



UNIVERSITY OF LEEDS

This is a repository copy of *The vulnerability of heterosexuality: consent, gender deception and embodiment*.

White Rose Research Online URL for this paper:
<http://eprints.whiterose.ac.uk/130190/>

Version: Accepted Version

Article:

Travis, M (2019) The vulnerability of heterosexuality: consent, gender deception and embodiment. *Social and Legal Studies*, 28 (3). pp. 303-326. ISSN 0964-6639

<https://doi.org/10.1177/0964663918773151>

© The Author(s) 2018. This is an author produced version of a paper published in *Social and legal Studies*. Uploaded in accordance with the publisher's self-archiving policy.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

The vulnerability of heterosexuality: consent, gender deception and embodiment

Mitchell Travis¹

Abstract

This article considers the institutional frameworks that privilege heterosexuality, police notions of sex and gender and individualise discussions and responsibilities around consent. In doing so, this article draws upon vulnerability theory and adds to it by advocating a richer conception of embodiment. By understanding embodiment as a product of corporeality, discourse, and institutions; vulnerability theory is better equipped to engage with the complexities of LGBTIAQ identities. The article traces these developments by engaging with a series of recent criminal law cases concerning deception as to gender. The article reflects upon the ways in which institutions such as law, the family and educational systems focus on individualising responsibilities around consent rather than focusing on their own role in creating the conditions under which non-heterosexual sex is disincentivised, constructed as predatory and ultimately criminalised. It concludes by demanding a new approach from the state that moves away from carceral approaches towards educative programmes grounded in substantive equality.

Keywords

Embodiment, Vulnerability, Consent, Deception as to Gender, McNally

Introduction

Since the summer of 2013, there have been a series of cases in the criminal law of England and Wales examining the notion of deception as to gender.¹ Though each of the cases involve differing facts and circumstances, at their core, these cases involve people being ‘tricked’ into a sexual encounter with someone of the same sex. These cases are problematic and have been heavily criticised (Sharpe 2014, 2015, 2016, Doig 2013, Childs 2016). This article engages with vulnerability theory whilst adding to the theory’s conception of embodiment by drawing upon post-structural feminism in order to highlight how embodiment is always shaped through the material, the discursive and the institutional. This article then uses vulnerability theory to

¹ School of Law, University of Leeds, UK. The author would like to thank Penny Crofts, Chris Dietz, Martha Fineman, Marie Fox, Fae Garland, Jonathan Herring, Stu Marvel, Michael Thomson, and the two anonymous reviewers for their insightful comments on an earlier version of this paper. Any mistakes remain my own.

move discussions away from considering these cases as unique, self-contained instances towards a broader institutional focus that interrogates the ways in which structural biases and inequalities may disadvantage sexual minorities. In doing so, this article considers the ways in which consent and sexual relationships are constructed and understood by institutions such as law, the family and the education system allowing for a cross-institutional interrogation of gender roles, trans embodiment, carceral justice and support services for LGBTIAQ youth. The article then moves to question whether the perpetuation of these institutional biases are a method of mitigating intrinsic institutional vulnerability. As such the article draws upon a wider construction of vulnerability than is commonly used capable of examining vulnerability at an institutional as well as an individual level (Fineman 2010, Marvel 2014-15, Dehaghani and Newman 2017). In its conclusion the article moves to consider how a more responsive state would require responses to institutional vulnerabilities to be anchored in substantive equality.

Law, vulnerability and embodiment

Martha Fineman's pioneering work on vulnerability has considered the precarity of the body in its material and social contexts (Fineman 2008, 2010). Vulnerability theory gives us a unique vantage point from which to conduct this analysis, as it acknowledges a vast range of human variation across both a physical and temporal scale over the life-course (2008, 2010, 2012). Vulnerability theory offers the idea that we are all dependent through various relations of care and need, starting from childhood and stretching into our elderly years. This analysis is capable of covering not only dependence on the family (so often constructed as 'natural' and 'inevitable' - Fineman 2004) but also other relationships with institutions and the state that mostly fail to be seen as dependence – for example: reliance on a fair and functioning police force; a just legal system; or accessibility to clean water.

Whilst all bodies are universally vulnerable, these vulnerabilities are felt in particular ways and can be ameliorated or exacerbated by relationships with institutions, the state and other circumstances. For example, all bodies are vulnerable to illness, however, individuals may have a range of differing resources in order to mitigate the effects of illness. These resources are generally governed, allocated and distributed by institutions at the behest of the state. Thus, resilience to illness and its effects are affected by laws on the cost, patenting and distribution of drugs, and the circumstances under which the state will pay for healthcare provision, private healthcare afforded through agreement with employers, care provided through private family arrangements, the way these roles are recognised by the state, as well as having a stable home, access to adequate nutrition, and employment law that allows for time off work to recuperate. Even in this simple example, we can see the vast and interlocking network through which resilience is constructed. As Fineman writes, ‘Unlike vulnerability, which is basic to the human condition, resilience is produced within society. We are not born resilient: it is produced over time and within state-created institutions and in social, political, and economic relationships’ (Fineman 2014-2015: 2090). Therefore, all subjects are vulnerable and both social institutions and the state play a role in the mitigation or perpetuation of each subject’s resilience. Resilience then is the ability to adapt to changes in environment, not only in the body’s capacity to recover from illness, but also socially and economically. Thus resilience ‘is largely dependent on the quality and quantity of resources or assets that [a person] has at their disposal or command’ (Fineman 2014: 320). Medical insurance is a good example of a legally-enforced mechanism that ensures resilience. It also highlights, however, disparities and inequalities in state provision, for example where people are either too poor to buy insurance; not rich enough to buy the best (or even adequate) insurance; or comfortably able to buy the finest insurance. In these examples, certain aspects of resilience will be distributed on the basis of financial capital

through the institution of the insurance industry (and the regulatory regime upon which it depends). For those who do not have access to adequate health insurance, large excess fees may leave them with severe debts – lowering their resilience further (despite being an institution prima facie set up to enhance resilience). Those who are already in the best position (rich enough to afford good quality insurance) have the resources and means to stay in such a position. In all of these cases the state could ensure a degree of substantive equality through increased monitoring of the insurance industry or through the creation of a National Health Service. For these reasons individual failures of resilience should not be seen solely as the fault of the individual, but must be set against a back drop of state failures and omissions (including the effective monitoring of institutions) in which the individual is embedded (Fineman 2014: 321).

In contrast to traditional liberal theories of the non-interfering state, vulnerability theory allows for a greater examination of institutional embeddedness and the relationship between individuals and the state. This analysis was originally rooted in a commitment to substantive rather than formal equality (although her more recent work has attempted to move beyond the limitations of equality - Fineman 2017). As Fineman notes:

Equality must escape the boundaries that have been imposed upon it by a jurisprudence of identity and discrimination, and the politics that has grown up around this jurisprudence. The promise of equality must not be conditioned upon belonging to any identity category, nor should it be confined to only certain spaces and institutions, be they deemed public or private. Equality must be a universal resource, a radical guarantee that is a benefit for all. We must begin to think of the state's commitment to equality as one rooted in an understanding of vulnerability and dependency, recognizing that autonomy is not a naturally occurring characteristic of the human condition, but a product of social policy. (Fineman 2008:23)

For Fineman then, substantive equality can be roughly equated with equality of opportunity rather than results (Fineman 2010:256-257). In order to truly enact substantive equality,

vulnerability theory demands that the state go beyond liberal notions of public and private matters in terms of its responsibilities, responsiveness and redistribution. Consequently, for Fineman the state must ensure the just distribution of ‘social goods’ such as ‘wealth, health, employment, or security’ (Fineman 2010:256-257). The theory moves away from traditional identity politics and post-structural theory in order to focus on areas of similarity and mutual benefit rather than difference and opposition. Traditional liberal rhetoric of limited resources set against a backdrop of competing claims to these resources are challenged by vulnerability theory, which compels the state to provide the resources necessary for all members of society to flourish. For Fineman, this is not a simple choice between the state being active or inactive but rather ‘whether or not the state is going to act... to implement a comprehensive and just equality regime that ensures access and opportunity for all consistent with a realistic conception of the human subject’ (Fineman 2010:273-274).

