomes counterproductive for achieving this goal—a kind of *cruel optimism* (i.e., an attachment that is detrimental to the attachment's objective) (Berlant 2011). Stated in another way, he questions if enthusiastic consent might become a barrier to advancing sexual politics because its conceptual inflation results in it overshadowing other necessary elements of healthy, ethical and fulfilling sexuality (e.g., sexual literacy, sexual exploration and sexual diversity) (see also, Craig 2011).

Others have challenged that consent, even in its less inflated forms, is a troubling standard for sexual ethics. Catherine MacKinnon (2016, 465), for instance, asserts that "[c]onsent is a pathetic standard for a free people," arguing elsewhere (1989, p. 177—178) that women's agency is so often constrained to such a great degree within our sexist society that it is unlikely that their consent can be as morally transformative or meaningful as progressives might think. For Mackinnon (2016, 476), the mere existence of a power imbalance makes sexual consent nearly impossible (i.e., she claims that when there is a power imbalance between sexual partners, we should "call it sexual assault.").[12] She clarifies elsewhere that only mutual and reciprocal trust, respect and desire can make sex equal when there is inequality between

[12] Jed Rubenfeld (2013b) has similarly critiqued a consent-based theory of rape, contending that consent is always subject to social pressures and can, thus, never be said to be freely given. Specifically, he has argued that while there is certainly a difference between cajoling a lover to have sex and the threat of force, consent is not a useful metric because it cannot explain why some forms of pressure result in rape while others do not.

partners. In this way, she argues that consent becomes the low standard of permissible sex that legally legitimizes unjust forms of sex. Crucially, she clarifies that she does not mean that all sex involving inequality is sexual assault; rather, she would proscribe only the instances where those inequalities are leveraged for sex (see, MacKinnon, 2016, p. 436).[13]

Many feminist theorists, however, have taken issue with MacKinnon's argument, arguing that it seems to ignore women's agency in navigating and negotiating inequalities (e.g., accepting money for sex from a much wealthier man), and does not sufficiently recognize the value of sexual pleasure for women. Katherine Franke (2001, 201), for example, critiques MacKinnon's idea that "all gender is always already about sexuality, and all sexuality is always already about gender. And both gender and sexuality are entirely about women's subordination to men." For Franke, sexual ethics cannot be just about power; it must also make allowances for women to make constrained choices in the pursuit of sexual satisfaction and pleasure. Building on this critique, Margo Kaplan (2013) argues that placing a greater emphasis on women's desire in law (instead of viewing them as "gatekeepers" for men's desire) would function to highlight women's rights to codetermine their sexual relationships. Certainly, as some theorists have noted (Fischel 2019; e.g., Craig 2011), the requirement for consent (at least in its less robust forms) can encourage people to talk more openly about their desires, allowing them to more safely explore possibilities for sexual satisfaction. Like Franke and Kaplan, Ann Cahill (2016, 759) notes that MacKinnon's views on consent and sexuality do not seem to acknowledge how agency is always exercised within socially mediated constraints and

[13] As Fischel (2019, 15) notes, MacKinnon's (2016; 2007) position seems to imply that most forms of commercial sex, including pornography, should be unlawful.

the "possibility of meaningful sexual action not [being] determined by systematic injustice." For Cahill (2016), there must be a distinction between unjust/unequal sex and the crime of rape; she locates this boundary in how the former involves actively seeking out another's sexual agency (even when that agency is limited) while the latter attempts to overwhelm or otherwise nullify another's sexual agency.

These "sex-positive" and queer perspectives have often challenged the idea that strong protections for sexual autonomy are antithetical to embracing sexuality as intrinsically valuable. Kaplan (2013, 161), for instance, argues that feminism's traditional antagonism toward sexual pleasure is difficult to justify—even for the lofty goal of protecting sexual autonomy—because "[v]aluing sexual pleasure provides no license to experience that pleasure at the expense of another's sexual autonomy." Franke (2001) similarly contends that while describing sex as something women "submit" to for men's sexual pleasure makes sense when talking about sexual assault, many feminist arguments seem to retain this way of conceptualizing sex even when talking about consensual sex. Offering an alternative to these sex-negative theories, Lynne Huffer (2013) denies the impossibility of a sexual ethics that is simultaneously attentive to harms while at the same time not moralistic or averse to sexual diversity and exploration. Specifically, she argues that a queer feminist sexual ethics would weave together the feminist emphasis on "seemingly more rationalist, normative, moralizing claims about sexuality in a gendered order" and "a queer embrace of performative disruption" (2013, 13) in such a way that "complicates an overly simplified approach to feminist ethics as justice versus care and a queer disinterest in ethics as moral norms…. toward an acknowledgement of the mutual imbrication of freedom and constraint, justice and care, love and betrayal" (2013, 157—58). In saying this, Huffer is trying to reconcile what Halley views

as a "split" in feminist and queer theory. Huffer suggests that there may be room for questioning feminism's sexual moralizing without giving into queer anti-social perspectives that imply the impossibility of ethical sexual regulation (see, Bersani 1987; Edelman 2013).

This same queer/feminist or sex-positive/sex-negative "split" (and also the possibility of convergence) is also evident in the debate on what standard of consent should be used in law and policy. Some have advocated for a more robust standard for affirmative consent, contending that the conceptual weaknesses of consent are preferable to antiquated approaches to rape law (e.g., the requirement that a woman refuse "to the utmost"). Remick (1993), for instance, argues that an explicit "yes" should be a legal requirement because verbal consent is the least ambiguous way of expressing consent. Such a strict requirement, Remick (1993, 1106) contends, is "justified in terms of insuring sexual autonomy for all." Most proponents of affirmative consent, however, have had a more moderate interpretation of the standard than Remick. Pineau (1989), for instance, argues that affirmative consent ensures that responsibility for negotiating consent is bestowed on the initiator of a sexual act. To achieve this objective, Pineau contends, consent needs to be present and unequivocal, but it does not necessarily have to be verbal and explicit. Peter Westen (2004) and Fischel (2019) similarly interpret affirmative consent as not necessarily verbal, asserting instead that consent must simply be performed in some intelligible way and not be assumed from the mere absence of refusal.

Even this more moderate conceptualization of consent, however, has met resistance from legal scholars who argue that affirmative consent standards are suspiciously conservative in logic. Halley (2015), for instance, incisively critiques the standard of affirmative consent, arguing that it embodies a distinctly conservative way of thinking about sex. Specifically, she argues that feminists have adopted the conservative strategy of criminalizing behaviour that

makes them uncomfortable rather than changing the actual issues they're concerned with (e.g., social inequalities that lead women to be more susceptible to coercion). Laura Kipnis (2017) and Jed Rubenfeld (2013b) similarly argue that a strict standard of affirmative consent seems to imply that virtually all sex is criminal. Such a standard thus poses a threat to the due process rights of defendants because complainants, desiring sex at the time, could rightly point out that they did not explicitly consent to sex after the fact for various reasons.[14] Jacob Gersen and Jeannie Suk (2016) likewise argue that the affirmative consent standard is part of an overarching trend of bureaucratically increasing the scope of criminal law and regulating people's sexuality.

Although these potential issues are certainly cause for concern, some legal theorists have observed that the rejection of affirmative consent may be too radical a reaction and unnecessary for protecting the rights of the accused and promoting sexual justice. For instance, Fischel (2019, 9) counters that while the "inflated" standard of enthusiastic consent is alarming, the sexual assault policies of the universities mentioned in these critiques usually do not include such a robust or "thick" conceptualization of consent. He notes, for example, that although the Dean of Students' Office at the University of Wyoming defines consent as necessarily enthusiastic, the university's policy on sexual assault more moderately defines consent as "a freely and affirmatively communicated willingness to participate in particular sexual activity or behavior, expressed either by words or clear, unambiguous actions." He further observes that this definition of consent requires only that there is some indication of consent (i.e.,

[14] It should be noted, however, while these are important considerations when designing a system that subjects people to carceral state power, false rape reports are almost non-existent except in cases of unique character, like teenage pregnancy without adequate access to abortion without parental consent.

consent beyond silence or stillness), not that consent cannot be hesitant or reluctant. Thus, such a definition does not run contrary to furthering sexual literacy or exploration, the source of Fischel's disagreements with the standard of enthusiastic consent. Further challenging these arguments against the standard of affirmative consent, Fischel (2019, 11) remarks that "even accounting for legitimate concerns over state and university overreach, affirmative consent is just not the bad guy." In other words, critiques of strict standards for consent (e.g., due process concerns) can be debated and addressed without excising affirmative consent from law or policy.

2.4 Empirical approaches to theorizing consent

In contrast with attempts to theorize the ethical and political import of consent, empirical research in the social sciences has adopted a more "descriptive" approach to studying consent. Specifically, empirical research on sexual consent has focused on two areas: (1) the conventionalized "sexual scripts" that interlocutors report using to interpret sexual consent from behaviours, and (2) the practices that research participants report actually using in negotiations of sexual consent.

2.4.1 Sexual script theory

In the behavioural sciences, sexual script theory posits that sexual actors must share some basic norms on how to engage in sexual activity to be able to successfully navigate the largely implied nature of negotiating sexual relations (see, Beres, Maitland, and Herold 2004). To fulfill this need, proponents of sexual script theory contend that communities develop "scripts" that allow individuals to identify sexual encounters, culturally salient roles within sexual interactions, and how to act in culturally competent ways within these encounters (Jozkowski et al. 2014; Kilimnik and Humphreys 2018; Muehlenhard et al. 2016; Beres,

Maitland, and Herold 2004; Beres 2010; Gagnon and Simon 2009). In this view, social actors learn to recognize socially salient participant roles and normatively expected behaviours through cultural narratives about sexuality (Muehlenhard et al. 2016; Jozkowski et al. 2014; Beres, Maitland, and Herold 2004; Beres 2007).[15] For example, Muehlenhard and Hollabaugh (1988) found that women often reported a desire to not conform to cultural narratives of promiscuous women who say "yes" to sex too readily and therefore provide token expressions of resistance even when they are interested in having sex. For sexual script theorists, these cultural narratives are viewed as being used by sexual actors to interpret sexual roles (e.g., men as initiators) and behaviours (e.g., women's refusals as "token" resistance) in sexual encounters (Gagnon and Simon 2009; Kilimnik and Humphreys 2018; Jozkowski et al. 2014; Beres, Maitland, and Herold 2004).

Sexual script studies have demonstrated that there is a rather high degree of consistency with which these "convenience" sample populations (i.e., heterosexual, largely white, college students) share common expectations surrounding sexual practices, including, for example, the expectation that men initiate sexual activity and that women offer "token" resistance even when they want to have sex (e.g., Edgar and Fitzpatrick 1993; Muehlenhard and Hollabaugh 1988; Muehlenhard et al. 2016). As Beres, Harold and Maitland (2004, p. 476) have observed, these studies also indicate a high degree of consensus regarding the preferred modalities of sexual communications among heterosexual college students—specifically, that both men and women largely expect sex to be negotiated primarily through nonverbal means (Byers &

[15] Sociocultural linguists may see similarities between these sexual scripts and what we refer to as linguistic ideologies because they are metapragmatic and metalinguistic commentaries that describe (verbal and nonverbal) language structure and use.

Heinlen, 1989; Byers & Lewis, 1988; O'Sullivan & Byers, 1992) and that both men's initial advances and women's responses of "token" refusals are expected to be subtle and indirect (Edgar and Fitzpatrick 1993).

At the level of interaction, these sexual scripts are thought to provide interlocutors with the ability to interpret others' sexual behaviours based on their conformance to normative expectations in sexual encounters, including the cultural norm of negotiating consent largely through nonverbal and indirect means (Jozkowski et al. 2014; Muehlenhard et al. 2016; Beres 2007; Edgar and Fitzpatrick 1993). As the previously mentioned literature on cultural narratives and rape myths would suggest, research in sexual script theory indicates that heterosexual college students seem to generally subscribe to the heteronormative understanding that men are the initiators of sexual activity and women are the "gatekeepers" of that desire. For instance, like Kulick (2003) argues, sexual script studies have generally found that there is a normative expectation that women should refuse sexual advances from men to avoid seeming "loose" and men should persist until women acquiesce (see also Kilimnik and Humphreys 2018; Muehlenhard et al. 2016; Check and Malamuth 1983; Gagnon and Simon 2009). This suggests that heterosexual college students often view women as the "givers" of consent and men are the "interpreters" or "receivers" of consent, highlighting others' observations that the standard of "consent" (as an act of permission) seems to place responsibility on women for managing male desire (see, Beres, 2007; Ehrlich, 2001). These studies might also explain why other studies have found that women often express embarrassment about initiating sexual activities (i.e., women who initiate sex are not conforming to their normatively prescribed sexual role) (Hickman and Muehlenhard 2018).

Although research in sexual script studies suggest that heteronormative cultural narratives shape how interlocutors *interpret* behaviours in hypothetical situations (provided in surveys for quantitative analyses), studies indicate that these idealized norms do not reflect how they report their own behaviours in negotiations of sexual consent. Anderson and Sorenson (1999), for example, found that men report that women often overestimate their sexual interest—perhaps because men are expected to be always ready, willing and interested in sex (see, Kulick 2003). What is more, studies have found that women might be the perpetrators of sexual assault more often than traditionally thought (see, Jozkowski et al. 2014), perhaps indicating that rape myths and the fact that most rapes are perpetrated by men against women might render male victims of rape less visible and consequently less likely to report rape or sexual assault (see, Beres 2007). Another explanation might be that these men might simply not think of themselves as having been raped by women because they may have different ways of defining rape than courts do (see, Beres 2007). Recent research, however, would suggest that this itself does not sufficiently explain why men are less likely to report rape because men and women do not generally report different views on the definition of consent (i.e., they both report defining consent as either "mutual agreement to have sex" or "the granting of permission to have sex" with nearly equal frequency) (Jozkowski et al. 2014).

Despite the plethora of studies that have found that gender and sexual orientation do not significantly affect how a person reports *defining* consent, sexual script studies using survey-based methods have indicated that heterosexual men and women often differ in how they report *interpreting* consent from nonverbal signs. That is, while heterosexual men and women report similar abstract understandings of what constitutes consent, studies show that they differ in their application of these definitions to concrete descriptions of behaviours. For

instance, survey-based research based on hypothetical examples indicate that men and women differ in how likely they are to interpret refusals as "token" resistance despite studies indicating that there is little difference in how men and women report defining consent (e.g., Abbey 1987; Osman 2003; Johnson, Stockdale, and Saal 1991). Beres, Maitland and Herold (2004) suggest that these studies might indicate that heterosexual men are more likely to misinterpret what women consider to be a friendly gesture as sexual implicature.

Others have often attempted to explain these differences in interpretative strategies by implying that women are just not being direct enough in their refusals (rather than men being responsible for failing to interpret these refusals successfully). Indeed, as Kitzinger and Frith (1999, 297) observe, "[t]he failure to 'just say no' is often attributed to internal personality characteristics such as low self-esteem (Stere 1985), lack of assertiveness (McConnch 1990), or lack of perseverance (Sandler, Watson, and Levine 1992)." Others have argued that women's oppression manifests in the form of internalizing subordinance, making it difficult for women to say no to men (Murnen, Perot, and Byrne 1989; Lakoff 1973). These prevailing attitudes about gendered communication seem to imply that women's putatively "timid" speech makes it difficult for men to recognize their indirect responses as refusals.

However, many researchers question if women's refusals are, in fact, difficult to recognize. As Kitzinger and Frith (1999) argue, indirect refusals are common and are rarely misinterpreted, suggesting that indirectness, itself, is not sufficient to explain why some men can't seem to interpret women's sexual refusals. Indeed, the hypothesis that men and women's communicative differences can explain why men mistake women's refusals as consent is hard to reconcile with the plethora of studies that suggest that most men generally report easily interpreting women's refusals, indirect or otherwise (Jozkowski et al. 2014; e.g., Beres 2010;

McCaw and Senn 1998; O'Byrne, Rapley, and Hansen 2006). Nevertheless, as non-resistance is a strategy to communicate consent in many individuals' reported sexual scripts (see, Beres 2010), it is perhaps not untenable to conclude, as some do (e.g., Jozkowski et al., 2014), that different interpretative strategies might account for *some* instances of honest but mistaken belief in consent. Even so, the person refusing a sexual advance should not be held accountable for these miscommunications (see, Tiersma 2007).

Recently, research has attempted to address the absence of sexual script studies among gay and lesbian populations, arguing that this lacuna may distort the literature's perspectives by too readily generalizing heterosexual behaviours as universal. Predictably, this research indicates that sexual scripts in same-sex encounters differ significantly from those used in heterosexual encounters. For instance, although Klinkenberg and Rose (1994) found some similarities between heterosexual survey responses and their findings on gay men and lesbians' reported expectations, there was less variation within sexual and gender analytic categories (e.g., gay men, lesbians, straight women, straight men) than across categories when it comes to how participants responded to interpreting hypothetical behaviours as either indicating sexual interest or a lack of willingness to participate in sex. Additionally, as Beres *et al*. (2004) observe, sexual script research has generally found that same-sex partners do not ascribe "initiator" and "gatekeeper" roles, which are generally tethered to specific genders (men and women, respectively), as previous studies have indicated is the case for their heterosexual counterparts. What is more, studies have found that there are very few differences between how gay men and lesbians negotiate sexual consent, perhaps indicating that gendered power asymmetries are more influential than differences in gender (Beres, Maitland, and Herold 2004). Some differences found in these studies include gay men being more likely to use

nonverbal modalities to negotiate consent (Beres, Maitland, and Herold 2004) and to more frequently discuss the use of prophylaxis—specifically, condoms (Edgar and Fitzpatrick 1993). Lesbians, by contrast, seem to be more likely to use verbal means to negotiate consent (Beres, Maitland, and Herold 2004) perhaps because they are also more likely to report ascribing an emotional dimension to sex than gay men are (see, Klinkenberg and Rose 1994).

For sociocultural linguists, sexual script theory might be understood as behavioural scientists' approach to understanding how language ideologies shape the intelligibility of expressions of consent. Specifically, an attentiveness to how "there is no privileged knowledge, including scientific, that escapes grounding in social life" provides an important analytic for interrogating the necessarily "interest-laden" and contestable nature of interpretation (Woolard and Schieffelin 1994, 58).[16] Adopting this understanding that meaning is always entangled with social, political, and ethical considerations, sociocultural linguists can understand sexual scripts as meta-pragmatic commentaries on how actors understand and socially structure sexual communications. In taking this view, research on sexual consent might be able to better explicate the ways that there is no "neutral" way to interpret consent and sexual scripts are thus always inured in highly political dynamics.

2.4.2 Sexual consent behaviours

Despite research detailing how social expectations shape the interpretation and acceptability of sexual behaviours, there has been significantly less attention given to the behaviours used in the negotiation of sexual consent. Indeed, as Jozkowski *et al*. (2014) note,

[16] Language ideology is defined variably in the literature (see, Woolard and Schieffelin 1994, 57). I discuss the distinct ways of conceptualizing language ideologies in chapter 4 when I elaborate on my theoretical framework and methodology. For now, a broad understanding of language ideology as "shared commonsense notions about the nature of language in the world" (Rumsey 1990, 346)Z should suffice.

most studies largely investigate how individuals *perceive or interpret hypothetical* examples of sexual behaviours rather than questioning how participants report on their own negotiations of consent. Departing from this trend, David Hall (1998) examined how college students report their *own* behaviours (as opposed to responding to hypothetical prompts) using questionnaire methods (e.g., choosing from a list of verbal and nonverbal behaviours), finding that there were not significant differences along gender lines (both men and women equally reported that they mostly used nonverbal behaviours). This differs from the previously mentioned literature on sexual script theory, which indicates that study participants generally expect different behaviours from men and women. Hall (1998) noted, however, that the more intimate or potentially invasive an act is, the more predictive it was of an increased likelihood for both genders to report verbal strategies for negotiating sexual consent (e.g., penetrative sex vs. oral sex). As mentioned earlier, Beres, Herold, and Maitland (2004) similarly found that gay men and lesbians report using nonverbal strategies more often than verbal ones. Jozkowski *et al*. (2014) note, however, that questionnaire-based studies have often provided very limited options (e.g., a binary choice between verbal or nonverbal strategies), suggesting that more detailed accounts are necessary. For obvious reasons, research on sexual behaviours has been largely limited to self-reported data rather than empirically observed behaviours in context.

Even so, some self-report studies have been highly attentive to the diversity of tactics that might be used to negotiate consent. Susan Hickman and Charlene Muehlenhard (2018), for instance, offered research participants over 30 options for indicating consent, observing that heterosexual women were more likely to use indirect verbal signals than heterosexual men and heterosexual men were more likely to use indirect nonverbal signals. Both groups, however, reported using the mere absence of resistance to indicate consent in most cases.

Taking what Jozkowski *et al*. (2014) call a novel approach, Melanie Beres (2010) used qualitative methods to analyse conversations where men and women discussed their strategies for negotiating sexual consent in casual sexual encounters. She observes three general strategies in these discussions: the assumption that "you just know," refusing sex through verbal or nonverbal means, and reciprocating sexual advances. Despite these largely indirect and nonverbal strategies, Beres argues that miscommunications are unlikely because her participants seem to share a substantial set of social norms for accurately interpreting these indirect strategies—that is, the participants varied very little in the strategies that they identified.

Importantly, experts in the field are quick to specify the limitations of their survey and questionnaire-based methods. Beres (2007), for example, has noted that this area of research has generally been insufficiently attentive to the nature of individuals' relationships,[17] and how potential power imbalances or social differences might influence their reported expectations surrounding negotiations of sexual consent. Additionally, she observes that the self-reported nature of sexual script studies is limiting because it both does not allow for descriptively rich, empirical accounts of actual sexual consent negotiations and how consent-negotiating practices are influenced by environmental factors (Beres 2007).

Although there is little empirical research on the actual practices used to negotiate sexual consent in context (understandably, given the highly personal and intimate nature of these interactions), recent research on flirting has provided some important insights that may

[17] Since saying this, however, recent research has sought to begin to address this lacuna in the literature. Kilimnik and Humphreys (2018), for instance, have noted that heterosexual college students generally report a belief that the duration of a relationship implies a reduced responsibility for negotiating consent verbally.

help direct future research on the matter. Kristine Mortensen's (2017) sociocultural linguistic research on flirting on online dating sites, for example, indicates that implicitness and indirectness is central to successfully building desire and intimacy in a flirtatious interaction, supporting theories positing similar (although not yet empirically substantiated) views on negotiations of sexual consent (e.g., Cameron and Kulick 2003; Harvey and Shalom 1997). More than simply supporting existing theories about flirting with concrete evidence, however, Mortensen's investigation contributes the important insight that the implicitness of flirtatious talk can be identified in how interlocutors are able to mutually construct and interpret the meaning of unstated intentions made through indirect references. For instance, Mortensen argues that although interlocutors might never explicitly state an intention to meet in person, one party might allude to the possibility of helping the other with gardening in the future. This reference to the potential for physical proximity, Mortensen contends, helps facilitate an intimate imaginary between the interlocutors, allowing for the building of desire through the postponement and possibility of pleasurable proximity.

This "imagined togetherness," she further contends, is integral to forming intimate bonds while maintaining a tenuousness of interaction that is necessary to prevent a violation of social norms (e.g., not being too sexually explicit in the early stages of getting to know one another). This is highly reminiscent of research that has found the negotiation of sexual consent to be generally indirect. Given these similarities between how scholars have theorized negotiations of sexual consent and flirting, Mortensen's findings may be useful for guiding future attempts at studying actual practices used for negotiating sexual consent even if this was not the object of her research.

2.5 Future directions

As this review has demonstrated, the scholarly literature on consent is not without debate or disagreement in terms of how consent is understood (i.e., as a subjective state vs. an objective performative), its value in law and policy (i.e., whether too much emphasis on consent has displaced other important elements of sexual ethics), how it is interpreted by sexual actors (e.g., using sexual scripts), and how it is negotiated in practice. Additionally, I have commented on the need for studies that do not rely entirely on responses to hypothetical prompts or self-reported data on individuals' own behaviours. By addressing the understandable absence of empirical accounts of how consent is actually negotiated in practice, studies may ameliorate theoretical perspectives on the interpretation of consent, the literature's understanding of how consent is negotiated, and how consent is theorized in terms of sexual justice.

In light of one of the overarching arguments of this dissertation—that the logic of HIV nondisclosure law is deeply interwoven with heteronormative assumptions about sexuality—I would suggest that future research try to theorize sexual justice in such a way so as not to define sexual assault exclusively through the binary presence or absence of consent while also avoiding reductively representing sexual ethics as simply a matter of legal and illegal sexual behaviours. What is more, as has been noted elsewhere (see, Beres, 2007), I see a need for qualitative research that provides a detailed account of how consent is negotiated in actual contextualized interactions as well as research that is "far more imbued with understandings of embodiment, structural inequality, and relationality than the traditional models provide" (Cahill 2016, 759). Specifically, whereas the literature is currently dominated by theories that privilege the rational elements involved in sexual practices (e.g., autonomy), Chapter 6 and 7

of this dissertation suggest that there is a great need for research that highlights the affective and experiential dimensions of negotiating sexual consent (see, Huffer 2013).

Finally, given my argument that Canadian courts often confound sexual diversity with sexual violence, thereby continuing a tradition of criminalizing sexual minorities, I feel compelled to comment on how most literature on sexual consent has focused on heterosexual encounters among cisgender individuals. Moreover (and more problematically), it is not uncommon for legal and feminist scholars to explicitly limit their analyses of sexual justice to heterosexual, cisgender contexts and examples (as if these are somehow neutral or generalizable) when theorizing the sexual ethics of consent. While rape is certainly a crime most commonly committed by heterosexual, cisgender men against women, the frequency with which scholarship avoids discussing its theoretical implications for same-sex and transgender populations is somewhat troubling given the fact queer and trans people are disproportionately more likely to experience sexual violence than straight cisgender women (although they are not more likely to in absolute terms because they comprise a smaller percentage of the overall population) (CDC 2010; Felix et al. 2015; National Center for Transgender Equality 2016; T. N. T. Brown and Herman 2015).

My disappointment, to be clear, is not that heterosexual violence is so often talked about (I understand that it is a social issue of epidemic proportions) but rather the fact that it is so common to add (often as a mere footnote) that homosexuality and transsexuality are outside the scope of a project on sexual consent even though queer and trans people are very much

affected by policies that rely on this scholarship.[18] Clearly, social context is important in these debates and discussions about sexual consent; yet, theorists rarely address the implications of their arguments for sexual and gender minorities. I want to clarify that, in bringing attention to this issue, my desire is not that we should talk about heterosexual violence any less; rather, I hope that my dissertation demonstrates how including queer and trans perspectives isn't simply about "political correctness" but, instead, is itself a step toward a more robust theory and better politics of sexual justice.

[18] It is worth noting that none of the research that refers to queer and transgender people similarly avoids discussing the topic of heterosexual, cisgender sex. Indeed, this research largely frames its subject matter in reference to heterosexual and cisgender scholarship.

3. Criminalizing HIV nondisclosure

Fraud-vitiated sexual consent in Canadian criminal law

3.1 Introduction

Canada's criminalization of HIV nondisclosure has become both increasingly more prevalent and progressively more severe over time (Dej and Kilty 2014). Although the charge for HIV nondisclosure was originally committing a common nuisance (e.g., *R. v. Thornton*, 1991), people living with HIV would later be convicted of criminal negligence (e.g., *R. v. Ssenyonga*, 1993), aggravated assault (e.g. *R. v. Cuerrier*, 1998), aggravated sexual assault (*e.g., R. v. Mabior*, 2012), and even murder (e.g., *R. v. Aziga*, 2009) for not disclosing their HIV status to sexual partners (Symington 2012; see, Cowan 2014; Grant 2011; Rey 2011; Mykhalovskiy, Betteridge, and McLay 2010). Additionally, prosecutions of HIV nondisclosure in Canada increased rapidly from the early 2000s onward after the Court's 1998 decision in *R. v. Cuerrier* (see, Dej and Kilty 2014; Mykhalovskiy and Betteridge 2012; Mykhalovskiy, Betteridge, and McLay 2010; Symington 2012).

In this chapter, I identify key moments in Canada's legal history in order to provide an account of how HIV nondisclosure came to be interpreted as fraud that vitiates sexual consent. My objective, in providing this genealogy, is to better understand how Canadian law came to treat HIV nondisclosure as aggravated sexual assault. I begin this account by examining how common law jurisdictions, including Canada, traditionally have not criminalized the nondisclosure of sexually transmissible infections as sexual fraud and sexual assault. I then trace the concrete genealogy of court decisions and legal reforms that eventually led to the contemporary treatment of HIV nondisclosure as aggravated sexual assault. Next, I

contextualize my account of this legal history, reviewing the scholarly literature's responses to the criminalization of HIV nondisclosure in Canada and its consequences for public health. In providing this review of the case law and scholarship on HIV nondisclosure, I hope to elucidate the historical and contemporary issues surrounding the criminalization of HIV nondisclosure in Canada, to identify potential avenues for (partial) decriminalization, and to help readers better follow my analyses in subsequent chapters.

3.2 The traditional interpretation of sexual fraud established in *R. v. Clarence*

This section provides a brief overview of how the standards used in cases involving sexual fraud have evolved over time. I begin by explaining how Canadian courts inherited the common law distinction between *fraud in the factum* and *fraud in the inducement* and how this standard has been applied and changed in recent decades.

Table 3-1: Overview of major advancements in the case law on sexual fraud

Case	Holding
R. v. Clarence	The nondisclosure of gonorrhea when there is no intention to infect the partner only misrepresents the secondary consequences of the sexual act and thus the deception does not vitiate consent to the act itself. The *transmission* of gonorrhea, however, may constitute a criminal offense.
R. v. Petrozzi	Following revisions to the *Criminal Code*, the standard set in *R. v. Clarence* still applies.
R. v. Ssenyonga	HIV nondisclosure does not misrepresent the nature of the act (see, *R. v. Clarence*) but the *transmission* of HIV due to reckless behaviour constitutes criminal negligence resulting in serious bodily harm.
R. v. Cuerrier	*R. v. Petrozzi* partially overruled. Changes to *Criminal Code* indicate an expansion of the standard for determining sexual fraud. Deceptions that misrepresent the "significant risk" of

	serious bodily harm now vitiate otherwise freely given consent. An intention to infect is not required.
R. v. Aziga	Death resulting from HIV that is transmitted via an act where the risks of transmission was not disclosed constitutes murder even if there is no intention to transmit the virus.
R. v. Mabior	"Significant risk" of serious bodily harm (see, *R. v. Cuerrier*) refers to the "realistic possibility" of transmission in cases involving the nondisclosure of HIV.

In *R. v. Clarence* (1888), it was determined that only misrepresentations of the nature or quality of a sexual act or the identity of a sexual partner could vitiate otherwise freely given consent. In other words, *fraud in the inducement* (i.e., fraud that misrepresents the consequences of an activity) would not vitiate consent to sexual or otherwise physical contact. In *Clarence*, the accused did not disclose to his wife that he had gonorrhea and transmitted the infection to her. She maintained that she would not have consented to sex had she known. Because the two were married and at the time it was not against the law for a man to rape his wife, Clarence could not be charged with rape. Clarence was instead charged with assault causing grievous harm.[19] Because the underlying principle violated in both rape and assault is the same (i.e., bodily autonomy), marital rape exception laws were not material to determining whether the act constituted an assault although they precluded the possibility of a rape conviction.

[19] Assault causing grievous harm is analogous to the contemporary Canadian infraction of aggravated assault.

Following the trial, Clarence was convicted of assault causing grievous harm. The conviction was overturned upon appeal, however, because it was ruled that the transmission was a secondary consequence of the sexual act and not intrinsic to the act itself. The court maintained, though, that the transmission of gonorrhea could constitute a separate offence. In making its decision to overturn the ruling, *the court affirmed that an assault required an intention to inflict harm or apply force*. While the court recognized that the accused's nondisclosure of his condition was intentional, the Crown had not established that the accused had the intention to transmit the infection to his wife. Moreover, the court ruled that consent could be obtained through fraud even if some forms of fraud vitiate consent (*R. v. Clarence* at 33; opinion of Wills, J.). For example, a man who did not intend to pay a prostitute for services rendered was guilty of fraud and not rape because the deception misrepresented a secondary consequence of the sexual act rather than the act itself. Following this logic, the court held that the nondisclosure of gonorrhea is incapable of vitiating the complainant's otherwise freely given consent because the fraud did not misrepresent the nature of the sexual act or the identity of the person. This interpretation of sexual fraud (i.e., the misrepresentation of the nature or quality of a sexual act or identity of a partner) would become the traditional standard upheld in common law for the next century.

3.2.1 Sexual fraud in the *Criminal Code*

Until 1983, this traditional interpretation of sexual fraud was enshrined in the Canadian *Criminal Code* under the statutes for rape and indecent assault. The statute for rape (s. 143; emphasis added), for example, read as:

> A male person commits rape when he has sexual intercourse with a female person who is not his wife,
> (*a*) without her consent, or

(*b*) with her consent if the consent
(i) is extorted by threats or fear of bodily harm,
(ii) is obtained by personating her husband, or
(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

As noted earlier, in response to feminist lobbying efforts in the 1980s and 1990s, the criminal laws governing sexual violation (e.g., indecent assault and rape) were revised to better reflect the similarities between sexual aggression and other forms of violence as well as repeal archaic provisions like marital rape exemptions (see, Boyle 1984; Ehrlich 2001; Tang 1998; Comack 1999). Following these revisions, a single statute for assault would cover both physical and sexual assaults, highlighting the shared principle of bodily autonomy underlying the two issues.[20]

Following the 1983 revisions to the *Code*, the assault statute (s. 265; emphasis added) reads as follows:

(1) A person commits an assault when
(*a*) without the consent of another person, he *applies force intentionally* to that other person, directly or indirectly.
(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the *complainant submits or does not resist by reason of*

[20] See, *R. v. Cuerrier* at 374. ("The objectives of the 1983 assault scheme are to protect people's physical integrity from unwanted physical contact, and to protect people's personal autonomy to decide under what conditions they will consent to be touched.") (Opinion of L'Heureux-Dubé, J.)

(*a*) the application of force to the complainant or to a person other than the complainant;
(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;
(*c*) *fraud*; or
(*d*) the exercise of authority.

Importantly, this revised statute explicitly mentions that while the intention to apply force is inherent to an assault, the actual use or threat of force is not necessarily involved in all instances of assault (e.g., the exercise of authority to coerce someone into a sexual act would result in the act being a sexual assault). Additionally, the new statutory language no longer mentions explicitly the traditional standard of sexual fraud established in *Clarence*. In the years immediately following the revision to the *Code*, this revision to the fraud provision would not present much difficulty for courts. In later years, however, it would spark the fuse for one of the most contentious rulings in Canadian criminal law. Specifically, it would eventually become the turning point in the Court's decision in *R. v. Cuerrier*, where it was established that fraud could vitiate consent even when it does not misrepresent the nature or quality of an act (see, section 3.3).

3.2.2 The traditional interpretation of sexual fraud upheld in *R. v. Petrozzi*

Until *Cuerrier*, courts generally upheld the *Clarence* interpretation of fraud despite the ambiguity presented in the removal of qualifying language around fraud in the provision for assault in 1983. In *Petrozzi*, for example, the British Columbia Court of Appeal ruled that the revisions to the *Code* did not indicate an intention to depart from the traditional interpretation of sexual fraud established in *Clarence*. (This ruling would be binding for lower courts until the Court's decision in *Cuerrier*.)

3.2.2.1 Background

The complainant testified that Petrozzi (drunk at the time) accosted her at an intersection, and she agreed to perform sexual acts for him for $100. She alleged that they drove to a nearby parking lot where she asked to be paid in advance and he refused and then proceeded to assault her, choking her and forcing her out of the vehicle. He then made her undress and have sex with him, including oral sex after the intercourse. She maintained that she was able to persuade the accused to allow her to dress and re-enter the vehicle. He gave her $10 and then drove to another location where he forced her to give him oral sex and then have sex again. The complainant reported that she saw a police car stop by the accused's car and when the police began searching the area the accused fled. As soon as she was free of the accused, she ran to the police.

The accused denied nearly everything in the complainant's testimony, stating that while he agreed to pay $100 for sexual services, he had never intended to pay, had not assaulted her, and had only been slightly drunk. He maintained that they had mutually agreed to leave their wallets, including the complainant's purse, in the car because he did not trust her. He stated that while "helping" the complainant undress, he broke the buckle of her belt and for that damage he offered her $10. She then demanded payment for sexual services, and he refused. He claimed she then struck him and that he retaliated by striking her in return.

3.2.2.2 Trial and appeal

The trial judge, despite both the prosecution and defense's objections, instructed the jury to consider whether the accused committed fraud by offering payment of services without an intention to pay, stating that if they found this to be the case, they could further "find that she did not consent" because the fraud would vitiate her consent. The judge did not instruct the

jury on the meaning of fraud for sexual cases (as determined in *Clarence*). The accused was ultimately found guilty of sexual assault. The defence appealed the decision, arguing that the judge failed to instruct the jury on the traditional interpretation of sexual fraud. Upon appeal, the *Clarence* interpretation of sexual fraud was upheld, affirming that fraud could vitiate sexual consent only when it misrepresented the nature or the quality of the act or identity of the person even after language supporting this standard had been removed from the *Code*. A new trial was ordered with fraud not being at issue.

3.2.3 The traditional interpretation of sexual fraud tested in *R. v. Ssenyonga*

Unsurprisingly, an appellate court upholding the *Clarence* interpretation of sexual fraud would come to have a significant impact in the early case law of HIV nondisclosure. In *R. v. Ssenyonga*, for example, the trial judge cited *Petrozzi* in his decision to acquit Ssenyonga of charges of aggravated sexual assault for HIV nondisclosure.

3.2.3.1 Background

Ssenyonga was aware that he was living with HIV and that having unprotected sex with others could result in transmitting the virus to them. He did not disclose his HIV-positive status to three women. All three women tested positive at the time of the trial and testified that they would not have consented to unprotected sex with Ssenyonga had he disclosed his HIV-positive status before having sex. Forensic analysis could not directly link the complainants' infections to Ssenyonga (as this is impossible to do), but testing indicated that the three women had the same strain of the virus of Ssenyonga and this strain belonged to a family that was "extremely rare in North America" (*R. v. Ssenyonga*, at 259) at the time of the trial.

3.2.3.2 Trial

Ssenyonga was charged with three counts of aggravated sexual assault and three charges of criminal negligence resulting in serious bodily harm[21] for not disclosing his HIV status to the three women. The defense made a motion for a directed verdict[22] of acquittal on the three charges of sexual assault (but not the charges of criminal negligence), arguing that the complainants freely consented to sexual relations with the accused. Opposing this motion, the Crown contended that the court should rule that consent was vitiated on three independent grounds, as follows:

1. HIV infection is so dangerous that it falls outside the complainants' implied consent to sex.
2. Fraud vitiates consent to contact in s. 265(3)(c) *Criminal Code*.
3. Public policy limits on consent as set out in *R. v. Jobidon*.[23]

The trial judge responded that he would not, "in the absence of a clear and binding authority" (*R. v. Ssenyonga,* 263), import the tort concept of informed consent to criminal law, ultimately ruling that the complainants' consent to sex was not contingent on them being informed about the accused's HIV-positive status. Furthermore, the trial judge, adopting the British Columbia Court of Appeal's ruling in *Petrozzi*, concluded that the revisions to the *Code* of 1983 were not intended to drastically shift the traditional interpretation of sexual fraud, indicating that the Crown's argument that the accused's fraud vitiated the complainants'

[21] The defence did not dispute that Ssenyonga had transmitted the virus to the complainants.

[22] A directed verdict is a ruling given after determining that there is insufficient evidence for a jury to reach another conclusion.

[23] In *Jobidon*, the Court ruled that a person cannot consent to abuse or serious bodily harm (e.g., a person cannot consent to a "fair" fist fight on the street) because it is not in the service of public policy to allow citizens to consent to being harmed without good reason. The Supreme Court added, however, that where there is a "social value" to an activity that requires consent to serious bodily harm (e.g., sporting events), this limitation on a person's ability to consent would not be applied.

consent was untenable. Finally, responding to the argument of limiting individuals' capacity to consent on policy grounds (i.e., that people should be incapable of consenting to the risk of serious bodily harm), the trial judge, applying the Court's ruling in *Jobidon*, concluded that sex is an activity with "social value" and, thus, the individuals should be able to consent to sex even when there is a risk of serious bodily harm. Consequently, the trial judge was unmoved by the Crown's opposition to the motion and gave a directed verdict acquitting the accused of the aggravated sexual assault charges.[24]

The trial judge's ruling in *Ssenyonga* closely resembles how HIV nondisclosure is treated in most other historically related common law jurisdictions, including England and Wales, Australia, and New Zealand. In England and Wales, for instance, HIV nondisclosure is generally not treated as a sexual crime or as an assault because assault requires an *intention to infect* (as opposed to just an intention to deceive), which is difficult to prove beyond a reasonable doubt (Cowan 2014; Grant 2011; Rey 2011). As such, HIV nondisclosure is almost exclusively criminalized as reckless behaviour resulting in grievous bodily harm (this is similar to the charges of criminal negligence resulting in serious bodily harm in *Ssenyonga*) (Cowan 2014). Australia and New Zealand likewise do not treat HIV nondisclosure as a sexual offence and generally parallel the approach of England and Wales by requiring the Crown to establish an intention to inflict harm to obtain a conviction for assault (Grant 2011).

[24] Ssenyonga died of HIV-related health complications before he could be sentenced for the three counts of criminal negligence resulting in serious bodily harm.

3.3 HIV nondisclosure as consent-vitiating fraud

In 1998, the consistent treatment of HIV nondisclosure across historically related legal systems would come to an end. Departing from a century of established law, the Canadian Court ruled that the definition of sexual fraud set out in *Clarence* needed modernizing.

3.3.1 The traditional interpretation of sexual fraud overruled in *R. v. Cuerrier*

In *Cuerrier* (1998), the Court unanimously decided that "a failure to disclose" HIV-positive status constitutes consent-vitiating fraud that involves a risk of serious bodily harm, resulting in an otherwise consensual act being an instance of aggravated assault. Because the assault statute in the *Criminal Code* does not differentiate between sexual and physical assault, HIV nondisclosure can also be considered to result in aggravated sexual assault when the potential transmission involves sex. Strangely, there does not seem to be any factual or legal distinction that can explain why some HIV nondisclosure cases are charged as aggravated sexual assault while others are charged simply as aggravated assault (Symington 2012).

3.3.1.1 Background

After being diagnosed as HIV-positive, a public health nurse informed Cuerrier to use condoms during sex and to disclose his HIV-positive status to sexual partners. He rejected the nurse's advice, stating that he would never be able to have a satisfactory sex life if he followed her direction to consistently disclose his HIV status and use condoms. Nearly a month later, he met KM and the two dated for a year and a half, having regular unprotected intercourse throughout the relationship. Early in the relationship, KM expressed a fear of sexually transmitted infections without explicitly mentioning HIV. Cuerrier responded that he had tested negative for HIV eight or nine months earlier (he did not mention that he had tested

positive more recently). Later in their relationship, the two were tested for HIV together and KM tested negative while Cuerrier unsurprisingly tested positive.

