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EQUALITY RIGHTS AND SEXUAL ORIENTATION: CONFRONTING HETEROSEXUAL FAMILY PRIVILEGE*

Bruce Ryder**

Heterosexual married couples are supported by a wide array of legal privileges, benefits, rights and powers. Recently, these legal advantages—which include, but are not limited to, economic support such as tax and pension benefits—have been extended in some areas to unmarried cohabiting heterosexual couples. Where the law continues to extend advantages to married couples not available to unmarried couples, heterosexual couples can choose to “opt in” to these advantages by marrying. Persons in same-sex relationships, by contrast, have no choice in the matter—they are excluded from the definition of “spouse” and their relationships are legal nullities upon which no legal privileges, benefits, rights or powers are conferred. At the same time, s.15 of the Charter of Rights and Freedoms guarantees equal rights to lesbians and gays. The existence and persistence of this contradictory legal situation can be traced to a compassion/condonation dichotomy in dominant legal attitudes towards gay men and lesbians. The compassion/condonation discursive framework functions to rationalize heterosexism by placing heterosexual privilege beyond critical examination. Until legal decision-makers are willing to confront and dismantle the legal construction of heterosexual privilege, and abandon the “compassion without condonation” approach, there will be neither freedom nor equality of sexual identity.

Les couples mariés hétérosexuels jouissent d'une gamme étendue de privilèges, d'avantages, de droits et de pouvoirs conférés par la loi. Dernièrement ces avantages, qui comprennent, sans y être limités, une aide économique, comme les avantages fiscaux et les pensions ou rentes de retraite, ont été étendus, dans certains domaines, aux couples hétérosexuels non mariés qui vivent maritalement ensemble. Dans les cas où la loi attribue aux couples mariés des avantages auxquels les couples non mariés n'ont pas accès, les couples hétérosexuels peuvent choisir de les recevoir en se mariant. Par contre, les personnes de même sexe qui vivent maritalement n'ont pas ce choix. Leurs rapports sont considérés comme nuls devant la loi et aucun privilège, avantage, droit ou pouvoir ne leur est donc conféré juridiquement. Cependant, l'interprétation donnée à l'article 15 de La Charte des droits et libertés garantit des droits égaux aux lesbiennes et aux homosexuels. On peut faire remonter l'existence et la persistance de cette situation juridique contradictoire à la dichotomie des positions

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juridiques dominantes sur la question des homosexuels et des lesbiennes. Les positions inconsistantes de la "compassion d'ordre humanitaire, mais de la réprobation morale" ont comme conséquence de rationaliser l'"hétérosexisme" en plaçant le privilège hétérosexuel au-dessus d'un examen critique. Jusqu'à ce que les autorités en matière de législation soient prêtes à prendre de front l'interprétation juridique du privilège hétérosexuel pour la démanteler et à abandonner cette approche de compassion humanitaire et de réprobation morale, il ne pourra y avoir ni liberté ni égalité d'identité sexuelle.

An interesting item appeared recently in Miss Manners' syndicated newspaper column. Manners (not her real name) answers questions from readers on those troublesome details of correct tablesetting, wedding plans, and other matters of etiquette. A concerned mother had written for advice regarding how to handle invitations to her daughter's wedding to another woman. Manners replied that she should invite only those friends and relatives who wish the couple well, just as one would for a heterosexual marriage. But please, Miss Manners informed her reader, you should not call the ceremony a wedding when it "is actually not a wedding". She suggested that the invitations "refer to the event as a church blessing or a union, rather than as a wedding or a marriage."¹

In the United Kingdom, lesbian and gay teachers have been struggling with other activists at the local level for more than a decade to foster policies and an educational curriculum condemning heterosexism and reflecting positive attitudes towards lesbians and gays. Yet the Conservative Party announced at its 1986 Conference that it would introduce legislation prohibiting the promotion of homosexuality. Section 28 of the *Local Government Act 1988* provides that "a local authority shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality," nor shall it "promote the teaching in any maintained [publicly funded] school of the acceptability of homosexuality as a pretended family relationship."²

In 1989, public funding of artists whose work included homoerotic subjects developed into a controversial issue in the United States. Congress passed an amendment to its appropriations bill for the National Endowment for the Arts that would bar the use of federal funds to "promote, disseminate or produce obscene materials including but not limited to depictions of sadomasochism, homoeroticism, the sexual exploitation of

¹ *Toronto Star* (6 October 1989) C5.

² *Local Government Act 1988* (U.K.), c.9, s.28. For a discussion, see J. Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800*, 2d ed. (London: Longman, 1989).

children, or individuals engaged in sex acts."³ The Canadian Secretary of State Women's Program has similar funding guidelines that render ineligible all individuals and groups "whose primary purpose is to promote a view on abortion or sexual orientation".⁴

Saskatchewan Minister of Social Services Grant Schmidt has stated that "[i]n no way do I want people who follow homosexual practices . . . showing a public example to my children . . ." and "[t]reating homosexual couples as families is contrary to the rules of Allah, God, the Holy Spirit . . ."⁵ In 1988, Saskatchewan Premier Grant Devine compared gay M.P. Svend Robinson and other gays and lesbians to "bank robbers". The premier offered the following assessment of members of parliament who are bank robbers: "I still have compassion for them but I don't condone the activity."⁶

According to the National Gay and Lesbian Task Force's annual survey of hate crimes, there were more than 7,000 reported incidents of violence, vandalism and harassment of gay and lesbian people in the United States in 1989. About two-thirds of the incidents were verbal harassment; of the remaining 2,322 incidents, 34% were physical assaults; 31% were threats of violence; 17% were acts of vandalism; 14% were police abuse; 3% were homicides; and 1% were arson or other acts of victimization.⁷ In a 1984

³ P.L. 101-121, (1989) 103 Stat. 701 at 741. For an analysis of the impact of the law, see Vance, "Misunderstanding Obscenity" (May 1990) 78:5 *Art in America* 49.

⁴ See Report of the Standing Committee on Secretary of State, *Fairness in Funding*, in Minutes of Proceedings and Evidence of the Standing Committee on Secretary of State, Issue No. 28, May 26, 1987 at 15; Ross, "Heterosexuals Only Need Apply: The Secretary of State's Regulation of Lesbian Existence" (1988) 17:3 *Resources for Feminist Research* 35; Ross, "Launching Lesbian Cultural Offensives" (1988) 17:2 *Resources for Feminist Research* 12; Bociurkiw, "Territories of the Forbidden: Lesbian Culture, Sex and Censorship" (April 1988) 49 *Fuse* 27.

⁵ Quoted in *Briarpatch* (October 1989) at 18.

⁶ *Ibid.*

⁷ "Task Force Calls Anti-Gay Bias Widespread" [*Toronto*] *Globe and Mail* (8 June 1990) A15. See also Sagarin and MacNamara, "The Homosexual as a Crime Victim" in I. Drapkin and E. Viano eds., *Victimology: A New Focus* (Lexington, MA: Heath and Co., 1975) 73; Harry, "Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men" (1982) 19 *Criminology* 546; Miller and Humphreys, "Lifestyles and Violence: Homosexual Victims of Assault and Murder" (1980) 3 *Qualitative Soc.* 169; van den Boogaard, "Blood Furious Underneath the Skins . . . On Anti-Homosexual Violence: Its Nature and the Needs of the Victims" in D. Altman et al., *Homosexuality, Which Homosexuality?* (London: GMP Publishers, 1989) 49; M. Kaufman, "The Construction of Masculinity and the Triad of Men's Violence", in M. Kaufman ed., *Beyond Patriarchy: Essays by Men on Pleasure, Power and Change* (Toronto: Oxford University

study by the Task Force, one in five gay men and one in ten lesbians reported being physically assaulted because of their sexual orientation.⁸ Statistics on anti-gay or anti-lesbian hate crimes are not available in Canada, but there is little doubt that, as in the United States, lesbians and gays are frequently the victims of verbal, physical and sexual assault because of their sexuality.⁹ In 1985, Kenn Zeller was killed by five teenage boys intent on "beating up a fag" in High Park in Toronto.¹⁰ In 1989, Joe Rose was stabbed to death by a group of young men on a Montreal bus. The men taunted Rose by shouting "faggot" before stabbing him with scissors and knives.¹¹

In the United States, the Hate Crime Statistics Act, which has been introduced in Congress every year since 1984, was finally passed into law on April 23, 1990.¹² The Act requires the Attorney General to collect data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity". The legislation had been stalled for years in part as a result of charges by legislators that compiling statistics on anti-lesbian and anti-gay violence amounts to a "subtle affirmation of homosex-

Press, 1987) 1. The continuum of violence against those who fail to conform to dominant sexual norms extends back to the burning of "witches" and "faggots" at the stake, and to the execution of thousands of lesbians and gays during the Holocaust. See R. Plant, *The Pink Triangle: The Nazi War Against Homosexuals* (New York: Henry Holt and Co., 1986).

⁸ Editors of the Harvard Law Review, *Sexual Orientation and the Law* (Cambridge: Harvard University Press, 1990) at 31.

⁹ See The Coalition for Gay Rights in Ontario, *Discrimination Against Lesbians and Gay Men: The Ontario Human Rights Omission* (October 1986); Sepejak, *The Willingness of Homosexuals to Report Criminal Victimization to Police* (MA Thesis, Department of Criminology, University of Toronto, 1979). See also the Report of the Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Queen's Printer, 1985) at 26:

We were shocked by a number of the experiences of unfair treatment related to us by homosexuals in different parts of the country. We heard about the harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression suffered by homosexuals. In several cities, private social clubs serving a homosexual clientele were damaged and the members harassed. Hate propaganda directed at homosexuals has been found in some parts of Canada.

¹⁰ Lesk, Popert and Taylor, "Boys Will Be Boys" *The Body Politic* (January 1986) 13; Shein, "Gay Bashing in High Park: A Tale of Homophobia and Murder" *Toronto Life* (April 1986).

¹¹ Jones, "AIDS Activist Murdered in Montreal" *Rites* (May 1989).

¹² Pub. L. No. 101-275 (1990).

uality".¹³ Senator Jesse Helms sponsored efforts in the Senate to exclude sexual orientation from the categories of discrimination warranting investigation.¹⁴ That having failed, he proposed an amendment stating that "the homosexual movement threatens the strength and the survival of the American family as the basic unit of society".¹⁵ In the end, Senators settled for an addition to the Bill which states that "American family life is the foundation of American society" and should be encouraged in the schools and by federal policy. The amendment further states that "nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of this Act be used, to promote or encourage homosexuality."¹⁶

As these examples illustrate, gay men and lesbians are constantly exposed to intolerance, condescension, marginalization, hatred and violence. The remarks of Premier Devine, Senator Helms and others represent the most common response of heterosexually-identified people to the struggles of lesbians and gays for equality: compassion for or tolerance of the misguided souls, yes; promotion or condonation of "their lifestyle", never.

The manner in which Canadian legislators and judges have responded to homosexuality can be understood in terms of the compassion/condonation dichotomy. The compassionate approach is evident in the belief, held by a strong majority of Canadians, that it should be illegal to deprive an individual of access to housing, employment and services solely because of his or her sexual orientation.¹⁷ The belief that gays and lesbians should have legal protection from discrimination is now enshrined in the human rights legislation of Manitoba, Ontario, Quebec and the Yukon, and in the Canadian Charter of Rights and Freedoms. At the same time, the "no condonation" approach is manifest in the wide range of overtly discriminatory laws and policies that provide material and ideological support to heterosexuality. Canadian law has consistently failed to provide any such support to gays and lesbians.

The compassion/condonation dichotomy provides the discursive framework through which the social and legal construction of heterosexual

¹³ Editors of the Harvard Law Review, *supra* note 8 at 167, note 36 (quoting Representative Dannemeyer).

¹⁴ *Ibid.* at 167.

¹⁵ 136 Cong. Rec. (February 8, 1990) (Debate on S1169-01).

¹⁶ *Supra* note 12.

¹⁷ A September 1985 Gallup Poll found that 70% of Canadians favoured making discrimination on the basis of sexual orientation illegal. See the Coalition for Gay Rights of Ontario, *supra* note 9 at 23.

privilege is placed beyond critical examination.¹⁸ On the one hand, if heterosexual privilege is socially and legally constructed, it can be socially and legally dismantled. On the other hand, heterosexually-identified people can avoid confronting their privilege by viewing heterosexuality as a norm dictated by biology or nature. The flip-side of the "normal" heterosexual is, of course, the "abnormal" homosexual. For many years, homosexuality was treated as a pathology of the soul, leading to criminalization; later, as a pathology of the body or mind, leading to medicalization. The criminal and medical models have been discredited, but the tendency to believe that biology or nature has somehow failed the homosexual remains. She or he deserves our compassion for this trick of fate.

The refusal to condone homosexuality is more difficult to understand, for if sexuality is "natural", it is beyond social control or human agency. The importance attached to not condoning homosexuality, then, represents an awareness that sexuality is, at least in part, within the control of individuals or society. Rather than deploying this awareness to critically examine the social construction of heterosexual privilege, it is used to portray gays and lesbians as a threat to the "natural" order of heterosexuality. In this way, the "no condonation" approach functions in tandem with the compassion model to rationalize heterosexual supremacy and keep gays and lesbians in their (subordinate) place. Heterosexuality, in the compassion/condonation discursive framework, is paradoxically both a "natural" and an artificial institution, vulnerable to the conferral of social and legal support to other sexualities.

The purpose of this paper is to describe the many ways in which the law disadvantages gays and lesbians, and then to consider whether the guarantee of equality in the *Charter of Rights and Freedoms* can change this situation

¹⁸ For works undertaking a critical examination of the social construction of sexuality, see M. Foucault, *The History of Sexuality, Volume I: An Introduction* (New York: Vintage, 1980); Rich, "Compulsory Heterosexuality and Lesbian Existence" (1980) 5 *Signs: Journal of Women in Culture and Society* 631; C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) 126-154; G. Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1987); M. Valverde, *Sex, Power and Pleasure* (Toronto: Women's Press, 1985); Weir and Casey, "Subverting Power in Sexuality" (1984) 14 *Socialist Review* 139; Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in C. Vance ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge and Kegan Paul, 1984) 267; J. Weeks, *supra* note 2; J. Weeks, *Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities* (London: Routledge and Kegan Paul, 1985); H. Buchbinder ed., *Who's On Top? The Politics of Heterosexuality* (Toronto: Garamond Press, 1987); G. Hanscombe and M. Humphries eds., *Heterosexuality* (London: GMP, 1987); Gay Left Collective ed., *Homosexuality: Power and Politics* (London: Allison and Busby, 1980).

and thus move Canadian law beyond the "compassion without condonation" approach to lesbian and gay existences.

In Part I, I outline an array of laws that discriminate on the basis of sexual orientation. The state has favoured one family form over others, namely a family composed of a father, a mother and their dependent children. This idealized family form does not accurately describe the way most people live,¹⁹ but it is the family form that is materially and ideologically supported by the law. That it is now challenged as an ideal is reflected in the fact that it can no longer be referred to simply as "the family". Rather, a host of adjectives are employed to distinguish this family from others. One might refer to it as the patriarchal, nuclear or heterosexual family, depending upon whether one wanted to distinguish it from an egalitarian, extended, gay or lesbian family respectively. Defenders of the ideological hegemony of this family form tend to refer to it as the traditional family. I will refer to the family composed of the married father and mother living with their children as the "privileged" or "heterosexual" family to emphasize both the legal support that has been given to this family form and the exclusion of gays and lesbians from its legal definition.

I will focus in this paper on the discrimination on the basis of sexual orientation inherent in the legal conferral of material, psychic and symbolic support to heterosexual relationships only. Same-sex couples are deprived of the material and psychic benefits granted by the law exclusively to heterosexual couples, and all lesbians and gays are stigmatized by the state's refusal to confer legitimacy on economically, emotionally and sexually interdependent relationships between persons of the same sex. Viewing heterosexual family privilege through the lens of sexual orientation discrimination leads me to focus on arguments for the removal of the legal disadvantage of same-sex couples relative to their heterosexual counterparts.

It should be recognized that according the same benefits to same-sex

¹⁹ According to Statistics Canada, *The Family in Canada: Selected Highlights* (Ottawa: Queen's Printer, January 1989), 32.7% of families in Canada are husband-wife families with no children at home, 12.7% are lone-parent families (80% of which are headed by women), and the number of common law heterosexual unions increased by over 35% between 1981 and 1986. Cohabiting lesbian and gay couples without children do not fall within Statistics Canada's definition of family, and are therefore not accounted for in the data. See also M. Eichler, *Families in Canada Today* (Toronto: Gage, 1988); G.N. Ramu ed., *Marriage and the Family in Canada Today* (Scarborough: Prentice-Hall, 1988); Boyd, "Changing Canadian Family Forms: Issues for Women" in N. Mandell and A. Duffy eds., *Reconstructing the Canadian Family: Feminist Perspectives* (Toronto: Butterworths, 1988).

couples as are currently granted to heterosexual couples may further trench the privilege of coupled (nuclear) family units at the expense of other familial arrangements.²⁰ Indeed, treating individuals living alone or in groups differently from persons living as couples or in nuclear families when their needs are the same may constitute discrimination on the basis of family status or marital status. An evolving human rights jurisprudence is establishing the principle that rules cannot be based upon distinctions drawn upon the marital or family status of an individual without a consideration of his or her actual needs, capacities or merits.²¹ Like prohibitions on discrimination on the basis of sexual orientation, prohibitions on marital status or family status discrimination have profound implications for the current array of laws and policies that privilege the married heterosexual family. Untangling the network of discrimination based on family status, marital status and sexual orientation that is bound up in the legal construction of heterosexual family privilege will be the topic of a subsequent paper. For the moment, I will examine heterosexual family privilege through the lens of sexual orientation discrimination, with a consequent focus on the legal disadvantage of lesbian and gay couples.