Fineman’s use of the term embodiment, however, is more problematic in that it tends to be used as a synonym for the body, the corporeal or the material. Whilst Fineman might contend that in vulnerability theory embodiment can never be severed from embeddedness such an approach may limit the insights of post-structural notions of embodiment whereby institutional forces construct subjecthood and identity. This is important, as these constructions frame the political possibilities of the subject through discourse and institutions: for example, what would it mean to be trans in a legal and medical system that does not recognise this embodiment or in a culture that has no words to describe such an experience? Law does not create the trans experience but it does provide a key structure through which it is understood both by the subject and wider society. This article therefore seeks to combine poststructural feminism and vulnerability theory in order to allow the insights of the cultural turn to be re-anchored in their material contexts.

To this end, the article understands the term embodiment to encompass the material experience of the body and its relationships with both discourse and institutions. Utilising such a lens allows for an interrogation of the ways in which law, medicine, culture, and society, conceive of, construct, and create our bodies. This is particularly useful when analysing the embodiment of those that fall outside of traditional sex or gender categories as it highlights the difficulties in decoupling material experiences from their legal and medical contexts (Fox and Thomson 2017). Moreover, such an analysis shows how crucial institutions have been in delimiting the resilience of those deemed to be non-normative.

Theories of embodiment allow for the location, situation and grounding of the subject. Its corporeal nature means the subject is always anchored, but at the same time relational. It differs primarily from Fineman's work as such approaches consider individual experience and institutional setting simultaneously and as constitutive of one another. Cregan, for example, theorises embodiment as 'the physical and mental experience of existence... the condition of possibility for our relating to other people and to the world' (Cregan 2006:3). Garland-Thomson similarly envisions embodiment as '...a dynamic encounter between flesh and world' (Garland-Thomson 2011:592). Grosz, who gives one of the earliest and perhaps most elucidating accounts of embodiment in its legal and feminist usage explains the concept as '...the condition and context through which I am able to have relation to objects' (Grosz 1994:86). In all of these accounts, embodiment can be seen as the method through which we relate to the world. Considering the subject as embodied allows us to challenge law's abstract understanding of its subjects outside of the parameters of those abstractions; particularly where these abstractions have been used to justify inequalities or perpetuations of inequality (Naffine 2009, 2011, Gear 2011, Travis 2015).

Importantly here, embodiment can be seen as something more than ‘the body’ (Fox and Murphy 2013). It situates the body within a context and allows us to consider how certain sites of embodiment are discursively and/or institutionally constructed (or at least framed). Haraway provides an elucidating example in her rejection of the term ‘female’ arguing that it is ‘itself a highly complex category constructed in contested sexual scientific discourses and other social practices’ (Haraway 1991:155). Here, Haraway notes the important relationship between corporeality and discourse: that the two are always linked and each is capable of influencing our understandings of the other. These problems are (re)played out in understandings of race, gender and disability, leading Haraway to feel ‘excruciatingly conscious of what it means to have a historically constituted body’ (Haraway 1991:157). Despite Haraway’s concerns our understandings of the material body are always constructed through these social and cultural lenses. The importance of discourse to understanding the body is further highlighted by the idea that ‘...discourses can be partially understood as formalizations, i.e., as frozen moments, of the fluid social interactions constituting them, but they should also be viewed as instruments for enforcing meanings’ (Haraway 1991:164). Michael and Rosengarten hold a similar view, noting that ‘...what the body ‘is’ and how it emerges depends on the relations of which it is a part and through which it is enacted. The point is that these enactments are both social and material’ (Michael and Rosengarten 2012:3). This is an important point for theorising embodiment as it begins to unpack the relationship between the material, the discursive, and institutions such as law. This article will examine what happens to these material sites where they fall between competing institutional and discursive understandings of the body and outside conceptions of normative embodiment.

For vulnerability theorists, institutional recognition and non-recognition are important for examining identity categories and the ways in which they are understood. Heterosexuality continues to be the dominant narrative, one so pervasive that it does not need to be articulated. The McNally case, the facts of which are elaborated on in the following section, is revealing of the institutional assumptions about gender transition. Gender transition, as constructed in McNally, is considered to be a spontaneous change from one gender to the other, crystallised through a particular type of legal document. Here, it is the legal document that is recognised rather than the experience of the individual. Gender transition is understood as a momentary change rather than a recognition of a gender identity that has always existed. Legal gender recognition is understood only through its own institutional processes rather than through the experiences of the individuals for whom it applies. As such, we can continue to understand embodiment as more than just a material condition; embedded within but also constructed through discursive and institutional processes. The experience of being trans is perfectly legal, but only if taken through certain institutional routes. If these processes are not engaged with, then the performative experiences of being trans are potentially reconstituted as deceptive and brought into the sphere of the criminal law. The life-course of trans individuals needs to be taken into account by law rather than privileging particular engagements with institutions - especially where, as in the case of McNally, the defendant was precluded from applying for a gender recognition certificate because of their age. Such an example highlights the tensions between different institutional and material understandings of the subject. Legally, McNally could not transition because of their age. This legal position was supported (and in some senses instigated) by the family and the education systems.

As a consequence, institutions and discourse not only shape and construct our materiality but also dictate the possibilities, potential and emergence of our corporeal selves. While it is

extremely useful to consider the ways in which individuals are embedded within institutions - at the same time vulnerability theorists must consider the ways in which institutions contribute to, create and construct our embodiment and restrict our bodily choices. Moreover, such an understanding of embodiment offers a richer starting point for challenging the responsive state and thinking through the ways in which law should operate as it necessitates a shift from formal to substantive equality. Therefore this article will go on to argue that in the case of gender deception the state must reconsider its role in the formation of gender deception, the material experience of trans people (as something more than the institutionally constructed gender recognition certificate), and the continued commitment of institutions to heterosexuality.

The McNally decision; consent and deception

On the 27th June 2013, the Criminal Division of the Court of Appeal dismissed the appeal against conviction of Justine McNally but allowed an appeal against sentencing. During the original High Court case McNally had plead guilty to four counts of ‘assault by penetration’ and received a sentence of six years imprisonment as well as being placed on the sex offenders register. By the time of the appeal, McNally had already served a year of their sentence. As McNally had pleaded guilty in the original case the appeal was also somewhat uncommon. The Court of Appeal altered her sentence to one year, releasing her for time served. The facts of the case were described by Lord Justice Leveson as ‘undeniably unusual’ (595). McNally met the complainant ‘M’ through a game that facilitated online networking when they were 13 and 12 respectively. On the game, and in their subsequent interactions, McNally used the avatar ‘Scott Hill.’ Over several years M and McNally began a romantic relationship to the exclusion of all others. This culminated in McNally visiting M several times, still identifying as Scott. During at least two of these occasions McNally engaged in a variety of sex acts with M including oral

sex and penetration with their fingers (somewhat confusingly referred to as ‘digital penetration’ in the case). At the time of the trial McNally presented as female. At the time that the sex acts took place McNally presented and identified as a male. They were however, born biologically female. Because of this inconsistency the article will use neutral pronouns when referring to McNally in order to alleviate some (although not all) of the potential for misgendering. This is particularly important in light of this articles’ further discussion of the institutional pressure likely faced by McNally before the court trial to present as female. The case centred on the offence of assault by penetration under Section 2 of the Sexual Offences Act 2003. The Act provided that

- (1) A person (A) commits an offence if—
 - (a) he intentionally penetrates the vagina ... of another person (B) with a part of his body or anything else,
 - (b) the penetration is sexual,
 - (c) (B) does not consent to the penetration, and
 - (d) (A) does not reasonably believe that (B) consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

In determining whether there had been an offence of assault by penetration the Court gave particular consideration of whether or not consent had been granted for the acts in question. As a result, the case focused on section 74 of the Sexual Offences Act 2003 which provided that ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice.’ The Appellant’s Counsel made the argument that the attributes of a person, such as gender, could not vitiate another’s consent as they did not fall under the ambit of s74. This reasoning was rejected by the Court who held that ‘depending on the circumstances, deception as to gender can vitiate consent....’ (601). McNally was subsequently found guilty under s2 of the Sexual Offences Act 2003 creating the offence of deception as to gender.

