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Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis

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I. *Introduction*

The tale often told of Canadian law's advancement in the field of sexual orientation rights is simple but sublime: law has moved, however ploddingly and not without substantial prodding, out of an epoch of almost total repression, into an ever more enlightened era. Castigated by criminal law, pushed to the perimeter by administrative law, and ignored by human rights law, the "homosexual"¹ had once been law's quintessential "other." In recent years, however, legislatures and courts have increasingly been willing to recognize "homosexuals" as a constituency too long held down by the heavy hand of legal control. Most penal prohibitions against exercises of same-sex sexuality have been lifted, several bureaucratic marginalizations have been corrected, and the omissions of civil rights legislation are at long last on the brink of being universally condemned. The story enjoys special currency in the human rights arena. Here law has been cast as awakening to the justice of acknowledging "homosexuals" as a category of persons no less deserving of legal equality than other so-called "minorities," and lawmakers are finally authorizing the enumera-

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1. I do not use the term "homosexual" for two reasons. First, because of its origins as a psychomedical concept developed in the late nineteenth century, I believe its use reinforces the conceptualization of "homosexuality" as a disease, and the scientific penchant to treat its occurrence as an objectifiable phenomenon to be studied, explained and (sometimes) cured or curtailed. Apart from this, the word "homosexual" obscures the very real differences of experience (and, therefore, oftentimes politics) that gender produces. My preference is for the words "lesbian" and "gay" because I believe they respond well to both these concerns. I do realize that they are not unproblematic: many lesbians think of themselves as "gay," and the word "lesbian" has been criticized for its race-contingent lineage. Gloria Anzaldúa has suggested that we instead adopt the word "queer" (see "To(o) Queer the Writer—Loca, escritora y chicana" in B. Warland, ed., *InVersions* (Vancouver: Press Gang, 1991) 249). In my view, like the homogenized term "homosexual," the word "queer" is wanting for its lack of attention to gender. Unable to resolve this lexical dilemma, in this paper I mostly use "lesbian" and "gay," although I sometimes use "queer," but I never use "homosexual" except in quotes.

tion of “sexual orientation” as a prohibited ground of discrimination in Canada’s wide range of civil rights instruments. This narrative, astoundingly enough, has circulated across divergent schools of legal thought: more or less the same story makes its appearance in the essentialized tropes of liberal reformers and in the anti-essentialist terms of poststructuralist radicals. One might refer to this chronicle of law’s inexorable evolution as the “progressive hypothesis.”

Foucault’s stance toward the form and function of law was somewhat inconsistent but, given his general tendency to expel law from the force field of discourse,² slightly troubling for critical legal thinkers. Nevertheless, his critical insights into the “nature” of sexuality and the mode of power in the modern era may assist in a re-reading of this rendition of law’s slow but steady progress in vindicating gay rights. Arguing against the grain of prevalent accounts, Foucault theorized that “sexuality” was not in fact a natural force or inclination inhering in individuals that came, in Victorian times, to be suppressed through the forces, legal and otherwise, of puritanical interdiction. Rather than the innocent victim of the relentless machinations of the imperial prude, “sexuality” was manufactured as an interior truth by and incited into the open through discourse, and more particularly, through the technique of the confession. Thus, Foucault did not deny that repression of sexuality existed, but he did insist that the “repressive hypothesis” was an incomplete account.³

The “progressive hypothesis,” which celebrates the relentless emancipatory progress of human rights law, and the textual grounding of sexual orientation as an outlawed form of discrimination, is as susceptible to reversal as the “repressive hypothesis” challenged by Foucault. Certainly, the enumeration of sexual orientation as a prohibited ground of discrimination has made possible legal redress for certain inegalitarian practices by creating the adjudicatory space for the recognition and remedy of what often were admitted injustices. Yet the legal developments of recent years might be understood as more multivalent, carrying both the negative charge of containment and the positive charge of liberation. More specifically, the pledge to protect sexual minorities came on the heels of and was followed by a discursive contouring of the “homosexual” body and its tendencies.

In the first part of this paper, I shall detail how sexual orientation reform was predicated on an already existing bifurcation between “ho-

2. For a review and discussion of Foucault’s treatment of law see A. Hunt, “Foucault’s Expulsion of Law: Toward a Retrieval” (1992) 17 *L. & Soc. Inquiry* 1.

3. M. Foucault, *The History of Sexuality: An Introduction*, vol. 1, trans. R. Hurley (New York: Pantheon Books, 1976).

mosexual” and other sorts of disempowered bodies. Early judicial opinions denied that lesbian and gay litigants could, in the absence of provisions specifically prohibiting discrimination on the basis of sexual orientation, lay legal claim to other human rights guarantees. “Homosexuals” were thus stripped, as a matter of law, of those other elements or characteristics that go into that constitutive mix loosely called “identity.” Interned exclusively in the juridical category of “queer,” they became “homosexuals” without remainder. This confinement was usually achieved by means of a methodology of negative affirmation: in a manner akin to Potter Stewart’s oft-quoted sentiment that although he could not define obscenity, he knew it when he saw it,⁴ judges confronted with lesbian and gay litigants were seemingly content to rely on their own normative understandings of what statutory guarantees against discrimination were meant to outlaw, and they could not and did not include discrimination against lesbians and gays.

I shall show how the enumeration of sexual orientation, instead of ushering in a new era of emancipation, actually made possible the continued circumscription of the “homosexual” as a juridical subject. Once the category “homosexual” was fashioned, the legal enunciation of who was “homosexual,” and what constituted discrimination on the basis of a sexuality oriented toward same-sex desire, became necessary. Hostile to the notion that heterosexual society should be at all curtailed in its freedom to discriminate against “homosexuals,” courts justified denying equality claims on the footing that, as sexual deviants, lesbians and gays were not the kind of group to which the law was obliged to extend protection. In Canada, the success of the lobby effort to have sexual orientation included in various human rights instruments did have the effect of rendering this position legally untenable, but codification did not prevent courts from persisting to delineate a space into which “progressive” law would not enter. What demarcated the legally protected from the legally unprotected, the tolerable from the intolerable,⁵ was so-called “homosexual” conduct. In other words, “sexual orientation” was interpreted in such a way that it would not insulate “homosexual” practices from discrimination, but would only spare “homosexu-

4. *Jacobellis v. Ohio*, 378 U.S. 184 at 197 (1964).

5. Bruce Ryder makes much the same argument. See “Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege” (1990) 9 Can. J. Fam. L. 39 at 43: “The manner in which Canadian legislators and judges have responded to homosexuality can be understood in terms of the compassion/condonation dichotomy.” As will become clear, I part company with Professor Ryder at the moment when the question of *how* to deal with the limits of liberal toleration is broached.

als” those inequalities born of antipathy towards “homosexual” “status” or “orientation.”

My method in making this argument also draws upon Foucault’s work, particularly his notion of genealogy.⁶ The frame of my analysis is thus temporally extensive. I undertake to provide a longitudinal history of lesbian and gay claims to equality under various human rights instruments since such efforts were first inaugurated. It is also spatially broad. I refuse the notion that the discursive contours of lesbian and gay oppression necessarily and neatly observe national boundaries, particularly across borders separating western nations with similar histories and comparable legal and political structures, and make critical use of the experience of American lesbians and gays in their struggle to secure legal protection against discrimination in analyzing the Canadian legal scene.⁷ It is this wider analytic framework that enables my claim that the story of law’s regulation of the rights of “homosexuals” cannot be reduced to a tale either of unmitigated oppression or of steady but slow progress.

In the final part of my paper, I turn to the question of how litigants might contend with the constraints law has imposed on the sexual orientation field. I comment on how most strategies proposed in the literature have failed to grasp that the legal construction of “homosexuality” is premised upon a series of successive and inter-related containments, but my focus will be on common strategies deployed in the litigation of equality rights under the rubric of sexual orientation. The predominant effect of those strategies, as I shall show, has been to reinforce rather than to challenge the construction of “homosexuals” as a species dissectible into what they are and what they do. More specifically, I argue that both the positions most litigants have presented before the courts and the being/doing distinction created and policed by judges are grounded in a sameness/difference model of equality. Recent Supreme Court equality jurisprudence, inasmuch as it effected a shift in the status of “difference” from being the register in which disentanglement to equality is determined to being problematized as the mechanism by which inequality is produced and maintained, may in fact provide a legal mode for engaging the conduct/orientation distinction in a critical way.

6. M. Foucault, “Nietzsche, Genealogy, History” in P. Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) 76.

7. To be sure, there is some connection between the national imaginary and the position of sexual minorities within it, as the differential figuration of the AIDS-infected body in North America and Africa, or of the citizen/soldier in Canada and the United States, demonstrates. My point, then, is not that there are no meaningful distinctions between the production of the “homosexual” under Canadian and American law, but only that none seem to be operative in a definitive way in the particular context of equality rights at this precise moment in history.

The question of "homosexual sex" is, under this new model of equality, not one of "homosexual" difference but rather one of heterosexual domination. My suggestion, then, is not simply that "homosexual" sex should be spoken of—although I do think it should—but rather that law's continuing circumscription of "homosexual" sex should be put squarely in issue.

II. *Lesbians, Gays and Equality Rights in Canada: A Historiography*

Not until very recently have some Canadian jurisdictions statutorily acknowledged sexual orientation as a prohibited form of discrimination.⁸ Before any Canadian human rights codes expressly proscribed discrimination on the basis of sexual orientation, lesbians⁹ and gays nonetheless attempted to use human rights legislation to challenge discriminatory acts and policies which operated to their detriment. Relying upon a variety of other enumerated proscriptions against discrimination, challenges to anti-lesbian and -gay practices were fashioned to conform with existing law. All of the claims brought in this first phase of litigation, however, were unsuccessful.¹⁰

Sex discrimination claims met dismissive responses by both courts and human rights adjudicators alike. For example, in *Board of Governors of the University of Saskatchewan v. Saskatchewan Human Rights Commission*,¹¹ a graduate student at the College of Education was informed by the head of his department that he would no longer be permitted to enter the public schools to supervise practice teaching carried out by students of the College when it became known that he was an out gay man who was attempting to establish an academic gay association.¹² This decision was confirmed and supported by the dean of the college and the president of the university.

8. See Quebec, *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10; Manitoba, *The Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2)(h); Yukon Territory, *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11, s. 6(g); Ontario, *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 4(1) as am. by *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64, s. 18(5); Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214 as am. by S.N.S. 1991, c. 12.

9. Insofar as all of these cases were brought by gay men, or by mixed lesbian and gay groups, it is only by extension that lesbians can be said to have participated in this early litigation.

10. Another case not discussed in this section was never decided because the complainant died during litigation: see *Damien v. Ontario Racing Commission* (1975), 11 O.R. (2d) 489 (H.C.J.) and *Damien v. Ontario Human Rights Commission* (1976), 12 O.R. (2d) 262 (H.C.J.).

11. [1976] 3 W.W.R. 385 (Sask. Q.B.) [hereinafter *University of Saskatchewan*].

12. The complainant had placed an advertisement in a campus newspaper to get the association off the ground. It was the publication of the ad that apparently prompted his removal by the University authorities.

The student, Mr. Wilson, complained to the Human Rights Commission that he had been discriminated against “because of his sex.”¹³ As he had “no control”¹⁴ over his sexual orientation, Wilson maintained that to discriminate against him on the basis of his “homosexuality” was tantamount to sex discrimination because it was premised on an immutable sex characteristic. In granting the University’s application for a writ of prohibition preventing¹⁵ the Commission from dealing with Wilson’s complaint, Johnson J. held that the meaning of the word “sex,” as it appeared in the section of the *Act*, could not be extended to apply to discrimination against “homosexuals”:

In The Fair Employment Practices Act, the provision for prohibiting employment discrimination against any person on the basis of his sex would generally be considered to be on the basis of whether or not that person was a man or woman, not on his sexual orientation, his sexual proclivity or sexual activity. In other words, sex as used in s. 3 would generally and popularly be regarded as referring to the gender of the employee or prospective employee and not to the sexual activities or propensities of that person.¹⁶

Later decisions confirmed that not only sex¹⁷ but other statutorily recognized heads of discrimination referred to relations between the sexes and did not apply to “homosexuals” vis-à-vis heterosexuals. In *Vogel v. Government of Manitoba*,¹⁸ for example, a claim that the denial of employment benefits to the partner of a gay employee amounted to discrimination on the basis of “marital status” was similarly rejected. Acknowledging that the Manitoba *Act* did not define “marital status,” and

13. *Supra* note 11 at 386.

14. *Ibid.* at 390.

15. Two years later the Saskatchewan Court of Appeal stated that Johnson J. was wrong to have stopped the Commission’s inquiry. See *Re CIP Paper Products Ltd. and Saskatchewan Human Rights Commission* (1978), 87 D.L.R. (3d) 609.

16. *Supra* note 11 at 388–89.

17. Other instances in which charges of sex discrimination were levelled unsuccessfully include *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.) [hereinafter *Knodel*]; *Egan v. Canada* (1991), 87 D.L.R. (4th) 320 (F.C.T.D.); *Vogel v. Government of Manitoba* (1983), 4 C.H.R.R. D/1654 (Man. Bd. Adj.) [hereinafter *Vogel*]; and *Vogel v. Manitoba (No. 2)* (1991), 16 C.H.R.R. D/233 (Man. Bd. Adj.) [hereinafter *Vogel (No. 2)*], *aff’d (sub nom. Vogel v. Manitoba)* (1992), 16 C.H.R.R. D/242 (Man. Q.B.).

18. *Ibid.* See also *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.), where an attempt by two gay men to have their marriage registered by provincial authorities was rejected on the grounds that marriage could only take place between persons of the opposite sex. See also *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.), leave to appeal granted 7 June 1993 [hereinafter *Layland*] (common law rule restricting availability of marriage to opposite sex couples does not infringe constitutional equality rights of “homosexuals”).

in particular that, unlike similar provisions in other jurisdictions,¹⁹ it did not specifically restrict the meaning of the term to couples consisting of partners of the opposite sex, the Board of Adjudication nonetheless found that the term “impliedly only refers to heterosexual relationships,”²⁰ and concluded: “Mr. Vogel and Mr. North may live together but, in my opinion, they do not do so in any legally recognized ‘marital status’.”²¹

“Family status,” a more unusual term in the human rights lexicon,²² has also been interpreted as not applying to lesbian and gay relationships. In *Mossop v. Canada (Secretary of State)*, a translator for the Department of the Secretary of State requested a day of bereavement leave, a benefit provided to employees under a collective agreement between the Department and Mossop’s bargaining agent, to attend the funeral of his lover’s father. This request was denied by the employer on the footing that the relevant article of the collective agreement only applied to persons of the opposite sex, although it offered to allow Mr. Mossop the day off so long as it counted as a vacation day. Dissatisfied with this offer, Mossop launched a complaint under the *Canadian Human Rights Act*.²³

Although the tribunal appointed to hear Mr. Mossop’s complaint under the *Act* allowed the claim,²⁴ its decision was subsequently quashed by the Federal Court of Appeal on judicial review,²⁵ which decision in turn was upheld by a majority of the Supreme Court of Canada.²⁶ Marceau J., writing for the majority of the Federal Court of Appeal,²⁷ disagreed with the tribunal that the phrase “family status” was flexible enough to include same-sex couples:

I do not see how it can be said that the word “family” has a meaning so uncertain, unclear and equivocal that, in a legal context, it must in every instance be subjected to interpretation by the courts. Is it not to be acknowledged that the basic concept signified by the word has always been a group of individuals with common genes, common blood, common ancestors. This basic concept lends itself to various degrees of extension

19. *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1) defines “marital status” as “the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.”

20. *Supra* note 18 at D/1657.

21. *Ibid.* at D/1658.

22. Manitoba and the Yukon are the only other jurisdictions that proscribe discrimination on the basis of “family status.” See *The Human Rights Act*, R.S.M. 1987, c. H175, s. 2(1); and *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11, s. 6(k).

23. S.C. 1976–77, c. 33 (now R.S.C. 1985, c. H-6).

24. *Mossop v. Canada (Secretary of State)* (1989), 10 C.H.R.R. D/6064 (C.H.R.T.).

25. *Canada (A.G.) v. Mossop* (1990), 71 D.L.R. (4th) 661 (F.C.A.).

26. *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

27. Technically speaking, Stone J. (Heald J. concurring) held the majority, although, with respect to the issues discussed here, he endorsed the reasons of Marceau J.

since the common ancestor may be chosen more or less remotely along the line of generations and the group referred to today is generally seen as including individuals connected by affinity or adoption, an inclusion rendered normal by the fact that marriage was made the only socially accepted way of extending and continuing the group, and adoption a legally established imitation of natural filiation. But that does not affect the core meaning conveyed by the word.²⁸

He concluded that the “real”²⁹ reason Mossop had been denied a day of bereavement leave was because of his sexual orientation, not his family status, a type of discrimination obviously not prohibited by the *Act*, and granted the Attorney General’s application to have the tribunal’s decision set aside.

The reasoning of Marceau J. was cited with approval by Lamer C.J.,³⁰ who wrote the majority decision for the Supreme Court. The Chief Justice reasoned that because Parliament had refused to add sexual orientation to the list of prohibited grounds enumerated in section 3 of the *Act*, it was evident that the legislature had not intended the words “family status” to cover same-sex couples. La Forest J., by contrast, grounded his reasons in the application of the plain meaning doctrine. He held that in “ordinary parlance” the term “family” meant the “dominant” or “traditional” conception of family, that is, the heterosexual family.³¹ Given that Parliament had not evidenced an intention to depart from this accepted meaning when it enacted the guarantee against family status discrimination, it was his view that Mr. Mossop’s claim was rightly rejected.³²

Unlike some of the other jurisdictions which specified the types of discrimination prohibited by law, British Columbia had enacted a human rights statute which made unlawful discrimination “without reasonable

28. *Supra* note 25 at 673.

