BRIEFING DOCUMENTS

Memorializing LGBTQ2 Histories: Thoughts on Moving Beside Our Debates

By Brenda Cossman[1]

On April 23, 2019, the Royal Canadian Mint released a new $1 coin design intended to commemorate the 50th anniversary of the decriminalization of homosexuality in Canada. The coin has the dates 1969 and 2019, as well as the word 'equality' in English and French. Many in the LGBT community welcomed the coin. Helen Kennedy, executive director of Egale Canada, which had been consulted, said 1969 was a "significant turning point" for Canada and the mint's official commemoration is a "big deal."[2] But others have denounced it. Tom Hooper, an LGBT historian and activist, said the coin commemorates a "myth", since the 1969 reforms did not decriminalize homosexuality.[3] "I feel like they're putting this myth onto a coin. They're stamping this coin with 1969 and right next to it 'equality' and there was nothing in 1969 to do with equality".[4] The critique of the coin is part of a larger debate over the meaning of the 1969 reforms. While some within the LGBT community celebrate the 50th anniversary, a coalition of LBGT activists came together to organize the Anti-69 forum and a conference entitled *Against the Mythologies of the 1969 Reform*.[5] The coalition points out that the 1969 reforms did not eliminate the criminal offenses of buggery and gross indecency, but simply created an exception. The criminal offences did not apply in relation to an act in private between husband and wife, or between two individuals over the age of 21. They further emphasize that the 1969 reforms left intact a range of other laws that were then used to continue to police homosexuality.[6]

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[1] Some of this "provocation paper" has been adapted from a longer paper, Brenda Cossman, "The 1969 Criminal Amendments: Constituting the Terms of Gay Resistance", forthcoming in the *University of Toronto Law Journal*.

[2] Kathleen Harris "New Gay Rights Coin Divides LGBT Community – and Outrages Social Conservatives" CBC News, April 16, 2019. https://www.cbc.ca/news/politics/mint-coin-loonie-homosexual-rights-1.5095317

[3] Tom Hooper "Canada is releasing a coin commemorating a myth: that homosexuality was decriminalized in 1969" CBC April 22, 2019. https://www.cbc.ca/news/opinion/canada-coin-1.5100177

[4] Hooper, supra note 3.

[5] See Tom Hooper, Gary Kinsman and Karen Pearlson "Anti 69 FAQs" https://anti-69.ca/faq/#1 The organizers of the Anti-69 forum took the position that "no such decriminalization took place, and these efforts at commemoration only serve to perpetuate a myth. This myth is being used to legitimize Liberal governments, both past and present, as pro-Lesbian, Gay, Bisexual, Trans, Queer, or Two-Spirit (LGBTQ2+).

[6] Tom Hooper "Pride Toronto's planned theme of "50 Years of Decriminalization of Homosexuality" perpetuates the mythology of the 1969 Criminal Code reform" January 31, 2019 https://anti-69.ca/prideto/ : "The 1969 reform didn't touch other provisions of the Criminal Code, including indecent acts, obscenity, or vagrancy. [And] the 69 reform left intact the infamous bawdy house law".

These responses to the 50th anniversary of the 1969 reforms to the *Criminal Code* are replaying a familiar pattern of opposition and antagonism within LGBT communities. From the struggle for same sex relationship recognition and marriage, to the passage of human rights legislation, activists have divided in relatively predictable ways. Along the liberal legal axis, activists have sought rights protections enshrined in law. Along the critical left axis, other activists have critiqued this rights strategy as hopelessly naïve, placing faith and power in a capitalist, homo-nationalist, white settler state. I have long argued that these debates force us into an unnecessary either/or position. In such polarized debates, questions cannot be asked because if one is not for it ("it" being same sex marriage, or a commemorative coin or equality rights), one is against it.[7] This polarized either/or approach misses many subtleties and complexities that underlie these debates. My position has long been that both sides make important contributions to our understanding of LGBT life, struggle and law.