The court interpreted M's consent as vitiated under section 74, which prescribes that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' It was held that McNally's deception removed the 'choice' and 'freedom' of M. Prior to McNally, section 74 had never been used in this manner. Since its enactment in 2003 lawyers and academics had conceived of section 74's use of the terms 'freedom' and 'capacity' only in relation to duress (Tadros 2006), intoxication (Elvin 2008, Cowan 2007, Gunby, Carline & Beynon 2010, Rumney & Fenton 2008, Cowan 2008) and mental illness or disorder (Saunders 2010). Similarly, the explanatory notes for the Sexual Offences Act 2003 state that 'The section refers to a person's capacity to make a choice. A person might not have sufficient capacity because of his age or because of a mental disorder.' This guidance points towards the use of section 74 as a method of ascertaining the ability of a person to make a choice. For example, a focus on the internal characteristics or issues that prevent the person from using and weighing information (in line with the Mental Capacity Act 2005), exercising their consent, or understanding the choices put to them, or that there is a choice. What neither the guidance nor the preceding cases point towards is that section 74 should be used for ensuring informed consent; particularly in regards to gender.

Jonathan Herring (2005) took a different construction of section 74 in his efforts to provide a 'thicker' conception of consent. In his article, Herring puts forward the interpretation that section 74 can be constructed as allowing the jury to take a broad view as to how the 'parties understood their sexual activity and reach a conclusion as to whether there was a sufficient co-operation to amount to an agreement' (Herring 2005:11). This can be relied upon to evaluate whether, through omission or deception, important or relevant factors were held from the complainant by the defendant where the defendant knew that these factors were of importance to the complainant. Such an agreement perhaps fails to take into account the attention to

institutional pressures that a vulnerability approach would necessitate. Co-operation, agreement and sexual activity may all have different meanings for different people as they are embedded within and understood through institutions. Nonetheless, the McNally decision deviates from Herring's reasoning by substituting the subjective factors of importance to the complainant with an 'objective' (abstract) understanding of factors important to the judiciary. In doing so, the decision sets up an opposition between individual reasons for non-consent and judicial reasons for non-consent thereby substituting subjective and individual understandings of embodiment with institutional notions of sex, gender and sexuality. Unsurprisingly these institutional responses are dogmatic, inflexible and homophobic. Moreover, they continue to entrench women in their vulnerability by constructing them as passive, sexual receivers whilst women or trans men (whom, of course, are very different, but may face similar social pressures to conform to feminine standards) who do not conform to these qualities are constructed as dangerous sexual aggressors continuing the normative gendered qualities underpinning and informing these decisions. As a result, these problems resonate with Janet Halley's recent critiques of calls for affirmative consent in the context of campus assault in the United States (2015a, 2015b). Affirmative consent campaigns have attempted to shift discourse around sexual assault from a 'no means no' mentality to one grounded in 'yes means yes'. Whilst such approaches are valuable they fail to interrogate institutional responsibilities around consent. Indeed, the continuing focus on individual responsibility masks institutional understandings of appropriate sexual relations and encourages victim blaming, gendered notions of appropriate sexual relations and heteronormativity. Such approaches, Halley writes:

...install profoundly conservative gender values and visions.... [D]ominance feminists, in their ambivalent push for affirmative consent laws, have engaged in yet another collaboration with conservatives; rather, that they are conservatives in today's left/right politics. The emphasis on punishment as the premier means toward the premier end of social control; the resentment of civil-liberties-based brakes on criminal punishment and severe civil sanctions like expulsion with a stigmatic transcript; the reassertion of

dichotomous gender roles reminiscent of the gilded cage, including the encouragement of male responsibility and female passivity; the division of the world into a mere two sexes and the reduction of the dazzling array of human sexualities into a model of (heterosexual) male domination and female subordination—all of these are strong markers of conservative social values. (Halley 2015b: 1)

As a result of this Halley is critical of approaches to consent that focus on individual rather than institutional responsibility. Significantly, for the purposes of this article Halley identifies the fact that ‘morning-after remorse can make sex that seemed like a good idea at the time look really alarming in retrospect’ compounded with institutional biases that make sexual and ethnic minorities more likely to be prejudiced by the adjudicative process (Halley 2015a: 1). As a governance feminist, Halley is keen for institutions (such as those presiding over sexual assault claims) to base their practices in substantive equality ensuring ‘fairness to all members of our community, ...not only to secure sex equality but also ...racial bias... and for discrimination on the basis of sexual orientation and gender identity — not only against complainants but also against the accused.’ (Halley 2015a: 1). Halley argues that such an approach requires significant training for those handling and presiding over such cases particularly in regard to differences in cultural understandings of sex (Halley 2015a: 1). Without this grounding in substantive equality, affirmative consent narratives risk drawing upon a normative heterosexual gender script and lowering the resilience of those who do not identify as heterosexual. These points mirror wider concerns around the shift towards carceral politics. Bernstein, for example, has observed ‘a rightward shift on the part of many mainstream feminists and other secular liberals away from a redistributive model of justice and toward a politics of incarceration’ (Bernstein 2010:47). This is problematic, she observes, as it shift focus away from the institutional conditions that lead to crime (in her example trafficking and sex work) towards the blame of individuals affected by these structural effects (such as poverty or a lack of education) (Bernstein 2010).

At present the judicial approach fails to take into account the discursive and institutional pressures that shape understandings of deception. Ten years after its enactment, McNally reinterpreted section 74 to include a new offence of ‘gender deception’. Since the decision in McNally a host of other cases have been decided along similar lines.ⁱⁱ So far, each of the cases have revolved around notions of gender deception where defendants have performed traditionally masculine sexual roles whilst identifying as trans men, lesbians, bisexual women or were considering gender transition to become men. Moreover, all of the complainants have been constructed in the media as cisgender heterosexual women. The next section begins to unpack some of the difficulties around institutional understandings of sex (as an identity, performance or biology) and sex (as a practice, encounter or activity) outside the context of individual responsibility.

Sex, sex and institutions

The McNally decision provides vulnerability theory with a case study for thinking through the ways in which sex and sexuality are institutionally structured. Whilst a focus on McNally as an individual might highlight societal intolerance towards difference, a focus on institutions allows consideration of the ways in which sex is socially understood and sexual possibilities can become foreclosed. A thicker notion of embodiment than the one currently used by vulnerability theorists can also highlight how these institutions construct the subject and impact upon the materiality of individuals such as McNally. Whilst law is particularly relevant here, other institutional forces come into play: the family and the education system are both prominent within the facts of the case and emphasise the continuing institutional entrenchment of heterosexuality. This section will discuss the ways in which the heteronormativity of institutions and the state fail to enhance the resilience of individuals. The penultimate section

of this article will discuss the ways in institutions themselves are vulnerable and how they have attempted to mitigate their vulnerability through heteronormativity whilst noting that this problematically comes at the expense of substantive equality.

