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### The Celebration of Same-Sex Marriage

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## THE CELEBRATION OF SAME-SEX MARRIAGE

Bruce MacDougall\*

*Cet article examine la nature du discours sur l'égalité, plus particulièrement l'égalité des personnes homosexuelles, et fait le point sur le débat actuel concernant le mariage des personnes de même sexe. L'auteur argumente que le discours juridique en la matière s'articule autour des pôles suivants : la condamnation, la compassion, le pardon et la célébration ou l'affirmation. La réalisation d'une égalité réelle (plutôt que formelle) en droit exige des progrès à chacun de ces égards. Au Canada, le discours juridique en matière de l'égalité des personnes homosexuelles a été assez fructueux sur les trois premiers plans, mais certains conflits demeurent sur le plan de l'affirmation. Le mariage, institution profondément symbolique, représente la reconnaissance par l'État de relations (hétérosexuelles) particulières. Selon l'auteur, l'ouverture de l'institution du mariage aux personnes homosexuelles constitue en quelque sorte une reconnaissance officielle de l'homosexualité et une preuve que les homosexuels et les lesbiennes se rapprochent davantage d'une égalité véritable en droit. Une telle égalité, par contre, soulève des questions politiques et juridiques nouvelles et difficiles pour les membres de ces groupes et exigent une grande introspection à l'égard de ces membres.*

*This article explores the nature of discourse about equality, in particular homosexual equality, and situates the current debate about same-sex marriage in that discourse. The author explores the idea that legal discourse about equality moves among sites that may be labeled condemnation, compassion, condonation and celebration. Achievement of real (as opposed to formal) legal equality requires advancement at each of these sites. In Canada, legal discourse about equality for gays and lesbians at the first three sites has been largely successful and contention now is at the site of celebration. Marriage is a profoundly symbolic institution, representing state celebration of particular (heterosexual) relationships. According to the author, the opening up of the institution of marriage to gays and lesbians would be a form of legal celebration of homosexuality and an indication that gays and lesbians are closer to a position of real legal equality. Such equality, however, would raise new and difficult political and legal questions for group members, necessitating much introspection for those members.*

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\* Associate Professor, Faculty of Law, UBC. The author wishes particularly to thank Robert Wintemute and Daniel Borrillo for their helpful observations and comments on the matters contained herein. The author also benefitted from the discussions held with those who attended seminars on this subject at the School of Law, King's College, London, and the Faculty of Law, UBC.

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## I. INTRODUCTION

Rather suddenly, same-sex marriage is now at the forefront of discourse about the meaning and content of homosexual equality in Canada. The ability to enter a legally recognized marriage has not until relatively recently been seen as a pressing concern for gays and lesbians, even those in committed relationships.<sup>1</sup> Why it should be the subject of discourse now, and what it represents in terms of recognition and achievement of legal equality for gays and lesbians,<sup>2</sup> is the subject of this essay. I explore the idea that legal discourse about homosexuality in Canada has moved to a site that I call celebration whence it has progressed from the sites of compassion and condonation (and the even earlier site of condemnation). Homosexuals, today legally protected from discrimination in Canada, and entitled largely to the same benefits as heterosexuals, now demand the symbolic recognition of state encouragement or celebration of their status, their sexual orientation. Among the most powerful of such recognition is that most traditional heterosexual institution in which the state has become intimately involved – marriage.<sup>3</sup> In this institution, the state has historically been involved in the celebration of heterosexuality. Its opening up so as to be a vehicle for the celebration of homosexuality would be in many ways a sign that, legally at least, gays and lesbians have moved from formal equality, the result of discourse at the sites of compassion and condonation, to real equality. Denial of access to gays and lesbians to the social institution of marriage, even in the context of offering an “alternative” such as registered domestic partnership,