29. *Ibid.* at 675.

30. Sopinka and Iacobucci JJ. concurred. La Forest J. wrote separate concurring reasons in which Iacobucci J. also concurred.

31. *Supra* note 26 at 585–86.

32. For a more thorough review and critique of *Mossop*, see M. Eaton, “Patently Confused: Compound Inequality and *Canada v. Mossop*” (1993–94) 1 *Rev. Constit. Studies* 203.

cause.”³³ When a Vancouver lesbian and gay rights group was refused permission to advertise the existence of its publication, *Gay Tide*, in a western Canadian newspaper,³⁴ the broad language of this anti-discrimination provision became the subject of one of the most notorious lesbian and gay rights cases in Canadian history, *Gay Alliance Toward Equality v. Vancouver Sun*.

The Board of Inquiry selected to hear Gay Alliance Toward Equality’s (GATE) discrimination complaint³⁵ divided over the question of the real reason behind the newspaper’s actions,³⁶ but all members agreed that there was no “reasonable cause” for its rejecting the ad and held that the *Sun* had violated the *Code*. GATE’s victory proved to be very short lived, however, when the *Vancouver Sun* sought review of the decision in the courts. By a majority of two to one, the British Columbia Court of Appeal found that there was “reasonable cause” within the meaning of the statute for the *Sun*’s refusal to carry the ad and overturned the Board’s decision.

Whereas Seaton J.A., thought that the Board’s reasons were legally sound, both of his colleagues felt that the Board had erred in law. Citing the rights and sensibilities of members of majorities, Robertson J.A. held that it was not the intention of the *Code* that these interests “be ignored for the benefit of those who are different.”³⁷ Accordingly, it was his view that the Board had crossed the proverbial line delimiting the function of

33. The *Human Rights Code of British Columbia*, S.B.C. 1973 (2d Sess.), c. 119, provided:

3(1) No person shall

(a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or

(b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.

(2) For the purposes of subsection (1),

(a) the race, religion, colour, ancestry or place of origin of any person or class of persons shall not constitute reasonable cause; and

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

34. The text of the ad simply read: “Subs to GAY TIDE, gay lib paper \$1.00 for 6 issues. 2146 Yew St., Vancouver.” The newspaper refused the ad, advising the person who submitted it that the advertisement was “not acceptable for publication.”

35. The reasons of the Board of Inquiry are reproduced in part in the opinion of the British Columbia Court of Appeal in *Re Vancouver Sun and Gay Alliance Toward Equality* (1977), 77 D.L.R. (3d) 487.

36. The majority found that the newspaper’s actions were motivated by a personal bias on the part of management against homosexuals and homosexuality. Board Member Dorothy Smith, dissenting, found that the *Vancouver Sun*’s policy was predicated on a desire to protect standards of decency and good taste (*ibid.* at 490).

37. *Ibid.* at 496.

adjudicators and had, “by some *quasi*-legislative process”³⁸ simply read in coverage for “homosexuals” in apparent disregard for the terms of the *Code*. Branca J.A., by contrast, felt that the critical question was whether the newspaper’s policy, even though motivated by bias, was reasonable. Taking judicial notice of the social, religious and legal predisposition against “homosexuals” and “homosexuality,” he concluded:

I am of the opinion, that in justice, a bias motivated because of the belief of some people that the homosexual engages in unnatural practice or that their sexual practices are immoral or against religions does not make the conclusion wrong, in the sense that it is unreasonable.³⁹

The issue whether “homosexuals” were entitled to protection under open-ended statutes like the British Columbia *Code*⁴⁰ was thus left less than clear. The opportunity to provide guidance to both the lesbian and gay and legal communities on this question presented itself in 1978 when GATE was granted leave to appeal to the Supreme Court of Canada.⁴¹ In what must surely be one of the great ironies of Canadian jurisprudence, freedom of the press was invoked by the Supreme Court of Canada to read into the plain language of a human rights statute permission for one newspaper to suppress the publication of the existence of another newspaper, the *raison d’être* of which was the promotion of human rights.⁴² Strangely, the majority of the Court preferred to dispose of the appeal on a ground that was not raised by either of the parties, and which was, in fact, conceded by the newspaper at all levels of the dispute.⁴³

38. *Ibid.* at 499.

39. *Ibid.* at 494.

40. Only Manitoba appears to still include the type of broad provision that was at issue in *Gay Alliance*. The *Human Rights Code*, S.M. 1987–88, c. 45, C.C.S.M. c. H175, s. 9(1)(a) prohibits “differential treatment of an individual on the basis of the individual’s actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit.”

41. *Gay Alliance Toward Equality v. Vancouver Sun* (1979), 97 D.L.R. (3d) 577 (S.C.C.) [hereinafter *Gay Alliance*].

42. This irony is compounded when one observes that four members of the GATE majority (Beetz with Martland, Ritchie and Pigeon JJ.) had decided one year earlier in *Canada (A.G.) v. Dupond* (1978), 84 D.L.R. (3d) 420, that such fundamental rights as freedom of speech, assembly and the press were not part of an implied Canadian Bill of Rights by virtue of the preamble of the *British North America Act, 1867* and were not “so enshrined in the Constitution as to be above the reach of competent legislation” (*ibid.* at 439). See on this point J. Richstone & J.S. Russell, “Shutting the Gate: Gay Civil Rights and the Supreme Court of Canada” (1981) 27 McGill L.J. 92 at 102, and W. Black, “*Gay Alliance Toward Equality v. Vancouver Sun*” (1979) 17 Osgoode Hall L.J. 649 at 659–65.

43. See the opinion of Laskin C.J., *supra* note 41 at 590. See also on this point Richstone & Russell, *ibid.*, and H. Kopyto, “The *Gay Alliance* Case Reconsidered” (1980) 18 Osgoode Hall L.J. 639.

For Martland J., the critical question was whether newspaper advertising facilities are services “customarily available to the public” within the meaning of section 3 of the *Code*, the answer to which turned on the right of freedom of the press, notwithstanding that, at least according to the Chief Justice,⁴⁴ counsel for the *Sun* did not pursue freedom of the press in its argument. Relying on American authority,⁴⁵ Martland J. offered the following mystifying analysis:

While there is no legislation in British Columbia in relation to freedom of the press, similar to the First Amendment or to the *Canadian Bill of Rights*, and while there is no attack made in this appeal on the constitutional validity of the *Human Rights Code*, I think that Chief Justice Burger’s statement about editorial control and judgment in relation to a newspaper is of assistance in considering one of the essential ingredients of freedom of the press. The issue which arises in this appeal is as to whether s. 3 of the Act is to be construed as purporting to limit that freedom.⁴⁶

The law, Martland J. stated, recognizes the freedom of the press to propagate opinions of their choice, to select what to publish and to reject material contrary to their views. The *Sun* exercised that freedom when it displayed a notice at the head of its classified section indicating that the paper reserved the right to revise, edit, classify or reject any advertisement submitted to it. Section 3 of the *Code* could not be interpreted to dictate the scope of a newspaper’s content, that is, to curb freedom of the press. Accordingly, Martland J. found that, because the advertising services of newspapers are services “customarily available to the public” except insofar as they are *subject to* the right of the newspaper to control ad content,⁴⁷ the *Sun* had simply rejected the content of GATE’s classified and, thus, had not violated the *Code*.

Although the two dissenting opinions⁴⁸ rejected some of the more generally anti-egalitarian arguments advanced by the *Sun* and accepted

44. *Supra* note 41 at 585. Dickson J., conversely, stated that the *Sun*’s counsel “strongly contended for the traditional right of editorial control over newspaper content, including advertising” (*ibid.* at 596).

45. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

46. *Supra* note 41 at 590. About this analysis Richstone & Russell, *supra* note 42 at 102, say: “The reasoning of Martland J. is based solely on arguments neither raised, nor pursued in any of the judgments *a quo*. This practice would seem to be at variance with actual procedures of appellate courts, and contrary to the practice of the Supreme Court itself.”

47. *Supra* note 41 at 591.

48. One was written by Laskin C.J., the other by Dickson J. in which Estey J. concurred.

by the Court of Appeal and the Supreme Court majority,⁴⁹ both focused primarily on the *Code*'s privative clause and held that the Court had no power to reverse the Board's decision.⁵⁰

In failing to resolve squarely whether lesbians and gay men could claim protection under open-ended human rights legislation, the Court left an opening for future litigants to secure the rights GATE was denied.⁵¹ However, this possibility was extinguished in the *Vogel* case.⁵² In addition to his double-barrelled argument that his employer had discriminated against him on the basis of both his sex and his marital status, Vogel invoked the open-ended non-discrimination clause in the Manitoba statute, a clause similar to the provision under the British Columbia *Code* at issue in *Gay Alliance*. Unlike the situation facing the Supreme Court in *Gay Alliance*, the claim as framed in *Vogel* left no room to avoid the issue of whether such clauses applied to acts of sexual orientation discrimination. The Board acknowledged that there was no clear authority on the point, the opinions in *Gay Alliance* being divided with respect to the substantive question of whether the no discrimination provision applied to "homosexuals." Nonetheless the Board thought it proper to

49. Both dissents rejected the *Sun*'s argument that, because running the ad might cost it subscribers, such projected loss of business constituted "reasonable cause" for rejecting GATE's ad. Laskin C.J. held that if a threatened loss of [bigoted] customers could justify discrimination, the *Code*'s protections could be "destroyed" not just for associations like GATE, but for all historically discriminated against groups. Dickson J., by contrast, considered the argument untimely insofar as it was first advanced at the Supreme Court. To credit it would require the Court to make new findings of fact.

The two dissenting judgments also rejected, as the majority did not, the *Sun*'s argument that the *Code* only proscribed discrimination against individuals seeking access to public services based on the personal traits of such individuals, but permitted discrimination, however unreasonable, against the class to which they belonged.

Finally, both dissents categorically rejected Branca J.A.'s holding that "honest biases" provide reasonable cause for discrimination. Such a ruling, both stated, would eviscerate the *Code* and its underlying policy by insulating public services and institutions from human rights law.

50. The decision of the tribunal was protected by a privative clause and some felt that the Court of Appeal had overstepped permissible bounds by basically deciding the case anew instead of reviewing it for jurisdictional error. See Kopyto, *supra* note 43; Richstone & Russell, *supra* note 42; and R.A. Goreham, "Comment" (1981) 59 Can. Bar Rev. 165.

51. As a point of historical interest, after GATE's defeat before the Supreme Court of Canada, the British Columbia Human Rights Commission urged that s. 3 of the *Code*, along with s. 8 (covering discrimination in employment) and s. 9 (dealing with discrimination by employee and employer organizations) be amended to include the words "sexual orientation." See Human Rights Commission of British Columbia, *I'm Okay; We're Not So Sure About You* (Victoria: Queen's Printer for British Columbia, 1983) at 54. The British Columbia statute was indeed amended, but in a way that served to solidify the exclusion of lesbians and gays from the *Code*'s reach. Not only was sexual orientation not added as a proscribed ground of discrimination, but the open ended language of the statute was deleted.

52. *Supra* note 17.

construe the provision narrowly. The adjudicator reasoned that, in light of the controversy surrounding the *Gay Alliance* decision, the legislature must have been aware of the case. Had it intended the statute to apply to "homosexuals," he went on, the legislature would have unambiguously spelled that out in the statute itself.

If ever there were any doubt about the scope of human rights for lesbians and gays in Canada, the early litigation certainly put the debate to rest: there was none. Undoubtedly because then extant categories of legally recognized forms of discrimination were construed as water-tight compartments which did not cover discrimination against lesbians and gays, reform energies were galvanized toward securing the inclusion of sexual orientation as an explicitly prohibited ground of discrimination in human rights instruments. In some jurisdictions, these lobbying efforts were successful and several legislatures agreed to amend their human rights codes.⁵³ In addition, although lobbying efforts to include sexual orientation as an enumerated ground in section 15 of the *Charter* were unsuccessful,⁵⁴ there was a general consensus that the inclusive language of the section would be interpreted broadly to apply to unenumerated grounds, including sexual orientation.⁵⁵

In view of these statutory reforms and the promise of section 15, lesbians and gays again took to the courts in search of legal equality. A few actions were brought claiming violation of statutory provisions expressly prohibiting discrimination based on sexual orientation,⁵⁶ but most⁵⁷ invoked the open-ended language of section 15 claiming consti-

53. See *ibid.*

54. See A. Bruner, "Sexual Orientation and Equality Rights" in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 457 at 464, and M. Leopold & W. King, "Compulsory Heterosexuality, Lesbians and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163.

55. See Bruner, *ibid.*; Leopold & King, *ibid.*; Ryder, *supra* note 5; J. Jefferson, "Gay Rights and the Charter" (1985) 43 U.T. Fac. L. Rev. 70; and M. Eaton, "Lesbians and the Law" in S.D. Stone, ed., *Lesbians in Canada* (Toronto: Between the Lines, 1990) 109.

56. It is worth noting that, judging from the reported decisions, only the Manitoba, Ontario and Quebec guarantees have been invoked thus far and so it remains to be seen how litigants will fare in Nova Scotia, New Brunswick, and the Yukon.

57. A great many of the *Charter* cases have been spousal or family claims. Those that have involved other matters, such as discharge from the military, never reached the substantive discrimination issue, either because the case was settled out of court or because the dispute was resolved on other grounds. See *Brown v. Minister of Health* (1990), 66 D.L.R. (4th) 444 (B.C.S.C.); *Stiles v. Canada (A.G.)* (1986), 3 F.T.R. 234 and (1986), 2 F.T.R. 173; *Sylvestre v. Canada* (1986), 23 C.R.R. 313 (F.C.A.), *rev'g* [1984] 2 F.C. 516 (T.D.); *Bordeleau v. Canada* (1989), 32 F.T.R. 21.

tutional protection from anti-lesbian and -gay laws and state policies.⁵⁸ Even with statutory and constitutional changes ostensibly more hospitable to sexual orientation claims, the vast majority of these challenges proved unsuccessful.

This seeming climate of toleration has not, for instance, altered adjudicators' persistence in defining spousal or family relationships in a heterosexually exclusive way, no matter what the sort of instrument under which these kind of claims have been made. In *Anderson v. Luoma*,⁵⁹ for instance, two women had lived together for a number of years, commingled their assets, and had had children together by alternative fertilization. When the couple broke up, one of the women sued under provincial family law legislation for division of property and support for herself and her children. Dohm J. held that the plaintiff could not rely on the *Family Relations Act*⁶⁰ to support her position, for the *Act* did 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.⁶¹

Perhaps anticipating this unreceptive response, counsel argued that, if applied only in this exclusionary way, the *Act* infringed section 15 of the *Charter*. Dohm J. dealt with the constitutional issue perfunctorily, saying in one line that any violation would certainly be justified under section 1.

Unlike Dohm J.'s curt dismissal of the constitutional argument in *Anderson*, a more sophisticated approach to *Charter* interpretation and application was evidenced in *Andrews v. Ontario (Minister of Health)*,⁶² where a challenge was launched against Ontario's state-supported hospital insurance scheme. Karen Andrews wished to have her lesbian partner treated as a dependent under the *Health Insurance Act*,⁶³ but was denied

58. *Mossop*, discussed in the text accompanying notes 23–32, also appears in this period, although the case was brought under a statute that contained no sexual orientation clause. Presumably Mossop believed that in the post-*Charter* era, tribunals and courts would be more receptive to his argument.

59. (1986), 50 R.F.L. (2d) 127 (B.C.S.C.) [hereinafter *Anderson*].

60. R.S.B.C. 1979, c. 121.

61. *Supra* note 59 at 140, quoting the words of Wallace J. dismissing an application by the same woman for interim relief [reported at (1984), 42 R.F.L. (2d) 444 at 446–47 (B.C.S.C.)]. It is noteworthy that Dohm J. also dismissed the plaintiff's common law claims for maintenance and support, although he did allow a division of some of the assets under the doctrine of constructive trust developed by the Supreme Court of Canada in *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

62. (1988), 64 O.R. (2d) 258 (H.C.J.).

63. R.S.O. 1980, c. 197.

this benefit pursuant to regulations issued under that *Act*,⁶⁴ where dependents were defined, *inter alia*, as spouses.

McRae J. of the Ontario Supreme Court expressed profound doubt that Ms. Andrews could, in the circumstances, claim the protections of section 15 of the *Canadian Charter of Rights and Freedoms*. In the alternative to his main finding that Ms. Andrews had failed to establish a violation of the equality provision, he went on to hold that whatever discrimination she suffered was justified under section 1. In clear contradiction to established Supreme Court of Canada jurisprudence on the evidentiary onus in *Charter* cases,⁶⁵ McRae J. ignored the province's failure to lead evidence in support of upholding the regulation and held that the restriction on Andrews' *Charter* rights was reasonable and demonstrably justified by the state's interest in supporting "traditional" families.