The nurse informed KM of Cuerrier's HIV-positive status and advised her to undergo repeat testing at another time to confirm her HIV-negative status because it can take up to three months for the body to develop the antibodies that most tests at the time used to determine a person's HIV status. Cuerrier was informed for the second time to disclose his HIV status to partners and to always use a condom. He responded that he would wait to see if KM tested positive and if she did not, he planned to leave her and find an HIV-positive woman to start a relationship with so that he could continue to not use condoms. Cuerrier and KM continued to have unprotected sex for several months after this. After breaking up, KM testified that she would never have begun having sex with Cuerrier had she known he was HIV-positive. KM did not test positive for HIV at the time of the trial.

After hearing that Cuerrier and KM's relationship had terminated, a public health nurse delivered a written order to Cuerrier advising him to inform his future partners of his HIV-positive status and to use condoms. After receiving this order, Cuerrier met the second complainant (BH) and the two developed a sexual relationship (often having unprotected sex). BH, like KM, expressed fear of sexually transmitted infections and the accused remained silent about his HIV-positive status. Subsequently, BM learned that Cuerrier was HIV-positive and confronted him. He apologized for not informing her of his medical condition. After ending the relationship, BM testified that she would not have had unprotected sex with Cuerrier had she known of his HIV-positive status. At the time of the trial, BM did not test positive. Cuerrier was charged with two counts of aggravated assault for not disclosing his HIV status to two sexual partners who would not have consented to sex had he been open about his condition.

3.3.1.2 Trial and appeal: *Clarence* upheld

At trial, the judge considered s. 268(1) of the Criminal Code (i.e., "Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant") and concluded that the accused had exposed the complainants to physical danger by engaging in unprotected sex with them. However, the trial judge, citing *Ssenyonga*, concluded that consent is invalidated only when the amount of force exceeds what can be normally expected in sexual acts. He concluded that Cuerrier's deception did not satisfy this condition and agreed with the ruling made in *Petrozzi* that only fraud that misrepresents the nature or quality of the act or the identity of the person could vitiate sexual consent. Although the Crown argued that public policy should intervene in the case of Cuerrier because of the seriousness of the risk of HIV, the trial judge, citing *Ssenyonga* again, contended that the assault provisions in the Criminal Code were not designed as a public health strategy but instead as a measure to protect people from the "non-consensual direct or indirect application of force" (*R. v. Ssenyonga*, at 265). The trial judge consequently gave a directed verdict and acquitted the accused on both counts of aggravated assault.

Upon appeal, Justice Prowse of the British Columbia Court of Appeals noted that prior to the 1983 revision of the Criminal Code, which included the removal of the wording "nature or quality of the act" with respect to fraudulently obtained consent, the case law on fraudulently vitiated consent had considered only a few kinds of fraud as capable of vitiating sexual consent. She ultimately concluded that this revision to the Criminal Code was not intended to broaden the categories of consent-vitiating fraud and affirmed the trial judge's decision in following the ruling laid out in *Petrozzi*. Additionally, Justice Prowse considered whether sexual consent needed to be "informed consent" (consent with knowledge of all relevant facts) and rejected

the proposal because she did not view the power dynamic between Cuerrier and the complainants to be equivalent to the power dynamics that necessitate informed consent in medical practice.[25] Additionally, she was reluctant to transfer principles of informed consent from tort law to criminal law. Further affirming the trial judge's position, Justice Prowse ruled that the complainants' consent should not be understood as having been vitiated by fraud on the grounds of public policy because the Criminal Code's provisions for assault were not designed for dealing with the HIV epidemic.

3.3.1.3 The Supreme Court: *Clarence* overruled

Contrary to the British Columbia Court of Appeal's ruling that the *Clarence* interpretation of sexual fraud still applied (as was held in *Petrozzi* as well), the majority of the Supreme Court in *Cuerrier* agreed that the 1983 revisions to the Criminal Code indicated Parliament's intention to move away from this interpretation of fraud and provide greater protections for personal autonomy. Although the Court did not clarify exhaustively what frauds could vitiate consent to sexual relations, Justice Cory, writing for the majority, observed that Cuerrier's nondisclosure of his HIV status satisfies the traditional requirements for fraud in commercial law: dishonesty and deprivation (or risk of deprivation)[26] because the accused had the intention to deceive the complainants and that deception resulted in risk of serious bodily harm for the complainants. Consequently, to obtain a conviction for a charge of aggravated sexual assault, the Court ruled that the Crown must establish *both* (1) that the accused intentionally deceived the complainants to induce her consent to sex where she would not have

[25] For more information on how these dynamics are determined, see *Norberg v. Wynrib*.

[26] As Symington (2012, 639) notes, the cases "referred to in relation to the concept of fraud [in *Cuerrier*] are commercial cases, looking at economic losses or risk — not at physical risks to people."

consented without deception *and* (2) that this deception resulted in serious bodily harm (e.g., infection) or a "significant risk" of serious bodily harm.

3.3.2 HIV nondisclosure and fraud-vitiated consent

In the years following the Court's contentious decision, legal theorists regularly critiqued the criminalization of HIV nondisclosure as consent-vitiating fraud. Kim Buchanan (2015) and Marina Rey (2011) for instance, argue that the inconsistent treatment of HIV nondisclosure from other forms of deceptions is not grounded in a principled application of criminal law. Rubenfeld (2013b) likewise contends that there is no legal principle that can explain how courts have treated HIV nondisclosure as capable of vitiating sexual consent while not similarly criminalizing other forms of deceptively obtained consent (e.g., false professions of love and more explicitly contractual cases like *Petrozzi*). Indeed, he goes so far as to insist that if protecting personal autonomy were truly the objective of criminalizing HIV nondisclosure, then all forms of deceptively obtained consent (e.g., false professions of love) ought to be criminalized because "consent obtained by deception, as courts have long and repeatedly held outside of rape law, 'is no consent' at all" (Rubenfeld 2013b, 1372).

As this expansion of criminal law seen in *Cuerrier* would criminalize commonly accepted and (hetero)normatively accepted sexual practices, Rubenfeld (2013b) argues that deception should never vitiate consent.[27] Buchanan (2015, 1277), however, responds that "[p]hilosophical consistency does not seem to be a compelling reason to decriminalize" other kinds of fraud such as husband impersonation (e.g., a man impersonating his twin to have sex

[27] I address the debate on rape-by-deception and fraud-vitiated consent in more detail in Chapter 7: *Matters of bodily integrity*.

with his twin's wife) or therapeutic sexual fraud (e.g., impersonating a doctor to give illicit "gynaecological exams"). She argues that these deceptions, unlike HIV nondisclosure and other kinds of deceptions, are always morally blameworthy and have been criminalized for such a long time that potential offenders can be thought of as being "on notice" that these forms of impersonation are prohibited by law.

3.3.3 HIV nondisclosure and murder-by-deception in *R. v. Aziga*

In addition to the inconsistent treatment of deceptively obtained consent, the Court's ruling in *Cuerrier* has also had undesirable consequences for establishing *mens rea* in assault cases. This is because the Court held in *Cuerrier* that the Crown is only required to establish that the accused was intentionally deceptive in not disclosing his or her HIV status and that this deception put his or her partner at "significant risk" of serious bodily harm. That is, the Court did not define any duty to establish an intention to do harm or apply force as is typical for assault convictions. As such, if HIV nondisclosure can result in a sexual act being an assault even if there is no intention of applying force or inflicting harm (see, s. 231(5)(d) of the *Criminal Code*),[28] then mere HIV nondisclosure could be interpreted as murder if the assault in question were to lead to death. What is more, an attempted murder charge would be appropriate *even when the activity does not result in any tangible harm to the complainant and is not motivated by an intention to harm* (see, Symington 2012).

This bizarre implication (i.e., murder without an intention to harm or apply force) of the Court's ruling in *Cuerrier* was eventually realized in *Aziga* where the accused was

[28] "Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections: … (d) section 273 (aggravated sexual assault) …"

convicted of two counts of murder in addition to 11 counts of aggravated sexual assault for not disclosing his HIV status to 11 women—two of whom died due to HIV-related health complications. Although Aziga was convicted of two counts of murder, *it is important to note that the Crown never established his intention to apply force or otherwise inflict harm upon his sexual partners*. In fact, the court determined, following the Court's ruling in *Cuerrier*, that all the Crown needed to establish was that Aziga was intentionally deceptive, that the complainants were at significant risk of serious bodily harm and that the two deaths were causally linked to the transmission of HIV to obtain convictions for murder charges. Following Aziga's conviction, courts now seem willing to consider the mere nondisclosure of HIV as attempted murder—at least three men have been charged with attempted murder in Ontario for HIV nondisclosure and these cases do not materially differ from earlier cases involving HIV nondisclosure that courts had not considered instances of attempted murder (Symington 2012).[29]

Crucially, retaining the traditional requirement of requiring an intention to apply force in order to obtain a conviction for assault would have prevented this unintuitive application of murder charges to cases involving the mere nondisclosure of HIV. This is evident in *Smallwood v. the State of Maryland* where the Maryland Court of Appeals ruled that *HIV nondisclosure could only be interpreted as attempted murder if transmission were an intended effect*. This overruled a lower court's opinion that an HIV nondisclosure constitutes attempted

[29] Aziga has appealed his two convictions for murder, but the appeal has yet to be addressed by an appellate court. In the meantime, the mere nondisclosure of HIV-positive status is being prosecuted in Canadian courts as aggravated assault, aggravated sexual assault and attempted murder.

murder because the sexual act in question involves a risk of HIV transmission, which could result in the complainant's death.

What is especially interesting about this case is that Smallwood had pled guilty to attempted rape charges. Importantly, the rape was not simply a result of his nondisclosure; there was also no consent (vitiated or otherwise). But, even with an intention to apply force, the concurrent risk of HIV (when not included in the accused's intention to use force) was not viewed by the higher Maryland court as an attempted murder. Thus, the court effectively held that for HIV nondisclosure *itself* to result in assault there must be an intention to infect a person. Otherwise, there would be no reason for the court to rule that rape involving a risk of HIV, which could potentially result in a person's death, would not constitute attempted murder. In other words, the court held that for HIV nondisclosure to vitiate consent, the risk of HIV cannot be a secondary consequence of the intended activity; *it must be an intended effect*. This decision, then, more closely accords with the way that most common law jurisdictions treat HIV nondisclosure. That is, it is treated as an assault only when there is an intention to infect in contrast to Canada's approach of criminalizing nondisclosure as an assault even when the risk of infection is only a secondary consequences of the activity (Cowan 2014; Symington 2012; Grant 2011; 2009; Kaplan 2012; Waldman 2011; see, Buchanan 2015; Rey 2011).

3.3.4 Redefining "risk" and responsibilities

In addition to the more general problems that the Court's decision in *Cuerrier* has had for general principles of criminal liability (e.g., insufficient *mens rea* requirements and the reinterpretation of sexual fraud in criminal law), the Court's handling of *Cuerrier*—specifically, its ambiguous test of "significant risk"—has resulted in courts inconsistently handling cases involving HIV nondisclosure. As Mykhalovskiy, Betteridge and McLay (2010)

observe in their review of over 104 prosecutions spanning from 1989 to 2009, there has been little consistency in the evidence used to establish the degree of risk in a sexual activity or the degree of risk deemed significant enough to warrant legal censure. Namely, while some courts have viewed using a condom as *not* signifying a significant risk of infection (e.g., *R. v. Aziga*, *R. v. Edwards*, *R. v. Williams*, *R. v. Trott*), others have ruled that only the combination of *both* using a condom *and* having a low viral load is sufficient for a person to not have a positive duty to disclose that he or she is living with HIV (e.g., *R. v. Mabior*) (Mykhalovskiy, Betteridge, and McLay 2010; Kaplan 2012; Waldman 2011; see, Grant 2009).

Some courts have even decided that neither having an undetectable viral load nor using a condom necessitates a positive duty to disclose, choosing instead to assess the facts on a case-by-case basis. In *R. v. J.A.T.*, for example, the trial judge concluded that an estimated risk of transmission of 0.12% arising from three instances of unprotected anal sex did not warrant the serious charge of sexual assault.

Although legal scholars have generally accepted that HIV nondisclosure law's risk calculus as a metric of legal obligation is unprincipled and potentially highly damaging to public health, some feminist legal theorists have suggested that the Court's ruling in *Cuerrier* indexes a positive shift in sexual assault law because it emphasizes sexual actors over sexual acts. Elaine Craig, for example, argues that the lower courts' treatment of *Cuerrier* emphasized the elements of the sexual act(s) rather than the sexual actors. For Craig (2011, 79), the Court's decision to expand the meaning of sexual fraud in criminal law is a step in the right direction because:

> A legal conception of sexuality focused on sexual actors (and thus sexual integrity) forces a different analysis. It requires the Supreme Court of Canada to ask much more than: did she say he could insert a speculum into her vagina and if so is that what he

> did? It requires the Court to inquire into the experience and perception of, as well as the potential impact on, all sexual actors involved.

In saying this, it seems as if Craig is arguing that the expansion of the view of sexual fraud is a good thing because it better reflects how people *experience* the act of sex and its (potential) consequences—that is, not as a legal transaction but instead as a betrayal. She adds, however, that while "[t]he reasoning in *Cuerrier* suggests a concern with how people treat each other sexually" (Craig 2011, 79), there have since been advancements in our understanding of the virus, its transmission and its treatment. She asserts that, in "light of these changes, the legal response in *Cuerrier* may no longer be appropriate." Given that the threshold of risk was made even lower since the time of her writing, one can likely infer that Craig would not believe that the continued criminalization of HIV nondisclosure as aggravated sexual assault is in the service of promoting sexual integrity.

3.3.4.1 Framing facts with privileged perspectives

The legal literature has often commented upon how judges frame their decisions regarding HIV nondisclosure using heteronormative cultural narratives. For example, it is common for courts to assume that women "trade" sex to men for loving, trusting relationships rather than for sexual satisfaction (Buchanan 2015; Symington 2012). Remarking upon this tendency for judges to incorporate heteronormative expectations into their decisions, Buchanan (2015, 1421) argues that HIV nondisclosure law seems to be about protecting the "inchoate expectation" that heterosexuals, specifically, should be immune to the anxiety of HIV. This is evident, she claims, in the way that courts frequently cite the purported right of heterosexual complainants to not need to consider the risk of contracting HIV despite this problem being an ever-present reality for gay men. Symington (2012) similarly notes differences in prosecutions

and convictions between HIV-related cases and other kinds of sexual assault cases, arguing that HIV nondisclosure criminalization seems more grounded in "AIDS panic" and assumptions about "natural" (read: heterosexual) sex than in a desire to protect women's bodily autonomy.

This might (partially) explain why prosecutions and convictions for HIV nondisclosure cases involving gay men are relatively uncommon despite gay men being the largest represented demographic among HIV-positive populations (Mykhalovskiy and Betteridge 2012; Dej and Kilty 2014). The way that heteronormative assumptions seem to guide judges' interpretations of facts and application of legal principles in HIV nondisclosure cases seems to be part of a broader pattern of judges' personal biases informing their decisions (see, Philips 1998; Tiersma and Solan 2004).

As the determination and defining of risk is always a social process by which some possibilities are highlighted and others ignored (see, Miskimmin, 2007), these implicit biases and "cultural baggage" (see, McConnell-Ginet 2008) may explain developments in HIV nondisclosure law following *Cuerrier*. Although the standard of the "reasonable person" is nominally an objective metric, individual judges inevitably use their personal (often androcentric and ethnocentric) biases and beliefs about the world to interpret what a reasonable person might believe (McConnell-Ginet, 1995; cited by Ehrlich 2001, p. 145; see also, Matoesian, 1993; Philips, 1998). This lends weight to legal scholars' skepticism of the *Mabior* Court's assertion that a "reasonable person" would consider the mere realistic possibility of infection as being "significant" enough to warrant the charge of aggravated sexual assault (Waldman 2011; Grant 2009).

At the trial level, these background assumptions and implicit biases seem to shape judges' findings of fact, which are generally given significant deference in higher courts (e.g., *R. v. Wilcox*). This has had significant consequences in trial courts' findings with respect to *mens rea* in cases involving HIV nondisclosure. As Symington (2012, 645) observes, very few courts "have interrogated the legal reasoning or test established in" *Cuerrier*, often electing, instead, to use their personal experiences to guide their interpretations of what a person might reasonably be expected to do when assessing her or his legal duty to disclose her or his HIV status. In *R. v. Iamkhong*, for example, Symington notes that the trial judge considered how he, an educated legal professional, would have acted rather than taking into account the individual experiences of the accused who was a Thai woman with less than a fourth-grade education. Iamkhong had tested positive for HIV at a clinic in Hong Kong prior to coming to Canada but at trial she claimed that she believed herself to be HIV-negative because she thought she tested negative during her Canadian immigration medical exam. The trial judge concluded that her actions did not accord with (his idea of) "common sense." As Symington (2012, 645—46) notes, the judge based his interpretation of a "reasonable person" on his personal background and thought processes rather than taking into account the fact that Iamkhong had limited proficiency in English, limited (sexual) education and had received no pre-test or post-test counselling in the small Hong Kong clinic where she tested positive for HIV. When taking these facts into consideration, Symington contends, Iamkhong's actions do not seem quite so unreasonable.

Unsurprisingly, the law's privileging of dominant (straight white male) perspectives in criminalizing HIV nondisclosure likely has negative consequences for the most vulnerable members of our society. For instance, while HIV nondisclosure law is purportedly intended to

protect victims of sexual assault (who are mostly women), research indicates that disclosure is especially difficult for people in dependent positions in relationships (often women in our society) (Siegel, Lekas, and Schrimshaw 2005; Adam et al. 2014). This is perhaps best exemplified in *R. v. D.C.* (2012) where an abusive male partner used the threat of HIV nondisclosure law to force his female partner to choose between continued abuse or criminal charges for not disclosing her HIV-positive status the first time that they had sex. Far from offering protection to the vulnerable party in this instance, the criminalization of HIV nondisclosure offered an abusive male partner yet another tool (in an already extensive array of tools) for exercising control over his female victim. This supports Buchanan's (2015) contention that unlike other criminal forms of sexual deception (e.g., impersonating a gynaecologist), HIV nondisclosure is rarely morally reprehensible and can constitute a strategy for avoiding abuse.

3.3.4.2 Public health consequences

More generally, public health research indicates that there are a wide range of social barriers to disclosing HIV status. For example, it has been observed that people living with HIV who disclose are often met with discrimination and sometimes violence, which can negatively affect mental health (Adam et al. 2014). Some have theorized that HIV nondisclosure criminalization might discourage people living with HIV from disclosing because they would want to avoid being made vulnerable in this way (Adam et al. 2014; Galletly and Dickson-Gomez 2009). Others have argued that HIV nondisclosure law's regulation of HIV might negatively affect people's ability to form meaningful relationships, further exacerbating mental health issues (Dodds and Keogh 2006). This may explain why people living with HIV often report using subtle strategies for discreetly "testing the waters"

before disclosing their HIV statuses to prospective partners (e.g., mentioning HIV in passing and gauging the partner's response) (Adam et al. 2014).

The requirement that people living with HIV disclose in spite of these risks is especially disheartening when one notes how the negative consequences of criminalizing HIV nondisclosure come without any evidence that the law's putative interest in intervening in the ongoing HIV epidemic has been advanced. In fact, it is well accepted within public health scholarship that HIV nondisclosure should be decriminalized because it negatively affects public health outcomes (Buchanan 2015; Galletly and Pinkerton 2004; Mykhalovskiy and Betteridge 2012; e.g., Adam et al. 2014). Eric Mykhalovskiy (2011), for instance, argues that applying criminal law to a public health issue results in a conflict of legal duties and professional obligations for healthcare providers who consequently provide patients with contradictory advice about disclosure (e.g., criminal law places the responsibility of negotiating consent solely on the person living with HIV while public health policies generally emphasize the personal responsibility of *all* sexual partners to promote better community-level health outcomes). What is more, researchers generally assert that HIV nondisclosure criminalization perpetuates harmful stereotypes about people living with HIV (e.g., that they are sexual predators or sexually promiscuous) and fosters an irrational fear about the virus and people living with HIV (e.g., Adam et al., 2013; Buchanan, 2015; Dej & Kilty, 2014). This stigmatization of HIV, Adam *et al*. (2014) contend, likely results in people not wanting to be tested and therefore going untreated and being increasingly likely to transmit the virus to others.

Despite these compelling points, courts have been largely unmoved by health policy arguments for decriminalizing HIV nondisclosure, perhaps highlighting the distinct roles of

criminal law and public health policy. In *R. v. Mercer*, for instance, Justice Marshall of the Newfoundland Court of Appeal responded to the argument that criminalization would discourage people from being tested for HIV, stating:[30]

> The sentences meted out in this case will have potential consequence only for individuals capable of such callousness and ruthlessness that they would intentionally put their partners at mortal risk solely to satisfy their own immediate proclivities… That the prospect of jail sentences to this minority may tend to impede efforts to prevent the spread of this virus is open to speculation. It is questionable whether such persons would be prone to submit to voluntary testing unless it suited their immediate interests, in which case they are likely to seek testing in any event… allowing [such individuals] to remain at large in society on the hypothesis that their imprisonment would dissuade others from voluntarily seeking testing is neither a practical nor an acceptable solution.

For Justice Marshall, the possibility that criminalizing HIV nondisclosure could result in worse public health outcomes is not sufficient to prevent courts from criminalizing HIV nondisclosure because the courts' primary objective is to incapacitate those who they identify as threats to society (rather than promote public health). Indeed, the *Cuerrier* Court explicitly stated that the policy objectives of the assault scheme were to protect personal autonomy and physical integrity while only noting public health consequences as a secondary consideration.[31]

It would seem then that policy arguments for decriminalizing HIV nondisclosure are unlikely to dissuade courts from continuing to criminalize people living with HIV because these arguments do not address the core issue of these cases—the consent-vitiating effects of fraud. Consequently, it seems that unless courts return to the *Clarence* interpretation of sexual fraud, the only thing that would decriminalize HIV nondisclosure as aggravated sexual assault would be revising the Code to change what kinds of fraud can vitiate consent. It should be

---

[30] *R. v. Mercer*, [1993] 84 C.C.C. (3d) 41 (Nfld.) at *para* 77.

[31] This excerpt seems like a good example of Fischel's (2010) insight that the figure of the sexual offender is often used to vilify a person in such a way that attacks on citizens' rights and interests become more readily dismissed.

noted, however, that even if this were to happen, it is likely that HIV nondisclosure resulting in transmission would still be criminalized as criminal negligence resulting in serious bodily harm (as it was in *R. v. Ssenyonga*) or as committing a common nuisance (as it was in *R. v. Williams*).

3.4 Chapter summary

In this chapter, I have traced the genealogy of HIV nondisclosure law in Canada, highlighting pivotal moments in the legal history that shaped the contemporary criminalization of HIV nondisclosure as aggravated sexual assault. Specifically, I have shown how recent changes to the *Criminal Code* led the Court to depart from over a century of established law that previously held that only fraud relating to the nature or quality of an act could vitiate sexual consent, and how courts have since refined when the revised *Code* imputes a duty to disclose one's HIV-positive status. Moreover, I discussed the legal, political and public health consequences of the criminalization of HIV nondisclosure, contending that Canada's treatment of HIV nondisclosure has resulted in inconsistent decisions (including the possibility of murder convictions without an intention to apply force or inflict harm) and an increased likelihood of heightened transmission rates. I also explained why public policy arguments have likely failed to convince courts to decriminalize HIV nondisclosure, suggesting that addressing the logic of fraud-vitiated consent may be a more promising avenue for future litigation.

The rest of my dissertation builds on this discussion in three ways. Firstly, I draw upon empirical data to propose a different standard for assessing guilty intent in cases of sexual fraud—one that better reflects the autonomy-undermining nature of fraud. Secondly, I provide an empirical account that challenges common assumptions about how consent is negotiated and the role that autonomy plays in these negotiations. Lastly, I critique existing models for

theorizing bodily integrity and offer a new theoretical model that better explains when fraud results in bodily violation (and when it does not). In doing so, I elaborate on how the mere nondisclosure of HIV-positive status should not be viewed as resulting in sexual assault or rape.

4. Diffractive theory and methodology

Approaches from sociocultural linguistics and the philosophy of science

4.1 Introduction

> A diffraction pattern does not map where differences appear but rather maps where the effects of differences appear.
>
> Donna Haraway.[32]

In this chapter, I develop a theoretical framework and methodology for interrogating the legal, cultural, political, and otherwise material construction of consent and its negotiation within conflicting regulatory conditions. Specifically, I articulate the methodological approach I adopt to examine how these contradictory structural forces become resolved in the negotiation of sexual consent within spaces of sexual silence. Firstly, I explicate my theoretical assumptions, drawing upon perspectives from sociocultural linguistics (especially scholarship addressing language and embodiment) and perspectives developed from the recent ontological turn in the social sciences and science and technology studies (e.g., Palec & Risjord, 2012; Papadopoulos, 2010; Sismondo, 2015; Sivado, 2015; Smith, 2012). My goal, in expressly stating these assumptions, is to frame the posthumanist project underlying my work—namely, my desire to demonstrate the value of posthumanist insights (about agency and knowledge) in the study of language. Next, I discuss the specific tools I use for data collection and analysis, including autoethnography, semi-structured interviews, and my interpretation of the case law on HIV nondisclosure and the broader issue of fraud-vitiated sexual consent. I then deliberate on the ethical issues that affect ethnographic research generally and sexuality studies

[32] Haraway, Donna. 2003. *The Haraway Reader*, p. 70. New York: Routledge.

specifically, advocating for an approach that affirms my community's ethical standards over institutional standards.

4.2 Theoretical assumptions

> Language has been granted too much power. The linguistic turn, the semiotic turn, the interpretative turn, the cultural turn: it seems that at every turn lately every "thing"—even materiality—is turned into a matter of language or some other form of cultural representation.
>
> Karen Barad.[33]

As noted by Gavin Lamb and Christina Higgins (2020, 361), recent research in applied linguistics "has highlighted the need to shift focus from language as the starting point and to pay greater attention to the ways that humans are enmeshed in dynamic relationships with the material world." For example, Alistair Pennycook and Emi Otsuji (2014b) have observed that marketplace produce is itself vital to the interactions that facilitate their sale. Specifically, Pennycook and Otsuji demonstrate that the "yellowing" of cucumbers elicits distinct forms of negotiation from interlocutors (e.g., trying to get a better price for the cucumbers due to their coloration) than would otherwise occur. Pennycook (2018, 457) elsewhere suggests that "[p]osthumanist thought has major implications for how we think about the subject (the individual, identity, the person)." Despite these advancements, posthumanism has not yet been sufficiently explored by language scholars.

Many posthumanist thinkers have challenged scholars to consider material phenomena/entities/objects as agents in discursive or otherwise social activities (e.g., Barad, 2003; Lamb & Higgins, 2020; Latour, 2005; Ren, 2011). This "posthumanist proposition" (i.e.,

---

[33] Barad, Karen. 2007. *Meeting the Universe Halfway*, p. 132. Duke University Press.

that materiality should be understood as having agency) has not yet been fully developed in applied linguistics or sociocultural linguistics, but there has been a push to "consider the subject in more material terms, as part of a wider distribution of semiotic and material resources, as interpellated by objects, as no longer the guarantor of meaning, as a product rather than a precursor of specific interactions" (Pennycook 2018, 457). For example, Pennycook (with others) has often studied how material objects and environmental features may act as semiotic resources that incidentally shape possibilities for communication (e.g., Pennycook, 2018; Pennycook & Otsuji, 2014a; Sultana et al., 2013).

While I understand why some researchers may be hesitant to adopt "the posthumanist proposition," I hope to show that it can have important implications for the future of the field. In the rest of this section, I provide a review of how scholars in linguistics and the humanities more generally have theorized the relationships between discourse, language, materiality, and subjectivity. In doing so, I explicate my theoretical assumptions to elucidate my approach to treating material phenomena as "actors in their own right" (Lamb & Higgins, 2020, p. 363).[34]

4.2.1 Discourse and language as material

Poststructuralist scholars have generally held that language is "itself material" (Philips 1992, 378), contending that it contributes to larger material configurations that establish, enact and maintain forms of rationality and power (e.g., Butler, 1988, 1991; Inoue, 2006; N. Rose, 1999, 2001). In this view, Foucauldian discourse/power/knowledge is embodied in *dispositifs* [devices, apparatuses], including (but not limited to) language (Barad 2003; 2007; Pennycook

[34] Lamb and Higgins (2020, 363) go so far as to state that "[p]erhaps more controversially [than merely advocating for a greater attentiveness to materiality in semiotics], a posthumanist approach would also direct discourse or conversation analysts to acknowledge objects like cheese not just as object-like resources for interaction but also as actors in their own right."

1994; Rose 1999), that structure the production of subjects within a regulatory regime. For example, prisoners are not an independently pre-existing class of persons but instead the product of particular forms of rationality that are *concretely enacted and maintained* through the *heterogeneous assemblage* of juridical institutions, statutory language, court decisions, handcuffs, uniforms, the architecture of prisons, etc. (Foucault 1980; 1995). Within this larger assemblage of material activities and structures, language is one of the primary devices through which power/discourse/knowledge is mobilized within political systems (see, Fairclough 2001; Van Dijk 2008).

4.2.1.1 Practice, performativity and embodiment

Practice theorists, like Pierre Bourdieu (1977) and Laura Ahearn (1998), underscore the material nature of language, theorizing that linguistic, social and cultural practices are encoded in the body's reflexive behaviours and tendencies through socially structured conditioning. Bourdieu (1984a), for instance, theorizes that a person's *habitus* (i.e., a person's bodily disposition) is shaped by her social environment and upbringing, which predisposes the subject to a particular set of perceptions, behaviours and skills for accomplishing a diverse range of social and communicative practices. For example, Bourdieu remarks that a person who trains to become a sommelier develops a greater "taste" for distinguishing sensory elements in wine, allowing her to perceive distinctions with greater ease. Another example might be identified in the way that highway driving often does not require much conscious thought for experienced drivers who often rely instead on reflexive behaviours. Judith Butler (1993a) and Sarah Ahmed (2006a; 2006b) likewise theorize that social norms, discursive practices, and personal histories become "sedimented" in bodily orientations, selectively

attenuating the body's reflexive tendencies and perceptions to facilitate the body's performance of varied social activities, including language practices.

Regardless of the technical language used (e.g., *habitus*, orientation, disposition), practice theorists and poststructuralists more generally believe that the body serves as the primary means for engaging in and understanding social and cultural activities and, moreover, that the body's capacity for doing so is shaped by regulatory norms, linguistic activities, and social structures. By theorizing the body's role in encoding and embodying knowledge and normative expectations, practice theorists can interrogate how social and linguistic practices are always enacted within socially structured constraints and how these constraints are inscribed within and by the very physiology and anatomy of the body used to perform those activities. In this way, practice theory allows researchers to identify how meaning is grounded in material (more specifically, bodily) systems and how the body becomes a locus of power.

Generally, practice theorists within sociolinguistics view social actors as able to manipulate bodily resources within a constrained range of possibilities in meaning-making practices, which, in turn, allow them to reconfigure meaning (e.g., Bucholtz and Hall 2016; Streeck, Goodwin, and LeBaron 2011; C. Goodwin 2007). Charles Goodwin (2007), for example, has argued that interlocutors can embody spatial orientations in interaction in ways that respond to others by physically foreclosing the possibilities offered by another in the conversation (e.g., in response to a grandparent's request for a hug, a child might run away). For Goodwin, the concrete embodiment of spatial relations, which differentially privileges or thwarts potential activities, demonstrates the value of considering embodiment in the analysis of communication in the same way that others have commented that language selectively enables or constrains subsequent linguistic practices (e.g., Ehrlich 2001; Philips 1992).

Recently, scholarship on language and embodiment has begun to explore how bodily performatives may exploit the affordances and limitations of the medium of a communicative act to strategically negotiate social positions in interactions. For example, Sarah Hillewaert (2016, 54) argues that hand greetings among Lamu women are bodily performatives that allow women to actively and intentionally "establish a public persona, negotiate social relations, and potentially redefine the social norms that regulate [their] use." Specifically, Hillewaert observes that while it is traditional for younger women to show increased deference to older women by kissing their hands, older women recognize younger women's new social positions as educated professionals by slightly withdrawing their hands from this kiss to subtly indicate that the young women's deference is not necessary given their value as educated professionals. For Hillewaert (2016, 55), these hand gestures are not merely unreflexive practices that simply adhere to social norms prescribing greeting conventions—they are "subtle tactics that enable interlocutors to negotiate their interpersonal relations and to make claims to shifting social positions without violating norms." By skillfully manipulating information across distinct private and public channels of communication, both younger and older women can show they respect tradition while simultaneously renegotiating expected social positions discreetly (e.g., gently pulling the hand away without visibly doing so).

4.2.1.2 Agency in a practice theory of meaning

Given that practice theorists view bodily dispositions as being shaped by regulatory norms and social structures, the question of where (if anywhere) individual agency can be identified has become a central concern in the literature. For practice theorists, agency is always constrained by the socially shaped material conditions within which it is exercised because the body's conditioning is subject to those social conditions (Ahearn 2001, 112). Yet,

as Ahearn (2001, 130) notes, this understanding does not precisely locate agency or describe its nature—where does agency come from? Who and what can have agency? Stated in another way, it is unclear why meaning and behaviour are not deterministically defined by the powerful social structures that orient bodies.

Attempting to address this issue, Butler (1993a; 1993b; 1997) contends that meaning is agnostic to the speaker's intentions because it emerges from its *iterative citationality*, that is, its reliance on its historical production for reference and its capacity for being inserted into new contexts. For Butler, the recontextualization of a sign necessarily entails its vulnerability to the acquisition of unpredictable features from the new context within which it is instantiated (see, Inoue 2006, 21). It is in this uncertainty that Butler locates agency because, in that moment of resignification, new meanings and understandings (outside of regulatory norms) may materialize, resulting in new potentials being made possible. For Butler, it is not in the mind of the actor where agency arises, but instead in the indeterminate nature of the sign. Agency, in this view, is not a state or capacity of the mind, but instead a possibility for escaping or subverting the constraints of power/discourse/knowledge.

With this explanation, however, the relationship between agency (in the sense of divergence from structural predisposition/determinism) and context is not entirely clear. For example, while Butler (1993a, 2) acknowledges that "bodies never quite comply with the norms by which their materialization is impelled," her framework cannot account for the precise mechanism by which this resistance is made possible. Stated in another way, while Butler does not deny the importance of materiality, her performative framework cannot explicate the role of materiality in resisting the regulatory norms that she describes as constituting the body (Barad 1998, 89). As Karen Barad (2007, 64) remarks, "while Butler

correctly calls for the recognition of matter's historicity, ironically, she seems to assume that it is ultimately derived (yet again) from the agency of language or culture." Matter, in this poststructuralist perspective, is interpellated from its relationship to social and cultural organizing activities; and agency, by extension, is only possible within those activities' reconfiguration.

4.2.2 Agential realism: a material-discursive framework

Although Butler's account of bodily materialization successfully identifies the problems inherent to approaches that ascribe an essential character to the body, her theory is limited in its capacity to articulate the material dimensions of agency and the processes by which the material world is not wholly subordinated to cultural processes. Like Foucault, Butler does not explain exactly *how* material configurations "anchor" or "support" discursive formations because, within a poststructuralist paradigm, the material world is made knowable only through its correlation to human cultural practices (see, Mackay 2012). By contrast, Barad (2007, 66) argues that "[c]rucial to understanding the workings of power is an understanding of the nature of power in the fullness of its materiality." In this way, power/discourse/knowledge cannot be simply understood as being "bound up" in or represented by material apparatuses; rather, it is the physical mechanisms of those material configurations that enact concrete constraints on what is possible. Thus, if the goal of poststructuralist theories and practice theory is to elucidate the mechanisms by which the body becomes the "locus of productive forces… then it would seem that any robust theory of the materialization of bodies necessarily account for *how the body's materiality*—for example, its anatomy and physiology—*and other material forces actively matter to the processes of materialization*" (Barad, 2003, p. 809; emphasis in original).

4.2.2.1 Intra-activity and agential separability within phenomena

Drawing upon their background as a theoretical physicist, Barad explains how poststructuralist perspectives, which have typically emphasized the power of language and culture to constitute social realities, have accurately observed that the material world is essentially indeterminate. That is, there are no pre-existing subjects and objects that *inter*-act with one another; rather, material relations are amorphous without clear distinctions between physical phenomena (e.g., there is no point at which one set of atoms can be distinguished in a principled way from another set of atoms). Departing from their poststructuralist predecessors, however, Barad does not deny the possibility of "the subject" being produced outside of (human) cultural intervention within the material world. Stated in another way, an agential realist account posits that "Nature is neither a passive surface awaiting the mark of culture nor the end product of cultural performances" (Barad 2003, 827).[35] If poststructuralism teaches us that discourse is always itself material, then agential realism gives us the converse: materiality is itself discursive. Whereas Foucault and Butler recognized that materiality was integral to the enactment of power, Barad's agential realism explicates the precise relationship of materiality, power and agency, describing discourse in material terms and materiality as discursive. In this view, discourse/power/knowledge can be understood as the *concrete* imposition of constraints upon possibilities.

By locating this productive power in materiality, rather than in discourse supported or anchored by materiality, Barad argues that the physical world is actively producing

[35] Following conventions used among philosophers of science, Barad adopts the distinction between the capitalized "Nature" to refer to the natural world and physical laws and the lower-case "nature" to refer to wilderness or essential character.

subjectivities outside of human intervention and explains how the amorphous materiality of the world (in its refusal to be subordinated to cultural activities) is where the agency necessary to resist social forces can be found. In some private prisons in the United States, for instance, floors for male and female inmates are separated to prevent them from developing relationships (presumably because society insists that they no longer deserve sexual or romantic intimacy). The prison's architecture enacts this form of power, concretely separating (and, by extension, demarcating and reconstituting) gendered populations. Yet, the materiality of the prison also creates unintended opportunities for resistance: inmates learned, quite by accident, that when the toilets are drained of water, they can communicate through the pipes to other floors. Many inmates use these built channels to communicate and develop relationships with inmates—relationships that the architecture was meant to prevent. Thus, materiality, by not perfectly enacting power, creates gaps in how that power is exercised.

The body (being itself material) works in a similar way, which is likely why queer theory has always seemed to conceptualize the body itself as being a site of agency (not just a locus of power) (e.g., Edelman 2013; Bersani 1987; Huffer 2013; Dean 2009; Ruti 2017). Despite prescriptive and compulsory heterosexuality and not even knowing that homosexuality is possible, many queer kids develop feelings for the same sex (even if they cannot name these feelings). Subordinated to the same socialization and regulatory structures, queer bodies fail to conform to the materialization they are impelled (to use Butler's words).

Importantly, in an agential realist account, agency is always present to some degree because materiality is constantly undergoing a process of iterative reconfiguration—it cannot be determinately defined through social power because physical properties are themselves essentially indeterminate. For Barad (2003, 818), agency is best understood as the potential

that is always latent within subjectivity because subjectivity is an *emergent* phenomenon—the product of causal, determining forces. Central to an agential realist account, then, is an attentiveness to the processes of differentiation produced by apparatuses (broadly understood) because these material-discursive practices are how ontologies and animacies are produced within entangled relations.

This view, of course, requires a fundamental reconceptualization of how causality is traditionally described: rather than pre-existing objects "*inter*-acting," indeterminate material relations intra-act upon themselves and produce emergent internal divisions within themselves through the materialization of distinct physical phenomena. In this posthumanist view of materialization, it is important to remember that "matter is not a fixed essence; rather, matter is substance in its intra-active becoming—not a thing but a doing, a congealing of agency" (Barad 2003, 828). For Barad, agency is not a matter of conscious or intentional action but instead a kind of emergent becoming, an ontological bifurcation of a subject from the surrounding world—what she calls *agential separability within phenomena*. Stated in another way, differentiating/exclusionary physical activities result in agential "cuts" or bifurcations within material relations that denote and produce distinct "agents." If this definition of agency is unintuitive, one could think of it instead as *animacy* as Chen (2012), a trained linguist, does. Drawing upon the grammatical feature of animacy prominent in many languages,[36] Chen views the reconfiguring of material relations as being "animate." Rather than viewing material relations as being comprised by inert substances, Chen ascribes a kind of liveliness to them due to their capacity to change over time.

[36] In English, for example, "it" is a pronoun that refers to an inanimate third person singular referent, contrasting with "she," "he," and singular "they."

Also consider the analogy of the ocean. In this body of water, there are no self-evident essential boundaries. Yet, within this amorphous set of relations, distinct subjectivities, agencies or animacies (whatever term is most intuitive for you) emerge in the form of differentiated physical phenomena. For instance, the movement of water within the broader amorphous world of water enacts an exclusionary mechanistic action, resulting in its differential behaviour from surrounding water (i.e., its agential separability within broader phenomena): the current is distinct from its surrounding phenomena despite there being no objective borderline between its water molecules and the rest of the ocean. Similarly, ocean cartography produces emergent ontological and epistemological boundaries that render parts of the ocean knowable with respect to geographical relations (e.g., North and Polynesian) and geological phenomena (e.g., magnetic poles and tectonic plates). Importantly, in an agential realist account, *both* the movement of currents and the "markings" of ocean maps are material-discursive practices as they are both apparatuses that enact agential "cuts" within entangled relations *through concrete means*. Just as oceanography discourse, enacted through material apparatuses (e.g., maps and labels), "cuts" ocean subjects, so too does the ocean's own materiality (e.g., movement and currents) make "cuts" from a greater, otherwise amorphous, whole. Importantly, this lively animacy of the material world precludes the possibility of its *passive* manipulation by productive cultural forces.[37] In other words, ocean materiality is (by virtue of its ongoing reconfigurations) enacting (discursive) "cuts" in ways that are not always consistent with the demarcations produced via cultural forces (e.g., ocean cartography).

[37] This is because materiality undergoes ongoing processes of reconfiguration, which necessitate its deviation from the boundaries drawn by cultural practices.

4.2.2.2 Apparatuses and material-discursive practices

> In the traditional view, it is assumed that there exists a reality in space-time and that this reality is a given thing, all of whose aspects can be viewed or articulated at any given moment. Bohr was the first to point out that quantum mechanics called this traditional outlook into question. To him the "indivisibility of the quantum of action", which was his way of describing the uncertainty principle, implied that not all aspects of a system can be viewed simultaneously. By using one particular piece of apparatus only certain features could be made manifest at the expense of others, while with a different piece of apparatus another complementary aspect could be made manifest in such a way that the original set became non-manifest, that is, the original attributes were no longer well defined. For Bohr, this was an indication that the principle of complementarity, a principle that he had previously known to appear extensively in other intellectual disciplines, but which did not appear in classical physics, should be adopted as a universal principle.
>
> F.A.M. Frescura and B.J. Hiley.[38]

What should be clear by now is that Barad advocates strongly against distinguishing discursive practices from the concrete apparatuses from which their power is enacted. For Barad, the effects of discursive practices are more accurately ascribed to the material nature of discourse (i.e., the Foucauldian *dispositif*) and, as such, a more elegant and capacious theory should articulate these putatively distinct activities (material and discursive) within the same conceptual scheme. Because the function of the apparatus is achieved by its material configuration and the mechanism of action by which constraints upon possibilities are produced and exclusionary "cuts" are enacted, all discursive practices can (and should) be described in concrete terms. In this view, the intelligibility of an utterance is constrained by its entangled relationship to other concrete utterances and the limits of their reference within new contexts (what others have called *intertextuality* or *iterative citationality*) (e.g., Ahearn, 1998;

[38] Frescura, F.A.M., and B.J. Hiley. 1984. "Algebras, Quantum Theory and Pre-Space." *Revista Brasileira de Fisica, Special Volume "Os 70 Anos de Mario Schonberg,"* 49—86.