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<sup>1</sup> In Canada, the literature on same-sex marriage has been thin until recent years and often buried in the context of longer discussions of homosexuals and homosexuality and the law. See J.A. Yogis, R.R. Duplak & J.R. Trainor, eds., *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons* (Toronto: Emond Montgomery, 1996); K.A. Lahey, *Are We “Persons” Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999). Lahey deals with marriage specifically only briefly but her study is an important work on the law as it affects same-sex relationships. Same-sex marriage has been treated by some as a regressive step not to be encouraged. See especially N. Duclos, “Some Complicating Thoughts on Same-Sex Marriage” (1991) 1 L. & Sexuality: Rev. Lesbian & Gay Legal Issues 31. See also P. Rusk, “Same-Sex Spousal Benefits and the Evolving Conception of Family” (1993) 52 U.T. Fac. L. Rev. 170 [hereinafter “Evolving Conception of Family”]. Regarding the U.S. situation, see M.B. Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire* (New York: Routledge, 1997) especially at c. 7.

<sup>2</sup> Terminology in this area is a loaded subject. In this paper, I usually use the terms “homosexual” and “gay and lesbian” rather interchangeably. The use of the term “a homosexual” is problematic but convenient. I realize that I differ from most writers in this area by using the old term. I also sidestep the issue of social construction of homosexuality. In this article, unless the context indicates otherwise, “a homosexual” is a person who identifies as gay or lesbian or possibly bisexual. For more elaboration on my views on nomenclature, see my book *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000) [hereinafter *Queer Judgments*], especially the Introduction.

<sup>3</sup> Ironically, the institution of marriage is perceived to be on the decline in many places. See R. Probert & A. Barlow, “Displacing marriage—diversification and harmonisation within Europe” (2000) 12 C.F.L.Q. 153. See also C. Bremner, “France makes unwedded bliss official” *The [London] Times* (18 December 1999) 15.

is denial of real equality.<sup>4</sup>

In this essay, then, I situate the discourse about same-sex marriage within the context of the larger process of the achievement of equality for gays and lesbians. I structure my discussion of this issue as follows. First, I examine why the institution of marriage has been perceived as an important symbol and the arguments proffered to justify the exclusion of same-sex couples from it. Second, I discuss how discourse about equality rights for homosexuals in Canada, particularly at the level of litigation, has moved to the site of celebration. Finally, I argue that if the discourse about celebration is to be successful, from the homosexual perspective, gays and lesbians must be admitted to the institution of marriage and not have to settle for some alternative. In this paper, I confine myself to legal discourse and legal results, occurring mostly at the level of the courts. Admittedly, that is a limited aspect of the social reality for gays and lesbians, but as I have explained elsewhere,<sup>5</sup> it is a significant aspect. The question may arise as to the extent to which *the law*, particularly through the apparatus of the courts, has any important role to play in discourse about equality for gays and lesbians. One commentator notes that what is a "marriage" is not determined by law but by language use.<sup>6</sup> If gay people and others call their union a marriage then it is a marriage. Do the courts in fact have any role to play? Some have doubted the value of the courts.<sup>7</sup> In my opinion, the achievement of legal equality, accomplished through the mechanism of the courts, is highly relevant to the achievement of broader social equality. I have addressed this issue elsewhere,<sup>8</sup> and I have argued for the view that what judges say about homosexuals and about homosexuality has a great deal of significance. Steps the courts have taken in recent years have been of profound importance to homosexuals. The social

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<sup>4</sup> It may even infringe international law. See E.H. Sadler, "A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?" (1999) 40 Va. J. Int'l L. 405.

<sup>5</sup> See *Queer Judgments*, *supra* note 2, especially Introduction.

<sup>6</sup> He writes of the definition in legislation:

But for those who value weddings, anniversaries and the associated traditions, the legislation is a stinging slap in the face. It is a shameful attempt at linguistic exclusion, something gay people are very familiar with, given the plethora of homophobic epithets still being used on playgrounds and in the rhetoric of hatemongers.

M.J. Munro, "Marriage, by any other name" *The Vancouver Sun* (22 April 2000) A23. See also M. Kuykendall, "Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language" (1999) 34 Harv. C.R.-C.L. L. Rev. 385. Other definitions may also have to change. See e.g. E.J. Graff, "What to call your gay mate" *The [Toronto] Globe and Mail* (11 November 1995) D6.