Perhaps the most clear-cut instances of adjudicators engaging in the same assiduous line drawing to define claims as falling outside the guaranteed protections are the decisions in *Re Carleton University and C.U.P.E., Local 2424*,⁶⁶ and *Vogel v. Manitoba (No. 2)*. In *Carleton*, a contractual provision which specifically prohibited sexual orientation discrimination was read down so as not to apply to domestic partnership claims. Carleton, a gay man, sought to obtain benefits for his partner under a collective agreement between his union and his employer which made certain employment benefits available to the "spouses" of members of the bargaining unit. The term "spouse" was defined in the agreement as meaning "husband or wife in law or in common law." Mr. Carleton filed a grievance claiming that the contract's definition of "spouse" was itself discriminatory, and that the meaning to be given to the term should be consistent with the non-discrimination provision.

But the Board of Arbitration disagreed. It held that the language in the agreement was clear, and that if the term spouse was to include same-sex partners, or if the parties had intended the non-discrimination clause to override the codified definition of spouse, the parties could have and

64. R.R.O. 1980, Reg. 452, s. 1(c).

65. Section one of the *Charter* provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

R. v. Oakes, [1986] 1 S.C.R. 103 held that, once a *Charter* violation has been made out, it is incumbent upon the party seeking to justify the infringement to demonstrate, by a preponderance of cogent and persuasive evidence, that the infringement is reasonable and demonstrably justified in a free and democratic society.

66. (1988), 35 L.A.C. (3d) 96 [hereinafter *Carleton*]; aff'd on judicial review (4 June 1990), (Ont. Div. Ct) [unreported].

should have said so in the contract. In support of its decision, it cited the Ontario *Human Rights Code, 1981*,⁶⁷ the structure of which paralleled the collective agreement: it too defined “spouse” in a heterosexual way notwithstanding that it also prohibited sexual orientation discrimination. Although it was open to the Board to read the two provisions as being consistent with one another, or to interpret the non-discrimination clause in such a way that it would trump in those instances where it conflicted with other articles of the agreement, it chose not to do so.⁶⁸ Instead, and without really offering any reasons,⁶⁹ the Board held that the spousal definition provision could not but prevail over the non-discrimination provision, and accordingly dismissed the grievance.⁷⁰

Worse was the decision in *Vogel (No. 2)*.⁷¹ In 1987, the Manitoba legislature repealed its *Human Rights Act*,⁷² enacting in its stead the *Human Rights Code*.⁷³ The new *Code* differed from the old *Act* in two important respects. It included sexual orientation, along with sex, race, marital status and other such characteristics, as a prohibited ground of discrimination. As well, whereas the old *Act* contained a restrictive definition of the meaning of “family status” discrimination,⁷⁴ the new *Code* left the term undefined. Seeking to take advantage of these changes, Richard North and his partner Chris Vogel renewed their challenge against the Manitoba Government⁷⁵ for its failure to provide the couple with several employee benefits afforded to married and common law

67. S.O., 1981, c. 53.

68. By this I mean that the *Code*’s proscription against spousal discrimination could have been “read down” to apply only to heterosexual spouses and not to limit the scope of the sexual orientation equality guarantee.

69. It seems worth pointing out that the provisions of the Ontario *Code* which the Board of Arbitration cited in support of its construction of the collective agreement had not been interpreted at the time the grievance was decided. Indeed, although the Board claimed to have been bound by the decision in *Andrews v. Ontario (Minister of Health)*, *supra* note 62, McRae J. expressly refrained from construing the provisions of the *Code*: “I do not intend, in this application, to consider the provisions of the Ontario *Human Rights Code, 1981*, or to interpret the applicants’ rights under the *Code*” (*supra* note 67 at 264).

70. Tina Head, nominee for the union, dissented, but did not record written reasons for doing so.

71. *Supra* note 17.

72. *Human Rights Act*, S.M. 1974, c. 65.

73. *Human Rights Code*, S.M. 1987–88, c. 45.

74. Specifically, s. 1(d.1) of the 1974 Act provided:

“family status” for the purposes of this Act includes the status of an unmarried person or parent, a widow or widower or that of a person who is divorced or separated or the status of the children, dependants, or members of a family of a person.

75. See text accompanying notes 18–21, 52. The pair also named the Manitoba Government Employees’ Association as a defendant.

heterosexual couples. In addition to reiterating their sex and marital status claims, they also complained that the benefits scheme discriminated against them on the basis of family status and sexual orientation. The Board of Adjudication noted that the addition of “sexual orientation” as a prohibited ground of discrimination did not alter the meaning of the guarantees against sex and marital status discrimination and dismissed these complaints as an abuse of process. As to the “family status” complaint, the Board reasoned that since “family” was by definition a heterosexual institution, the repeal of the definition of “family status discrimination” could be “attributed to redundancy,”⁷⁶ and therefore it was no violation of that provision to adopt a benefits scheme that privileged heterosexual over “homosexual” couples. And as to the sexual orientation claim, the Board concluded:

Benefits are provided based upon whether employees are married as defined in the various programs and whether employees have children. The sexual orientation of the employee is irrelevant. A person may very well be married to a person of the opposite sex and yet be homosexual. A person may have children as contemplated in the employee benefit plans and yet be homosexual. Similarly, a person may be heterosexual and yet receive no benefit whatsoever either directly or indirectly from the employee benefit plans because he or she is neither married nor has children as contemplated in the plans. Accordingly, I have concluded that the benefit plans do not discriminate based on sexual orientation.⁷⁷

Despite the many ways in which the recognition of sexual orientation as a prohibited ground of discrimination failed to deliver on its promise, there were some victories. In *L'Association A.D.G.Q. v. Catholic School Commission of Montreal*,⁷⁸ for example, the Quebec Superior Court ruled that the School Commission had violated the *Quebec Charter of Human Rights and Freedoms* when it refused to rent its facilities to a gay group seeking to hold a weekend conference. In *Veysey v. Correctional Service of Canada*,⁷⁹ prison authorities were ordered to consider a gay inmate's eligibility for participation in a family visiting programme on the same basis as his heterosexual counterparts. In *Knodel*⁸⁰ the Supreme Court of

76. *Supra* note 17 at D/240.

77. *Ibid.* The complainants unsuccessfully sought judicial review of the decision: *Vogel v. Manitoba* (1992), 16 C.H.R.R. D/242 (Man. Q.B.). Upholding the reasonableness of the Board's opinion, Hirschfield J. had occasion to comment: “The prohibited ground of discrimination because of sexual orientation does not, in my opinion, create a third gender for which special legislative protection is either needed or to be granted” (*ibid.* at D/249). See also *Layland*, *supra* note 18.

78. (1979), 112 D.L.R. (3d) 230 (Que. Sup. Ct.) [hereinafter *L'Association A.D.G.Q.*].

79. (1990), 109 N.R. 300 (F.C.A.) [hereinafter *Veysey*], *aff'g* on different grounds (1989), 29 F.T.R. 74 (F.T.D.).

80. *Supra* note 17.

British Columbia issued a declaration that same-sex couples are spouses for the purposes of province-run medical benefits. In *Haig v. Canada*,⁸¹ the federal government's failure to include sexual orientation as a prohibited head of discrimination under section 3 of the *Canadian Human Rights Act* was declared unconstitutional.

The decisions in *L'Association A.D.G.Q.*, *Veysey*, *Knodel*, and *Haig* have been a cause for celebration: not only did they bring some material relief to the parties themselves, they also have symbolic importance for both the litigants and the community at large. While I do not wish to minimize the importance of the victories secured in these cases, a close reading of the decisions reveals that some of them constitute neither unqualified denunciations of discrimination against lesbians and gays nor untempered declarations of their right to legal equality. Indeed, some of the cases were decided on such narrow legal grounds that the weight of their authority as precedent is somewhat questionable.⁸²

In *L'Association A.D.G.Q.*, for instance, the respondent urged the court to follow the *Gay Alliance* decision and find that the School Commission was entitled to refuse to rent its facilities to groups which it found objectionable. Beauregard J. declined to do so, but distinguished the case in a way which suggested that had the functional equivalent of the newspaper's right to editorial control been asserted by the School Commission prior to its dealings with the Association, the result might well have been different:

81. (1991), 5 O.R. (3d) 245 (Gen. Div.) [hereinafter *Haig*], aff'd in part (1992), 16 C.H.R.R. D/226 (Ont. C.A.). See also *Waterman v. National Life Assurance Co. of Canada* (No. 2) (1993), 18 C.H.R.R. D/176 (Ont. Bd. Inq.) (discriminatory dismissal of "out" lesbian contrary to Ontario Code); *Leshner v. Ontario* (No. 2) (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.) (restriction of definition of "marital status" to heterosexuals in Ontario Code unconstitutional as offending s. 15 of the Charter); and *Clinton v. Ontario Blue Cross* (No. 2) (1993), 18 C.H.R.R. D/377 (Ont. Bd. Inq.) (restriction of availability of spousal benefits to heterosexuals discriminatory on the basis of sexual orientation).

82. I cannot help but note that in several of the winning cases decided thus far, the courts were presented with rather extraordinary fact situations. In *Haig*, *ibid.*, one of the plaintiffs had committed suicide before the litigation was completed. Similarly, in both *Knodel*, *supra* note 17, and *Braschi v. Stahl Associates*, 544 N.Y.S.2d 784 (Ct. App. 1989)—the one United States case to recognize a gay familial claim—the plaintiffs were very sympathetic characters. Not only was there nothing in the record of either case to suggest that their claim to spousal status was a ruse or that their relationships were anything other than committed and sincere, but also, the situations of both Mr. Braschi and Mr. Knodel were quite tragic in that both had lost their lovers to a fatal disease. It remains to be seen, of course, whether these facts will prove dispositive in litigation to come, distinguishing cases on their facts being a ready mechanism to avoid the binding force of precedent, but certainly it does seem somewhat morbidly and sadly significant that so many of the lesbian and gay claims that the law has so far recognized involved plaintiffs who were no longer alive.

The *ratio decidendi* of the Supreme Court case is that the Vancouver Sun ordinarily offered advertising services to the public not in an absolute way but reserving its right to control the content of the advertising. In the present case, respondent offers the use of its buildings to the general public reserving its right to control the nature of the activities carried out in its buildings. But it has never reserved to itself the right to control the nature or the content of the discussions which it permits within its buildings.⁸³

Similarly, Tim Veysey's right of access to the prison Family Visiting Programme was affirmed in a *per curiam* decision of the Federal Court of Appeal, but like the opinion in *L'Association A.D.G.Q.*, the decision signalled that a minor variation in the behaviour of the respondent might well produce a different result in future cases. In its view, the language of the Commissioner's Directive (and the booklet which accompanied it) which described the programme was so broad that it could be construed not to preclude the Commissioner, in his discretion, from permitting Veysey to participate.⁸⁴ Various descriptions of the wording used in the booklet as "novel," "ambiguous," "unusual," "special," "unique" and "obviously not drafted by lawyers,"⁸⁵ the court held that same-sex partners fell within the definitional scope of the provisions:

In our view, the general wording of section 19 of the *Directive*—"this list shall normally include relatives such as spouse, common law partner . . ."—opens the door to applications by common law partners of the same sex. "Relative" can be defined as "one who is connected with another or others by blood or affinity"—(*The Shorter Oxford English Dictionary*, Third Edition, at 1786), "a person connected with another by blood or affinity," (*Black's Law Dictionary*, 5th Ed. at 1158), and "affinity" may refer to "any close link or connection," "a strong liking or attraction between one person and another," (*The New Lexicon, Webster's Encyclopedic Dictionary of the English Language*, Canadian Edition, 1988, at 13). Obviously, therefore, the use of the expression "relatives," when coupled with that of the expression "common law partner," allows for an interpretation of section 19 which goes beyond the traditional family circle. For example, section 19 would make eligible persons such as uncles and godfathers, even though they are not mentioned in the list.⁸⁶

The decision, therefore, did not establish that Veysey and his partner in particular or that same-sex couples in general are "spouses" nor indeed that Veysey's *Charter* rights had been infringed.⁸⁷ Instead, the court

83. *Supra* note 78 at 234. I should also note that Beauregard J. distinguished *Gay Alliance* on the additional footing that the Quebec *Charter* was different than the British Columbia *Code* and that the case did not involve the principle of freedom of the press.

84. *Supra* note 79 at 303.

85. *Ibid.*

86. *Ibid.* [emphasis in original].

87. *Ibid.*

concluded only that the Commissioner had wrongly refused to exercise his discretion in considering Veysey's application and ordered him to do so. Notably, by grounding its decision on the wording of an internal document, without the status of law, the court left it open to the prison authorities to redraft the booklet with orthodox language to exclude claimants like Veysey.

III. *The Theory and Practice of the Legal Subordination of Lesbians and Gays: An Account*

Recently, the federal government announced its proposal to make "sexual orientation" a prohibited ground of discrimination under federal law.⁸⁸ The government's move was widely hailed by a variety of groups until it was discovered that a companion provision exempting family rights⁸⁹ also figured in the government's legislative plans. Reactions after the disclosure of this information ranged from outraged protestations that the government had reneged on its promises,⁹⁰ to dismissal of the package of proposals as almost worse than useless, to resigned acceptance that, politics being the art of the possible, the government's compromise was at least better than nothing.⁹¹

88. The announcement was made December 10, 1992 by then Minister of Justice and Attorney General of Canada, the Honourable Kim Campbell.

89. The Bill included a new definition of marital status, couched in opposite sex terms (s. 10). It also provided that it was no violation of the *Act* for separate pension funds or plans to be established for different groups of employees provided those employees were not grouped according to a prohibited ground of discrimination (s. 8).

90. Many of those who had pushed for inclusion of sexual orientation in the *Act* cited the fact that an all-party parliamentary committee (popularly known as the Boyer Commission) had recommended seven years earlier that such an amendment be implemented [*Report of the Parliamentary Committee on Equality Rights: Equality for All* (Ottawa: Queen's Printer, 1985)]. Upon disclosure of the government's lack of integrity. Unfortunately, these critics seemingly failed to appreciate that the position embodied in the Bill was not at all inconsistent with the position endorsed by the Boyer Commission. While the Report adopted a condemnatory attitude toward the injustices done to lesbians and gays through the denial of their equality rights, it made absolutely no mention of the spousal issue in its discussion. Likewise, in a separate chapter dealing specifically with the issue of marital and family status discrimination, no reference was made to the question of lesbian and gay couples.

91. Sheila McIntyre has pointed out to me that there is yet a third line of objection to the government's proposal, one founded more in principle than in particular complaints about family status and rights: that there is something unprincipled about the granting human rights protection with one hand while taking some of it away with the other. I do not disagree, but sense that this "principled" objection did not figure largely in popular reactions to the events in question, at least as they were reported in the mainstream media. In any event, should I be shown to be in error on this point, it would not detract from my analysis which follows.

This last response arguably recognized that the government was simply attempting to codify existing law. The family provisions did not alter the common law position that protection against discrimination on the basis of sexual orientation, whether express or implied, does not entitle lesbian and gay couples to the same kinds of privileges and benefits accorded heterosexual unions. But what seems to have been overlooked both by those who denounced the government's proposed amendments *in toto* and by those who were prepared to swallow the bitter pill of political compromise is that, by locating the source of the problem in the family provisions rather than the sexual orientation clause, they assumed that there was nothing *per se* problematic about the use of the words sexual orientation or their addition to the *Act*. Problematic enough was their implicit assumption that all lesbians and gays want to be counted as family, though of course some do, but worse still was the equally implicit assumption that the protection of the rights of unpaired lesbians and gays (or rights which are unlinked to couple issues) was somehow not at issue.

While the addition of sexual orientation as a prohibited ground of discrimination has made possible a few legal victories, they have been so random and/or qualified that it is difficult to say with much confidence that they represent a positive trend. Perhaps because of the rather less than stellar track record of the courts on the issue of equality rights for lesbians and gays, thinking about why most litigation has failed so dismally has not evolved very far beyond bald accusations of judicial homophobia. I do not doubt that "homophobia" or "heterosexism"⁹² has figured in the near consistent denial of legal entitlement to equality for lesbians and gays. Nevertheless, I do think that the charge that the courts are biased is rather lacking as an account of what has transpired to date in litigation, and none too inspiring in terms of providing a foundation for a manifesto for action in the future. A more sophisticated model for accounting for heterosexual hegemony in the legal sphere is required if it is ever to be effectively challenged.

92. I myself prefer not to use the word "homophobia" because I think it wrongly implies that the oppression of lesbians and gays is grounded in fear rather than hatred. See, for example, G. Kinsman, *The Regulation of Desire* (Montreal: Black Rose Books, 1987) at 28–29, and the sources cited in R.B. Mison, "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation" (1992) 80 Cal. L. Rev. 133, n. 103. "Heterosexism" comes closer to describing lesbian and gay oppression, conveying, as it does, the notion that such subordination is systemic and institutionalized. Something analogous to the term "misogyny" (meaning hatred of women) would best capture the nature and function of the specific social relation I have in mind, but unfortunately, no such word yet exists.

The parallels between the course of sexual orientation litigation in the United States and Canada are striking.⁹³ In the absence of explicit legislative protection against sexual orientation discrimination, for instance, American lesbians and gays similarly sought to take advantage of existing equality guarantees in federal and state human rights instruments to challenge discriminatory policies and practices. These attempts likewise attracted little judicial approbation. For example, a gay male couple that had been denied a marriage licence challenged the decision under the sex equality guarantee contained in Washington's state constitution, but to no avail.⁹⁴ Title VII's prohibition against sex discrimination was invoked unsuccessfully both by a gay man who had been fired from his job because he was gay⁹⁵ and by a man who had been refused a position because he exhibited "effeminate" characteristics.⁹⁶ Guarantees against marital status discrimination also proved of no assistance.⁹⁷ Like their Canadian counterparts, members of the American judiciary rejected these attempts to incorporate sexual orientation claims under other heads of discrimination, and by means of similar interpretive methods: the equality guarantees contained in state and federal civil rights instruments were narrowly construed, their scope circumscribed by reference to legislative intent and popular, "plain" meanings of contested language.