In Part II, I discuss the attitudes that lesbians and gays have confronted when they have placed their rights on the legislative agenda. In Part III, I turn to a consideration of section 15 of the Charter and evaluate its potential to promote equality for gays and lesbians. And in Part IV, I briefly examine some positive recent decisions expanding the definition of family beyond its traditional form to include cohabiting lesbian and gay couples.

I

Canadian legislation stigmatizes lesbian and gay existences by exclusion. Most often this exclusion is accomplished by silence. Lesbians and gays are omitted, ignored. For example, many laws employ the word "spouse" to allocate rights, powers, benefits and responsibilities to family

²⁰ See Cox, "Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?" (1989) 8 St. Louis Univ. Pub. L. Rev. 299; Cox, "Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining" (1986) 2 Wis. Women's L.J. 1.

²¹ *Brossard v. Québec (Comm. des Droits de la Personne)*, [1988] 2 S.C.R. 279 at 298 (municipality's blanket anti-nepotism policy discriminated on the basis of civil status); *Cashin v. C.B.C.*, (1988) 86 N.R. 24 (F.C.A.); *Re Saskatchewan Human Rights Commission et al. v. Government of Saskatchewan Department of Social Services*, (1988) 52 D.L.R. (4th) 253 (Sask. C.A.) (lower welfare benefits to single persons constitutes discrimination on the basis of marital status under the provincial human rights code); *Schaap v. Canada*, (1988) 56 D.L.R. (4th) 105 (F.C.A.) (employer's policy of granting family accommodation only to married couples (at

members. In Ontario alone, over seventy acts employ the word "spouse". Some statutes define "spouse" as either of a man or a woman who are married to each other. In the absence of a legislative definition, judges rely on "common understandings" and dictionary definitions to interpret spouse as meaning a married heterosexual person.²² In recent years, the definition of spouse in many acts has been amended to accord legal status to unmarried heterosexuals cohabiting in a relationship of some permanence.²³ In no case has the legislative recognition of unmarried cohabitation extended to same-sex partners. Canadian law continues to define spouse uniformly in heterosexually-exclusive terms.

The legal exclusion of gays and lesbians operates on a number of levels. On an ideological level, it constructs heterosexuality as the norm and gays and lesbians as deviant. Despite the prevalent ideology of there being one natural, private family form (namely the nuclear, heterosexual family), and the ideology of heterosexuality as the natural, private sexual identity, these institutions are in fact largely shaped and defined by law. The amount of legal architecture that has gone into building the ideal family and supporting heterosexuality is staggering—hundreds of pieces of legislation, thousands of regulations, rules, by-laws and judicial decisions. This plethora of government activity promotes the idea that there is only one legitimate sexual identity, only one legitimate family form, and thus ensures that all those people living outside these legally and ideologically created norms are constructed as deviant.²⁴

115) "perpetuates a stereotype, namely, that a relationship between a man and a woman has a lesser social value if it does not have the status of marriage . . . It is a commonplace that the existence of the marriage bond is no guarantee of the permanency and stability of a relationship, just as its absence is no sure indicator of a mere passing fancy."

²² E.g., *Andrews v. Ontario (Ministry of Health)*, (1988) 64 O.R. (2d) 258 (Ont. H. Ct.); *Cummings v. Fleming*, [1980] 4 W.W.R. 688 (B.C.S.C.); *Louis v. Esslinger*, (1981) 121 D.L.R. (3d) 17 (B.C.S.C.); *Trowsdale v. McDonald*, (1980) 20 B.C.L.R. 1 (B.C.S.C.); *No. 673 v. M.N.R.*, 60 D.T.C. 21; *Schapira v. M.N.R.*, 66 D.T.C. 157; *Sokil v. M.N.R.*, 68 D.T.C. 314; *The Queen v. Taylor*, 84 D.T.C. 6234; *The Queen v. Scheller*, [1975] C.T.C. 601; *Toutant v. M.N.R.*, [1978] C.T.C. 2671; *Fraser v. Haight et al.*, (1987) 58 O.R. (2d) 676 (H. Ct.), *aff'd* 69 O.R. (2d) 64n (C.A.); *Miron v. Trudel*, (1990) 71 O.R. (2d) 662.

²³ See, e.g., the *Equality Rights Statute Law Amendment Act*, S.O. 1986, c.64.

²⁴ See S. Gavigan, "Law, Gender and Ideology", in A. Bayefsky ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printers and Publishing, 1988) 293-4; C. Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge and Kegan Paul, 1984) 221; Barrett and McIntosh, *The Anti-Social Family* (London: Verso Editions, 1982) 77; Mossman and MacLean, "Family Law and Social Welfare" (1986) 5 Can. J. Fam. L. 79 at 104-7.

More concretely, the law is a source of material and psychic oppression for gays and lesbians. Gays and lesbians are deprived of the advantages and powers afforded by laws aimed at improving the emotional and material security of heterosexual family units. The state has not concerned itself with the well-being of gays and lesbians coping with old age, the breakdown of a relationship, or the death or injury of a partner. As a result of the legal deprivation of resources and powers, these events are likely to produce greater emotional and material vulnerability in the lives of gays and lesbians than they do for heterosexuals.

As we shall see, there are two sides to the material inequality of gays and lesbians created by the law. First, in aggregate, gay men and lesbians are paying more tax than heterosexuals. Secondly, gay men and lesbians receive less in public benefits, since they get nothing in return for their contributions in terms of survivors' benefits, family employment benefits or spousal pension benefits. In other words, gays and lesbians are being forced to subsidize heterosexual privilege.

A summary of laws which institutionalize heterosexuality and discriminate against gays and lesbians follows. The examples of legal discrimination in provincial areas of jurisdiction are drawn from Ontario legislation, but could just as easily have been compiled in any other province.

A. Legislation Conferring Economic Benefits or Obligations

1. Pension Benefits

Many statutes provide opposite-sex spousal pension benefits to elderly persons generally and to various sectors of public employees.²⁵ For example, the federal *Old Age Security Act* provides for spousal pension benefits where one spouse is over 65, the other is between 60 and 64 and the couple's income is less than \$16,000. Benefits are available to heterosexual couples who have lived together for a year or more, but not to same sex couples. Jim Egan and John Nesbit, a gay couple who have lived together for over 40 years but were denied a spousal pension, have launched a Charter challenge to the legislation in the British Columbia Supreme Court, arguing that it discriminates on the basis of sexual orientation.²⁶

²⁵ E.g., *War Veterans Allowance Act*, R.S.C. 1985, c.W-3, s.2(3)(a); *Canada Pension Plan Act*, R.S.C. 1985, c.C-8, s.64; *Old Age Security Act*, R.S.C. 1985, c.O-9; *Public Service Superannuation Act*, R.S.C. 1985, c.P-36, s.25; *Legislative Assembly Retirement Allowances Act*, R.S.O. 1980, c.236, s.11; *Teachers' Pension Act, 1989*, S.O. 1989, c.92, s.67.

²⁶ "Homosexual Couple to Sue Over Benefits", [Toronto] *Globe and Mail* (27 August 1988); "Challenging the Charter", *Angles* (October 1988) 12-3.

2. Other Family Employment Benefits

Occasionally legislation relating to public employees sets out the range of family benefits that can be provided to heterosexual family members.²⁷ More frequently, the scope of family benefits available to employees, such as dental and medical plans, is determined by the individual employment contract or collective agreement. Unions and employee groups across the country are starting to insist that contract language ensure that family-related benefits be provided on an equal basis to employees with same-sex partners.²⁸ Gay men and lesbians are asserting their right to equal family benefits through grievance procedures, human rights complaints and court challenges, so far without success.²⁹

3. Benefits Conferred on Death or Injury of a Family Member

Many statutes provide benefits or rights in crisis situations such as the death, injury or sickness of a heterosexual family member. Thus, in addition to the deprivation of public financial assistance, gays and lesbians are deprived of the empowering rights that members of privileged families would take for granted in responding to family emergencies. For example, gays and lesbians are always at risk of being left out of decisions regarding a partner's health care if she or he is incapacitated.³⁰

²⁷ E.g., *Education Act*, R.S.O. 1980, c.129, s.155(1)(a); *Municipal Act*, R.S.O. 1980, c.302, s.208, para.48.

²⁸ *Canadian Human Rights Advocate* (March/April 1990) 3; "Gay Couples Step Up Fight to Get Paid Medical Benefits" *Toronto Star* (27 October 1989) D10; "BC Prof Wins Spousal Benefits" *Xtra!* (April 1990) XS3.

²⁹ *Mossop v. Canada (Secretary of State)*, (1989) 10 C.H.R.R. D/6064 (denial of bereavement leave to attend funeral of gay partner's father discriminates on the basis of family status), set aside in *A.-G. of Canada v. Mossop*, Unreported decision of the Federal Court of Appeal, June 29, 1990 (Court file A-199-89); *Vogel v. Government of Manitoba*, (1983) 4 C.H.R.R. D/1654 (denial of dental benefits to gay partner of government employee does not amount to discrimination on the basis of marital status or sex); *Re Carleton University and C.U.P.E., Local 2424*, (1989) 35 L.A.C. (3d) 96 (denial of spousal benefits to same-sex partners does not constitute discrimination on the basis of sexual orientation); "Ottawa, Union Accused of Discrimination" [*Toronto*] *Globe and Mail* (26 August 1989) A12; "Vancouver Lesbian Launches Bias Complaint Against Feds" *Xtra!* (April 1990) XS1.

³⁰ In Ontario, regulations under the *Public Hospitals Act* give a spouse the right to consent to surgery if the individual is incapable of making the decision. See O.Reg.518/88, s.25. For a particularly heartbreaking story of a lesbian cut off from her disabled lover, see *In re Guardianship of Sharon Kowalski*, 382 N.W.2d 861 (Minn. App. 1986), cert. denied, 106 S. Ct. 1467; K. Thompson and J. Andrzejewski, *Why Can't Sharon Kowalski Come Home?* (San Francisco: Spinsters/Aunt Lute, 1988).

Unlike cohabiting heterosexuals, gays and lesbians cannot claim a spousal pension or survivor's benefits pursuant to workers' compensation legislation if their partners are killed in workplace accidents.³¹ Similarly, only cohabiting or married heterosexuals can apply for dependants' benefits if their partners die as a result of criminal acts.³² The exclusion of gays and lesbians in this context is all the more unforgivable given that they have an increased risk of being the victims of violent crime.³³

Gays, lesbians and their children face a greater risk of economic losses arising from automobile accidents than heterosexuals. Whether a person injured in an automobile accident will be able to recover benefits under compulsory automobile insurance contracts depends, in some circumstances, on whether the claimant falls within statutory definitions of family members of the insured. For example, in Ontario, an uninsured person injured by an uninsured vehicle or while an occupant of an uninsured vehicle can recover benefits if she or he is the spouse of an insured, or a dependent relative of either the insured or the insured's spouse.³⁴ Until recently, in the absence of a definition of "spouse" in the legislation, the Ontario courts had held that only married spouses were included.³⁵ However, in a recent decision, *Leroux v. Co-operators General Insurance Co.*,³⁶ Madam Justice Arbour held that this definition of spouse must be interpreted in a manner consistent with the Charter. She found that denying a child's claim against the insurance company based solely on his mother's non-marital relationship with the insured man constituted discrimination on the basis of marital status.³⁷ The Charter required that the word "spouse" be interpreted to include "persons who live in a relationship of some permanence and commitment, akin to a conjugal relationship."³⁸ Although this case involved a heterosexual couple, the reasoning should be equally applicable to a cohabiting same-sex couple.

Under the no-fault provisions of Ontario's standard automobile insur-

³¹ *Workers' Compensation Act*, R.S.O. 1980, c.539, s.36 as am. by S.O. 1984, c.58 and S.O. 1986, c.64, s.69.

³² *Compensation for Victims of Crime Act*, R.S.O. 1980, c.82 as am. by S.O. 1986, c.64, s.5(1).

³³ See *supra* notes 7-11 and accompanying text.

³⁴ *Insurance Act*, R.S.O. 1980, c.218, s.231(2)(b)(iii).

³⁵ *Fraser v. Haight*, *supra* note 22; *Miron v. Trudel*, *supra* note 22.

³⁶ 65 D.L.R. (4th) 702 (Ont. H. Ct.).

³⁷ *Ibid.* at 714.

³⁸ *Ibid.* at 716. See also *Matheson v. Matheson*, (1988) 25 B.C.L.R. (2d) 351 (B.C.S.C.) (basing right to indemnity on marital status violates s.15 of the Charter).

ance policies, death benefits are payable to the head of the household or the spouse of the head of the household in which the deceased resided.³⁹ The statutory definition of spouse includes cohabiting heterosexuals. Although "the obvious purpose of [death benefits] would seem to be to provide assistance to the person or persons closest to a deceased insured immediately following his [or her] death",⁴⁰ benefits would not be payable to a gay man or lesbian who lost his or her "head of the household" in an automobile accident.

4. Income Tax

Although the federal *Income Tax Act* is based on the principle of individual taxation, it privileges married heterosexual couples in several ways. For one, the married status tax credit is available only to married heterosexual couples.⁴¹ It can be claimed by one spouse (most commonly the husband) only when the other has earned little or no income. Cohabiting heterosexuals and same-sex couples cannot claim a tax credit for their dependent partners, although they can claim the single person tax credit.⁴² As the marital status tax credit is significantly larger than the single person tax credit, the Act gives a substantial financial advantage, of all one-income couples, to those who are married. The tax credit scheme is relatively neutral in the case of two-income couples since both partners, married or not, can claim a single person tax credit.

The Act provides further advantages to married heterosexuals by allowing them to contribute to each other's registered retirement savings plans and by providing tax-free rollovers on the transfer of property from one spouse to another.⁴³ For some wealthy taxpayers, however, a lack of marital status may be advantageous in enabling the avoidance of income tax attribution rules upon the transfer of income or property to the taxpayer's spouse. But the net effect of the rules described above is to make same-sex and unmarried heterosexual couples worse off relative to their married counterparts. This economic penalty places a particularly onerous burden

³⁹ *Insurance Act*, R.S.O. 1980, c.218, Schedule C.

⁴⁰ *Demers v. Cornwall*, (1981) 125 D.L.R. (3d) 537 at 539 (Ont. H. Ct.).

⁴¹ *Income Tax Act*, section 118(1), added by S.C. 1988, c.55, s.92. Cohabiting heterosexuals are not entitled to the married status credit: *Toutant v. M.N.R.*, *supra* note 22; Interpretation Bulletin IT-513, February 3, 1989. In 1989, the maximum married status tax credit amounted to \$1,890.57.

⁴² *Ibid.*, s.118(1)(c). The single person tax credit in 1989 was \$1,031.22.

⁴³ See Maloney, "Women and the Income Tax Act: Marriage, Motherhood and Divorce" (1989) 3 Can. J. Women and Law 182 at 185-6.

on lesbian couples who face additional economic disadvantage as women.⁴⁴

B. Legislation Conferring Rights and Obligations

1. Right to Marry or to Have One's Relationship Recognized by the State

In Canada, the capacity to marry is not defined clearly in legislation. As a constitutional matter, jurisdiction to legislate regarding who can and cannot marry rests with the federal government, while jurisdiction over ceremonial requirements rests with the provinces.⁴⁵ The Parliament of Canada has not exercised its jurisdiction to set out explicit criteria regarding the capacity to marry,⁴⁶ and any attempt by the provinces to do so would be unconstitutional and of no force and effect. As a result, neither federal nor provincial legislation explicitly bars same-sex couples from marrying.⁴⁷

⁴⁴ In 1988, the average salary of women working full time was \$21,918, while for men it was \$33,558. *Earnings of Men and Women 1988* (Ottawa: Statistics Canada, 1989). See also *Employment Equity Report* (Ottawa: Minister of Supply and Services, 1989); *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); *Women in Canada: A Statistical Report* (Ottawa: Ministry of Supply and Services, 1985); R.S. Abella, *Report of the Royal Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984).

⁴⁵ Section 91(26) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction in relation to "marriage and divorce". By virtue of s.92(12), the provinces have exclusive jurisdiction in relation to the "solemnization of marriage in the province". According to judicial interpretation of these powers, the federal government has exclusive jurisdiction to regulate the legal capacity to marry ("essential validity") while the provinces have exclusive jurisdiction to impose ceremonial or evidentiary requirements as conditions precedent to a marriage ("formal validity"). *Re Marriage Legislation in Canada*, [1912] A.C. 880; *Kerr v. Kerr*, [1934] S.C.R. 72; *A.G. Alta. v. Underwood*, [1934] S.C.R. 635; P. Hogg, *Constitutional Law of Canada* 2d ed. (Toronto: Carswell, 1985) 535-6; H.A. Hahlo, *Nullity of Marriage in Canada* (Toronto: Butterworths, 1979) 5-6; Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage" (1975) 7 *Ottawa L. Rev.* 384.

⁴⁶ The federal government has legislated regarding capacity to marry to alter the degrees of consanguinity prohibited by the common law. *Marriage Act*, R.S.C. 1985, c.M-2.

⁴⁷ For example, s.5(1) of the Ontario *Marriage Act* provides as follows:

Any person who is of the age of majority may obtain a license or be married under the authority of the publication of banns, provided no lawful cause exists to hinder the solemnization.