<sup>7</sup> In "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17 Dal. L.J. 130 at 131, Mary Eaton states: "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." See also D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); A. Lajoie, É. Gélinau & R. Janda, "When Silence Is No Longer Acquiescence: Gays and Lesbians under Canadian Law" (1999) 14:1 Can. J. L. & Soc'y 101; W. Morgan, "Queer Law: Identity, Culture, Diversity, Law" (1995) 5 Australasian Gay & Lesbian L.J. 1. Herman writes, *ibid.* at 8: "concrete shifts in social meanings and practices have taken place" in the area of sexuality, whereas they have not for class divisions. (Emphases in original).

<sup>8</sup> See *Queer Judgments*, *supra* note 2, *passim*.

situation of gays and lesbians in Canada would not be what it is today without judicial action. On the issue of marriage, for example, the legislatures have shown a singular determination not to be proactive. Because of the importance of judicial action, those who want to preserve a “traditional” view of marriage have talked of trying to exclude the courts from the discussion, even by way of using the notwithstanding clause.<sup>9</sup>

Only to the limited extent necessary to achieve the above-outlined discussion do I explore “the law” on marriage or “the law” on equality rights in Canada. Those subjects are treated in detail by others.<sup>10</sup> My goals are to explore the significance of marriage and equality rights for gays and lesbians in the legal context.

## II. MARRIAGE: THE STATUS QUO

In Canada, in a somewhat odd partition of powers, the federal government has jurisdiction over “marriage” while the provinces have exclusive jurisdiction over “solemnization of marriage in the province”.<sup>11</sup> In the recent federal legislation designed to eliminate discrimination based on sexual orientation, the government belatedly attached a provision which says, “For greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others.”<sup>12</sup> The amendment to the bill came after intense political pressure from the right, including some within the governing Liberal party itself, to save the institution of marriage.<sup>13</sup> The intensity of the attempt to “protect” the institution of marriage indicates the symbolic importance of the institution. The question currently much debated is whether the federal government is able, without invoking the notwithstanding clause of the *Canadian Charter of Rights and Freedoms*, to exclude gays and lesbians from the institution of marriage. The B.C. government has

<sup>9</sup> T.T. Ha, “Day unveils arsenal against gay marriage: Would use notwithstanding clause to overturn Supreme Court ruling” *The [Toronto] Globe and Mail* (8 June 2000) A4. This is characteristic of the attitude of conservative US commentators who have taken a markedly narrow view of the role of the courts in the rights process when it comes to same-sex marriages.

<sup>10</sup> For a very good treatment of the theoretical reasons for which same-sex marriage ought to be recognized. see especially A. Woolley, “Excluded by definition: Same-sex couples and the right to marry” (1995) 45 U.T.L.J. 471. Woolley also treats well the legal history in Canada about recognition of marriage. See also Lahey, *supra* note 1; M.A. McCarthy & J.L. Radbord, “Family Law for Same Sex Couples: Chart(er)ing the Course” (1998) 15:2 Can. J. Fam. L. 101; A. Robinson, “Lesbiennes, mariage et famille” (1994) 7 C.J.W.L. 393.

<sup>11</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(26), 92(12), reprinted in R.S.C. 1985, App. II, No. 5.

<sup>12</sup> *Modernization of Benefits and Obligations Act*, S.C., C.Gaz. 2000.III, c. 12 at s.1.1, assented to on 29 June 2000 [hereinafter *Modernization of B & O Act*].

<sup>13</sup> See S. Albers, “Reform party can’t get Liberals to bite: Marriage motion ignites firestorm of anger instead” *National Post* (9 June 1999) A1 at A7. The Minister of Justice, Anne McLellan, is quoted in a departmental news release as stating: “I have repeatedly said that this bill is about fairness. It is not about marriage and will not change the legal definition of marriage. . . Having said that, I recognize that it is important to Canadians to clearly indicate in Bill C-23 that the definition of marriage will not change.” Department of Justice Canada, News Release 25105, “Government of Canada Proposes Amendment to Bill C-23” (22 March 2000). Of course, prior to this, there was no federal law on point, apart from the common law. See e.g. B. Laghi, “Gay-rights bill stirring up Liberal caucus” *The [Toronto] Globe and Mail* (10 February 2000) A3; R. Fife, “Liberal mavericks want public debate on gay rights bill: MPs won’t be punished” *National Post* (27 May 1999) A7.