Bakhtin, 1981; Briggs & Bauman, 1992; Butler, 1997). Because of this iterative citationality or intertextuality, the concrete elements of an utterance delimit possibilities for reference, inclusion and exclusion (e.g., a sentence requires a subject and predicate). Likewise, the concrete architecture of prisons similarly produces distinct and intelligible subjectivities (e.g., prisoner and corrections officer) and limits how agents may act within the physical system (e.g., freedom of movement and capacity to open cell doors). Although this might at first seem to illicitly conflate ontologically distinct "substances" (i.e., abstract and concrete "things"), it is important to remember that social phenomena are only ever enacted through material means, according to the agential realist view, and those apparatuses are thus always constrained by their material capabilities and limitations.

Studies in quantum mechanics have found that all physical phenomena are bound to principles of indeterminacy and complementarity. The physical properties of phenomena are not determinate until that determination is produced by an apparatus (either "natural" or "human-made"—indeed, there is no principled distinction between these two in agential realism) and the determination of these features are complementary (i.e., as one feature becomes more determinate, another complementary feature becomes less so).[39] Light, for instance, exhibits particle and wave properties in complementary distribution (see, Auccaise et al. 2012; Nakazato 2005; Barad 2003; 2007). In the famous "double-slit" experiment, it was

[39] What we call "particles" have properties defined by their wave functions. For instance, the more constant the wave's frequency, the necessarily results in a wave function that results in highly indeterminate position (because the greater uniformity of the wave function's frequency is incompatible with other wave features that would result in a more determinate position). As such, a particle can never be fully determined — there is always quantum uncertainty — because the more an apparatus determines one property, the less the complementary property will be defined (e.g., the more determinate the particle's position becomes, the less determinate its momentum becomes).

observed that light passing through two “slits” create an interference pattern (see figure 4.1), evidencing a wave-like nature.

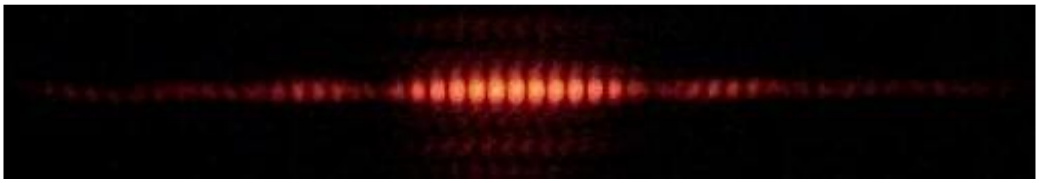


Figure 4.1 Double-slit experiment interference pattern on detection screen[40]

Specifically, the diffracted waves produce increased or decreased amplitudes when occupying the same space, resulting in predictable variations in intensity (see figure 4.2). Strangely, this effect is observed even when a single photon (a light particle) is fired through the apparatus, indicating that the photon simultaneously passes through both slits and “interacts” with itself (as evident by its subsequent interference).[41]



Figure 4.2 Double-slit light diffraction and interference[42]

[40] Photo credit: Creative Commons, Jordgette

[41] Crucially, this indeterminacy is not simply a matter of not *knowing* where the precise location of the particle but instead the particle exists in a superposition state where it simultaneously occupies all possible positions within a field of probability until its position is further determined (and in doing so its complementary property, momentum, becomes inversely less determinate).

[42] Photo credit: SHARK Physics, Justin Tzeng

However, when one endeavours to detect the photon's passage through the two slits, it passes through only one slit and it does not produce an interference pattern, demonstrating its particle-like properties. Although unintuitive, physicists have established that the photon's behaviour is determined by the act of observation, detection or measurement. It is not simply that observation influences the result (the observer's paradox) or that the apparatus's ability to identify the position is imperfect; rather, the photon's behaviour is *ontologically* indeterminate (it possesses the contradictory possibilities of wave-like and particle-like behaviour) until the act of observation. Even more strangely, this particle-wave duality has more recently been observed to be a quality of *all* material and physical "things" (e.g., the particles making up the human body) (see, Barad, 2003, 2007; Herzog, Kwiat, Weinfurter, & Zeilinger, 1995; Nakazato, 2005).

Given that apparatuses always enact their exclusionary "cuts" through their material configurations, a posthumanist theory of material-discourse examines not only how cultural practices marshal material mechanisms to constrain, enable or thwart particular activities but also *how these constraints are material in nature and how this materiality is governed by principles of uncertainty and indeterminacy*. In this view, discursive and material practices are not productively distinguished because their mechanisms of action are both physical in nature. Thus, just as discursive practices produce the boundaries of the body through their iterative citationality and enactment of power (through concrete apparatuses, such as linguistic practices), so too does the body's anatomy and physiology delimit the body's ontology.

In this way, an agential realist perspective accounts for how apparatuses enact exclusionary, differentiating logics in the material world, thus presenting an opportunity to build upon sociocultural linguists' observations that communicative practices selectively

embody distinct possibilities for subsequent social and linguistic activities (e.g., C. Goodwin 2007; Hillewaert 2016). Like these poststructuralist perspectives, an agential realist view posits that meaning is a matter of (constrained) possibilities: the concrete form of discursive practices quite literally shapes the potential linguistic functions. However, agential realism expands this insight by explaining how meaning is not solely a product of sociocultural practices; these possibilities (and their constraints) are bound up in material relations.

4.3 Methods and tools

Informed by these theoretical assumptions, my data collection and coding practices incorporate diverse tools for interrogating social phenomena and regulatory norms without assuming that the phenomena I observe have essential characteristics. Given the custom of silence that constrains speech within bathhouses, these sites provide an important interference effect for observing how their material-discursive constraints on speech distinctly materialize negotiations of consent, including the disclosure of HIV (and other material facts) (analogous to how the double-slit experiment exploits the contradictory materializing effects of different apparatuses). Stated in another way, contradictory regulatory logics stemming from the custom of silence in bathhouses and legal obligations to explicitly disclose one's HIV-positive status present an opportunity for observing how these competing forces resolve in context. These spaces are thus well suited to my objective of discerning the role of context in shaping the character and quality of consent.

As my objective is to understand the limits of consent, I designed my methodology to disentangle the constitutive elements of consent so that I might examine its ontology and its materialization within regulatory constraints. Specifically, I engaged in autoethnographic analysis, including dialogue with other community members, to provide an account of actual

consent-negotiating practices—as this has been called for by others studying sexual consent (see, Beres 2007; 2010). In doing so, I both identify what might be called "emic" understandings (i.e., socioculturally salient categories) of consent as well as the material-discursive conditions within which consent-negotiating practices are enabled or constrained.

4.3.1 Diffractive autoethnography

Unlike traditional ethnography, which is conventionally understood to be the process by which an "outsider" participates in and observes the cultural practices of a community, autoethnography refers to the process by which a researcher analyses her own experiences as a member of a community. While traditional ethnography provides important insights about a culture from an external perspective, allowing a researcher to more readily deconstruct the cultural understandings of a community in ways that elucidate the cultural worldviews that form the foundation of the community's practices, autoethnography allows a researcher to describe (among other things) the actual physical experience of those practices by a member of the community (see L. Anderson 2006; Hillewaert 2016). This is important because non-member participant observers have developed distinct bodily dispositions from individuals in the communities they study and thus often have not developed the reflexive distinction-making processes that shape experiences of social activities (see, Edwards 2014). Given that I am a member of the community I research, my methodology would be considered autoethnographic.

Because autoethnographic approaches allow a researcher to speak from her personal experiences, they have provided important insights in the field of sexuality studies and queer theory that might not otherwise have made it into the literature (due to the highly sensitive and personal nature of the subject matter). Tim Dean (2009), for example, draws upon his personal experiences in barebacking subcultures to explain how gay men in these subcultures

purposefully distance themselves from the safe-sex messaging that dominates gay spaces and communities to foster new networks of kinship and possibilities for intimacy. Similarly, I hope to use autoethnography to examine how bathhouse patrons negotiate sexual consent within the competing regulatory regimes of a custom of silence and the legal prescription that consent to the risk of HIV be expressed.

My goal of providing a descriptive and analytic account of bathhouse practices is likely best understood as a kind of analytic autoethnography. Leon Anderson (2006), a proponent of analytic autoethnographic methods, describes the five key features of analytic autoethnography as being "(1) complete member researcher (CMR) status, (2) analytic reflexivity, (3) narrative visibility of the researcher's self, (4) dialogue with informants beyond the self, and (5) commitment to theoretical analysis." In this section, I detail the resonances and divergences between my approach and the approach he describes to explicate my approach for systematically investigating the negotiation of sexual consent in bathhouses. In doing so, I distinguish Anderson's analytic autoethnography from the diffractive autoethnography I developed for my research.

4.3.1.1 Group membership

For Anderson (2006, 379), a basic requirement for autoethnography is that the researcher's "group membership precedes the decision to conduct research on the group." Anderson is quick to identify that one of the chief advantages of being an autoethnographer is having access to "insider meanings" (although he acknowledges that groups are heterogenous with respect to values, beliefs and interpretations) (see also, Hayano 1979). However, it is unclear how one can be a "complete member" of a group if the group is itself an internally

fractured or heterogenous arrangement. This unresolved tension is something that an agential realist paradigm is well-suited to addressing.

Unlike theoretical frameworks that presuppose the essential nature of entities (that researchers "discover" or "identify"), agential realism posits that the researcher is both a constitutive element and a product of the observed activities. Identity, in an agential realist account, is not a static or inherent characteristic of a person (or a status that she "achieves" once) but instead an ongoing process of establishing, re-establishing and reconfiguring a particular subject position, often as part of a larger, collective subjectivity. It is thus not the identity of the researcher that is of primary importance but instead the apparatuses by which that identity is achieved and maintained (and other "cuts," configurations or possibilities that are disabled).

In a sense, then, the writing of an autoethnography contributes to the researcher's group membership. It is a claiming of group membership just as much as it is an attempt to consolidate the defining experiences of group members. And, like all claims to group membership, writing from the position of someone with "insider" knowledge is contestable—as is the very idea that "insider" knowledge truly exists. An autoethnography, in an agential realist framework, is thus meaningful only within a conditional frame. Remember that light exhibits wave-like behaviour only under specific conditions and its description as a wave is accurate only within those conditions. In this same way, an autoethnographic account is only meaningful under the specific conditions of the author's described experience. The text must always be understood in the context in which it is written. In my case, I am speaking as someone who has been visiting bathhouses with variable frequency for over ten years, and as someone who has visited bathhouses for nearly the entirety of my adult life; but also, as

someone who was not yet alive during important moments of history (for bathhouse patrons) in Canada, including the mass arrests of bathhouse patrons during bathhouse raids in the early 80s. Moreover, I am speaking from the perspective of a *kathoey* (the Laotian third gender) person, and my experiences often reflect how Asianness and femininity are treated in gay sexual spaces (e.g., with more sexually aggressive attention, often framed by fetishizing remarks).

Rather than expecting a researcher to have a "complete" member experience, I would suggest that a better metric is that the autoethnographer is intimately familiar with the norms of the community she is writing as a member of. She should be able to navigate the daily activities expected within the community with little conscious effort. This awareness of "insider knowledge" is something that autoethnographers seem to accept as a requirement either explicitly or implicitly. Anderson (2006), for instance, contends that autoethnographers need to wrestle with the Schutzian distinction (1962) of first-order and second-order constructs of social analysis more than other social scientists. That is, the autoethnographer is expected to have "common sense" understandings of phenomena in the way other members of the group do while also developing self-conscious analytic categories for describing these phenomena. In my own work, for example, I was required to know how to negotiate sexual consent wordlessly while at the same time explicating the concrete mechanics of these practices in abstracted terms. This is similar to the way in which undergraduate linguistic students who are native speakers of Standard Canadian English exhibit unconscious bodily dispositions for producing aspiration in systematic and predictable ways but are not necessarily able to articulate (or even aware of) the second-order, abstract "rules" that govern these practices. By taking a course in introductory linguistics, the undergraduate students become able to describe

and articulate the rule-based nature of their reflexive (previously beneath the level of consciousness) behaviours.

4.3.1.2 Analytic reflexivity vs. diffraction

For Anderson, the autoethnographer's reconceptualizing of common-sense understandings of the world implies that she is "someone who helps to form and reform the constructs that [she studies]." While Anderson seems to accept that all ethnographers draw on both personal and community knowledge, he argues that "this is likely to be much more the case for autoethnography by virtue of the ethnographer's unique positioning as a member of the group under study." The development of second-order constructs, in this view, is the result of a process of reflexivity—an interrogation of the researcher's position within the group she occupies. Although I agree that introspection is a necessary part of this analytic process, it is important to explicate how an agential realist framework conceptualizes this introspection in a very different way—namely, its denial of independently pre-existing subjects precludes the possibility of Anderson's conceptualization of reflexivity. This is because reflexivity is grounded in a representationalist understanding of knowledge—that "allegedly unbridgeable epistemological gap between knower and known" (Barad 2007, 88).

Inconsistent with an agential realist framework, reflexivity presumes that knowledge emerges from the correlation of the tripartite configuration of objects, representations, and knowing subjects. Holding a mirror up to reveal how the knowing subject comes to know what she knows within this configuration does not change the nature of that correlational thesis of knowledge—it still assumes the subject's independence from objects and (mediating) representations (Barad 2007). As Barad (2007, 88) argues, "[r]epresentation raised to the nth power does not disrupt the geometry that holds object and subject at a distance as the very

condition for knowledge's possibility." That is to say, reflexivity simply reveals the role of the researcher in producing knowledge; it does not (and cannot—no matter how many "mirrors" it uses to show the researcher's position) make possible the conditions for describing knowledge outside of mediating (abstract) representations. An agential realist account, by contrast, explains that there is no "abstract" representation: thoughts, words, beliefs, etc. are all material, concrete "things." In this view, there is no mediating representation, there are only apparatuses that enact agential "cuts" in reality, resulting in the production of differentiated (and thus knowable) phenomena.

Reviewing potential alternatives to reflection and reflexivity, Barad identifies diffraction as a more accurate metaphor for understanding how researchers can investigate their subject matter: the analytic of diffraction. Diffraction, in physics, refers to the behaviour of waves when passing through apertures smaller than their wavelength. This phenomenon is abundantly observable in our daily lives. It can be seen, for example, in how light spreads "unevenly" when passing through the opening made by a door that's slightly ajar (Barad 2007). Diffraction patterns result from the resolution of differences of merging instances of diffracted waves (and the "overlapping" of their "uneven" amplitudes in space) (see, figure 4.3). (This is responsible for the interference patterns discussed earlier.) A diffractive methodology, then, can be understood as "a commitment to understanding which differences matter, how they matter, and for whom" (Barad 2007, 90).



Figure 4.3: Ripple Tank Two-Slit Interference.[43]

In this view, researchers construct knowledge from *within* the phenomena they observe rather than outside of it. That is, by engaging in some sort of act of measurement or observation, a researcher's subjectivity and the object of her study *emerge* from the surrounding phenomena (within which the researcher, the object of study, and surrounding phenomena were previously entangled).[44] Importantly, making knowledge "as part of the world does not mean that knowledge is necessarily subjective (a notion that already presumes the pre-existing distinction between object and subject that feeds representationalist thinking)" (Barad 2007, 91). Objectivity, in an agential realist account, is not about producing "perfect" representations of objects in the world "from afar" (such a task is impossible); objectivity is instead about acknowledging how one matters in the world, articulating one's own process of materialization, and the interference patterns one's becoming produces. Whereas reflexivity attempts to expose the researcher's understandings of the world, diffractive methodology is about producing differences and intervening in the production of those difference. It is about

[43] University of Michigan Physics DemoLab. "Ripple Tank Two-Slit Interference." Retrieved from: <https://www.youtube.com/watch?v=V-vWqji4BFs>

[44] Barad refers to the process that makes this possible as *exteriority within phenomena*.

observing the effects of activities and the subjectivities, including one's own, that emerge from the interference patterns created within a specific material configuration. The difference between diffraction and reflection, then, is that the process of diffraction is not merely an act of revealing the researcher's position; it also disentangles the broader relations within which the researcher and her subject matter emerge. Stated in other words, diffractive methodology might be understood as an attentiveness to how one's own research and theory enacts exclusionary, differentiating boundaries within the world: how one is always a part of (and a product of) the world's ongoing reconfiguration.

Applying this diffractive analysis to autoethnography (and ethnography more generally), the goal of the researcher is to use theory to disentangle the constitutive elements of regulatory social norms. In the same way that a diffractive prism separates "white" light into wavelengths of varying "colours," diffractive analysis is a kind of material-discursive practice that forcefully materializes unstated or otherwise invisible regulatory logics and conditions. In this way, autoethnography in agential realism is a kind of systematic production of interference within specific conditions, necessarily including the conditions (from which the researcher's subjectivity emerges) that reveal the constitutive elements of social norms. Where a reflexive methodology might merely explain the researcher's reasons for making a conclusion about a social norm, a diffractive ethnomethodology attempts to forcefully reveal the very concrete mechanisms by which that norm is sustained and enacted and, in doing so, identifies her subjectivity's production from those apparatuses of differentiation.

4.3.1.3 Narrative visibility of the researcher's subjectivity

This process of identifying the researcher as an experimental apparatus (i.e., explaining how she *matters* in her own observations) necessitates her reference in the text. Specifically,

as Anderson (2006, 348) observes, it entails a responsibility for autoethnographers to "openly discuss changes in their beliefs and relationships over the course of fieldwork, thus vividly revealing themselves as people grappling with issues relevant to membership and participation in fluid rather than static social worlds." Autoethnographers, in Anderson's view, are not insular, invisible or detached observers; they are instead actively "involved in the construction of meaning and values in the social worlds they investigate."

However, as Anderson remarks, this narrative visibility of the researcher can potentially result in the researcher's detailed subject position overshadowing the phenomena she observes. As stated by one anthropologist friend of mine, "if ethnography is often pornographic, autoethnography is often masturbatory." This echoes Anderson's (2006, 385) anxiety that autoethnography has often come to embody a kind of self-absorption—what Clifford Geertz (1988) disdainfully refers to as "author saturated texts." For Anderson, however, this is not an inherent weakness of autoethnography but rather a symptom of its emphasis on researcher visibility within the text. Anderson's (2006, 385) proposed solution to this problem of "self-absorbed digression" is "the ethnographic imperative of dialogic engagement with others in the social worlds they seek to understand." For this reason, he asserts that autoethnography necessarily includes dialogue with other members of the community.

4.3.1.4 Dialogue with informants beyond the self

Anderson argues that "analytic autoethnography is grounded in self-experience but reaches beyond it as well." As I mentioned earlier, autoethnography is only a meaningful analytic enterprise if the author's claims are consistent with (although not necessarily identical to) the claims of others within the group. As such, I supplement my autoethnographic analysis

with semi-structured interviews (described in-depth in section 4.3.2), allowing me to triangulate my findings through entangled subjectivities within a collective (although heterogenous) subjectivity or community of practice (see, Pennycook 2018; Ahearn 2001).

4.3.1.5 Commitment to theoretical analysis

Finally, Anderson's analytic autoethnography includes a commitment to theoretical analysis. For Anderson (2006, 387), the goal "is not simply to document personal experience, to provide an 'insider's perspective,' or to evoke emotional resonance with the reader. Rather, the defining characteristic of analytic social science is to use empirical data to gain insight into some broader set of social phenomena than those provided by the data themselves." Similarly, in writing a diffractive autoethnography, my goal is not to merely describe the rich and lively practices used in bathhouses but also to describe the mechanics by which these practices produce subjectivities, constrain possibilities, and resist broader regulatory frames. Although an agential realist account is skeptical of generalizing knowledge in fixed terms, it can describe the specific practices by which the more general process of exclusionary differentiation is enacted to produce distinct subjectivities within entangled relations. In this way, an agential realist account describes the concrete mechanisms by which phenomena are materialized in exclusionary ways, explicating the process by which some possibilities are enabled, and others thwarted.

4.3.2 Semi-structured interviews

To complement the insights that I generate from the autoethnographic approach I describe in the previous section, I conducted semi-structured interviews with 14 participants (5 in a pilot study and 10 in the second phase of the project with one participant, Tim, participating in both phases). Three men in the pilot study reported living with HIV. Two men

in the second phase of the study reported living with HIV. All other participants reported being HIV-negative (none reported being unsure of their HIV status and none chose to not answer).

4.3.2.1 Recruitment

All participants self-identified as either gay, bisexual or queer men at the time of their interviews. Additionally, while most participants in the pilot study noted that they were at least occasionally patrons of bathhouses, I specifically recruited participants who identified as bathhouse patrons for the second phase of the project.

To recruit participants for my pilot study, I reached out through networks I fostered with AIDS service organizations and asked my contacts to forward my study's recruitment information to anyone they thought might be interested in participating. For the second phase of my study, I put up recruitment posters near bathhouses on the street and on bulletins, asking for people to contact me if they were over the age of 18, visited bathhouses and were interested in participating an hour-long interview. I offered $20 to compensate my participants for their time. After interviews, participants often thanked me and offered to help in the recruitment process by forwarding my contact information to friends and acquaintances who might be interested. Three of the ten phase II participants were a result of this "snowballing" recruitment tactic.

4.3.2.2 Interview questions

My interview questions and probes can be found in Appendices A and B (pilot and phase II studies, respectively). Interviews lasted between 30 minutes and 2.5 hours with most being roughly an hour in length. I developed my pilot interview questions to better understand how people living with HIV and AIDS service providers understood the state of HIV nondisclosure law in Canada. I developed my interview questions and probes for the second

phase of my research project following the pilot study when my research interests had become more clearly defined. My goal, in designing phase II interview questions, was to better understand the sexual scripts, linguistic ideologies, and norms governing the negotiation of sexual consent in bathhouses, including the disclosure of sexually transmissible infections.

Integrating the research on consent-negotiating practices I discuss in Chapter 2 with approaches from sociocultural linguistics, I elicited my informants' beliefs about language structure and use—that is, their linguistic ideologies (Woolard and Schieffelin 1994; Silverstein 1979; Irvine and Gal 2000)—to identify the salient sexual scripts that research participants recognized as important for the process of negotiating sexual consent in bathhouses (see, Beres 2007; 2010; Jozkowski et al. 2014; Gagnon and Simon 2009). I examined these metalinguistic commentaries because they have elsewhere been observed to concretely entangle language, identity, aesthetics, ethics and epistemology (Briggs 1992; Kulick 1990; Gal 1992; cited by Woolard and Schieffelin 1994).

As an agential realist account explicates the mechanisms by which some possibilities are encouraged, and others are constrained, my objective was to understand how these concrete articulations of normative expectations regarding language use and structure contribute to a regulatory framework that governs the intelligibility and appropriateness of communicative practices in bathhouses, including the negotiation of sexual consent. Importantly, I do not assume that linguistic ideologies directly reflect understandings of reality or "mediate" individuals' understandings of the world. Rather, these metalinguistic expressions act as interventions in the production of subjects/objects/phenomena; they are apparatuses that enact exclusionary boundaries, defining and demarcating them. Like other critical approaches to

qualitative research, an agential realist account posits that statements made in interviews do not "delineate" meaning but instead reconfigure it (see, Finlay 2002).

As an apparatus, a semi-structured interview provides an important opportunity for knowledge-making in the diffractive ethnomethodology I develop in this chapter. Specifically, by underplaying my experience as a bathhouse patron, I could interrogate my informants' first-order understandings of phenomena as well as elicit their second-order analyses of these practices.[45] This methodological practice encouraged participants to explicate the normative expectations that structured the practices, which for them are likely second nature (and, as such, require little, if any, conscious reflection to perform in culturally appropriate ways). For instance, when questioning Steve about why he used the nonverbal tactics he described, he answered that he and others in bathhouses are often "shy" and when I followed up by asking why they are shy, he eventually concluded that people do not want to be the first to speak in "quiet zones" where not speaking is "just an unspoken thing" like the way that "nobody says a word to anybody" when walking on "the sidewalks downtown." Similarly, when Steve noted how practices common to bathhouses—specifically, touching strangers sexually as a greeting—would be interpreted differently on public sidewalks, I asked him why and he responded, "I guess in the bathhouse most people are there for sexual encounters." In this way, my questioning can be thought of as forcefully materializing otherwise unstated conventions that govern appropriate behaviour within specific cultural contexts—norms that participants might not articulate because they expect me to know them already.

[45] While I did not lie about having been to bathhouses in the past, I was not forthcoming about the knowledge I possessed and often asked questions about generally accepted norms.

4.3.2.3 Transcription style

When transcribing my interview data, I adopted a *naturalized* style (i.e., I transcribed speech in a way that conforms to standard orthography) because several of my interlocutors who were familiar with academic research indicated discomfort with *denaturalized* styles of transcription (i.e., transcriptions that highlight elements of spoken discourse often omitted from written texts, such as fillers and pauses) (Poland and Pederson 1988; Bucholtz 2000). Specifically, they told me that they felt that these transcription styles made them seem unintelligent or inarticulate. Although transcription has often been fetishized as an apparatus that precisely captures the speech event "verbatim," more critical researchers generally accept that transcription always reconfigures meaning in political and powerful ways (see, Bucholtz 2000; Poland 1995). As such, it is important to keep in mind that while transcription is a valuable tool for presenting data, it is necessarily a "*selective process reflecting theoretical goals and definitions*" (Ochs, 1979, p. 44; emphasis in original). Stated in another way, transcription, like any other material-discursive practice, encodes a non-neutral position, resulting in the selective highlighting, effacing, and reproduction of power and knowledge (Irvine and Gal 2000). Because the primary goal of my interviews was to identify and interrogate my informants' conceptualizations of practices in bathhouses, including their views on the structure and use of nonverbal and verbal practices, the fine detail afforded by denaturalized transcripts was not necessitated by the analysis.

4.3.3 Case law and legal analysis

In an agential realist account, court decisions may be understood as material-discursive apparatuses that are entangled in a heterogenous assemblage of juridical concrete forms of power that, taken together, comprise what we understand to be "law." In this view, "law" is

not some monolithic entity but rather an assemblage of court decisions, paperwork for motions, acts of police enforcement, trial proceedings, etc. (Foucault 1980). Indeed, even within a single court decision, competing legal forms of rationality might conflict with one another; and judges might selectively interpret and apply putatively objective legal principles when assessing information (see, Tiersma and Solan 2004; Philips 1998). In my analysis of HIV nondisclosure law, then, I am critical of how these concrete elements of "law" are organized around certain forms of rationality, cultural narratives, and "rape myths" (see, Cahill, 2014; Gavey, 1999; Gavey, 2005; Kilimnik & Humphreys, 2018; Lazar, 2010). Stated in another way, my analysis interrogates the material configurations that these elements of "law" enact and what possibilities they enable, constrain, and thwart.

My goal, however, is not to simply identify the principles used in rulings but also to scrutinize the way these assumptions either accord with or deviate from other forms of rationality and the material resolution of activities within these contradictory regulatory conditions (e.g., how judges selectively apply principles that would otherwise conflict). (This is like the way a physicist is interested in how light's complementary materialization occurs within contradictory environments.) Specifically, I am interested in how these elements of legal apparatuses constrain, privilege, or thwart ways of conceptualizing HIV nondisclosure, including its interpretation as consent-vitiating fraud and, thus, aggravated sexual assault. For example, in Chapter 7, I critique the understanding of the body as an essentially discrete "entity" whose putatively fixed physical boundaries demarcate the physical form of a person's rational subjectivity. As the primary goal in my legal analysis is to examine what forms of rationality have shaped courts' decisions in criminalizing HIV nondisclosure as a kind of fraud-vitiated consent, I focus my analysis on the case law surrounding HIV nondisclosure to situate

my study within the larger assemblage of legal practices that constitute what we understand to be the "law."

Following the advice of a legal librarian, I began my search of relevant cases with *R. v. Cuerrier* (using *CanLii* and *Lexis Nexis academic*) because the Court's ruling in this case was the "turning point" for HIV nondisclosure law (as described in the previous chapter). I then read the cases that were cited in the decision and more recent cases that cited *Cuerrier*. As *Cuerrier* defines the contemporary logic of HIV nondisclosure law (i.e., that not disclosing one's HIV-positive status vitiates otherwise freely given consent), this approach aggregated legal decisions that concretely enact the logic of fraud-vitiated consent in cases involving HIV nondisclosure. I later learned in law school that this is sometimes referred to as "the one good case" method of legal research. Additionally, to reassure myself of the comprehensiveness of my case data gathering, I also searched for the term "HIV nondisclosure" but noted no cases that I had not already found through following the bread crumbs of cases left on the way to and in the wake of *Cuerrier*.[46] I then cross-referenced my assemblage of cases with the cases analysed in reviews of Canadian cases involving HIV nondisclosure (Symington 2012; Rey 2011; e.g., Grant 2011; Mykhalovskiy, Betteridge, and McLay 2010), paying special attention to the cases that these reports and law review articles noted as being especially important in the development of HIV nondisclosure law.

[46] It would be unthinkable for an assault case involving HIV nondisclosure following 1998 to not cite *Cuerrier*.

4.4 Ethical considerations

Given the sensitive and intimate nature of my research, an attentiveness to the ethical interferences my methods and theories produce are of paramount importance. Although an agential realist account is paradigmatically incompatible with the concept of reflexivity (Barad 2007, 86), the rich literature on reflexivity in qualitative methods provides important insights on why locating the researcher in her subject matter is an ethical necessity. As Finlay (2002, 531) argues, "outing" the role of the researcher is important not only to recognize the influence of the researcher on the observed phenomena, but also because it forces the researcher to be aware of how her interpretations of an event might differ from her research participants' conceptualizations of the same phenomena. Failing to recognize these differences, she contends, is a form of erasure that wrests power from the research participant or research community. This is not to say that the "reflexive researcher" is not entitled to a perspective of her own—indeed, whatever she does, she necessarily adopts a perspective: she "actively constructs interpretations of [her] experiences in the field and then questions how those interpretations came about" (Hertz 1997, viii; cited by Finlay, 2002, p. 532). In an agential realist account, this might be understood as an attentiveness to the interferences and subjectivities that produce the researcher in relation to her observations.

Unlike perspectives that view the goal of qualitative research as identifying the "lived experience that resides in the space between subject and object" (Finlay 2002, 533), a diffractive methodology posits that the subject and object are produced within the resolution of their intra-action: the researcher's "exteriority" or differentiation emerges *within* entangled relations. Meaning, in this view, is a concrete positioning and entanglement, not some mediated ontologically "distant" or distinct relationality. As such, my analysis does not look at subjects

and objects as pre-existing the resolution of their causal intra-action but, rather, theorizes their ontology as resulting from that mutual entanglement. It follows that the mythical sovereignty of the researcher's perspective is necessarily dispelled because the researcher exists only in relation to the phenomena she observes; her observations, findings and theses are thus necessary to explicate her perspective/position—the site from which her epistemic and ontological "exteriority" emerges.

This discussion of metaphysics is necessitated because the matter of ethics is complicated by the posthumanist rejection of thoughts as "(1) pre-existing states of mind, and (2) properly assigned to individuals" (Barad 2007, 23) (thoughts, for Barad, are material "things"). As Barad (2003, 826) remarks, any account of ontology is necessarily an account of epistemology and, thus, ethics because the greater determinacy necessarily delimits phenomena's potential, constrains their interpretation, and enacts power over physical systems (e.g., a person's body and, thus, her lived experience). For Barad, one cannot forget that while subjectivities are emergent phenomena, they are constrained by the material-discursive historical relations from which they are produced, including the anatomy and physiology from which our traditional understanding of agents is tied to. Our unfixed and dynamic ontologies do not preclude our contemporaneous relationships to others; rather, these entanglements constitute the very phenomena from which we emerge, and within which our potential is realized and demarcated. We are always situated within material-discursive relations with a history that delimit our possible actions and those actions likewise delimit future possibilities. Consequently, our subjectivity is always entangled in ethical concerns inclusive of what our immediate actions might produce, enable or thwart, and the constraints within which we act. Stated another way, the ongoing intra-activity of the world implies that "possibilities for acting

exist at every moment, and these changing possibilities entail a responsibility to intervene in the world's becoming, to contest and rework what matters and what is excluded from mattering" (Barad 2003, 827). An agential realist account thus necessarily examines the forms of power it enacts and the consequences of these exercises of power.

4.4.1 Troubling the distinction between pornography and ethnographic approaches

> How are pornography and ethnography alike, especially vis-à-vis the levels of hierarchy and forms of power that they produce/reproduce, and what is their shared discourse? How do the dominant discourses of masculinism and late capitalism establish a context and system constraints that helps to structure these two domains? What sort of web do they weave to contain and constrain those whom they represent? Our assertion is that both pornography and ethnography are discourses of domination, of patriarchal power, and that they are structured as such—the one obviously, the other more insidiously.
>
> Christian Hansen, Catherine Needham, and Bill Nichols.[47]

In detailing sexual encounters, my work straddles the line between ethnography (as autoethnography is a kind of ethnography) and pornography, making it a potential site for reproducing the forms of power so often embodied by both textual genres. Although both pornography and ethnography have lent themselves to liberation from troubling modes of thinking—respectively, Victorian sexual sensibilities and smug ethnocentrism (paraphrasing Hansen et al., 1989, p. 78)—the two share similar kinds of patriarchal logic. Namely, in both textual forms, the (heterosexual) male gaze is reproduced through its privileged perspective. In the case of pornography, this is made explicit: the spectacle is the man's fantasy (even when, or perhaps especially, when lesbian acts are showcased for his pleasure). In a very literal sense,

[47] Hansen, Christian, Catherine Needham, and Bill Nichols. 1989. "Skin Flicks: Pornography, Ethnography, and the Discourses of Power." *Discourse* 11 (2): 64—79, 66-67.

the perspective (positioned by the camera, cameraman, director, etc.) is male-oriented. In ethnography, by contrast, the heterosexual male position is reinscribed through its unmarkedness in the literature (see, Newton, 1993). The sexuality of the heterosexual male is rarely explicitly commented on or identified as salient in the process of knowledge production; it is at once inexplicably absent from and insidiously pervasive within ethnographic texts.

Importantly, a queer theoretical perspective does not find the relationship between ethnography and pornography to be *necessarily* problematic. This is best articulated in Foucault's (1994) philosophy of *homosexual ascesis*—the ethical practice of orienting oneself in such a way that one's sexual *habitus* or orientation interferes with regulatory logics:

> Homosexuality is a historic occasion to reopen affective and relational virtualities; not so much through the intrinsic qualities of the homosexual but because the "slantwise" position of the latter, as it were, the diagonal lines he can lay out in the social fabric allow these virtualities to come to light.

In this view, queerness inhibits the body (along with other materialities) from aligning with normativity. That is, the materialization of a dispositional orientation through repetitive action may result in the queer subject producing an interference pattern that enacts a reconfiguration of conditions such that new possibilities are enabled and others prevented (Ahmed 2006b). Of course, as queer theorists, including Foucault, have often remarked, this effect is only possible for homosexuality (and other forms of queerness) so long as homosexuality remains non-normative because interfering with and contradicting regulatory, rigid "straight" logics requires a "slantwise" orientation (see, Ahmed 2006b; Foucault 1994; Muñoz 2009; Halberstam 2011).

Very obviously, queer porno-ethnography does not readily lend itself to the reproduction of heteronormative and patriarchal discourses (although it can certainly reproduce

those dynamics regardless). An ethical porno-ethnography must "cut" agents, actors and activities distinctly from the apparatuses of patriarchal heteronormative systems; it must enable new subjectivities while thwarting normative and oppressive positions (of course, it must at least implicitly reference these discursive formations). Although at the individual level the sexuality of heterosexual men might produce queer interferences through taking on a slantwise orientation, the sexualities of women and gays "can never be unproblematic" (Newton 1993, 8) in a patriarchal heteronormative society (that presumes all sexual subjects to either be heterosexual men or exist for heterosexual men's pleasure). The erotic subjectivities of straight women and queers are thus more readily capable of disrupting regulatory frameworks. What is important, however, is not the identity of the researcher but instead the interference patterns that the researcher produces through her critical engagement within the field and through theory—some social positions are merely more conducive to achieving this.

This objective requires, of course, that the porno-ethnography expose, in some way, the erotic subjectivity of the author because if "the burden of authorship cannot be evaded," then neither can the anthropologist ethically distance himself from his erotic subjectivity in research (Geertz 1988, 140; cited by Newton 1993, 15). The porno-ethnographer's perspective cannot be insinuated to be an objective, disembodied third-person view; it must expose the porno-ethnographer's erotic subjectivity. Indeed, anthropologists commenting on the "crisis of representation" (e.g., Alcoff, 1991; Newton, 1993) have argued that ethnographers are often conspicuously absent from their own narratives despite adopting an omniscient narrative perspective (although this problem of authorial erasure is obviously not likely to be an issue in autoethnography). Ultimately, this failure to identify the ethnographer's position results in the text's overreliance on the unstated regulatory (often patriarchal) norms, resulting in its implicit

alignment with the logics that a queer slant would interfere with. This imperative of locating the porno-ethnographer explains why the "reflexive turn" has so greatly influenced modern anthropology; the ethnographer (traditionally a man) can no longer project his account from an undefined subject position, compelling him to identify his role in the practices and processes he participates in and observes.

Even so, the (contemporary) researcher's mere acknowledgement of her position is not itself transformative because, if this position's production is undefined, its positioning is not sufficiently determinate to have a slantwise orientation (which is necessary for subverting heteropatriarchal power). This perhaps explains why "[m]ost 'reflexive' anthropology, which explicitly spotlights how ethnographic knowledge is produced, has rendered sex and emotion between ethnographers and informants more abstract than before" (Newton 1993, 5). By contrast, a diffractive methodology necessarily describes the concreteness of apparatuses, explicating the emergence of erotic subjectivities from erotic activities and interferences. In this way, it is necessarily attentive to the way that subject positions are variously constrained, enabled or thwarted by social and material conditions, thus allowing for an explicitly "slantwise" theoretical orientation.

In the case of my project, porno-ethnographic elements might be understood to comprise a kind of "coming of age" or "sexual awakening" narrative where I describe my "intra-active becoming" (to steal Barad's phrase)—the moments that shape my understandings of sexuality and cultural practice. Importantly, the perspective in this form of porno-ethnography emphasizes the processes and apparatuses of self-transformation/production rather than any "other." My goal, here, is not simply a "masturbatory" or self-absorbed account of emergent erotic subjectivity, but rather a process of training the subtle vision necessary for

a diffractive analysis. That is, I am developing a theoretical device or set of insights for examining the production of subjectivities within the interference pattern of my experiences in "the field." In this way, my autoethnography is continuing the ethnographic tradition of *defamiliarization* (i.e., "making the familiar strange and the strange familiar") (see, Miner 1956) by critically interrogating the very nature of my "self" and critically examining the more general means of subjective production within spaces of sexual silence.

4.4.2 Confidentiality, consent and care

In addition to the ethics of pornographic and ethnographic power, the intimate and erotic nature of my scholarship requires that I be especially attentive to the confidentiality of my informants and partners (who could potentially face criminal reprisals for the information they shared with me). Fortunately, the anonymizing architecture and activities in bathhouses would make it very difficult (if not impossible) for me to consistently identify my past partners when detailing my past experiences in the form of autoethnographic narratives. Even so, I take care to not include identifying information other than my partners' gender and the language the partner used when speaking with me (almost exclusively English, but also French, Japanese and Chinese). Because of Toronto's cultural and linguistic diversity, however, this information is not a significant confidentiality risk.

Protecting my interview informants' confidentiality, however, required more explicit attention. I used several strategies to prevent breaching their confidence, including anonymizing transcripts, using their preferred pseudonym throughout the interview, not creating a "key" for connecting transcripts to consent forms (see, Appendices C and D), which includes legal names, offering the option of giving verbal consent instead of written consent so that participants had the option of never disclosing their legal names to me, and using a

password-protected and encrypted USB stick to store my recordings. Additionally, when transcribing my data, I removed potentially identifying information, including references to their professions, named acquaintances, membership in community organizations or social groups, etc. Although there is no way that I can entirely guarantee the confidentiality of my interlocutors, I made sure to inform them of the strategies I would use to anonymize their contributions when seeking their consent to participate in the study, warned them of the potential risk of identification despite these strategies, and sought their input throughout the interview and analysis process on how to represent potentially identifying information.

Although I was careful to actively seek out my informants' informed consent, I recognize that "institutionalized informed consent procedures may undercut participant agency and expose symbolic violence towards their carefully built interactional framework" (Mortensen 2015, 1). Rather than strictly adhering to institutional guidelines for research as the baseline for my ethical standards, I instead adopt the more compassionate and ethically transformative "principle of care" (Boellstorff et al. 2012): rather than simply attempting to pre-empt potential conflicts in my research, I am careful to respect the agency of members of my community of practice as well as the norms of the community. In doing so, I emphasize community ethical standards (e.g., personal responsibility and the protection of anonymity) rather than imposing institutional norms on my peers.

This commitment to my community's standards of ethics took many forms throughout the research process. In semi-structured interviews, I often sent consent forms over email and provided a summary of their rights as research participants (e.g., they could end the interview at any time, choose not to answer any question and ask to have information redacted at any point during the process without consequence). Before beginning interviews, I would mention

the consent form and go over the key issues again, including their rights and potential risks (e.g., the possibility of being identified despite my efforts to conceal their identities). I then asked them if they wanted to participate in the study orally and offered them the informed consent form. Additionally, I told them that, if they consented orally on record, they would not have to provide their legal names (as they would on the consent forms), which might provide additional confidentiality. Because I understand consent as an ongoing process in research, I made sure to regularly check in with my informants during the interview process, especially if they seemed uncomfortable or confused by a line of questioning, reminding them that they could choose not to answer or end the interview at any time. After interviews, I would thank participants and remind them that they could email me later to have me redact anything they wanted removed from the interview transcript (in only three cases did informants ask me to alter information they provided, and in these cases the altered data was not included in my analyses). Using this more informal process for negotiating informed consent throughout the research process provided my participants with greater agency over how they would share their expertise and how that knowledge would be disseminated. I also chose not to include large excerpts of the interview data to further limit the potential risk of publishing identifying information accidentally.

Unfortunately, I could not retroactively seek consent from individuals I discuss in my autoethnographic narratives (almost none of which I could even recognize by sight at this point) because my membership in this community of practice long preceded my decision to engage in this research project. As this is a typical issue for autoethnography, I adopted the autoethnographic convention of emphasizing my personal experiences rather than presenting observations of others' activities and applied the principle of care in my analytic process,

carefully minimizing the possibility of revealing potentially identifying information about my partners. In a sense, my autoethnographic introspections might be understood as a kind of self-interview—that is, the kind of observations I provide and insights I make are not very different from the kinds I elicit from my interview informants (especially since I am part of the same community of practice). However, because autoethnography primarily exposes the researcher's experiences, it provides a more ethical, less exploitative, way of investigating sensitive topics (see, Sinding and Aronson 2003). Crucially, as I've mentioned already, the information I present about people I interacted with in bathhouses could not realistically be used to identify a person—indeed, given the anonymizing conditions surrounding these encounters, even I could not likely identify most of the people I've spoken to in bathhouses.