The debate over the meaning of the 1969 reforms are another instantiation of this antagonistic debate. The critics are of course right in their description of what the 1969 reform did and did not do to the Criminal Code. In May 1969, the Canadian government passed an omnibus Criminal Code reform bill that partially decriminalized homosexuality and abortion.[8] Neither buggery nor gross indecency was removed from the Criminal Code. Rather, an exception to these offences was created, for two persons over the age of 21 years, provided that the act occurred in private.[9] However, the legislative fact does not resolve the broader discursive contestation over the meaning of the 1969 Omnibus bill. Does it represent an important, indeed historic step toward equality? Or a pink-washing of the continued criminalization of homosexuality? The debate over the meaning of the 1969 reforms represents another in a long line of this liberal/left either/or debates within the LGBT community. One is either for or against the 1969 reforms, and all that they stand for. One is either a liberal reformist or a critical leftist. Once again, I believe that this polarized

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[7] Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 2004).

[8] Criminal Code, RSC 1953–54, c 51, ss 147, 149. *Criminal Law Amendment Act*, 1968–69, SC 1968–69, c 38, cl 7 (Bill C-150, 1st Sess, 28th Parl).

[9] The *Criminal Law Amendment Act*, supra note 4, added the exception the buggery and gross decency provisions as s.149A, which provided:

> (1) Sections 147 and 149 do not apply to any act committed in private between
> (a) a husband and his wife, or
> (b) any two persons, each of whom is twenty-one years or more of age,
> both of whom consent to the commission of the act.

Section 149A also further defined "private";

> (2) For the purposes of subsection (1),
> (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present;

debate forecloses the ways in which both arguments make important contributions to understanding LGBT engagement with law.

I have argued that one can neither be for not against the 1969 reforms, any more than one can be against, say the *Matrimonial Causes Act* of 1857 or the *Divorce Act* of 1968. Just as each piece of legislation constituted the terms of successive eras of modern family law, so too did the 1969 reforms constitute the discursive terrain of the modern era of gay rights. The reform, I argue, helped constitute the modern Canadian gay activist. The Omnibus Bill created a small liminal space within which homosexuality was not criminal, and within which advocacy became possible; it was a small space within which the modern gay political subject could come into being, stigmatized, always on the verge of criminality, but also in the process of becoming citizens.[10]

In a recent paper, I explore these debates, and my claims to a less antagonistic framing in relation to three subsequent moments of LGBT political interventions: We Demand, the *Body Politic* and the Right to Privacy Committee after the bathhouse raids. Each represented moments of the gay movement's engagement with law: demanding law reform and/or fighting against legal prosecution. Each were foundational moments in the political organizing and mobilization of the gay community. But each also tells a story about contradictory legacy of the 1969 reforms. Rather than being framed as struggles against these reforms, each of these political moments are, I argue, better understood as political struggles produced through the 1969 reforms.

What does this have to do with thinking through a monument to "memorialize the historical discrimination against LGBTQ2 Canadians, including with respect to the LGBT Purge"? In my view, everything. The process of thinking through a monument requires that we grapple

[10] Much of the discussion that follows focuses on the deployment of the 1969 reforms and its privacy rhetoric in relation to the surveillance of and resistance by gay men. As sexuality scholars have demonstrated, there were many cleavages and contestations between gay men and lesbians on questions of sexuality and sexual identity. On this history, see Miriam Smith *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (Routledge, 2008); Miriam Smith *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (University of Toronto Press, 1999); Tom Warner *Never Going Back: A History of Queer Activism in Canada* (University of Toronto Press, 2002); David Rayside *On the Fringe: Gays and Lesbians in Politics* (Cornell University Press, 1998); Tim McCaskell *Queer Progress: From Homophobia to Homonationalism* (Between the Lines, 2016); Catherine Nash "Contesting Identities: Politics of Gays and Lesbians in Toronto in the 1970s" 12(1) *Gender, Place, Culture* 113 (2005); Gary Kinsman *The Regulation of Desire: Homo and Heterosexuality* (Black Rose Books). On the history of lesbian activism in the 1970s in Canada in particular, see Becky Ross *The House that Jill Built: A Lesbian Nation in Formation* (University of Toronto Press, 1995). See also Karen Pearlston in "Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the 1968 Divorce Act" (2017) 32 *Canadian Journal of Law and Society* 37 who has argued lesbian sexuality, post Trudeau reforms, was regulated through family rather criminal law.