announced plans to go to court to argue that the federal ban on same-sex marriages contravenes the *Charter*.<sup>14</sup> The City of Toronto also seeks a ruling on whether it can issue a marriage licence to same-sex couples.<sup>15</sup> Several individuals have challenged or proposed to challenge the marriage laws after their application for a marriage certificate was turned down.<sup>16</sup>

Until the prefatory definition in the *Modernization of B & O Act*, with one exception, marriage had not been defined in either federal or provincial legislation dealing with capacity or formalities of marriage.<sup>17</sup> Instead, the courts, when called upon have looked to common law precedents that give a simple definition of one man and one woman united in some officially recognized ceremony.<sup>18</sup> The courts have also tended to appeal to values and traditions which can only be regarded as religiously based. The leading Canadian case on same-sex marriages was explicit in its reliance on religion. In *Re North and Matheson*,<sup>19</sup> the court had to decide whether two men could marry. The statute involved did not say that the two people had to be of the opposite sex but the court found that two people of the same sex could not get married to each other. Philp Co. Ct J. relied in part on the case of *Hyde v. Hyde and Woodmansee*, where Lord Penzance said: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."<sup>20</sup> In *Layland v. Ontario*,<sup>21</sup> the majority of the court held proper the refusal to grant a same-sex couple a marriage licence because marriage was for procreation (apparently impossible for a person in a same-sex union). The argument that some opposite-sex couples (with licences) are childless was met with the response that, "Despite these circumstances in which a marriage will be childless, the institution of marriage is intended by the states, by religions and by society to encourage the

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<sup>14</sup> See P. Willcocks, "B.C. wants to legalize same-sex marriages" *The Vancouver Sun* (21 July 2000) A1.

<sup>15</sup> J. Rusk, "City seeks clarity on same-sex marriage licences" *The [Toronto] Globe and Mail* (20 May 2000) A25.

<sup>16</sup> There are now cases in B.C., New Brunswick, Ontario and Quebec. See S. Sutherland, "B.C. lesbian couple challenges laws with marriage licence application" *The Vancouver Sun* (27 May 2000) A14. The issue also arises as same-sex marriages are debated in other jurisdictions. Such unions may give rise to calls for recognition in Canada. See e.g. M. Bailey, "How Will Canada Respond to Same-Sex Marriages?" (1998) 32 *Creighton L. Rev.* 105 [hereinafter "How Will Canada Respond"]; M. Bailey, "Hawaii's Same-sex Marriage Initiatives: Implications for Canada" (1998) 15:1 *Can. J. Fam. L.* 153.

<sup>17</sup> See D.G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery, 1996) at 228. The exception is Art. 365 C.C.Q. See also É. Deleury, "L'union homosexuelle et le droit de la famille" (1984) 25 *C. de D.* 751; Robinson, *supra* note 10.

<sup>18</sup> On the definition of marriage, see S. Poulter, "The Definition of Marriage in English Law (1979) 42 *Mod. L. Rev.* 409; see also R.D. Mohr, "The Case for Gay Marriage" (1995) 9 *Notre Dame J.L. Ethics & Pub. Pol'y* 215, especially at 219-27.

<sup>19</sup> (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.), 20 R.F.L. 112 [hereinafter *Re North*].

<sup>20</sup> *Ibid* at 284, citing *Hyde v. Hyde and Woodmansee* (1866), 1 L.R. P. & D. 130 at 133, 35 L.J.P. & M. 57 (emphasis in original). This case was applied *C.(L.) v. C.(C.)* (1992), 10 O.R. (3d) 254, [1992] O.J. No. 1830, online: QL (OJ) (Gen. Div.).