R.S.O. 1980, c.256. The relevant legislation in the other provinces is: *Solemnization of Marriage Act*, S.N. 1974, No.81; *Solemnization of Marriage Act*, R.S.N.S. 1989,

However, according to the common law, "marriage being, by definition, the union of a man and a woman, a marriage between two persons of the same sex is null and void."⁴⁸

In only one reported Canadian decision has a same-sex couple sought to have their marriage legally recognized.⁴⁹ In *North v. Matheson*⁵⁰, a gay couple sought to compel the Manitoba authorities to register their marriage. The Manitoba *Marriage Act*⁵¹ provided simply that an authorized person "may solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract the marriage."⁵² Philp Co. Ct. J. noted that neither federal nor provincial legislation defined the capacity to marry; neither level of government had explicitly prohibited same-sex marriage. He pointed out that a province lacked the constitutional power to pass a law permitting same-sex marriage since the federal government has the exclusive constitutional authority to legislate regarding capacity to marry.⁵³

In the absence of legislative direction, the judge decided that capacity to marry had to be gleaned from the common law, dictionaries and the *Encyclopedia Britannica*. After consulting these sources, Philp J.A. concluded that it is "universally accepted by society"⁵⁴ that marriage is the union of

c.436; *Marriage Act*, R.S.N.B. 1973, c.M-3; *Marriage Act*, R.S.P.E.I. 1974, c.M-5; Quebec Civil Code, Title V, c.III, Article 142; *Marriage Act*, R.S.M. 1987, c.M50; *Marriage Act*, R.S.S. 1978, c.M-4; *Marriage Act*, R.S.A. 1980, c.M-6; *Marriage Act*, R.S.B.C. 1979, c.251.

⁴⁸ H.A. Hahlo, *supra* note 45 at 10.

⁴⁹ In the United States, the courts have rejected arguments that state marriage statutes should be interpreted as including same-sex couples. See *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

⁵⁰ (1974) 20 R.F.L. 112 (Man. Co. Ct.).

⁵¹ R.S.M. 1987, c.M50.

⁵² *Ibid.*, s.2.

⁵³ The judge stated (*supra* note 50 at 114) that if a provincial legislature had passed a law enabling same-sex couples to marry,

... I would have no hesitation in finding that such a provision is clearly *ultra vires* as being part of the substantive law of marriage and divorce, a matter exclusively within the competence of the Parliament of Canada under s.91(26) of the B.N.A. Act, 1867. I would view such a provision as affecting the essential capacity of a person to marry, and not as a condition as to the solemnization which is within the legislative competence of the provincial legislatures under s.92(12)...

⁵⁴ *Ibid.* at 114. Presumably, the gay couple before the court was not part of "society."

two persons of the opposite sex. Thus, the applicants' ceremony of marriage was, in the eyes of the law, a nullity.⁵⁵

Not only has access to marriage been denied to gay and lesbian couples, Canadian law provides no alternative legal status for same-sex relationships. Federal and provincial legislation has increasingly taken account of the existence of the "common law" relationships of heterosexual cohabitants who choose not to marry.⁵⁶ But common law recognition of unmarried cohabitation does not extend to same-sex couples; nor have statutory definitions of cohabiting unmarried spouses been extended to include gays or lesbians.⁵⁷ While heterosexual couples may choose the legal status that best suits their needs, gay and lesbian couples have no choice: they have no legal status.

2. *Right to a Mechanism for Resolving Property Disputes on the Breakdown of a Relationship*

Provincial legislation provides a right to resolve property disputes on breakdown of a relationship. However, this legislation does not apply to same-sex nor (in most instances) to unmarried heterosexual couples. In Ontario, for example, the *Family Law Act* applies only to married heterosexuals for the purposes of dividing family property and the disposition of the family home.⁵⁸ Similarly, in a B.C. case, *Anderson v. Luoma*,⁵⁹ Dohm J. rejected a woman's claims, based on the B.C. *Family Relations Act*⁶⁰ and the

⁵⁵ The *North* decision was based on statutory interpretation, and it was decided in 1974, eight years before the coming into force of the Charter. The judge relied on traditional understandings to give meaning to the open-ended language of the legislation. When a similar case comes before the Canadian courts in the future, *North* can be distinguished on the grounds that judges are now under an obligation to interpret legislation and develop the common law in a manner consistent with the equality rights in the Charter, to be discussed in Part III below.

⁵⁶ For overviews of the legal status of cohabiting unmarried heterosexuals, see *Equality for All*, *supra* note 9 at 35-7; Bala and Cano, "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together" (1989) 4 *Can. Fam. L.Q.* 147; Boivin, "To Marry or Not to Marry? A Study of the Legal Situation of Common Law Spouses in Canadian Law" in E. Sloss ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) 169; McLellan, "Marital Status and Equality Rights" in A. Bayefsky and M. Eberts eds., *Equality Rights and the Charter* (Toronto: Carswell, 1985) 411; W. Holland, *Unmarried Couples: Legal Aspects of Cohabitation* (Toronto: Carswell, 1982).

⁵⁷ See *Anderson v. Luoma*, (1986) 50 R.F.L. (2d) 127 (B.C.S.C.).

⁵⁸ S.O. 1986, c.4, s.1(1).

⁵⁹ *Supra* note 57.

⁶⁰ *Family Relations Act*, R.S.B.C. 1979, c.121, s.1.

common law, to maintenance and a share of the matrimonial property on the breakdown of her lesbian relationship. To the argument that the plaintiff's exclusion from the scheme of the Act violated her equality rights in s.15 of the Charter, Dohm J. gave an unexplained, one-line response: "[t]he answer is found in s.1 of the Charter."⁶¹ However, relying on the equitable doctrine of constructive trust which entitles a partner to claim a share of property where she has contributed to its acquisition, preservation, maintenance or improvement,⁶² Dohm J. was able to award the plaintiff an interest in property to reflect her economic contribution to the relationship.⁶³

Married heterosexuals have resort to both statutory and equitable remedies in resolving property disputes on the breakdown of the relationship. On those occasions where equitable remedies may be more advantageous to a claimant than statutory remedies, the Supreme Court has held that it would be

... inequitable ... if married persons were precluded by the Family Law Act, 1986 from utilizing the doctrine of remedial constructive trust which is available to unmarried persons.⁶⁴

Arguably, it is similarly inequitable to deny unmarried persons access to the matrimonial property legislative provisions which are available to married persons. However, the existence of remedial disparities based on marital status is not per se inequitable if there is value in providing a plurality of legal regimes and allowing couples to choose the legal status that best suits their needs. Some cohabiting heterosexuals may make a conscious choice not to "opt in" to the legal framework of marriage. The exclusion of gay and lesbian couples from matrimonial property legislation is inequitable, however, for they are not only excluded along with unmarried cohabiting heterosexuals, they are also denied the choice to "opt in" by marrying.

3. Right to Support on Breakdown of a Relationship

Similarly, the right of an economically dependent partner to seek support from the other partner on the breakdown of a relationship is not made available to lesbians or gays by family law legislation, although in most

⁶¹ *Supra* note 57 at 142.

⁶² *Rathwell v. Rathwell*, [1978] 2 S.C.R. 204; *Pettkus v. Becker*, [1980] 2 S.C.R. 834.; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 220; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70.

⁶³ *Supra* note 57 at 149-153.

⁶⁴ *Rawluk v. Rawluk*, *supra* note 62 at 96.

jurisdictions both married persons and opposite-sex cohabitants are entitled to support from their partners.⁶⁵ In *Anderson v. Luoma*, Wallace J. rejected a lesbian's claim for interim maintenance from her partner, reasoning as follows:

The Family Relations Act does not purport to affect the legal responsibilities which homosexuals may have to each other or to children born to one of them as a result of artificial insemination. The Act's application is, in general, directed to the spousal and parental relations of men and women in their role of husband, wife and parent.⁶⁶

The legislative failure to recognize the existence of gay and lesbian relationships serves to exacerbate the economic vulnerability, particularly of lesbians, that is created by discrimination in the provision of family benefits. Although lesbians and gays may choose to live economically interdependent lives, they do so at greater risk than heterosexuals. A dependent partner has no right to claim support, and in the absence of a legislative mechanism for a fair resolution of economic affairs on the breakdown of a same-sex relationship, trust doctrines provide the only means of equitably allocating rights to property.

4. Right to Enter Cohabitation Agreements

One way of minimizing the risk of being unfairly treated on breakdown of a relationship is to enter into cohabitation contracts or separation agreements to deal with such matters as property rights, support obligations and custody of children. Traditionally, the common law sought to promote marriage by holding invalid, as contrary to public policy, contracts that contemplated cohabitation without marriage.⁶⁷ The common law rule has been altered by statute in most jurisdictions to allow cohabiting unmarried heterosexuals to enter into cohabitation and separation agreements.⁶⁸ Legislation is silent on the contractual rights of same-sex couples. Thus, the validity of contracts between gay and lesbian couples will continue to be determined by the common law. In the absence of legislative reform, judges have cited increased social acceptance of cohabitation and sexual relations between unmarried heterosexuals in abandoning the old common law

⁶⁵ *Family Law Act*, S.O. 1986, c.4, s.29; *Family Relations Act*, R.S.B.C. 1979, c.121, s.1(c). For an overview of legislation in other jurisdictions, see Bala and Cano, *supra* note 56.

⁶⁶ (1984) 42 R.F.L. (2d) 444 at 446 (B.C.S.C.). This reasoning was later affirmed and adopted by Dohm J. in the trial decision: *supra* note 57.

⁶⁷ *Fender v. St. John Mildmay*, [1938] A.C. 1 (H.L.); *Prokop v. Kohut*, [1965] 54 D.L.R. (2d) 717 (B.C.S.C.).

⁶⁸ E.g., *Family Law Act*, 1986, R.S.O. 1986, c.4, ss.2(10), 53 and 54.

position and upholding contracts between cohabiting heterosexuals.⁶⁹ The one Canadian case dealing with the issue suggests that cohabitation contracts between gays and lesbians are enforceable at common law.⁷⁰

5. *Right to Custody of and Access to Children*

On the breakdown of a relationship, custody of children is determined according to "the best interests of the child" test.⁷¹ The judiciary exercises a great deal of discretion in the application and interpretation of this general legislative standard in particular cases.⁷² The courts have frequently stated that a parent's homosexuality is not per se a bar to custody. There are as yet no reported cases dealing with custody disputes between same-sex parents. However, the case law dealing with the breakdown of an opposite-sex relationship indicates that a parent involved openly in a same-sex relationship has an increased risk of losing custody or being granted restricted access to her or his children. Many of the court decisions ask gay and lesbian parents to choose between their children and open relationships with their lovers.

For lesbian mothers in custody disputes, a relationship with a woman is a liability unless the court is satisfied that she will be discreet, not "flaunt" her sexuality, or publicly associate herself with lesbian organizations.⁷³ A

⁶⁹ *Chrispen v. Topham*, (1986) 3 R.F.L. (3d) 149 at 154 (Sask. Q.B.), aff'd (1987) 9 R.F.L. (3d) 131 (Sask. C.A.); *Wray v. Rubin*, (1987) 62 O.R. (2d) 578, 14 R.F.L. (3d) 201 (Ont. Div. Ct.); *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

⁷⁰ *Anderson v. Luoma*, supra note 57 (assuming that a contract regarding support obligations would have been enforceable if it had existed). Two decisions from the California courts suggest that cohabitation contracts between two men will be more difficult to enforce because the judiciary will be more likely to view gay relationships solely in sexual terms: *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981) (refusing to enforce a cohabitation contract because it was based on "meretricious consideration"); *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988) (enforcing a contract between two gay men).

⁷¹ See, e.g., *Children's Law Reform Act*, R.S.O. 1980, c.68, s.24(1).

⁷² See, e.g., *Re Moores and Feldstein*, (1973) 12 R.F.L. 280 (Ont. C.A.); *More v. Primeau*, (1977) 2 R.F.L. (2d) 254 (Ont. C.A.).

⁷³ See *Case v. Case*, (1974) 18 R.F.L. 132 (Sask. Q.B.); *K. v. K.*, (1975) 23 R.F.L. 58 (Alta. Prov. Ct.); *Barkley v. Barkley*, (1980) 28 O.R. (2d) 136 (Prov. Ct.); *Bernhardt v. Bernhardt*, (1979) 10 R.F.L. (2d) 32 (Man. Q.B.); *Bezaire v. Bezaire*, (1980) 20 R.F.L. (2d) 358 (Ont. C.A.); *Elliott v. Elliott*, (1984) 25 A.C.W.S. (2d) 304. In *J. v. R.*, (1982) 27 R.F.L. (3d) 380 (Que. S.C.), the court struck down a clause in a separation agreement that required a mother's access to her children to be exercised only in the absence of her lesbian lover. The court found that the clause constituted discrimination prohibited by the Quebec Charter of Rights and Freedoms. For

similar pattern emerges in cases involving gay fathers. These cases most frequently arise in the context of an attempt to vary the father's access rights in response to his entering a relationship. Openly gay fathers who live with their lovers risk a restriction or denial of overnight access, particularly if they are "activists" or not "discreet about their homosexual lifestyle."⁷⁴ For example, in *Saunders v. Saunders*,⁷⁵ a gay man was denied overnight access, notwithstanding the conclusion of a court-ordered access report that the men "would be as discreet as heterosexual couples when children are in the home." Wetmore J. concluded that:

This child has a normal stable home in which there are only the normal environmental circumstances for maturity to develop. Surely it cannot be argued that exposure of a child to unnatural relationships is in the best interests of that child of tender years . . . the prudent parent does not voluntarily and deliberately expose a child to any environmental influence which might affect normal development.⁷⁶

The judge distinguished cases with results more favourable to lesbian and gay parents on the grounds that the parents in those cases had "exercised great restraint in minimizing the sexual choice of that parent as a role model for the child." Here, the father had demonstrated "no intention in minimizing his attachment" to his lover.⁷⁷

thorough discussions of these cases, see Arnup, "'Mothers Just Like Others': Lesbians, Divorce and Child Custody in Canada" (1989) 3 Can. J. Women and Law 18; Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986) 1 Can. J. Women and Law 505; Leopold and King, "Compulsory Heterosexuality, Lesbians and the Law: The Case for Constitutional Protection" (1985) 1 Can. J. Women and Law 163 at 170-6; Brownstone, "The Homosexual Parent in Custody Disputes" (1980) 5 Queen's L.J. 199; Boyle, "Custody, Adoption and the Homosexual Parent" (1976) 23 R.F.L. 129.

⁷⁴ *D. v. D.*, (1978) 20 O.R. (2d) 722 (Co. Ct.) (bisexual father awarded custody because he was not a "militant" active in gay organizations and he kept his sexual identity hidden from all but a few close friends); *Worby v. Worby*, (1985) 48 R.F.L. (2d) 369 (Sask. Q.B.) (gay parent cohabiting with his lover denied overnight access "while his present lifestyle continues"); *E.(A) v. E.(G.)*, Unreported decision of the Newfoundland Supreme Court, Halley J., September 22, 1989 (refusing to terminate access to "discreet", apolitical gay parent cohabiting with his lover, but delaying overnight access to gay father cohabiting with his lover to give grandparents a chance to "get used to the idea"); *P.B. v. P.B.*, April 6, 1988, Unreported decision of the Ontario Provincial Court (Family Division) (delaying overnight access to gay parent cohabiting with his lover; two men ordered to sleep in separate rooms when overnight access commences).

⁷⁵ (1989) 20 R.F.L. (3d) 368 (B.C. Co. Ct.).

⁷⁶ *Ibid.* at 370-1.

⁷⁷ *Ibid.* at 371.

The implicit or explicit devaluing of gay or lesbian relationships present in these cases contrasts starkly with a reverse presumption operating in custody disputes if a parent has a lover of the opposite sex. A new heterosexual relationship, flaunted or not, is seen as an indication of a return to stability and a loving, nurturing environment, unless it can be demonstrated by positive evidence that the relationship is harmful to the children.⁷⁸ Evidently, the best interests of the child test is applied in custody disputes with reference to a normative standard, namely that a privileged family unit provides the ideal environment for the raising of children. As a result, the emotional trauma and economic vulnerability that often follows a separation will be compounded for gay and, especially, lesbian parents.

6. Wills

A gay man or lesbian has no recourse if his or her partner dies intestate or without leaving adequate financial provision. In Ontario, when a person dies intestate, the spouse and children of the deceased are entitled to the entire estate.⁷⁹ Spouse is defined as the heterosexual marriage partner of the deceased.⁸⁰ If there is no spouse so defined, and no descendants, the estate will be distributed to parents, siblings, and others related by consanguinity.⁸¹ The onus is placed on gays, lesbians and cohabiting heterosexuals to execute wills in order to protect their partners' financial well-being.

Similarly, heterosexual spouses, parents, children and siblings of a de-

⁷⁸ *Hill v. Hill*, (1975) 19 R.F.L. 119 (Ont. C.A.) (mother living with her male lover granted custody in the absence of evidence "of any acts of immorality in the presence of children, by word or deed" (at 122)). *Fullerton v. Fullerton*, (1983) 37 R.F.L. (2d) 168 (Nfld. S.C.T.D.) (refusing application to vary father's access on grounds that he was cohabiting with his female lover; "if such unions were a bar to custody or overnight access a great many children would not be able to live or visit with their parents" (at 169)); *Mattison v. Mattison*, (1984) 42 R.F.L. (2d) 215 (Sask. Q.B.) (refusing application to deny overnight access to father living with his female lover in the absence of evidence that the relationship was harmful to the children). In cases where fathers are granted custody, the courts are frequently impressed by the stabilizing, loving, co-parenting role played by the father's female lover: *Law v. Maxwell*, (1984) 40 R.F.L. (2d) 189 (B.C.C.A.); *Fishback v. Fishback*, (1985) 46 R.F.L. (2d) 44 (Ont. Dist. Ct.); *Bosch v. Bosch*, (1985) 49 R.F.L. (2d) 157 (Sask. Q.B.).