4.5 Chapter summary

In this chapter, I have developed a diffractive methodology that informs my autoethnographic approach and my dialogue with other bathhouse patrons (in the form of semi-structured interviews). Broadly speaking, I have explicated my theoretical assumptions, explained my choice of research site, identified the specific tools I use to gather and analyse data (e.g., diffractive autoethnography, semi-structured interviews, and case law), and discussed the ethical considerations I made throughout my research and writing. More specifically, I have rearticulated other scholars' methodological tools in a way that is consistent with the posthumanist perspective that I have adopted. For example, I have reconciled Anderson's analytic autoethnographic approach with agential realism's rejection of reflexivity. Likewise, I have explained how I integrated Barad's insights about the ethics of agential realism and Boellstorff's principle of care to explicate the ethical framework that guided my research practices "in the field" and throughout my analysis. By combining methodologies

using the governing principles of agential realism, I have sought to develop a research approach that can explicate the mechanisms of practices used to negotiate sexual consent, the subjectivities they produce, and the constraints that they produce and are produced in.

5. Consent in context

Gay sexual norms, anonymous casual sex, and HIV nondisclosure

5.1 Introduction

In 2011, Mr. James Steven Wilcox was convicted of aggravated sexual assault for not disclosing his HIV status to a sexual partner he met in a gay bathhouse before having unprotected penetrative sex. Although Wilcox stated that he had no intention to deceptively induce his partner's consent, an honest but mistaken belief in another's consent to sex is (as of 2018) insufficient to prove an absence of *mens rea* in cases involving fraudulently obtained consent (see, s. 273.2(a)(iii) of the Code). Accordingly, the trial court observed that the Crown "had to establish beyond a reasonable doubt that the accused's acts endangered the life of [the] complainant as there was no disclosure, no implicit consent and [that the] complainant would never have accepted to have sexual intercourse with the accused if he had been informed…."[48]

At trial, the complainant testified that he would never have had unprotected sex with Wilcox had he been aware of the latter's HIV status. In response, the defence maintained that the complainant implicitly consented to the potential risk given that it is widely accepted in bathhouses that consent to unprotected anonymous sex is inclusive of the risks implied by the activity.[49] In other words, the defence argued that an element of the *actus reus* was not fulfilled because the complainant had consented.[50]

---

[48] *R. v. Wilcox* at *para* 229.
[49] *Ibid.*, at *para* 3.
[50] The *actus reus* of sexual assault is established when there is sexual contact without consent. In Canada, courts consider consent to be a subjective state that may or may not be outwardly expressed. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at *paras* 26-27, per Major J.

Dismissing this defence of implicit consent, the trial judge asserted that Wilcox could not truly believe that the complainant would consent to the risk of HIV, and that such a belief could only be called "magic or wishful thinking."[51] The defence appealed the decision, arguing that the trial judge erred in concluding that the complainant would not have consented to sex with the accused had he known the accused's HIV-positive status. This was because the complainant had subsequently consented to unprotected sex with the accused even after being made aware of the risk of HIV transmission. The Quebec Court of Appeal and later the Supreme Court of Canada dismissed these appeals, deferring to the trial judge's decision to believe the complainant's testimony that he would never have consented to sex involving a realistic probability of HIV transmission.[52]

In this chapter, I present data from my semi-structured interviews as a way of interrogating the assumption that one could not reasonably believe that a person would consent to the risk of HIV transmission without that consent being expressed explicitly. The interviews I conducted provide insights on how bathhouse patrons interpret sexual consent in bathhouses. The data generated in these interviews may thus be "excavated" to better evaluate whether Wilcox could have reasonably believed that his partner was consenting to the risk of HIV transmission when he consented to anonymous casual sex with someone he had met in a bathhouse. The study's findings suggest that bathhouse patrons participate in context-specific customs involving silence that constrain the ability of people living with HIV to disclose their HIV status. As a result, bathhouse patrons widely adopt strategies that make such disclosures unnecessary.

---

[51] *Ibid.*, at *para* 142
[52] *Wilcox v. R.*, [2014] QCCA 321; *Wilcox v. R.*, [2014] SCC 75.

5.3 Interpreting sexual consent and silence

Research in discourse analysis and pragmatics has long asserted that a decontextualized approach to interpreting language is untenable given that utterances are often readily intelligible despite their logical content being underdetermined. For instance, the utterance, "The river had been dry for a long time. Everyone attended the funeral", is likely to be incomprehensible to a Canadian who lacks the cultural knowledge that a speaker of Sissala has—specifically, that funerals are held for river spirits (Blass 1990, 85—86). This example highlights the ways in which speakers rely on shared cultural knowledge and norms to retrieve meanings that are not directly denoted by the linguistic forms themselves. In other words, according to some basic tenets of pragmatics, the process of interpretation or meaning-making is radically underdetermined by textual evidence alone and interlocutors go beyond the immediate evidence of texts by drawing inferences. Such inferences involve general interpretive principles (e.g., Grice 1975) *in addition to* the mobilizing of extralinguistic contextual factors, including cultural background assumptions, *which are not necessarily shared across individuals nor across discourse communities* (Blass 1990; Carston 2002; McConnell-Ginet 2008; Soria and Romero 2010).

It seems plausible, then, that the normative expectations that govern interactions in bathhouse contexts may enrich a communicative practice with meanings that would be opaque to those unfamiliar with the norms and community background knowledge that regulate interactions in these spaces. Accordingly, the trial judge's assumptions about Wilcox's belief in his partner's implied consent (due to the context of the sexual activity) being "wishful thinking" might be problematized by research that is more attentive to how social norms in the bathhouse govern sexual behaviour and the interpretation of sexual behaviour. Specifically, if

(as Wilcox argued) bathhouse patrons generally accept that consent to unprotected sex is also consent to the implied risks of unprotected sex, it becomes difficult to accept the trial judge's characterization of Wilcox's belief in the complainant's consent as mere "wishful thinking." Moreover, support for Wilcox's asserted defense (i.e., that it is an established norm for bathhouse patrons to consider consent to unprotected sex with a stranger to include consent to the natural risks associated with that activity) should also have important implications for assessing Wilcox's culpability with respect to the *mens rea* element of the putative crime (i.e., it would be difficult to prove beyond a reasonable doubt that he had the *intent* to deceive the complainant to induce the complainant's consent by not disclosing his HIV status).[53]

As discussed in Chapter 2, the literature is still developing on how gay men negotiate sexual consent. While there has been limited research investigating how gay sexual norms may differentially structure negotiations of consent, recent work in sexuality studies has observed that some subcultures of gay men *purposefully* foster conditions where disclosure is not expected *especially in cases where condoms are not used* to increase personal vulnerability and, thus, enhance the intimacy that forms between partners (Dean 2009). Other research has noted that gay men are generally more likely to use indirect and nonverbal indicators of consent than their straight counterparts (Beres, Maitland, and Herold 2004), and that deciding whether to use condoms is an important element of negotiating sexual consent for gay men (Edgar and

[53] While this was the standard for *mens rea* used in *Cuerrier*, subsequent revisions to the Code — specifically, s. 273.2 — make it impossible to assert (as a defense) that the accused had an honest but mistaken belief in the complainant's consent to a sexual act when no consent has been obtained as a result of coercion or fraud. The intent requirement in sexual assault cases involving HIV nondisclosure is no longer the standard described in *Cuerrier* (i.e., intent to deceive for the purpose of inducing consent); the *mens rea* requirement is now satisfied merely by choosing not to disclose one's HIV status when having sex in a way that involves a realistic possibility of transmission. *See R. v. Wilcox* at *para* 233.

Fitzpatrick 1993). Additionally, given the increased awareness that gay men often have of sexual health issues and practices, some scholars have hypothesized that that gay men are likely to accept a high degree of personal responsibility when it comes to sexual health (although they note that there has yet to be research that demonstrates this empirically) (Mykhalovskiy and Betteridge 2012, 43—44).

Given this scholarly literature, Wilcox's argument that consent to unprotected sex with a stranger *includes* consent to the risk of HIV transmission is perhaps reasonable, at least in the context of the bathhouse. While research has demonstrated that gay men typically report holding the view "that disclosure is unnecessary if safe sex is practised" (Heaphy 2001, 127), the converse (i.e., that unprotected sex makes disclosure necessary) has been neither sufficiently substantiated nor disproven (Adam et al. 2014, 41). As such, this chapter investigates how bathhouse patrons describe sexual consent practices used in bathhouses to elucidate the subcultural contextual norms that govern the role of disclosure in negotiating consent and whether the use of prophylactics is an important consideration for members of this community.

5.4 Findings

In the first part of this section, I discuss several interwoven, contextually appropriate social norms governing bathhouse interactions that constrain people's ability to disclose their HIV status in bathhouses. These contextual norms, I argue, make the disclosure of HIV dispreferred and largely unnecessary. Chief among these norms is the custom of silence that governs interactions in the bathhouse: sexual scripts exclude verbal negotiations of sexual consent (e.g., the explicit discussion of sexual health), resulting in increased reliance on nonverbal social norms for interpreting implied consent. Moreover, this custom of silence

appears to be directly linked to the purpose of visiting bathhouses—specifically, it sets a sexual "mood" for bathhouse patrons. Furthermore, because interlocutors make use of a context's capacity for enriching an utterance with unstated meanings (e.g., Carston 2002; Soria and Romero 2010), bathhouse patrons use the sexual frame of the bathhouse to infer context-specific (sexual) meaning from nonverbal practices.

In the second part of this section, I explain how bathhouse patrons have developed diverse practices that enable them to circumvent many potential issues posed by the custom of silence. For example, bathhouse patrons consistently report that this custom of silence is complemented by the normative (although not universally held) expectation that all sexual partners are living with HIV and the assumption that the choice to not use condoms is evidence of either an indifference toward the risk of HIV or an indication that the individual is already living with HIV. These operating assumptions allow bathhouse patrons to adhere to the contextual prescription of silence while also exercising agency in managing sexual health risks, supporting Mykhalovskiy and Betteridge's (2012, 43—44) hypothesis that gay men are likely to accept a high degree of personal responsibility for their sexual health, as opposed to relying on potential sexual partners to take on or assume that responsibility.

In the final part of this section, I argue that the potentially romantic and otherwise relational functions of HIV disclosure make disclosure incompatible with the casual sexual atmosphere of the bathhouse. While the participants in my study were generally skeptical about the need for disclosure in casual sexual relationships, they often asserted that it was an important conversation to have to build the trust necessary for a romantic relationship. Consequently, given that the bathhouse context keys a casual sexual frame that structures the appropriateness of certain conversations, some conversations, including those involving HIV

disclosure, are viewed as too serious or too romantic to be had in the bathhouse with a casual anonymous sexual partner.[54]

5.4.1 Context-specific strategies for interpreting sexual contact

My findings suggest that gay men generally recognize that bathhouses and many other "cruising" areas (i.e., gay sexual spaces), like public parks, proscribe verbal communications and that they act in accordance with these spaces' conventions. For instance, TJ explained that he generally preferred to hook up through digital apps (where linguistic communication is necessitated by the medium) over going to gay sexual spaces, like bathhouses or public parks, for sex precisely because linguistic communication is necessitated by the medium of digital apps whereas in gay sexual spaces like bathhouses consent is customarily negotiated wordlessly. Crucially, TJ had earlier told me that he found it important to disclose his HIV-positive status to prospective partners; indeed, he said that he had the legal duty to initiate these kinds of conversations. However, below he suggests that this "kind of conversation" is not called upon in encounters in gay sexual spaces, like bathhouses.

> I've never been comfortable or confident meeting guys casually and if I have it's usually like in a park, at the bathhouse, and not a lot of talking was happening, right? So, I've never been out in a situation where I would be called upon to have that kind of conversation […] and because of the way I'm hooking up with people online, it's a lot easier to have those discussions via *interface* than say if I were going out to a park or a bar or if I were meeting someone in a different milieu I don't know if I would feel the same.[55]

[54] "Keying" refers to using a communicative action — such as an utterance — to "unlock" another meaning for a text or utterance (see, Goffman 1974). "Spatial practice" refers to how social actors' uses of their bodies imbue a space with social significance (see, Bourdieu 1984b).

[55] *Italics* in excerpts is used indicate emphasis in original speech.

Here, TJ is very explicit in stating that the online "interface" of hookup apps is more hospitable to having such a conversation because "not a lot of talk is happening" in gay sexual spaces. It would seem, then, that gay men who are familiar with gay sexual spaces are at least somewhat consciously aware of the normative expectation of silence in these spaces, and that they make decisions based on this information.

When I asked participants why there is a custom of silence in bathhouses, they almost universally responded that speaking was not conducive to setting the "mood" for sexual encounters. For instance, Ryan, in the following excerpt, notes that talking is at odds with the sexual environment of the bathhouse.

> **Me:** I've heard that sometimes people get shushed in the-
> **R:** Yes! People get shushed.
> **Me:** Yeah, I've been shushed.
> **R:** You've been shushed?
> **Me:** Yeah.
> **R:** Yeah. Because it's like you're not supposed to talk you're supposed to be more... *into* it.

In this excerpt of our conversation, Ryan explains why he thinks that I have been "shushed" in the past when violating the custom of silence, suggesting that my behaviour was inconsistent with the sexual purpose of the bathhouse. Later, when I asked him to define, precisely, when speech is appropriate, he observed that speech relating to the logistics of sex is acceptable so long as it is kept brief, further supporting the view that the constraints on speech are related to the sexual, action-oriented frame of the bathhouse. This is evident, also, in the way that one Toronto bathhouse states on its website that: "Conversations in the orgy room should be kept to a minimum. Grunts, groans, notices that 'I'm [climaxing],' and invitations to do it in a room

instead are acceptable."[56] Talk, albeit brief, is generally only permissible when it pertains to the sexual purpose of the bathhouse.

Notably, the erotic nature of the bathhouse context seems to have important consequences for how bathhouse patrons interpret nonverbal communication. Specifically, my findings suggest that bathhouse patrons use context-specific strategies for interpreting consent within spaces of sexual silence that differ significantly from the way they would interpret consent in other contexts.[57] Steve, for instance, asserted that "[i]f someone walked up to you on the sidewalk and grabbed you, it would be sexual assault. In the bathhouse, you just keep walking." In saying this, Steve astutely observes how the cultural context of the bathhouse differentially structures the intelligibility of an instance of (potentially non-consensual) contact, normalizing what would otherwise be understood as a criminal act. When I asked him why he believed that this kind of sexual assertiveness was different in bathhouses than it is on, say, a public sidewalk, he responded "in the bathhouse, most people are there for sexual encounters." Importantly, Steve also remarked that being "too pushy" and persisting in contact after a person pulls away violates the social norms of the space, suggesting that the initial contact is a means for negotiating consent to further contact rather than being itself an action that requires explicit consent. Taken together, these comments from Steve suggest that the context of bathhouses can result in distinct interpretations of nonverbal behaviour. Specifically, Steve's statements indicate that the normative expectations in bathhouses regarding the intentions and desires of bathhouse patrons key a sexual frame that allows bathhouse

---

[56] "Rules and etiquette." Spa Excess. <https://spaxsto.com/facilities/rules-etiquette> Retrieved, June 10, 2019.

[57] I address the tactics that bathhouse patrons use to negotiate consent silently in the next chapter.

participants to contextually interpret some kinds of contact as negotiations of consent rather than as unexpected sexual assaults.

My interviews further indicate that one's willingness to accept this kind of tentative touching as a negotiation (rather than an assault) is generally expected of a person by virtue of her being in the sexual space of the bathhouse. Indeed, negative responses to light touches are frowned upon by most of my participants. This is evident in Ryan's comments below.

> I find that when people kind of get a little, like, "ugh, why did you touch me?" it's like, "you're in a bathhouse, you're standing in a towel, next to the wall. And I walked over and touched you to show you that I was interested in you, and you look like I just tried to like *beat* you."

Ryan, like many of my participants, seems to have negatively evaluated people for not conforming to the normative expectation that some forms of unsolicited contact are acceptable, characterizing such individuals as not sufficiently socialized to the cultural norms of the bathhouse. Moreover, by contrasting these unwanted touches with "beatings," Ryan implicitly contests their interpretation as assaults within the context of bathhouses.

When I remarked that I used to react negatively to being touched when I first went to bathhouses, Ryan responded by stating "whoever took you didn't instruct you." He subsequently explained that a properly instructed or socialized bathhouse patron would understand that the physical contact was merely an indication of interest, and the appropriate refusal would sound more like, "oh, no thank you." He further explained that it is then the responsibility of the initiator to "back off" if someone responds in the negative. While Ryan's report suggests that it is acceptable to touch others in bathhouses to indicate one's sexual interest, it also echoes Steve's observation that there are conventionally defined limits constraining the form that these tentative touches can take before they are no longer interpreted

as mere indications of interest. It should be noted, however, that while refusals can take the form of an explicitly stated refusal (e.g., "oh, no thank you"), my participants generally report that nonverbal signifiers (e.g., not making eye contact, pulling away, gently pushing hands away) are more common because of the custom of silence that governs interactions in bathhouses.

Steve and Ryan's commentaries suggest that bathhouse patrons may invoke the context of the bathhouse to enrich the meanings of their communicative practices. Specifically, bathhouse patrons seem to draw upon shared understandings of bathhouse practices to infer unstated meanings (e.g., interpreting looking away as a sexual refusal). This is consistent with the way that McConnell-Ginet (2011, 248) has theorized the idea that linguistic forms (or other kinds of semiotic forms) are relatively empty of meaning: members of a local community of practice may rely on shared background knowledge to "fill in" otherwise under-determined linguistic expressions (e.g., McConnell-Ginet 2011, 166).[58]

5.4.2 "Have they already got HIV?": condomless sex and sexual responsibility

Although some of my research participants report that they have had explicit conversations regarding HIV status and other sexual health matters in the bathhouse, the majority insist that they have not had these kinds of conversations or have had them only very rarely (e.g., once or twice in several decades of going to bathhouses), suggesting that these conversations are not normatively expected to occur in bathhouses. Perhaps explaining the discrepancy between legal obligations and the expectation of silence in bathhouses, the

[58] Although McConnell-Ginet makes this argument with respect to linguistic forms, I believe the insight applies more broadly to other semiotic modes as well, such as the kinds of communicative practices used in negotiations of sexual consent.

minority who reported having had disclosure conversations generally view them as having been unnecessary and largely pointless. Tim, for instance, reported giving the following response when asked whether his partners had inquired about his HIV status and how people had responded when he disclosed his HIV-positive status to partners in bathhouses:

> I've had people who are surprised and then say, "I don't think I can do this [have sex] then." In which case I say, "well, that's fine. That's your decision. However, if you think that asking somebody whether they're HIV-positive or expecting them to tell you that they're HIV-positive because you're going to do something unsafe—if that's your strategy for keeping safe, this is not a good strategy. Lots of people don't know their status. Lots of people will be afraid to tell you. So, if you want to protect yourself, you need to have safe sex all the time.

In responding this way, Tim makes clear that he does not think that asking a person's HIV status is a productive endeavour because it is not an effective strategy for keeping oneself "safe." Indeed, the way he takes on a pedagogical role to his partners who ask about his HIV status suggests that he interprets their questions as being indicative of their naiveté regarding sexual health.[59]

Interviews from my research participants also suggest that widely accepted norms of the bathhouse generally make explicitly disclosing HIV status unnecessary because bathhouse patrons often interpret a person's willingness to accept the risk of HIV transmission based on her sexual practices. The choice to not use condoms, for instance, is generally identified as evidence of a person's indifference to sexual health risks. This is evident in the way that Tim describes an encounter with someone who asserted a preference not to use condoms.

> I had one young man who wanted me to fuck him, and I said, "well, sure" so I went to get a condom and he said, "No, you don't need to use that." I did my teachable moment thing [to explain how unprotected sex increases the risk of acquiring HIV] and he said,

[59] He later makes this pedagogical role more explicit in the interview when he calls these interactions "teachable moments."

> "well what if the person already has it." So, I said, "well if the person already has it, you know I've had it for a long time and I've been on drugs for a long time, so mine might be mutated and there are all those other STIs so that might not be a good idea." And then after we finished having sex—I fucked him with a condom—and I said, "what do you know about HIV transmission?'" […] I said, "you're positive, right?" and he said, "yeah I am," and I said, "but you were going to let me fuck you without a condom? And if I wasn't positive, you could have given it to me." And he said, "Oh, I thought that only tops could give it to bottoms." So, then a whole other conversation begins to develop.

Although his partner was clearly unaware of some of the finer points of HIV transmission (e.g., that bottoms can transmit HIV to tops), Tim's narrative potentially provides a rationale for why my participants consistently interpret a person's disregard for condoms in bathhouses as reflecting an indifference to the risk of HIV. Specifically, Tim's sexual partner asked, "what if they already have it?", suggesting that his willingness to engage in unprotected sex was related to his personal indifference toward the risk of HIV transmission (because, already being HIV-positive, he was not at risk of contracting the virus from unprotected sex). While these remarks could support other interpretations as well, my participants' reports indicate that this interpretation of indifference is highly salient among bathhouse patrons. Steve, for instance, stated that he finds it "scary" when a person solicits him for unprotected sex in a bathhouse and finds himself questioning "Why don't they want to be safe?" and "Have they already got HIV?" even after the person has asserted HIV-negative status. This suggests that Steve feels that the willingness to have unprotected sex is indicative of a person's indifference to the risk of HIV transmission, potentially because the person is already living with HIV.

Some participants went into more detail when describing how contextual information could render discussions about HIV status unnecessary. Like Tim, Ryan viewed disclosure conversations as practically pointless. He stated, for example, that inquiring about HIV status is of questionable value because even if a partner claims to be HIV-negative, he would find

himself asking “I’m supposed to believe you? And I would put my health at risk because of that?”. Diverging from the way that HIV nondisclosure law places the onus of negotiating consent on people living with HIV, making them solely responsible for the joint activity and its associated risks (see, Race 2012), Ryan advised me to “just assume everyone’s [HIV] positive.” Stated another way, rather than relying on others’ disclosures or violating the custom of silence himself to discuss HIV status (which would be of dubious value anyway), Ryan adopts the operating assumption that anyone he meets in a bathhouse may be living with HIV and protects himself accordingly. All participants who identified as being HIV-negative similarly affirmed that they choose to always use a condom so that the risk of HIV transmission is (mostly) avoided without requiring the disclosure of prospective partners.

In contrast, Greg, like Wilcox, presumes that people who consent to unprotected sex in bathhouses are likely indifferent to the risk of HIV transmission. Specifically, he states that he does not feel a need to disclose that he is living with HIV to people asking to be fucked without a condom because he is undetectable, and he believes other bathhouse patrons must surely already know that unprotected sex involves the risk of HIV transmission. When asked if he felt that disclosure should be required of people living with HIV who could not get their viral load to be undetectable, he reasserted that the people consenting to unprotected sex are aware of the risks they are seeking out. While Greg’s position seems to deviate from that of other participants, it is noteworthy that he likewise seems to view individuals who engage in unprotected sex in bathhouses to be indifferent to the risk of HIV associated with such activities.

5.4.3 Disclosure and the casual sexual frame of the bathhouse context

As noted, I consistently received skeptical responses from my interlocutors when discussing the necessity or advisability of HIV disclosure in the bathhouse. However, this skepticism was largely limited to interactions in bathhouses. In other contexts, like dating, my research participants generally had very different views on the significance of disclosure. Specifically, they expressed the opinion that disclosure and sexual health discussions are important for building intimacy and trust in a relationship. Ryan, for instance, reported that he and his romantic partner discussed their sexual health, including HIV status, prior to agreeing to having unprotected sex with each other. Part of this discussion included an agreement to not have unprotected sex with other people while their relationship remained open. He noted that because their relationship is romantic and not just casual sex, his husband trusts him to think about their collective sexual health. In his words,

> I'm not going to put my health at risk. I'm never going to put [my partner's] health at risk because *we* don't use condoms with each other. So, we *absolutely* have to use them [with others]. Like, when we opened up our relationship, we decided that we have two rules: no sex at home with somebody else without us being there and always play safe.

In this way, Ryan demonstrates that sharing responsibility in managing the couple's sexual health is as important to the intimacy of their relationship as not inviting other sexual partners into their shared bed (unless it is for a threesome).

Brad similarly made a connection between disclosure and romantic intimacy. Specifically, he noted that he was happy when one of his previous partners told him that he was living with HIV *not* because he thought it was necessary information for him to have as a *sexual* partner but because it helped him be a better *romantic* partner. Indeed, he reported feeling affirmed that his partner trusted him enough to reveal this private medical information

because it allowed him to respond by suggesting that his partner leave some of his medication at his apartment so that his partner would not miss a dose if he slept over. Given the casual and sexual—non-romantic—nature of the bathhouse, however, it is not surprising that this affective and relational function of disclosure is rarely invoked in bathhouses. In fact, Ryan's and Brad's reports suggest that disclosing one's HIV status in a bathhouse might be viewed as just as inappropriate as an expression of love following a one-night stand. When one recalls that bathhouse patrons generally view gay sexual spaces like bathhouses as almost exclusively locations for casual and anonymous sex (e.g., TJ's assertions that he often feels uncomfortable in these spaces because he has never felt entirely comfortable hooking up casually; Steve remarking on the sexual frame of the bathhouse; and Ryan commenting on how speech indicates one isn't sufficiently "*into*" the sexual activities one is participating in), it is unsurprising that many bathhouse patrons view disclosure to be inappropriate given how they seem to associate sexual health conversations with romantic love and trust. The casual sexual "mood" of the bathhouse often results in a *caveat emptor* approach to sexual health whereas this casualness and focus on *individual* responsibility is not evident in romantic sexual relations that emphasize mutuality and reciprocity.

Interestingly, the interpretation of disclosure as fulfilling a romantic function closely parallels some of the heteronormative assumptions underlying HIV nondisclosure law while simultaneously recontextualizing them in such a way that their logical inconsistencies become increasingly obvious. For example, if one accepts the assumption that women "give" sex to men to develop a romantic, trust-based, relationship (rather than out of a desire for their own

sexual satisfaction),[60] there might be some value in criminalizing HIV nondisclosure to protect women from being deceptively induced into consenting to the "transactional" exchange of sex for "damaged goods" (i.e., mendacity and untrustworthiness). Obviously, this argument is untenable if one accepts (as most contemporary feminist thinkers seem to) that women might have sex for their own sexual satisfaction rather than "giving" sexual pleasure to men for some other reason (Kaplan 2013; Franke 2001; Buchanan 2015). Indeed, criminalizing nondisclosure in cases involving casual sex among gay men further exemplifies the faulty logic of "trading" sex for trust and romance because there is no (putatively asexual) woman or implied romantic investment in the equation.

Other research participants in my study likewise critiqued the romantic assumption underlying HIV nondisclosure criminalization. For example, Tim noted in his interview that when he talks to straight women about HIV nondisclosure law (as a sexual health educator), they generally express support for criminalizing HIV nondisclosure until he asks them if people should also be criminalized for not disclosing their HIV status to one-night stands or other casual hookups. He observed that in his experience considerably fewer women maintain their position when their taken-for-granted frame of romantic relationships is explicitly suspended, suggesting that they also find HIV nondisclosure problematic largely because it is contrary to the assumed goal of having sex (i.e., a trusting romantic relationship). This is not to say that women only have sex for the sake of developing a relationship; rather, I am arguing that this heteronormative interpretation of sex's purpose (i.e., forming relationships) might often be

[60] Kim Buchanan (2015) posits that this is one of the many assumptions used to support HIV nondisclosure law.

taken for granted (by most people, not just straight women) until it is explicitly challenged. If this is the case, the cultural norms of the bathhouse and casual sex among gay and bisexual men might be understood as powerful analytics for exposing how this heteronormative assumption underpinning HIV nondisclosure law is inappropriately applied to sexual activities happening in gay sexual spaces (and likely in many other contexts).

5.5 Discussion

Proponents of ever-increasing regulations on sexuality have often taken for granted that sexual pleasure is a worthwhile pursuit only when there is no (or very limited) risk of harm—as if a rational person would never accept the risk of harm in the pursuit of pleasure (Kaplan 2013). Contrasting with this view, my research participants generally asserted a belief in individual agency and personal responsibility when discussing HIV disclosure and the risk calculi that they engage in when negotiating consent. Study participants contended that individuals are responsible for their personal health and did not consider it reasonable to expect others to make these individual determinations on their behalf. Indeed, there is often the expectation that people take reasonable *concrete* steps to directly manage their own sexual health (e.g., using condoms) rather than relying on unspoken assumptions about another's HIV status as a prevention strategy.

As discussed in Chapter 2, feminist scholars and queer theorists have recently begun to question how feminist activists have wielded their significant social and political influence to advance punitive regulations of sexuality, noting that this tactic has largely been detrimental to more marginalized women, racialized communities, sexual minorities and transgender people (Brown, 1995; Fischel, 2010; Gotell, 2009; Halley, 2006, 2015). As previously mentioned, Lise Gotell (2009, pp. 882—897) argues that the transactional logic underlying

affirmative consent standards renders unintelligible the narratives of women who are unable to satisfactorily frame their experiences in neoliberal discourse. My study similarly suggests that the neoliberal values reified in contemporary Canadian HIV nondisclosure law (as evident in the application of commercial law to the sexual context) results in a legal standard for consent that is inconsistent with the cultural norms and practices of one of the communities most affected by the ongoing HIV epidemic. Even if one accepts that deceptions unrelated to the nature or quality of a sexual act could vitiate otherwise freely given consent, as is held in *Cuerrier*, current standards for determining criminal culpability in cases involving HIV nondisclosure elide the contextual nature of negotiations of sexual consent. This is because it is taken for granted that people living with HIV could not reasonably believe that their partners would consent to sex involving a realistic probability of infection (despite almost all sex having at least some risk of HIV transmission (Symington 2012, 645)).

Rather than assuming deceptive intent, a better standard would require that the accused *meant* to induce another person's consent through deception. In this view, the *mens rea* of the act is not merely the intention to not disclose a fact that one (putatively) has a moral duty to disclose; rather, the culpable mental state is evident in a person's intent to override another's sexual autonomy through deception. Not only would this proposed standard more directly emphasize the relationship between the *mens rea* of sexual deception and the infringement of sexual autonomy, but it would also better account for how context shapes individuals' assessments of what facts are material to others' decisions to consent. For example, if bathhouse patrons generally believe that prospective partners who consent to unprotected anonymous sex are indifferent to the risk of HIV (as my findings strongly suggest is the case), it should be clear that there may be reason to doubt that Wilcox "acted dishonestly in a manner

designed to induce [a prospective partner] to submit to a specific activity, and that absent the dishonesty, the [prospective partner] would not have submitted to the particular activity."[61] To hold otherwise would fly in the face of the most basic principles of pragmatics and interpretation: that context and social norms matter. In this way, a return to the pre-2018 standard eschews the assumption that heteronormative romantic ideals constitute a universal baseline for sexual actors' decision-making.

What is more, by inhibiting Wilcox's ability to assert a defense of honest but mistaken belief in consent, the law effectively confounds sexual diversity with sexual violation, reproducing a problematic legal tradition of criminalizing gay and bisexual people for not conforming to heteronormative sexual practices and expectations. Indeed, failing to account for differing social norms in gay sexual spaces imposes heteronormative worldviews upon sexual minorities, rendering their sexual practices and norms criminal. Moreover, because criminal law is not simply an apparatus for evaluating and punishing behaviour but also a powerful means for constituting and maintaining social realities (see, Ehrlich, 2001; Lacey, 1998; Lazarus-Black & Hirsch, 1994; Lees, 1997; Merry, 1990; Mertz, 1994; Smart, 1989), not only does this application of HIV nondisclosure law put queer communities at increased risk of facing the punitive force of criminal law, it also undermines the progress queer communities have made in seeking acceptance and acknowledgement in the political and legal spheres. In other words, criminalizing HIV nondisclosure does not simply identify pre-existing forms of deviance (e.g., consent-vitiating fraud in gay sexual spaces); it is also the apparatus through which deviance and perversion are produced with the consequence of rendering what

[61] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at *para* 374 (emphasis added.).

might be understood as sexual diversity as sexual violation instead. Consequently, if the goal of sexual assault law is to promote sexual integrity, including "not just freedom from bodily violation, but also the conditions for sexual benefit, fulfilment, diversity, literacy, and exploration" (Craig 2011, 193), then an interpretation of law that disavows the possibility of diversity in sexual practices is not ideal (to say the least).

5.6 Conclusion

Taken together, my findings indicate that the social norms that regulate sexual interactions in bathhouses result in disclosure of HIV status generally being viewed as both inappropriate and unnecessary in these spaces. Specifically, they suggest that HIV disclosure is dispreferred in the bathhouse because it does not accord with the casual sexual frame of the bathhouse, because patrons generally expect each other to be aware of what the risks of their sexual behaviours are, and because disclosure violates the contextual custom of wordlessly negotiating consent in gay sexual spaces. Additionally, my findings suggest that rather than violating these social norms, bathhouse patrons prefer to use individualized strategies that make disclosure unnecessary, such as always using a condom.

I have demonstrated that normative expectations within the context of the bathhouse simultaneously constrain speakers' ability to disclose their HIV status while providing interlocutors with conventions for interpreting others' consent to the risk of HIV through nonverbal behaviours (e.g., choosing not to use a condom). While the *actus reus* of a sexual assault can still be established under these conditions, this social context may provide a basis for the defense to assert a lack of *mens rea* in some jurisdictions. Thus, it cannot be said that a person's choice to not disclose his HIV status to an anonymous sexual partner he met in a

bathhouse before having unprotected sex is evidence of his *intention* to deceptively induce that partner's consent to sex.

Stated another way, I have argued that an expression of consent cannot be interpreted through some universal and neutral frame because the context surrounding a speech act has material consequences for the speech act's performative potential and intelligibility. Indeed, by ignoring the role that social norms and context play in rendering consent intelligible to social actors, courts risk confounding sexual diversity with sexual violence in a way that contributes to our nation's troubling history of criminalizing sexual minorities. Because nondisclosures not motivated by an intent to deceive (such as those described in this chapter) lack the moral culpability generally associated with sexual assault, I have advocated for a return to the pre-2018 standard of determining *mens rea* in HIV nondisclosure cases. This standard, which is attentive to the motivations behind a person's decision to not disclose her HIV status, is better suited to analyzing the contextual factors that structure negotiations of sexual consent.

6. Beyond words?

Nonverbal negotiations of consent in Toronto bathhouses

6.1 Introduction

I wended my way through the labyrinthine corridors of the bathhouse. Unsurprisingly, given the fact it was a Wednesday night, there were few people moving through the space. A man whispered at me as I passed him, but he seemed to do so more by reflex than with any intent to converse with me. He seemed uninterested in capturing my attention and the unintelligibility of his murmuring suggested, to me at least, that he was not highly invested in communicating anything other than a phatic greeting. I turned the corner and wandered through the twists and turns of narrow paths, inevitably bumping shoulders with the few other patrons I passed due to narrowness of the halls.

Eventually, my absent-minded wandering came to an end when I saw a figure walking in my direction and elevated my gaze only to see him do the same. I smiled and he greeted me wordlessly—as is customary—with a careful caress of my shoulder. In return, I traced my finger along the curves of his collarbone, feeling for pleasure—both his and my own. He leaned in toward me and his breath whispered warmly on my neck before he pressed his lips against my skin. I pulled him closer to me and he placed his hand on my waist. I led him to my room. Hastily, I slipped the coiled key-string from my left arm and opened the door. I didn't bother adjusting the light, leaving the room even more dimly lit than the corridors. I pulled out a small plastic package and raised my brow, not knowing if he could see my affected countenance under the blanket of darkness. I slowly drew it closer to me, then held it outward to him and

repeated the motion. There was no sound but the crinkle of the wrinkled condom wrapper. He took it from me in a slow deliberate motion, and I nodded in response.

Later, he discarded the used condom in the provided bin. Only then did I break the silence with a question, asking his name. He paused, looking at me as if curious and spoke to me in what I barely recognized to be Mandarin Chinese. He laughed and shrugged. I laughed as well, not knowing any other way to comment on the humour of the moment. He smiled as he left, and I gently closed the door behind him, wondering how I hadn't realized that we didn't share a common tongue. Wordlessly, we acknowledged each other, navigated the nuances of negotiating consent throughout the encounter until bidding each other farewell.

Despite not sharing a common language, my partner and I negotiated sexual consent through the manipulation of visual and tactile information with little difficulty. Indeed, it was not until the end of the encounter that we even realized we didn't speak the same language. In this chapter, I investigate how such wordless negotiations of sexual consent are possible and explore the implications of my findings for theorizing the discursive potential of these practices. Specifically, I synthesize research on sexual script theory (e.g., Gagnon and Simon 2009; Beres 2010; Beres, Maitland, and Herold 2004; Jozkowski et al. 2014; Muehlenhard et al. 2016; Hall 1998) and the literature on language and embodiment (Streeck, C. Goodwin, and LeBaron 2011; Streeck 2009; 2013; Bucholtz and Hall 2016; Hillewaert 2016; Edwards 2012; C. Goodwin 2000) to develop a framework for explicating the sophisticated tactics that bathhouse patrons employ to negotiate sexual consent nonverbally through subtle manipulations of tactile information. In doing so, I argue that (1) these "speech" events are rendered intelligible through conventionalized, context-specific "scripts" (or archetypes) that contribute to a custom of silence; and, (2) that the corporeal experience of these tactile

exchanges is important for understanding their performative potential. I conclude with the observation that an increased attentiveness to how materiality, including embodiment, quite literally shapes cultural and linguistic practices can enrich contemporary approaches to sociolinguistic and anthropological research.

In the previous chapter, I discussed how research participants in my study talk about the wordless negotiation of sexual consent in gay sexual spaces. In this chapter, I provide an ethnographic account of how interlocutors negotiate sexual consent using nonverbal modalities. I begin by relating the linguistic literature on silence to the scholarship on negotiations of sexual consent that I discussed in Chapter 2. Next, I elaborate on how nonverbal modalities may be used to construct meaning and constitute social subjectivities by selectively embodying and thwarting possibilities and activities. I then present my findings, detailing the ways that bathhouse patrons "script" nonverbal interactions, the affordances of tactile modalities for intimate communication, and how conflicts are resolved in these negotiations. Finally, I draw connections between my findings to literature on language and embodiment, sexual consent, and posthumanist linguistics.

6.2 Silence and nonverbal consent

Silence is not the absence of meaning. There is a rich literature in linguistics that has addressed the issue of silence, including its communicative functions and its interpretation in interaction. Jack Bilmes (1994, 78—79), for instance, observed that silence is especially meaningful when there is an expectation to speak. As noted by Michal Ephratt (2008), silence may be used to fulfill any number of functions, including functions of language famously described by Roman Jakobson (1956) in *Fundamentals of Language*. Ephratt (2008, 1926)

notes, for example, that silence may have a metalinguistic function.[62] Others have observed that silence, in the form of pauses, is an invaluable tool for structuring conversations (Sacks, Schegloff, and Jefferson 1974). Moreover, silence has been shown to have important sociological and political functions. For example, there is ample research that has theorized that social practices used to silence others often have pernicious motivations and effects, including the establishment and maintenance of power imbalances (e.g., Clair 1998; Miller 1991; Zerubavel 2006).

Although silence is a productive communicative resource, there has been a recent push by feminist activists for sexual assault laws and policies that require explicit verbal consent, especially in the college context. As discussed in Chapter 2, there has been an insurgence of campaigns that advocate for law and policy that would define any sex lacking explicit verbal affirmation of consent as sexual assault (e.g., "only yes means yes") (Fischel 2019). While there is limited scholarly support for this position (e.g., Remick 1993), legal theorists have generally argued that verbal consent is unnecessary as long as there is some affirmative expression of consent (i.e., consent that is not inferred from mere lack of resistance) (e.g., Fischel 2019; Kaplan 2013; Pineau 1989; Tiersma 2007). It has been further argued that laws and policies that would define the absence of verbal consent as sexual assault risk criminalizing most consensual sexual activity (Rubenfeld 2013b). Survey-based research on sexual behaviours supports this view as studies indicate that individuals often negotiate consent

[62] Ephratt offers the example of a person who does not speak French responding with silence to the question "*parlez-vous français?*" ('do you speak French?').

nonverbally (e.g., Hickman and Muehlenhard 2018; Kilimnik and Humphreys 2018; Muehlenhard et al. 2016; Beres 2010; Beres, Maitland, and Herold 2004).[63]

Despite advances in research on sexual consent, there is still a strong need for descriptively rich, empirical accounts of how interlocutors wordlessly negotiate consent (Beres 2007). Unsurprisingly, as discussed in Chapter 2, much of the research on sexual consent has relied on self-reported data. A detailed ethnographic account of these negotiations, by contrast, could provide important information for understanding how sexual consent is negotiated in practice. By examining how interlocutors negotiate sexual consent in this study, I hope to explain how nonverbal practices in Toronto bathhouses are sufficiently legible to be used to negotiate the complexities of sexual consent, and how involuntary embodiments of meaning in these practices may have important implications for legal theorists, sociolinguists, and anthropologists. In doing so, I aim to provide a detailed account of sexual consent practices in spaces of sexual silence, address the question of whether nonverbal modalities are truly inadequate for negotiating sexual consent, and theorize what forms of agency are exercised through these practices.

6.3 Multimodality, embodiment, and subjectivity

Since movements of the body are heavily laden with social meaning, linguistic anthropological research has become increasingly attentive to how gestures and other physical activities are versatile resources in communication (e.g., C. Goodwin 2000; Hillewaert 2016; Edwards 2012; Streeck, C. Goodwin, and LeBaron 2011; Streeck 2009; Streeck 2013; M. H. Goodwin and Alim 2010). In addition to embodying referential information (e.g., holding up

[63] These studies have largely involved white, college-aged heterosexual students in America.

two fingers to express the number "2"), research has found that bodily movements enable interlocutors to reconfigure subject positions within interactions by strategically manipulating communicated information across modalities (see, Goffman 1956). Imagine, for instance, that a child makes a promise to his mother in front of his father while discreetly showing his father that his fingers are crossed. In this hypothetical example, the child has configured distinct participant roles for the social subjects across visual and verbal modalities. Specifically, the child is the author, principal, and animator of two distinct messages; the mother is the addressee of the promise but excluded from the visual communication; and the father is the overhearer of the verbal message and the addressee of the visual communication.

Research indicates that the meaning of gestures and other bodily activities may be attributed at least partially to how they concretely embody constraints and possibilities for subsequent social activity. For example, Charles Goodwin (2007, 57) describes a father arranging his body in relation to his daughter's body when helping her with her homework to create a "shared focus of visual and cognitive attention." That is, he moves his body in a way that results in the two having a shared vantage point for viewing the homework—the object of their shared activity. However, when the father requests the daughter hand him a pencil so he can show her how to work with the problem, the daughter instead withdraws the writing implement. In doing so, she somatically contests the framing of the activity, limiting subsequent actions primarily to aural modalities. In this way, interlocutors' physical positions may embody conflicting social purposes even as they are made meaningful in relation to each other.