<sup>21</sup> *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658, 104 D.L.R. (4th) 214 (Div. Ct.) [hereinafter *Layland* cited to O.R.].

procreation of children.”<sup>22</sup>

The Supreme Court of Canada has not yet been called upon to deal with the same-sex marriage question, but, it has certainly been aware that the issue will come before the court. As I have argued elsewhere, running through the recent *M. v. H.*<sup>23</sup> decision is a not-so-subtle subtext about same-sex relationships and the place of marriage.<sup>24</sup> Throughout the reasons in the case, on its face about benefits to a person leaving a same-sex relationship, can be found a concern about its effect on the institution of marriage. Gonthier J., in dissent, was the most enthusiastic that marriage be kept the sole preserve of heterosexuals. He explicitly tied marriage and heterosexuality to human procreation and to the raising of children. He echoed the views of La Forest J. in *Egan v. Canada*<sup>25</sup> who said, “marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.”<sup>26</sup> While Gonthier J.’s conception of marriage, like La Forest J.’s, can be easily faulted, more persuasive is his conclusion that the majority’s decision in *M. v. H.* leaves little room for any decision other than that an exclusion of same-sex spouses from the conception of marriage is contrary to the equality provisions of s. 15(1). The majority did occasionally protest that they were not pronouncing on marriage, but, given the extent to which the court recognized the similar situation of same-sex and opposite-sex couples in the decision, the only thing that remains to differentiate them legally is that opposite-sex couples are given the choice of entering the state-celebrated status of marriage whereas same-sex couples are not.<sup>27</sup>

Despite the pronouncements of some Canadian courts, the question of who can be considered to be legally married has historically been a flexible thing. At different times and places, people now considered children could be married.<sup>28</sup> A person could be married to more than one person. Two people of the same sex could be married.<sup>29</sup>

<sup>22</sup> *Ibid.* at 666. Southey J. took an extraordinary view, one in no doubt acceptable to traditional religious ideology, of how a homosexual should cope. In an amazing feat of logic, he stated, *ibid.* at 666-67:

The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.

<sup>23</sup> [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 [hereinafter *M. v. H.* cited to S.C.R.].

<sup>24</sup> B. MacDougall, “Case Comment on *M. v. H.*” (2000), 27 *Manitoba Law J* 141. The Supreme Court of Canada rejected a request by Ontario to review its ruling in *M. v. H.*: “Landmark ruling on gay rights to stand” *The Globe and Mail* (27 May 2000) A4.

<sup>25</sup> [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan* cited to S.C.R.].

<sup>26</sup> *Ibid.* at para. 21. On the construction of the family in *Egan*, see L.G. Beaman, “Sexual Orientation and Legal Discourse: Legal Constructions of the ‘Normal’ Family” (1999) 14:2 *Can. J.L. & Soc’y* 173.

<sup>27</sup> On the issue of the involvement of the state, see Mohr, *supra* note 18 at 224-226. See also B. Cossman & B. Ryder, “*M. v. H.*: Time to Clean Up Your Acts” (1999) 10:3 *Constitutional F.* 59.

<sup>28</sup> See H.R. Hahlo, *Nullity of Marriage in Canada: With a Sideways Glance at Concubinage and Its Legal Consequences* (Toronto: Butterworths, 1979) at 21.

<sup>29</sup> See J. Boswell, *Same-Sex Unions in Premodern Europe* (New York: Villard Books, 1994); W.N. Eskridge Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996) especially c. 2; A. Sullivan, ed., *Same-Sex Marriage:*



That marriage is the “crucible of human procreation and the usual forum for the raising of children”, in Gonthier J.’s words,<sup>30</sup> is a rose-tinted view of a particular religious conception of marriage rooted in a specific time. Like so many other concepts of similar provenance, such as family, spouse, person, and so on, it is subject to reconsideration in the Canadian-*Charter* democracy. What appears to be unchanged is that marriage is an institution of immense symbolism.