with the meaning of our histories. And it is a contested history. The reform/critical divide runs through the LGBTQ2 community, past, present, and no doubt, future. How do we think about a monument to a history about which we do not agree? I think that we start by agreeing to disagree. We cannot expect to resolve these longstanding divisions of critical thought and activist practice. Nor should we "pick a side" in thinking about how to memorialize the history of discrimination against LGBTQ2 people. In my view, a monument needs to capture the complexities and divisions within our communities, not choose from between them.

My expertise is admittedly in thinking about LGBTQ2 engagement with law, not cultural monuments. But, the way in which I go about thinking about this history is one that I think has resonance with thinking about cultural monuments, precisely because it is premised in bringing a more complicated understanding to our collective histories. We are where we are (and that "here" is also contested) because of the decades of activist engagement that has come before; activist engagement that has been both reformist and radical. Sometimes, it was in conversations and contestations between more reformist and radically minded activists. Other times, it was within the same individuals and groups.

Consider for example the strategies of the Right to Privacy Committee following the bath house raids. It argued for concrete legal reforms, deploying the language of privacy, derived directly from the 1969 amendments. But, it did so with a much more radical vision. As Tim McCaskell, chair of the Public Action Committee of the Right to Privacy Committee has argued, "Throughout the period, RTPC argued for an expansion of the notion of privacy. The Criminal Code suggested that it was about the number of people – two. George Smith, on the other hand, talked about how privacy was *constituted*". [11] Instead of arguing for a right to public sex, RTPC 's strategy was to broaden the scope of privacy: "If those engaged in sex took precautions to not be seen, then they were constituting privacy even if the sex was taking place in a public place like a park. If they paid admission and went into a private space, like a bathhouse, then it should be considered private as well". [12] Smith was clear about the inadequacies of the 1969 reforms, its narrow definition of privacy and the ensuing mass arrests of gay men under its public/private distinction. While the police had adopted a broad definition of public and a correspondingly narrow definition of private, divided entirely by the four walls of the bedroom, Smith argued that privacy needs to be more broadly conceived. The discourse of privacy of the 1969 amendments was being used to resist the narrow conception of privacy contained therein. It is not a history, I have argued, that can be captured by being for or against the 1969 amendments. It is not a history that can be captured by choosing "a side".

[11] McCaskell, *Queer Progress: From Homophobia to Homonationalism* (Between the Lines Books, 2016).
[12] Id

This complicated and contested history of LGBTQ2 struggles has repeated itself over and over. From lesbian invisibility to trans marginalization, same sex marriage to police at Pride parades, liberal reformists and leftists (for lack of a better language) have taken opposing views, with each side sure of its own rightness, and by virtue of the polarized debates, the other side's "wrongness". I am not suggesting that these divisions are easily transcended or healed. There are no doubt some incommensurable positions. But, we would do well to think about the arguments underlying these positions, and the possibility that seemingly opposing claims could both be valid. Moving towards thinking about a monument memorializing the history of LGBTQ2 discrimination in Canada must take the history of reform and radical critique, inclusion and exclusion *within* the LGBTQ2 communities into account. We are not going to resolve these debates. Nor should we. This kind of democratic contestation should make us more informed, more critically engaged citizens. We are a richer community because of these political differences, and they should be celebrated not erased in any commemoration of the history, present and future of our political struggles.