Whereas in the early years in Canada the only place to turn in the face of defeat was the political arena, in the United States the possibility of turning to the constitution for assistance was always open, and American litigants did not hesitate to challenge anti-lesbian and -gay laws and policies on constitutional grounds. In consequence, there is now a fairly developed jurisprudence on the scope of protection that the constitutional guarantee of equality—the Equal Protection Clause of the Fourteenth

93. I acknowledge that there are dangers in relying upon American jurisprudence, especially since the Supreme Court of Canada has specifically refrained from following American constitutional precedent on more than one occasion. See, e.g., *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979* (1985), 24 D.L.R. (4th) 536 (s. 7); and *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*] (s. 32). Such jurisprudential differences are not particularly germane to my argument at this point, although they will become so later.

94. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) [hereinafter *Singer*].

95. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

96. *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978). See also *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977) (refusal to hire transsexual not sex discrimination).

97. *Phillips v. Wisconsin Personnel Commission*, 482 N.W.2d 121 (Wis. Ct. App. 1992) [hereinafter *Phillips*] (employer's denial of family health insurance coverage to lesbian partner of employee not marital status discrimination within the meaning of the *Wisconsin Fair Employment Act*, Wis. Stat. § 111.321 (1992)).

Amendment⁹⁸—has to offer, a jurisprudence under which the politics of sexual orientation law has become quite explicit.

While strategists considered a number of constitutional provisions in the quest to secure some legal protection for lesbians and gays, more than any other guarantee, the right to privacy seemed to attract the most support. In part this undoubtedly had to do with the strong line of authority dealing with the right to privacy established by the United States Supreme Court in several landmark cases. It seemed logical to suppose that if decisions concerning abortion,⁹⁹ birth control¹⁰⁰ and marriage¹⁰¹ were constitutionally beyond the power of government to restrict, so too would be decisions concerning an individual's sexuality. As an academic matter, the promise of privacy appeared very full indeed.¹⁰² Not surprisingly, therefore, the first "gay rights case" to reach the United States Supreme Court was argued on privacy rather than equal protection grounds.

After some debate in the lower courts whether existing jurisprudence could legitimately be extended to cover private exercises of "homosexual" sexuality,¹⁰³ the opportunity to settle the law arose when a gay man named Michael Hardwick was arrested and charged with the crime of sodomy for engaging in consensual sexual relations with another adult man in the privacy of his own bedroom contrary to Georgia state law.¹⁰⁴

98. Section 1 of the Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

99. *Roe v. Wade*, 410 U.S. 113 (1973).

100. *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

101. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

102. See, for example, K. Karst, "The Freedom of Intimate Association" (1980) 89 *Yale L.J.* 624.

103. Some courts had held that the right to privacy did extend to private homosexual sexual conduct: see, e.g., *New York v. Onofre*, 424 N.Y.S.2d 566 (App. Div. 1980) [hereinafter *Onofre*]. Most courts thought otherwise (see, e.g., *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) and *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) [hereinafter *Dronenburg*]), but they attracted much critical commentary. See, for instance, H. Pearlman, "Dronenburg v. Zech: Strict Construction or Abdication of Judicial Responsibility" (1985) 12 *Hastings Const. L.Q.* 669, and R. Dworkin, "Law's Ambition for Itself" (1985) 71 *Va. L. Rev.* 173. But see A. Brooks, "Doe and Dronenburg: Sodomy Statutes Are Constitutional" (1985) 26 *Wm. & Mary L. Rev.* 645. Additionally, there was some question whether the United States Supreme Court's summary affirmation in *Doe v. Commonwealth's Attorney*, 96 S.Ct. 1489 related to the substantive or only the procedural issue at stake in the appeal: see L. Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1978) at 943.

104. Ga. Code Ann. § 16-6-2 (1984). For an excellent exegesis of the facts leading to and surrounding the prosecution of Michael Hardwick, see K. Thomas, "Beyond the Privacy Principle" (1992) 92 *Colum. L. Rev.* 1431.

Though the charges against Mr. Hardwick were eventually dropped, he was permitted to challenge the Georgia statute on constitutional grounds because, technically, he remained in danger of prosecution. The federal district court dismissed Hardwick's complaint, but this decision was reversed by the United States Court of Appeals for the Eleventh Circuit. Johnson J., writing for the majority, held that the activity in which Mr. Hardwick wished to engage was "quintessentially private" and lay "at the heart of intimate association."¹⁰⁵ The state's petition for *certiorari* was unexpectedly¹⁰⁶ granted by the United States Supreme Court.

Although the facts and circumstances of *Hardwick* seemed near perfect in terms of winning a privacy challenge, the Court dismissed Hardwick's complaint, saying there could be no fundamental right to engage in "homosexual" sodomy under the United States Constitution. According to the majority, the protection of privacy extended only to rights "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition,"¹⁰⁷ and, unlike the decision to marry or to bear or beget a child, the assertion that "homosexual" sodomy satisfied these preconditions was characterized as "at best, facetious."¹⁰⁸

Because Hardwick's claim was framed almost entirely in terms of substantive due process principles, the equal protection implications of the case were never seriously raised¹⁰⁹ and the Supreme Court failed to give much indication of its views on this issue.¹¹⁰ The idea that the Equal Protection Clause might be used to advance the civil liberties interests of

105. *Hardwick v. Bowers*, 760 F.2d 1202 at 1204 (11th Cir. 1985).

106. Y. Apasu-Gbotsu *et al.*, "Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity" (1986) 40 U. Miami L. Rev. 521.

107. *Bowers v. Hardwick*, 106 S. Ct. 2841 at 2844 (1986) [hereinafter *Hardwick*] quoting *Palko v. Connecticut*, 302 U.S. 319 at 325 and *Moore v. East Cleveland*, 431 U.S. 494 at 503.

108. *Ibid.* at 2846.

109. See L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, New York: Foundation Press, 1988) at 1431, n. 71. In fact, the equal protection issue was alluded to in a footnote of the respondent's brief, but the Court obviously chose to regard the reference as parenthetical.

110. Both Justice Blackmun (Brennan, Marshall and Stevens JJ. concurring) and Justice Stevens (Brennan and Marshall JJ. concurring) hinted that the Georgia provision violated the Equal Protection Clause of the Fourteenth Amendment. Justice Blackmun noted that although the impugned statute was cast in gender-neutral terms, the State of Georgia had defended it by stressing only its interest in criminalizing homosexual acts of sodomy, and that this raised "serious questions of discriminatory enforcement" (*supra* note 107 at 2850, n. 2). He also regarded the parallel between the criminalization of homosexual sodomy in *Hardwick* and the criminalization of mixed-race marriage in *Loving v. Virginia*, 87 S. Ct. 1817 (1976) as "uncanny" (*supra* note 107 at 2854, n. 5). In *Loving*, the Court struck down as racially discriminatory a state anti-miscegenation statute. The miscegenation analogy was also noted by Justice Stevens (*ibid.* at 2857, n. 9). The dissent's cryptic comments on *Loving* have been more fully developed by A. Koppelman, "The Misccegenation Analogy: Sodomy Law as Sex Discrimination" (1988) 98 Yale L.J. 145.

lesbians and gays was not unheard of. Indeed, by the time *Hardwick* was decided, a number of cases had been litigated under this provision,¹¹¹ some of which even involved challenges to sodomy statutes. The defeat of the privacy claim in *Hardwick* inspired renewed interest in the

111. *Childers v. Dallas Police Department*, 669 F.2d 732 (5th Cir. 1982), aff'g 513 F. Supp. 134 (N.D. Tex. 1981); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981); *Rowland v. Mad River Local School District*, 105 S. Ct. 1373 (1985), per Brennan J. dissenting from denial of cert.; *Under 21 v. City of New York*, 488 N.Y.S.2d 669 (App. Dep't 1985); *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985), rehearing denied 769 F.2d 289 (5th Cir. 1985); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) [hereinafter *National Gay Task Force*]; and *Onofre and Dronenburg* both *supra* note 103. Some of the cases were decided under the fundamental rights branch while others were decided under the suspect class branch of the Equal Protection Clause. Under the fundamental rights branch, the Fourteenth Amendment will be violated if the state singles out a group and denies them a fundamental right: See *Kramer v. Union Free School District No. 15*, 89 S.Ct. 1886 (1969); *Shapiro v. Thompson*, 89 S.Ct. 1322 (1969); and *Skinner v. Oklahoma*, 62 S.Ct. 1110 (1942). Complainants need not show themselves to be a member of a discrete and insular minority; state action which singles out any group for the purpose of denying it a fundamental right always attracts rigorous scrutiny. Under the suspect class branch of equal protection analysis, different levels of judicial scrutiny attach to different classifications depending upon the characteristics of the group. As explained by the Supreme Court in *City of Cleburne, Texas v. Cleburne Living Centre*, 105 S. Ct. 3249 (1985), the "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" (*ibid.* at 3254). However, when a state classifies by race, alienage or national origin, strict scrutiny of the state action is justified because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" (*ibid.*, citing *McLaughlin v. Florida*, 85 S.Ct. 283 at 288 (1964) and *Graham v. Richardson*, 91 S.Ct. 1848 (1971)) and because such discrimination "is unlikely to be soon rectified by legislative means" (*ibid.*). Legislative classifications based on gender are subject to a "heightened standard of review," requiring that the classification be substantially related to a sufficiently important government interest in order to survive, because gender "generally provides no sensible ground for differential treatment" (*ibid.*) and because classifications based on gender are "very likely to reflect outmoded notions of the relative capabilities of men and women" (*ibid.* at 3255, citing *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982) and *Craig v. Boren*, 97 S. Ct. 451 (1976)). For classifications based on grounds other than race, alienage, gender, *et cetera*, the Supreme Court has developed the four criteria, listed *infra*, to assist in determining whether heightened or strict scrutiny is justified.

potential of the Fourteenth Amendment,¹¹² but the promise of the equal protection guarantee was never fully realized. The very ideology that governed the loss in *Hardwick* also proved controlling in the anti-discrimination context.

At issue in *Padula v. Webster*¹¹³ was an FBI policy of considering “homosexual” conduct a significant factor in employment decisions. Margaret Padula applied for a position as a special agent and ranked fairly well on screening tests. Background checks, however, revealed that Padula was a “practising homosexual” who, while she did not “flaunt” her sexual orientation, was open and unembarrassed about it. When Padula was unsuccessful in securing a position with the FBI, she filed suit alleging that her right to equal protection had been denied.¹¹⁴

The FBI argued that its hiring policy focused only on “homosexual” conduct and not on “homosexual” status. Padula countered with the

112. Paradigmatic of the academic literature in which the equal protection approach was advocated is a note which appeared in the *Southern California Law Review* in 1984 (H. Miller II, “An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality” (1984) 57 S. Cal. L. Rev. 797). Relying upon the fourfold criteria of suspectness, the author argued that historical, sociological and psychomedical evidence demonstrated that homosexuals fit the Fourteenth Amendment notion of the kind of group deserving of heightened scrutiny where laws single them out for discriminatory treatment. There has, of course, been some dispute over what the criteria of suspectness are or should be (see, for example, J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 150ff) but at the same time there has been general agreement amongst academics that some form of heightened scrutiny of anti-homosexual laws is appropriate under the Fourteenth Amendment. See, e.g., E. Chaitin & R. Lefcourt, “Is Gay Suspect?” (1973) 8 Lincoln L. Rev. 24; J. Friedman, “Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation” (1979) 64 Iowa L. Rev. 525; Note, “The Constitutionality of Laws Forbidding Private Homosexual Conduct” (1974) 72 Mich. L. Rev. 1613; J.W. Hawarth, “The Rights of Gay Prisoners: A Challenge to Protective Custody” (1980) 53 S. Cal. L. Rev. 1225; Note, “Homosexuals’ Right to Marry: A Constitutional Test and A Legislative Solution” (1979) 128 U. Pa. L. Rev. 193; and D. Barnhardt, “*Commonwealth v. Bonadio*: Voluntary Deviate Sexual Intercourse—A Comparative Analysis” (1981) 43 U. Pitt. L. Rev. 253. See also Note, “The Constitutional Status of Sexual Orientation: Homosexuality As A Suspect Classification” (1985) 98 Harv. L. Rev. 1285.

In spite of the academic consensus that had been building on this point, the judiciary tended to view the matter differently. Before 1987, not a single court was willing to recognize homosexuals as a suspect or quasi-suspect class. See, e.g., *Singer*, *supra* note 94; *People v. Santibanez*, 154 Cal. Rptr. 74 (Ct. App. 1979); *National Gay Task Force*, *supra* note 111; *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) [hereinafter *Rich*]; *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985); and In *Re Opinion of the Justices*, 530 A.2d 21 (N.H. Sup. Ct. 1987).

113. 822 F.2d 97 (D.C. Cir. 1987) [hereinafter *Padula*].

114. The Equal Protection Clause of the Fourteenth Amendment is binding on the federal government (and therefore the FBI as a federal state actor) as part of the due process clause of the Fifth Amendment. See *Bolling v. Sharpe*, 74 S.Ct. 693 (1954), and *Weinberger v. Wiesenfeld*, 95 S.Ct. 1225 (1975).

assertion that the distinction between “homosexual” conduct and orientation was specious because “homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status.”¹¹⁵ The court, however, eschewed the idea that the distinction was relevant for the purposes of the appeal since the policy, as framed, targeted “homosexuals” defined as persons who engage in “homosexual” conduct: the only question was whether practising “homosexuals” constituted a suspect or quasi-suspect class. In spite of its claim that it was deciding only the narrow issue before it, the court went on to pronounce on the status question anyway, citing *Bowers v. Hardwick*¹¹⁶ in support. In its view, *Hardwick* implicitly answered the equal protection issue when it found that the Georgia sodomy statute met the rational basis test. The court continued:

It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.¹¹⁷

The following year, the Ninth Circuit took a different and more restrictive view of the Supreme Court’s *Hardwick* decision. In *Watkins v. United States Army*,¹¹⁸ Perry Watkins, a longtime member of the forces, was discharged on the basis that he was an admitted “homosexual.” Watkins had enlisted in the army in 1967. A pre-induction medical form inquired whether he had any “homosexual” tendencies, which Watkins answered in the affirmative. The army nevertheless found that he qualified for admission and Watkins was subsequently inducted.

Eight years later in 1975, the army convened a board of officers to determine whether Watkins should be discharged on the basis of his “homosexual” tendencies. His commanding officer testified that Watkins was “the best clerk I have ever known,” that he did a “fantastic job” and that his “homosexuality” did not affect the company. The board unanimously decided that Watkins should be retained, as there was no evidence that “his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance.”¹¹⁹ In

115. *Supra* note 113 at 102.

116. *Supra* note 107.

117. 822 F.2d 97 at 103.

118. 847 F.2d 1329 (9th Cir. 1987) [hereinafter *Watkins*].

119. *Ibid.* at 1331.

1977, Watkins applied for but was denied a position in the Nuclear Surety Personnel Reliability Program because of his previous admission concerning his sexual orientation. After Watkins' commanding officer requested that he be re-qualified for the position, citing his excellent qualifications, the decision to deny his application was reversed. Finally, in 1979, Watkins' security clearance was revoked as a result of yet another investigation into his sexual orientation. Nonetheless, Watkins was permitted to remain in the armed services. When the army issued a new regulation in 1981 mandating the discharge of all "homosexuals," regardless of the length or quality of their service, Watkins was finally dismissed.

Watkins contested his discharge in federal court arguing that it violated his right to the equal protection of the laws under the Fifth Amendment.¹²⁰ The Ninth Circuit upheld Mr. Watkins' claim, finding that the regulations under which he was discharged were unconstitutional as *prima facie* discriminating on the basis of sexual orientation. Justice Norris, writing for the majority, found that the regulations targeted "homosexual" orientation in itself, and went far beyond proscriptions against "homosexual" conduct.¹²¹ He disagreed with the D.C. Circuit ruling in *Padula* that the issue of "homosexual" status was determined in *Hardwick*, and preferred to read the Supreme Court's decision more narrowly as deciding only that same-sex sexual conduct fell outside the purview of the Constitution.¹²² Since Watkins' dismissal was in fact solely premised upon his admission of "homosexual" orientation, the court found that the army had impermissibly discriminated against him.¹²³ In the result, Norris J. struck down the regulation and ordered the Army to consider Watkins' application for re-enlistment without regard to his sexual orientation.

A number of courts have had occasion to consider the divergent opinions in *Padula* and *Watkins*. Various anti-gay and -lesbian provisions have been subjected to judicial review, including the denial of prison visits for same-sex partners,¹²⁴ and employment policies against the

120. See *supra* note 114.

121. In a footnote, Justice Norris explained that by "conduct" he was referring to sexual activity, and by "orientation" a desire for such activity (*supra* note 118 at 1330, n. 1).