What does marriage symbolize? What is the role that marriage plays outside the context of same-sex relationships? It is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value. That is not a novel proposition and is far from being contentious. For example, in explaining the B.C. challenge to the federal legislation, the Attorney-General of B.C. has said: “Same-sex couples who want to strengthen their relationship, want to provide the kind of stability marriage can afford .... I hear more and more about the breakdown of families, about the fracturing of communities, and marriage is an institution that can help to counteract that.”<sup>31</sup> In the U.S. context, John G. Culhane says: “Although marriage is not necessary for a fulfilling life, those who choose to marry are often provided with deep, broad, and warm support from society. The commitment of the couple is encouraged by family, friends, and community, financially supported by the government, and seen as a common incident of citizenship.”<sup>32</sup> Even those who would exclude gays and lesbians from marriage admit its social significance. One such person, Linda S. Eckols, writes:

Often marriage is considered a foundational unit of civilized society, but it is also an anchor for an individual’s identity. One is married when in the office, at a business lunch, or at a conference. One is married at the tennis tournament, at the benefit dinner, or at the church musical. One is married while brushing teeth, driving a car, or writing in a journal. One is married wherever one is, whatever hat one’s wearing, and whether one’s task is grand or mundane. Marriage is legal, religious, social, vocational, and personal. ... The power of marriage comes not from what it is in the abstract, or how it is defined, or even what it symbolizes, but from how it is transubstantiated by society’s focus on marital status as a key element in defining every person.<sup>33</sup>

Various judges in the Supreme Court of Canada have stressed the important role of marriage. In *Egan*, La Forest J. said that: “The legal institution of marriage exists

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*Pro and Con* (New York: Vintage Books, 1997). For a critique of the position in Boswell and Eskridge, see P. Lubin & D. Duncan, “Follow the Footnote or the Advocate as Historian of Same-Sex Marriage”(1998) 47 *Cath. U.L. Rev.* 1271. The authors criticize the two earlier authors for bad use of authority and for being advocate-historians. The same criticism could be applied to them. See also B.D. Shaw, “A Groom of One’s Own?” in Sullivan, *ibid* at 7; R. Hexter, “Same-Sex Unions in Pre-Modern Europe: A Response” in Sullivan, *ibid.* at 17. Boswell’s work particularly remains highly regarded.

<sup>30</sup> *M. v. H.*, *supra* note 23 at para. 228.

<sup>31</sup> “Q & A with the AG” *The Vancouver Sun* (21 July 2000) A4. *Vancouver Sun*. See also E. Veitch, “The Essence of Marriage – A Comment on the Homosexual Challenge” (1976) 5 *Anglo-Am. L. Rev.* 41.

<sup>32</sup> J.G. Culhane, “Uprooting the Arguments Against Same-Sex Marriage” (1999) 20 *Cardozo L. Rev.* 1199 at 1180-1181 [footnotes omitted].

<sup>33</sup> L.S. Eckols, “The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony” (1999) 5 *Mich. J. of Gender and L.* 353 at 354 [footnotes omitted].

both for the protection of the relationship and for defining the obligations that flow from entering into a legal marriage. Because of its importance, legal marriage may properly be viewed as fundamental to the stability and well-being of the family.”<sup>34</sup> In *Miron v. Trudel*,<sup>35</sup> Gonthier J. called it “a basic institution of society”, and “a fundamental social institution”.<sup>36</sup> In the same case, McLachlin J. said that the state, through civil marriage, sanctions the union.<sup>37</sup> She went on to state: “To most in our society, marriage is a good thing; to many a sacred thing. There is nobility in the public commitment of two people to each other to the exclusion of all others. How can it be wrong to use this commitment as the condition of receiving legal protection and benefit?”<sup>38</sup>