By strategically manipulating semiotic resources across distinct modalities in this way, interlocutors can represent themselves in sophisticated ways through everyday practices

(Goffman 1956).[64] Mark Sicoli (2013; cited by Ahearn 2017:44), for example, observes that the potential for simultaneously conveying contradictory messages across modalities (what he calls "intermodal discord") enables interlocutors to creatively meet conflicting social expectations. By using one's body to preclude the possibility of a proposed transgressive activity (a social norm violating practice) while verbally affirming the proposer of the activity, a speaker may express politeness while physically contesting the activity (e.g., saying "that's so kind of you" when a guest offers to do the dishes while moving to do the dishes).

The embodied and intersubjective nature of communicative bodily practices enable interlocutors to establish and reconfigure their self-presentation (Butler 1988; Hillewaert 2016; Inoue 2006). This is because performatives are always meaningful both due to their citation of familiar norms and their iteration into novel contexts (Butler 1993b; Hillewaert 2016; Inoue 2006; Kulick 2000). The body is integral to both these processes. Social norms and structures shape the disposition of the body, which is integral to the body's role as the primary vehicle by which the social subject achieves recognition by materializing her will in the world (Bourdieu 1984a; Merleau-Ponty 1962; Mauss 1973). In this view, a gesture or expression (and conventionalized responses) cannot be thought of as having entirely self-evident meaning because bodily senses do not perceive discrete, objectively knowable "things" (see, Merleau-Ponty 1962); rather, as Thomas Csordas (1990) contends, the body becomes attuned to and

[64] These transmodal practices can be used in creative ways to configure the self in complex ways. For example, Marjorie Goodwin and Samy Alim (2010) demonstrate how a preadolescent white girl, Sarah, uses multimodal tactics, including verbal and visual cues, to mock an African American girl by contrasting "Valley Girl" talk while performing affected gestures associated with "Ghetto Girls" (e.g., neck rolls, eye rolls, and teeth sucks). Using cross-modal practices, Sarah was able to simultaneously configure and occupy distinct social and racial positions.

calibrated for culturally intelligible categories, through which encountered "things" are interpreted and made meaningful due to their citation of familiar forms.

Because an expression is only ever meaningful when it is given form in context (and it acquires meaning from context), "it is vulnerable to unpredictable features" and the subject may strategically exploit this vulnerability to create new meanings (Inoue 2006, 21). As discussed earlier, Sarah Hillewaert (2016, 152) argues that Lamu women's hand greetings are not simply sequential ritualized expressions that reflect or uphold existing social structures but instead "tactile tactics" through which interlocutors can subtly manipulate sensory information, such as physical pressure, to negotiate changing understandings of women's social positions. Specifically, Hillewaert observes that the relatively new professional class of educated Lamu women strategically conform to traditional practices of paying respect to older (non-professional) women by kissing their hands even while many of these older women acknowledge the younger professionals' newly valued statuses as educated women. They do this by subtly withdrawing their hands from the interaction in such a way that the older woman's deference is not visible to others but is privately *felt* by the younger professional. In this way, embodied greetings do not always simply act out a script of social niceties; they may also contribute to the reconfiguration of those same normative expectations.

6.4 Findings

In this section of the chapter, I explain the strategies bathhouse patrons use to negotiate consent primarily using nonverbal practices, the way that interlocutors in these spaces may take advantage of modality-specific affordances in an interaction, and how individuals negotiate interpersonal and intrapersonal conflicts. Firstly, I argue that bathhouse patrons use context-specific conventions, as described in Chapter 5, for interpreting nonverbal behaviours

as consent-negotiating practices. While these conventions seem to be widely accepted, my findings suggest that they are flexibly applied in context depending on the addition of further social or material constraints on communication (e.g., negotiating consent in a dark room). I next discuss how interlocutors in these spaces may strategically make use of the tactile medium's lower degree of referential legibility to emphasize the poetic and emotive functions of language. In doing so, bathhouse patrons make the negotiation of sexual consent a pleasurable act in itself as well as a means for fostering further intimacy. I then build upon Hillewaert's insight that interlocutors may strategically convey potentially conflicting information across the public and private channels of communication (that are created by distinct modalities). Finally, I provide an example of intermodal discord in which voluntary and involuntary bodily activities communicated conflicting information, contending that this resulted in the embodiment of distinct subjectivities or social positions by a single individual.

6.4.1 Nonverbal negotiations

As alluded to in the last chapter, I observed a pattern in my research participants' reported strategies for negotiating sexual consent nonverbally in spaces of sexual silence. Specifically, the participants would often describe the general form of encounters as adhering to the following sequence: (1) a visual indication of sexual interest (e.g., sustained eye contact), (2) a telegraphing of one's intention to make physical contact (e.g., tentatively reaching forward), (3) establishing physical contact, and then (4) either engaging in a sexual encounter in public or finding a more private area to have sex. Steve, for instance, reported in his interview that negotiations of sexual consent typically begin with a nod or a smile followed by a slow, tentatively reaching forward to remove another person's towel or to touch that person's body (and then eventually doing so). He then stated that offering to go somewhere more private

is typical. When I asked him if people would ever "skip" stages or otherwise diverge from his described "script" of events, he noted that it does happen from time to time but that it is undesirable. This general schematic for negotiating sexual consent generally matches my own experiences as well as the etiquette guides that can be found on some bathhouses' websites (although my participants seemed unaware of these guides).

In my experience, the "steps" in the general outline for negotiating consent are not always obvious when performed in practice despite my participants' assurances that "you just know" when someone else is interested. One sexual partner I met in a bathhouse, for example, commented that he had tried repeatedly to make eye contact with me and smile at me but assumed I wasn't interested in him because I had failed to reciprocate eye contact.[65] I recall finding him very attractive and not wanting to add to the dearth of unwanted attention that I observed he was receiving. Eventually, I initiated contact (after apparently missing several of his attempts to do so) by making eye contact with him when we passed each other in a hallway. He smiled at me, and as we walked by, I gently reached out to touch his shoulder in passing, which he seemed to be able to see and not avoid (but he did not lean into the touch either). We passed and continued walking in our respective directions, and I interpreted this exchange as him not being opposed to the idea of engaging with me but being otherwise occupied (he was with a friend with whom he had come to the bathhouse). Later, I observed him receiving sexual attention from someone on a padded bench, and he looked at me and smiled. I smiled back and he tilted his head as if inviting me over. I shrugged, not wanting to get involved in the public encounter. Later in the evening, as I was preparing to leave, he came up to me in the changing

[65] As an autistic person, failing to make eye contact is not an uncommon occurrence for me across social contexts.

area (where the limitation on speaking is less restrictive and quiet discussions are more acceptable). He offered to exchange phone numbers, and then we met outside of the bathhouse later that week, eventually becoming casual lovers and then transitioning our relationship into a friendship that occasionally involved sex.[66] For the most part, notwithstanding my obliviousness in the beginning, this exchange accords with Steve's general outline of how these negotiations are expected to take place.

Despite the high degree of consensus among my study's participants regarding the general structure of nonverbal negotiations of sexual consent, participants acknowledge that the "sexual scripts" may vary depending on context. The research participants report, for example, that in "dark rooms" (i.e., rooms in bathhouses where there is very little light), it is expected that an interaction will begin with physical touch rather than visual cues. (Predictably, there is an increasing reliance on tactile information when visual and auditory channels are restricted.) Although my interview data suggests that most participants do not spend a lot of time in dark rooms (e.g., Ryan explains his dislike of darkrooms by asserting "unless I can see who you are I don't want to be touched by you."),[67] a few patrons report enjoying dark rooms (and my personal observations suggest they are active hubs in bathhouses). Specifically, older and racialized interview participants often informed me that they sometimes feel more comfortable in dark rooms because visual hierarchies of desirability (what Ryan referred to as "tiers of desirability"), which generally privilege youth and whiteness, are less emphasized in

[66] Although outside of the scope of this chapter, it should be noted that this partner disclosed that he is living with HIV to me over text before we met outside of the bathhouse. This seems to affirm the point made by TJ in the previous chapter that disclosures are more socially appropriate over text-based media than they are in spaces of sexual silence. I have his obtained his permission to report this information.

[67] Others noted that they avoid dark rooms because the darkness prevents them from noticing visual signs of infectious diseases, like sores.

these spaces. Similarly, some participants reported that the reduced importance of visible features not only made them feel more comfortable about their own appearances but also allowed them to find greater pleasure in their sexual partners in these spaces because they could rely more on the excitement and sensations of the actual experience than the appearance of their partners (who they might not necessarily find physically attractive).[68]

6.4.2 The poetics of touch

My findings indicate that bathhouse patrons may make use of modality-specific affordances to express functions that language, with its enhanced ability to code referential functions, is less well-equipped to handle. In one of my visits to a local bathhouse, for example, I encountered a man in a steam room, and he greeted me from behind with a tentative touch of my arm. After turning around, I reciprocated by caressing his chest. Encouraged by his smile, my hands traveled downward, grazing his torso and touching the towel wrapped around his waist. As my fingers touched the fibers of the fabric, I felt him pull away from me and I suddenly withdrew my hands and reconnected my gaze to his. He gently pulled my hands back to his body, placing them on his torso and pressed them hard against his skin. Although he moved my hands to influence the form of our interaction, it should not be thought that I was passive in this process. Even though I did not resist his guiding of my wrists, neither did I let my limbs go limp. Instead, I actively followed him in the movement of the caresses, resulting

[68] Some participants reported rather clever strategies for subverting the anonymity of dark rooms to increase their capacity for inferring or even directly observing the appearance of other bathhouse patrons. For instance, several participants report that they use the tactility of "greetings" in dark spaces to determine another's physical fitness by running their fingers along partners' torsos to identify their leanness and musculature. Likewise, Pierre reported that one can strategically place oneself in dark rooms near entrances in such a way that one is obscured but able to see incoming men as they pass the threshold from dimly lit areas to the darker domain of the dark room.

in a *pas de deux* of sorts, carried out through playfully mimicking each other's use and placement of pressure and incrementally increasing the intimacy of the interaction.

Building upon the insight that haptic exchanges have pro-social functions (M. H. Goodwin 2017),[69] I contend that these practices fulfill an important poetic function in the process of negotiating sexual consent and intimacy (see, Jakobson 1960). Specifically, these exchanges reference and emphasize the sensory qualia of the signs themselves to make the negotiation itself pleasurable. Rather than ending the encounter, my partner's resistance and momentary withdrawal of contact prolonged the pleasure of the process of negotiating consent by building sexual tension and sensuality through a strategic manipulation of the dynamics of pressure. That is, by postponing the achievement of desire, he reconfigured the exchange as being itself a pleasurable process rather than a mere means to an end (see, Deleuze & Parnet, 2002; Kulick, 2003; Mortensen, 2017). (Indeed, there is not really an objective point at which the tactile negotiation of sexual consent can be distinguished from its ensuing sexual act.)

While one might argue that spoken language similarly affects the physical bodies of others through engaging auditory systems (e.g., soundwaves reverberate in listeners' eardrums), the skillful use of nonverbal modalities, like tactility, differs from the use of spoken language because spoken language generally has a greater capacity (or at least is more commonly used) for coding referential functions. Stated another way, while poetic verbal linguistic practices, like alliteration, similarly rely on self-referential articulations of sensory information (e.g., rhyming), a touch's elicited sensations are less directly entangled with

[69] Goodwin (2017) examines how haptic exchanges help to establish, maintain, and negotiate intimacy among family members. Her findings demonstrate that affectionate contact among family members may serve pro-social functions, including reconciliation and the expression of sympathy.

legible referents. The decreased representational legibility of tactile tactics seems to result in a decreased referential function in their meanings, permitting social actors to emphasize the poetic (e.g., a touch that plays with pressure on skin) and emotive (e.g., the communicated sensory information contributes information about the participants' experiences of desire and pleasure) functions of the communication (see, Jakobson 1960). Moreover, the tactile tactics directly elicit the sensory responses that are essential to most forms of sexual activity, which itself is a self-referential phenomenon. So, while such interactions certainly position participants and present opportunities for representing the self (and others), the sensual experience of touch is meaningful beyond its limited referential functions.

6.4.3 Tactics in tension

While the previous section detailed how interlocutors can collaboratively manipulate the tactile medium to playfully take advantage of the poetic potential of haptic exchanges, this section elaborates on instances of conflict between bathhouse patrons. The following excerpt illustrates some possible consequences of negotiations that do not end in mutual satisfaction.

> Walking beneath the scattered lighting of the narrow corridors of a bathhouse, I felt fingers wrap themselves around my waist as an unseen man's palm pressed to my side and pulled me backward. My shoulder blades pulled together as my muscles tensed reflexively. Before I could even think to speak, I felt his body pressed against the back of my own as his arms enfolded me in an unexpected embrace. Regaining composure and some clarity of thought, I pulled my right shoulder down and pushed my hand behind my back, gently and subtly pushing him away. My use of pressure was so subtle that another man, a meter or two in front of me, did not seem to notice the conflict. Seemingly in response to my push, I felt the man behind me pull me in tighter. I whispered, "I'm OK thanks," to which his response was to run his hands along my exposed front. I raised my voice, reiterating "I'm OK thanks," and he pushed me forward, hissing as he did so. The bystander, startled, visibly straightened his posture. He leveled his gaze to mine with what I interpreted as concern or at least curiosity. I shrugged and told him what had happened. He shook his head and stated that I should have punched the guy in the face. I thanked him for his concern and then walked away, taking the shortest route I could to get back to my room.

> As I was unlocking my door, I felt movement behind me as another suitor made an advance. My body, primed from the earlier encounter, braced itself under the unexpected touch of this new suitor. He grounded his hips against my back-side and whispered nothings on my neck. Despite not wanting the attention, an intense feeling of arousal coursed through my body in response to his touch. I shakily stated, "I'm OK thanks," while hoping my unwanted suitor did not notice the increasingly visible sign of arousal under my towel. My words made no purchase. He increased the pressure he applied to my body. I pushed open my door and wrestled his hands off my body, and more insistently asserted "I'm OK, thanks" while trying to enter my room. He called me a "stupid bitch" before I shut the door.

These excerpts demonstrate how the haptics of nonverbal exchanges can be used to negotiate and establish social positions and, furthermore, how the subtle exchange of sensory information through an intimate and private channel plays a significant role in negotiating sexual consent and in actors' self-presentations. Building off of Hillewaert's (2016) arguments that hand greetings among Lamu women are not merely unreflexive phatic responses within a conventionalized script, I argue that hand greetings used to negotiate consent in Toronto bathhouses produce simultaneous and potentially conflicting channels of communication and performative effects. For instance, in the first interaction, my original attempt to politely rebuff unwanted attention telegraphed limited information to the bystander while simultaneously, though a different channel, communicated refusal privately and provided my suitor an opportunity to discontinue the proposition without losing face publicly. That is, the bystander in the first instance of unwanted touching could see the interaction but did not seem to notice the privately signalled sensory information that I subtly communicated by pushing against my suitor's advance. When I more visibly telegraphed my refusal, however, the onlooker acknowledged the refusal through his change in countenance and by explicitly commenting on the event. This highlights how interlocutors can leverage the affordances of particular modalities to achieve their social and communicative objectives.

Building upon the observation that interlocutors can manipulate tactile, aural, and visual information to simultaneously embody distinct subject positions across different channels of communication (e.g., M. H. Goodwin and Alim 2010; Hillewaert 2016), the events in the second excerpt suggest that the body's own reflexive responses can result in the embodiment of distinct subjectivities within a given channel of communication. For instance, although I had consciously communicated refusal in my encounter with the second unwanted suitor (both verbally and nonverbally), my body's reflexive signs of arousal exemplify a moment in which my body was not a passive instrument that I molded to embody my will (see, Blackman and Venn 2010). While I occupied several speaker roles in this encounter (e.g., I authored and animated the utterance "I'm OK thanks" as an indirect refusal and pushed back against my suitors), my body, too, was a "speaker" in that it animated an intelligible sign and, in doing so, authored a very different message than I attempted to by intentionally pushing away my suitor's advances.[70]

This suggests that when the body acts in ways that fail to embody the will of its associated social actor, the very materiality of the body exerts some sort of influence on semiotic relations and, by extension, the social structures that shape bodily experiences. This aligns closely with the observation that material "things" have the capacity "to reconfigure, through the mediation of signs, our relationship to these [things] and also our own habits" (Vincent Colapietr's reply in Kockelman 2007, 389). This suggests that when the body

[70] I want to clarify that while I imply that there were "conflicting" or "mixed" messages, I doubt that my refusals were not sufficiently clear to my persistent suitors. Given that I was confident that my addressees fully understood my nonverbal refusals despite the physiological indications of arousal, my verbalization of refusal may be understood as unequivocally reasserting my refusal. This has the function of undermining my suitors' ability to potentially reconstruct my refusals ex post as deficient (perhaps even to themselves).

becomes willful (see, Ahmed 2014), it can embody "properties normally associated with mental entities: attention, desire, purpose, propositionality, thoughts, and goals" (Kockelman 2007, 377). This is consistent with the way that Maurice Merleau-Ponty (1962) theorized the mind as a product of physiological processes rather than being substantially distinct from the body: the body cannot be merely an inert instrument manipulated by a substantially distinct human will because it provides the precursive physiological structures necessary for what we refer to as the mind. In this view, rather than being distinct from the body, the mind is a bodily phenomenon.

The proposition that parts of the body might act as if they have minds of their own builds upon the contributions of studies on intermodal discord (e.g., Sicoli, 2020) by virtue of ascribing agency to the distinct positions embodied throughout the interaction. The literature on intermodal discord has largely emphasized the capacity of individual social actors to navigate conflicting social expectations by strategically manipulating semiotic resources, using voluntary bodily movements, to convey conflicting messages across distinct channels of communication. By contrast, my research highlights how parts of the body can themselves communicate purposes distinct from their associated social subject's intent, often happening in the same medium of communication (e.g., visibly withdrawing from a touch and becoming visibly erect in response to that touch)—producing a kind of intra-individual discord (see, McElhinny 1998, 181). In this way, my findings resonate with McKim Marriott's (1976, 109) observation that "what goes on *between* actors are the same connected processes of mixing and separation that go on *within* actors." Specifically, I suggest that rather than thinking of an individual as a singular subject who is demarcated by a single corresponding body, scholars

might consider moments when it is more useful to analyze discordant practices through the lens of distinct subjects rather than a single subject transmitting conflicting messages.

The discord evident in my acts of refusal (e.g., "I'm OK, thanks" and pushing away the suitor) and the arousal response can be viewed as two distinct social actors emerging from what is normally understood to be one subject (i.e., there is a bifurcation of subjectivities). While I do not suggest viewing these subjects as essentially distinct, highlighting their emergent differentiation enables an analysis of how this intrapersonal conflict is negotiated in a way similar to interpersonal conflicts. My attempts to hide the unintentional arousal response by keeping it out of my potential suitor's view are not so different from one person shushing another or a parent sidelining an impulsive or socially inappropriate child in an interaction to avoid embarrassment. Additionally, my compulsion to hide the sign of arousal and quickly terminate the interaction before my suitor could notice may suggest that presenting a coherent embodied subjectivity was important for my presentation of self in the situation.

My understanding of physiological phenomena having the capacity to constitute social actors is related to "the posthumanist proposition" that I discussed in Chapter 4. Notably, because an erection is ostensibly a transient physiological process, it lends itself to an agential realist characterization. Specifically, the phenomenon—within the social interaction—enacts an agential cut by which it emerges as a distinct agent (from the social actor associated with the same body). Using Goffman's participant framework as a diffractive lens, the physiological phenomenon becomes intelligible as a "speaker" (and possibly even an overhearer—for the unwanted tactile communication). This is because, as I have discussed already, my physiology communicated information distinct from what I—the socially recognized interlocutor—conveyed.

In making this point, my project builds upon the work of applied linguists who have initiated the field's foray into posthumanist analysis by proffering an answer to the question of what happens when we adopt "the posthumanist proposition" that material phenomena exercise agency in social and cultural activities (see, Lamb & Higgins, 2020). Importantly, I am not characterizing the materiality of the body as some inert mass that may be used as a semiotic resource or passive instrument (see, Blackman and Venn 2010). Rather, because agential realism informs my posthumanist perspective, I have understood physiological phenomena as constituting *emergent* social actors within a participant framework. In other words, my analysis has recognized the potential for materiality to, in its ongoing reconfigurations, instantiate meaningful signs (independent of the will of any rational or human actor). As we will see in the next chapter, this understanding of the body has the potential for significantly altering how we might theorize HIV nondisclosure and sexual (mis)conduct more generally.

6.5 Discussion

Although this chapter has emphasized the role of nonverbal communication, verbal communication is not wholly replaced by nonverbal practices in spaces of sexual silence; rather, spoken language remains a potential resource for indicating dispreference and initiating repair sequences in interactions within the bathhouse. Notably, the use of verbal communication in these situations serves to highlight how interlocutors invoke different modalities of communication to leverage their distinct capabilities or to avoid the limitations of another modality of communication.

Preference and dispreference refer to "the alignment in which a second action stands to a first, and the alignment which recipients take up toward a first pair part by the second pair part which implements their response" (Schegloff 2007a, 59). In this framework, actions that

"are delayed, qualified and accounted for are termed 'dispreferred'." (Kitzinger and Frith 1999, 302). Consistent with how others have observed that refusals are dispreferred in many social contexts, (Labov and Fanshel 1977, 86—88; Kitzinger and Frith 1999, 302), my refusals in the excerpts above were mitigated and indirect refusals (e.g., "I'm OK, thanks" rather than "no."), which are hallmark features of dispreferred responses (Kitzinger and Frith 1999, 302).

Despite being dispreferred (and inconsistent with the general custom of silence), verbal refusals seemingly fulfill an important purpose in instances of misaligned understandings or goals in interactions within the bathhouse. It has been observed elsewhere that interlocutors may initiate repair sequences to deal with "problems such as impropriety or transgressions of social norms" (Albert and de Ruiter 2018, 286). More generally, as explained by Emmanuel Schegloff (2007b, xiv), repair sequences aim to ensure "that the interaction does not freeze in place when trouble arises, that intersubjectivity is maintained or restored, and that the turn and sequence and activity can progress to possible completion." Applying these insights, my initiation of repair sequences can be understood as responses to social transgressions (i.e., persisting in sexual advances after a nonverbal refusal) to resolve intersubjective conflict and, in doing so, bring the interaction to its end.

Notably, these instances of initiating repair verbally suggest that interlocutors can strategically invoke the distinct affordances of different modalities to better achieve their communicative objectives. For example, my use of verbal communication when my would-be suitor did not acknowledge my nonverbal refusals could be understood as an attempt to invoke the greater referential legibility of spoken language to express my refusal more clearly. A similar phenomenon has been observed in code choice when initiating repair sequences. As noted by Celia Kitzinger (2012, 230), "[r]epair practices both harness, and are constrained by,

the grammatical resources available in a particular language . . . .” Paralleling this insight, my findings indicate that repair practices similarly harness, and are constrained by, the potential communicative functions that are more readily available in a particular modality of communication.

Additionally, my findings may contribute to the field’s understanding of *how* nonverbal communication is meaningful. While shared context-specific social norms certainly guide interlocutors’ interpretations of nonverbal negotiations of sexual consent, my findings also suggest that bathhouse patrons’ tactics are meaningful when set against the background of cultural norms and basic interpretive principles (e.g., relevance). This is perhaps especially well illustrated in the introductory vignette to this chapter wherein my partner interpreted my gestures with the condom. Recall how I communicated a query about my partner’s sexual preference in the introductory vignette by slowly moving a condom between us. In doing so, our potential relationships to the condom (i.e., who would be wearing it and who would not) was at least partially meaningful due to the shifting levels of privileged access to the condom that my gestures produced. By presuming the deictic dimensions embodied in my gestures to be relevant to my intended communication, my partner was able to interpret my intended question and respond to it by taking the condom to adopt the role of “top” in the encounter. Notably, verbal communication could not have achieved this same outcome because speech could not as readily embody these relations given the absence of a shared language.

The most basic forms for nonverbally negotiating consent in bathhouses (e.g., eye contact, nodding, tentative touching) may similarly be viewed as meaningful at least partially because of how they concretely telegraph and structure possibilities for subsequent action. That is, these nonverbal communicative practices embody potentials that would facilitate sexual

activity (e.g., making physical contact). Refusals in the bathhouse context likewise rely on the interlocutor's ability to embody certain relevance relations in the form of enabling or inhibiting possibilities or purposes. For instance, by pulling away from a touch, the movement prevents the continuation of the tactile exchange. Recall that the tactile negotiation itself is a means for eliciting pleasure and desire. By creating distance and preventing this exchange of sensory information, the channel of communication is disconnected; thus, the relevance of pulling away from a touch is meaningful not only because of context-specific expectations regarding its use but also because it extinguishes the mode of communication that enables the experience of sensual pleasure.

Notably, theories of meaning-making that assume intentionality (e.g., speech act theory) cannot answer the question of what happens when the body fails to embody an intended message, materializing instead a discordant but intelligible sign. When I rebuffed the second unwanted suitor (as mentioned in the previous section), for instance, my body's reflexive arousal response communicated information that I did not intend to convey. Because this available interpretation was not intended, a framework that is not dependent on intention is necessary to further my analysis.

Providing a means for conceptualizing the process by which language encodes unintended meanings, McConnell-Ginet (2008, 514) offers the idea of CONCEPTUAL BAGGAGE, which includes "what traditional lexicographers and others have called connotations, ... encyclopedic knowledge, stereotypes or prototypes, and background assumptions, as well as knowledge about social practices in the course of which the word gets used." CONCEPTUAL BAGGAGE, she explains, highlights how an expression is always nested within indexical relations or associations, which are always at least partially accessible for aiding in

interpretation. In this view, background knowledge about what an erection connotes (e.g., sexual desire) or facilitates (e.g., sexual activity) can have implications for the interpretation of my attempt to rebuff an unwanted advance in ways that I did not anticipate. My physiological signs of arousal, then, could have been interpreted as meaningful despite their reflexive (unintentional) nature because they embodied possibilities for subsequent sexual activity.

By providing a detailed account of nonverbal negotiations of sexual consent, this study has responded to the debate on verbal consent requirements in sexual assault and rape law. Specifically, building upon research that has found that people generally negotiate consent wordlessly, I have examined some strategies and conventions that bathhouse patrons use in spaces of sexual silence to make such negotiations sufficiently legible to negotiate sexual consent. Although verbal consent is generally more legible than nonverbal forms of communication, my findings suggest that, with the enrichment of context and the aid of social conventions, nonverbal modalities are adequate for negotiating the complexities of sexual consent while also enabling distinct possibilities for interaction, such as making the process of negotiation more pleasurable. What is more, as others have argued, a legal requirement for explicit verbal consent would have the consequence of criminalizing many (perhaps even most) forms of consensual sex, especially in sexual minority communities like my research community. By contrast, a standard that accepts nonverbal affirmative expressions of consent as legitimate would be able to better account for a community's specific norms for negotiating consent (e.g., norms that make nonverbal tactics for negotiating consent legible). In this way, this less restrictive standard (i.e., affirmative but not explicit and verbal consent) would better balance concerns of sexual exploitation with the value of sexual diversity and pleasure.

Additionally, echoing the findings of other language and embodiment research, my findings indicate that bathhouse patrons' nonverbal practices are meaningful not only due to contextual conventions but also because they concretely constrain or privilege subsequent potential actions. That is, they differentially embody possibilities or purposes, and thus may acquire meaning in relation to what subsequent activities they thwart or enable. As my experiences in the field have shown, however, matters become more complicated when conflicting meanings become embodied through intentional and involuntary bodily activities. For this reason, I have suggested that it may sometimes be more useful to view the parts of bodies of a given social actor as occupying distinct and emergent subject positions within an interaction. By being attentive to how the body may act in meaningful ways that are contrary to the intent of the social subject that the body is commonly thought to represent, linguistic anthropological research may better understand how social actors reconcile seemingly discordant or conflicting bodily activities, including involuntary ones (e.g., slips of the tongue), in everyday practices (see, Billig 1999; 2006). By further interrogating this issue, linguistic anthropologists may open up unfamiliar techniques for examining familiar situations, including the processes by which social actors reconcile involuntary bodily activities with their self-representations, how they engage in ascetic practices to discipline their bodies to better comply with their wills (see, Foucault 1988; Rose 2001), and how they make sense of themselves in the world.

6.6 Conclusion

My account of nonverbal negotiations of sexual consent in Toronto bathhouses elucidates some strategies and techniques that individuals may use when interpreting and communicating sexual consent and refusal across modalities. While verbal communication is

sometimes used in these negotiations of sexual consent, context-specific conventions and expectations allow bathhouse patrons to navigate the nuances of intimacy-building without relying on the spoken word. Using this repertoire of context-specific strategies and techniques, bathhouse patrons may achieve a variety of social and linguistic purposes, including self-presentation, politeness, intimacy-building, and the negotiation of sexual consent.

This autoethnographic account further demonstrates that nonverbal modalities are sufficiently legible, adaptable and determinate to negotiate the complexities of sexual consent. Specifically, I have shown that the social norms of the bathhouse are such that the legibility of nonverbal consent to sex is also understood as encompassing consent to the risks that accompany it in these contexts. Moreover, my findings indicate that nonverbal modalities may just as clearly communicate refusal while also having the affordances of allowing others the opportunity to save face (important in semi-public sexual settings) and more directly express intimate poetic functions as *part* of the negotiation of sexual consent. Synthesizing these insights, I conclude that verbal requirements for consent in sexual assault law and policy are unnecessary and likely serve to undermine, rather than protect, sexual agency among those most vulnerable, including the communities that I am examining.

My findings may also suggest that theories about sexual assault and consent that presuppose rational, autonomy-centric values to support the legal regulation of sex may not be sufficiently attentive to how sexuality is a deeply physical and bodily experience. Specifically, the possibility for intrapersonal discord across affective and rational faculties suggests that legal theorists should reconsider their presumption that sexual assault is primarily a violation of a person's sexual autonomy. As I demonstrate in the next chapter, models of bodily subjectivity that account for the physiology of the body and the visceral experience of intimate

relations may provide a more principled standard for adjudicating potential instances of sexual assault, including cases involving HIV nondisclosure. By decentralizing autonomy, scholars might better understand how consent (as a rational exercise of autonomy) plays an important but not definitive role in distinguishing lawful sex from rape. By contrast, emphasizing the bodily experience of sex has the potential to provide legal theorists and jurists with more sophisticated standards for determining what kind of sex is rape, including nuanced metrics for deciding what kind of frauds do and do not constitute rape-by-fraud.

7. Matters of bodily integrity

Rape-by-deception and a theory of bodily subjectivity

7.1 Introduction

As discussed in Chapter 3, courts have traditionally distinguished between criminal instances of *fraud in the factum* (i.e., instances where the fraud is related to the nature and quality of the activity) and non-criminal cases of *fraud in the inducement* (i.e., instances where the fraud misrepresent the outcomes of an activity) to avoid criminalizing all fraudulently obtained sexual consent (see, Falk, 1998; Rubenfeld, 2013b; Wertheimer, 1996). This was established in *R. v. Clarence* (1888) where the Supreme Court of Canada held that fraud vitiates consent to sex only if the deception misrepresents the nature or quality of the act itself. Recall, however, that the crimes of rape and indecent assault would be subsumed under the umbrella of a single, more general, assault provision (s. 265) in 1983. The new provision no longer included qualifying language for fraud, stating instead that no consent is obtained if the consent is induced by fraud, *simpliciter*.

Following this change, the traditional standard was consistently upheld (e.g., *R. v. Petrozzi* and *R. v. Ssenyonga*) until 1998. In *R. v. Cuerrier* (1998), the Court ruled that the changes to the *Code* indicated Parliament's intention to expand the legal interpretation of fraud-based sexual assaults. It was ultimately ruled that the traditional standard of criminalizing only instances of *fraud in the factum* would no longer apply. Writing for the majority opinion, Justice Cory stated:[71]

[71] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at *para* 125.

> Persons knowing that they are HIV-positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for [commercial] fraud namely dishonesty and deprivation. That fraud may vitiate a partner's consent to engage in sexual intercourse.

As noted in Chapter 3, Justice Cory did not say that all deceptions that result in deprivation or risk of deprivation would vitiate consent; rather, he stated that HIV nondisclosure satisfied those two elements of fraud. Moreover, although he did not discount the possibility of expanding the interpretation of sexual fraud further, he observed that at the very least an extension to cases involving the risk of serious bodily harm is warranted (presumably because this would be a material fact for most people when deciding to have sex).

It is implicit in the majority's opinion (and expressed in Justice L'Heureux-Dubé's concurring opinion) that the importance of consent for defining the *actus reus* is evident in consent being an exercise of autonomy (see, Wertheimer 1996; Buchanan 2015). But, the posthumanist insight provided in the previous chapter suggests that there is reason to believe that negotiations of consent may not entirely be exercises of persons' autonomy (e.g., the body may be a salient social actor independent of a conscious decision-making faculty). My goal in this chapter, then, can be understood as a re-examination of the generally accepted theory that it is bodily autonomy—and not some other right—that is at stake in sexual assault cases.

7.2 Rape-by-deception—a debate

Legal theorists have generally agreed that extending the interpretation of sexual fraud to include HIV nondisclosure, but not material deceptions more generally is unprincipled. Marina Rey (2011, 92), for instance, states that she cannot identify a principle for singling out HIV nondisclosure (or nondisclosure of any sexually transmissible infection) as capable of vitiating fraud in the Supreme Court's decision. She further contends that a more principled

prohibition on sexual fraud (e.g., criminalizing all fraudulently obtained consent) would too greatly expand the offence of assault (Rey 2011, 93). Kim Buchanan (2015, 1276) likewise argues "that sexual autonomy cannot explain the criminalization of HIV nondisclosure when almost all other material sexual deceptions are lawful." Buchanan further notes that HIV nondisclosure is rarely convicted when the complainant is a member of a stigmatized group associated with a high risk of HIV (e.g., gay, sex worker, IV drug user) while members of stigmatized groups are regularly convicted "even when their actions pose no risk of transmission" (e.g., spitting on a police officer).[72] Buchanan (2015, 1342) concludes from this that "[i]n action, HIV criminalization seems to protect an inchoate expectation that heterosexuals should be immune to anxiety about HIV—even when they engage in casual, unprotected, or commercial sex."

More generally, legal scholars have struggled to find consensus on a principled method for adjudicating instances of sexual fraud. Indeed, Jed Rubenfeld (2013b, 1372) recently observed that the traditional standard of distinguishing instances of *fraud in the factum* from cases of *fraud in the inducement* cannot be justified using internally consistent logic. Specifically, he argues that if sexual autonomy (i.e., the right to choose what kind of sex we have and with whom) is the object at issue in an instance of rape or sexual assault, then material deceptions should be criminalized irrespective of whether they misrepresent the nature of an act or its consequences because fraud denies a person the conditions necessary to make an informed and free choice—that is, it denies her autonomy. Moreover, he notes that in every other area of the law, courts interpret both *fraud in the factum* and *fraud in the inducement* as

[72] Buchanan draws from both Canadian and American example cases.

being capable of vitiating consent (e.g., misrepresentations used to commit larceny and trespass) (Rubenfeld 2013b, 1398—99). As Rubenfeld (2013b, 1399) insightfully questions, "[i]f the false meter reader cannot claim consent when he enters a person's home, why can a false bachelor claim consent when he enters a woman's body?"

Proffering a solution to what he dubs the "riddle" of rape-by-deception, Rubenfeld argues that sexual autonomy is not and has never been the *true* principle underlying rape law.[73] Indeed, Rubenfeld (2013b, pp. 1424—1425; emphasis in original) goes so far as to say that "sexual autonomy is a red herring when it comes to rape" and that it "*is irrelevant to rape law*." For Rubenfeld (2013b, 1425), defining rape as infringing upon a person's sexual autonomy fails to capture the way in which rape is not simply an infringement of another's decision-making faculties but instead an invasion, occupation, and *possession* of that person's body. This violence, he contends, is more aptly characterized in relation to the right to self-possession, which protects a person's right to exercise fundamental control over her or his body. Conceptualizing rape in terms of a violation of autonomy characterizes rape as a negation of a person's will; by contrast, conceptualizing rape as a violation of self-possession identifies rape through the way it physically takes possession of another for sexual purposes.

Crucially, Rubenfeld distinguishes self-possession from the way a person possesses property. For Rubenfeld, rape involves possessing a person in a fundamental and visceral way—it quite directly divests a person of control over her or his body.[74] Specifically, Rubenfeld (2013b, p. 1426; emphasis added) contends that:

---

[73] Although Rubenfeld writes in the American context, the same principle of autonomy premises sexual assault law in Canada.

[74] This is like how demonic possession is understood as a malign spirit directly taking control of a person's body.

> You don't own your body the same way you own a car. Rather, bodily possession is a matter (like most forms of possession) of physical control. While no one fully controls his body — our mastery of our bodies is partial in a thousand ways and absent in a thousand more — *almost all of us enjoy a basic integration of mind and body that gives us an irreducible measure of physical governance over our bodies and makes our bodies our own*.

In making this distinction, Rubenfeld contends that the right to self-possession stems directly from the integration of our minds and bodies (thus distinguishing it from other forms of possession). Unlike a conceptualization of rape as a violation of autonomy (i.e., it is a negation of a person's will), he argues that rape understood as a violation of self-possession better captures how rape "consists of a power to force the victim to serve the other: to please the other, to be occupied with any task he commands, to exist for his purposes and his satisfaction" (Rubenfeld 2013b, 1427). Thus, in this view, rape is only possible when a person's physical control of her body is usurped by another.

Rubenfeld's characterization of rape as a physical violation (rather than a violation of autonomy) is grounded in his conceptualization of personhood. For Rubenfeld (2013b, 1421), persons cannot exist without boundaries and this boundary is primarily demarcated by our physical bodies, which he seems to view as essentially determinate and fixed in nature. Unlike an autonomy model of personhood, which defines a person in relation to her agency and ability to make choices, self-possession, Rubenfeld contends, recognizes that the basic element of personhood lies in one's fundamental control over her own body. Stated another way, Rubenfeld contends that the relationship between autonomy and the body is indirect because autonomy is the *rational subject's* maintenance of the *physical body*'s borders—the two occupy distinct domains (mental and physical)—while self-possession characterizes the immediate, direct integration of the mind and body. This fits in neatly with his argument that

autonomy abstractly views the harm of rape as an infringement of choice rather than a bodily violation of one's most basic form of personhood (Rubenfeld 2013b, 1425). By Rubenfeld's account, rape, like torture and slavery, denies a person of her fundamental control of her body, resulting in the violation of her right to self-possession.

Returning to the issue of rape-by-deception, Rubenfeld (2013b, 1433) contends that replacing sexual autonomy with self-possession solves the issue of rape-by-deception because *only* through force or threat of force (and thus not fraud) can one fundamentally divest a person of control over her or his body. Analogies to other violations of the right to self-possession (e.g., slavery), he contends, are especially helpful for understanding the concept of self-possession and its implications for rape law. If, for example, one imagines a case where a person is duped into believing he is performing paid labour when the "employer" has no intention to pay for services rendered, this person is the victim of fraud, not enslavement (Rubenfeld 2013b, 1432). By analogy, then, deceptively obtaining sexual access to another's body (in his account of self-possession) is better understood as fraud, not rape, because the manipulation does not divest a person of fundamental, physical control over her body.

Pre-empting resistance to his proposal of a force requirement for rape, Rubenfeld explains why coercion (other than the threat of force) cannot be the basic requirement for rape: because it ultimately relies on the definition of rape as unconsented-to sex, which the issue of rape-by-deception reveals as fundamentally flawed. Specifically, Rubenfeld (2013b, 1412) argues that:

> The coercion requirement's exclusion of rape-by-deception is contradicted by its own internal logic. Coercion is objectionable because a coerced "yes" does not reflect a valid or genuine consent. But the same is true of a deceived "yes." An anti-coercion principle is attractive because coerced sex is unconsented-to sex. But if unconsented-to sex is rape law's target, then *deceptive sex ought to be punished as well*.

In saying this, Rubenfeld contends that no internally consistent theory of rape can define rape as merely the absence of consent to sex because doing so would fail to provide a principled standard for determining what forms of deceptions constitute rape. By contrast, Rubenfeld's theory of self-possession is internally consistent because only force would physically divest a person of her fundamental bodily faculties—and deception is not force. He distinguishes the threat of force from other threats by observing that the threat of force still relates to the physical body whereas other coercions do not.

Unsurprisingly, many legal theorists have taken issue with Rubenfeld's insistence that rape requires force, arguing that other alternatives to sexual autonomy are preferable to self-possession. Deborah Tuerkheimer (2013), for instance, argues that while Rubenfeld's critique of sexual autonomy is well-founded, his proposal of a force requirement for rape is less appealing than many of its alternatives. More specifically, Tuerkheimer (2013, 336) argues that Kathryn Abrams's (1999) articulation of sexual agency recognizes that sexual actors' choices are always constrained and that "we make decisions that are less than fully informed." Unlike autonomy, which idealizes an impossibly independent subject that cannot be meaningfully realized when subordinated, Tuerkheimer contends that sexual agency "leans toward a positive understanding of sex—sex not only as pleasure, but as resistance to subordination." In this view, sexual agency offers a way for theorizing how women can occupy constrained social positions while also engaging in meaningful and empowering sexual encounters (see also, Cahill 2016).

This increased attentiveness to how agency always operates within constraints, Tuerkheimer (2013, 343—44) argues, explains why "sexual misrepresentation might be tortious or even criminal. But, except under narrow circumstances, it does not seem to be rape."

Specifically, she argues that it is not being misinformed *per se* that renders consent defunct (because choices are always constrained) but rather the issue of whether the deception is "sufficiently reprehensible" to invalidate consent. Some have noted, however, that this formulation of sexual agency does little to advance the project of developing a principled and objective standard for adjudicating the issue of rape-by-deception because it does not provide a precise metric for determining when a deception is "sufficiently reprehensible" (see, Rubenfeld 2013a; Vidler 2017). Indeed, if sexual agency defines culpable sexual misconduct by its quality of overcoming or denying a woman's agency (as opposed to actively seeking it out despite its constrained nature) (see, Cahill 2016), then any deception intended to deprive a woman of information material to her decision to have sex (i.e., her exercise of sexual agency) should be called rape, resulting in the same problem that arises when rape is understood as a violation of sexual autonomy.

Nevertheless, it is not clear to some scholars that the general criminalization of all material deceptions used in negotiations of sexual consent is a problem. Tom Dougherty (2015), for instance, concedes that an *ad hoc* approach to criminalizing sexual fraud is unprincipled but contends that Rubenfeld has not sufficiently explained how a force requirement for rape is preferable to simply following through with sexual autonomy's logical implication that almost all sexual deceptions result in rape. For Dougherty (2013; 2015), valuing autonomy and following through with its implications for deceitful seductions is the only ethical solution to the so-called "riddle" of rape-by-deception because all alternatives fail to adequately respect people's choices about sexual activities, which are always highly personal and intimate. Unlike the majority in the debate who advocate for practical (but not necessarily principled) approaches to handling cases of rape-by-deception that criminalize

reprehensible or uncommon forms of deception (e.g., impersonating your twin to have sex with your sister-in-law) on an *ad hoc* basis (e.g., Buchanan, 2015, p. 1277; Ramachandran, 2013, p. 387; Tuerkheimer, 2013, p. 345), Dougherty (2015, 333) takes a highly principled stance in this debate, supporting a concept of rape as a violation of sexual autonomy without suggesting practical exceptions from his high standard for consent (e.g., he would consider any material deception to be capable of vitiating sexual consent). To this, Rubenfeld (2013a, 391) briefly responds that he has no rebuttal other than he does not think that most people would be satisfied with a definition of rape that likely criminalizes normatively expected kinds of sexual courtship (e.g., false professions of love or lies about age).