⁷⁹ *Succession Law Reform Act*, R.S.O. 1980, c.488, ss.44-7.

⁸⁰ *Ibid.* s.1(fa), added by S.O.1986, c.53, s.1(2). Prior to the amendment, spouse was interpreted to mean the person to whom the deceased was legally married: *Re McFarland*, (1987) 60 O.R. (2d) 73 (H.Ct.); *Re Ingram and Fenton*, (1987) 5 A.C.W.S. (3d) 108 (Ont. H.Ct.).

⁸¹ *Ibid.* s.47.

ceased may apply for dependants' relief if they have not been adequately provided for in the deceased's will.⁸² Dependent same-sex partners are denied this right.

7. *Tort Rights*

Family members have the right to bring a dependants' claim for damages against a person who has negligently caused the death or injury of another family member. For example, in Ontario, s.61 of the *Family Law Act, 1986* allows married persons, cohabiting heterosexuals, parents, grandparents, children, grandchildren and siblings to bring an action for their pecuniary loss and the loss of guidance, care and companionship.⁸³ The heterosexually-exclusive definition of "spouse" does not allow for claims by gays or lesbians for losses flowing from the negligently caused death or injury of their partners.

Similarly, a person who suffers emotional shock upon witnessing or hearing of the death or injury of a closely related person caused by the negligence of another can bring an action for damages suffered as a result of the negligent infliction of emotional distress. However, the defendant must have been able to foresee that a person in the plaintiff's position would suffer injury, and generally the courts have denied recovery to plaintiffs unless they are rescuers or closely related to the victim by blood, marriage or adoption. I know of no Canadian cases where a claim has been brought by the gay or lesbian lover of a victim. The California courts, relying on the state's interest in promoting marriage, have recently denied recovery to both a gay man⁸⁴ and an unmarried heterosexual⁸⁵ who suffered emotional distress upon witnessing the negligently caused injury of their respective lovers.

8. *Right to Employment in the Canadian Armed Forces*

The Canadian Armed Forces has a long-standing policy of refusing to enlist gays and lesbians. In addition, pursuant to Canadian Forces Administrative Order 19-20, members of the Armed Forces have a duty to report any suspicions that another member is a "homosexual" or has a "sexual abnormality". CFAO 19-20 further provides that "service policy does not

⁸² *Ibid.* s.57(6), as am. by S.O. 1986, c.53, s.2. In B.C., see the *Estate Administration Act*, R.S.B.C. 1979, c.14, ss.85, 86, which now allows claims by the unmarried heterosexual spouse of the deceased.

⁸³ S.O. 1986, c.4, ss.29, 61.

⁸⁴ *Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987).

⁸⁵ *Elden v. Sheldon*, 46 Cal.3d 267, 250 Cal. Rptr. 254, 758 P.2d 582 (1988).

allow homosexual members or members with a sexual abnormality to be retained in the Canadian Forces."⁸⁶ In other words, the Forces' policy has been to seek out and dismiss gays and lesbians. Members have been discharged after investigations and interrogations that have been described as "literally hours of voyeuristic harassment for us to reveal the intimate details of our sex life."⁸⁷

In 1985, the Report of the Parliamentary Committee on Equality Rights condemned the Armed Forces' policy of exclusion and the prejudices and stereotypes on which it is founded.⁸⁸ In 1986, the federal government responded by promising to remove employment discrimination on the basis of sexual orientation in all areas of federal jurisdiction.⁸⁹ Four years later, the policy is still "under review".⁹⁰

9. *Immigration: Right to Sponsor a Family Member*

The *Immigration Act* was amended in 1952 to add "prostitutes, homosexuals or persons living on the avails of prostitution or homosexuality" to the classes of persons prohibited from entering Canada.⁹¹ As a result, gays and lesbians were barred from entering Canada as visitors or prospective permanent residents, and were subject to deportation. More than a dozen gay and lesbian organizations appeared at parliamentary hearings held in 1975, and were successful in having the references to homosexuals removed from the *Immigration Act, 1976*.⁹² As Philip Girard has noted, the immigration exclusion represents the sole occasion on which Canadian legislation has referred to "the homosexual" as a status or type of person.⁹³

⁸⁶ For a full discussion see Bruner, "Sexual Orientation and Equality Rights", in A. Bayefsky and M. Eberts eds., *Equality Rights and the Charter* (Toronto: Carswell, 1985) 457 at 478-91; Jefferson, "Gay Rights and the Charter" (1985) 43:1 U.T. Fac. L. Rev. 70 at 86-8.

⁸⁷ Testimony of Ms. Darl Wood, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs (Sub-Committee on Equality Rights)* (Ottawa: Queen's Printer, 1985) 14:38.

⁸⁸ *Equality for All*, *supra* note 9 at 31.

⁸⁹ Canada, Department of Justice, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: 1986) 13.

⁹⁰ Canada, House of Commons Debates, March 8, 1990 at 9005.

⁹¹ *Immigration Act, 1952*, R.S.C. 1952, c.325, ss.5(e), 5(f) and s.19.

⁹² S.C. 1976-77, c.52. See Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act, 1952-1977" (1987) 2 C.J. Law and Society 1; Green, "Give Me Your Tired, Your Poor, Your Huddled Masses (Of Heterosexuals): An Analysis of American and Canadian Immigration Policy" (1987) 16 Anglo-American L. Rev. 139.

⁹³ Girard, *supra*, note 92 at 6.

Discrimination against gays and lesbians continues under the family reunification provisions of the current *Immigration Act*. A principal policy goal of the Act is to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad."⁹⁴ To this end, Canadian citizens or permanent residents can sponsor members of their families for immigration purposes. The regulations define the family class as those individuals related by blood, marriage or adoption to the sponsoree. Children, parents, married spouses and even fiancé(e)s are included.⁹⁵ Unmarried heterosexual, gay or lesbian partners cannot be sponsored.⁹⁶

C. Legislation Conferring Benefits on the Basis of Family Income

Some legislation prescribes eligibility for public benefits on the basis of income earned by a family unit. In this type of situation, same-sex cohabitants have an ironic advantage over opposite-sex cohabitants, because being deemed a "spouse" may disentitle a person from benefits if her or his income lifts the family over the income ceiling for entitlement.

An example of this type of legislation are welfare laws that disentitle persons in need from benefits if they are cohabiting with a person of the opposite sex.⁹⁷ These rules are premised on the male breadwinner model of

⁹⁴ *Immigration Act*, R.S.C.1985, c.I-2, s.3(c).

⁹⁵ *Immigration Regulations, 1978*, SOR/78-172, 1978 Canada Gazette Part II at 757, as am. by SOR/85-225, 1985 Canada Gazette Part II at 1517 (s.2(1) defines spouse as "the party of the opposite sex to whom that person is joined in marriage"; s.4(1) defines members of the family class). See McIntosh, "Defining 'Family' -- A Comment on the Family Reunification Provisions in the Immigration Act" (1988) 3 J. L. and Social Policy 104.

⁹⁶ See *Vulpen v. Minister of Employment and Immigration*, Immigration Appeal Board, V79-6100, August 29, 1980, holding that a transsexual sponsoree was of the same sex as her husband and therefore not a spouse within the meaning of the regulations. The Federal Court of Appeal reversed, finding that the sponsoree did fall within the definition of spouse (A-179-81, 1982). See Green, *supra*, note 92 at 152-3. Nor has United States law recognized same-sex relationships for immigration purposes: *Adams v. Howerton*, 673 F.2d 1036 (1982), *cert. denied* 458 U.S. 1111 (1982) (denying an alien gay partner's petition for classification as an immediate family member of an American citizen).

⁹⁷ E.g., *General Welfare Assistance Act*, R.S.O. 1980, c.188, Reg. 441; *Family Benefits Act*, R.S.O. 1980, c.151, Reg. 318. See Mossman and MacLean, "Family Law and Social Welfare: Toward a New Equality" (1986) 5 Can. J. Fam. L. 79; Leighton, "Handmaids' Tales: Family Benefits Assistance and the Single-Mother-Led Family" (1987) 45 U.T. Fac. L. Rev. 324.

Another example is eligibility for student loans. For the purposes of Ontario student loans, the Minister is to determine the financial resources of the student,

relationships: a man in the house is presumed, solely by virtue of his "spousal" status, to be providing economic support to his opposite sex cohabitant. The ironic exclusion of lesbians and gays from these rules is a result of seeing relationships through this traditional heterosexual lens.

D. Conflict of Interest Legislation

Lesbians and gays are excluded from the state's definition of emotionally involved relationships for the purposes of conflict of interest laws. This type of legislation usually prohibits persons in situations of potential conflict of interest from holding certain financial interests and then deems a financial interest of a spouse to be a financial interest of the other spouse.⁹³ Thus, whether the law is imposing economic restrictions, conferring benefits or allocating rights and obligations, the state has consistently refused to acknowledge that people may be involved in emotionally and economically interdependent relationships with persons of the same sex.

E. Criminal Law

In only one area has the law dealt especially with gay men: in regulating their sexuality under the *Criminal Code*.⁹⁹ Until 1969, anyone who engaged in anal intercourse ("buggery")¹⁰⁰ or "gross indecency"¹⁰¹ committed a criminal offence. Gross indecency has never been adequately defined; the best definition the courts have been able to provide is that it is a "marked departure from decent conduct expected of the average Canadian".¹⁰² Prior to its repeal in 1987, it included virtually any gay sexual conduct.¹⁰³ In

having regard to the income and assets of the student's heterosexual spouse. Reg.644 under the *Ministry of Colleges and Universities Act*, R.S.O. 1980, c.272.

⁹⁸ E.g. *Municipal Conflict of Interest Act*, 1983, S.O. 1983, c.8, s.1(n) as am. by S.O. 1986, c.64, s.38; *Ontario Energy Board Act*, R.S.O. 1980, c.332, as am. by S.O. 1986, c.64, s.45.

⁹⁹ See Demers, "De la Lex Scantinia aux Récents Amendements du Code Criminel: Homosexualité et Droit dans une Perspective Historique" (1984) 25 *Les Cahiers de Droit* 777; A. Gigeroff, *Sexual Deviations in the Criminal Law: Homosexual, Exhibitionistic and Pedophilic Offences in Canada* (Toronto: University of Toronto Press, 1968).

¹⁰⁰ S.C. 1954, c.51, s.149.

¹⁰¹ *Ibid.*, s.147.

¹⁰² *R. v. Quesnel and Quesnel*, (1979) 51 C.C.C. (2d) 270, 280 (Ont. C.A.); *R. v. Lebeau*, (1988) 41 C.C.C. (3d) 163 (Ont. C.A.).

¹⁰³ As recently as 1967, a gay man was sentenced to an indefinite prison term for four unspecified acts of gross indecency with other consenting men: *Klippart v. The Queen*, [1967] S.C.R. 822. See G. Kinsman, *supra* note 18 at 161-4. The rela-

addition, many gay men have been charged over the years as "found-ins" or "keepers" of a "common bawdy-house", defined vaguely as any place resorted to for the practice of acts of indecency.¹⁰⁴

In 1969, the *Criminal Code* was amended to decriminalize anal intercourse and acts of gross indecency when engaged in, in private, between husband and wife, or between any two persons over the age of twenty one, both of whom consent to the act.¹⁰⁵ Although anyone can engage in anal intercourse and gross indecency, the practical effect of the amendment was to partially decriminalize gay sexuality. Nevertheless, the boundaries on legal sex set by the age of consent¹⁰⁶ and the public/private distinction¹⁰⁷ continued to be more narrowly drawn in practice for gay men than for heterosexuals.

In 1987, the offence of gross indecency was repealed and the age of consent to anal intercourse was reduced to eighteen.¹⁰⁸ The criminal stigma attached to gay sexuality remains, as the age of consent to other sexual acts is fourteen. The federal government did not follow the recommendation of the Parliamentary Committee on Equality Rights that the age of consent to private sexual activity be made uniform without distinction based on sexual orientation.¹⁰⁹

tionship of "gross indecency" to lesbian sexuality was never decided clearly by the courts: see *R. v. C.*, (1981) 30 Nfld. & P.E.I.R. 451 (Nfld. C.A.). For a discussion of the ways in which the criminal law impacts on lesbian existence, see Eaton, "Lesbians and the Law", in S. Stone ed., *Lesbians in Canada* 109 at 111-4 (Toronto: Between the Lines, 1990).

¹⁰⁴ *Criminal Code*, R.S.C. 1985, c.C-46, s.197(1) and s.210. For analyses of the impact of this provision on institutions of the gay community, see Russell, "The Offence of Keeping a Common Bawdy House in Canadian Criminal Law" (1982) 14 *Ottawa L. Rev.* 270; Fleming, "The Bawdy House 'Boys': Some Notes on Media, Sporadic Moral Crusades and Selective Law Enforcement" (1981) 3 *Cdn. Crim. Forum* 101.

¹⁰⁵ *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c.38, s.7.

¹⁰⁶ The 1969 amendment set the age of consent to gay sex at 21, while for most heterosexual acts it was 14.

¹⁰⁷ In practice, the public/private distinction, which determined the legality of gross indecency and anal intercourse under the 1969 amendment, has a different meaning for gays who are far more likely to be charged for having sex in quasi-public places than heterosexuals are, for example, while parked in "lover's lanes".

¹⁰⁸ *Criminal Code*, R.S.C. 1985, c.C-46, s.159(2).

¹⁰⁹ Arguments that s.159 in its current form violates Charter equality rights have led to inconsistent results: *R. v. H.(D.)*, (1989) 64 *Alta. L.R.* (2d) 414 (*Alta. Prov. Ct.*) ("justifiable protection of unmarried children"); *R. v. Robinson*, (1988) 4 *W.C.B.* (2d) 178 (*Ont. Dist. Ct.*) (rejecting arguments that the section discriminates on the basis of marital status); *R. v. L.(L.A.)*, (1986) 16 *W.C.B.* 483 (*Ont. Prov.*

F. Summary

The above survey illustrates that the law has deprived lesbians and gays of material and psychic social resources and contributes dramatically to the invisibility of gay and lesbian existence. Gays and lesbians, apparently, are not fit to be named in Canadian legislation. The few legal glimpses of lesbians and gays one finds are exclusionary and stigmatizing, such as the exclusion of "homosexuals" in the 1952 Immigration Act and from the Armed Forces, and the criminalization of gay sexuality. One searches in vain for a positive image of gays or lesbians in Canadian legal culture.

II

Since the emergence of the gay liberation movement in the late 1960s and early 1970s, gays and lesbians have organized to demand equal rights to those currently granted to heterosexuals.¹¹⁰ As the prevalence of legal discrimination outlined in Part I illustrates, these efforts have been largely ignored. There has been some success in obtaining amendments to the *Criminal Code* and the *Immigration Act*, in having sexual orientation included as a prohibited ground of discrimination in human rights legislation in Quebec,¹¹¹ Ontario,¹¹² Manitoba,¹¹³ and the Yukon,¹¹⁴ and in having sexual orientation recognized as a ground of discrimination that is prohibited by the open-ended language of s.15 of the Charter of Rights.¹¹⁵

As a result, gays and lesbians find themselves in the paradoxical situation where their right to equality is guaranteed by legislation and, it appears, by the Constitution, yet they are subject to a wide array of laws that

Ct.) (section discriminates on the basis of age and is of no force and effect); *R. v. Schnare*, Unreported decision of the Nova Scotia Provincial Court, February 15, 1990 (rejecting arguments that s.159 discriminates against gays).

¹¹⁰ See, e.g., the demands of the August 28th, 1971 Gay Day Committee, reprinted in E. Jackson and S. Persky eds., *Flaunting It! A Decade of Gay Journalism from the Body Politic* (Vancouver: New Star Books, 1982) 216-220.

¹¹¹ *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c.C-12, s.10.

¹¹² *Human Rights Code*, 1981, S.O. 1981, c.53, as am. by S.O. 1984, c.58, s.39 and S.O. 1986, c.64, s.18.

¹¹³ *Human Rights Code*, S.M. 1987-88, c.45, s.9(2)(h).

¹¹⁴ *Human Rights Act*, S.Y. 1987, c.3, s.6(g).

¹¹⁵ *Equality for All*, *supra* note 9 at 21; *Towards Equality*, *supra* note 89 at 13; *Veysey v. Canada (Commissioner of Correctional Services)*, (1990) 29 F.T.R. 74, *aff'd* on other grounds by the Federal Court of Appeal, unreported decision dated May 31, 1990 (Court File A-557-89); *Brown v. British Columbia Minister of Health*, (1990) 42 B.C.L.R. (2d) 294 at 309-10 (B.C.S.C.).

discriminate explicitly on the grounds of sexual orientation.¹¹⁶ Two recent examples of legal documents in which institutionalized inequality sits side-by-side with a commitment to equality illustrate the legal contradictions in this area.

In the 1985 Report of the Parliamentary Committee on Equality Rights, *Equality for All*,¹¹⁷ the authors argued that discrimination on the basis of marital status is prohibited by the open-ended language of s.15 of the Charter.¹¹⁸ Therefore, "a law that treats those in a common law relationship less favourably than those who are legally married is arguably in violation of the Charter."¹¹⁹ The committee urged that the definition of "spouse" in federal laws be amended to include cohabiting heterosexual partners, not just married persons.¹²⁰

The Report also concluded that discrimination on the basis of sexual orientation is prohibited by s.15.¹²¹ The committee went on to recommend that the policy of excluding gays and lesbians from the military be repealed, and that sexual orientation be added as a prohibited ground of discrimination in the *Canadian Human Rights Act*.¹²² However, the committee did not mention the exclusion of same-sex couples from the definition of spouse in all federal legislation.