For some, marriage elevates heterosexual relationships beyond mere base sex or sexuality which would seem to be the basis, apparently, for non-marriage relationships. La Forest J., in *Egan*, certainly thought so. Citing the authority of the Inter-Faith Coalition on Marriage and the Family, he thought the heterosexual family unit was “the only unit in society that expends resources to care for children on a routine and sustained basis”.<sup>39</sup> Marriage is the institution that “protects” this heterosexual family. David Orgon Coolidge and William C. Duncan differentiate between the “traditional” and the “non-traditional” views of marriage. In the second view, sexuality is the “starting point”. Sexuality is for pleasure and intimacy and marriage is a state mechanism to encourage committed and stable relationships. In the other view, which is the authors’, marriage is the starting point: “We exist as male *or* female, intended for community with one another. Marriage is primarily a shared, socially beneficial way of life as male *and* female. Other forms of sexuality are understood in relationship to marriage, and marriage has something to do with the connection between the generations.”<sup>40</sup> Sex and sexuality are, however, very much caught up in the “traditional” view of marriage. In fact, arguably the traditional approach to marriage defines it essentially by a particular sex act that only a man and a woman can perform. Whatever the basis, for many, marriage is a symbol for heterosexuality from which homosexuals must necessarily be excluded.<sup>41</sup> Sotirios Sarantakos says:

A very significant factor that guides the attitudes of the heterosexual community is its strong identification with the institution of marriage. Matrimony appears to be the “registered trademark” of heterosexuality which homosexuals are not entitled to. Use of this trademark by homosexuals not only violates the “rights” and “vested interests” of heterosexuals and the integrity of heterosexuality but also downgrades the value of the institution

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<sup>34</sup> *Supra* note 25 at para. 22.

<sup>35</sup> [1995] 2 S.C.R. 418 at para. 26, 124 D.L.R. (4th) 693 [hereinafter *Miron* cited to S.C.R.].

<sup>36</sup> *Ibid.* at para. 41.

<sup>37</sup> *Ibid.* at para. 153.

<sup>38</sup> *Ibid.* at para 157.

<sup>39</sup> *Supra* note 25 at para. 25.

<sup>40</sup> D.O. Coolidge & W.C. Duncan, “Definition or Discrimination? State Marriage Recognition Statutes in the ‘Same-Sex Marriage’ Debate” (1998) 32 Creighton L. Rev. 3 at 22 (emphasis in original). The authors are both of the Marriage Law Project at the Columbus School of Law, The Catholic University of America.

<sup>41</sup> Some would use marriage to save themselves from the stigma of homosexuality. See Chris Blackhurst, “[British] Tory MPs suspected of being homosexual face pressure to marry” *Vancouver Sun*, 16 February 1994, p. A8.

of marriage.<sup>42</sup>

### III. SAME-SEX MARRIAGES?

What more is there to this idea that homosexuals and their relationships must be excluded from the institution of marriage and what is achieved by it, both for heterosexuals and for homosexuals? Homosexuals and homosexuality have, of course, historically been marginalized and made inferior.<sup>43</sup> The old marginalizing stereotypes are more than evident in the same-sex marriage debate. Back in 1993, Peter Rusk made a comment that unfortunately is still largely true today: "Same-sex couples are, by reflex, attributed characteristics that most often bear no relationship to reality, characteristics that invariably cast these relationships as being either inferior to opposite-sex relationships or simply non-existent."<sup>44</sup> The objections to same-sex marriage are, however, usually couched in terms disclaiming homophobia and asserting respect for homosexuals. Representative of this defensive approach, Lynn Hogue writes:

Although some may dismiss such a line of analysis under the epithet of so-called 'homophobia,' I persist in believing that a well-grounded distaste for particular conduct that is viewed as morally objectionable by a majority within a democratic society—and hence proscribable under the police power in the same way that other socially undesired conduct such as drug use or prostitution is banable [*sic*]-is not a product of unreasoned fear, as the term suggests, but rather of proper moral reservation.<sup>45</sup>

While at the same time as he decided to exclude same-sex couples from receiving the same recognition as heterosexual couples (married or otherwise), Gonthier J. in *M. v. H.* also went out of his way to say that "nothing in my reasons should be taken as suggesting that same-sex couples are incapable of forming enduring relationships of love and support, nor do I wish to imply that individuals living in same-sex relationships are less deserving of respect."<sup>46</sup>

The arguments against same-sex marriage that have been made in the legal context or by legal scholars usually involve in an interrelated way the following factors: definition and tradition, religion and morality, and children and sex.<sup>47</sup> Though some

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<sup>42</sup> S. Sarantakos, "Same-Sex Marriage: Which Way to Go?" (1999) 24 *Alternative L.J.* 79 at 83.