122. The *Padula* rationale was adopted by Judge Reinhardt in dissent (*supra* note 118 at 1354ff).

123. It is of considerable note, however, that a rehearing was granted on the issue of whether Watkins was really a psychologically committed, though celibate, homosexual, or whether he had indeed been a practising homosexual at the relevant time. See *Watkins v. United States Army*, 847 F.2d 1362 (9th Cir. 1988).

124. *Doe v. Sparks*, 733 F.Supp. 227 (W.D. Pa. 1990)

hiring or retention of “homosexuals” in the military and other like employment contexts.¹²⁵ Of the courts that have considered the issue, only the district courts of Wisconsin and California followed the more liberal *Watkins* approach, with both limiting the sphere of “conduct” unprotected by the Equal Protection Clause. In *BenShalom v. Marsh*, Justice Gordon read *Hardwick* as limiting the application of strict scrutiny review to those classifications which fell below the level of criminal sodomy.¹²⁶ Justice Henderson came to a similar conclusion in

125. See, e.g., *Todd v. Navarro*, 698 F. Supp. 871 (S.D. Fla. 1988); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989); *Doe v. Sparks*, *ibid.*; and *Steffan v. Cheney*, 733 F. Supp. 121 (D.D.C. 1989), rev'd 920 F.2d 74 (D.C. Cir. 1990) (allegation that plaintiff had engaged in homosexual conduct never made).

126. *BenShalom v. Marsh*, 703 F.Supp. 1372 (E.D. Wis. 1989) [hereinafter *BenShalom*]. After reviewing the decisions in *Hardwick* and *Padula*, Gordon J. concluded that they could “only be reasonably construed as standing for the proposition that classifications are not subject to strict scrutiny when defined by homosexual conduct that rises to the level of criminal sodomy” (*ibid.* at 1379, citing *Doe v. Casey*, 796 F.2d 1508 at 1522 (D.C. Cir. 1986)), a holding which he admitted was reasonable (*ibid.* at 1380). But as to whether a distinction could legitimately be drawn between status and conduct, Justice Gordon commented:

The Secretary has continuously characterized homosexuals as a group defined by the desire and intent to engage in criminal acts of sodomy. Yet not one shred of evidence has been presented to the court to show that homosexuals as a group share a compelling desire to commit that particular form of sexual conduct. The court is asked by the Secretary to hold that homosexual orientation is inherently intertwined with a desire and intent to commit criminal acts of sodomy. To do so is to create a class based on prejudicial notions of what homosexuals are supposedly like. (*ibid.* at 1379)

Homosexual status, he went on to find, did constitute a suspect class deserving of strict scrutiny. Having established the appropriate standard of review, Justice Gordon examined the army's regulation, found it constitutionally wanting, and struck it down. The net result was that the army was ordered to continue Sgt. BenShalom's enlistment without regard to her sexual orientation.

High Tech Gays.¹²⁷ Both *BenShalom* and *High Tech Gays*, however, were overturned on appeal,¹²⁸ thus joining the seventh and the ninth circuits to the first, tenth, federal and D.C. circuits in giving effect to the *Padula* ruling. To make matters worse, even the Ninth Circuit cast some doubt on the precedential authority of its earlier decision in *Watkins* when, following the release of Justice Norris' opinion, the army successfully petitioned for a rehearing.¹²⁹ The Army argued that even if Justice Norris had been correct in drawing a constitutional distinction between conduct and orientation, the facts indicated that *Watkins*' claim fell on the prohibited side of the constitutional divide: new evidence disclosed that Sgt. *Watkins* actually had engaged in "homosexual" conduct. Adopting an approach reminiscent of the Supreme Court of Canada in *Gay Alliance*¹³⁰ and the Federal Court of Appeal in *Veysey*,¹³¹ the full court managed to avoid addressing the central issue of whether the status/behaviour distinction was well-founded, and held that the army was equitably estopped from discharging *Watkins*: having been aware of his admitted "homosexuality" for many years, it would be inequitable to allow the military to found his dismissal on something which it had condoned for some fifteen years.

It is difficult to say with any certainty whether the *Watkins* approach or the *Padula* approach will eventually prevail. Although subsequently

127. *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987) [hereinafter *High Tech Gays*]. In finding that classifications based on homosexuality were to be subject to a heightened standard of review, Justice Henderson distinguished *Hardwick* not only on the basis that it did not deal with the appropriate standard of scrutiny to be applied under the Equal Protection Clause to provisions aimed at homosexual status, but also because it "did not address the issue of all homosexual activity" (*ibid.* at 1370). He held that any classification which disadvantages lesbians and gay men because of any homosexual sexual activity or preference would be subject to a heightened standard of review:

Hardwick does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other. Nor does *Hardwick* address such issues as whether lesbians and gay men have a fundamental right to engage in homosexual activity such as kissing, holding hands, caressing, or any number of other sexual acts that do not constitute sodomy under the Georgia statute. *Hardwick* simply did not address the issue of discrimination based on sexual orientation or sexual preference itself. (*ibid.* at 1370–71)

In the result, he found that the Department of Defense's policy could not pass even the standard of rational review and enjoined the Department from subjecting the plaintiffs to expanded investigations, mandatory adjudications or any other procedures based on their sexual orientation or homosexual activity.

128. *Benshalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) and *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

129. 875 F.2d 699 (9th Cir. 1989).

130. *Supra* note 41.

131. *Supra* note 79.

there seems to have been very little unqualified support for the view taken in the original *Watkins* decision, at the same time, it is possible to confine the scope of the decisions of its detractors quite narrowly. In *Padula* itself, for instance, Silberman J. noted that it was unnecessary to engage in the conduct/orientation debate on the facts of that case since Margaret Padula had openly acknowledged that she had lesbian sex and had no inclination to refrain from doing so in the future. Since it was completely unnecessary to determine whether constitutional protection was possible for pure status claims, the court's remarks in this regard can be regarded as *obiter* and unbinding. Much the same can be said of those cases which follow *Padula*: in every instance except for *BenShalom*, sexual conduct on the part of complainants clearly existed or could be inferred. Unsuccessful litigants either admitted that they were "practising homosexuals"¹³² or that they were involved in a sexual relationship at the relevant time,¹³³ or failed or refused to claim that they were celibate.¹³⁴ More to the point, I suppose, a growing number of commentators have argued quite convincingly that the *Padula* ruling is plainly wrong, legally speaking.¹³⁵ Even so, it seems unlikely that laws curtailing lesbian and gay sexual expression are going to be reviewed under a higher standard than simple rationality, and conversely, that the most lesbian and gay litigants can expect to get from the constitution is heightened review for status discrimination.

In Canada, of course, there has yet to be any authoritative appellate pronouncement as to whether the provisions of the *Charter* embody a similar guarantee of the right to privacy¹³⁶ (nor has there been any attempt to have private sexual acts declared constitutionally protected),¹³⁷ and our equality jurisprudence has not been complicated by the notion that different types of discrimination should be subject to different levels of

132. *High Tech Gays*, *supra* note 127, and *Watkins*, *supra* note 118.

133. *Todd v. Navarro*, *supra* note 125.

134. *BenShalom*, *supra* note 126, and *Woodward*, *supra* note 125.

135. As a technical matter, *Hardwick* should have had an impact on only the fundamental rights branch of equal protection analysis and not the suspect class branch. See, e.g., T. Prince, "Webster v. Doe: Toward Constitutional Protection of Gays Against Governmental Discrimination" (1989) 16 *Hastings Const. L.Q.* 639; C. Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection" (1988) 55 *U. Chi. L. Rev.* 1161; T. Rich, "Sexual Orientation Discrimination in the Wake of *Bowers v. Hardwick*" (1988) 22 *Ga. L. Rev.* 773.

136. The opportunity arose in *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.), but with the exception of Wilson J., the Court declined to take advantage of it.

137. But see *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163 (Ont. C.A.) (offence of gross indecency does not unconstitutionally restrict freedom of expression).

review.¹³⁸ Apart from these juridical differences, and despite the fact that the specific discourse of “orientation” or “conduct” has not yet been deployed by judges, there are indications, sometimes subtle but at other times quite overt, that the same tension about the meaning and social status of “homosexual” sexuality marks Canadian case law.

For instance, criminal law regulation of “homosexuality” “activity” played a crucial role in Mr. Wilson’s fight against the University of Saskatchewan.¹³⁹ There, the issue was whether it was acceptable to permit an admitted—indeed militant—“homosexual” into the public schools to teach. Perhaps because Mr. Wilson’s claim raised the stereotypical spectre of “homosexual” child molestation, Johnson J. thought it appropriate to discuss the relevance of the *Criminal Code*. He suggested that, because the Trudeau amendments¹⁴⁰ merely carved out an exception to what was otherwise *per se* criminal activity, there could be no human rights protection for lesbians and gays:

It is also noteworthy that in recent years the public attitude to homosexuality and lesbianism has undergone a marked change. It is a far cry from the days of Oscar Wilde. The Criminal Code . . . has been amended to permit homosexual activities between consenting adults. If the Legislature had intended the word “sex” . . . to cover homosexuality or lesbianism, it ought to have said so in express language, and its failure to do so confirms my view that it did not so intend.¹⁴¹

Although not always as explicit, the fact that “homosexual” sexuality was punishable under federal penal law was also a central point of contention in the *Gay Alliance* case. Indeed, it was over the relevance of such crimes that the disagreement between those who allowed GATE’s claim and those who denied that “homosexuals” were at all entitled to seek legal relief from acts of discrimination took shape.

The Board of Inquiry characterized the issue before it as one involving a tension between “values.” On the one hand, it accepted the importance of ensuring the protection of “those basic concepts of decency and propriety” which are fundamental to “a civilized way of life.” Equally vital to the mature community, however, was the protection of citizens whose “difference” attracted acts of discrimination fostered by pre-

138. Of course, the very considerations that go into determining the appropriate standard of review under the American Bill of Rights simply enter into the Canadian constitutional calculus at a different location in the analysis, namely, under the application of section one of the *Charter*.

139. *University of Saskatchewan*, *supra* note 11.

140. The *Criminal Law Amendment Act, 1968–69*, S.C. 1968–69, c. 38, s. 7.

141. [1976] 3 W.W.R. 385 at 389–90. This passage was quoted with approval in *Vogel*, *supra* note 17 at D/1658.

conceived and unreasonable “suspicion, fear, intolerance or hatred.”¹⁴² Those values came into conflict, presumably, when what defined difference was indecency. To avoid such a clash, the Board drew the following distinction:

Acceptance of people for what they are does not require that society at the same time encourage or promote homosexuality or convert those who are not naturally so inclined. To recognize and respect the beliefs or practices of others without necessarily agreeing or sympathizing with them is to show the sort of tolerance that is the mark of a truly civilized and mature society.

So it is that we can safely conclude that the acceptable standard of decency which we wish to maintain is in no way threatened or challenged by our taking, as a society, a tolerant and mature approach to those homosexuals who are not breaking the law and who seek only the right to live normally in society without fear of persecution or discrimination.¹⁴³

Having defined the sphere of human rights protection to which “homosexuals” were entitled in a manner distinctly akin to the reasoning of Norris J. in *Watkins*, the Board turned to the particular facts of the case:

there is nothing of an indecent, lascivious, or improper nature contained anywhere in [the tendered advertisement]. Apart from a general theme of urging all homosexuals to recognize themselves as a first step towards greater public acceptance, the publication does not purport to advocate homosexual activity for all members of society nor does it purport to counsel heterosexuals to change their way of life. Nothing in the paper could be considered illegal. Nothing in the paper advocates nor counsels the commission of an illegal act by any person.¹⁴⁴

Like Silberman J. in *Padula*, the majority of the Court of Appeal felt that the fact that “homosexuals” engage in criminal acts was determinative of GATE’s claim. In the words of Branca J.A., there were good and reasonable grounds why “homosexuals” are discriminated against:

One may well consider that the *Criminal Code* [ss. 157 and 158] of our country defines the commission of an act of gross indecency by one person with another, as a crime punishable with imprisonment. . . . One, too, may well consider that under our *Immigration Act* . . . homosexuals are classed as undesirables, together with prostitutes and persons living on the avails of prostitution and pimps, all of whom are within the prohibited classes. If one bases a bias against homosexuals because they are persons who engage in unnatural sexual activity which may make them guilty of a serious crime in certain circumstances and because they are forbidden entry into Canada as undesirable, can one say that such a bias, if it is arrived at for those reasons, is unreasonable? I would not think so.¹⁴⁵

142. *Re Vancouver Sun and Gay Alliance Toward Equality*, *supra* note 35 at 498.

143. *Ibid.* [emphasis added].

144. *Ibid.* at 502.

145. *Ibid.* at 494–95.

Whereas the Board of Inquiry, by stressing the fact that not all activities engaged in by “homosexuals” are unlawful, implicitly relied upon various legal prohibitions or regulations of “homosexuality” to establish the outer boundaries of human rights protection of lesbians and gays, Branca J.A. explicitly invoked these same provisions to support his view that discrimination against “homosexuals,” irrespective of the context in which the discrimination took place, was reasonable, justifiable and legal, so long as “honestly entertained.”¹⁴⁶ Thus for him, it was neither bigoted nor discriminatory for the *Vancouver Sun* to refuse to publish GATE’s ad: anti-discrimination law was never intended to place “criminal perverts” on a par with others who unfairly suffered at the hands of the irrational majority.

Parting company with his colleagues, Seaton J.A. held that the fact of public law regulation of “homosexuals” and their activities was completely beside the point. Invoking the special nature of human rights statutes (foreshadowing the characterization of such legislation as quasi-constitutional by the Supreme Court in the years that followed¹⁴⁷) it was his view that statutory law outside the human rights context was not relevant to the determination of human rights issues:

The policies behind federal statutes governing immigration are not indicative of the policies exemplified in provincial human rights legislation. Indeed, for many years Canadian immigration policies were based on types of discrimination that the *Human Rights Code* rejects. Nor is the *Criminal Code* of help to the appellant’s case. The amendments of recent years have quite changed the law respecting acts which the appellant suggests are committed by homosexuals.¹⁴⁸

Although in its decision the Supreme Court of Canada focused on a different aspect of the appeal, the relevance of “homosexuality” also factored in the reasoning of both Laskin C.J. in dissent and Martland J. for the majority.¹⁴⁹ Although he would have upheld the Board’s decision, the Chief Justice framed his otherwise sympathetic analysis with a statement of facts suggesting that his tolerance, like that of the Tribunal, was qualified. He emphasized that GATE, “an association of homosexuals, men and women, whose main object is to protect the societal and legal

146. *Ibid.* at 495. He distinguished “honest” bias from that derived from “base views” or based on “spite, malice or bad faith.”

147. See *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

148. *Supra* note 35 at 503.

149. *Supra* note 41.

interests of its members and to advance their claim to equality of treatment with all other members of society,"¹⁵⁰ was a lawful association and that the content of the advertisement which it sought to place was in no way illegal. What the Chief Justice intended to convey in making this distinction is not exactly clear, although one would imagine that, having read the reasons of the adjudicators below, he too was concerned with the undoing of the criminal law by extending human rights too far.

Recalling that the majority saw the real issue as one of freedom of expression, one can be forgiven for wondering why Martland J. *et alia* did not acknowledge that the speech rights of the Gay Alliance were also at issue. A brief passage from the judgment suggests that GATE's ad was envisioned as an act, not as expression, or at the very least as the kind of expression which public law will not protect. According to him, the ad promoted subscriptions to *Gay Tide*; *Gay Tide* propagated the views of GATE; and GATE's purpose was "to establish recognition for the thesis that homosexuality is a valid and legitimate form of human sexual and emotional expression in no way harmful to society or the individual and completely on a par with heterosexuality."¹⁵¹

That anti-discrimination law could protect "homosexuals" who were not breaking the law or otherwise thrusting their sexuality on the otherwise tolerant heterosexual majority was equally evident in *L'Association A.D.G.Q.*¹⁵² Although Beauregard J. appreciated that "homosexuality" was a practice condemned by the highest authorities of the Catholic Church—an attitude with which he sympathized¹⁵³—he concluded that since neither the group's activities nor the School Commission's complaint were conduct-based, the claim should be allowed. The Commission could not take advantage of the Quebec *Charter's* exemption for non-profit, religious or education institutions:

In the present case, respondent has decided to offer the general public the rental of its buildings. Respondent has even granted leases to non-Catholic churches and atheist or agnostic political parties. On the fringes of this more or less commercial practice I see no connection between the respondent's religious or educational character and its decision to exclude the petitioner association as a lessee on account of the ideas which this group advances.¹⁵⁴

150. *Ibid.* at 580.

151. *Ibid.* at 586–87.

152. *Supra* note 78.

153. *Ibid.* at 234.

154. *Ibid.* at 233.

In keeping with some American authority that simple expressions of “homosexual” identification are protected,¹⁵⁵ the court allowed the claim but signalled that the scope of protection might prove very narrow indeed. By placing such a heavy emphasis on the fact that all the Association sought to do was to get together and talk, the court conveyed a distinct impression that non-verbal activities (dancing, public displays of affection, parenting, sex) would not be protected under the *Charter*, the purported illegality of sexual orientation discrimination notwithstanding.