A similar contradiction lies at the heart of the Ontario *Equality Rights Statute Law Amendment Act, 1986* (Bill 7),¹²³ passed in 1987 to bring some Ontario statutes into conformity with the Charter. Among other things, Bill 7 removed some instances of marital status discrimination by changing the definition of spouse in more than thirty statutes to include cohabiting heterosexual partners. Section 18 of the Bill added sexual orientation as a prohibited ground of discrimination to the *Ontario Human Rights Code*. However, the Bill made no attempt to alter the fact that same sex couples are excluded from the definition of spouse in all Ontario legislation.

The omission of same-sex couples from the Equality for All Report and

¹¹⁶ Of course, other disadvantaged groups live in conditions of social and legal inequality together with a promise of legal equality, but the form of discrimination tends to be more subtle, although no less invidious in effect.

¹¹⁷ *Supra* note 9.

¹¹⁸ *Ibid.* at 34.

¹¹⁹ *Ibid.* at 35.

¹²⁰ *Ibid.* at 37.

¹²¹ *Ibid.* at 29.

¹²² *Ibid.* at 30-2. The federal government promised to follow this recommendation in 1986 (see *Toward Equality*, *supra* note 89, at 13). As of mid-1990, the government has not introduced the promised amendment.

¹²³ S.O. 1986, c.64.

the terms of Bill 7 cannot be explained as a matter of logic. Nor can it be explained as an oversight. Gays and lesbians have been demanding equal benefits to heterosexuals for many years. Rather, the current state of the law is a reflection of the compassion/condonation discursive framework through which heterosexism is rationalized.

The role of the compassion/condonation dichotomy in rationalizing heterosexism can be seen more clearly through an examination of the few occasions on which gay and lesbian rights have been the subject of serious debate in Canadian legislatures. The records of those debates are breath-takingly heterosexist documents.

The 1969 reform of the *Criminal Code* partially decriminalizing gross indecency and anal intercourse gave rise to an extensive debate in Parliament. Both opponents and proponents of the amendment assumed that homosexuality was a sickness. They differed on the appropriate mechanisms of control and treatment, the successful reformers arguing that the "perversion" of homosexuality "requires charity and treatment" by doctors and psychologists, rather than coercive state intervention through the imposition of criminal sanctions.¹²⁴

Since 1969, debates have taken place in the legislatures of Quebec, Ontario, Manitoba and the Yukon regarding the addition of sexual orientation as a prohibited ground of discrimination to the human rights legislation of these jurisdictions.¹²⁵ The debates in Quebec and the Yukon were calm, with only a few voices being raised in opposition to the principle that persons should not be deprived of access to housing, employment and services solely on the basis of their sexual orientation.¹²⁶ On the other hand, the debates in Ontario and Manitoba revealed the negative attitudes toward homosexuality of a minority of legislators, ranging from, at best, ignorance and a lack of sensitivity to, at worst, a deep-seated homophobia.

Opponents of the addition of sexual orientation to the Ontario Human Rights Code by Bill 7 argued that it amounted to giving "special rights" or

¹²⁴ Canada, House of Commons Debates, 1969 at 4717-8669. For a full account of the debate, see G. Kinsman, *supra* note 18 at 166-172.

¹²⁵ Since 1988, unsuccessful attempts have been made to amend the Nova Scotia human rights legislation to prohibit discrimination on the basis of sexual orientation. Recent debates indicate that government members who oppose the amendment subscribe to the same myths articulated by opponents in Manitoba and Ontario. See "Mt. Cashel Evidence a Barrier to Rights Extension, Minister Says" [*Toronto*] *Globe and Mail* (7 June 1990) A10.

¹²⁶ *Québec, Débats de l'Assemblée Nationale* 1977, 4882-4892; *Yukon Hansard*, December 9, 1986, 219-230, February 12, 1987, 712-9.

“preferential treatment” to gays and lesbians.¹²⁷ A hateful and ignorant parallel was drawn between homosexuality and pedophilia, necrophilia and bestiality.¹²⁸ One member of the provincial parliament suggested the amendment would lead to a decline in the birth rate.¹²⁹ And most frequently, opponents of reform argued that society has every right to promote and prefer heterosexuality. They opposed the amendment because, in their view, it threatened the privilege, or, some argued, the very existence, of the heterosexual family by legitimating, promoting and condoning “a homosexual lifestyle”.¹³⁰

Those who spoke in favour of the amendment denied that it amounted to a condonation, promotion or approval of homosexuality, or a threat to the heterosexual family.¹³¹ They appealed to members’ sense of charity and compassion, arguing that gays and lesbians had an equal right to housing, employment and services. A minority of members spoke out against the hate and ignorance motivating the opposition.¹³² Only one member of the legislature, Bob Rae, was willing to directly challenge the opposition’s heterosexual-exclusive definition of the family:

Let me remind those people who say otherwise that gay people have families too. It is an insult to those whose parents, whose brothers and sisters and whose children are gay . . . Surely it is an insult to say, “Our view of the family is so exclusive that it does not possibly include you.”¹³³

The 1987 debate in Manitoba followed a similar pattern. Bill 47 introduced a new *Human Rights Code*,¹³⁴ that, among other things, protects against discrimination on the basis of sexual orientation. The debate on this

¹²⁷ *Legislative Assembly of Ontario, 1986 Debates*, at 3624 (Cousens); 3642 (Haggerty); 3679 (Hennessy); 3683 (Villeneuve); 3684 (Partington); 3689 (Barlow); 3740 (Gregory); 3750 (Sheppard); 3793 (McCague); 3835 (Leluk).

¹²⁸ *Ibid.* at 3835-7 (Leluk).

¹²⁹ *Ibid.* at 3682 (Villeneuve).

¹³⁰ *Ibid.* at 3625 (Cousens); 3634 (McKessock); 3636-8 (Bernier); 3643, 3668-9 (Johnson); 3673, 3675 (Runciman); 3678-9 (Hennessy); 3681-2 (Davis); 3686 (Partington); 3741-2 (Gregory); 3748 (Marlan); 3750 (Sheppard); 3756 (Pope); 3794-5 (McCague); 3835-7 (Leluk); 3846 (Jackson).

¹³¹ *Ibid.* at 3622 (Scott); 3676 (Henderson); 3791 (Caplan); 3796 (Callahan); 3806-8 (Fish); 3838-9 (Wrye); 3854 (Grossman); 3856 (Peterson).

¹³² *Ibid.* at 3627-9 (Gigantes); 3691 (Nixon); 3805 (Mackenzie); 3852 (Rae); 3853 (Grossman).

¹³³ *Ibid.* at 3852. Several other members challenged the heterosexual family rhetoric of the opposition less directly, by speaking of the “human family” (*ibid.* at 3789 (Reville)), “that broader family we call Ontario society” (*ibid.* at 3807-8 (Fish)), or the biblical family of “all human beings” (*ibid.* at 3743 (Smith)).

¹³⁴ S.M. 1987-88, c.45.

legislation focused almost exclusively on the sexual orientation clause. Again, those in opposition argued that the Bill granted special status to homosexuals.¹³⁵ The most homophobic comments equated homosexuality with pedophilia, bestiality, necrophilia, kleptomania, drug addiction, alcoholism, and any other sign of the moral decline of Western civilization that came to mind.¹³⁶ A number of members suggested that providing human rights protection to gays would hamper efforts to control the spread of AIDS.¹³⁷ The most common objection was that the amendment would undermine the privilege of the heterosexual family by condoning homosexuality. Member after member spoke against "equating the homosexual with the heterosexual lifestyle."¹³⁸

Those in favour of the amendment professed their allegiance to the heterosexual family, and emphasized that the Bill provided no support to or condonation of any lifestyle.¹³⁹ In response to the fervour of the opposition, the government introduced an amendment on second reading to clarify this point:

Nothing in this Code shall be interpreted as condoning or condemning any beliefs, values or lifestyles based upon any characteristic referred to in subsection (2).¹⁴⁰

However, the amendment had the effect of inflaming the passions of the opposition who insisted that social policy should condone heterosexuality and condemn homosexuality. This clause suggested the government

¹³⁵ *Manitoba Debates* 1987, 3712 (Roch); 3722, 3988 (Rocan); 3727, 3980 (Derkach); 3961 (Mitchelson); 3971 (Kovnats); 3977 (Ducharme); 3944 (Orchard).

¹³⁶ *Ibid.* at 3707 (Ernst); 3713 (Roch); 3723 (Rocan); 3981 (Derkach).

¹³⁷ *Ibid.* at 3709 (Ernst); 3714 (Roch); 3723 (Rocan); 3725, 3979 (Findlay); 3726 (Pankratz); 3728 (Derkach); 3992-4 (Orchard); 3995 (McCrae).

¹³⁸ *Ibid.* at 3707-9 (Ernst); 3711-2, 3981 (Walding); 3712-4 (Roch); 3718-9, 3989 (Cumplings); 3721-2 (Scott); 3724-5, 3978-9 (Findlay); 3726 (Pankratz); 3727-8, 3979-80 (Derkach); 3975-6 (Manness); 3977 (Ducharme); 3977 (Brown); 3982 (Blake); 3986 (Connery); 3987-8 (Rocan); 3992-4 (Orchard); 3995-6 (McCrae); 3999-4000 (Filion).

¹³⁹ *Ibid.* at 3715, 3718, 3960, 3982 (Ashton); 3957-8 (Baker); 3958-9 (Desjardins); 3959 (Santos); 3961 (Carstairs); 3962 (Mackling); 3962, 4001 (Pawley); 3905 (Harapiak); 3966 (Schroeder); 3968 (Waslycia-Leis); 3970 (Storie); 3971-2 (Scott); 3971 (Smith); 3972 (Hemphill); 3973 (Doer); 3998-9 (Walding).

¹⁴⁰ *Ibid.* at 3957. Now S.M. 1987, c.45, s.9(5). In addition, section 9(4) was added to the Code to reassure those members who had trouble distinguishing homosexuality from sexual assault: "For the purpose of dealing with any case of alleged discrimination under this Code, no characteristic referred to in subsection (2) shall be interpreted to extend to any conduct prohibited by the Criminal Code of Canada."

should do neither.¹⁴¹ Several members of the government condemned the hate and myths propagated by the opposition, and suggested that the tone of the debate was the best proof of the need for a prohibition on discrimination against gays and lesbians.¹⁴² The opposition reacted angrily to the suggestion that their position was founded on hate and ignorance.¹⁴³

In fact, the opponents in the debates relied on grotesque stereotypes of gay and lesbian people. Becki Ross described her experience sitting through the Ontario debates on Bill 7 as follows:

My life was rendered an abstraction. I could not locate myself inside the repeatedly stated category, "homosexual" . . . In the House I felt battered and stretched apart, tossed about on a stormy sea, a vessel rubbed raw. I felt angry, hated and ridiculed. JUDGMENT DAY. It was obvious that my loving women was dangerous, and that this loving was clearly under attack (though the attack was not unfamiliar to me). That I live, with my family, differently, at the margins, without social approval, with fear, without safeness, is not found on the state agenda.¹⁴⁴

Although the notion that homosexuality is an illness needing to be cured has faded since the late 1960s, the opponents labelled gays and lesbians deviant by associating them with socially unacceptable behaviour such as the sexual abuse of children. In fact, sexual abuse of children is a gender crime, not a sexual orientation crime. The victims of sexual assault are overwhelmingly female and the perpetrators are overwhelmingly male.¹⁴⁵ The Badgley Report found that 97% to 99% of sexual assaults against children and youth are committed by adult men,¹⁴⁶ and that three out of four victims of child sexual abuse are girls.¹⁴⁷ In the face of these facts, casting blame for the tragedy of child abuse on the homosexual "other" involves, at best, ignorance, or, at worst, a wilful refusal to confront the fact

¹⁴¹ *Ibid.* at 3958 (Orchard; Manness); 3958, 3985 (McCrae); 3960 (Walding); 3962 (Filmon); 3962-3 (Johnston); 3969 (Ernst); 3974 (Birt).

¹⁴² *Ibid.* at 3963 (Kostyra); 3962 (Pawley); 3968-9 (Waslycia-Leis); 3982 (Ashton); 3997-8 (Maloway).

¹⁴³ *Ibid.* at 3984 (McCrae) ("we don't hate the sinner, we hate the sin."); 3964 (Birt); 3969 (Ernst); 3979 (Findlay); 3980 (Derkach).

¹⁴⁴ Ross, "Sexual Dis/Orientation or Playing House: To Be or Not To Be Coded Human", in S. Stone ed., *Lesbians in Canada* 133 at 138 (Toronto: Between the Lines, 1990).

¹⁴⁵ Solicitor General of Canada, "Female Victims of Crime", Bulletin 4, *Canadian Urban Victimization Survey* (Ottawa: 1985).

¹⁴⁶ Committee on Sexual Offences Against Children and Youths, *Report on Sexual Offences Against Children in Canada (Badgley Report)* (Ottawa: 1984) 213-15. See also Clark, "Boys Will be Boys: Beyond the Badgley Report" (1986) 2 *Can. J. Women and Law* 135.

¹⁴⁷ Badgley Report, *ibid.* at 196-8.

that sexual victimization of children is perpetrated by men, both inside and outside of heterosexual families.

In the 1980s, those in favour of human rights protection rejected myths and stereotypes of the sick or evil homosexual. Nevertheless, as David Rayside has pointed out, achieving protection against discrimination on the basis of sexual orientation "depended on the issue being framed as a limited one — not raising challenges to traditional family structure and ideology, not even challenging the moral condemnation of homosexuality".¹⁴⁸ The debates in both Manitoba and Ontario took place within a discourse framed by the assumption that homosexuality is an unfortunate and pitiful condition. Although supporters of reform abandoned the illness metaphor, they continued to suggest that society, the family, nature or biology had somehow failed gays and lesbians. For example, Schroeder stated:

I must admit I hope that my children will grow up heterosexual, but we all know people who haven't. Whether it is something social or genetic or whatever that makes them different in terms of sexual orientation, I don't know.¹⁴⁹

And in Premier David Peterson's words:

But then I say to myself: "Supposing that when one of my children was 16 or 18 he came to me and said: 'Dad, I am a homosexual,' what would I do then? Would I give my child some of the speeches we have heard in this House in the past six days and throw him out the door?" Obviously, I would be concerned. Obviously, there would be repercussions. Obviously, I would look at myself and ask, "What did I do wrong?"

My guess is that most of us, after we had got over the shock, would embrace that child and try to incorporate him into our own family.¹⁵⁰

Heterosexuality continued to provide the measure of normality, and all deviations from it continued to be seen as unnatural or perverse. As Ross has pointed out, "there was no discussion on the floor of the taken-for-granted ways in which people's lives are ideologically and materially organized as heterosexual."¹⁵¹ In the two legislatures, not one member identified himself or herself as gay or lesbian. Indeed, many members took care to emphasize their affiliation with a church or a heterosexual family. Gays and lesbians, once again, became the invisible other.

All of these features of the debates are an indication of the lack of political

¹⁴⁸ Rayside, "Gay Rights and Family Values: The Passage of Bill 7 in Ontario" (1988) 26 *Studies in Pol. Econ.* 109 at 139.

¹⁴⁹ *Supra* note 135 at 3966.

¹⁵⁰ *Supra* note 127 at 3857.

¹⁵¹ Ross, *supra* note 144 at 137.

power of gays and lesbians. Self-identification as gay or lesbian carries enormous social, economic and political risks. And even heterosexually-identified politicians rarely risk affirming the value of gay and lesbian lives. As a result, reform has taken place within a compassion/condonation discourse that simultaneously affirms the superiority of heterosexuality and the inferiority of homosexuality.

The principal issue in the Ontario and Manitoba debates was whether adding sexual orientation as a prohibited ground of discrimination "promotes or condones a homosexual lifestyle". Traditionally, the law has avoided any such condonation or promotion through silence and criminal stigmatization. By providing protection against discrimination on the basis of sexual orientation, is the law "promoting a homosexual lifestyle"?

First of all, the notion of there being a "lifestyle" associated with any particular sexual identity is ludicrous. Heterosexuals, bisexuals, gays, lesbians are categories that describe people with diverse lives, sexually and otherwise, and who are further differentiated by race, class, gender, age and ability. The "lifestyle" notion seems to reflect both stereotypical views of gays and lesbians and an authoritarian belief that everyone should live in a monogamous, nuclear, patriarchal, heterosexual family unit.

Including a personal characteristic as an enumerated ground in human rights legislation represents a judgment that that characteristic is presumptively unrelated to a person's merits and capacities. Like other enumerated grounds such as sex, race, religion and ethnicity, it ought not to form the basis for determining the distribution of burdens and benefits by the state. As we have seen in Part I, at the moment a wide range of benefits are accorded to heterosexuals on the basis of their sexual orientation. Our law promotes and condones heterosexuality at the expense of other sexual identities and thereby grants it a privileged, special status. In a heterosexist society, the purpose of prohibiting discrimination on the basis of sexual orientation is not to "promote homosexuality", but to remove heterosexual privilege.

For example, providing protection against discrimination based on religion does not promote Judaism. It does mean that the state or individuals providing public services cannot initiate policies that promote Christianity or Christians at the expense of members of other religious groups. Similarly, adding sexual orientation as an enumerated ground means that special privileges cannot be granted to heterosexuals solely because of their sexual identity. Human rights legislation requires that a person's religion or sexual orientation be treated as irrelevant factors by individuals and the state, except where it is necessary to take them into account to overcome historic or systemic disadvantage, or to accommodate differences in a manner that promotes equality.