Others have challenged the idea that sexual assault law is not premised solely on the principle of sexual autonomy, contending that the important policy purposes that rape law serves cannot be maintained if it is reduced to instances of forced sex as Rubenfeld proposes. Corey Yung (2016), for instance, argues that it is acceptable to provide an overly broad principle to protect against sexual misconduct because a society that does not condone sexual exploitation and violence is preferable to one that disregards all but the most egregious sexual misconduct. Essentially, Yung is saying that the law does not have to be principled if it is understood as a method of achieving its desired policy effects. However, as Vidler (2017, 124) explains, "while such refutations are noteworthy, they possibly address an issue different in nature to that of Rubenfeld's argument. Yung… provides no guidance for a determinative standard, principle or device that may be utilized to adjudicate an allegation of sexual assault." In other words, Vidler is saying that Yung merely reasserts the normative argument that rape is whatever sex acts society doesn't want to be lawful, which is inapposite to Rubenfeld's endeavour of developing a principled framework. Moreover, as Rubenfeld's (2013b, 1434)

view of rape does not limit what laws could be used to police sexual misconduct more generally through mechanisms other than rape law, Yung's fear of a society that sanctions violence against women could perhaps be addressed as other forms of criminal misconduct.

In this chapter, my objective is to provide an alternative to Rubenfeld's approach of criminalizing only instances of rape-by-force while similarly meeting the law's need for principled reasoning and without significantly weakening the protections that rape and sexual assault laws currently afford victims. I would like to explicitly state, then, that this is not intended to limit the possible range of criminalized sexual offenses but instead to define what misconduct should *necessarily* be considered rape or sexual assault.

7.3 On the matter of bodies

While seemingly intuitive, Rubenfeld's characterization of the self as demarcated by the body's physical boundaries has been critiqued as overly simplistic. As Gowri Ramachandran notes, this model of the body makes it impossible to have a principled distinction between rape and other forms of bodily violations, which do not have the same social significance as rape. Specifically, Ramachandran (2013, p. 380; emphasis added) argues:

> The problem with this definition of self-possession is that *it doesn't explain why rape is unique*. I've been deprived of this form of self-possession if I'm put in handcuffs or tied to a chair, if someone grabs my arm to prevent me from defending myself against an attack, or if I'm force-fed a piece of chocolate cake.

For Ramachandran (2013, 371), the unique history of rape as a tool for subjugating women means that it should be criminalized as distinct from other forms of violation. Rubenfeld's account, she contends, fails to capture this significance. She does not clarify, however, why elegantly capturing the similarities between sexual violence and other forms of bodily violence is undesirable. Indeed, this was one of the primary goals of feminist activists seeking reforms

to rape and sexual assault law in Canada because "[d]esignating rape as a kind of assault emphasize[s] the affinity between unwanted sexual aggression and other forms of assault and battery" (Ehrlich 2001, 22). Additionally, by emphasizing how rape is like other (less stigmatized) forms of assault and battery, rape victims may feel more comfortable seeking justice.

Although relating rape to assault more generally may potentially "give the impression that sexual imposition is not much of a consequence unless it is accompanied by violence" (Lees, 1996, p. 242; cited by Ehrlich, 2001, p. 153), this has not generally been the case in Canadian courts. Following the subsumption of rape under a more general assault statute, courts seem to highlight the importance of ascertaining the presence or absence of consent—that is, the exercise of autonomy—in sexual assault cases (see, Wertheimer 2003). Recall, for example, how in *Cuerrier* Justice L'Heureux-Dubé noted that the "objectives of the 1983 assault scheme are to *protect people's physical integrity from unwanted physical contact*, and to *protect people's personal autonomy to decide under what conditions they will consent to be touched*."[75] This suggests that the substantive revisions to the *Criminal Code* were not meant to reductively define rape as requiring physical violence but instead recognize how rape is itself a kind of violence. Additionally, the fact that the Supreme Court ultimately ruled that it was the absence or invalidation of consent, not the use of physical force, that defines a sexual assault implies that courts seem to have not fallen prey to the crabbed view of sexual assault that Ramachandran fears.

[75] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at pp. 374 (emphasis added).

Nevertheless, Ramachandran is correct that Rubenfeld's account of self-possession may not adequately capture how women experience rape because of its unique history. Several scholars have argued that Rubenfeld fails to capture how rape is unique in the social lives and personal experiences of women and rape victims (Tuerkheimer 2013; Falk 2013; Ramachandran 2013). Ramachandran (2013, 387), for instance, critiques Rubenfeld's formulation because it ignores how "sex is important because of its social meaning and implications, not only for the physical experience."[76] While she accepts that neither sexual autonomy nor self-possession captures fully how "rape subordinates women," she contends that sexual autonomy at least "recognizes that sex is important for its social effects and cultural meaning" (Ramachandran 2013, 388).

Rubenfeld (2013a, p. 403; emphasis added), however, maintains that this is not an accurate characterization of his position, arguing that:

> the right to bodily self-possession *does* capture the deep connection between rape and the subordination of women. At least it was supposed to. It's pretty uncontroversial, I would have thought, that a cardinal feature of women's subordination over the centuries—perhaps the defining feature—has been the notion that women's bodies don't, fundamentally, belong to them… Women's bodies are there for the taking: this kind of thinking has been a definitive feature of the crime of rape, as it has been engaged in by men against women, for about as long as recorded history describes it. In this way, the assertion that women's bodies belong to men sums up what might be called the ideology of rape and, in a sense, the whole history of women's subordination.

For Rubenfeld (2013a, 405), although force can "be understood in purely physical terms, the thesis that rape is a violation of self-possession cannot be." The possession of another, the action of subjugating her body through forceful control, he further contends, "cannot be wholly

[76] Although Ramachandran doesn't explicitly state what she means by the "social meaning" of sex, it seems that she is referring to the importance or significance of sex in society.

captured by a merely physical description." That is, he argues that his self-possession model recognizes that rape is "not only physical; it's also a matter of social, cultural, and psychological meanings—especially what it means to have sex forced on you against your will." It would seem, though, that his account of self-possession, as Ramachandran contends, is primarily fixated on the physical dimensions of rape even if it does not deny the social, psychological and cultural *consequences* (as opposed to elements) of the act.

7.3.1 The socially configured body

While Rubenfeld's self-possession model of mind-body integration does not necessarily deny the social, psychological and cultural *effects* of rape, it does not explain how these elements are *constitutive* of the metaphysics of rape. His critics, by contrast, conceptualize rape as an act that is *saturated* with social meaning derived from its unique history of gendered violence; and that this social history should be included in an account of the body. Ramachandran (2009, 2), for instance, elsewhere argues that "there should be no one-to-one mapping between the physical borders of the organic, integrated human body and the legal borders of the rights derived from it." She further asserts that the body, rather than being a purely physical entity, is constituted by social and cultural practices (Ramachandran 2009, 23). In this way, Ramachandran explicitly builds upon the work of Judith Butler to conceptualize the body not as some self-evident objective matter (as Rubenfeld seems to) but instead as the product of discursive practices. For Butler (1993a, p. 9; emphasis added), what we know as the body is constituted by an assemblage of social and cultural practices that undergo "a process of materialization that stabilizes over time to produce the *effect* of boundary, fixity, and surface we call matter." Building upon this poststructuralist view of the body, Ramachandran argues that the body, in law, should be understood in relation to the social

and cultural activities that denote its use and form—not some strict sense of control/possession or autonomy over the physical body. Ultimately, Ramachandran (2013, 388) concludes that while neither self-possession nor autonomy adequately captures this relationship between the body and social practices, sexual autonomy at least "recognizes that sex is important for its social effects and cultural meaning." Justifying this choice between two inadequate accounts of bodily materialization, Ramachandran (2013, 388) incisively concludes that "[i]f law must make room for lofty abstractions, I'd suggest the one a little closer to earth."

Rubenfeld (2013a, 402), however, counters that, if anything, his model of self-possession is more grounded in reality than Ramachandran's interpretation of autonomy, arguing that his self-possession model of mind-body integration, which is mapped to the physical body, "at least has the virtue of remaining relatively close to earth." Although Ramachandran (2009, 4) recognizes that the "body is especially personal because it grounds our subjective experience, the experience that others cannot directly access," the precise relationship between the body and subjectivity, unlike in Rubenfeld's proposal, is left conspicuously absent from her account. This suggests, then, that if Rubenfeld's account, as Ramachandran contends, does not satisfactorily address the constitutive social and cultural forces in the metaphysics of rape, her own position conversely does not address the materiality of the body and the mechanism by which it "grounds" subjectivity.

7.3.2 Sexual integrity and mind-body integration

Similarly recognizing the need for a theory of rape that integrates the body and subjective experience, Vidler (2017, 125) considers Nicola Lacey's theory of integrity as a potential alternative to Rubenfeld's self-possession. For Lacey (1998b, 118—23), integrity is the alignment of one's "sexual imago" (i.e., one's psychic understanding of sexual activity)

with one's bodily sexual experience. As Vidler (2017, 125) notes, this implies that deception results in rape because misrepresentations distort how a person psychically understands the sexual act, thus fracturing the process of achieving integrity. Although this seems to provide support for a sexual integrity model of mind-body integration that evidences a right to sexual autonomy, Vidler ultimately concludes that the "misalignment of imagoes would conceivably be pervasive in sexual interactions, rendering Lacey's principle operationally defunct and very difficult to establish evidentially." Stated in another way, Vidler is saying that Lacey's model would mean that deceptions are inherently inimical to sexual integrity, resulting in very common sexual behaviours (e.g., false professions of love) and justifiable nondisclosures (e.g., a transgender person not disclosing her or his birth-assigned sex to a casual sexual partner) being deemed as rape or sexual assault.

It is important to note, however, that Lacey's proposal of sexual integrity is not one of legal reform but rather a premise for a political and ethical ideal. She explicitly remarks that this ideal of integrity "is, in one important sense, impossible: it is not something which can be realised or determined institutionally; rather, it operates as a vision which generates both individual ideals and critical standards for the assessment of existing legal and political arrangements." For Lacey (1998a, 65), the ideal of integrity is not something that legal apparatuses can ever capture or realize—even if they can, by contrast, close off or "kill" possibilities for realizing sexual integrity. Integrity, then, is better understood as a motivation, not a schematic, for legal reform and developing a language for expressing "the real damage of rape… more fully" (Lacey 1998a, 63).

7.4 Meeting the body halfway

Although Lacey's theory of integrity was not intended to address the issue of rape-by-deception, the motivation for her theorizing may provide an important reorientation for theoretical perspectives on rape and sexual assault law. Specifically, like Rubenfeld, Lacey is interested in understanding the relationship between the body and selfhood (although she tackles the question in a very different way). Given that "we need philosophical accounts of agency that are far more imbued with understandings of embodiment, structural inequality, and relationality than the traditional models provide" (Cahill 2016, 759), the intention behind Lacey's theorizing (i.e., recognizing the importance of the body in theorizing rape), if not the theory itself, may provide us with the vantage point necessary for finding a better solution to Rubenfeld's so-called "riddle" of rape-by-deception than a force requirement.

In this section, I identify a new principle for theorizing the violence of rape as neither a purely physical nor abstract phenomenon. Rather, drawing upon insights from the philosophy of science, I present a model of bodily subjectivity that better explains both how the body is a locus of socially productive forces and how the physiology of the body is integral to the materialization of the subject. I then propose that rape may be understood as a violation of the body's ability to materialize this subjectivity. From this, I develop a standard that can, in a principled way, better adjudicate cases involving potential instances of rape and sexual assault, including sexual frauds.

7.4.1 Agential realism: a material-discursive theoretical framework

> It is not, believe it or not, that every object has a line around it! There is no such line. It is only in our own psychological makeup that there is a line.

Richard Feynman.[77]

As discussed in Chapter 4, physicist-philosopher Karen Barad's agential realism is a theoretical framework that can account for both the materiality of the world, including the body, and the mechanisms by which discursive, social, and cultural practices are complicit in processes of materialization. Whereas traditional realist perspectives, like Rubenfeld's, generally take for granted that physical entities have inherent, determinate boundaries, Barad's paradigm, informed by her background as a theoretical physicist, is skeptical of this atomistic view of matter (i.e., the idea that physical objects are identifiable as discrete sets of atoms delineated by physical borderlines). Specifically, she contends that such a view is untenable when one considers how physical reality is fundamentally indeterminate and comprised by entangled, amorphous material relations.

Consider again, as we did in Chapter 4, the example of a world that consists only of water. At no point is there an objective borderline denoting physically distinct bodies of water (i.e., there is no objective point at which one set of atoms can be distinguished from another set). Now, imagine that some water within this universe moves and, in doing so, differentiates itself from the rest of the world through this movement. In an agential realist framework this physical movement is understood as enacting an agential "cut," resulting in *agential separability*. Stated another way, this instance of movement demarcates an objective boundary *within* the broader physical system (although not based on an atomistic understanding of

[77] Feynman, Richard P., Robert B. Leighton, and Matthew Sands, (1964). *The Feynman Lectures on Physics*. Volume I, p. 36. Reading, MA: Addison-Wesley.

physical borderlines); the current is "cut" and made distinct from surrounding phenomena (see, Barad, 2003, p. 815).

Although poststructuralist perspectives similarly deny the possibility of essentially determinate physical boundaries in nature, Barad's agential realism has the benefit of being able to describe the concrete mechanisms by which the interpellation of meaningful subjects, including bodies, are enacted. Whereas poststructuralist positions, like that of Ramachandrand and Butler, view the material world as essentially amorphous and given form through the intervention of "congealing" discursive practices that produce a culturally intelligible "figure" of a subject, Barad's (2003, 827) agential realism posits that "Nature is neither a passive surface awaiting the mark of culture nor the end product of cultural performances."[78] For Barad, the material world is lively, animate, and actively undergoing a constant process of reconfiguration that does not rely exclusively on human intervention for ontological determination (e.g., a current's physical differentiation enacts its agential separability within the local resolution of the activity within the broader, otherwise amorphous, physical system). While poststructuralists would likely not disagree with the way that agential realism posits the material world as resisting cultural interpellation,[79] a poststructural framework is itself incapable of explicating this agency and resistance because it does not account for the possibility of physically emergent metaphysical boundaries absent human intervention (see, Barad 1998, 90). An agential realist account, by contrast, necessarily explicates the concrete

[78] Like many philosophers of science, Barad uses "Nature" to refer to the natural world and physical laws and "nature" to refer to wilderness or essential character.

[79] Indeed, Butler (1993a, 2) expressly states that the body resists the norms by which its materialization is impelled.

exclusionary practices by which agents, actors, and objects (or whatever you want to call them) materialize within otherwise amorphous physical relations.

7.4.2 Toward a legal theory of bodily subjectivity

From Barad's general account of posthumanist subjectivity, a more specific theory of bodily subjectivity may be derived. Although an agential realist account necessarily recognizes that bodies are not essentially discrete physical entities, central nervous systems and apparatuses of perception more generally offer an objective point for identifying the *emergence of physiologically distinct subjects*. For instance, even though there is no objective point in which a person's atoms are differentiated from her lover's atoms, the two lovers' central nervous systems produce distinct experiences of reality, evidencing a physiologically derived agential separability within the broader system (see, Barad 2013).[80] The neural impulses that communicate the viscerally experienced sensation of touch between the two lovers operate in two distinct nervous systems: one does not experience a mutual touch the same as the other participant in the act.[81] In this way, physiological apparatuses produce, through "observation," a differentiation of the "self" and "other"—a realization of the "self" as a discrete physical entity. In technical terms, then, a touch is not simply a matter of contact between two pre-existing subjects, but rather an activity that contributes to the exclusionary and

[80] Although there is no objective way to describe discrete lifeforms (see, Skillings 2016), my objective here is to understand where subjective experiential discreteness emerges and, thus, my argument is specific to that way of organizing life.

[81] This explains, in concrete terms, Ramachandran's (2009) observation that the body is especially personal because it is the material basis for producing distinct experiences of reality.

contemporaneous production of those distinct subjects.[82] In this view, the bodily self conditionally and contextually emerges through the logic of *I feel therefore I am*.

This physiological self-awareness, what I will henceforth call bodily subjectivity, provides an objective basis for deriving a principled justification for protecting subjects' rights to bodily integrity because a bodily subject cannot meaningfully exist when its ontological boundaries are challenged. This model therefore accords with Rubenfeld's argument that the self cannot exist without a boundary but differs by explaining the mechanisms by which the self emerges from the body rather than relying on common-sense understandings of the body's physical delimitations. Additionally, because the boundaries of bodily subjectivity are iteratively configured through physiological apparatuses of perception, sexual intimacy does not necessarily violate the boundaries of the self as Rubenfeld (2013b, 1421) theorizes it does.[83] In fact, in this model of mind-body integration, sex might be better understood as an apparatus by which one's bodily subjectivity's boundaries are reconfigured, suggesting that sex is potentially a valuable tool for visceral self-actualization and expression (see, Lacey 1998a). In this account of bodily subjectivity, the visceral experience of willingness to engage in a sexual act with another person might be understood as indexing a recalibration of the borders of experiential subjectivity in relation to the differentiated phenomena (e.g., a sexual partner), suggesting that the feeling of willingness implies that the boundaries of the self are not violated by the recognized and accepted *other*. By contrast, a violation of bodily integrity occurs when

[82] This resonates closely with Ramachandran's observation that the body is especially important because it "grounds" our subjective experiences — those experiences that others have cannot directly access.

[83] ("…autonomy and sexuality are situated very differently with respect to this boundary. Autonomy jealously guards it, fearful of every puncture or penetration. Sexuality, by contrast, desires nothing other than this boundary's violation, both physically and psychologically.")

an apparatus (e.g., a touch) challenges the body's production of experiential discreteness. *In this way, a violation of one's bodily integrity is a violation of the very experience of life.*

Given that I am describing the fundamental relationship between bodily integrity and viscerally experienced agential separation, this bodily subjectivity model does not take for granted a distinction between "sexual" or other physical touches—or even what constitutes a "sexual" touch. Differentiations of sexual and non-sexual touching, I contend, are best explained by the apparatuses through which cultural norms and personal experiences are "sedimented" in the body's orientations and dispositions (see, Ahmed 2006a; 2006b; Bourdieu 1977; 1984a; Butler 1988)—what could be understood as social conditioning of the body through exposure to stimuli. The differential conditioning of bodies to kinds of touches, then, can explain how a gentle lick of a person's neck can be just as problematic for the integrity of one's bodily subjectivity as a punch to the gut even if these violations are experienced differently (i.e., respectively, as sexual invasiveness and as physical pain). As such, one must account for how social norms and personal experiences shape the body's responses to the stimuli (e.g., sexual touching) that produce bodily subjectivity.

7.4.3 A three-part test

This theory ultimately suggests that a right to bodily autonomy is not directly supported by the heterogenous phenomena (i.e., the assemblage of perceptual physiological apparatuses) I refer to as bodily subjectivity, suggesting that rape law need not be beholden to the definition of rape as unconsented-to sex (even if a right to autonomy is rightly applied in other areas of law, like contracts, where autonomy, rather than bodily subjectivity, is directly at issue). It is not necessarily the case, then, that HIV nondisclosure results in a violation of bodily integrity because it deprives a person "of the ability to exercise [her] will in relation to [her] physical

integrity with respect to the activity in question."[84] Rather, I suggest that the primary consideration in adjudicating matters of sexual assault is the presence or absence of the *feeling* of willingness.[85] Consent (as a mental exercise of autonomy), I argue, merely waives the right to not have the realization of one's bodily subjectivity impeded when this willingness is absent. Accordingly, where a person *feels* willing (as a bodily affect), neither the expression of consent (see, Simmons 1979; Wertheimer 2003) nor the conscious formation of an intention to waive one's right to autonomy (see, Alexander 1996; 2014) is necessary because the person's bodily subjectivity is not threatened. Importantly, because autonomy is not the principle necessitating this consideration of the feeling of willingness, the autonomy-undermining nature of deception does not preclude the legal value of one's deceptively induced feelings of willingness.

In effect, I am proposing that there are potentially three issues to consider (in a sequential order) when assessing a potential instance of rape (see, figure 7.1), including cases of rape-by-deception: (1) the presence or absence of the feeling of willingness, (2) the presence or absence of consent, and (3) the validity of the consent.

---

[84] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at *para* 374.

[85] I explicitly theorize this as a *feeling* rather than a rational decision in the mind (Alexander 2014; c.f., 1996; Hurd 1996; 2016) because my bodily subjectivity model suggests that it is a physiological, rather than rational, form of subjectivity violated by rape.

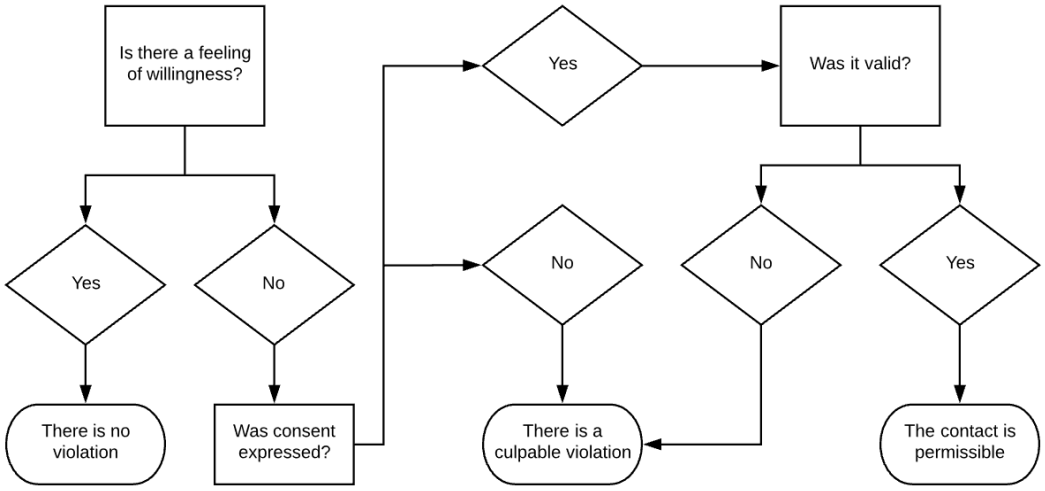


Figure 7.1 A three-part test to assessing bodily violation

As previously noted, the *feeling* of willingness that I describe is distinct from an autonomy-exercising decision to have sex. Willingness, as a feeling, is a reflexive physiological *sense* of openness to an act. This is not necessarily desire but it is also not merely acquiescence or submission. For instance, when I greet a close friend, I am generally open to her giving me a kiss on the cheek (and would likely enjoy the platonic act of affection) although I do not necessarily seek it or affirmatively desire it in that moment. The feeling of willingness is, rather, a basic physiological *recognition of the potential act and an openness to it*. When the feeling of willingness toward a specific activity is present, I argue, this affective experience denotes a recalibration of the boundaries of bodily subjectivity, resulting in an instance of physical contact being an apparatus of self-realization rather than an act of violation. If there is a feeling of willingness, an exercise of autonomy to sanction that activity is not necessary to preclude culpability because bodily subjectivity is not threatened. However, in cases where a person does not experience this affective state of willingness (e.g., when one is sedated for surgery), the issue of that consent must be addressed because a valid exercise of autonomy is

necessary to render the violation of bodily subjectivity lawful (although not necessarily ethical) by waiving the person's right to bodily integrity.

Consent differs from this feeling of openness because it is an affirmative decision—either outwardly expressed outwardly or manifested within the mind. I will not rehash the debate on consent's ontology as either an objective performative or a subjective exercise here (e.g., Alexander 2014; Healey 2015; Wertheimer 1996). Instead, I will note that since my proposed standard already accounts for the subjective state of a person, the objective expression of consent may be preferable. For this reason, I refer to consent as an outward performative for the rest of the chapter. It should be noted, however, that my framework is still compatible with the mental exercise theory of consent as the consideration of consent (in my framework) is due to its relationship to autonomy, and this element is satisfied regardless of whether consent is viewed as the direct exercise of autonomy or the indication of this exercise.

> This proposed model differs from the subjective mental state view described in Chapter 2 in at least one important way. In the mental state view, rape is a violation of a person's autonomy. In the affective state view, the injury is first a harm to the person's most fundamental and visceral sense of self and only secondarily a harm against the person's autonomy. Because the mental state view is grounded in autonomy (exercised by informed choices), it can never provide a principled rationale for why some material deceptions vitiate consent while others do not (see, Rubenfeld 2013b). By contrast, the affective state view that I propose recognizes that our feelings are not "rational" or calculated (e.g., we can have conflicting feelings about something or feel positively about someone who has only ever harmed us). In this view, the affective state of willingness must merely be present—it need not be informed or otherwise rational.

7.5 Application

In this section, I demonstrate how my model of bodily subjectivity can be consistently applied to a broad range of cases, including instances of sexual fraud, without either defining rape as simply a violation of personal autonomy or ignoring the role of autonomy in constituting lawful sexual relations. In doing so, I elaborate on when and why consent is and is not necessary and some of the ways that consent can be invalidated by the use or threat of force, coercion more generally, and deception. I begin by examining more obvious instances of rape (i.e., rape-by-force and rape-by-coercion) before I turn to my ultimate concern of rape-by-deception. Before I do so, however, I want to reiterate that my objective is not to limit what might be criminalized as sexual misconduct but instead to define what misconduct should *necessarily* be criminalized as rape or sexual assault.

7.5.1 Force

Rape is most readily evident and uncontroversial in instances where force is used to induce a person's submission or assent to sexual activity (see, Tuerkheimer 2013; Estrich 1987). Where force is used on an unwilling person, there is no disputing that the act constitutes rape because there is neither willingness nor consent (see, figure 7.2). In technical terms, the use of force is the mechanism by which a person penetrates the emergent boundaries of a victim's bodily subjectivity and there is no freely given consent through which the victim exercises her autonomy to permit this violation of his or her body. This is evident also when a person is sleeping because bodily subjectivity, being produced through apparatuses of perception grounded in autonomic systems, is a reflexive physiological phenomenon (not a rational form of conscious self-awareness) and, thus, not dependent on being consciously aware of violations of its boundaries. Thus, sex with an unconscious person is always

performed using force (even if the person's state of unconsciousness significantly reduces the amount of force required) (see, figure 7.2). Similarly, if a person is in a semi-conscious state (e.g., due to drugs or alcohol) and thus incapable of sexual willingness and consent, sexual contact is impermissible. By contrast, if a person is intoxicated but still wants to have sex, the sex would be lawful even though consent is normally not possible while intoxicated (due to the effect of intoxication on a person's decision-making faculties) (see, figure 7.5).[86] However, if that intoxication is induced by a person using deception to drug a victim, the act of deceptively drugging the victim would itself constitute a violation of the person's bodily subjectivity. I discuss this last issue further in section 7.5.3 as part of my more general discussion about deceptively induced consent.

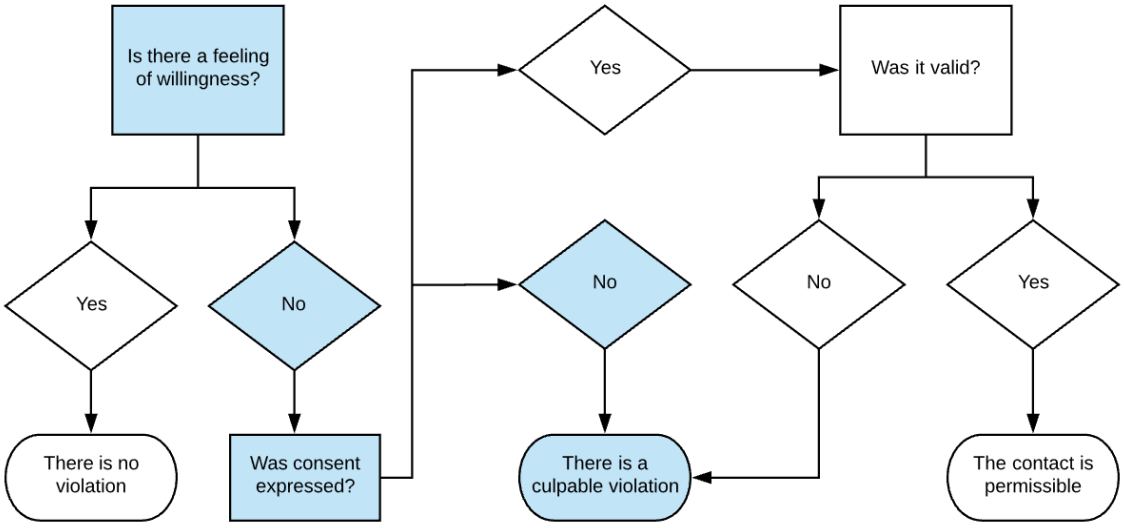


Figure 7.2 No consent

The exercise of autonomy through consent is possible in some cases that technically involve force, however, because autonomy empowers people to make informed and calculated

[86] In contract law, for example, intoxication is viewed as potentially impeding one's autonomy to such a degree that one's assent to a transaction is deficient and, thus, the transaction is made voidable.

choices about their bodies even when they might not be contemporaneously willing. For instance, while there is no contemporaneous experience of willingness during surgery involving general anesthesia (see, Craig 2014), informed and freely given consent prior to surgery should be sufficient to establish conditions for rendering the activity permissible (and, thus, not assault and battery) (see, figure 7.3).

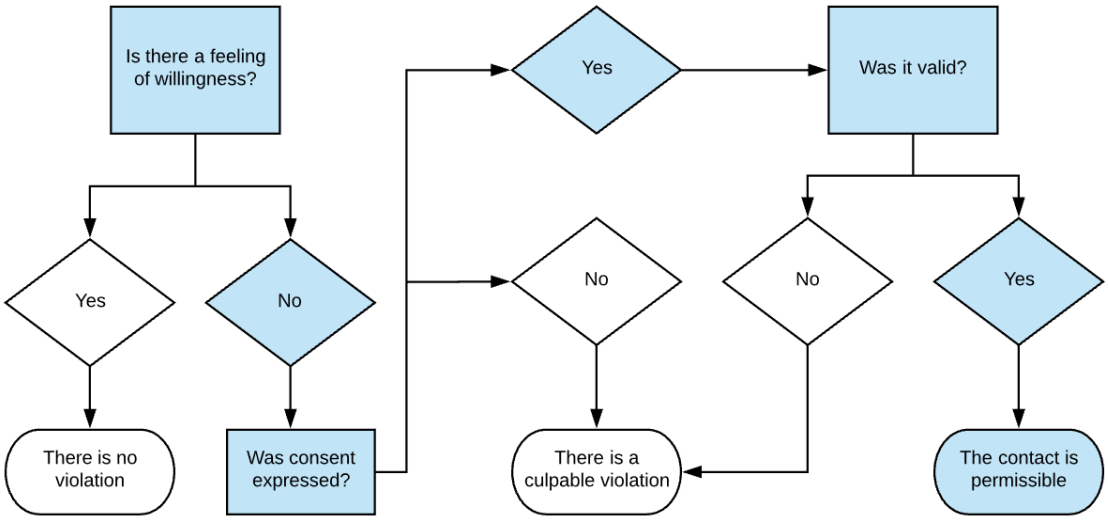


Figure 7.3 Exercising autonomy to consent to a penetration of bodily subjectivity

It follows, then, that sexual activity where there is not contemporaneous feeling of willingness (e.g., "wake-up" blow jobs) is likewise acceptable under the same conditions: unequivocal and explicitly stated consent, which grants permission to a specific activity (e.g., requesting a "wake-up" blow job for the following morning). The exact conditions for an expression of consent to be valid, though, would be dependent on cultural expectations (since performatives acquire their potential through regulatory social norms) (see, Austin, 1975; Butler, 1988, 1997, 2009; Kuhn, 1984). I would assume, though, that the more potentially harmful or invasive an act is, the more explicit and informed the decision to consent must be. For example, kissing a sleeping partner on the forehead before leaving for work would need

significantly less assurance that it is acceptable to the sleeping partner than performing surgery or oral sex on an unconscious person. When there is not a valid expression of consent to a specific activity when a person is unconscious, the absence of an experiential state of being willing results in the act being an illicit violation of a person's body (see, figure 7.2).

While my argument runs contrary to claims that there is no way to decriminalize sexual activity where one partner is unconscious without risking the revival of a spousal exemption to rape (as it suggests that implied consent is a valid defense for rape) (Craig 2014), I contend that differentiating the expression of consent and experience of willingness makes this possible because, by not conflating them, their distinct functions and mechanisms of action can be more clearly defined. Specifically, while unconscious sex or surgery under anaesthesia is performed upon a subject who is unaware and, thus, not contemporaneously willing, the explicit expression of consent at some other point in time *conditionally* waives the right to not have the subject's boundaries invaded by the *previously specified* act. Although there is a strong argument to be made for not recognizing the validity of consent in some instances, like fistfights to the death (e.g., *R. v. Jobidon*) (see, figure 7.4), it seems unnecessary to limit lovers' mutually agreed upon activities when there is no real risk of harm and only a mitigated risk of exploitation. This agreement, however, cannot just be taken for granted (as it is in the marital exception defense); it must be affirmative.

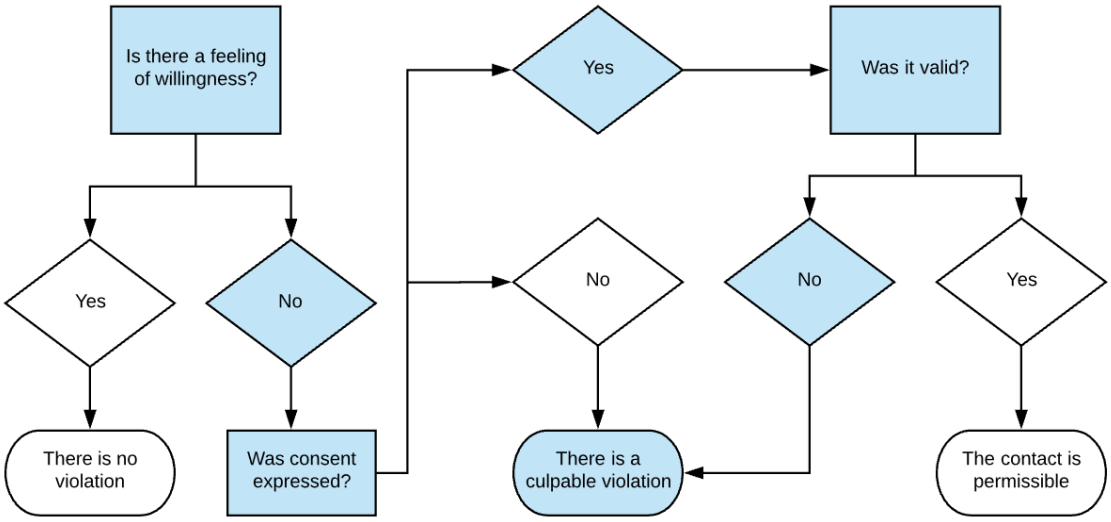


Figure 7.4 When consent cannot waive the right to bodily subjectivity

7.5.2 Coercion

Only voluntarily granted consent may waive a person's right to bodily integrity because consent can only fulfill its purpose if it is an exercise of autonomous will. For this reason, when a person consents and submits to sex to avoid a perceived, implied or explicit threat of violence or harm, the performative is ineffective at permitting the invasion of the victim's bodily subjectivity. It is not always clear, however, what constitutes freely given consent when agency and autonomy are always mediated by social, cultural and material conditions (Barad 2007; 2003; Ahearn 1998; 2001; Bumet 2012; Coe and Jordhus-Lier 2011). Commenting on the always-constrained nature of autonomy, Rubenfeld (2013b, 1412) contends that using coercion as the standard for defining when an act constitutes rape is problematic because there is no objective metric for determining what forms of social pressure are sufficient to constitute an act as rape. To support this contention, Rubenfeld provides an example of a woman who threatens to leave a relationship if her partner does not agree to meet her sexual needs. While this example is not at all like actual instances of coercion where a person might fear for her life

or safety, hypothetical cases like this one need to be differentiated in principle from other actual instances of coercion to ensure that there is a consistent standard for determining instances of rape-by-coercion.

Making the kind of ultimatum that Rubenfeld describes is not rape, I contend, because while the man may not be willing, he has exercised his autonomy to make a calculated decision (e.g., choosing to have sex to continue the relationship or choosing not to, knowing that his partner might leave) and only threats forcing a person to choose between sex and the infringement of another right are sufficiently coercive to vitiate sexual consent (Wertheimer 2003) (see, figure 7.3). What is important to note in this hypothetical instance is that while the man may not have felt willing, he was not forced to choose between sex and having a right infringed upon (as victims who fear violent reprisals are) because he does not have a right to his partner's romantic commitment and his partner has every right to make decisions about her romantic relationships based on her sexual satisfaction. By contrast, an employer who threatens to fire an employee if she does not sexually submit to him would force the woman to choose between a violation of her bodily subjectivity and her job despite her having the right to not have her employment be based on her willingness to perform sexual favours (see, figure 7.4). Unlike the girlfriend in the earlier example, this employer does not have a right to choose his employees based on their fulfilment of his sexual desires and the employee has the right not to have her employment terminated for simply asserting her right to bodily integrity. Consent is not valid under such conditions.[87]

[87] This becomes a bit hazier in cases that involve offers rather than threats because sometimes such offers may be implied threats. For example, if a studio executive tells an aspiring actor that he will help the actor find good work if they have sex, this might be a veiled threat of the converse. This kind of problem, however, is a

Importantly, my theory's articulation of the mechanics of willingness and the performative expression of consent suggests that Wertheimer's approach to identifying when coercion vitiates consent is tenable despite critiques that challenge its rights-based metric. Although Rubenfeld (2013b, 1411) asserts that Wertheimer's approach cannot explain why, in the case of *Commonwealth v. Mlinarich*, a teenaged girl submitting to sex with her legal guardian to avoid returning to juvenile detention is rape (because she has been convicted and does not have a right to *not* be in juvenile detention), I argue that her consent is invalidated by the power relationship (i.e., the man is essentially acting as a corrections officer) that prevents the meaningful exercise of her autonomy.[88] As courts have consistently ruled that the power dynamics between prisoners and corrections officers makes the valid expression of consent impossible,[89] her expression of consent cannot be understood as a legally recognizable exercise of her autonomy. Thus, because the girl was clearly not willing, *and* her expression of consent is invalidated by the differential power relationship and threat of reprisal for noncompliance, my proposed method identifies this case as a clear instance of rape (see, figure 7.4). By contrast, if one were to imagine a man offering to not report the whereabouts of an escaped serial killer (with whom he has no previous relationship) to the police in return for sex, this calculated "transaction" would not constitute rape because, despite not feeling willing, the serial killer is making a rational decision to engage in sex and the man is not threatening to violate any of her rights (see, figure 7.3). This is not to say, however, that sex is generally

---

factual issue. It is up to a factfinder, like a jury, to determine whether, given the context, such a promise was in fact a threat.

[88] Stated another way, one may understand courts' decisions to invalidate consent in these contexts as courts determining that prisoners and juvenile detainees have a right to not have their diminished social and legal positions exploited by those who are charged to guard them.

[89] *See, e.g., Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999).

understandable as a rational legal transaction between neoliberal subjects; rather, I simply identify the circumstances where one's rational decision-making may reconfigure the ethical relations of an otherwise intimate and highly personal activity that is ordinarily organized by affective logics.

7.5.3 Deception

In addition to being able to handle the less contentious issues of rape-by-force and rape-by-coercion, my proposed framework provides a principled standard for determining when deceptions can result in rape. As the exercise of autonomy is only necessary when a person is unwilling to participate in a potentially invasive activity, the capacity for fraud to vitiate consent is only an issue when a person does not experience willingness to participate in the sexual activity in question. While fraud is problematic because it misrepresents the information necessary for a person to adequately exercise her or his autonomy, the exercise of autonomy is not necessary, even though it is sometimes sufficient, for the agreed-to activity to not be a violation. In other words, when a person experiences willingness to participate in a sexual activity, her reasons for feeling willing (e.g., a fraudulently induced belief that her partner loves her) are not what is at issue.[90]

In this view, fraud is only a problem for one's right to bodily integrity when it is used to induce consent when a person does not experience a willingness to participate in the sexual activity. For instance, in *Boro v. Superior Court*, when the accused impersonated a woman's doctor, telling her that she had a rare condition that could only be cured by having sex with a

[90] Highlighting the intuitiveness of this position, consider how most monogamous individuals would likely not consent to sex if they knew their partners were having affairs but would also be unlikely to say that the sex was rape just because the unfaithful party had not disclosed their infidelity.

man who had been injected with the means to cure her (the impostor), her exercise of autonomy to agree to the act that she felt reluctant to engage in was invalid because the man's fraud vitiated her performative expression of consent (see, figure 7.4). In other words, her conscious and rational *decision* to grant a man access to her body despite not *feeling* willing was not sufficient to waive her rights, resulting in Boro being culpable for the violation of the victim's body. By contrast, if a lie were used successfully to induce a feeling of willingness, the deception's vitiating of a person's exercise of autonomy is not a problem because the feeling of willingness is present (see, figure 7.5). For example, if a woman lied about being "out" to her parents, knowing that her partner previously affirmed that she would not have sex with a closeted woman, this sexual encounter would not constitute rape (even if it is unethical for other reasons) because her partner felt willing during the act. As her partner's consent is only necessary to legitimize an otherwise illicit violation of her partner's bodily subjectivity, the woman's misrepresentation of her openness about her sexuality can vitiate her partner's autonomy-based consent without resulting in the sexual act being rape.

A more complicated problem arises in the previously mentioned issue of victims who are deceptively drugged to induce willingness to engage in sexual activities. In cases where the drugging results in unconsciousness or other impairment (e.g., semi-consciousness), both the act of deceptively drugging the victim and any subsequent sexual activity would constitute violations of the victim's bodily subjectivity. Similarly, if someone deceptively drugged another person with, say, MDMA (a drug that often *subtly* makes people more affectionate and lower their inhibitions but does not generally impair their *ability* to make decisions), the very act of deceptively drugging the person would violate her bodily subjectivity. However, assuming the person still retained basic mental faculties, the person could still subsequently

have sex without it being *per se* unlawful.[91] This means that if the person who deceptively provided drugs and the drugged party engaged in sex, it is possible that only the act of drugging would be unlawful (assuming the participants both experienced the feeling of willingness). If this outcome is undesirable, courts could determine that the first bodily violation (the deceptive drugging) results, via some sort of transitive property, in the second contact (the sexual act involving willing participants) being similarly unlawful.[92] However, if the drugged person were to willingly have sex with an uninvolved third party, the sex would be lawful regardless of the fact that the feeling of willingness were induced by the drug (unbeknownst to either the drugged person or the third party).