Efforts to secure spousal benefits (or their equivalent) have, in recent years, become the mainstay of lesbian and gay litigation. Although a small but significant number of these attempts to secure equal employment benefits have met with some success, most such claims have been rejected.¹⁵⁶ Of course, concerns regarding the role of family in reproduction and in the transmission of cultural values undoubtedly play some part in the denial of such claims, as does simple resistance to the idea that “homosexual” unions are no different in substance from traditional heterosexual pairings. But because the possibility or existence of a sexual relationship has long been acknowledged as a central element of the spousal relationship,¹⁵⁷ spousal claims can also be conceptualized around sexuality. Indeed, the point was conceded by an expert witness in

155. See *Gay Activists Alliance v. Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981); *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977); and J. Gómez, “The Public Expression of Lesbian/Gay Personhood as Protected Speech” (1983) 1 *Law & Ineq.* 121. See *contra Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb. 1986); *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) [hereinafter *Pruitt*]; and *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980), *aff’d* on other grounds (*sub nom. Ben-Shalom v. Secretary of Army*) 826 F.2d 722 (7th Cir. 1987). For a critique of the *BenShalom* decision see G. Caldwell, “The Seventh Circuit in *Ben-Shalom v. Marsh*: Equating Speech with Conduct” (1991) 24 *Loy. L.A. L. Rev.* 421.

156. For American examples of this trend, see *Hinman v. Department of Personnel Administration*, 213 Cal.Rptr. 410 (Ct. App. 1985); *Phillips*, *supra* note 97; *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Matter of Estate of Cooper*, 564 N.Y.S.2d 684 (Sur. Ct. 1990); *Beaty v. Truck Insurance Exchange*, 8 Cal.Rptr.2d 593 (Ct. App. 1992) and *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

157. See, e.g., *Corbett v. Corbett*, [1970] 2 W.L.R. 1306 at 1324: “[S]ex is clearly an essential determinant of the relationship called marriage.” Also see *Gajamugan v. Gajamugan* (1979), 10 R.F.L. (2d) 280 (Ont. H.C.J.) (incapacity to consummate due to psychological revulsion at prospect of having sex with wife adequate grounds for annulment). But see *Norman v. Norman* (1979), 9 R.F.L. (2d) 345 (Ont. U.F.C.) (impotence on part of husband not adequate grounds for annulment where wife entered marriage for purposes of companionship). See also the cases cited in B. Hovius, *Family Law* (Toronto: Carswell, 1987) at 61–62.

Andrews v. Ontario (Minister of Health).¹⁵⁸ To the extent, then, that a claim for recognition of spousal status requires the implicit recognition and condonation of spousal conduct (*i.e.*, sex), these challenges do not, by and large, succeed because they amount to demands for validation of the unacceptable and intolerable part of “homosexual” existence. They are not, to put it another way, orientation or status claims.

It is true that some such spousal claims have met with success in the courts and before tribunals, but of those that have, none has actually gone as far as to assert fully and without qualification that lesbian and gay couples are on a legal par with heterosexual ones.¹⁵⁹ In Timothy Veysey’s case,¹⁶⁰ it is noteworthy that he did not attempt to describe his relationship with Mr. Beu as familial or spousal. Drawing on the correctional authority’s description of the visiting programme,¹⁶¹ which noted that the purpose of the programme was to foster “the maintenance of family ties and the preparation of inmates for their return to life in the community outside the penitentiaries,”¹⁶² Veysey argued that, to the extent that the programme was only available to families, the programme itself discriminated on the basis of sexual orientation in violation of section 15 of the *Charter*.

The trial court as well as the Court of Appeal underscored the point that Veysey’s position was not that his relationship with Mr. Beu was spousal, but that there was no good reason why the visiting programme, given its purpose, should have been limited to inmates in spousal relationships. In other words, because there was no connection between the goals of the programme and limiting its availability to persons in heterosexual relationships, the programme discriminated against “homosexuals” in violation of the constitutional guarantee of equality. By framing his case this

158. *Supra* note 62. On this point, see D. Herman, “Are We Family?: Lesbian Rights and Women’s Liberation” (1989) 28 Osgoode Hall L.J. 789 at 798. See also R. Eblin, “Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)” (1990) 51 Ohio St. L.J. 1067 at 1069, and A. Friedman, “The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family” (1988) 3 Berkeley Women’s L.J. 134.

159. I have already registered my concern with the *Knodel* case, *supra* note 82. I do not think it necessary to adopt a contrived reading of the case in order to make it fit my thesis, especially since it remains a legal anomaly. Nonetheless, I maintain that it fits the pattern that “orientation” cases succeed while conduct claims do not because, insofar as the plaintiff’s lover, Mr. Garneau, had passed away, the claim was essentially an abstract status plea for recognition of a relationship that was in many important respects, no more.

160. *Supra* note 79.

161. Established pursuant to section 27 of the *Penitentiary Service Regulations*, C.R.C., c. 1251.

162. 29 F.T.R. 74 at 75.

way, Veysey avoided any contentious equation between heterosexual and “homosexual” relationships and hence any claim that gay sexuality was on a par with heterosexual sexuality. Consequently, there was no need to probe the intimate details of Veysey’s and Beu’s life together. In contrast to other spousal claims, the two court decisions in *Veysey* emphasize only that the partnership was Veysey’s “most supportive relationship.”¹⁶³ This was the only real fact of relevance in the circumstances, given that the root purpose of the programme was to smooth an inmate’s re-integration into the community upon release. Veysey’s de-emphasis of sexuality made possible his victory, such as it was.¹⁶⁴

Viewed through the lens of the American experience, Canadian cases seem to map the controversy over whether “homosexuals” should be entitled to legal protection against discrimination, and if so, to what extent. With the addition of sexual orientation as a prohibited head of discrimination under human rights law and its recognition as an analogous ground under the *Charter*, the *Padula* rationale has become virtually untenable, and the debate over whether “homosexuals” are at all deserving of equality rights seems at last to have come to a close. These reforms have not, however, dislodged the ideological substrate of dominant thinking about lesbians and gays and their place in society. Whatever society might think about “homosexuals” who self-present as no different in any meaningful respect from heterosexuals, sexuality is a different matter.

Admittedly, this “sexuated” reading of the case law is but one of several possible ways of conceptualizing the jurisprudence. Even so, I maintain that it is a very useful way of interpreting how and why the courts deal with lesbian and gay equality claims as they do. It is simply not the case, for instance, that the state of equal protection doctrine in the United States is a product of the *Hardwick* decision: Fourteenth Amendment equality cases predating the Supreme Court’s decision exhibit the very same antipathy toward the “sex” issue.¹⁶⁵ Similarly, concerns about “homosexual conduct” are beginning to appear in American decisions under non-federal instruments¹⁶⁶ which specifically prohibit sexual ori-

163. *Ibid.*

164. See my discussion of the legal limitations of *Veysey*, text accompanying notes 84–87.

165. See, e.g., *National Gay Task Force*, *supra* note 111; *Baker v. Wade*, *supra* note 112, and *Gay Activists Alliance v. Lomenzo*, 320 N.Y.S.2d 994 (Sup. Ct. 1971).

166. For a listing of such American state and municipal instruments, see B. Case, “Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays” (1989) 7 *Law & Ineq.* 441.

entation discrimination,¹⁶⁷ and in current efforts to prevent the passage of such measures or to have them repealed.¹⁶⁸ The very same divisions between status and act can be seen in other contexts. For instance, in 1982, before most of the cases I have reviewed were launched, Professor Douglas Schmeiser wrote that there is a legitimate distinction to be drawn between “sexual orientation and activity,” and that as the sexual activities of heterosexuals are sometimes curtailed, “it would be remarkable if the law would give greater protection to homosexual behaviour than to heterosexual.”¹⁶⁹ Similarly, published accounts of the legislative reform process in Ontario¹⁷⁰ and Massachusetts,¹⁷¹ reveal that legislatures, like courts, are preoccupied with the problem of “homosexual” sex. The debates evidence concern whether anti-discrimination protections could be misconstrued as condoning rather than simply tolerating “homosexuals” generally (and thus as encouraging the disintegration of the nuclear family and concomitantly an increase in the number of “homosexuals”), and insulating child molestation and the spread of AIDS from legal

167. Two cases decided pursuant to the Minneapolis Municipal Ordinance prohibiting discrimination on the basis of “sexual preference” exhibit this trend. In *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. Ct. App. 1985) a gay man was expelled from an exercise club, ostensibly for engaging in offensive conduct. Rejecting the club owners’ contentions that the plaintiff had engaged in explicit sexual misconduct, or that his actions were “effeminate and done in an obviously homosexual manner,” the court concluded the “[h]omosexuals must have the same right to do a quick, impulsive dance step in a public place as other members of society” (*ibid.* at 788). See also *Potter v. LaSalle Court Sports & Health Club*, 384 N.W.2d 873 (Minn. Sup. Ct. 1986), similarly finding that the plaintiff had not engaged in “conduct” of any sort and holding that “[a] right to converse with another in a public place should not and cannot be predicated solely upon an individual’s sexual orientation” (*ibid.* at 876).

168. Attempts to roll back or pre-empt protection for lesbians and gays through the use of referenda or ballot initiatives have been the subject of litigation in Colorado, Oregon, Massachusetts and California. See, for example, *Citizens for Responsible Behavior v. Superior Court*, 2 Cal.Rptr.2d 648 (Ct. App. 1992) [hereinafter *Citizens for Responsible Behavior*]; *American Civil Liberties Union of Oregon, Inc. v. Roberts*, 752 P.2d 1215 (Or. Sup. Ct. 1988); *City of Takoma Park v. Citizens for Decent Government*, 483 A.2d 348 (Md. Ct. App. 1984); *Collins v. Secretary of the Commonwealth*, 556 N.E.2d 348 (Mass. Sup. Ct. 1990); and *Baker v. Keisting*, 822 P.2d 1162 (Or. Sup. Ct. 1991). In *Citizens for Responsible Behavior*, for example, the initiative accused the Mayor and City Council of Riverside of using the word “sexual orientation” to disguise the question whether homosexual conduct should be protected.

169. D.A. Schmeiser, “The Problems of Human Rights Activity and the Challenges of the 1980s” in G.L. Gall, ed., *Civil Liberties in Canada: Entering the 1980s* (Toronto: Butterworths, 1982) 96 at 106.

170. For an account of the Ontario process, see B. Ross, “Sexual Dis/Orientation or Playing House: To Be Or Not To Be Coded Human” in Stone, *supra* note 155, 133.

171. For an account of the process in Massachusetts, see P. Cicchino *et al.*, “Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill” (1991) 26 Harv. C.R.-C.L. L. Rev. 549.

proscription in particular. But perhaps most tellingly, the bifurcation between acts and status has long been part of social—not just legal—discourse about “homosexuality.” It can be seen, to cite one example, in the ordination debates, where the question has been framed as whether so-called non-practising “homosexuals” should be permitted to become ministers.¹⁷²

IV. *A Way Forward: Toward a Jurisprudence of Power*

Placed within its historical context, the effort to achieve statutory reform indeed made a great deal of intuitive sense: once the possibility that other extant guarantees, such as “sex” and “marital status,” might be interpreted to protect lesbians and gays against discrimination was foreclosed, it was rational to assume that the enumeration of “sexual orientation” as a proscribed ground of discrimination in the *Canadian Human Rights Act* and other like statutes would offer lesbians and gays the legal protection they so obviously lacked and so desperately needed. The lobby to secure the enumeration of “sexual orientation” as an explicitly prohibited ground of discrimination in Canadian human rights instruments emerged, then, as the strategy of choice in the struggle for lesbian and gay legal equality.

If proponents of legal reform began to cast their claims to equality in the very terms law established for them, they are not necessarily to be criticized, from the vantage that the present provides, for having done so. Foucault himself recognized that, even if sexual identity was produced in and through discourse, it was possible for sexuality itself to “speak in its own behalf, to demand that its legitimacy or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.”¹⁷³ Indeed, it was his view that no dis-

172. A brief overview is provided in P. Girard, “Sexual Orientation as a Human Rights Issue in Canada 1969–1985” (1986) 10 *Dalhousie L.J.* 267 at 278.

173. Foucault, *supra* note 3 at 101. Much the same position on the logic of social transformation has been articulated, in the legal arena, by Professor Crenshaw:

The possibility for . . . change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it.

See K. Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101 *Harv. L. Rev.* 1331 at 1367 (footnote omitted).

Crenshaw drew largely on the work of Piven and Cloward in making her argument. They argued that struggles for emancipation are produced by and challenge the systems which create those very conditions of inequality which spark resistance. See F.F. Piven & R.A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Vintage Books, 1977) at 22–25.

course, including those the self-proclaimed end of which is to disrupt the prevailing order and effect a redistribution of rights and obligations, lies beyond the parameters of and unaffected by power. There could be no pure liberatory or counter-discourse, no unadulterated dominant discourse, no clear space within or without the operation of power's terms.¹⁷⁴ Confronting power in its modern manifestation implied not only that revolution of the grand sort was unattainable, but also that liberatory struggles could not proceed on the basis of static, unmalleable programmes that assumed an unshifting, rigid power to be reckoned with:

Discourses are tactical elements or blocks operating in the field of force relations; there can exist different and even contradictory discourses within the same strategy; they can, on the contrary, circulate without changing their form from one strategy to another, opposing strategy. We must not expect the discourses on sex to tell us, above all, what strategy they derive from, or what moral divisions they accompany, what ideology—dominant or dominated—they represent; rather we must question them on the two levels of their tactical productivity (what reciprocal effects of power and knowledge they ensure) and their strategic integration (what conjunction and what force relationship make their utilization necessary in a given episode of the various confrontations that occur).¹⁷⁵

Insofar as contemporary litigation reveals that the struggle for legal equality did not end with the enumeration of sexual orientation as a prohibited ground of discrimination, the movement to secure legislative amendments now seems a less than sanguine line of contest. Even where recognition of lesbians and gays as a protected group was formally secured, adjudicators have construed such protections in a circumscribed way, and in particular, have read in the proviso that sexual orientation rights protect not “homosexual conduct,” but only “homosexual status.” The enumeration of sexual orientation proved not to be the final chapter in the chronicle of law's sure movement toward emancipation, not the happy closure of the narrative of law's progress, but the establishment of new epistemic terrain for the juridical “scaling”¹⁷⁶ of the “homosexual” body. The question now is how or whether to strategize within and around this new legal space into which “the homosexual” has been interned.

174. M. Foucault, “The Subject and Power” in H.L. Dreyfus & P. Rabinow, eds., *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) at 208.

175. Foucault, *supra* note 3 at 101–02.

176. I. Young, “The Scaling of Bodies and the Politics of Identity” in I. Young, *Justice and the Politics of Difference*” (Princeton: Princeton University Press, 1990) 122.

Critical Legal Scholars would, I suppose,¹⁷⁷ have no trouble demonstrating that the judicial construction of sexual orientation equality guarantees is an easy, perhaps quotidian, illustration of the indeterminate character of legal rights and of the legitimating function of law and law reform.¹⁷⁸ But the conclusion drawn from this demonstration—that law should be “trashed,”¹⁷⁹ and engagement with it ceded—seems unsatisfactory, both as a matter of theory and as a matter of practicality. Anti-rights arguments oftentimes assume a rather romantic posture in relation to liberatory efforts outside the legal field: law is portrayed as shot through with power while the province of “politics” is envisioned as somehow more pure, less corrupt, and therefore the preferred venue in which to wage social struggle. Largely unacknowledged and untheorized in these CLS accounts is how power seems also to have contaminated extra-legal and non-institutional domains. For sexual orientation, as for race, this is a theoretical gap of no small consequence.¹⁸⁰ As well, the idea that lesbians and gays should disabuse themselves of the notion that law is a worthwhile site of contest¹⁸¹ and accept that law will inevitably prove limited and limiting seems, even in utilitarian terms, somewhat of an indulgence.¹⁸² For a constituency so long denied even the most rudimen-

177. I am somewhat loathe to ascribe a position to any group, composed as groups are of many different individuals with varying views and politics. That said, I hope that my comments here do not do a complete injustice to the work of those connected to CLS.

178. See, for example, M. Tushnet, “An Essay on Rights” (1984) 62 *Tex. L. Rev.* 1363. Tushnet argues that rights are unstable and indeterminate, and that their use tends to reify experience and impede the advance of progressive social forces. See similarly, P. Gabel, “The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves” (1984) 62 *Tex. L. Rev.* 1563.

179. See M. Kelman, “Trashing” (1984) 36 *Stan. L. Rev.* 293.

180. See Crenshaw, *supra* note 173.

181. The same argument has been made within communities of colour. See, for example, Crenshaw, *supra* note 173, and P. Williams, “Alchemical Notes: Reconstructing Ideals From Deconstructed Rights” (1987) 22 *Harv. C.R.-C.R. L. Rev.* 401.

182. The Women’s Legal Education and Action Fund conducted community consultations with lesbians at three different locations in Canada (Vancouver, Toronto and Halifax) in the late spring and early summer of 1992, one object of which was to discuss and strategize around the problem of the conduct/orientation distinction. Even after having been presented with evidence that “sexual orientation” had not been interpreted broadly, some participants were nonetheless of the view that the pursuit of equality in the courts on sexual orientation grounds should remain the pre-eminent strategy. They took this position because they believed that, given the long history of denying even formal recognition of lesbian and gay rights, it was symbolically important to press for and litigate anti-discrimination claims under a specifically lesbian and gay head.

tary civil liberties,¹⁸³ rights are not so easily relinquished. Whatever its shortcomings, the enumeration of "sexual orientation" has made possible legal redress for certain forms of discrimination, redress which was unavailable before the moment of reform.