These are simple human rights notions, but they are nonetheless startling propositions in a society founded on heterosexual supremacy. We live in a society that promotes heterosexuality at every turn. Clearly, when opponents of human rights protection for gays and lesbians protest that the reformers are "promoting homosexuality", what they mean is promoting it up from legal disadvantage and stigma. And they are right.

III

Section 15 of the *Canadian Charter of Rights and Freedoms*¹⁵² provides as follows:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

On its face, s.15 appears to continue the legal pattern of ignoring the concerns of gay men and lesbians. Sexual orientation is not enumerated as a prohibited ground of discrimination. In moving testimony before the Joint Parliamentary Committee on the Constitution in 1980, members of the Canadian Association of Lesbians and Gay Men had requested that sexual orientation be included in s.15.¹⁵³ Some members of the committee responded predictably to these submissions by indicating they were not prepared to promote a lifestyle they did not condone.¹⁵⁴ In the end, the committee voted down an amendment that would have added sexual orientation as an enumerated ground of discrimination.¹⁵⁵ The government took the position that s.15 was open-ended and therefore was capable of prohibiting discrimination on other than the enumerated grounds. It would be up to the courts to decide what grounds were covered.¹⁵⁶

Five years after the coming into force of the equality rights, it appears that s.15's silence regarding sexual orientation will not result in its exclusion as a prohibited ground of discrimination. The general approach to the interpretation of equality rights set out by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*¹⁵⁷ and *R. v. Turpin*¹⁵⁸ indicates that

¹⁵² Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

¹⁵³ *Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution*, 24:22-29 (1980).

¹⁵⁴ *Ibid.* at 24:29-32 (Epp) and 24:38-41 (Mackasey).

¹⁵⁵ *Ibid.* at 48:34.

¹⁵⁶ *Ibid.* at 36:14-5 and 48:31-3.

¹⁵⁷ [1989] 1 S.C.R. 143.

¹⁵⁸ [1989] 1 S.C.R. 1296.

s.15 has the potential to pose a significant challenge to the legal construction of heterosexual privilege.

The Supreme Court has indicated that the purpose of s.15 is to remedy or prevent discrimination against groups suffering social, political and legal disadvantage in our society.¹⁵⁹ To establish a violation of s.15, one must follow a two-step process. First, one must establish a violation of one of the four basic equality rights guaranteed by s.15.¹⁶⁰ That is, one must show that one has been deprived of one's right to equality before the law, equality under the law, the equal protection of the law, or the equal benefit of the law. The Supreme Court has yet to define the meaning of each of these rights. McIntyre J., writing for a majority of the Court in *Andrews*, expressed the general goal of the four equality rights as follows:

... the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.¹⁶¹

And in *Turpin*, Wilson J. provided the following definition of equality before the law:

The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.¹⁶²

Thus, a law violates the guarantee of equality before the law if it works to an individual's disadvantage by denying an opportunity to that individual which is available to others.¹⁶³ It appears that any law that operates "more harshly"¹⁶⁴ on gays and lesbians than it does on heterosexuals will violate equality before the law.

The second step is to establish that the impact of the law is discriminatory.¹⁶⁵ The Court has adopted the following definition of discrimination put forward by McIntyre J. in *Andrews*:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which with-

¹⁵⁹ *Ibid.* at 1333.

¹⁶⁰ *Ibid.* at 1325.

¹⁶¹ *Supra* note 157 at 165.

¹⁶² *Supra* note 158 at 1329.

¹⁶³ *Ibid.* at 1329.

¹⁶⁴ *Ibid.* at 1329-30, adopting the test set out in *R. v. Drybones*, [1970] S.C.R. 282.

¹⁶⁵ *Supra* note 157 at 182.

holds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.¹⁶⁶

Excluding gays and lesbians from the legislative benefits conferred on heterosexuals arguably constitutes discrimination according to this definition. In fact, legislation that accords benefits only to heterosexuals is a quintessential example of withholding benefits based on group status rather than individual merits and capacities.

The protection afforded by s.15 is available to those groups suffering discrimination on the basis of an enumerated or analogous ground. To decide whether a group discriminated against on a non-enumerated ground can claim the protection of s.15, the court set out the features of the enumerated grounds that explain their inclusion as prohibited grounds of discrimination, and then assessed whether a non-enumerated ground shares a sufficient number of those features so as to be classified as analogous.

A number of features of the enumerated grounds have been identified by the Supreme Court. First, the groups defined by the enumerated grounds are disadvantaged groups in that they have suffered a history of discrimination and are relatively politically powerless. In McIntyre J.'s words, the enumerated grounds correspond to "socially destructive and historically practised bases of discrimination."¹⁶⁷ Wilson J. emphasized that a determination of whether a group falls into an analogous category is to be made "in the context of the place of the group in the entire social, political and legal fabric of society."¹⁶⁸ Thus, a finding of discrimination will "necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."¹⁶⁹

The groups afforded protection by s.15 are disadvantaged by a relative lack of political power. McIntyre J. recognized non-citizenship as an analogous ground of discrimination, noting that non-citizens are "a good example of a discrete and insular minority."¹⁷⁰ And La Forest J. noted that "non-citizens are an example without parallel of a group of persons who are

¹⁶⁶ *Ibid.* at 174-5.

¹⁶⁷ *Andrews, supra* note 157 at 175.

¹⁶⁸ *Ibid.* at 152; *Turpin, supra* note 158 at 1331.

¹⁶⁹ *Ibid.* at 1332.

¹⁷⁰ *Andrews, supra* note 157 at 183.

relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."¹⁷¹

The Court has made it clear that as a precondition to the invocation of s.15, an individual must be a member of a group that has suffered social, political and legal disadvantage apart from and in addition to the law in question. Based on this reasoning, it has rejected s.15 claims brought by injured workers and their dependents,¹⁷² criminal defendants outside of Alberta,¹⁷³ and individuals claiming relief against the federal Crown.¹⁷⁴

In addition to the Court's emphasis on the enumerated grounds as the historical basis of the production of group disadvantage, La Forest J. in *Andrews* pointed out two additional features of non-citizenship that, in his view, qualified it as an analogous ground. One is that non-citizenship bears no relation to an individual's ability to perform or contribute to society.¹⁷⁵ Another is that non-citizenship is an "immutable" characteristic, "typically not within the control of the individual" and "at least temporarily, a characteristic of personhood not alterable except on the basis of unacceptable costs."¹⁷⁶

A consensus has emerged that sexual orientation is an analogous ground of discrimination prohibited by s.15 of the Charter. The Parliamentary Committee on Equality Rights concluded that "sexual orientation should be read into the general open-ended language of section 15 of the Charter as a constitutionally prohibited ground of discrimination", a position that is shared by the federal government.¹⁷⁷ In the absence of any serious argu-

¹⁷¹ *Ibid.* at 195. Wilson J. also found (at 152) that non-citizens are an analogous group "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."

¹⁷² *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

¹⁷³ *Turpin*, *supra* note 158.

¹⁷⁴ *Rudolph Wolff and Co. v. Canada*, unreported, March 29, 1990.

¹⁷⁵ *Supra* note 157 at 197.

¹⁷⁶ *Ibid.* at 195.

¹⁷⁷ *Supra* note 9 at 29. The federal government's position is set out in *Toward Equality*, *supra* note 89 at 13: "The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees of s.15 of the Charter". The federal government has not had the political courage to take any responsibility for the promotion of equality for gays and lesbians, preferring instead to cast responsibility on the courts and the Charter. Indeed, Justice Minister Kim Campbell recently justified the government's persistent refusal to add sexual orientation to the *Canadian Human Rights Act* on the grounds that the Charter somehow rendered it unnecessary: "... the government's commitment in 1986 with respect to sexual orientation was to do whatever is required. The government has taken the position that it is covered by Section 15 of the Charter." *Canada, House of Commons Debates*, March 8, 1990, at 9005.

ment that gays and lesbians do not constitute a disadvantaged group, the issue has been conceded in argument before the courts.¹⁷⁸

There can be little doubt that "a search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice" will yield the conclusion that gays and lesbians are deserving of the protection of s.15.¹⁷⁹ I have surveyed in Part I of this paper the hatred, violence and legal discrimination directed at gays and lesbians. The scarcity of legislative representatives willing to forego the privilege and risk the backlash that comes with abandoning heterosexual identification, evident in the debates described in Part II, is testimony to the relative lack of political power of lesbians and gays. And clearly there is no correlation between an individual's sexual orientation and his or her merits and capacities.

As Didi Herman has pointed out,¹⁸⁰ the only feature of the enumerated and analogous grounds identified by the Supreme Court that is problematic for recognizing sexual orientation as an analogous ground is the notion of "immutability" referred to by La Forest J. The inclusion of religion as an enumerated ground, and the recognition of non-citizenship, marital status and family status as analogous grounds indicates that "immutability" should not be interpreted literally, or even considered as a precondition to recognition as an analogous ground. However, in *Veysey v. Correctional Services of Canada*,¹⁸¹ Dubé J. seemed to assume that it was necessary to establish that a personal characteristic be immutable to qualify for s.15's protection against discrimination based on that characteristic:

Most of the grounds enumerated in s.15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national

¹⁷⁸ See *Veysey v. Correctional Service of Canada*, *supra* note 115; *Brown v. British Columbian (Minister of Health)*, *supra* note 115.

¹⁷⁹ See Parts I and II, *supra*; Jefferson, "Gay Rights and the Charter" *supra*, note 86; Leopold and King, "Compulsory Heterosexuality, Lesbians and the Law: The Case for Constitutional Protection" (1985) 1 Can. J. Women and Law 163; Bruner, *supra* note 86; Girard, "Sexual Orientation as a Human Rights Issue in Canada 1969-1985" 10:2 Dal. L.J. 267 (1986). For a summary of the law in the United States, see Note, "Developments in the Law: Sexual Orientation and the Law" 102 Harv. L. Rev. 1508 (1989). For a strong case recognizing the need to grant constitutional protection to gay men and lesbians, see *Watkins v. United States Army*, 837 F.2d 1428 (1988), *aff'd* on other grounds, 875 F.2d 699 (9th Cir. 1989). See also Girard, "The Protection of the Rights of Homosexuals under the International Law of Human Rights: European Perspectives" (1986) 3 Can. Hum. Rts Y.B. 3.

¹⁸⁰ Herman, "Are We Family? Lesbian Rights and Women's Liberation" (1990) 28:4 Osgoode Hall L.J. (forthcoming).

¹⁸¹ *Supra* note 115.

or ethnic origin, colour, age. One's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability.¹⁸²

The notion of immutability has some superficial attraction given the view, dominant from the late nineteenth century through the early 1970s, that homosexuality is a pathology of the body or the psyche that can be cured. In the search for a cure, gay and lesbian individuals have been sent to asylums, subjected to psychotherapy and hypnosis, aversion therapy, electroshock, drugs, and surgical intervention such as castration, hysterectomy and lobotomy.¹⁸³ Such attempts to "cure" gay and lesbian patients by transforming them into heterosexuals were notoriously unsuccessful, however, and the illness model of homosexuality has finally been put to rest.¹⁸⁴

Undoubtedly, many lesbians, gays and heterosexuals experience their sexuality as being set at an early age and determined by forces beyond their control. But to describe sexuality as immutable is to fail to capture the complexity and politics of sexual identity. As Herman has argued:

... lesbianism can be expressed politically as well as personally. It may not be necessary to have intimate sexual relations with women in order to "be a lesbian" (self-definition plus the rejection of heterosexual privilege might suffice) . . . Lesbianism, thus, becomes not only the personal recognition of oppositional desire; it also constitutes political resistance to heterosexual hegemony . . . while it may be true that a heterosexual's sexual identity is not easily changed, this is not due to an inherent sexuality, but to the context of enforced and privileged heterosexuality that denies people choice. Notions of immutability set the homosexual *and* the heterosexual in a mould that is politically reactionary in that it denies to heterosexuals the agency to break out.¹⁸⁵

Recognizing the flaws in the immutability argument, some have argued that the appropriate test for constitutional protection should be whether

¹⁸² *Ibid.* at 78.

¹⁸³ J. Katz, *Gay American History* (New York: Crowell, 1976) 129-207. See also Note, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality" (1984) 57 S. Cal. L. Rev. 797 at 817-21.

¹⁸⁴ The American Psychiatric Association removed homosexuality from its list of mental disorders in 1973. Coleman, "Changing Approaches to the Treatment of Homosexuality", in Paul, Weinrich, Gonsiorek and Hotvedt eds., *Homosexuality: Social, Psychological and Biological Issues* (Beverly Hills: Sage Publications, 1982) 81-8; R. Bayer, *Homosexuality and American Psychiatry* (New York: Basic Books, 1987).

¹⁸⁵ Herman, *supra* note 180.

the characteristic is a fundamental aspect of individual identity such that it is offensive for the state to seek to alter it.¹⁸⁶ But this reformulation of the immutability requirement does not escape the objection that the meaning and import of sexual identity to an individual cannot be detached from the social construction of heterosexual privilege:

To protect the rights of "the homosexual" would of course be a victory; doing so, however, because homosexuality is essential to a person's identity is no liberation, but simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies 'faggots'.¹⁸⁷

A more desirable approach to s.15 would be to recognize that discrimination on the basis of the enumerated and analogous grounds operates in diverse ways. The enumerated grounds of discrimination in reality share only one feature in common: they describe personal characteristics that have been used historically to identify and disadvantage groups perceived to share the stigmatized characteristic. Apart from this common feature, the disadvantaged groups identified by the enumerated characteristics have experienced discrimination in different ways. For example, most of the characteristics bear no relation to an individual's capacities. Mental or physical disability, on the other hand, does bear such a relation. The inclusion of mental or physical disability is aimed at overcoming a historical tendency to undervalue and/or neglect the different merits and capacities of disabled persons. Similarly, immutability is a characteristic of some of the enumerated grounds, such as race, colour and national origin. One enumerated ground, religion, and other analogous grounds recognized in our human rights jurisprudence, such as marital status, family status, non-citizenship, and political orientation, are clearly not immutable. For these reasons, attempts to describe a set of features that are common to all enu-

¹⁸⁶ Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification" (1985) 98 Harv. L. Rev. 1285 at 1304; Note, "Sexual Orientation and the Law" *supra*, note 179 at 1567-8; *Watkins v. United States Army*, 837 F.2d 1428 at 1446 (9th Cir. 1988) ("immutability may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.").

¹⁸⁷ Rubinfeld, "The Right of Privacy" (1989) 102 Harv. L. Rev. 737 at 781. See also D'Emilio, "Making and Unmaking Minorities: The Tensions Between Gay Politics and History" (1986) 14 N.Y.U. Rev. L. & Soc. Change 915 at 917 ("central to the oppression of lesbians and gay men, and to society's ability to shape and enforce it, are the homosexual and heterosexual categories themselves."); J. Weeks, *Sexuality and Its Discontents*, *supra* note 18 at 198-9.

merated and analogous grounds (apart from their relationship to historical disadvantage) are misguided.

For example, we value equal treatment of all religions not because religion is immutable. It is possible to change one's religion or to avoid religious persecution by hiding or disguising one's beliefs. Religion is protected in s.15 because historically it has formed the basis of persecution and discrimination, and we want to overcome these biases in order to promote the uninhibited flowering of the human conscience. Asking individuals to suppress their religious beliefs runs squarely against the purpose of protecting freedom of religion as a fundamental freedom in s.2(a) of the Charter. The courts have held that religious freedom is violated by any legislation that has the effect of compelling the abandonment of, or of creating an inducement to abandon, an essential religious practice.¹⁸⁸ And the state is free to provide education regarding religion, but it must do so in an even-handed manner, avoiding indoctrination that amounts to the imposition of majoritarian religious beliefs on minorities.¹⁸⁹ Religious freedom is inseparably connected to the promotion of religious equality.

Like one's religion, one's sexual orientation can be suppressed or disguised. The cost is the loss of expression of political opposition to the status quo of institutionalized heterosexuality, and a loss of freedom of choice regarding intimate association.¹⁹⁰ Equality for gays and lesbians is hindered by the denial of freedom of expression and association. Thus, like religion, there is a strong connection between recognizing sexual orientation as a protected ground of discrimination under s.15 and the fundamental freedoms in s.2 of the Charter.¹⁹¹ Focusing on the expressive aspects of lesbian and gay existences directs our attention far more effectively than immutability does to the nature of legal discrimination. The law tells lesbians and gays that by not expressing their sexual identities, by not "flaunting their sexuality", they can avoid legal penalties and social stigma. Pri-

¹⁸⁸ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295; *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713.

¹⁸⁹ *Zylberberg v. Sudbury Board of Education*, (1988) 52 D.L.R. (4th) 577 (Ont. C.A.); *Canadian Civil Liberties Association v. Ontario (Education Minister)*, (1990) 65 D.L.R. (4th) 1 (Ont. C.A.); *Russow v. British Columbia (Attorney-General)*, (1989) 62 D.L.R. (4th) 98 (B.C.S.C.).

¹⁹⁰ Karst, "The Freedom of Intimate Association" (1980) 89 Yale L.J. 624.