In the case of McNally, there are a number of ways in which the particularities of vulnerability rendered both the defendant (McNally) and the complainant (M) less resilient. Age, gender, sexuality and trans experiences all play into the harms and misfortunes faced by both individuals. These harms are not inherent to these states of embodiment, however, but caused by their relationships with and reliance upon institutions. In terms of age, for example, McNally, the defendant, was unable to apply for a Gender Recognition Certificate (which would legally recognise her gender identity) as they were too young. In order to qualify for the certificate, one must live in accordance with their 'new' gender identity for a period of two years. During this 'transition' period, however, there seems to be a lack of legal protection for young trans people. Nonetheless, these issues are not caused by McNally's age; such an approach places blame and responsibility on to McNally supposing that they should abstain from relationships whilst awaiting appropriate legal validation. A vulnerability approach highlights that these issues are caused by institutions themselves – in this case law – which excludes McNally from its legitimating force highlighting an imbalance in terms of equality of opportunity to form loving relationships. Moreover, age plays a greater part in understanding the relationships between embodied and embedded vulnerability. For both M and McNally, their young ages left them reliant upon their families. These forms of dependency leave young people hostage to the (sometimes hostile) views of parents and siblings. With interfamilial conflict being one of the leading causes of LGBTIAQ homelessness (Hunter 2008) the familial institution can often work to lower the resilience of LGBTIAQ youth. This can lead to individuals waiting to come out until they are no longer dependent on their families – or never

coming out to their families (Pride Resource Center 2017). Here, although age is an important factor, it is not in and of itself lowering the resilience of M and McNally – it is the institutional dependence upon the family that is capable of limiting their resilience. This is, in part, why vulnerability does not focus on individual characteristics but instead attempts to draw out the universality of embodied vulnerability and ways in which forms of resilience are embedded within our institutional relationships. In many of the cases that have followed McNally, age has played a similarly important role – using a vulnerability analysis allows us to highlight the institutional contexts that may be at play in these cases revealing systemic and structural biases rather than placing responsibility solely onto the individuals involved.

The facts of McNally, as already mentioned, note that Justine McNally identified and presented as masculine. The judgment notes that McNally felt ‘more comfortable’ as Scott (per 596), desired a sex change (per 596) and had, in some ways, deceived herself (per 605). McNally’s masculinity, however, was rendered unacceptable in a range of institutional contexts: schoolteachers, M’s parents, and McNally’s parents were all relied upon to not only dispute McNally’s masculinity, but also to disavow the possibility of its existence or emergence. The family and education system continue to operate on a basis of heteronormativity and to disempower youth as either agentic or sexual subjects. In the McNally case the complainant’s family, particularly her mother, was heavily involved in the policing of M’s sexuality. M’s mother refused to allow McNally to stay at her house (per 596) and was the first to confront McNally about ‘being a girl’ (per 596). Moreover, M’s mother raised the matter with McNally’s school (per 596) and part of McNally’s sentence is a restraining order operating for the benefit of the mother (per 595). We can see, therefore, that M’s heterosexuality is, throughout the judgment, constructed through the lens of the familial institution. Given M’s dependence upon her parents (financially, but also, presumably, emotionally) it would be

difficult to challenge their views about her sexuality. These types of dependencies can lower the resilience of LGBTIAQ youth. Heterosexuality, in this instance, was supported by family structures that incentivised heteronormative behaviour.

Similarly, and following M's mothers' complaint to McNally's school, the education system continues to reinforce heterosexuality. McNally's witness statement, for example, notes that 'I went to London on four occasions as a boy as I told the headmaster ... I stayed with [M] or her family and admit the sexual activities complained of took place with the specific exception of the use of the dildo' (per 603). McNally's former legal representative also recalls the importance of McNally's 'admissions to her headmaster in relation to the dildo' (per 602). The headmaster becomes a focal point in McNally's admission of guilt but using a vulnerability analysis we can see the structures and strictures within the education system that lead her to be institutionally coded as 'female'. School uniform requirements and single sex classes render education as a gendered space in which trans embodiment is often discounted or erased lowering the resilience of LGBTIAQ youth. As a consequence, it comes as no surprise that the headmaster plays a central role in the policing of McNally's sex, gender and sexuality. Indeed, the headmaster was so concerned by McNally's non-conformity (and his inability to censor it) that he was the first to report McNally to the police (and thus delivered McNally into a more formal and adversarial method of regulation). When considering the institutions of the family and the education system it is important to note their impact on entrance to other social institutions. As Fineman writes:

The failure of one system in this sequence to provide necessary resources - such as a failure to provide an adequate education - affects the individual's future prospects in employment, building adult family relationships, and old age. Given that systems further down the line are constructed in reliance on an individual's successful gathering of necessary resources in earlier systems, it is often impossible to fully recover from,

or compensate for, resource deprivation. Someone without a good education typically will have fewer skills and fewer options and opportunities in the workplace, which will make supporting a family difficult, likely means a more precarious retirement and fewer savings to cushion them in the event of accident or injury. (Fineman 2014: 320-321)

The problems that LGBTIAQ youth face in the education system are well documented but include homophobic, biphobic and transphobic bullying; common use of homophobic language and a lack of LGBTIAQ resources or support within the school (Bradlow, Bartram, Guasp and Jadvá 2017). As a result, making schools into LGBTIAQ friendly spaces continues to be a priority for many policy makers and charities. However, the high incidence rates of these issues highlight the difficulties that LGBTIAQ youth may face in the education system – issues which the institution of the family often compounds. Overall then, these institutions, which are meant to enhance the resilience of all subjects, may be lowering the resilience of LGBTIAQ youth and certainly played a part in dis-incentivising a relationship between M and McNally.

Unfortunately, law continues this pattern, with lawyers and judges strictly framing McNally as female with no discussion of the flexibility of this term. Here we see McNally's understanding of her body and its potential come into conflict with the knowledge/power of law, its structuring effect and its continued conflation of gender and sex. Whilst both McNally and M understood McNally's gender to be masculine the judiciary in this case were unable to countenance this possibility, relying upon other institutions to undermine McNally's claim to masculinity. Throughout its discussion of 'gender deception', the court seems to ignore the role of institutions in the creation of gender and its norms and implies that any distinction between legal sex and lived gender will be dealt with under McNally as *prima facie* evidence of fraud. This is a worrying development for sites of embodiment where there are tensions between the material, discursive and intra-institutional accounts of the body. Moreover, as Rosemary

Garland-Thomson notes in a different context, such non-recognition ‘definitively lodges injustice and discrimination in the materiality of the world more than in social attitudes or representational practices, even while it recognizes their mutually constituting entanglement’ (Garland-Thomson 2011:593). As Bernstein observes in her critique of carceral feminism in the context of anti-trafficking, such an approach is typical of a neoliberal ideology that encourages ‘a vision of social justice as criminal justice, and of punitive systems of control as the best motivational deterrents for men’s bad behaviour...’ (Bernstein 2010:58).