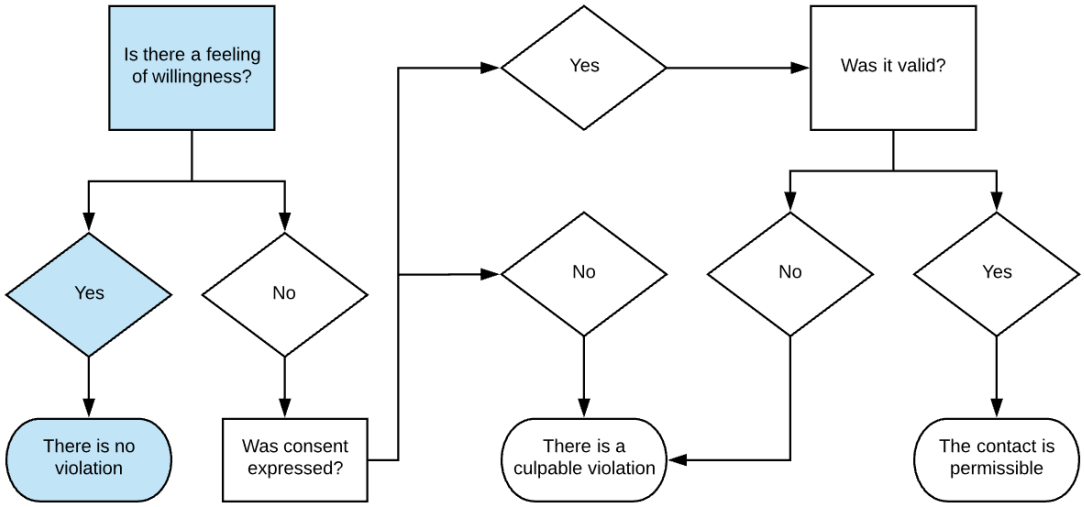


Figure 7.5 The feeling of willingness is present

[91] For example, if the drugged person later had sex with an ignorant third party, the actus reus of rape would not be met because the drugged person experienced a feeling of willingness.

[92] This highlights how the "floor" that my standard provides may be readily built upon to better address the complexities that courts might face. Another instance that might warrant such intervention is sex with minors. While a fourteen year-old might very well be willing to have sex (perhaps even enthusiastically so) with a forty five year-old, law-makers would undoubtedly want to continue to prohibit this kind of intergenerational sex due to the increased risk of sexual exploitation using statutory rape laws (see, Craig 2014).

In cases of *fraud in the factum*, however, deception almost certainly results in rape because it renders a person fundamentally unaware of the sexual nature of an act. Ignorance of an act's nature, I argue, results in a violation because a person must experience an affective orientation toward a *specific activity* for the boundaries of bodily subjectivity to be calibrated in relation to the "other" in such a way that there is no penetration of experiential discreteness, and ignorance of an act precludes this possibility. *Thus, whenever a deception obscures the quality or nature of an act—that is, its invasiveness or material configuration—there can be no feeling of willingness to the act in question and, as any consent given is deceptively obtained, the activity constitutes a culpable violation of bodily subjectivity* (see, figure 7.2). Importantly, my theory designates the presence of willingness, not the absence of resistance, as denoting the recalibration of one's bodily subjectivity, meaning that merely not resisting an act (that one is unaware of) does not make the act lawful.

In applying my proposed framework, it is important to note that a person's willingness to sex does not necessarily index an openness to an unfettered range of bodily activities (e.g., being a willing sexual partner does not also include a willingness to being choked during the sexual activity), and a person's willingness to participate in a non-sexual activity does not further evidence her willingness to a sexual act happening instead (e.g., exploiting a person's willingness to receive a hug to discreetly grope the person) (see, figure 7.2). It follows, then, that when the *sexual invasiveness* of an activity is misrepresented, a charge of sexual assault or rape would be appropriate. For instance, deception regarding the sabotage of a condom,[93] as happened in *R. v. Hutchinson*, would misrepresent the invasiveness of the act because bodily

[93] This would likely include cases of "stealthing" in which a condom is removed without the partner's knowledge (see, Brodsky 2017).

fluids could enter the body where they would not in the activity the victim believed herself to be engaging in, resulting in a sexual violation of bodily subjectivity. Similarly, in *R. v. Wilcox*, the accused was convicted of aggravated sexual assault because he did not disclose to his partner that he was inserting a dildo alongside his penis. His deception made the complainant unaware of the nature of the act and the complainant had no reason to suspect that his partner would so fundamentally alter the dynamics of their sexual activity without first consulting him. In these cases, the increased invasiveness of, respectively, the unexpected and unwanted exchange of bodily fluids and insertion of the dildo can be understood as being performed through force with deception being used to reduce the amount of force necessary.

Crucially, my approach also provides a principled rationale for differentiating between kinds of deception and, thus, can explain how mendacities like lying about being a doctor to seem more appealing as a partner is qualitatively different from misrepresenting oneself as a doctor to perform fake "gynaecological exams." If, for instance, a woman claimed to be a doctor while talking to another woman at a bar, hoping that this would make her appear more attractive, the lie would not render the addressee unaware of the sexual nature of the act (even if it is ethically questionable). As such, while the deception may have been material to the woman's decision to consent (and thus undermined her sexual autonomy), her experience of willingness (even though it was induced by deceit) indicates that her bodily subjectivity was not violated (see, figure 7.5). However, if lying about being a doctor were used to render someone unaware of the sexual quality of an act, in the way the accused in *R. v. Maurantonio* convinced several women he was a doctor in order to perform "gynaecological exams" on them, the exploitation of the individuals' deceptively induced ignorance would clearly embody my definition of bodily violation because they could not feel the orientation of willingness

toward the actual sexual act (see, figure 7.2). In this case, it is not directly the deception about Maurantonio's profession that results in these acts being rape, but instead how his deception is used to render the complainants ignorant to the sexual nature of the acts.

It follows from this analysis that the mere nondisclosure of HIV-positive status is not rape-by-deception because it does not fundamentally misrepresent the sexual nature of an act (see, figure 7.5). Stated another way, HIV nondisclosure has the potential to induce a feeling of willingness but does not render another ignorant to the nature or quality of the act. Although HIV nondisclosure would not constitute rape or sexual assault in my proposed framework, it could, depending on the jurisdiction or facts of the case, constitute criminal negligence or recklessly inflicting grievous harm if it was shown beyond reasonable doubt that the infection resulted from criminally reckless behaviour (see, Cowan 2014; Rey 2011). It would not, however, be an assault unless the nondisclosure was used as part of an attempt to intentionally infect the partner. Even in such an unlikely scenario, though, I would suggest that this is not properly thought of as a sexual assault because the deception does not misrepresent the sexual qualities of the act, which the (intended) victim is willingly engaging in. Rather, like others (e.g., Buchanan, 2015; Cowan, 2014; Rey, 2011; Symington, 2012), I contend that HIV nondisclosure even in cases where a person intends to infect another person is generally not properly understood as a sexual offence (paralleling the approaches of England and Wales, Australia and New Zealand), but instead as a physical assault.

7.6 Discussion

The intuitiveness of my approach may be seen in how, in practice, it differs very little from the law's current standard because only in very few instances would someone who experiences the feeling of willingness during a sexual activity seek to use the punitive force of

criminal law against her sexual partners. Interestingly, if one assumes that women do not have sex for personal pleasure (but rather for some extrinsic purpose), as is common in sex-negative perspectives, then my proposed standard functions almost identically to current frameworks: (1) did consent happen, and (2) was it valid? By considering bodily subjectivity, my proposed standard merely makes it easier to delineate lawful and unlawful sex in the currently hazy margins of Canadian sexual assault jurisprudence (e.g., consented-to unconscious sex, HIV nondisclosure, and imbalanced power dynamics).

Although my proposed solution to the so-called "riddle" of rape-by-deception does not significantly alter the practical protections for rape victims currently in place, it has some less obvious implications for legal theories about the body. In this section, I seek to address how I conceptualize rape as a form of assault and describe it in physical terms, despite previous objections to these approaches to theorizing rape (see, Ramachandran 2013). I also consider some of the potential consequences of shifting from bodily autonomy to bodily subjectivity in other areas of the law (e.g., the sale of organs).

Like Rubenfeld, I do not make an *a priori* distinction between rape and other forms of bodily violation. I do, however, explicate how social activities and norms are implicated in the bodily phenomena I describe—that is, I theorize the mechanism by which these socially structured activities are sedimented in the body's reflexive perceptions and orientations, which, in turn, influence how people experience bodily violations. In this way, my proposed solution does not, as others have criticized Rubenfeld's proposal as doing, dislocate rape from its social meaning and unique history (see, Falk, 2013; Ramachandran, 2013; Tuerkheimer, 2013). Rather than distinguishing physical and social phenomena, I understand how social forces are manifested in (and by) the physical world and integrated within the body. By "reinserting the

corporeal" (Lacey 1998a) in my theory of bodily subjectivity (i.e., by accounting for the physiology of the body), I avoid viewing the harm of rape in neoliberal transactional terms (see, Gotell 2009), and provide a more nuanced language for more fully describing the visceral violence of the act. Furthermore, although one might argue that by not treating rape as unique, I reduce its harm to that of other assaults (sexual or otherwise), I claim only that rape does not differ from these other violations *in principle*. However, I take it as a given that these offenses differ in degree and quality of harm (see, Vidler 2017, 104).

Moreover, my approach succeeds in reconciling the affordances of Rubenfeld's postpositivist and Ramachandran's poststructuralist analyses without suffering the limitations of essentialism and correlationism (i.e., the philosophy that meaning emerges from the relationship between human actors and the physical world). As discussed earlier in the chapter, individual experiences and exposure to cultural norms are engrained in individuals' bodily dispositions and orientations (see, Ahmed 2006a; 2006b; Bourdieu 1977; 1984a; Butler 1988). This explains how prosthetics, canes, wheelchairs, etc., can be part of a subject.[94] These examples highlight how the model of bodily subjectivity effectively explains how bodily subjectivity cannot be defined in decontextualized terms and, by extension, how the right to bodily integrity ought to be similarly defined in context.

In this view, social history of rape and its material mechanisms of action for shaping the meaning of rape cannot be separated from the bodies and activities that are central to the actual act of rape. This is because rape, at least in an agential realist framework, is an emergent phenomenon that does not exist as some abstract concept outside of its immediate and specific

[94] Barad (2007, 155—58) has a more general (and thorough) explanation of how subjectivity (not limited to the physiologically derived subjectivity I describe) can include prosthetics and implements.

instantiation. Accordingly, rape can be understood as always being a *specific* result of how an individual's bodily subjectivity emerges in relation to a *specific* apparatus of touch.

What is more, my bodily subjectivity model is capable of accounting for the importance of autonomy (i.e., the role of consent in waiving one's right to bodily integrity) without saying that autonomy is a fundamental right that should not be limited. While the right to bodily autonomy suggests that there should be few restrictions on what people can do with or to their bodies (e.g., selling one's organs for profit), the right to bodily subjectivity only entitles a person to feel "at home" in their bodies (i.e., their visceral reflexive sense of self is not challenged). Although we should be suspicious of attempts to limit people's right to bodily subjectivity, we can (and should) place limits on autonomy to prevent people from engaging in behaviours that are not desirable for society (e.g., consenting to fist fights to the death). This explains why a transgender man should not be prevented from removing "healthy" breast tissue to support his mind-body integration while also explaining how people more generally can be prevented from unnecessarily removing (and selling) healthy organ tissue. In the first instance, the tissue impedes the man's mind-body integration whereas this is not at issue in the case of commercial organ extraction.

Operationally, my three-part test functions similarly to the current framework except that it does not implicitly assume that women do not want to engage in sex absent extrinsic motivation (e.g., developing a loving relationship or receiving material benefits, like fur coats). Instead, my framework begins by questioning whether sexual actors are affectively open to and ready for intimate contact. Notably, because the feeling of willingness is a subjective experience, objective evidence of the state (e.g., reciprocation) can only ever be circumstantial. Accordingly, at trial, a complainant's testimony would likely be the primary basis upon which

a court would make a finding (with respect to the first element of my three-part test). Generally speaking, unless the complainant has a record of perjury, fraud, or other such crimes, the first element (being related to the victim's subjective state) would generally be determined in favor of the complainant. However, in most cases in which willingness was deceptively induced (e.g., false professions of love but *not* the example of *Boro*), the defendant would likely prevail because the subjective experience of willingness could likely be determined from the witness's testimony.[95] By contrast, in instances involving coercion (including coercion resulting from threats of deception, as was the case in *Boro*), testimonies indicating that the complainant did not want to have sex but felt compelled to have sex would provide evidence supporting a finding that the complainant lacked the requisite state of willingness.

Finally, although I have provided a principled standard for determining what deceptions can result in rape and the mechanism for achieving this, I admit that I have only alluded to the ethics of sex beyond the low standard of lawfulness. As such, I want to explicitly state here that my bodily subjectivity model is not intended to comprehensively engage with or interrogate the "gray areas" of sexual ethics (see, Cahill 2016). Nor is it my goal to reduce the broader conversation of what constitutes sexual ethics to the binary question of whether an act is legal or not (see, Fischel 2010). Instead, my argument might be understood as providing a "bare bones" framework for such discussions by explaining the precise line where unjust and unequal sex become rape.

[95] For example, if the complainant's testimony indicates that the sexual relations would have been entirely acceptable to her but-for the nondisclosure, the testimony would indicate that the willingness requirement has been satisfied.

7.7 Conclusion

In this chapter, I proposed a new principle for theorizing rape and sexual assault—what I have called bodily subjectivity. Specifically, I have argued that previous approaches to theorizing rape failed to capture the integrated nature of the body and selfhood, resulting in legal standards that too greatly emphasised either the concrete physical body or the self as a social subject. By contrast, the principle of bodily subjectivity is premised on the view that the body is determined both by its concrete physiology and socially productive forces. For example, physiological apparatuses of perception, like the central nervous system, offer an objective measure for identifying distinct subjects in an intimate activity (i.e., the participants *experience* the feeling of their contact differently) while also explaining how the body's physiology is shaped by socially structured experiences (e.g., how one differentiates sexual versus nonsexual touching is dependent on one's personal history and familiarity with cultural narratives about sex).

From this principle of bodily subjectivity, I have identified a standard for determining what conduct should *necessarily* be considered rape or sexual assault. Specifically, I have argued that when there is no feeling of willingness, which indicates the body's openness to contact, a bodily violation has occurred. Thus, absent the valid exercise of one's autonomy (in the form of consent) to license the violation, the act is unlawful. However, when the feeling of willingness is present, no violation occurs and there is therefore no need for an exercise of autonomy to legitimate the bodily contact.

Crucially, because I do not define rape or bodily violations as merely infringements of autonomy, the consent-vitiating nature of fraud does not *necessarily* result in an act being rape or sexual assault. By distinguishing between the affective *experience* of willingness and the

autonomous *exercise* of consent, I have provided a determinative standard for adjudicating sexual assault allegations that explains why some forms of fraud result in rape and others do not. Specifically, I have argued that when a deception induces the feeling of willingness in another to a specific activity, that activity does not constitute a bodily violation; and, conversely, when a deception precludes the possibility of such a feeling of willingness to a sexual activity (as occurs when one misrepresents the nature or quality of a sexual act), that activity constitutes rape.

8. Conclusion

8.1 Introduction

In this dissertation, I have presented an analysis of how Canadian HIV nondisclosure law's assumptions and premises fail to adequately account for the material and social conditions within which consent is negotiated and made meaningful, especially in gay sexual spaces. Moreover, by going beyond more traditional sociolinguistic and discourse analytic approaches and considering the physical and physiological mechanics of discursive practices, my investigation has allowed me to theorize the concrete elements of my subject matter—negotiations of consent in gay sexual spaces. In doing this, I have not only considered how bathhouse patrons *talk about* their (often wordless) negotiations of consent, I have also developed a sophisticated and nuanced language for describing the practices that bathhouse patrons actually use to negotiate consent, the role of the body in animating and (re)configuring meaning, and the viscerally experienced harm of rape.

By employing a diffractive methodology, my work opens new possibilities for feminist legal theory and sociocultural linguistics. Although sociocultural linguists have generally accepted that language is itself a material activity (e.g., Philips 1992), we have not often taken account of how materiality is itself discursive—how physical relations are themselves meaningful with or without human intervention. Feminist legal theorists have similarly remarked that there is a strong need for a greater attentiveness to embodiment, arguing that a failure to do so risks misrepresenting the harm of rape (Lacey 1998a; Cahill 2016). By providing a posthumanist account of the precise mechanics by which sexual subjectivity emerges through intimate contact (sometimes even in the very process of negotiating consent),

my dissertation has provided a novel contribution to the field. In doing so, I hope to encourage others to take seriously the lively animacy of materiality, including bodies.

8.2 Summary of findings

Chapters 5-7 trace my broader project of demonstrating the value of posthumanism in the study of language and communication. While the first of these chapters relies on relatively familiar methods and theoretical frameworks (in the fields of discourse analysis and sociocultural linguistics), the next chapter draws upon posthumanist insights in its examination of materiality, subjectivity, and embodiment; and the final findings chapter more fully adopts a posthumanist disposition to reconceptualize the metaphysics of the body as it relates to sexual assault. Notably, this progression of posthumanist thinking provides a sequence that illustrates how traditional approaches to language scholarship (as used in Chapter 5) can be enriched by "the posthumanist proposition" that agency is not limited to rational actors (as described in Chapter 6) and the agential realist insight that Nature is not passively shaped by cultural forces (as discussed in Chapter 7).

In Chapter 5, I considered the case of *R. v. Wilcox* to highlight how contemporary standards that preclude the defense of honest but mistaken belief in another's consent in HIV nondisclosure cases are grounded in heteronormative ideals about sex and intimacy that do not apply in spaces of sexual silence. Using semi-structured interviews, I investigated how bathhouse patrons use context-specific norms to interpret and structure negotiations of sexual consent in bathhouses. These norms and practices, I explained, are not consistent with the way that Canadian courts have assumed people negotiate sexual consent. Specifically, while courts presume that all rational actors would expect partners to disclose if they were living with HIV, my findings suggest that HIV disclosure is dispreferred in bathhouses for at least three reasons.

First, the casual sexual frame of the bathhouse constrains individuals' ability to discuss matters not related to the logistics of sex. Notably, I showed how interlocutors invoke the sexual context of the bathhouse to infer sexual intent from nonverbal practices, like eye-contact or light touching. Secondly, the romantic connotations of disclosure, which is often seen as something one does in a relationship, is at odds with the bathhouse's explicitly sexual purpose. Third, bathhouse patrons generally view disclosure as unnecessary because they emphasize individuals' personal responsibility in managing sexual health through consistent safer-sex practices.

Because people may choose not to disclose their HIV status due to context-specific constraints (rather than ill-intent), I argue that a just standard for *mens rea* would require that an accused had an intention to deceive her partner (to induce the partner's consent) to be convicted in cases involving HIV nondisclosure. I further contend that this proposed standard would better emphasize the relationship between criminal deceptions and the putative issue at stake: a person's sexual autonomy. What is more, by being more open to the possibility of diverse approaches to negotiating sexual consent, this standard avoids contributing to the long-held tradition of criminalizing sexual minorities for merely engaging in sexual practices that differ from the broader public's expectations.

In Chapter 6, I presented autoethnographic insights alongside interview data to provide a detailed account of the primarily nonverbal methods bathhouse patrons use to negotiate sexual consent. In doing this, I made several observations about these multimodal practices. Firstly, I outline the general structure of negotiations of sexual consent within bathhouses. I then discuss how bathhouse patrons strategically manipulate modality-specific affordances in these negotiations to creatively invoke linguistic functions. For example, I explain that because

the medium of touch produces less clearly legible referents (relative to language), interlocutors may more readily emphasize its poetic and emotive functions in ways that are conducive to building physical intimacy.[96] Next, I explain how, despite the general custom of silence, verbal communication plays an important role in indicating dispreferred actions in negotiations of sexual consent and initiating repair sequences. The use of nonverbal communication in these situations highlight how interlocutors may invoke different modalities of communication to leverage their distinct affordances (and mitigate their unique limitations). Finally, I examine instances where interlocutors purposefully and involuntarily send "mixed messages" when negotiating consent. In the first instance, I identify how bathhouse patrons may intentionally convey potentially conflicting information across public and private channels created by distinct modalities (respectively, verbal, and tactile). In the second instance, I challenge the traditional understanding of the body as a semiotic resource to explain how the body's willful animacy may result in it adopting a "speaker" role in an interaction. This is helpful for understanding how the body can communicate information that may conflict with what the individual intended to communicate.

Based on these findings, I build upon prior research to theorize that at least part of nonverbal communication's meaning in bathhouses arises from its embodiment of possibilities for subsequent (sexual) activity. By concretely privileging or precluding certain responses, I argue, a gesture or touch becomes meaningful because of the relevance relations it invokes and the subsequent possibilities it selectively thwarts or enables. What is more, this same relations-based form of meaning makes it possible to explain how unintended (and potentially

[96] Of course, I recognize that touch is also associated with sexual pleasure for other obvious reasons.

conflicting) meanings are made possible by involuntary bodily movements and responses. Ultimately, I argue that these consent-negotiating practices are sufficiently sophisticated to justify legal standards that do not require express verbal consent. Finally, in Chapter 7, I end my suspension of disbelief regarding the possibility of the mere nondisclosure of HIV status resulting in a sexual act that constitutes aggravated sexual assault. Whereas my argument in Chapter 5 primarily addressed the issue of *mens rea*, Chapter 7 deals with the *actus reus* of rape and bodily violations more generally. I begin by reviewing proposals for a determinative standard for adjudicating issues of rape and sexual assault that consistently handles instances of deceptively obtained consent in a principled way, observing that none of the existing proposals have been sufficiently attentive to both the ontology and epistemology of the body. Specifically, I argue that while a self-possession model of body-mind integration describes the physical mechanics and elements of rape in a way that social constructivist and poststructuralist models do not, it relies on an untenable understanding of the body's physical boundaries being essentially determinate.

Adopting an agential realist approach, I examine the concrete physiology of the body to describe how mind-body integration is derived, ultimately arguing that while physical and essentially determinate boundaries to the body do not exist, the central nervous systems and perceptual apparatuses of bodies enact an objective exclusionary boundary between subjective experiences and, thus, experiential subjects. This bodily subjectivity model supports the view that rape's mechanism of violation is not merely its function of infringing upon another's autonomy or will (as is conventionally accepted) nor the loss of self-possession. Rather, rape is defined as the sexual violation of a person's psychophysiological experience of individuality.

This implies that when a person experiences an affective orientation of willingness, openness, or receptiveness in relation to another, the subjective boundaries of the body are recalibrated through the tactile experience of contact rather than violated by the activity. It follows, then, that the exercise of autonomy to waive one's right to bodily integrity (through consent) is unnecessary when a person is willing because her or his bodily subjectivity is not threatened. When that person's bodily subjectivity is threatened, however, the person's rational decision to waive this right temporarily and conditionally should be necessary for the violation to not be assault. As such, while fraud vitiates consent (because it is inimical to the meaningful exercise of autonomy), it would only result in an unlawful violation of bodily integrity when a person does not experience willingness to participate in an activity. Crucially, this provides principled support for a determinative standard for distinguishing criminal and non-criminal forms of sexual fraud: only when a fraud is used to induce consent where there is not a feeling of willingness (e.g., *Boro v. Superior Court*) *or* when it is used to make a person unaware of the sexual nature of an act (e.g., *R. v. Maurantonio*) can it result in the sexual act being an instance of rape-by-deception.

8.3 Research significance and implications

My project demonstrates how interlocutors expertly manipulate sensory information through aural, visual, and tactile channels of communication to leverage the distinct communicative affordances of each medium. Notably, despite emphasizing the importance of nonverbal communication, my research has demonstrated that verbal communication provides interlocutors with a valuable resource for more legibly communicating with one another when other modalities (that better conform to the social expectation of silence) prove inadequate. However, notwithstanding the affordances of verbal communication, my findings clearly

indicate that the sophisticated conventions surrounding bathhouse negotiations of sexual consent generally make verbal communication unnecessary. This is because interlocutors can reference socially salient sexual scripts while simultaneously manipulating visual and tactile information to achieve a variety of tasks and fulfil an array of linguistic functions. Additionally, even when verbal communication is not used, its potential use provides a contrastive reference point that may imbue nonverbal communications with social meaning. That is, its generally superior ability for encoding referential information provides a social background that implicitly foregrounds the non-referential functions (e.g., the poetic function of language) of nonverbal communications.

Applying these insights, my dissertation explicates both the mechanics and limits of consent in negotiating sexual relations in gay sexual spaces (i.e., physical spaces in which gay men "cruise" for casual anonymous sex).[97] I have examined how a posthumanist, contextualized perspective recognizes that negotiating consent in practice is not (as others have claimed) a neoliberal, rational engagement in a "legally relevant transaction" (Pickard 1980, 76) but, instead, a socially meaningful activity that is guided largely by social conventions and embodied heuristics (see, Bourdieu 1977). As others have argued, I suggest that imposing a neoliberal governmentality upon sexual relations and regulating them through disciplinary forms of rationality are likely to reproduce (rather than subvert or contest) the production of a "good/bad" binary for sex and sexual actors, ultimately running contrary to the advancement of sexual justice (Gotell 2009; Fischel 2010; Halley 2006; W. Brown 1995).In reconceptualizing the matters of consent and bodily integrity, my dissertation likely challenges

[97] The norms that surround the use of digital applications for casual gay sex differ significantly from traditional gay sexual spaces. My findings should not be interpreted as applying to these contexts.

many long-held assumptions and political commitments in feminist scholarship on sexual justice. My goal, in doing this, is not to fundamentally challenge feminist theory (see, Halley 2006) but, rather, to advocate for the insertion of a queer "slant-wise" perspective within a broader feminist politics and ethics. More simply, I am not objecting to the objectives of "straight" feminism; I am merely skeptical of its attachment to sexual regulation, which "contributes to the attrition of the very thriving that is supposed to be made possible in the work of attachment in the first place" (i.e., a kind of *cruel optimism*) (Berlant 2006, 21). In doing this, I seek to embody the spirit of the queer feminist "killjoy"—the feminist with a chip on her shoulder who, in pointing out violence, might be seen as violent herself (see, Ahmed 2017). My aspiration, though, should not be understood as simply upending the *cruel optimism* of feminism's preoccupation with carceral forms of sexual regulation; rather, I seek to contribute to Lynne Huffer's (2013, 13) queer feminist project of developing an ethics of care that is neither grounded in the traditional feminist "obsession" with rational sexual actors nor queer theory's ethical apathy.

8.4 Future directions and final remarks

My inchoate ideas about sexual justice and the limits of consent undoubtedly provoke more questions and reveal more problems than the solutions they provide. My hope, though, is that this might be an instance of what Jack Halberstam (2011) calls the queer art of failure—an opportunity for new divergences in thinking and doing, and an opening up of possibilities, and perspectives. The interference patterns I created in this dissertation have given rise to many nascent possibilities and I am optimistic (although hopefully not *cruelly optimistic*) that others might be able to refine my theories, strengthening them through repeated scholarly interventions. I therefore call for research that challenges my bodily subjectivity model of

mind-body integration, poking holes in its conceptual fabric and patching the tears with stronger stuff and tighter seams. In the way that bone fractures become stronger and more resilient when the damage is repaired by osteoblasts, I am hopeful that my model, through repeated fracturing and intervention, might become structurally stronger. While my bodily subjectivity model provides a more nuanced analysis of sexual violence and at least does not increase the scope of criminal law and state power, I acknowledge that it does not provide a vocabulary for expressing the colourful contours of sexual ethics beyond determining criminality. Consequently, I admit I have likely failed to fully live up to my queer theoretical goals (as described in Chapter 2). I am hopeful, however, that others might rise to the challenge where I fell short.

One small boon born from this failure is that I have likely at least demonstrated that an attentiveness to queer and trans perspectives may provide a fruitful dialogue with feminist legal theory. As I asserted in Chapter 2, scholars must discontinue the practice of writing in ways that purposefully centralize a heterosexual, cisgender perspective. Although I recognize that rape is most often a tool used by straight cisgender men to subjugate women (of varied gendered embodiments), it is troubling that many write about sexual assault as if their explicitly hetero-cis-centric scholarship will not ultimately affect sexual and gender minorities (the populations that are likely to be both most vulnerable to sexual crimes and criminalized by these laws). To clarify, I have no issue with how often the important subject of heterosexual violence is discussed—it is, after all, a major problem in our society. Rather, my objection is how scholars often (implicitly or explicitly) exclude queer and trans experiences from the scope of their analyses without considering how their theory might benefit from including more diverse perspectives or how the exclusion of these perspectives might contribute to the ongoing

persecution and marginalization of queer and trans persons. In saying this, I am not calling for a moratorium on research that focuses on heterosexual violence or gendered power dynamics; instead, I merely call for greater attention to how including a greater diversity of perspectives would ameliorate existing theories on sexual justice.

References

Cases cited

Boro v. Superior Court, [1985] 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122

Carrigan v. Davis, [1999] 70 F. Supp. 2d 448

Commonwealth v. Mlinarich, [1988] 542 A.2d 1335 Pa.

R c. Wilcox, [2011] QCCQ 11007

R. v. Aziga, [2009], ONSC CR- 08-1735

R. v. Clarence, [1889] 22 QB 23

R. v. Cuerrier, [1998] 2 S.C.R. 371

R. v. DC, [2012] 2 S.C.R. 626

R. v. Dica, [2004] EWCA Crim 1103

R. v. Edwards, [2001] NSSC 80

R. v. Hutchinson, [2014] 1 SCR 346

R. v. JA, 2011 SCC 28, [2011] 2 S.C.R. 440

R. v. JAT, [2010] BCSC 766

R. v. Jobidon, [1991] 2 S.C.R. 714

R. v. Konzani, [2005] EWCA Crim 706

R. v. Mabior, [2012] 2 S.C.R. 584

R. v. Maurantonio, [1968] 1 O.R. 145

R. v. Mercer, [1993] 84 C.C.C. (3d) 41 (Nfld.)

R. v. Ssenyonga, [1993] CanLII 14680 (ON SC)

R. v. Thornton, [1991] 1 O.R. 3d 480

R. v. Trott, [2008] BCCA 463

R. v. Williams, [2003] SCC 41

R. v. Iamkhong, [2009] ONCA 478

Smallwood v State, [1996] 680 A.2d 512, 343 Md. 97

Williams v. Humphrey, [2009] 09-cv-202-bbc W.D. Wis.

Bibliography

Abbey, Antonia. 1987. "Misperceptions of Friendly Behavior as Sexual Interest: A Survey of Naturally Occurring Incidents." *Psychology of Women Quarterly* 11 (2): 173–94. https://doi.org/10.1111/j.1471-6402.1987.tb00782.x.

Abrams, Kathryn. 1999. "From Autonomy to Agency : Feminist Perspectives on Self-Direction." *William and Mary Law Review* 40 (3): 805.

Adam, Barry D., Richard Elliott, Patrice Corriveau, and Ken English. 2014. "Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada." *Sexuality Research and Social Policy* 11 (1): 39–49. https://doi.org/10.1007/s13178-013-0131-8.

Ahearn, Laura. 1998. "'A Twisted Rope Binds My Waist': Locating Constraints on Meaning in a Tij Songfest." *Journal of Linguistic Anthropology* 8 (1): 60–86. http://dx.doi.org/10.1525/jlin.1998.8.1.60.

———. 2001. "Language and Agency." *Annual Review of Anthropology* 30 (1): 109–37. https://doi.org/10.1146/annurev.anthro.30.1.109.

———. 2017. *Living Language: An Introduction to Linguistic Anthropology*. Second Edi. Malden, MA: Wiley Blackwell.

Ahmed, Sarah. 2006a. *Orientations: Toward a Queer Phenomenology*. *GLQ: A Journal of Lesbian and Gay Studies*. Vol. 12. https://doi.org/10.1215/10642684-2006-002.

———. 2006b. *Queer Phenomenology: Orientations, Objects, Others*. Durham: Duke University Press.

———. 2014. *Willful Subjects*. Durham: Duke University Press.

———. 2017. *Living a Feminist Life*. Duke University Press. https://doi.org/10.1215/9780822373377-001.

Albert, Saul, and J. P. de Ruiter. 2018. "Repair: The Interface Between Interaction and Cognition." *Topics in Cognitive Science* 10 (2): 279–313. https://doi.org/10.1111/tops.12339.

Alcoff, Linda. 1991. "The Problem of Speaking for Others." *Cultural Critique*, no. 20: 5–32.

Alexander, Larry. 1996. "The Moral Magic of Consent (II)." *Legal Theory* 2 (03): 165. https://doi.org/10.1017/S1352325200000471.

———. 2014. "The Ontology of Consent." *Analytic Philosophy* 55 (1): 102–13.

Anderson, Leon. 2006. "Analytic Autoethnography." *Journal of Contemporary Ethnography* 35 (4): 373–95. https://doi.org/10.1177/0891241605280449.

Anderson, Peter B., and William Sorensen. 1999. "Male and Female Differences in Reports of Women's Heterosexual Initiation and Aggression." *Archives of Sexual Behavior* 28 (3): 243–53. https://doi.org/10.1023/A:1018736326344.

Attia, Suzanna, Matthias Egger, Monika Müller, Marcel Zwahlen, and Nicola Low. 2009. "Sexual Transmission of HIV According to Viral Load and Antiretroviral Therapy: Systematic Review and Meta-Analysis." *Aids* 23 (11): 1397–1404. https://doi.org/10.1097/QAD.0b013e32832b7dca.

Auccaise, R., R. M. Serra, J. G. Filgueiras, R. S. Sarthour, I. S. Oliveira, and L. C. Céleri. 2012. "Experimental Analysis of the Quantum Complementarity Principle." *Physical*

Review A - Atomic, Molecular, and Optical Physics 85 (3): 1–5. https://doi.org/10.1103/PhysRevA.85.032121.

Austin, John. 1975. *How to Do Things with Words*. Edited by J Urmson and M Sbisa. 2nd ed. Harvard University Press.

Bakhtin, Mikhail. 1981. *The Dialogic Imagination: Four Essays*. Edited by Caryl Emerson and Michael Holquist. Austin: University of Texas Press. https://utpress.utexas.edu/books/bakdia.

Barad, Karen. 1998. "Getting Real: Technoscientific Practices and the Materialization of Reality." *Differences* 10 (2): 87. http://cdu.summon.serialssolutions.com/2.0.0/link/0/eLvHCXMwY2BQsEhKNTSzSAW27tMMEo2Mk5KAbQhgK9kyJTUlKc3UMhHlpgak0txNiIEpNU-UQcbNNcTZQxdWNMan5OTEA8taYzPQwS5iDCzAfnGqBIOCsYWJRVqioWWSRUqiiZG5QZIpsO40N00EdigsDcxSUwC15iEA.

———. 2003. "Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter." *Signs: Journal of Women in Culture and Society* 28 (3): 801–30. https://doi.org/10.1086/345321.

———. 2007. *Meeting the Universe Halfway*. Duke University Press.

———. 2013. "On Touching--The Inhuman That Therefore I Am." *Differences* 23 (3): 206–23. https://doi.org/10.1215/10407391-1892943.

Beres, Melanie A. 2007. "'Spontaneous' Sexual Consent: An Analysis of Sexual Consent Literature." *Feminism and Psychology* 17 (1): 93–108. https://doi.org/10.1177/0959353507072914.

———. 2010. "Sexual Miscommunication? Untangling Assumptions about Sexual

Communication between Casual Sex Partners." *Culture, Health and Sexuality* 12 (1): 1–14. https://doi.org/10.1080/13691050903075226.

Beres, Melanie A, Scott B Maitland, and Edward S Herold. 2004. "Sexual Consent Behaviors in Same-Sex Relationships." *Archives of Sexual Behavior* 33 (5): 475–86. https://doi.org/10.1023/B.

Berlant, Lauren. 2006. "Cruel Optimism." *Differences* 17 (3): 20–36. https://doi.org/10.1215/10407391-2006-009.

———. 2011. *Cruel Optimism*. Durham: Duke University Press.

Bersani, Leo. 1987. "Is the Rectum a Grave?" *AIDS: Cultural Analysis/Cultural Activism* 43: 197–222.

Billig, M. 1999. *Freudian Repression: Conversation Creating the Unconscious.* Cambridge University Press.

———. 2006. "A Psychoanalytic Discursive Psychology: From Consciousness to Unconsciousness." *Discourse Studies* 8 (1): 17–24.

Bilmes, Jack. 1994. "Constituting Silence: Life in the World of Total Meaning." *Semiotica* 98 (1–2): 73–88. https://doi.org/10.1515/semi.1994.98.1-2.73.

Blackman, Lisa, and Couze Venn. 2010. "Affect." *Body and Society* 16 (1): 7–28. https://doi.org/10.1177/1357034X09354769.

Blass, Regina. 1990. *Relevance Relations in Discourse: A Study with Special Reference to Sissala*. Cambridge University Press.

Boellstorff, Tom, Bonnie Nardi, Celia Pearce, and T. L. Taylor. 2012. *Ethnography and Virtual Worlds: A Handbook of Method.* Princeton University Press.

Bourdieu, Pierre. 1977. *Outline of a Theory of Practice*. Cambridge: Cambridge University

Press.

———. 1984a. *Distinction: A Social Critique of the Judgement of Taste*. London: Routledge.

———. 1984b. "'The Aristocracy of Culture' and 'The Habitus and the Spaces of Lifestyles.'" In *Distinction: A Social Critique of the Judgment of Taste*.

Boyle, Christine. 1984. *Sexual Assault*. Toronto: Carswell.

Briggs, Charles L. 1992. "Linguistic Ideologies And the Naturalization of Power in Warao Discourse." *Pragmatics* 2 (3): 387–404. https://doi.org/10.1075/prag.2.3.14bri.

Briggs, Charles L, and Richard Bauman. 1992. "Genre, Intertextuality, and Social Power." *Journal of Linguistic Anthropology* 2 (2): 131–72.

Brodsky, Alexandra. 2017. "'Rape-Adjacent' : Imagining Legal Responses to Nonconsensual Condom Removal." *Columbia Journal of Gender and Law* 32 (2): 183–210.

Brown, T. N. T., and J. L. Herman. 2015. "Intimate Partner Violence and Sexual Abuse among LGBT People: A Review of Existing Research." https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton University Press.

Buchanan, Kim. 2015. "When Is HIV a Crime? Sexuality, Gender, Consent." *Minn L Rev* 99: 1231–1342.

Bucholtz, Mary. 2000. "The Politics of Transcription." *Journal of Pragmatics* 32 (10): 1439–65. https://doi.org/10.1016/S0378-2166(99)00094-6.

Bucholtz, Mary, and Kira Hall. 2016. "Embodied Sociolinguistics." In *Sociolinguistics: Theoretical Debates*, edited by Nikolas Coupland, 173–98. Cambridge University Press.

Bumet, Jennie E. 2012. “Situating Sexual Violence in Rwanda (1990–2001): Sexual Agency, Sexual Consent, and the Political Economy of War.” *African Studies Review* 55 (02): 97–118. https://doi.org/10.1353/arw.2012.0034.

Butler, Judith. 1988. “Performative Acts and Gender Constitution : An Essay in Phenomenology and Feminist Theory.” *Theatre Journal* 40 (4): 519–31.

———. 1991. “Imitation and Gender Insubordination.” In *Inside/out: Lesbian Theories, Gay Theories*. New York: Routledge.

———. 1993a. *Bodies That Matter: On the Discursive Limits of “Sex.”* New York: Routledge.

———. 1993b. “Imitation and Gender Insubordination.” In *The Lesbian and Gay Studies Reader*, edited by H Abelove, M. A. Barale, and D. M. Halperin. New York: Routledge.

———. 1997. *Excitable Speech: A Politics of the Performative*. New York: Routledge.

———. 2009. “Performativity, Precarity and Sexual Politics.” *AIBR* 4 (3): i–xiii.

Cahill, Ann J. 2014. “Recognition, Desire, and Unjust Sex.” *Hypatia* 29 (2): 303–19. https://doi.org/10.1111/hypa.12080.

———. 2016. “Unjust Sex vs. Rape.” *Hypatia* 31 (4): 746–61. https://doi.org/10.1111/hypa.12294.

Cameron, Deborah, and Don Kulick. 2003. “Language and Sexuality : Theory , Research and Politics.” In *Language and Sexuality*, edited by Deborah Cameron and Don Kulick. Cambridge University Press.

Carston, Robyn. 2002. *Thoughts and Utterances: The Pragmatics of Explicit Communication.* Wiley Blackwell.

CDC. 2010. “The National Intimate Partner and Sexual Violence Survey: An Overview of

2010 Findings on Victimization by Sexual Orientation." www.cdc.gov/violenceprevention/nisvs.

Check, James V., and Neil M. Malamuth. 1983. "Sex Role Stereotyping and Reactions to Depictions of Stranger versus Acquaintance Rape." *Journal of Personality and Social Psychology* 45 (2): 344–56. https://doi.org/10.1037/0022-3514.45.2.344.

Chen, Mel Y. 2012. *Animacies: Biopolitics, Racial Mattering, and Queer Affect*. Duke University Press.

Clair, Robin Patrick. 1998. *Organizing Silence.* Albany, NY.: State University of New York Press.

Coe, N. M., and D. C. Jordhus-Lier. 2011. "Constrained Agency? Re-Evaluating the Geographies of Labour." *Progress in Human Geography* 35 (2): 211–33. https://doi.org/10.1177/0309132510366746.

Comack, Elizabeth. 1999. "Theoretical Excursions." In *Locating Law: Race/Class/Gender Connections,* 19–68. Halifax: Fernwood Publishing.

Cowan, Sharon. 2014. "Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission." *New Criminal Law Review: An International and Interdisciplinary Journal* 17 (1): 135–61. https://doi.org/10.1525/nclr.2014.17.1.135.

Craig, Elaine. 2011. *Troubling Sex: Towards a Legal Theory of Sexual Integrity*. Vancouver: University of British Columbia Press.

———. 2014. "Capacity to Consent to Sexual Risk." *New Criminal Law Review: An International and Interdisciplinary Journal* 17 (1): 103–34. https://doi.org/10.1525/nclr.2014.17.1.103.

Csordas, Thomas J. 1990. "Embodiment as a Paradigm for Anthropology." *Ethos* 18 (1): 5–

47. https://doi.org/10.1525/eth.1990.18.1.02a00010.

Dean, Tim. 2009. *Unlimited Intimacy: Reflections on the Subculture of Barebacking*. University of Chicago Press.

Dej, Erin, and Jennifer M Kilty. 2014. "'Criminalization Creep': A Brief Discussion of the Criminalization of HIV/AIDS Non-Disclosure in Canada." *Canadian Journal of Law and Society* 27 (1): 55–66. https://doi.org/10.1353/jls.2012.0011.

Deleuze, G., and C. Parnet. 2002. *Dialogues II*. 2nd editio. New York: Columbia University Press.

Derlega, Valerian J., Barbara a. Winstead, Kathryn Greene, Julianne Serovich, and William N. Elwood. 2004. "Reasons for HIV Disclosure/Nondisclosure in Close Relationships: Testing a Model of HIV–Disclosure Decision Making." *Journal of Social and Clinical Psychology* 23 (6): 747–67. https://doi.org/10.1521/jscp.23.6.747.54804.