¹⁹¹ The courts have thus far shown little inclination to give freedom of association meaning in the "private" realm of family relationships: see *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)*, (1989) 69 O.R. (2d) 189 (Ont. C.A.); Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy" (1988) 3 Can. Fam. L.Q. 315.

vate, consensual sexual expression between consenting same-sex adults has been decriminalized. But a range of social and legal penalties can attach to public acts of self-identifying expression. Not surprisingly, an important strategy of the gay and lesbian movement has been to encourage individuals to take the risks and consequences of self-identification, "come out of the closet", express their sexuality openly, and associate with others in the struggle for equal rights. As Kenneth Karst has argued regarding American laws criminalizing gay sexuality:

... it seems clear that today one of the chief concerns underlying the maintenance of those laws is a concern to regulate the content of messages about sexual preference. It is said that the state, by repealing its prohibition on homosexual conduct, will itself be seen as making a statement approving that conduct... The immediate practical effect of such a law's enforcement is thus to penalize public expression. And that public expression, as I have said, may be a political act.¹⁹²

Drawing the connection to the fundamental freedoms of expression and association allows us to complete the analogy between sexual orientation and religious freedom/equality. The rights of gays and lesbians are violated by any legislation that has the effect of compelling the abandonment of, or of creating an inducement to abandon, the expression of one's sexual orientation. Laws that confer economic privileges on heterosexuals fall into this latter category. And the state is free to provide education regarding sexuality, but it must do so in an even-handed manner, avoiding heterosexual indoctrination.

The foregoing discussion suggests that laws that disadvantage lesbians and gays, either by privileging heterosexuality or depriving gays and lesbians of public benefits or opportunities, will violate s.15 of the Charter. Such laws will be unconstitutional unless they can meet the test of s.1, which guarantees rights and freedoms "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." To justify overriding Charter rights and freedoms, a law must be pursuing a pressing and substantial objective; the means selected must not be arbitrary, unfair or based on irrational considerations, and must impair as little as possible the right or freedom in question; and, finally, there must be a proportionality between the severity of the effects on rights and freedoms and the importance of the legislative objective.¹⁹³

The s.1 test confers a great deal of discretion on the judiciary and it is here that lesbian and gay rights are most vulnerable to being curtailed. For

¹⁹² Karst, *supra* note 190 at 658.

¹⁹³ *R. v. Oakes*, [1986] 1 S.C.R. 103.

example, in one case, in response to an argument that a lesbian's exclusion from a heterosexually-exclusive definition of spouse violated her equality rights, the judge gave an unelaborated one-line response: "[t]he answer is found in s.1 of the Charter."¹⁹⁴ This is a terse reminder, if one were needed, that logic does not necessarily determine judicial decision-making.

If governments are conceding that sexual orientation is covered by s.15, and if it is true that a plethora of heterosexually-exclusive laws contribute to the disadvantage of gays and lesbians, what purposes will governments assert to justify these laws under s.1?

The government might assert that it is promoting heterosexuality and that there is a long moral and religious tradition behind this goal. However, like a law that seeks to compel observance of Christianity, such a purpose would not be "pressing and substantial" for the purposes of the *Oakes* test. Indeed, it would be "fundamentally repugnant because it would justify the law upon the very basis which it is attacked for violating" Charter rights.¹⁹⁵ Inequality cannot be justified by promoting more of it. As Justice Wilson stated in *Turpin*:

The argument that s.15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of Charter provisions.¹⁹⁶

Another unconvincing justification that is offered for the exclusion of gay and lesbian couples from legal entitlements is the argument of administrative convenience.¹⁹⁷ On this view, it is conceded that the state has an interest in recognizing the emotional and economic interdependence of a variety of living arrangements, but it is argued that the state needs to have an easily verifiable measure of that interdependence, namely, marriage. This argument does not explain why such a verifiable measure has not

¹⁹⁴ Dohm J. in *Anderson v. Luoma*, *supra*, note 57.

¹⁹⁵ *R. Big M Drug Mart*, *supra* note 188.

¹⁹⁶ *Supra* note 158 at 1328.

¹⁹⁷ See *Andrews v. Ontario (Minister of Health)*, *supra* note 22 at 265:

Once the traditional context employed under the Act is departed from there are any number of variations which become possible. The legislation in question does not single out same sex couples. As I have already stated they are treated the same way as a multitude of other relationships such as family units consisting of adult siblings, extended as well as various combinations of unrelated heterosexual or homosexual adults with and without children. In order to make the scheme under the Act administratively and economically practicable there needs to be an objective interpretation imposed that will necessarily exclude some persons. Simplicity and administrative convenience are legitimate concerns for the drafters of this type of legislation...

been extended to persons living outside the heterosexual family. Nor can it account for the extension of legal entitlements to cohabiting heterosexuals notwithstanding the difficulties of verifying the nature and duration of their relationships. In any case, as Arbour J. stated in *Leroux*, the exclusion of common law partners from the definition of spouse in an insurance contract

... suggests either a legislative oversight or a deliberate choice to use marital status as a convenient limit to the insurer's exposure. No other plausible explanation has been offered and none comes to mind. Either way, oversight or convenience do not constitute a reasonable limit to equality rights.¹⁹⁸

Perhaps the most commonly asserted justification of heterosexual privilege is that heterosexual families are the natural and desirable arena for procreation and the raising of children. Thus, the argument would proceed under s.1, the state has a "pressing and substantial" interest in encouraging and protecting the formation of heterosexual family units. For example, in *Andrews v. Ontario (Minister of Health)*,¹⁹⁹ McRae J. rejected Karen Andrews' challenge to a regulation that had been interpreted as excluding her lover and her lover's children from the definition of family members for the purposes of hospital insurance coverage. McRae J. reasoned as follows:

Homosexual couples are not similarly situated to heterosexual couples. Heterosexual couples procreate and raise children. They marry or are potential marriage partners and most importantly they have legal obligations of support for their children whether born in wedlock or out and for their spouses pursuant to the Family Law Act. A same sex partner does not and cannot have these obligations.²⁰⁰

This reasoning is obviously problematic. For one, the family before the court consisted of two women raising two children. And, at direct odds with the Supreme Court's approach to equality, McRae J. has relied on a history of legal exclusion and disadvantage to justify further disadvantage. Indeed, McRae J.'s use of the similarly situated test is a good example of why that test was rejected as a guide to s.15 by the Supreme Court.²⁰¹ Sheppard has succinctly described the problems with the similarly situated test as

... its conceptual transformation of problems of inequality, domination and subordination into problems of irrational classification. When applied to

¹⁹⁸ *Supra* note 36 at 715.

¹⁹⁹ *Supra* note 22.

²⁰⁰ *Ibid.* at 263.

²⁰¹ *Supra*, *Andrews* note 157 at 168 ("the [similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter.").

cases involving historically disadvantaged groups, such a doctrine solidifies a legal ideology that masks the inequalities of power between dominant and subordinate groups. Equal protection law thereby concerns itself with irrational differential treatment, not with subordinating treatment.²⁰²

These problems aside, McRae J.'s view that the state interest in promoting procreation justifies the promotion of the traditional heterosexual family deserves examination. The same reasoning has been put forward in a series of American cases to reject equal protection challenges to the exclusion of same-sex couples from marriage laws. A good example is the following comment of the Washington Supreme Court in *Singer v. Hara*:²⁰³

. . . marriage exists as a protected institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same sex marriage results from such impossibility of reproduction rather than from an invidious discrimination . . .²⁰⁴

There are at least three difficulties with the argument that differences in the capacity to procreate can justify discrimination against same-sex couples. The first is whether promoting procreation is a sufficiently "pressing and substantial" purpose to satisfy the first branch of the s.1 test set out in *Oakes*. The state interest in encouraging people to bring babies into an already over-crowded world is not self-evident. Leaving that issue aside, another problem is the premise that the ability to procreate is an essential aspect of marriage. Equally problematic is the assertion that gay and lesbian couples cannot procreate.

Historically, an ability to procreate has never been a precondition to capacity to marry. A marriage is voidable in a nullity action if it cannot be consummated. Consummation is defined as the man experiencing orgasm

²⁰² Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*" (1989) 35:1 McGill L.J. 207 at 220.

²⁰³ *Supra* note 49.

²⁰⁴ *Ibid.*, 522 P.2d at 1195. See also *Adams v. Howerton*, *supra* note 96 (spouse for the purposes of the Immigration and Nationality Act must be a person of the opposite sex; legislation as interpreted does not violate the equal protection clause); *Baker v. Nelson*, *supra* note 49 (no constitutional violation in interpreting marriage statute to embrace only traditional heterosexual union; "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family is as old as the Book of Genesis" (191 N.W.2d at 186); *Jones v. Hallahan*, *supra* note 49 (same); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 67 Misc. 2d 982 (1971); *B. v. B.*, 355 N.Y.S.2d 712 (1974); *Corbett v. Corbett*, [1970] 2 All E.R. 33; *North v. Matheson*, *supra* note 50.

while engaging in vaginal intercourse. Women's pleasure has never been a relevant consideration to the law of marriage.

There are two ways of understanding the consummation rule: it could be linked to a requirement that at least the possibility of procreation be present in every marriage, or it could reflect the patriarchal view that male sexual pleasure, defined narrowly as reaching orgasm during vaginal intercourse, is the essence of the marital relationship.

An examination of the case law relating to the consummation rule reveals that the latter interpretation is correct: the impossibility of procreation does not render a marriage voidable. Incurable impotence does constitute grounds for a nullity decree; sterility, on the other hand, is irrelevant. A good example is the 1947 case of *Baxter v. Baxter*,²⁰⁵ where a husband sought a decree of nullity on the grounds that his wife refused to engage in intercourse without a condom. The House of Lords rejected the application, stating that:

Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant.²⁰⁶

The court stated that the true rationale of the consummation rule could be found in the following quote from a 1681 textbook:

So then, it is not the consent of marriage as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as minds, as the general end of the institution of marriage, is the solace and satisfaction of man. "I am content to adopt these words as my own."²⁰⁷

Notwithstanding its antiquated, sexist foundations, this long-established principle of the English common law has been followed in numerous Canadian and American decisions.²⁰⁸

²⁰⁵ [1948] A.C. 274 (H.L.).

²⁰⁶ *Ibid.* at 286.

²⁰⁷ *Ibid.* at 289, quoting from Lord Stair's *Institutions*, Book I (1681 ed.). See also *D. v. A.*, (1845) 1 Rob. Ecc. 280 at 296: "Mere incapability, however, of conception is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient that it would be a waste of time to discuss an admitted point."

²⁰⁸ H.R. Hahlo, *supra* note 45 at 35-9; *Tice v. Tice*, [1937] 2 D.L.R. 591 (Ont. C.A.) (if procreation were essential to marriage, "it would follow that every marriage without issue could be dissolved — a doctrine for which there is no authority" (at p.592)); *Hathaway v. Baldwin*, (1953) 9 W.W.R. 331 (B.C.S.C.); *Hale v. Hale*, [1927] 2 W.W.R. 366, 3 D.L.R. 481 (Alta. C.A.); *Miller v. Miller*, [1947] 1 O.R. 213

If marriage truly were the exclusive preserve of men and women with a capacity to procreate, then access to the institution would be barred to infertile men and women. But proof of fertility or of an intention to procreate has not been demanded of prospective marital partners, nor have post-menopausal women been denied the right to marry.

Moreover, the consummation requirement is not interpreted in a manner that prohibits a couple from entering a companionate marriage with no intention of engaging in sexual relations, traditionally defined. An inability to consummate a relationship renders a marriage voidable. In other words, an unconsummated marriage continues to exist until it is terminated by a decree of nullity or divorce. A party who has agreed to or acquiesced in a marriage with knowledge of the other party's inability or disinterest in engaging in sexual intercourse will be barred from bringing a nullity action. Thus, in *Norman v. Norman*,²⁰⁹ a decree of nullity for non-consummation was denied to an elderly couple where the court found that the prime motive for entering the marriage was companionship. In the judge's words, "[i]t is not open to the applicant, having entered what might be termed a platonic marriage, to complain of the absence of sexual intercourse."²¹⁰

The availability of a decree of nullity for non-consummation no longer serves any useful purpose given the availability of divorce after one year of living separate and apart.²¹¹ The rule embodies offensive sexist and heterosexist assumptions about men's and women's sexuality — men on top, women on the bottom, gays and lesbians on the outside. The consummation rule has no place in a common law that should be applied and developed by the judiciary in a manner consistent with the equality rights enshrined in the Constitution.²¹²

This discussion illustrates that the law of marriage is sufficiently flexible to accommodate same-sex relationships. For heterosexuals, access to mar-

(Ont. C.A.); *Kirschbaum v. Kirschbaum*, (1920) 92 N.J. Eq. 7, 111 A. 697; *Turney v. Avery*, (1921) 92 N.J. Eq. 473, 113 A. 710; *Wendel v. Wendel*, (1898) 30 App. Div. 447, 52 N.Y.S. 72; *Schroter v. Schroter*, (1907) 56 Misc. 69, 106 N.Y.S. 22; *Marks v. Marks*, (1948) 191 Misc. 448, 77 N.Y.S.2d 269.

²⁰⁹ (1979) 9 R.F.L. (2d) 345 (Ont. U.F.C.).

²¹⁰ *Ibid.*. See also *Foster v. Foster*, [1953] 2 D.L.R. 318 (B.C.S.C.).

²¹¹ *Divorce Act 1985*, S.C. 1986, c.4, s.8(1). The previous *Divorce Act* (R.S.C. 1970, C.D-8) permitted a spouse to petition for divorce on the grounds that the marriage had not been consummated (s.4(1)(d)). This provision was not retained in the 1985 Act. However, non-consummation remains as a basis for a nullity action at common law. H.R. Hahlo, *supra* note 45.

²¹² *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 603.

riage is not affected by an inability or lack of desire to procreate or engage in sexual relations. It is only when the courts have been confronted with the possibility of same-sex marriage that the ability to procreate has been elevated to an essential condition of the marital relationship.

If the state purpose in promoting marriage as a union between a man and a woman is to foster procreation, the rule of heterosexual exclusivity is both over-and under-inclusive. The right to marry is protected regardless of its connection to procreation. Infertile heterosexuals are permitted to marry, and gay and lesbian couples interested in child-rearing are denied the right.²¹³ Thus, the rule of heterosexual exclusivity would fail the least restrictive means branch of the *Oakes* test.

In sum, the state goal of promoting procreation provides neither a coherent rationale for excluding gay and lesbian life partners from marrying, nor for heterosexually-exclusive definitions of spouse in other legislative contexts. Even if it did, what are we to make of the commonly voiced assertion that "gays and lesbians cannot procreate"?

Of course, any fertile man or woman has the capacity to procreate in the sense of contributing genetically to conception that may lead to the birth of a child. By definition then, infertile persons cannot procreate (without technological assistance); fertile gays and lesbians can procreate. Many gays and lesbians have children by adoption, from previous heterosexual relationships, or by choosing to conceive and ultimately to parent by engaging in heterosexual intercourse or artificial insemination. To state that gays and lesbians cannot procreate is either to ignore the reality of gay and lesbian parents, or to exclude parents with primary emotional and/or sexual attachments to persons of the same sex from the categories "gay and lesbian."

On closer examination then, the assertion that lesbians and gays cannot procreate reduces to the following: the act of conception cannot be linked to the sexual acts of same sex partners absent the genetic and/or reproductive contribution of an opposite sex third party. The question becomes: does the state have a valid interest in seeking to promote the linking of procreation to the sexual acts of two life partners?

I cannot think of any rational reason why relationships should be sanctioned by the state only when the possibility exists for children to be born of a sexual act between the spouses and thus genetically linked to both parents. After all, we do not penalize the infertile or heterosexuals who choose not to procreate. Indeed, the removal of legal discrimination against children born out of wedlock²¹⁴ and state support of in vitro fertilization and

²¹³ See Note, "Sexual Orientation and the Law" *supra*, note 179, at 1608-11.

²¹⁴ E.g., *Children's Law Reform Act*, R.S.O. 1980, c.68, s.1.

artificial insemination for infertile heterosexual couples belies the bonafides of any such asserted state purpose.²¹⁵ The state has tolerated the severance of the link between sexuality and procreation so long as heterosexual dominance has not been threatened.²¹⁶

An insistence on the linking of procreation and sexuality is an attempt to rationalize heterosexism by seizing on the distinct feature of heterosexual relationships and elevating it to the standard with which all other sexualities must comply. Equality requires that differences be accommodated in a manner that promotes the overcoming of historic disadvantage.²¹⁷ Therefore, laws that take into account the fact that procreation is not linked to gay and lesbian sexuality must do so in a manner that promotes equality. Refusing to accord *any* legal support, recognition or legitimacy to same-sex relationships clearly does not promote equality for lesbians and gays.

A useful parallel can be made to pregnancy discrimination. In the *Bliss* case,²¹⁸ the Supreme Court had upheld a law that disadvantaged pregnant women on the grounds that "[a]ny inequality between the sexes in this area is not created by legislation but by nature."²¹⁹ In *Brooks v. Canada Safeway*,²²⁰ the Supreme Court overruled *Bliss*, and recognized that women's distinctive reproductive role may be based in biology or nature, but that any inequality flowing from this difference is socially constructed:

That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant . . . It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable to pregnant women did not discriminate against them as women.²²¹

As pregnancy is to sex discrimination, the lack of a connection between procreation and sexuality is to sexual orientation discrimination. From a

²¹⁵ E.g., Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985).

²¹⁶ Coffey, "Of Father Born: A Lesbian Feminist Critique of the Ontario Law Reform Commission's Recommendations on Artificial Insemination" (1986) 1 Can. J. Women and Law 424; Lahey, "The Criminal 'Justice' System and Reproductive Technologies" (1985) 14:4 Resources for Feminist Research 27.

²¹⁷ *Andrews*, *supra* note 157; *Turpin*, *supra* note 158; C. MacKinnon, "Difference and Dominance" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) 32; Sheppard, *supra* note 202.

²¹⁸ *Bliss v. A.-G. Canada*, [1979] 1 S.C.R. 183.

²¹⁹ *Ibid.* at 190.

²²⁰ [1989] 1 S.C.R. 1219.

²²¹ *Ibid.* at 1243-4.

male, heterosexual perspective, both are biological differences that have been used to rationalize and justify disadvantage. Section 15 requires that such distinct features of members of disadvantaged groups be accommodated in a manner that promotes equality.