The issue, then, is not so much whether to use law but how,¹⁸⁴ and the claim I would like to make here is that the particular terms in which most litigants have cast their claims, and in which most commentators have suggested they do so, have contributed to, perhaps even retrenched, the

183. The point should be underscored that express recognition of the illegality of discrimination against lesbians and gays was first introduced in one province in 1977, and did not gain any widespread legislative support until the late 1980s. See *supra* note 8. It also bears repeating that where lobbyists have succeeded in achieving statutory reforms, public groundswell of support for their repeal has been partly successful. See *supra* note 168. The indignity of having been refused such basic legal protections is compounded when one considers as well the phenomenon of lesbian and gay bashing. The National Gay & Lesbian Task Force Policy Institute issues annual reports on the nature and extent of anti-lesbian and -gay violence. The 1988 report (*Anti-Gay/Lesbian Violence, Victimization & Defamation*) indicated that of those surveyed, 44.2 percent reported that they had been threatened with violence, 27.3 percent had had objects thrown at them, 19.2 percent had been punched, hit, kicked or beaten, and 9.3 percent had been assaulted with a weapon. See also G.D. Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991); and G.M. Herek & K.T. Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Newbury Park, Calif.: Sage Publications, 1992).

184. Lesbians and gays might well want to reconsider using the terminology of "sexual orientation" in future efforts to secure statutory protection against discrimination, at least in those jurisdictions which have so far declined or neglected to enact specific guarantees for lesbians and gays in their human rights codes. For a sustained argument supporting such an approach, see D. Majury, "Lesbian Inequality" (unpublished manuscript on file with the author). Where, however, "sexual orientation" has already been statutorily recognized as a prohibited ground of discrimination, short of pushing for legislative amendments, the more pressing matter concerns how to litigate claims under the rubric of existing guarantees in a way that avoids the barriers to full recognition of equality rights which the courts have so far erected. How this might be achieved is the question that occupies the remainder of this paper.

very foundations of law's circumscription of sexual orientation rights.¹⁸⁵ One might say that the legal and factual positions most litigants have presented to the courts have effectively ceded the sexual terrain in favour of securing what benefits law's recognition of "homosexual" orientation might yield. They are, or attempt to be, in other words, status claims.¹⁸⁶ At stake in this is not just the limitations of engagement with the legal calculus, but the conceptual foundations of equality law and its application in the sexual setting. As a general matter, most sexual orientation claims have emphasized that there exists a broad continuum of shared experience between heterosexuals and "homosexuals." They consist, that is, in appeals to sameness and denials of difference. These appeals find expression in various forms, the first of which concerns the conceptual frame within which equality determinations are made. Under the "similarly situated" test of equality, an excluded group is awarded protection against discrimination provided it is "like" an included group which has suffered no deprivation; if it does not resemble the preferred or favoured group in material respects, there is no obligation to treat it in a similar way.¹⁸⁷ This model of equality has a substantial pedigree, and has almost

185. Space does not permit me to explore how the circumscription of "homosexual" sex might be implicated in differences of "homosexual" self-identification across the categories of, for instance, gender and race. There has been some debate amongst lesbians over how important sex is to lesbian identity, a debate which was intensified by the publication of Adrienne Rich's "Compulsory Heterosexuality and Lesbian Existence" (1980) 5 *Signs* 631. Rich argued for the concept of a "lesbian continuum," on which all women who identified with women could place themselves. Some complained that the continuum unduly downplayed the erotic aspect of lesbianism, and in so doing, buttressed dominant de-sexualized imagery of lesbians. See, for example, C. Bearchell, "Why I Am A Gay Liberationist: Thoughts on Sex, Freedom, the Family and the State" (1983) 12 *R.F.R.* 57 and the debates in *Love Your Enemy? The Debate Between Heterosexual Feminism and Political Lesbianism* (London: Onlywomen Press, 1981). Consequently, the legal notion that sex is unrelated to lesbian identity or that ceding of sexuality as ground for legal struggle is acceptable would in all likelihood be a matter of serious concern for lesbians for reasons stemming from the difference gender makes to identification as "homosexual." There is now also an emerging literature on the interaction between sexual and racial identity that might likewise bear on the soundness of the conduct/orientation distinction. See, for example, E. Hemphill, ed., *Brother To Brother* (Boston: Alyson Publications, 1991); R. Fung, "Looking for My Penis: The Eroticized Asian in Gay Video Porn" in Bad Object-Choices, ed., *How Do I Look?* (Seattle: Bay Press, 1991) 145; K. Mercer, "Looking for Trouble" in H. Abelove et al., *The Lesbian and Gay Studies Reader* (New York: Routledge, 1993) 350; A. Cornwell, *Black Lesbian in White America* (Tallahassee, Fla.: Naiad Press, 1983); and M. Silvera, ed., *Piece of My Heart* (Toronto: Sister Vision Press, 1991).

186. Many American commentators have actually advocated that litigants follow this precise path. See, e.g., M. Fink, "Washout on the Road to Equal Protection: *Watkins v. U.S. Army*" (1989) 1 *Det. C.L. Rev.* 243; and A. Leonard, "*Watkins v. United States Army* and the Employment Rights of Lesbians and Gay Men" (1989) 40 *Lab. L.J.* 438.

187. A more thorough enunciation of the similarly situate approach to equality can be found in the seminal article by J.T. Tussman & J. tenBroek, "The Equal Protection of Laws" (1949) 37 *Cal. L. Rev.* 341.

completely dominated North American legal thinking since relations of inequality became a matter of serious legal concern. In 1988, the Supreme Court of Canada rejected this Aristotelean approach to equality in favour of what is sometimes referred to as the dominance or anti-subordination model.¹⁸⁸ Before the Supreme Court effected this shift in *Andrews v. Law Society of British Columbia*,¹⁸⁹ it was not uncommon for litigants to phrase their claims in “similarly situated” terms, nor was their tendency to do so particularly exceptional. What is noteworthy is that even after equality law underwent what arguably was a transformation of profound dimensions, many sexual orientation equality claims have continued to reference sameness as the paragon of equality entitlement.

Of course, reference to the similarly situated test will not be found in the post-*Andrews* caselaw, but arguments in the pre-*Andrews* style seem not to have lost their allure. In the early 1980s,¹⁹⁰ the proscription of sexual practices and/or their representation, as exemplified in the *Body Politic* trials¹⁹¹ and the bath house raids, occupied the lesbian and gay legal field. Sexual difference in this era figured quite prominently. By the late 1980s, by contrast, “homosexuals” were portrayed as exhibiting the qualities of decency, respectability and sexual circumspection,¹⁹² in short, as a class not decidedly distinct from heterosexuals and wrongfully stereotyped as sexually odd or different. That the types of cases which have been brought forward have shifted so markedly in the direction of spousal or family claims is evidence of this, as is the way those claims themselves have been framed. It has become, for example, almost *de rigueur* to highlight emotional and economic ties over sexual ones, or if the existence of a sexual relationship is mentioned at all, it is almost

188. See, e.g., R. Colker, “Anti-Subordination Above All: Sex, Race and Equal Protection” (1986) 61 N.Y.U. L. Rev. 1003.

189. [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

190. See *R. v. Pisces Health Spa* (1981), 63 C.C.C. (2d) 427 (Alta. C.A.); *Re Hislop and The Queen* (1983), 43 O.R. (2d) 208 (C.A.); and *R. v. Carvalho* (1981), (Alta. Prov. Ct.) [unreported].

191. See *R. v. Pink Triangle Press* (1979), 45 C.C.C. (2d) 385 (Ont. Prov. Ct.), rev’d (1980), 51 C.C.C. (2d) 485 (Ont. Co. Ct.), aff’d (*sub nom. R. v. Popert*) 58 C.C.C. (2d) 505 (Ont. C.A.).

192. I should note that the trend may once again be reversing itself. Invoking recent Supreme Court of Canada precedent in support [*R. v. Butler*, 1 [1992] S.C.R. 452 (upholding the constitutionality of the obscenity provisions in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 163(8))], the police recently have seized sexually explicit lesbian and gay magazines such as *On Our Backs* from lesbian and gay bookstores, and charged bookstore personnel with distributing obscene materials. It remains to be seen whether these prosecutions will effect a shift in the public self-representation of lesbians and gays, away from the “just like you” image toward a more sexually rebellious one.

always escorted by the point that it is monogamous in nature.¹⁹³ Typically, one learns that the couple has pledged fidelity to one another, engaged in joint acquisition of material goods, and intertwined their finances. Consider, for instance, the description of the relationship of the plaintiff and his deceased lover in *Knodel*:

They exchanged wedding bands to symbolize their love and commitment towards each other. Their relationship was both known and supported by their family members and friends. Mr. Garneau's parents gave them a vacation in Reno as a gift in 1988. They took vacations together whenever they could. In 1985, they drove to the United States on a four-day trip. In 1986, they visited Mr. Garneau's parents in Vancouver Island, visited Long Beach and visited the petitioner's parents in Kamloops. In 1987 and 1988, they travelled to Reno together for one week each time.¹⁹⁴

It would seem that from such descriptions of these rather idyllic relationships the only rational conclusion to be drawn is that but for the fact that it is two women or two men who comprise the couple, the union is no different in substance or form from (romanticized) heterosexual ones,¹⁹⁵ and should be protected for that reason.

No less popular have been appeals to etiological accounts of "homosexuality." Sexual orientation, like race or sex, is portrayed as trait acquired very early in life, perhaps even before birth (through the genetic complement passed on by the parents to the fetus), and hence beyond the reach of individual will. Behind the invocation of these theories of origin lies a notion of fairness: there is a certain inequity, so the argument goes, in burdening individuals with social disadvantages on the basis of traits in relation to which they can exercise no meaningful choice or control. An obsession with difference, with deviation from the norm, seems to be what drives efforts to fathom how it is that certain individuals do not evolve naturally into heterosexuals as most do, but somehow develop a queer sexual inflexion. It would appear to follow, moreover, that ideas of etiology and notions, not of sameness, but of difference, are inextricably intertwined. Immutability arguments are, however, also a form of sameness argument insofar as they attempt to render irrelevant the difference which

193. Mr. Veysey, of course, could make no such claim since he had been imprisoned for committing a sexual assault.

194. *Knodel*, *supra* note 17 at 361.

195. Lest it need be said, the point is not to denigrate these choices, or to suggest that lesbians and gays who choose to conduct their relationships in this way have somehow sold out. Nevertheless, I agree with Ruthann Robson [*Lesbian (Out)Law: Survival Under the Rule of Law* (Ithaca: Firebrand Books, 1992)] that, to the extent law recognizes and extends its protections only to lesbians (and gays) who comport themselves according to its standards, law establishes a division between "good" and "bad" "homosexuals," a division that should be rejected.

seems to set “homosexuals” apart. Sexual minorities, like racialized and gendered minorities—indeed, like heterosexuals of all descriptions—are “simply born that way” and “cannot help themselves.” Not only is it thus unjust to castigate “homosexuals” when all the will they might muster would not alter the course nature has chosen for them, but discrimination against “homosexuals” is predicated on a mistaken notion that, unlike everyone else, they have elected to be different and are the masters of their own unfortunate fate. Immutability theories, then, operate a double gesture, introducing “homosexual” difference and sameness in one complex movement.

Some critics of the jurisprudence have distanced themselves from at least certain strains of these litigative strategies, but nonetheless continue to operate within the sameness and difference bipolar frame. Carl Stychin, for instance, criticizes proponents of the immutability thesis for their investment in naturalized notions of identity, notions which fix identity with a transcendental quality it does not possess and which freeze the number of different identities qualifying for legal recognition.¹⁹⁶ Similarly, in her deft attempt to tackle the act/status distinction, Janet Halley acknowledges that “homosexual” and heterosexual identities bear “real, material importance” but refers to them nonetheless as “rhetorical

196. C. Stychin, “A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination” (1994) 17 Dalhousie L.J. 61.

categories” or “facilities”¹⁹⁷ in order to avoid imputation that they spring full-blown from the natural world.¹⁹⁸

Both Stychin and Halley attempt to deal constructively with the concept of difference as it figures in struggles for legal emancipation, although they do so in diametrically opposed ways. For Stychin, liberation (at least of the constitutional variety) lies in a brand of pluralism where ever proliferating identities received legal recognition. Canada constitutes fertile ground for this postmodern constitutionalism to grow,

197. J. Halley, “Reasoning About Sodomy: Act and Identity In and After *Bowers v. Hardwick*” (1993) 79 Va. L. Rev. 1721.

198. Most legal commentators acknowledge that the evidence regarding the immutability of “homosexuality” is less than conclusive, although most share the view that it is exceedingly difficult to change. For my purposes, this distinction is without meaningful consequence. See, e.g., J. Jefferson, “Gay Rights and the *Charter*” (1985) 43 U.T. Fac. L. Rev. 70 at 83: “Whether homosexuality is an immutable characteristic is debatable. . . . [C]ommon sense makes one wonder why anyone would choose to adopt a life style traditionally abhorred and widely reviled.” See also Leopold & King, *supra* note 54. For American commentary adopting essentially the same view, see J.C. Hayes, “The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After *Bowers v. Hardwick*” (1990) 31 B.C.L. Rev. 375 at 457, 460; Note, “The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification” (1985) 98 Harv. L. Rev. 1285 at 1302–03; E.R. Arriola, “Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority” (1988) 10 Women’s Rts. L. Rep. 143 at 154–55; T. Rich, “Sexual Orientation Discrimination in the Wake of *Bowers v. Hardwick*” (1988) 22 Ga. L. Rev. 773 at 802; and K. Lasson, “Civil Liberties for Homosexuals: The Law in Limbo” (1985) 10 U. Dayton L. Rev. 645 at 656. See *contra* Herman, *supra* note 158; Ryder, *supra* note 5; M.A. Coles, “The Case for Gay Rights” (1989) 9 Hamline J. Pub. L. & Pol’y 237 at 247–48; R.J. Magnusson, “Civil Rights and Sexual Deviance: The Public Policy Implications of the Gay Rights Movement” (1989) 9 Hamline J. Pub. L. & Pol’y 217 at 224–27; C. Calhoun, “Denaturalizing and Desexualizing Lesbian and Gay Identity” (1993) 79 Va. L. Rev. 1859; and D.R. Ortiz, “Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity” (1993) 79 Va. L. Rev. 1833.

The notion that the very category “homosexual” is the creature of social/political/historical forces, as such having no fixed or transcendent meaning, seems to have been more readily accepted outside the legal context. See, for example, J. D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago: University of Chicago Press, 1983); J. Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet Books, 1977); Kinsman, *supra* note 92; L. Faderman, *Surpassing the Love of Men* (New York: Morrow, 1981); and Foucault, *supra* note 3. Although my comments here are entirely speculative, I imagine that the immutability view has won out over the social constructionist view in the legal setting because it is the dominant view in the scientific community, because people think it works, and because of the persistence of the idea that immutability has something to do with entitlement to equality. Additionally, taken to its extreme, the social constructionist view threatens the very idea that there has always been or should continue to be such a thing as a lesbian and gay community in need of legal protection. See J. D’Emilio, “Making and Unmaking Minorities: The Tensions Between Gay Politics and History” (1985–86), 14 N.Y.U. Rev. L. & Soc. Change 915 at 920–21:

To [prove that we are a minority subject to discrimination] one would at least have to demonstrate convincingly a history of discrimination. This task is feasible if we restrict

given the character of its relationship to itself as a nation-state¹⁹⁹ and the open ended structure of the *Charter of Rights and Freedoms*. Indeed, it would appear to be his view that the decision in *Haig*,²⁰⁰ acknowledging sexual orientation as an analogous ground of discrimination under section 15, exemplifies this promise.²⁰¹

Whereas Stychin would celebrate difference in all its fabulous variety, emancipation for Halley seems to reside in the calculated obliteration of difference as a term of constitutional reference. She notes how the *Hardwick*²⁰² Court equivocated on the relationship between act and identity in its consideration of the constitutionality of Georgia's sodomy statute. This lack of coherence provided the Court with the necessary conceptual fluidity to deploy the category "homosexual" differently at different points in the judgment in the service of homophobic power, but it also, in her view, revealed the heterosexual subject position to be the shifting and provisional one it is. This dual instability provides an occasion and location for "homosexuals" to break the legal bonds which tether them to an identity despised for its difference. She suggests, in short, that sexual minorities should disengage with difference and forge an alliance with heterosexuals along the axis of acts.

ourselves to the last generation. . . . A minority must exist before it can be oppressed, but a socially-defined, self-conscious homosexual minority simply does not exist very far back in the nation's past. . . . [C]entral 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. The identity and the oppression are bound together. It is not deeply ironic and troubling that a strategy which relies on civil rights laws is a strategy which strengthens the categories that allow a system of oppression to continue?

See similarly, A.B. Goldstein, "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Harwick*" (1988) 97 Yale L.J. 1073 (arguing that the Supreme Court was mistaken when it held that there were ancient prohibitions against homosexuals).

199. Stychin, *supra* note 196 at 67:

Postmodern national identity has a particular relevance to Canadian nationalism. The success of Canada as a postmodern state is tied to its failure as a "modern" nation.

....

From this provisionality in the Canadian identity there may be found within the fabric of Canadian life a greater willingness to incorporate new social movements and identities in terms of national citizenship.

200. *Supra* note 81.

201. *Supra* note 196 at 71:

The general approach adopted by the courts and its specific application to discrimination on the basis of sexual orientation suggests a willingness to recognize emergent identities within constitutional discourse and to protect those who so identify themselves through the equality guarantees of the *Charter*.