Derrida, Jacques. 1977. *Limited Inc*. Baltimore: John Hopkins University Press.

Dijk, Teun A. Van. 2008. "Critical Discourse Analysis and Nominalization: Problem or Pseudo-Problem?" *Discourse & Society* 19 (6): 821–28. https://doi.org/10.1177/0957926508095897.

Dodds, C., and P. Keogh. 2006. "Criminal Prosecutions for HIV Transmission: People Living with HIV Respond." *International Journal of STD and AIDS* 17 (5): 315–18. http://www.embase.com/search/results?subaction=viewrecord&from=export&id=L43668170%5Cnhttp://docserver.ingentaconnect.com/deliver/connect/rsm/09564624/v17n5/s7.pdf?expires=1146712818&id=28847473&titleid=72&accname=Elsevier&checksum=448387181D5D48A9E3C7321.

Dougherty, Tom. 2013. "Sex , Lies , and Consent." *Ethics* 123 (4): 717–44.

———. 2015. “No Way Around Consent: A Reply to Rubenfeld on Rape-by-Deception.” *Yale L.J. Online* 123: 321–34. https://doi.org/10.3868/s050-004-015-0003-8.

Edelman, Lee. 2013. “The Future Is Kid Stuff : Queer Theory, Disidentification, and the Death Drive.” *Narrative* 6 (1): 18–30.

Edgar, Timothy, and Mary Anne Fitzpatrick. 1993. “Expectations for Sexual Interaction: A Cognitive Test of the Sequencing of Sexual Communication Behaviors.” *Health Communication* 5 (4): 239–61. https://doi.org/10.1207/s15327027hc0504_1.

Edwards, Terra. 2012. “Sensing the Rhythms of Everyday Life: Temporal Integration and Tactile Translation in the Seattle Deaf-Blind Community.” *Language in Society* 41 (1): 29–71. https://doi.org/10.1017/S004740451100090X.

———. 2014. “From Compensation to Integration: Effects of the pro-Tactile Movement on the Sublexical Structure of Tactile American Sign Language.” *Journal of Pragmatics* 69: 22–41. https://doi.org/10.1016/j.pragma.2014.05.005.

Ehrlich, Susan. 1998. “The Discursive Reconstruction of Sexual Consent.” *Discourse & Society* 9 (2): 149–71. https://doi.org/10.1177/0957926598009002002.

———. 2001. *Representing Rape: Language and Sexual Consent*. Routledge.

Ephratt, Michal. 2008. “The Functions of Silence.” *Journal of Pragmatics* 40 (11): 1909–38. https://doi.org/10.1016/j.pragma.2008.03.009.

Estrich, Susan. 1987. *Real Rape*. Harvard University Press.

Fairclough, Norman. 2001. *Language and Power*. Routledge.

Falk, Patricia J. 1998. “Rape by Fraud and Rape by Coercion.” *Brooklyn Law Review* 64 (1): 39–180.

———. 2013. “Not Logic, but Experience: Drawing on Lessons Fromt He Real World in

Thinking about the Ridde of Rape-by-Fraud." *Yale L.J. Online* 123: 353–70. https://doi.org/10.3868/s050-004-015-0003-8.

Felix, Shanna, Justin Hoyle, Chad Posick, and John Stogner. 2015. "Deconstructing the LGBT-Victimization Association: The Case of Sexual Assault and Alcohol-Related Problems." *Journal of Family Strengths* 15 (1).

Feynman, Richard P., Robert B. Leighton, and Matthew Sands. 1964. "The Feynman Lectures on Physics Volume III." *The Feynman Lectures On Physics*. Addison Wesley.

Finlay, Linda. 2002. "'Outing' the Researcher: The Provenance, Principles, Adn Practice of Refelxivity." *Qualitative Health Research* 12 (4): 531–45.

Fischel, Joseph J. 2010. "Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary." *Duke Journal of Gender, Law and Policy* 277: 277–311.

———. 2019. *Screw Consent: A Better Politics of Sexual Justice*. Oakland: University of California Press.

Foucault, Michel. 1976. *The History of Sexuality Volume 1: The Will to Knowledge*. Reissue. Vintage.

———. 1980. "The Confession of the Flesh." In *Power/Knowledge Selected Interviews and Other Writings (1972-1977)*, edited by Colin Gordon, 194–228. Vintage.

———. 1988. *Technologies of the Self: A Seminar with Michel Foucault*. Edited by Luther H. Martin, Huck Gutman, and Patrick H. Hutton. University of Massachusetts Press.

———. 1994. "Friendship as a Way of Life." In *The Essential Works of Michel Foucault, 1954-1984*, edited by P. Rainbow and J. Faubion. New York: New Press.

———. 1995. *Discipline and Punish : The Birth of the Prison*. Vintage Books.

Franke, Katherine M. 2001. “Theorizing Yes: An Essay on Feminism, Law, and Desire.” *Columbia Law Review* 101 (1): 181–208.

Frescura, F. A. M., and B. J. Hiley. 1984. “Algebras, Quantum Theory and Pre-Space.” *Revista Brasileira de Fisica, Special Volume “Os 70 Anos de Mario Schonberg,”* 49–86.

Gagnon, H., and W. Simon. 2009. *Sexual Conduct: The Social Sources of Human Sexuality (2nd Ed.)*. Rutgers, NJ: Aldline Transaction.

Gal, Susan. 1992. “Multiplicity and Contention among Ideologies: A Commentary.” *Pragmatics* 2 (3): 445–49.

Galletly, Carol L., and J. Dickson-Gomez. 2009. “HIV Seropositive Status Disclosure to Prospective Sex Partners and Criminal Laws That Require It: Perspectives of Persons Living with HIV.” *International Journal of STD and AIDS* 20 (9): 613–18. https://doi.org/10.1258/ijsa.2008.008417.

Galletly, Carol L., and Steven D. Pinkerton. 2004. “Toward Rational Criminal HIV Exposure Laws.” *The Journal of Law, Medicine & Ethics* 32: 327–37.

Gavey, N. 1999. “‘I Wasn’t Raped, but...’: Revisiting Definitional Problems in Sexual Victimization.” In *New Versions of Victims: Feminists Struggle with the Concept*, edited by S Lamb, 57–81. New York: New York University Press.

Gavey, Nicola. 2005. *Just Sex? The Cultural Scaffolding of Rape*. Abingdon-on-Thames: Routledge.

Geertz, C. 1988. *Works and Lives: The Anthropologist as Author.* Stanford University Press.

Gersen, Jacob, and Jeannie Suk. 2016. “The Sex Bureaucracy.” *California Law Review* 104: 881–948.

Goffman, Erving. 1956. *The Presentation of Self in Everyday Life.* New York: Doubleday.

———. 1974. *Frame Analysis: An Essay on the Organization of Experience*. New York: Harper and Row.

Goodwin, Charles. 2000. "Action and Embodiment within Situated Human Interaction." *Journal of Pragmatics* 32: 1489–1522.

———. 2007. "Participation, Stance and Affect in the Organization of Activities." *Discourse and Society* 18 (1): 53–73. https://doi.org/10.1177/0957926507069457.

Goodwin, Marjorie Harness. 2017. "Haptic Sociality the Embodied Interactive Constitution of Intimacy through Touch." *Intercorporeality: Emerging Socialities in Interaction*, 73–102. https://doi.org/10.1093/acprof:oso/9780190210465.003.0004.

Goodwin, Marjorie Harness, and H Samy Alim. 2010. "'Whatever (Neck Roll, Eye Roll, Teeth Suck)': The Situated Coproduction of Social Categories and Identities through Stancetaking and Transmodal Stylization." *Journal of Linguistic Anthropology* 20 (1): 179–94. https://doi.org/10.1111/j.1548-1395.2010.01056.x.T.

Gotell, Lise. 2009. "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women." *Akron Law Review* 270 (1516): 865–98.

Grant, Isabel. 2009. "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions." *McGill Law Journal* 54 (2): 389. https://doi.org/10.7202/038659ar.

———. 2011. "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier." *McGill Journal of Law and Health* 5 (1): 7–59.

Grice, Paul. 1975. "Logic and Conversation." In *Syntax and Semantics Volume 3: Speech Acts*, edited by Peter Cole and Jerry Morgan, 41–58. New York: Academic Press.

Gruber, Aya. 2016. “Not Affirmative Consent.” *University of the Pacific Law Review* 47: 683–707.

Halberstam, J. 2011. *The Queer Art of Failure*. Durham: Duke University Press.

Hall, David S. 1998. “Consent for Sexual Behavior in a College Student Population.” *Electronic Journal of Human Sexuality* 1.

Halley, Janet. 2006. *Split Decisions: How and Why to Take a Break from Feminism*. Princeton University Press.

———. 2015. “The Move to Affirmative Consent.” *Signs: Journal of Women in Culture and Society* 42 (1): 257–79.

Hansen, Christian, Catherine Needham, and Bill Nichols. 1989. “Skin Flicks : Pornography , Ethnography , and the Discourses of Power.” *Discourse* 11 (2): 64–79.

Haraway, Donna. 2003. *The Haraway Reader*. New York: Routledge.

Harvey, K., and C. Shalom. 1997. *Language and Desire: Encoding Sex, Romance and Intimacy*. London; New York: Routledge.

Hayano, David M . 1979. “Auto-Ethnography : Paradigms , Problems , and Prospects.” *Human Organization* 38 (1): 99–104.

Healey, Richard. 2015. “The Ontology of Consent: A Reply to Alexander.” *Analytic Philosophy* 56 (4): 354–63.

Heaphy, B. 2001. “The (Im)Possibilities of Living as People with AIDS.” In *Exploring the Body*, edited by S. Cunningham-Burley and K. Backett-Milburn, 117–36. New York: Palgrave Macmillan.

Hertz, R. 1997. *Reflexivity and Voice*. Thousand Oaks: Sage.

Herzog, Thomas J, Paul G Kwiat, Harald Weinfurter, and Anton Zeilinger. 1995.

"Complementarity and the Quantum Eraser." *Physical Review Letters* 75 (17): 3034–37. http://link.aps.org/doi/10.1103/PhysRevLett.75.3034.

Hickman, Susan E, and Charlene L Muehlenhard. 2018. ""By the Semi-Mystical Appearance of a Condom ": How Young Women and Men Communicate Sexual Consent in Heterosexual Situations " By the Semi-Mystical Appearance of a Condom ": How Young Women and Men Communicate Sexual Consent in Heterosexual Situations" 36 (3): 258–72.

Hillewaert, Sarah. 2016. "Tactics and Tactility: A Sensory Semiotics of Handshakes in Coastal Kenya." *American Anthropologist* 118 (1): 49–66. https://doi.org/10.1111/aman.12517.

Huffer, Lynne. 2013. *Are the Lips a Grave? : A Queer Feminist on the Ethics of Sex*. New York: Columbia University Press.

Hurd, Heidi. 1996. "The Moral Magic of Consent." *Legal Theory* 2 (02): 121. https://doi.org/10.1017/S1352325200000434.

———. 2016. "The Normative Force of Consent." *Routledge Handbook on The Ethics of Consent* 53: 1–24. https://doi.org/10.1017/CBO9781107415324.004.

Inoue, Miyako. 2006. *Vicarious Language: Gender and Linguistic Modernity in Japan*. Berkeley: University of California Press.

Irvine, Judith, and Susan Gal. 2000. "Language Ideology and Linguistic Differentiation." In *Regimes of Language: Ideologies, Polities, and Identities*, 35–84. Santa Fe: School of American Research Press.

Jakobson, Roman. 1956. *Fundamentals of Language*. https://doi.org/10.1093/library/s1-1.1.313.

———. 1960. “Concluding Statment: Linguistics and Poetics.” In *Style in Language*, edited by Thomas Albert Sebeok, 350–77. Cambridge: MIT Press.

Johnson, Catherine B., Margaret S. Stockdale, and Frank E. Saal. 1991. “Persistence of Men’S Misperceptions of Friendly Cues Across a Variety of Interpersonal Encounters.” *Psychology of Women Quarterly* 15 (3): 463–75. https://doi.org/10.1111/j.1471-6402.1991.tb00421.x.

Jozkowski, Kristen N., Zoë D. Peterson, Stephanie A. Sanders, Barbara Dennis, and Michael Reece. 2014. “Gender Differences in Heterosexual College Students’ Conceptualizations and Indicators of Sexual Consent: Implications for Contemporary Sexual Assault Prevention Education.” *Journal of Sex Research* 51 (8): 904–16. https://doi.org/10.1080/00224499.2013.792326.

Kaplan, Margo. 2012. “Rethinking HIV-Exposure Crimes.” *Indiana Law Journal* 87 (4): 1517–70. https://doi.org/10.3366/ajicl.2011.0005.

———. 2013. “Sex-Positive Law.” *New York University Law Review* 87: 89–164. https://doi.org/10.2139/ssrn.2308955.

Kazan, Patricia. 1998. “Sexual Assault and the Problem of Consent.” In *Violence against Women: Philosophical Perspectives*, edited by Stanley French, Wanda Teays, and Laura Purdy. Ithaca: Cornell University Press.

Kiel, and Brennan-Marquez. 2013. “A Quite Principled Conceit: A Response to Jed Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 Yale L J 1372 (2013).” *University of Chicago Law Review Online* 80 (1): Article 5.

Kilimnik, Chelsea D., and Terry P. Humphreys. 2018. “Understanding Sexual Consent and Nonconsensual Sexual Experiences in Undergraduate Women: The Role of

Identification and Rape Myth Acceptance." *The Canadian Journal of Human Sexuality*, no. November: 1–12. https://doi.org/10.3138/cjhs.2017-0028.

Kipnis, Laura. 2017. *Unwanted Advances: Sexual Paranoia Comes to Campus*. New York: Harper.

Kitzinger, Celia. 2012. "Repair." In *The Handbook of Conversation Analysis*, edited by Jack Sidnell and Tanya Stivers, 229–56. Malden, MA: Blackwell.

Kitzinger, Celia, and Hannah Frith. 1999. "Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal." *Discourse & Society* 10 (3): 293–316. https://doi.org/10.1177/0957926599010003002.

Klinkenberg, Dean, and Suzanna Rose. 1994. "Dating Scripts of Gay Men and Lesbians." *Journal of Homosexuality* 26: 23–35.

Kockelman, Paul. 2007. "Agency The Relation between Meaning, Power, and Knowledge." *Current Anthropology* 48 (3): 375–401.

Kuhn, Elisabeth D. 1984. "Speech Act Theory and Pragmatics." *Journal of Pragmatics*. https://doi.org/10.1016/0378-2166(84)90068-7.

Kulick, Don. 1990. "Anger, Gender, Language Shift and the Politics of Revelation in a Papua New Guinean Yillage." *Pragmatics* 2 (3): 281–96.

———. 2000. "Gay and Lesbian Language." *Annual Review of Anthropology* 29: 243–85.

———. 2003. "No." *Language & Communication* 23 (2): 139–51. https://doi.org/10.1016/S0271-5309(02)00043-5.

Labov, William, and David Fanshel. 1977. *Therapeutic Discourse*. New York: Academic Press.

Lacey, Nicola. 1998a. "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and

Criminal Law." *Canadian Journal of Law and Jurisprudence* 11 (1): 47–68. https://doi.org/10.1017/S0841820900001685.

———. 1998b. *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*. Hart Publishing.

Lakoff, Robin. 1973. "Language and Woman's Place." *Language in Society* 2 (1): 45–80. https://en.wikipedia.org/wiki/Robin_Lakoff.

Lamb, Gavin, and Christina Higgins. 2020. "Posthumanism and Its Implications for Discourse Studies." *The Cambridge Handbook of Discourse Studies*, 350–70. https://doi.org/10.1017/9781108348195.017.

Latour, Brian. 2005. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford University Press.

Lazar, Ruthy. 2010. "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada." *Canadian Journal of Women and the Law* 22 (2): 329–63. https://doi.org/10.3138/cjwl.22.2.329.

Lazarus-Black, M, and S Hirsch. 1994. *Contested States: Law, Hegemony and Resistance*. London: Routledge.

Lees, S. 1996. *Carnal Knowledge: Rape on Trial*. London: Hamish Hamilton.

———. 1997. *Ruling Passions: Sexual Violence, Reputation, and the Law*. Buckingham and Philidelphia: Open University Press.

Mackay, Robin James. 2012. *Collapse : Philosophical Research and Development*. Urbanomic. https://www.urbanomic.com/book/collapse-2/.

MacKinnon, Catherine A. 1989. *Toward a Feminist Theory of the State*. Cambridge. MA: Harvard University Press.

———. 2003. “A Sexual Equality Approach to Sexual Assault.” *Annals of the New York Academy of Sciences*, no. 989: 256.

———. 2007. *Women’s Lives, Men’s Laws*. Cambridge. MA: Harvard University Press.

———. 2016. “Rape Redefined.” *Harvard Law and Policy Review* 10: 431.

Marriot, McKim. 1976. “Hindu Transactions: Diversity without Dualism.” In *Transaction and Meaning: Directions in the Anthropology of Exchange and Symbolic Behaviour*, edited by Bruce Kapferer, 109–42. Philidelphia: Inst. Study Hum. Issues.

Matoesian, Gregory M. 1993. *Reproducing Rape: Domination through Talk in the Courtroom*. Chicago: University of Chicago Press.

Mauss, Marcel. 1973. “Techniques of the Body.” *Economy and Society* 2 (1): 70–88. https://doi.org/10.1080/03085147300000003.

McCaw, Jodee M, and Charlene Y Senn. 1998. “Perception of Cues in Conflictual Dating Situations: A Test of the Miscommunication Hypothesis.” *Violence Against Women* 4 (5): 609–24.

McConnch, S. 1990. *Assertiveness: A Personal Skills Course for Young People*. Basingstoke: Macmillan Education.

McConnell-Ginet, Sally. 1989. “The (Re)Production of Sexual Meaning: A Discourse Based Theory.” In *Language, Gender and Professional Writing*, edited by F. Frank and P. Treichler, 111–34. New York: Modern Language Association.

———. 1995. “Can Linguists Help Identify Sexual Harassment?” In *Linguistic Perspectives on Sexual Harassment.* Louisiana: Linguistic Society of America Symposium.

———. 2008. “Words in the World: How and Why Meanings Can Matter.” *Language* 84 (3): 497–527. https://doi.org/10.1353/lan.0.0040.

———. 2011. *Gender, Sexuality, and Meaning: Linguistic Practice and Politics (Studies in Language and Gender)*. Oxford University Press.

McElhinny, Bonnie. 1998. “Genealogies of Gender Theory: Practice Theory and Feminism in Sociocultural and Linguistic Anthropology.” *Social Analysis* 42 (3): 164–89.

Merleau-Ponty, Maurice. 1962. *Phenomenology of Perception (Colin Smith, Trans.)*. London: Routledge and Kegan Paul.

Merry, S. 1990. *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: Chicago University Press.

Mertz, Elizabeth. 1994. “Legal Language : Pragmatics, Poetics and Social Power.” *Annual Review of Anthropology* 23 (1): 435–55.

Miller, Alice. 1991. *Breaking Down the Wall of Silence: The Liberating Experience of Facing Painful Truth*. New York: Dutton.

Miner, Horace. 1956. “Body Ritual among the Nacirema.” *American Anthropologist* 58 (3): 503–7. https://doi.org/10.1525/aa.1956.58.3.02a00080.

Miskimmin, Susanne. 2007. “When Aboriginal Equals ‘at Risk’: The Impact of an Institutional Keyword on Aboriginal Head Start Families.” In *Words, Worlds, and Material Girls Language, Gender, Globalization*, edited by Bonnie McElhinny. New York: Mouton de Gruyter.

Mortensen, Kristine Køhler. 2015. “Informed Consent in the Field of Language and Sexuality: The Case of Online Dating Research.” *Journal of Language and Sexuality* 4 (1): 1–29. https://doi.org/10.1075/jls.4.1.01mor.

———. 2017. “Flirting in Online Dating: Giving Empirical Grounds to Flirtatious Implicitness.” *Discourse Studies* 19 (5): 581–97.

https://doi.org/10.1177/1461445617715179.

Muehlenhard, Charlene L., and Lisa C. Hollabaugh. 1988. “Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex.” *Journal of Personality and Social Psychology* 54 (5): 872–79. https://doi.org/10.1037/0022-3514.54.5.872.

Muehlenhard, Charlene L., Terry P. Humphreys, Kristen N. Jozkowski, and Zoe D. Peterson. 2016. “The Complexities of Sexual Consent among College Students: A Conceptual and Empirical Review.” *Journal of Sex Research* 53 (4–5): 457–87. https://doi.org/10.1080/00224499.2016.1146651.

Muñoz, José. 2009. *Cruising Utopia: The Then and There of Queer Futurity*. New York University Press.

Murnen, Sarah K., Annette Perot, and Donn Byrne. 1989. “Coping with Unwanted Sexual Activity: Normative Responses, Situational Determinants, and Individual Differences.” *The Journal of Sex Research* 26 (1): 85–106. https://doi.org/10.1080/00224498909551493.

Mykhalovskiy, Eric. 2008. “Beyond Decision Making: Class, Community Organizations, and the Healthwork of People Living with HIV/AIDS. Contributions from Institutional Ethnographic Research.” *Medical Anthropology* 27 (2): 136–63. https://doi.org/10.1080/01459740802017363.

———. 2011. “The Problem of ‘Significant Risk’: Exploring the Public Health Impact of Criminalizing HIV Non-Disclosure.” *Social Science & Medicine (1982)* 73 (5): 668–75. https://doi.org/10.1016/j.socscimed.2011.06.051.

Mykhalovskiy, Eric, and Glenn Betteridge. 2012. “Who? What? Where? When? And with

What Consequences?: An Analysis of Criminal Cases of HIV Non-Disclosure in Canada." *Canadian Journal of Law and Society* 27 (1): 31–53. https://doi.org/10.3138/cjls.27.1.031.

Mykhalovskiy, Eric, Jonathan Glenn Betteridge, and David McLay. 2010. "HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario." https://doi.org/10.2139/ssrn.1747844.

Nakazato, H. 2005. "Complementarity in the Double-Slit Experiment Revisited." *Progress of Theoretical Physics*. https://doi.org/10.1143/ptp.85.1177.

National Center for Transgender Equality. 2016. "The Report of the 2015 U.S. Transgender Survey." http://scholar.google.com/scholar?q=The Report of the&btnG=&hl=en&num=20&as_sdt=0%2C22 VN - readcube.com.

Newton, Esther. 1993. "My Best Informant's Dress: The Erotic Equation in Fieldwork." *Cultural Anthropology* 8 (1): 3–23. https://doi.org/10.1525/can.1993.8.1.02a00010.

O'Byrne, Rachael, Mark Rapley, and Susan Hansen. 2006. "'You Couldn't Say "No", Could You?': Young Men's Understandings of Sexual Refusal." *Feminism and Psychology* 16 (2): 133–54. https://doi.org/10.1177/0959-353506062970.

Ochs, Elinor. 1979. "Transcription as Theory." In *Developmental Pragmatics,* edited by Elinor Ochs and Bambi Schieffelin.

Osman, Suzanne L. 2003. "Predicting Men's Rape Perceptions Based on the Belief That 'No' Really Means 'Yes.'" *Journal of Applied Social Psychology* 33 (4): 683–92. https://doi.org/10.1111/j.1559-1816.2003.tb01919.x.

Palec, Martin, and Mark Risjord. 2012. "Relativism and the Ontological Turn within Anthropology," no. September. https://doi.org/10.1177/0048393112463335.

Papadopoulos, Dimitrios. 2010. “Insurgent Posthumanism,” 134–52. http://orca.cf.ac.uk/25430/.

Pennycook, Alastair. 1994. “Incommensurable Discourses?” *Applied Linguistics* 15 (2): 115–38. https://doi.org/10.1093/applin/15.2.115.

———. 2018. *Posthumanist Applied Linguistics*. New York: Routledge.

Pennycook, Alastair, and Emi Otsuji. 2014a. “Metrolingual Multitasking and Spatial Repertoires: ‘Pizza Mo Two Minutes Coming.’” *Journal of Sociolinguistics* 18 (2): 161–84. https://doi.org/10.1111/josl.12079.

———. 2014b. “Market Lingos and Metrolingua Francas.” *International Multilingual Research Journal* 8 (4): 255–70. https://doi.org/10.1080/19313152.2014.951907.

Philips, Susan. 1992. “A Marx-Influenced Approach to Language and Ideology: Comments.” *Pragmatics* 2 (3): 377–85.

———. 1998. *Ideology in the Language of Judges : How Judges Practice Law, Politics, and Courtroom Control*. Oxford University Press.

Pickard, Toni. 1980. “Culpable Mistakes and Rape : Relating Mens Rea to the Crime.” *University of Toronto Law Review* 30 (1): 75–98.

Pineau, Lois. 1989. “Date Rape: A Feminist Analysis.” *Law and Philosophy* 8: 217–43.

Poland, Blake D. 1995. “Transcription as an Aspect of Rigor in Qualitative Research.” *Qualitative Inquiry* 1 (3): 290–310.

Poland, Blake D, and A. Pederson. 1988. “Reading Between the Lines: Interpreting Silences in Qualitative Research.” *Qualitative Enquiry* 4 (2): 293–312.

Race, Kane. 2012. “Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law.” *Journal of Bioethical Inquiry* 9 (3): 327–38.

https://doi.org/10.1007/s11673-012-9375-x.

Ramachandran, Gowri. 2009. “Against the Right to Bodily Integrity: Of Cyborgs and Human Rights.” *Denv. U. L. Rev.* 87 (1): 1–57.

———. 2013. “Delineating the Heinous: Rape, Sex, and Self-Possession.” *Yale L.J. Online* 123: 371–88.

Remick, Lani Anne. 1993. “Read Her Lips: An Argument for a Verbal Consent Standard in Rape.” *University of Pennsylvania Law Review* 141 (3): 1103-1151 CR-Copyright © 1993 The Universi. https://doi.org/10.2307/3312449.

Ren, Carina. 2011. “Non-Human Agency, Radical Ontology and Tourism Realities.” *Annals of Tourism Research* 38 (3): 858–81. https://doi.org/10.1016/j.annals.2010.12.007.

Rey, Marina. 2011. “Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada.” *McGill Journal of Law and Health* 5 (1): 61–102.

Rose, N. 1999. *Governing the Soul: Shaping the Private Self*. 2nd ed. London: Free Association.

———. 2001. “The Politics of Life Itself.” *Theory, Culture and Society* 18 (6): 1–30. https://doi.org/10.1177/02632760122052020.

Rubenfeld, Jed. 2013a. “Rape-by-Deception - A Response.” *Yale L.J. Online* 123: 389–406. https://doi.org/10.3868/s050-004-015-0003-8.

———. 2013b. “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy.” *Yale Law Journal* 122 (6): 1372–1443.

Rumsey, Alan. 1990. “Wording, Meaning, and Linguistic Ideology.” *American Anthropologist* 92 (2): 346–61. https://doi.org/10.1525/aa.1990.92.2.02a00060.

Ruti, Mari. 2017. *The Ethics of Opting out: Queer Theory’s Defiant Subjects*. New York:

Columbia University Press.

Sacks, H, E Schegloff, and G Jefferson. 1974. “A Simplest Systematics for the Organization of Turn-Taking for Conversation Harvey Sacks , Emanuel A . Schegloff and Gail Jefferson.” *Language* 50 (4): 696–735.

Sandler, Adrian D, Thomas E Watson, and Melvin D Levine. 1992. “A Study of the Cognitive Aspects of Sexual Decision Making in Adolescent Females.” *Developmental and Behavioral Pediatrics* 13 (3): 202–7.

Sartre, Jean-Paul. 1945. *Les Temps Modernes: Revue Mensuelle, Volume 1, Number 1, Présentation.* Paris, France: Temps Modernes.

Schegloff, Emanuel A. 2007a. *Sequence Organization in Interaction: A Primer in Conversation Analysis, Vol. 1*. Cambridge, UK: Cambridge University Press.

———. 2007b. *Sequence Organization in Interaction: A Primer in Conversation Analysis I*. Cambridge, UK: Cambridge University Press.

Schutz, Alfred. 1962. “Common-Sense and Scientific Interpretation of Human Action.” In *Vol. 1 of Collected Papers of Alfred Schutz*, 3–47. The Hague, the Netherlands: Nijhoff, Martinus.

Sherwin, Emily. 1996. “Infelicitous Sex.” *Legal Theory* 1: 209–31. https://doi.org/10.3366/ajicl.2011.0005.

Sicoli, Mark. 2013. “Multi-Modal and Multi-Authored Social Actions in a Lachixío Zapotec Video Corpus.” *Paper Presented at the 112th Meeting of the American Anthropological Association, Chicago, IL, November 21, 2013.*

Sicoli, Mark A. 2020. *Saying and Doing in Zapotec*. Bloomsbury Academic. https://doi.org/10.5040/9781350142190.

Siegel, Karolynn, Helen-Maria Lekas, and Eric W. Schrimshaw. 2005. “Serostatus Disclosure to Sexual Partners by HIV-Infected Women Before and After the Advent of HAART.” *Women and HEalth* 41 (4): 63–85. https://doi.org/10.1300/J013v41n04.

Silverstein, Michael. 1979. “Language Structure and Linguistic Ideology.” In *The Elements: A Parasession on Linguistic Units and Levels,* edited by Paul R. Clyne, William F. Hanks, and Carol L. Hofbauer, 193–248. Chicago Linguistic Society.

Simmons, A. John. 1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

Sinding, C., and J. Aronson. 2003. “Exposing Failures, Unsettling Accommodations: Tensions in Interview Practice.” *Qualitative Research* 3 (1): 95–111.

Sismondo, Sergio. 2015. “Ontological Turns , Turnoffs and Roundabouts,” no. 2014. https://doi.org/10.1177/0306312715574681.

Sivado, Akos. 2015. “The Shape of Things to Come? Reflections on the Ontological Turn in Anthropology,” no. January 2014. https://doi.org/10.1177/0048393114524830.

Skillings, Derek. 2016. “Holobionts and the Ecology of Organisms: Multi-Species Communities or Integrated Individuals?” *Biology & Philosophy* 31 (6): 875–92. https://doi.org/10.1007/s10539-016-9544-0.

Smart, C. 1989. *Feminism and the Power of Law*. London: Routledge.

Smith, Benjamin. 2012. “Language and the Frontiers of the Human: Aymara Animal-Oriented Interjections and the Mediation of Mind.” *American Ethnologist* 39 (2): 313–24. https://doi.org/10.1111/j.1548-1425.2012.01366.x.

Soria, B., and E. Romero. 2010. *Explicit Communication: Robyn Carston’s Pragmatics*. London: Palgrave Macmillan.

Stere, L K. 1985. “Feminist Assertiveness Training: Self-Esteem Groups as Skill Training for Women.” In *Handbook of Feminist Theory*, edited by L B Rosewater and L G A Walker. New York: Springer.

Streeck, Jürgen. 2009. *Gesturecraft: The Manu-Facture of Meaning*. Philidelphia: John Benjamins.

———. 2013. “Interaction and the Living Body.” *Journal of Pragmatics* 46 (1): 69–90. https://doi.org/10.1016/j.pragma.2012.10.010.

Streeck, Jürgen, Charles Goodwin, and Curtis LeBaron. 2011. *Embodied Interaction: Language and the Body in the Material World*. Cambridge: Cambridge University Press.

Sultana, Shaila, Sender Dovchin, and Alastair Pennycook. 2013. “Styling the Periphery: Linguistic and Cultural Takeup in Bangladesh and Mongolia.” *Journal of Sociolinguistics* 17 (5): 687–710. https://doi.org/10.1111/josl.12055.

Symington, Alison. 2012. “HIV Exposure as Assault : Progressive Development or Misplaced Focus?” In *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, edited by Elizabeth A Sheehy. University of Ottawa Press.

Tadros, Victor. 2006. “Rape without Consent.” *Oxford Journal of Legal Studies* 26 (3): 515–43. https://doi.org/10.1093/ojls/gql016.

Tang, Kwong Leung. 1998. “Rape Law Reform in Canada: The Success and Limits of Legislation.” *International Journal of Offender Therapy and Comparative Criminology* 42 (3): 258–70. https://doi.org/10.1177/0306624X9804200307.

Tiersma, Peter. 2007. “The Language of Consent in Rape Law.” In *The Language of Sexual Crime*, edited by Janet Cotterill, 83–103. Palgrave Macmillan.

Tiersma, Peter, and Lawrence Solan. 2004. “Cops and Robbers: Selective Literalism in

American Criminal Law." *Law and Society Review* 38 (2): 229–66. https://doi.org/10.1111/j.0023-9216.2004.03802008.x.

Tuerkheimer, Deborah. 2013. "Sex Without Consent." *Yale L.J. Online* 123: 335–52.

Vidler, Jack. 2017. "Ostensible Consent and the Limits of Sexual Autonomy." *Macquarie Law Journal* 17: 103–26.

Waldman, Ari Ezra. 2011. "Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults." *Virginia Journal of Social Policy and Law* 18 (3): 550–605. https://doi.org/10.3366/ajicl.2011.0005.

Wertheimer, Alan. 1996. "Consent to Sexual Relations." *Legal Theory* 1: 89–112.

———. 2003. *Consent to Sexual Relations*. Cambridge University Press.

Westen, Peter. 2004. *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (Law, Justice, and Power).* Abingdon-on-Thames: Routledge.

Woolard, Kathryn A., and Bambi B. Schieffelin. 1994. "Language Ideology." *Annual Review of Anthropology* 23 (1): 55–82. https://doi.org/10.1146/annurev.an.23.100194.000415.

Yung, Corey Rayburn. 2016. "Rape Law Fundamentals." *Yale Journal of Law and Feminism* 27 (1): Article 1. https://doi.org/10.2139/ssrn.2337621.

Zerubavel, Eviatar. 2006. *No The Elephant in the Room: Silence and Denial in Everyday Life.* Oxford: Oxford University Press.

Appendices

Appendix A: Pilot study interview questions and probes

1. How did you hear about this study and why did you want to get involved?
2. Have you disclosed your status to anyone? If so, to whom, how and when do you decide to disclose? (probe for examples unless the participant seems reticent or uncomfortable in any way. This question includes family, friends, coworkers, employees, clients, sexual and romantic partners, and service providers)
3. How have people reacted to you disclosing? (make sure to get answers for each kind of relationship, e.g., friend or romantic partner)
4. How familiar are you with non-disclosure laws? When do you think (if ever) that disclosure should be necessary? (**Direct to HALCO if necessary**)
5. What advice would you give to a friend on how and when to disclose? (probe for example scenarios. If necessary to prompt an answer, remind participant that this is hypothetical.)
6. Do you feel a sense of belonging to any communities? Why or why not? If so, which ones? (probe for examples and narratives unless the participant seems reticent or uncomfortable in any way. This question should look at acceptance, celebration, tolerance, stigma, prejudice, and discrimination.)
7. What resources are you currently aware of for HIV-positive MSM (men who have sex with men)? (probe for when the participant began accessing resources, what kind of resources they access, and why)

8. What services have you found particularly helpful? What services do you think need to be provided or improved? (probe for examples and narratives)
9. What other resources and services do you access? (probe for social, educational, financial, health and legal services—not just HIV related, this will help to understand participant's background and social position)
10. When did you learn that you are HIV-positive? (probe for how they learned they are HIV-positive and why they got tested)

Appendix B: Phase II study interview questions and probes

1. How did you hear about this study and why did you want to get involved?
2. What would you like your pseudonym to be if this research is published?
3. What is your age?
4. Have you ever been to a bathhouse? If so, how often do you go?
5. Are you OK with being recorded? The recording will be kept on a password protected encrypted USB drive.
6. How would you like to identify your sexual orientation (e.g. gay, bisexual, straight man who has sex with men)?
7. How would you like to identify in terms of HIV status? (this can be quite open ended. E.g., non-disclosed, positive, negative…)
8. Have you heard of PrEP (Pre-Exposure Prophylaxis)? (If negative, add: If so, do you use PrEP?)
9. How often do you go to bathhouses? When did you start? How have your bathhouse visiting habits (in frequency) changed over time?
10. How would you characterise interactions in the bathhouse? (probe for distinctions depending on location within the bathhouse and "sex talk" vs "small talk"; also, probe for different modalities of communication).
11. How familiar are you with non-disclosure laws? When do you think (if ever) that disclosure should be necessary? (explain what non-disclosure laws are if necessary).

12. Do you bring up sexual health discussions when you are hooking up in bathhouses? If not, why not? If so, why and how? (probe for general ideas and specific examples; also, probe for their consideration of prophylactics, if any)
13. If you bring up sexual health discussions, how do people generally respond? (probe for descriptions of embodied reactions, not just social labels like "anger"; in addition, ask for generalizations and specific examples)
14. Has anyone ever asked you about your sexual health or HIV status? If so, how did they go about it? How did you respond? How did you feel? (ask for generalizations and specific examples; also, probe for physiological responses of their feeling)
15. I am interested in speaking with other people who go to bathhouses to meet men. If you know of anyone who would be interested, would you be willing to put me in contact with them?

Appendix C: Pilot study informed verbal consent script

Consent to participate in an oral history interview as part of the research project

Poz-itive Intimacy: laws and language of consent and HIV status disclosure

The Poz-itive Intimacy project is the original research project I will be conducting to fulfill the requirements of my master's degree in Anthropology at the University of Toronto.

As a participant in the Poz-itive Intimacy project, you will assist, through providing oral history, in the investigation of how non-disclosure laws affect HIV-positive MSM (men who have sex with men). Specifically, I will be interested in hearing your views on non-disclosure laws and the reactions you have had with disclosure. I am asking you to participate in this research because you have identified yourself as an HIV-positive man who has sex with men. Because of the sensitive nature of this research, the interview questions have been designed to minimize any legal risks or risks of triggering unpleasant emotions. However, you are encouraged to not answer any question that makes you feel uncomfortable, or to ask for more information. It is important to know that your information is yours and you choose what to share with me. As this project has not received any research funding, you will receive no direct compensation for your contribution, but I can cover your public transit costs to meet with me.

Because there is a remote possibility that you may disclose to me information that would put you at legal risk (the authorities may subpoena the information shared within the interviews), this projection will not require you to ever document your name. Should you consent to participating in this research, you will be asked to consent orally. It is important to remind you that I do not have a duty to report you if you tell me incriminating information, but despite this the interview questions have been designed with the intention of avoiding this

issue. The interviews will be recorded with your permission, but if you do not feel comfortable with this, I will instead take detailed notes of our conversation. Whether we record or conversation or not, I will show you the transcript of the interview (if we record) or the detailed field notes (if you choose not to have the conversation recorded) so that you may review it for accuracy. Your inclusion in this project is voluntary. At any point during the project, you may withdraw any data you wish from being included in the project's completed product. There will be no consequence from withdrawing from the project.

Your identity will be kept confidential to the fullest of my ability. We will work together on editing details in the interview that might identify you, and as mentioned earlier your name will never appear on any of the transcripts or field notes. I plan to have seven research participants in total (five HIV-positive MSM and two AIDS Committee Toronto service providers). The interviews will be stored on a USB drive that is encrypted and in a password protected file. Should you consent to participate in this research, the information you provide may be published and presented. You will be offered to see a summary of this research project's results.

Other than us, the following people will have access to the information you provide: my supervisors and faculty on my committee. Should you wish, you may inform me not to share the full transcript or field notes from your interview. I will keep this encrypted information indefinitely unless you decide otherwise.

Have you read and understood the information letter regarding participation in an oral history interview as part of the *Poz-itive Intimacy: laws and language of consent and HIV status disclosure* research project?

Have all of your questions regarding participation in this research been answered?

Do you understand that I, the researcher, will make all reasonable efforts to protect your confidentiality and that of others where you have requested me to do so, including working with you to change identifying details?

Do you understand that despite this there is still a chance that others may be able to guess your identity from reading or hearing the research findings?

Do you understand that you may withdraw from the study at any time prior to completion of the research?

Do you consent to the recording of this interview?

Appendix D: Phase II study informed consent form

Informed Consent Form

Study name

Sexual disorientations: Speaking in spaces of silence

Researchers

Researcher name Seran Gee

Doctoral Candidate

Graduate Program in Linguistics & Applied Linguistics

Email address [redacted] Office phone [redacted]

Purpose of the research

Because HIV non-disclosure law in Canada requires people living with HIIV/AIDS to disclose their status to prospective sexual partners whenever there is a 'realistic probability of transmission', there is a potential conflict between a person's legal obligations and the customs surrounding talk in bathhouses. Specifically, while the law requires people living with HIV/AIDS to explicitly disclose their HIV status, sexual consent in bathhouses is customarily negotiated wordlessly. As such, this project seeks to investigate how people negotiate their understandings of potentially conflicting legal and cultural expectations.

What you will be asked to do in the research

The interview will probably take an hour or two. It is up to you whether you choose to participate in this research, and you may end the interview at any time. If you choose to participate I will ask you questions and listen to your responses. You may refuse to answer any question or end the interview at any time. Data will be retained for an indefinite period of time. It is common practice in linguistic anthropology to retain data throughout the researcher's active scholarly career to enable longitudinal analyses. Data will be destroyed when no longer used.

Risks and discomforts

There is a risk of you being identified despite the use of pseudonyms and removing identifying information. There is a risk of feeling emotional distress in response to sharing experiences about negotiating legal requirements. It is possible that a third party, such as a court, may request for access to research data, to which I may be compelled to respond. However, there will be no 'key' for my transcripts to easily identify the speaker of any given transcript. All data will be stored on an encrypted password-protected USB drive, which I will store in a locked storage unit.

Benefits of the research and benefits to you

This research could benefit HIV advocates and policy analysts by explaining how unilaterally imposing legal assumptions can have unforeseen complications when applied to different cultural and social contexts. In addition to being compensated $20 for their time, many research participants find the process of participating in an interview study to be pleasant opportunity to discuss aspects of their lives in a non-judgmental space.

Voluntary participation: Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the relationship you may have with the researchers or study staff or the nature of your relationship with York University either now, or in the future.

Withdrawal from the study: You can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researchers, York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

Once you having agreed to participate in the research, you may later ask me at any time to destroy some or any of the data I have collected through your involvement and still receive the $20 compensation. The data will be stored and protected for an indefinite period of time or until you request it be destroyed.

Confidentiality

This research will be reported in journal publications and conference presentations. To best ensure confidentiality of participants, I will not create a key that links individuals' names to their transcripts. Likewise, I will remove identifying information from the transcripts to the best of my ability. In addition, you may advise me to exclude or revise information in the transcripts to protect your identity after the interview.

Confidentiality will be provided to the fullest extent possible by law.

Questions about the research?

If you have any questions about this research or your potential involvement, please do no hesitate to contact Seran Gee, the PhD candidate conducting this research, at [redacted]

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, your may contact the Senior Manager and Policy Advisor for the Office of Research Ethics, 5th Floor, York Research Tower, York University, telephone [redacted] or e-mail [redacted]

Legal rights and signatures:

I, _____, consent to participate in

the "Sexual disorientations: Speaking in spaces of silence" project

conducted by Seran Gee . I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature _____ **Date** _____
Participant

Signature _____ **Date** _____
Principal Investigator