IV

I have reviewed the myriad ways in which lesbians and gays are legally deprived of rights, benefits and full social participation. We have seen that heterosexism is rationalized by legislators and judges by reference to a compassion/condonation dichotomy that reflects the stigmatization flowing from criminalization, legal exclusion and the lingering influence of the once-dominant illness model of homosexuality. We have also seen that logically compelling arguments can be made that these laws promoting heterosexuality or disadvantaging gays and lesbians are unconstitutional as a violation of s.15 of the Charter. Should we anticipate that law-makers will invoke the Charter, and human rights legislation with similar guarantees, to dismantle the legal construction of heterosexual privilege? Experience would suggest otherwise. It seems unlikely, to say the least, that the complete absence of positive images of lesbians and gays in Canadian legislation and judicial decisions will suddenly be replaced by a new equality-based approach. Thus, when considering the promotion of equality for lesbians and gays, one confronts a palpable tension between constitutional possibilities and predictive probabilities. Nevertheless, several recent decisions have generated some hope that law-makers are prepared to accord legal recognition to non-heterosexual families.

A broad and functional definition of family was adopted by the New York Court of Appeals in *Braschi v. Stahl Associates*.²²² The issue in the case was whether a gay man had the right to remain in a rent-controlled apartment that he had shared with his lover until his death. The lease was in the deceased's name. According to New York's Rent Control regulations, the landlord could evict Braschi unless he was "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant".

The majority of the court found that Braschi was a family member of his deceased lover:

The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners

²²² 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

whose relationship is long-term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units..."²²³

In the majority's view, family membership

should be based on an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services... it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.²²⁴

The first Canadian decision to find that exclusively heterosexual spousal benefits violate human rights is the decision of the Canadian Human Rights Tribunal in *Mossop v. Department of Secretary of State*,²²⁵ recently overturned on judicial review by the Federal Court of Appeal.²²⁶ Brian Mossop was denied bereavement leave to attend the funeral of his gay lover's father. The collective agreement granted paid leave to common law spouses, defined as cohabiting heterosexuals who had lived together for at least one year. Mossop and his lover had lived together for nine years. As sexual orientation is not a prohibited ground of discrimination in the Canadian Human Rights Act, he argued that he was discriminated against on the basis of his family status. "Family status" is not defined by the Act. The legislative history indicates that Parliament preferred to leave the meaning of "family status" to be determined by tribunals and the courts.²²⁷

Counsel for the Treasury Board referred vaguely to "certain traditional values" in arguing that the meaning of the family is "generally under-

²²³ *Ibid.* at 211, 543 N.E.2d at 53-4, 544 N.Y.S.2d at 788-9.

²²⁴ *Ibid.* at 212-5, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. For a critical comment on *Braschi*, see Esseks, "Redefining the Family" (1990) 25 Harv. Civ. Rts.-Civ. Lib. L. Rev. 183.

There is increasing support in Canadian law for the view that housing rights and zoning regulations cannot be based on personal characteristics: *Bell v. The Queen*, [1979] 2 S.C.R. 212; Himel, "We Are (Not) Family: Zoning by-Laws and Reasonableness -- A Comment on Bell" (1980) 1 S.C.L.R. 367; *Schaap v. Canada (Canadian Armed Forces*, *supra* note 21; *Canadian Mental Health Association v. Winnipeg*, Unreported decision of the Manitoba Court of Appeal, April 24, 1990.

²²⁵ *Supra* note 29.

²²⁶ *Supra* note 29.

²²⁷ *Ibid.* at D/6081-4.

stood".²²⁸ He suggested that Mossop and his lover should be excluded from the definition of family because their sexuality is not linked to procreation. He seemed to imply that only privileged, heterosexual family units are deserving of protection from discrimination on the basis of family status.²²⁹ The tribunal rejected such a heterosexually-exclusive notion of family in favour of the "functional approach" advocated by counsel for the Commission:

The possibilities inherent in the term family are many, and complex . . . In the Tribunal's view, the test of "general understanding" must be rejected, quite apart from its majoritarian aspects, because it cannot be ascertained with any degree of confidence . . . the Act does not promote certain types of status over others and that the Act is intended to address group stereotypes. For these reasons, the Tribunal finds that it is reasonable to conclude that homosexual couples may constitute a family.²³⁰

In the result, the tribunal found that the collective agreement discriminated on the basis of family status, and ordered that the day of leave taken by Mossop be designated a day of paid bereavement leave.

The Federal Court of Appeal set aside the tribunal's decision on judicial review.²³¹ Marceau J.A., who wrote the principal judgment for a unanimous bench, argued that the "basic concept" of family is a group of individuals related by blood, marriage or adoption.²³² He rejected the "functional" approach to the definition of family adopted by the Tribunal in favour of a "legal" approach:

It seems to me that what was done by the Tribunal was to take some attributes usually ascribed to families, such as mutual love between members, mutual assistance, joint residence, emotional support, sharing of domestic tasks, sexual relations, and treat them as being the essence of the concept itself being signified. There is a difference between being, in certain respects, functionally akin to a family and being a family . . . I fail to see how any approach other than a legal one could lead to a proper understanding of what is meant by the phrase "family status". Even if we were to accept that two homosexual lovers can constitute "sociologically speaking" a sort of family, it is certainly not one which is now recognized by law as giving its members special rights and obligations.²³³

²²⁸ *Ibid.* at D/6091.

²²⁹ *Ibid.*

²³⁰ *Ibid.* at D/6092 and D/6094.

²³¹ *Supra* note 29.

²³² *Ibid.* at 15-6.

²³³ *Ibid.* at 16-7.

Like McRae J. in *Andrews v. Ontario*,²³⁴ Marceau J.A. relied upon a history of legislative exclusion of lesbian and gay relationships to justify further disadvantage by exclusion. Consequently, he interpreted family status in a manner that can only serve to further entrench the privilege of the heterosexual family.

Even if the *Mossop* decision is not reversed by the Supreme Court of Canada on appeal, its reasoning will not affect the interpretation of discrimination on the basis of sexual orientation prohibited by the Charter and by Manitoba, Ontario, Quebec and Yukon human rights legislation. Indeed, Marceau J.A. suggested that the real issue raised by Mossop's complaint was discrimination based on sexual orientation. In his view, since Parliament had not amended the *Canadian Human Rights Act* to prohibit discrimination on that ground, it was not "appropriate for tribunals or courts to preempt the legislative process."²³⁵

The first case to hold that discrimination on the basis of sexual orientation is prohibited by s.15 is *Veysey v. The Commissioner of Correctional Service*.²³⁶ Timothy Veysey, an inmate in a federal penitentiary, successfully challenged the refusal of the prison authorities to allow him to participate in the Private Family Visiting Program with his gay lover.

The program was set up by a Commissioner's Directive²³⁷ issued under the authority of the *Penitentiary Act*.²³⁸ Inmates eligible to participate are entitled to extended private visits with members of their families. The stated goals of the program are "the maintenance of family ties and the preparation of inmates for their return to life in the community outside the penitentiaries."²³⁹ According to the program:

Relatives approved for private visits include the inmate's spouse, common-law partner, children, parents, foster-parents, siblings, grandparents and in-laws.²⁴⁰

Veysey's request to participate in the program with his lover was denied on the grounds that "existing policy does not support your wish to have the

²³⁴ *Supra* note 22.

²³⁵ *Supra* note 29 at 22. See also the concurring opinion of Stone J.A., at 4-5, rejecting the argument that the Charter's prohibition of discrimination on the basis of sexual orientation requires that family status be interpreted in a manner that encompasses same-sex partners.

²³⁶ *Supra* note 115.

²³⁷ Commissioner's Directive 770, January 1, 1987.

²³⁸ R.S.C. 1985, c.P-5, s.37(3).

²³⁹ *Supra* note 115 at 75.

²⁴⁰ Regional Instruction 771, Deputy Commissioner, Ontario Region, August 29, 1988, paragraph 3.

private family program extended to common-law partners of the same sex."²⁴¹ Veysey then challenged this decision in court, arguing that he had been discriminated against solely on the basis of sexual orientation.

Justice Dubé had no difficulty reaching the conclusion that sexual orientation is a ground of discrimination analogous to those enumerated in s.15.²⁴² In his words, persons who have deviated from sexual norms "have been victimized and stigmatized throughout history because of prejudice, mostly based on fear and ignorance, as most prejudices are." Having reached this conclusion, it followed that Veysey's exclusion from the program violated his equality rights.²⁴³

Nor did Dubé J. consider that there was any argument that the exclusion of same-sex partners could be justified under s.1 of the Charter:

Bearing in mind that a goal of the program is the preparation of inmates for their return to life in the community through the preservation of their most supportive relationships, this desirable goal is not furthered by denying the applicant's access to his most supportive relationship. Obviously, the successful reintegration into the community of this inmate would be a benefit not only to him, but to the community as a whole.²⁴⁴

On appeal to the Federal Court of Appeal, the court affirmed that Veysey had a right to be considered for participation in the program.²⁴⁵ The court concluded that, as a matter of legal interpretation, the expression "common law partner" in the Directive includes partners of the same sex. The court could have held that this result was *required* by the Charter of Rights, but chose instead to give relief to Veysey on the narrowest possible grounds:

... we express no opinion on those [constitutional] aspects of the judgment below except to say that Counsel for the Appellant has formally informed us that it is the position of the Attorney General of Canada that sexual orientation is a ground covered by section 15 of the Charter.²⁴⁶

Indeed, the discomfort of the court with the broader implications of the issue is patent in its creative avoidance of rendering a decision that would have created a precedent on either the scope of gay and lesbian rights under the Charter or on the interpretation of the word "spouse" in other legislation. The court noted that the words "common law partner" were a

²⁴¹ *Supra* note 115 at 75.

²⁴² Accord: *Brown v. British Columbia Minister of Health*, *supra* note 115.

²⁴³ *Supra* note 115 at 78.

²⁴⁴ *Ibid.* at 79.

²⁴⁵ *Supra* note 115.

²⁴⁶ *Ibid.* at 6.

“novelty” that “have never been used, in our knowledge, in any other statutory document.”²⁴⁷ Accordingly,

We do not, in this case, have to decide whether or not common-law partners of the same sex are common-law spouses and we refrain from expressing any view on that issue. We are dealing with very special and unusual expressions found in a unique document obviously not drafted by legal experts and directed at a specific program of integration of inmates in society.²⁴⁸

The *Veysey* and *Braschi* decisions, and the tribunal decision in *Mossop*, all represent positive steps forward, if only small steps, in removing the privilege of the heterosexual family and in fostering a plurality of sexual and familial arrangements. The decisions mark at least some progress in the tolerance of same-sex relationships. For example, both the trial and appellate decisions in *Veysey* recognized that allowing a prisoner to maintain contact with his gay partner for the duration of his imprisonment would further his reintegration into society upon his release. The courts thus abandoned heterosexist assumptions that would have denied that gay relationships are a valuable part of the social fabric.

Nevertheless, the decisions fit comfortably into heterosexist discourse framed by the compassion/condonation dichotomy. Viewed in the overall legal context outlined in this paper, the results of these cases do not challenge the central institutions of heterosexual privilege. The *Veysey* case arose in an already marginal social context (prisons) and the Federal Court of Appeal was careful to confine its reasoning to that context. One would have to be hard-hearted to deny *Braschi* the right to remain in the apartment he shared with his deceased partner. On the other hand, marriage, the ideological centrepiece of heterosexual supremacy, has thus far been immune to transformation. And, at the time of writing, following the Federal Court of Appeal decision in *Mossop*, statutes or employment policies that provide material benefits exclusively to heterosexual families have yet to be successfully challenged in Canada.²⁴⁹

One would think that the state has an interest in promoting and preserving the formation of *any* families that are capable of performing functions traditionally associated with family life, such as the socialization and rearing of children, the organization of consumption and household production, and the provision of care and emotional support, particularly in times of unemployment, illness and other adversity. These functions are increas-

²⁴⁷ *Ibid.* at 4.

²⁴⁸ *Ibid.*

²⁴⁹ In addition to the *Mossop* decision, see *Andrews v. Ontario*, *supra*, note 22; *Vogel v. Government of Manitoba*, *supra*, note 29; *Re Carleton University*, *supra*, note 29.

ingly being performed in families that do not fit the traditional married, heterosexual mould.

However, where legislation has extended rights and obligations to non-traditional families, it has not departed from heterosexual exclusivity. Unmarried cohabiting heterosexuals have obtained some legal recognition, resulting largely from the state's desire to relieve itself of the burden of family support and breakdown. For example, the definition of "spouse" in the Ontario *Family Law Act* and the *Succession Law Reform Act* were expanded to include cohabiting unmarried heterosexuals for the purposes of claiming support from a spouse or a spouse's estate, while for other purposes, such as entitlements to property, the definition was left unchanged. The state, clearly, has a special interest in broadening obligations and structures of mutual care, and thereby further privatizing those costs. Furthermore, bringing relationships within the disciplinary and regulatory purview of the law diminishes the threat to the status quo posed by "outlaw" communities. In these ways, the state has an interest in according legal recognition to gay, lesbian and other family forms.²⁵⁰

Attempts at reform have not yet been able to crack the walls of heterosexual privilege. As many lesbian and gay couples are determined to achieve the legitimacy and material benefits they are currently denied, the legal hegemony of the heterosexual family will continue to be challenged. However, Canadian law will not move beyond the compassion/condonation approach to lesbian and gay existences until lawmakers are prepared to confront and examine heterosexual privilege. At the moment, judges and legislators have demonstrated a marked inability or unwillingness to acknowledge the social and legal construction of sexual difference as hierarchy. Instead, using arguments similar to those that have been used historically to rationalize sex inequality, they have appealed to nature, tradition, biology or a history of legal exclusion of lesbians and gays to place heterosexual privilege beyond question.²⁵¹

²⁵⁰ As the editors of the Harvard Law Review put it: "To the extent that marriage is a vehicle for stability because of the commitment it embodies, gay men and lesbians in stable, committed relationships should no less be entitled to marry than their heterosexual counterparts." Note, "Sexual Orientation and the Law" *supra*, note 179 at 1608. For similar arguments see Veitch, "The Essence of Marriage—A Comment on the Homosexual Challenge" (1976) *Anglo-American L. Rev.* 41; Sullivan, "Here Comes the Groom: A (Conservative) Case for Gay Marriage" *New Republic* (28 August 1989) 20; Grey, "Eros, Civilization and the Burger Court" (1980) 43 *Law and Contemporary Problems* 83 at 90 ("for the [gay and lesbian] community to be governed effectively, it must be recognized as legitimate").

²⁵¹ See Eaton and Peterson, "Comment on *Andrews v. Ontario*" (1987-88) 2 *Can. J. Women and Law* 421.

Judges and legislators alike have delayed taking responsibility for reform by passing the buck to each other. For legislators, apparently, it is far easier to say "the Charter made me do it" than to speak out against the disadvantaging of lesbians and gays. As a result, the political issue has been transferred to the judiciary, not a group renowned for its inclination to instigate social change. Judges are predominantly wealthy, white, male, heterosexually-identified lawyers. As Bakan has argued,

Judges will normally unquestioningly and uncritically rely upon dominant ideologies in the process of characterizing disputes and interpreting legal texts. By 'dominant ideologies' I mean the web of premises, frameworks, images and 'common sense' that are presented as natural, necessary and beyond question by dominant-knowledge producing institutions . . . These ideologies . . . take for granted the desirability of prevailing institutions of social relations, such as private ownership of property, wage labour, or the 'family', and thus function to legitimate these institutions and establish a presumption against other forms of social relations.²⁵²

It is not surprising, then, that the Federal Court of Appeal indicated, in its recent decisions in *Veysey* and *Mossop*, that it will return the issue to Parliament wherever possible. Thus, we are caught in a stalemate of silence.

Hafen has said that the "preferred family model based on marriage and kinship resembles a city under siege: those who are in it want to get out, while those who are outside it want to get in."²⁵³ According to Barrett and McIntosh, the explanation for this paradox lies in heterosexual family privilege itself:

The iniquities of the family and its appeal are closely related — they are two sides of the same coin. The benefits of family life depend upon the sufferings of those who are excluded. The *ideal* of the family life brings in its train many a bitter marriage and disappointed parents. If the family were not the only source of a range of satisfactions, were it not so massively privileged, it would not be so attractive.²⁵⁴

²⁵² Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1990) *Can. Bar Rev.* (forthcoming). For other analyses of the ideological and institutional limitations on pursuing progressive change through litigation, see Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 *McGill L.J.* 439; Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989); Fudge, "The Public/Private Distinction: The Possibilities and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall L.J.* 485; Petter, "The Politics of the Charter" (1986) 8 *S. Ct. L. Rev.* 473; Glasbeek, "Some Strategies for an Unlikely Task: The Progressive Uses of Law" (1989) 21 *Ottawa L. Rev.* 387.

²⁵³ Hafen, "The Family as an Entity" (1989) 22 *U.C. Davis L. Rev.* 865 at 904.

²⁵⁴ Barrett and McIntosh, *supra*, note 24 at 132-3.

There is intense debate in lesbian and gay communities about the desirability of gaining admission to the traditional institutions of heterosexuality.²⁵⁵ What is clear is that there will be neither freedom nor equality of sexual identity until the walls of heterosexual privilege are dismantled, and lesbians and gay men no longer suffer the assaults of heterosexuality's natural pretensions.

²⁵⁵ See Herman, *supra* note 180; Ettlbrick and Stoddard, "Gay Marriage: A Must or a Bust?" *Outlook* (Fall 1989) 8; and the debates in *Rites* (November 1989) 11 and (February 1990) 8-9.