202. *Supra* note 107.

To the extent that available decisional law can be regarded as good evidence, it would appear not only that the courts conceptualize sexual orientation claims in terms of the sameness/difference paradigm, but also that such notions of similarity and dissimilarity are intricately bound up with the doing/being distinction created by them. Similarity exists, if at all, only insofar as the desire to commit acts is never acted upon; only, that is, in the register of orientation. Difference of the problematic, relevant kind is the desire that cannot be contained and erupts into "conduct." What marks "homosexuals" as "homosexual," as creatures distinct from heterosexuals, is their engagement in same-sex sexual practices. Deeply embedded within law's vivisection of "homosexual" bodies into the things they want and the things they do, the sameness/difference model has proved resistant to attempts to deploy it strategically.

Assertions that "homosexuals" are just like "heterosexuals," for instance, whether supported by a substantial body of factual evidence, cast in the legal terminology of similarity of situation, or buttressed by scientific study into origins and causes, are typically summarily dismissed. Emotional commitment, sexual fidelity, and financial interdependence does not a family make: for all the talk of wills, insurance policies, and vacations, judges by and large have been unwilling to characterize lesbian or gay couples as "family" or "spouses" like heterosexual couples. So too, the courts have almost without exception rejected claims that "homosexuals" are similarly situated to heterosexuals, and usually in tones which suggest that the divide between these two groups is so self-evident as to be a matter of common sense.²⁰³ Even when couched in terms of nonvolitional preference, sameness arguments have not garnered much judicial sympathy or support. Although some courts have embraced the immutability thesis advanced by litigators,²⁰⁴ most judges insist that the evidence is less than clear that "homosexuality" is fixed at birth or at an early age,²⁰⁵ implying that "homosexuals" could

203. See, e.g., *Andrews*, *supra* note 62 at 263: "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 to support for their children whether born in wedlock or out and for their spouses" (emphasis in original).

204. See *University of Saskatchewan*, *supra* note 11, and the trial decision in *Veysey*, *supra* note 79, as well as the factum filed on behalf of the plaintiff in *Andrews*, *supra* note 62. For American cases in which the immutability of homosexuality is endorsed see *Rich*, *supra* note 112; *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991); *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C. App. 1987); and *High Tech Gays v. Defense Industrial Security Clearance Office*, 909 F.2d 375 (9th Cir. 1990).

205. *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986); *High Tech Gays*, *supra* note 127; and *Woodward v. United States*, *supra* note 125.

change were the spirit a measure more willing and the flesh not quite so weak. Indeed, if there have been instances where the courts have lent sexual orientation discrimination claims their full due, they have been occasions where the traces of “homosexual” difference raised by such claims were so fine as to be virtually non-existent. Suits involving decontextualized abstract pleas for legal protection,²⁰⁶ or complaints of so-called reverse discrimination launched by spurned heterosexuals,²⁰⁷ for example, seem to fare best.

Judicial denials that “homosexuals” are sufficiently similar to heterosexuals to warrant legal protection are not always so conclusory or untextured. Simple factual assertions of similarity have not prevented the courts from forcing difference out of the closet, as it were, requiring sex to speak its truth, and turning the courtroom into an epistemic space not unlike the confessional. After Watkins’ victory, several American litigants sought to take advantage of the Ninth Circuit’s finding that status claims would be subject to strict scrutiny review. At times, this involved engaging in procedural maneuvers which, if successful, would prevent information regarding the litigants’ sexual practices from becoming part of the record. For instance, Dusty Pruitt filed her constitutional challenge against the Navy before its investigation into her discharge was completed in the obvious hopes that her case would go forward without there being any evidence of her having “practised” as a “homosexual.”²⁰⁸ Joseph Steffan tried more or less the same thing when he refused to answer questions regarding his sexual practices during the deposition stage of his litigation.²⁰⁹ But sexual “realities” are not so easily concealed. Joseph Steffan was ordered to answer the military’s questions on pain of having his case dismissed, and when he refused to do so, the court made good on its threat. Pruitt was forced to put her claim on hold while the Navy completed its investigation.

206. *Haig*, *supra* note 81. To be fair, the decisions of both the trial court and the Court of Appeal focused on the situation of Joshua Birch. Mr. Birch, who had been a member of the armed forces for some five years, was informed by his superiors that he would no longer qualify for promotions, postings or further training when it became known that he was a “homosexual.” His military career, in other words, was effectively over. Mr. Birch has since committed suicide.

207. See, for example, *Green v. Howard University* (reported in *Legal Times* (19 January 1992) 21) (\$140,000 in damages awarded to heterosexual woman fired because she was not a lesbian). See similarly *Jantz*, *supra* note 203, *rev’d* on different grounds 976 F.2d 623 (10th Cir. 1992) (married heterosexual man with children denied right to equal protection of laws when denied job because he was wrongly perceived to be homosexual).

208. *Pruitt*, *supra* note 155.

209. *Steffan*, *supra* note 125.

Likewise, the strategic use of etiological theories has been subject to a perverse judicial inversion. In *Watkins*,²¹⁰ sameness (in the form of non-volitional preference) grounded its holding that “homosexual” status, but not conduct, deserved the highest level of scrutiny available under the Equal Protection Clause, but in *Padula*,²¹¹ difference (also in the form of immutability) grounded its holding that discrimination against “homosexuals” should only be subject to rational review. In the view of the *Padula* court, “homosexual” conduct is as beyond conscious control as “homosexual” orientation. Thus, both conduct/orientation proponents and its detractors subscribe to etiological accounts of “homosexuality” that draw on immutability thinking: on the “liberal” view, simply being queer cannot be helped but acting on it can, while on the latter, being “homosexual” and doing “homosexual” things are so inextricably intertwined that it would be fictive to suggest that the former is amenable to conscious control but the latter is not. Compassionate courts may hold that “homosexuals” deserve protection since (alas) they are not able to control who they turned out to be, but courts inimical to the idea of “gay rights” may just as easily invoke the notion that because “homosexuals” have no power to alter their “essence,” there can be little place in the constitutional constellation for them.

Insofar as Professors Stychin and Halley have formulated theoretical approaches to litigation in terms of the sameness/difference paradigm, they have not confronted and cannot avoid the limits which inhere in that model. Stychin’s account of law’s embrace of ever proliferating identities seems to assume that laws plays no constitutive role in molding those identities even as it admits them within its protective sweep. Consequently, he does not advert to the fact that certain practices of the flesh remain subject to legal interdiction, that “sexual orientation” has delivered less protection, as a practical matter, than it seemed to promise. Halley’s formula for change has the advantage of confronting the difficulty with the circumscription of sexual orientation rights. But it is, at its core, contradictory and reformist. If the heterosexual/homosexual division is as deeply embedded within social and political life, indeed within our very epistemological and ontological structures, as she suggests,²¹² it is difficult to image how highlighting the fact that both heterosexuals and “homosexuals” practise sodomy would be sufficient to dislodge it. Moreover, her proto-deconstructive move amounts to little more than an inversion of the very strategy already unsuccessfully

210. *Supra* note 118.

211. *Supra* note 113.

212. *Supra* note 197 at 1723–26.

attempted in the courts: whereas litigants have pressed for sameness in the register of being, Halley suggests pressing for sameness in the register of doing. Hence, instead of challenging sameness/difference as an appropriate and efficacious model by which to determine questions of (in)equality, positing an essential similarity, either along the plane of orientation, as most litigants have done, or along the axis of acts as Halley counsels, or making difference plural and therefore in some sense costless as Stychin seems to suggest, amount to maneuvers within the very conceptual space law has mapped out and used in subordinating ways.²¹³

What seems to be missing from the “laundered image”²¹⁴ strategy pursued by litigants, the postmodern constitutionalism advanced by Stychin, and the reversal of sodomitical reasoning proposed by Halley is the critical interrogation of why same-sex sex is an anathema. In part, reliance upon the sameness/difference conceptual frame accounts for this omission: where entitlement to equality is measured in terms of similarity, dissimilarity merely figures as a conclusion, not a question. The immutability approach, for example, by purporting to excuse only those differences which are a product of biological happenstance, never questions why differences which are not (or not only) subject to conscious choice are undeserving of legal protection. Likewise, the similarly situate analysis rests content to assert that “difference” is sufficient to justify discrimination without ever problematizing the notion of “difference” in the first place.²¹⁵

In *Andrews*,²¹⁶ the Supreme Court of Canada laid down a framework for the determination of inequality claims that effected a paradigmatic shift from the sameness/difference approach that had previously guided determinations of questions of discrimination, and that continues to infuse most thinking on sexual orientation equality rights. Openly distancing itself from American thinking about equality, and in particular,

213. Professor Halley might be forgiven for her uncritical acceptance of the sameness/difference paradigm, given its entrenchment in Fourteenth Amendment jurisprudence. For an earlier attempt of hers to use the process-based model of the Equal Protection Clause productively, see J. Halley, “The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity” (1989) 36 UCLA L. Rev. 915.

214. I am indebted to Professor Douglas Sanders of the University of British Columbia for coining this phrase.

215. The point was put most eloquently by MacKinnon when she said that the “difference approach misses the fact that hierarchy of power produces real as well as fantasied differences, differences that are also inequalities” (C.A. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 37).

216. *Supra* note 189.

the similarly situated test of equality entitlement,²¹⁷ the Court opted instead for a test of equality that took as its central point of reference the experience of those groups named in the text of section 15 itself.²¹⁸ Later, in *R. v. Turpin*,²¹⁹ the Court clarified that it was the mark of legal, social and political subordination that distinguished those groups for whom the guarantee of equality was intended and by reference to which the existence of discrimination was to be determined.²²⁰

In combination, *Andrews* and *Turpin* arguably established a new, more substantive, paradigm for understanding equality²²¹ under which lesbian and gay discrimination claims might be differently, and perhaps more productively, framed. The Court's rejection of similarity of situation as the proper measure of the (in)appropriateness of discriminatory treatment has made both "homosexual" sameness and "homosexual" difference largely irrelevant to the constitutional equation. It matters not whether lesbian and gay couples form stable fulfilling unions just like the ones heterosexuals create together, whether some "homosexuals" see fit to engage in sex with members of their own sex (irrespective of whether

217. *Ibid.* at 167: "[M]ere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights." See also McKinney, *supra* note 93 at 279, *per* La Forest J.: "I do not believe that the similarly situated test can be applied other than mechanistically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*."

218. *Supra* note 189 at 173–76.

219. [1989] 1 S.C.R. 1296.

220. [1989] 1 S.C.R. 1296 at 1331–32.

[I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

221. It is not my intention here to describe in any great detail the current state of constitutional equality jurisprudence since it has already been done by others and because it seems a divergence from the trajectory of my argument. It should be acknowledged, however, that I take a particularly optimistic view of the potential of section 15, a view which I myself have not always held wholeheartedly [see M. Eaton, "Comment: *Andrews v. Law Society of British Columbia* (1990) 4 C.J.W.L. 276] and with which others will surely disagree. For commentary on *Andrews*, see D. Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1991) 4 C.J.W.L. 407; D.W. Elliott, "Comment on *Andrews v. Law Society of British Columbia* and Section 15(1) of the *Charter*: the Emperor's New Clothes?" (1989) 35 McGill L.J. 235; A.F. Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms: *Andrews*, *Workers' Compensation Reference*, *Turpin*" (1990) 1 Supreme Court L.R. (2d) 503; M. Gold, "Comment: *Andrews v. Law Society of British Columbia*" (1989) 34 McGill L.J. 1063; W. Black & L. Smith, "Note" (1989) 68 Can. Bar Rev. 591; and C. Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States" (1990) 39 U.N.B.L.J. 111.

their sexual styles map those of heterosexuals), or whether the desires they conceal or celebrate stem from divine design, hormonal happenstance, or conscious choice: at the level of determining entitlement to equality, these observations and arguments are constitutionally inconsequential.

Given that the discourse of “homosexual” sameness and difference has been so instrumental in the juridical subordination of “homosexuals” as the undeserving minority, the *Andrews* rejection of that discourse constituted a jurisprudential moment of no small importance. But rather than expelling considerations of sameness and difference from constitutional equality entirely, *Andrews* resituated those considerations: the Court recognized that classification of the different is a mode by which relations of inequality are produced and reproduced. It is in this sense most especially that *Andrews* has made possible a critical evaluation of “homosexual” inequality because, in recognizing that it is through the discourse of difference that inequality is put into play and immunized from critique, it has created the jurisprudential space to analyze “homosexual” sex, not as a site of difference but as a site of dominance. Within that analysis neither assumed problems with “homosexual” sex nor the standard objections to it—that it is abnormal, unhealthy, immoral, the outward symptom of arrested psychic development—suffice to rationalize discrimination; grounded as they are in discriminatory notions themselves, such rationales serve to reinforce domination.²²² If “homosexual” sex is to remain outside the protective purview of the constitution, the law now permits lesbians and gays to pose the question just why that is so and demands that they be provided with a straight, so to speak, answer.

In saying this, I do not mean to suggest that the anti-subordination paradigm for understanding and determining matters of (in)equality has been safely ensconced in the jurisprudence and is there for litigants to take ready advantage. For instance, although “immutability” has yet to be expressly endorsed by the Supreme Court²²³ as a requirement in making out claims under section 15, there are some indications that it has become indirectly injected into the constitutional calculus. Even in some of the more forward thinking judgments of the Supreme Court released after

222. See the reasons of Wilson and L’Heureux-Dubé JJ. in *McKinney*, *supra* note 93.

223. Of all the members of the Court, Justice La Forest has come closest to articulating immutability as a requirement. At p. 195 of his opinion in *Andrews*, *supra* note 189, he noted:

The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

Andrews was handed down, hints at a biologicistic approach to equality are discernable.²²⁴ Nor do I mean to suggest that making use of the *Andrews* emphasis on domination will necessarily avoid the pitfalls associated with engaging with law as a tool of social transformation. But while the Court made some disturbing statements within *Andrews* itself which seemed to undercut some of its more progressive findings, and although other decisions released since contain some worrying indications that the Court either misunderstood or is backtracking from the transformative shift in equality thinking which that watershed opinion effected, it is nonetheless true that the case has yet to be explicitly overturned or qualified. Additionally, that reification of the *status quo* may always already be the result in any attempt to use law misapprehends the point: given that the struggle for civil rights does offer something to the otherwise legally dispossessed, the limited object of the enterprise is to minimize the tendency to legitimate conditions of (in)equality.

V. Conclusion

I am under no illusion that making use of the dominance model of equality rights (ostensibly) accepted by the Supreme Court of Canada will necessarily cause a paradigmatic shift in the jurisprudence of lesbian and gay (in)equality; I would not go so far as to assert that “Andrewsizing” the litigation will necessarily effect a radical transformation of the legal construction of “homosexuality.”²²⁵ Nevertheless, *Andrews* arguably has made possible the refiguration of the place of “homosexual” sex in constitutional discourse and the terms by which it must be addressed, a refiguration which has profound implications for the way that the litigation of sexual orientation equality rights might be conducted in future. The conduct/orientation, doing/being distinction need not be exploited for the small, albeit admittedly important, protection it has to offer or accepted as a sound conceptualization of “homosexuality.” *Andrews*’ granting of a jurisprudential licence to problematize the legal circumscription of “homosexuals” implies that lesbians and gays might

224. For instance, in *R. v. Hess*, [1990] 2 S.C.R. 906 at 928, the Court rejected an equality challenge to the statutory rape provision of the *Criminal Code* (R.S.C. 1985, c. C-46, s. 146) on the grounds that the offence could “only be committed by one sex.” For critical commentary on this decision, see W. Black & I. Grant, “Equality and Biological Differences” (1990), 79 C.R. (3d) 372.

225. Indeed I believe there are significant limitations embedded within the *Andrews* analytic framework, particularly insofar as its ability to deal effectively with interacting inequalities is concerned.

re-enter the constitutional arena as sexual rather than split subjects.²²⁶ More profoundly, I think, the implications of the juridical demonization of same-sex sexuality for a plural constituency marked by differences of gender, of race and so on might be made the object of critique. It may be that the very terminology of “sexual orientation” so embodies the problems identified in this paper that all the theorizing or strategizing in the world will prove fruitless to dislodge them. It may be that other guarantees apart from the promise of equality will turn out to be more responsive to the conditions, both material and ideological, which now plague lesbian and gay existence.²²⁷ And it may be that the law will offer no respite and we should get out of the courtroom and, once again, take to the streets. Yet, until the subordination thesis is seriously engaged—until, that is, the way in which power operates in relation to “sexual orientation,” to other sites of oppression, and to the intersections between them is examined—these options cannot be evaluated meaningfully.

226. Patricia Cain is similarly critical of the trend in American litigation to “ignore sex,” calling it an “absurdity” (P.A. Cain, “*Litigating for Lesbian and Gay Rights: A Legal History*” (1993) 79 Va. L. Rev. 1551 at 1641). Because of the limitations which inhere in Equal Protection jurisprudence—limitations, it bears repeating, that arguably do not plague section 15 jurisprudence—she suggests that litigants pursue substantive due process claims instead.

227. See, for example, Thomas, *supra* note 104 at 1435 (analogously arguing with respect to privacy rights that “against the backdrop of its violent political history, the substance of the constitutional claim asserted in *Hardwick* is best viewed as a right to ‘corporal integrity,’ whose textual grounding is the Eighth Amendment prohibition against ‘cruel and unusual’ punishments.”)