The gender order that is reproduced here is not only heterosexuality, but also that there are only two sexes – male and female. This is not a question of mere semantics. The McNally decision suggests that trans or intersex individuals who do not hold a Gender Recognition Certificate are merely impersonating their desired sex (Sharpe 2014:214-215) creating particular problems where individuals, as was the case with McNally, are too young to obtain a gender recognition certificate. Such an approach marginalizes the experiences of trans persons and misunderstands ‘the phenomenon of transgender and its ontology’ (Sharpe 2014:219). Despite the institutional recognition of gender dysphoria in both medicine and law the decision in McNally constructs gender transition as the flicking of a switch rather than the acknowledgement that, for many, an individual has always been that gender. Indeed, the McNally decision does not even conform to the idea that gender transition is a gradual process despite the legislation requiring a two year transition period. As such, law continues to ignore ‘the complex and powerful socio-political and cultural forces at work in maintaining the current heteronormative sex/gender system’ (Cowan 2009:250) and undermines its own legislation where contrary possibilities can be found. Moreover, the court’s reasoning places blame onto individuals for a separation between legal sex and lived gender rather than placing this blame squarely at the feet of law. Law only recognises this separation through its own mechanisms (such as the Gender

Recognition Act 2004); the key process of which is to ‘forget’ the separation between sex and gender. For example, The Gender Recognition Act 2004 2(1)(b) requires individuals to live in their acquired gender for 2 years before a gender recognition certificate can be issued. This seems to produce the very situation that it finds to be deceptive. McNally highlights the lack of state protection for these individuals. As such, law here reaffirms its own powers to decide on sex/gender but at the same time highlights the arbitrariness of the process. The judiciary ought to have recognised the role of the state in the production of these ‘deceptions’ and acknowledge the place of law in the production of gendered subjects. We can see McNally, and those subsequently found guilty of deception as to gender, as victims of institutional processes that continue to entrench heterosexuality and lower the resilience of LGBTIAQ youths. The next section traces the ways in which the McNally decision highlights the vulnerability of heterosexuality and the institutional responses to this.

The vulnerability of heterosexuality: active deception and McNally

The McNally case is emblematic of the discursive structural underpinning of heterosexuality that, even where treated ambivalently, still colours institutional responses to its subjects. Lord Justice Leveson felt that M, the complainant, had been deliberately deceived by Justine McNally into believing that McNally was male. This vitiated M’s consent, as she had chosen ‘to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant’s deception’ (per 600 my emphasis). Nonetheless, we can delve deeper into the question of whether gender was pivotal to M’s consent through the use of vulnerability theory. Although M reports feeling ‘physically sick’ and ‘devastation’ (per 596) at finding McNally’s biological sex at the same time the judgment notes that ‘if she had told her from the start she wouldn’t have judged her

and things might have been different' (per 596). M also gave some 'equivocal' answers about whether she had known that McNally was a girl (per 596). This ambivalence raises questions as to whether the criminal law is the best setting for such a discussion. In this case vulnerability analysis can be used to highlight criminal laws' position as the last resort for the enforcement of heterosexuality after informal policing through the family and the education system have failed. This article argues that the use of criminal law is an inappropriate arena for framing such discussions particularly given criminal law's traditional focus on retributive rather than substantive accounts of justice (Bernstein 2010). Criminal law's focus on objective standards creates a disjunction between M's assumed (yet ambivalent) heterosexuality and her material experiences. Further weight is given to the idea that this is the institutional policing of heterosexuality if we consider the headmaster rather than M as the source of the police investigation. The education system's role as the originator of the complaint further denies the agency of M in regards to her sexual relationships and lends weight to the idea that both M and McNally are victims of a system that still fails to enhance the resilience of LGBTIAQ youth.

Here it is useful to return to notions of embodiment and the institutional framing in which it is embedded. M and McNally were in a relationship. M was institutionally understood as heterosexual, certainly in terms of the family unit, the education system and at the legal level. Discursively, M's ambivalence was read as heterosexuality, a clear example of a society which understands heteronormativity as the default mode of being. Without M clearly announcing her homosexuality, or bisexuality, or heteroflexibility, or attraction to trans or intersex embodied men, her heterosexuality continues to be assumed. Because of M's equivocal sexuality, she is constructed as a passive victim, rather than an active participant in a (five year) relationship. Again, turning to vulnerability theory we can see M's representation against an institutional backdrop that reaffirms traditional gender roles and has historically framed women as passive,

submissive, dependent and incapable of (non)consent. In actuality, this case does not empower M but lowers her resilience by entrenching her within and constructing her through these properties in order to protect her 'fragile' sexuality.

On the subject of gender roles, by the time of the Court of Appeal decision McNally was presenting as a woman with long hair, some make-up and dressed in 'feminine' clothes (a suit with long trousers cut for a woman). In the case, McNally's female appearance was understood as their 'true' identity helping to locate their earlier masculine appearance as 'false' and thus deceptive. However, this article would question such superficial analysis instead suggesting that McNally's young age and severely negative experiences during the process of coming out as trans would have been likely to affect their confidence to publically present as masculine. Prior to the trial, McNally had been subject to extremely negative reinforcement about their gender identity from their partner, their partner's family and their school. Not to mention, they were also subject to a criminal investigation and trial where they were found guilty of a sexual offence and sent to prison for six years, one of which they had already served by the time of the appeal case. If McNally had, despite all of these negative experiences, decided to apply for a Gender Recognition Certificate upon reaching the age of 18, they could have faced the unenviable proposition of being sent to an all male prison as a pre-operative eighteen-year-old trans-male sex offender. Such a proposition carries a huge amount of risk, and may have daunted all but the most courageous of trans-men. Against, these odds, this article suggests that it is little wonder that McNally presented as female by the time of the Court of Appeal case. However, crucially, these institutional pressures to appear as female were not identified in the case and thus, McNally's feminine appearance was understood by the judiciary as further evidence of deception.

Removed from the corporeal realities and everyday nuances of the relationship, the facts of this case are re-read by the judiciary who interpret them with horror, and as such find themselves obliged to give a strained interpretation of section 74. This is a dangerous precedent, in part because it standardises M's sexuality as heteronormative and fails to acknowledge that this may alter in certain contexts or over time. Moreover, this standardisation is based on an institutional premise that individuals are capable of creating unspoken sexual contracts as long as they conform to an enduring heteronormative script. This is problematic, as it is based on the foundation that the sexual subject has considered all of the sexual possibilities that the world may offer and rejected them in advance. However, what happens to sexualities or sites of corporeality that the individual had never considered? Under McNally are all of these foreclosed or capable of vitiation after they have been participated in? If individuals can retrospectively vitiate their consent on the basis that it did not fit with their sexuality, bodies that do not fit easily into binary and culturally accepted understandings of sex or gender are particularly susceptible to this institutional entrenchment (for discussion in the context of campus assault see Halley 2015a, 2015b).

McNally's embodiment is, similarly, institutionally understood through a heteronormative lens. McNally's understanding of her body and feelings towards M are constructed as 'predatory' and sanctioned using the criminal law (incarcerating her and leaving her on the sex offenders register). Much of the analysis in McNally cohered around discussions of whether McNally's 'deceptions' were active or deliberate. In the case a number of factors were relied upon to assume the presence of active deception. McNally's use of a different surname, discussions of marriage and children, general gender confusion, the term 'putting it in' and the purchase of condoms were all seen as evidence of active deception. At these crucial junctures actions that would be fine within the context of a heterosexual relationship are used against

McNally as evidence of a deceptive nature. These evidentiary presumptions are, of course, cultural rather than natural. Whilst the offense of assault by penetration itself is theoretically objective these criteria have the potential to disproportionately impact upon the LGBTIAQ community by creating different standards for a finding of deception. Here, resilience is limited in two ways. Firstly, the resilience of LGBTIAQ people to (or the ability to overcome) claims of sexual assault is restricted. This is problematic as it highlights a clear breach of both formal and substantive equality – potentially innocent people will have a harder time proving their innocence than their heterosexual counterparts calling the objectivity of the criminal law into question. Secondly, resilience is lowered through the reinforcement of a societal perception that these individuals are more likely to sexually assault and are socially dangerous or undesirable. This societal perception serves to foster the scrutiny that non-heteronormative behaviours are subject to in the familial and educational institutions. Whilst the first example, the claim of sexual assault, is potential – in the sense that not all LGBTIAQ people will face such a claim, the second highlights the scalability and the primacy of the issue. As a result, the following quotation from Alex Sharpe applies not just to the judiciary but to wider society:

The importance attributed to these facts reveals the somewhat illusory nature of the distinction between non-disclosure and active deception in the context of transgender defendants charged with sexual offences. That is to say, and as the reasoning of the Court of Appeal demonstrates, it may not take much in terms of defendant conduct and/or speech before non-disclosure of gender history is translated into active deception. (Sharpe 2014:218)

This judicial slippage between non-disclosure and gender deception potentially leads to a decline in resilience for many people not just to claims of sexual assault, but also represents a broader societal attack on individual's abilities to form relationships with other people and institutions. The Court's failure to engage with embodiment means that they end up sketching a (superficial) disjuncture between mind and body in order to colour their understanding of McNally's identity. The judgment in McNally, places many people under a de facto obligation

to disclose their gender history if they want to be safe from the purview of the decision or risk sex being rendered criminal due to their 'fraudulent' states of embodiment. In a range of institutional contexts abstracted understandings of heterosexual bodies are understood as objective or natural rather than attempting a more embodied and contextual approach that considers vulnerability theory and substantive equality. Here we can see that this state response is based on a commitment to reinforcing the resilience of heterosexuality. In this section we have seen the ways in which heterosexuality is institutionally imposed, the next section returns to notions of vulnerability and offers some explanations as to why institutions continue to reinforce heteronormativity whilst also sketching reform proposals for a responsive state committed to substantive equality.

Institutional heterosexuality/institutional vulnerability

Understanding the reasons behind the continued institutional entrenchment of heterosexuality requires further consideration of the nature of vulnerability. Vulnerability is not only an intrinsic characteristic of our embodiment but is also an inherent feature of our institutions (Fineman 2008, 2010). As such, institutions are also embroiled in a process of ensuring their own resilience as well as the resilience of other institutions on which they are founded or otherwise rely upon. Institutions are created by and reliant upon humans and thus are always vulnerable. As Fineman writes;

We know that societal institutions are not foolproof shelters, even in the short term. They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudices. Even the most established institutions viewed over time are potentially unstable and susceptible to challenges from both internal and external forces. Further, this institutional vulnerability is almost always obscured, and those in control of institutions have a powerful interest in disclaiming the appearance of any vulnerability. Riddled with their own vulnerabilities,

society's institutions cannot eradicate, and often operate to exacerbate, our individual vulnerability. (Fineman 2010:256)

As such, vulnerability theory is not simply about the vulnerability of the individual and its relationship with the state but also provides a novel lens for (re)considering the actions of the institutions and the state. This focus on institutional vulnerability has been usefully applied in a number of different contexts including the prison service and the provision of legal aid (Dehaghani and Newman 2017) and the institution of the family (Marvel 2014-15). The embedded focus of vulnerability analysis means that such explorations are central to this approach. Consideration of the embedded nature of the individual necessitates a robust understanding of the vulnerabilities of the institutions within which we are all embroiled particularly as, ‘...institutional vulnerability can alter the response of the institution towards individuals and may serve to further perpetuate disadvantage, whether intentionally or otherwise’ (Dehaghani and Newman 2017:9). For Fineman, the vulnerability of institutions provides further justification of state intervention. As she notes, ‘those institutions are themselves vulnerable to a variety of internal and external corruptions and disruptions, and this realization is the basis for the further claim that these institutions must be actively monitored by the state in processes that are both transparent and inclusive’ (Fineman 2010:256). This monitoring of institutions also extends to their evaluation and reform in line with the notions of equality of access and opportunity (Fineman 2010:273). So whilst a vulnerability analysis may explain why institutions have sought to enhance their own resilience, if this is at the expense of substantive equality, vulnerability cannot be used as the basis for justification of such actions. This is because vulnerability is universal – it cannot be used as a way of justifying or perpetuating inequalities – but rather should be used to ensure ‘the obligation of the state to act with equal regard for the vulnerability of all’ (Fineman 2010:273). Consequently, an

assessment of the vulnerability of institutions also requires consideration of appropriate state responses grounded in substantive equality.

Before this article further discusses the institutional pressures on the McNally decision it will first consider their structural foundations. Underpinning each of these institutions are structural allegiances to the gender binary, heteronormativity and the reproductive family. The gender binary is at the heart of many social institutions – most notably the reproductive family – and thus it is profoundly vulnerable to rupture and contestation and in need of constant protection to ensure its survival. As Stu Marvel explains:

... the social institution of family is... vulnerable and requires state action to ensure its ongoing resilience. In America, the institutional form that has received both historic and contemporary privilege is the two-person model of heterosexual family: this intimate arrangement has long been viewed as the ideal structure for childbearing and childrearing. It is through the legal recognition of marriage, and the channeling of associated rights, benefits, and obligations through marriage, that the state aims to manage the labor of managing human dependency. It is within the private sphere that the critical work of social reproduction is done, and the organization of the state depends upon the resilience and continued effectiveness of the marital family... The vulnerability of the state is thus ameliorated by the social institution of family. Viewing the family through this lens clearly renders the deep political and economic stakes of marriage and the need for a stable model of two-parent cohabitation where sex and reproduction occur within the marital home. (Marvel 2014-2015:2066)

Thus, heterosexuality and the privatization of dependency have traditionally been framed as natural. Challenges to this heteronormative social arrangement have been considered as unnatural. Using a vulnerability lens, however, allows us to consider the ways in which challenges to heteronormativity hold within them the opportunity to subvert some of the foundational myths relied upon by the liberal state including the privatization/naturalization of dependency and the ways in which gender roles are configured to support this dependency (Fineman 2004). Acknowledging the vulnerability of the family institution and the state enable better understandings of the institutional pressure points that formed the background of the

McNally decision. Whilst same-sex marriage is now enshrined within law the McNally decision shows us that non-heterosexual encounters taking place outside of the confines of marriage are still subject to a heightened level of institutional scrutiny, in order to ameliorate institutional vulnerabilities and concerns around heterosexuality. This decision appeared to prohibit deception as to gender as part of a continuing agenda of preventing ‘inadvertent communion with the homosexual’ (Sharpe 2007:74) highlighting same-sex marriage provisions as formal, rather than substantive equality. As Barker has noted, although same-sex marriage introduces rights and protections it also reifies the reproductive family (2013). As such, the struggle for same-sex equality can also be read as ‘managing homosexuality’ into a state of profound conservatism that continues to support rather than challenge contemporary institutions. The McNally decision plays into this conservatism, highlighting that whilst ‘appropriate’ same-sex relationships are accepted (i.e. relationships that mirror the traditional reproductive family) other same-sex relationships will not be tolerated. As a result, a whole host of experimental, fleeting and tentative encounters are institutionally signified as dangerous. This construction of sex outside the confines of marriage (or marriage-like relationships) as unsafe is not particularly new but rather, depressingly persistent. This institutional focus highlights the vulnerability of heterosexuality and the ways in which homosexuality is normalised (or neutralised) and encouraged to fit into an agenda that supports (rather than challenges) the heterosexual state. Vulnerability theory would demand a different approach from the state shifting the focus from the formal equality bestowed through same-sex marriage to one more grounded in substantive equality. Such an approach would be attentive to the fact that, at present, only trans men, lesbians and bisexual women have been prosecuted for the offence of deception as to gender. Acknowledging this highlights that the offence is, at present, falling disproportionately onto particular communities and thus failing in its duty to provide substantive equality. As such, a responsive state ought to reconsider the ways in which young

people's non-heterosexual sexual encounters are institutionally positioned as sexual offences. Moreover, the state must understand its role in the creation and reinforcement of gendered embodiment.

Similarly, we can use understandings of substantive equality to measure the states current effectiveness in responding to these issues. Firstly, we must question whether these institutional settings are appropriate arenas to adjudicate such complex experiences. Central to this is evaluating whether the criminal law is the right space for this debate and whether the carceral approach is helpful in nuancing these intersubjective dynamics. Whilst the state is responding it is doing so in a way that is not attentive to notions of substantive equality. This is, 'in part because of their origin in a carceral project that is overcommitted to social control through punishment in a way that seems... to be social-conservative, not emancipatory' (Halley 2015: 1). Such a view equates social justice squarely with criminal justice without considering the structural underpinnings that might lead to inequality (Bernstein 2010). These carceral approaches have often been equated with a broader 'commitment to heteronormative family values, crime control, and the putative rescue and restoration of victims' (Bernstein 2010: 57) similarly evidenced in the McNally judgment. A vulnerability approach would be wary of this type of state intervention, primarily due to its failure to be attentive to systemic causes of inequality which can be more effectively remedied through support rather than punishment. Punishment and the carceral system (particularly in the US) often further entrench minority groups into cycles of systemic inequalities (Dayan 2011).

Taking substantive equality as a reference point, the current institutional response is problematic on a number of levels. Firstly, these legal decisions are impacting disproportionately on sexually stigmatized minorities (at the moment trans men, bisexual

women and lesbians) but with the potential to effect a host of other already institutionally stigmatized groups (race, impairment and class being obvious future and contemporary examples). These groups, which have already so often been let down by institutions are likely to be caught up in this carceral approach (Halley 2015a, 2015b, Gross 2015, Bernstein 2010). Bound up with this is a second objection; that this decision reaffirms traditional gender roles – whereby women are institutionally constructed as passive victims lacking the agency necessary to make decisions about their sexual relationships. As such, presumptions against certain ‘predatory’ groups are presented as necessary (Halley 2015a). Consequently, the courts fail to consider structural accounts of vulnerability: that ‘many individuals are caught in systems of disadvantage that are almost impossible to transcend. Increasingly, government is unresponsive to those who are disadvantaged, blaming individuals for their situation and ignoring the inequities woven into the systems in which we all are mired’ (Fineman 2010:257 footnotes omitted). Whilst it is argued that this criminalizing approach is inappropriate - consideration of the context in which the McNally case arose highlights its unfortunate predictability.

Whilst this article has no insight into the ‘truth’ of what transpired between M and McNally, it has noted the institutional frameworks that worked to make a relationship with McNally seem unappealing once it had been ‘outed’ as non-normative. Certainly, M’s parents’ reaction to the relationship (the familial institution) was overwhelmingly negative. Similarly, the education system (the teachers of both M and McNally) worked to ‘protect’ M’s fragile heterosexuality. As such, we can note that the relationship between M and McNally was institutionally discouraged and whilst non-heterosexual encounters are by no means impossible they are made extremely difficult even in the current discursively permissive moment. Furthermore, this institutional scaffolding can incentivise the retrospective vitiation of consent in the sense that it may appease parents and teachers. Thus, the legal framework takes place against an

institutional backdrop that works to lower the resilience of non-heterosexual individuals; particularly in their youth where they are dependent on institutions such as the family and the education system. Here, progressive arguments around individual consent are used to ameliorate the vulnerability of heterosexuality for both individuals and institutions by taking the focus away from the systemic and structural inequalities that underpin non-heterosexual sexual encounters. A vulnerability approach would demand a different set of responses from the state aimed at remedying the structural inequalities that work to disempower LGBTIAQ youth. For example, the education system, including individual schools must have a support system embedded for LGBTIAQ youth. Passing issues on to more formal methods of regulation (through the police) seems like a failure for a sympathetic, supportive and diverse educational environment. If this support system had of been in place for McNally, they may have been more able to explore (or discuss) their gender identity, sexuality and hopes for the future in a safe and helpful manner. The McNally case seemingly highlights a significant lack of teacher training around sex and LGBTIAQ youth on an individual level but also points towards a broader systemic issue. A vulnerability approach would mean remedying the specific substantive inequalities faced by LGBTIAQ youth rather than a 'one size fits all' sex education approach that potentially further marginalizes them.

Taken together these institutional moments highlight the need for consideration of the vulnerability of not only the individual but also our institutions. In so doing, we are better able to understand their motivations, which in turn place us in a better position to critique them. This critique, first and foremost, must be grounded in a commitment to substantive equality and provides a justification for the state to monitor, evaluate and ultimately restructure institutions in line with such responsibilities.

Conclusions

In conclusion, this article argued that the individualising of consent responsibilities in deception as to gender cases ignores the systemic and structural gendered, transphobic and homophobic inequalities that underpin and constitute these sexual encounters. These inequalities are created and reinforced by a number of institutions including family, the education system and law in order to mitigate the vulnerability of heterosexuality at both an institutional and individual level. Such decisions warrant attention outside of a focus on the judiciary but also the ways in which decisions are operationalised and expedited through criminal law procedures that focus on individual consent rather than institutional failings. As such, appeals to the responsabilisation of individuals in these cases miss broader systemic issues about the choices and pressures LGBTIAQ youth are faced with and the way these choices are framed, interpreted and understood in differing institutional contexts. Deception as to gender, in providing for a retrospective vitiation of consent, is a problematic addition to the law – especially for sexual minorities. Judicial decisions that hold incongruence between sex and gender as fraudulent states of embodiment are dangerous and fail to take into account the role of institutions such as law, education and the family in the creation and reinforcement of these divisions. The criminalisation of active deception, in turn, allows for a policing of behaviour that falls outside of the heteronormative order previously informally regulated at the cultural and social levels and represents a failure to think through the embodied experiences of individuals in favour of an internal focus on institutional process. This carceral state approach cannot be the place for consideration of the intersubjective dynamics of human sexual relationships. Such an approach will further disenfranchise those already made less resilient through their relationships with the state.

Sadly, however, these decisions are not altogether surprising. Historical institutional approaches to marriage, sex and sexuality highlight an overarching backdrop of homophobia. Now that same-sex marriage has been incorporated into the law of England and Wales the systemic privileging of heterosexuality within the law has been directed against the threat of ‘accidental’ homosexual sex and in so doing perpetuated the individualisation of consent rather than challenging the heteronormative structures that continue to perpetuate inequalities. In part, this analysis reveals the inherent vulnerability of heterosexuality at both an individual and institutional level. It also highlights a continuing commitment to entrenching heterosexuality and attempts to mitigate its vulnerability at an institutional and individual level. As a result there is an urgent need to acknowledge the role of the state in creating the conditions of precarity in which LGBTIAQ embodied people find themselves (Fineman 2014). Much more needs to be done to anchor the state and its emanations to notions of substantive equality. This cannot come soon enough; there have been six cases of this kind in recent years. In responding to these issues the state must reconsider notions of equality and vulnerability: care, support, and education seem like more appropriate responses than being registered as a sex offender and criminalised. Consequently, this article would advocate state-led improvements to the support that is offered to young people who are navigating the often choppy waters of gender, sex, sexuality, and technology. In addition, this article promotes the idea of educational reform in relation to gender, sex, and sexuality, particularly in regards to relationships, the internet, and sex education. Whilst heterosexuality may be vulnerable, there are no clear reasons as to why its continued entrenchment would be valuable. The institutional protection of heterosexuality, therefore, is in dire need of change.

In addition, this article has sought to enrich conceptions of vulnerability with a broader understanding of embodiment. It is hoped that by doing so, theories of vulnerability will

consider embodiment as a product of the material, the discursive and the institutional; each of which are co-constitutive. Such an approach highlights the ways in which institutions not only shape the material experience of the subject but also structure the possibilities, potential and emergence of our corporeal selves. As a result - while it is important to understand the ways in which individuals are embedded within institutions - at the same time vulnerability theorists need to reflect upon the ways in which institutions contribute to, create and construct our embodiment and restrict the ways in which bodies and identities can be understood. Not only does this allow for a more contextualised interpretation of the vulnerable subject but it also offers guidance for state responses. In the case of gender deception the state must reevaluate its place in the construction of gender, the material experiences of trans people (who cannot be reduced to static institutional moments), and the ongoing allegiance of institutions to heterosexuality. If we accept corporeality uncritically as somehow uninfluenced by discursive and institutional pressures then we limit the ways in which we can challenge the state. This article, therefore, contributes to vulnerability theory by providing a richer conception of embodiment.

Bibliography

Barker, Nicola. 2013. *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage*. Basingstoke: Palgrave Macmillan.

Bernstein, Elizabeth. 2010. Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns
Signs: Journal of Women in Culture and Society 36: 45-71.

Bradlow, Josh, Bartram, Faye, Guasp, April and Jadva, Vasanti. 2017. *School Report: The experiences of lesbian, gay, bi and trans young people in Britain's schools in 2017* http://www.stonewall.org.uk/sites/default/files/the_school_report_2017.pdf (Last accessed 1/8/2018)

Bronitt, Simon. 1992. Rape and lack of consent. *Criminal Law Journal* 16: 289-310.

Childs, Penelope. 2016. 'Gender Fraud': Where Do We Go From Here? *Plymouth Law and Criminal Justice Review*. 8: 109-117.

Cowan, Sharon. 2007. Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape. In *Sexuality and the Law: Feminist Engagements*, ed. Vanessa Munro and Carl F. Stychin. 51-71. London: Routledge-Cavendish.

Cowan, Sharon. 2008. The Trouble with Drink: Intoxication, (In)Capacity, and the Evaporation of Consent to Sex. *Akron Law Review* 41:899-922.

Cowan, Sharon. 2009. Looking Back (To)wards the Body: Medicalization and the GRA. *Social and Legal Studies* 18: 247-252.

Cowan, Sharon. 2014. Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission. *New Criminal Law Review* 17: 135-161.

Cregan, Kate. 2006. *The Sociology of the Body*. London: Sage Publications.

Dayan, Colin. 2011. *The Law is a White Dog: How Legal Rituals Make and Unmake Persons*. Oxford: Princeton University Press.

Dehaghani, Roxanna and Newman, Daniel. 2017. "We're vulnerable too": an (alternative) analysis of vulnerability within English criminal legal aid and police custody. *Onati Socio-Legal Series* 7: 1199-1228.

Doig, Gavin A. 2013. Deception as to gender vitiates consent. *Journal of Criminal Law* 77: 464-468.

Elvin, Jesse. 2008. The Concept of Consent under the Sexual Offences Act 2003. *The Journal of Criminal Law*. 72:519-536.

Fineman, Martha. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism*. 20: 1 – 23.

Fineman, Martha. 2010. The Vulnerable Subject and the Responsive State. *Emory Law Journal*. 60:251-275.

Fineman, Martha. 2012. 'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility. *The Elder Law Journal*. 20: 101- 141.

Fineman, Martha. 2014. Vulnerability, Resilience, and LGBT Youth. *Temple Political & Civil Rights Law Review*. 23: 307-329.

Fineman, Martha. 2017. Vulnerability and Inevitable Inequality. *Oslo Law Review* 4: 133-149.

Fox, Marie, & Murphy, Thérèse. 2013. The Body, Bodies, Embodiment: Feminist Legal Engagements with Health. In *The Ashgate Research Companion to Feminist Legal Theory*, eds. Margerat Davies & Vanessa Munro. 249-266. Farnham: Ashgate.

Fox, Marie & Thomson, Michael. 2017. Bodily Integrity, Embodiment and the Regulation of Parental Choice. *The Journal of Law and Society* 44: 501–531.

Garland-Thomson, Rosemary. 2011. Misfits: A Feminist Materialist Disability Concept. *Hypatia*. 26: 591-609.

Grear, Anna. 2011. Sexing the Matrix: Embodiment, Disembodiment and the law – towards the re-gendering of legal rationality. In *Gender, Sexualities and Law*, eds. Jackie Jones, Anna Grear, Rachel Fenton & Kim Stevenson. Oxon: Routledge.

Grear, Anna. 2013. Vulnerability, advanced global capitalism and co-symptomatic injustice: locating the vulnerable subject. In *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Anna Grear & Martha Fineman. 41-60. Aldershot: Ashgate.

Gross, Aeyal. 2015. Rape by Deception and the Policing of Gender and Nationality Borders. *The Tulane Journal of Law and Sexuality*. 24:1-33.

Grosz, Elizabeth. 1994. *Volatile Bodies*. Bloomington and Indianapolis: Indiana University Press.

Gunby, Clare, Carline, Anna, & Beynon, Caryl. 2010. Alcohol Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice. *Journal of Criminal Law*. 74: 579-600.

Halley, Janet. 2015a. Trading the Megaphone for the Gavel in Title IX Enforcement: Backing off the Hype in Title IX Enforcement. *Harvard Law Review Forum*. 128:103.

Halley, Janet. 2015b. The Move to Affirmative Consent. *Signs*. Available at < <http://signsjournal.org/currents-affirmative-consent/halley/>> (Last Accessed 6/7/16).

Haraway, Donna. 1991. *Simians, Cyborgs and Women*. London: Free Association Books.

Herring, Jonathan. 2005. Mistaken Sex. *Criminal Law Review*. 5:511-524.

Hunter, E. 2008. What's Good for the Gays is Good for the Gander: Making Homeless Youth Housing Safer for Lesbian, Gay, Bisexual, and Transgender Youth. *Family Court Review*, 46: 543-557.

- MacKinnon, Catherine. 1987. *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press.
- Marvel, Stu. 2014-2015. The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage. *Emory Law Journal*. 64: 2047-2088.
- Michael, Mike & Rosengarten, Marsha. 2012. Medicine: Experimentation, politics, emergent bodies. *Body & Society*. 18:1-17.
- Naffine, Ngaire. 2009. *Law's Meaning of Life; Philosophy, Religion, Darwin and the Legal Person*. Oxford: Hart Publishing.
- Pride Resource Center (2017) Coming out to your parents <https://prideresourcecenter.colostate.edu/resources/coming-out-to-your-parents> (Last accessed 8/1/2018)
- R v McNally [2013] EWCA Crim 1051
- Rumney, Phillip & Fenton, Rachel. 2008. Intoxicated Consent in Rape: Bree and Juror Decision-Making. *Modern Law Review*. 71:279-290.
- Saunders, Candida. 2010. Making it Count: Sexual Offences, Evidential Sufficiency, and the Mentally Disordered Complainant. *Liverpool Law Review*. 31:177-206.
- Sharpe, Andrew. 2007. Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category. *Feminist Legal Studies* 15: 57-84.
- Sharpe, Alex. 2014. Criminalising sexual intimacy: transgender defendants and the legal construction of non-consent. *Criminal Law Review* 3: 207-223.
- Sharpe Alex. 2016. Expanding Liability for Sexual Fraud through the Concept of 'Active Deception': A Flawed Approach. *Journal of Criminal Law*. 80: 28-44.
- Sharpe Alex. 2016. Sexual Intimacy, Gender Variance and Criminal Law. *Nordic Journal of Human Rights*. 33: 380-391.
- Tadros, Victor. 2006. Rape without Consent. *Oxford Journal of Legal Studies*. 26: 515-543.

Wallbank, Julie & Herring, Jonathan. 2013. Introduction: Vulnerabilities, Care and Family Law. In *Vulnerabilities, Care and Family Law*, eds. Julie Wallbank and Jonathan Herring. 1-21. Oxon: Routledge.

ⁱ R v McNally [2014] QB 593, R v Barker [2012] unreported, R v Lee (Mason)[2015] unreported, R v Newland [2015] unreported, R v Newland [2017] unreported, R v Staines [2016] unreported and the Scottish case of R v Wilson [2013] unreported.

ⁱⁱ R v Barker [2012] unreported, R v Lee (Mason)[2015] unreported, R v Newland [2015] unreported, R v Newland [2017] unreported, R v Staines [2016] unreported and the Scottish case of R v Wilson [2013] unreported.