<sup>43</sup> This phenomenon has been well documented, in part in my book *Queer Judgments*, *supra* note 2. There were some problems in the recent Alliance party leadership race, when supporters of Stockwell Day criticized some organizers of the Tom Long campaign for being gay. See B. Laghi & J. Ibbitson, "Alliance Race Gets Nasty Amid Antigay Attacks" *The Globe and Mail* (26 May 2000) A1.

<sup>44</sup> Rusk, *supra* note 1 at 195.

<sup>45</sup> L.L. Hogue, "State Common-Law Choice-of-Law Doctrine and Same-Sex 'Marriage': How Will States Enforce the Public Policy Exception?" (1998) 32 *Creighton L. Rev.* 29 at 36 [footnotes omitted] citing, R.H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996). The author describes herself as part of a "conservative, public interest law firm." *Ibid.* at 29.

<sup>46</sup> *Supra* note 23 at para. 249.

<sup>47</sup> One particularly impressive treatment, with refutation in some detail, is E.J. Graff, *What is Marriage For?* (Boston: Beacon Press, 1999). She provides six categories of reasons given for marriage having the content it is now traditionally thought to have: money, sex, babies,

attempt to do so, these factors cannot really be separated out because they are in fact all part of a single objection to same-sex marriage. At the end of the day, however, there is no legally defensible objection to same-sex marriage unless one simply accepts that tradition dictates it and that that is a legally acceptable argument.

One argument we have already seen is that a same-sex couple cannot be married because marriage by its very *definition* involves a man and a woman. Certainly previous Canadian cases that have dealt with same-sex marriage have had this response.<sup>48</sup> In *M. v. H.*, Gonthier J. concluded that the *Ontario Family Law Act* dealt with “spouses” and he said that people in a homosexual relationship could never be considered spouses:

The definition of “spouse”, as I have already suggested, is an extension of marriage. To be a spouse is, in essence, to be as if married, whether or not one is actually married. Spousehood is a social and cultural institution, not merely an instrument of economic policy. The concept of “spouse”, while a social construct, is one with deep roots in our history....It is rooted in Western history, in which the concept of “spouse” has always referred to a member of a cohabiting opposite-sex couple. That is what it means to be a spouse....That well-recognised definition does not discriminate on the basis of sexual orientation, any more than the status of “child” or “adult” discriminates on the basis of age, or “male” or “female” discriminates on the basis of sex.<sup>49</sup>

We have seen that La Forest J. in *Egan* also said that “marriage is by nature heterosexual.”<sup>50</sup> One cannot help but wonder how La Forest J. and particularly Gonthier J. managed to overlook all recent cases and legislation that redefine spouse or whether they accept at all the idea of evolving social concepts.<sup>51</sup> One wonders how they might have decided cases which led to the relief from historic oppression for other groups who had been defined out of a privileged class. How would they have decided the “persons” case?<sup>52</sup> How would they have decided a miscegenation case?<sup>53</sup> Gonthier J.’s own

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kin, order and heart. See also Eskridge Jr., *supra* note 29 at c. 4; M. Strasser, “Natural Law and Same-Sex Marriage” (1998) 48 *DePaul L. Rev.* 51; G.W. Willett, “Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate” (1997) 73 *Ind. L.J.* 355; C.G. Christensen, “If Not Marriage? On Securing Gay and Lesbian Family Values by a ‘Simulacrum of Marriage’” (1998) 66 *Fordham L. Rev.* 1699; A.K. Blair, “Constitutional Equal Protection, Strict Scrutiny and the Politics of Marriage Law” (1998) 47 *Cath. U.L. Rev.* 1231; T.S. Collett, “Recognizing Same-Sex Marriage: Asking for the Impossible?” (1998) 47 *Cath. U.L. Rev.* 1245; A. Koppelman, “Same-Sex Marriage, Choice of Law, and Public Policy” (1998) 76 *Tex. L. Rev.* 921; L.D. Wardle, “Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage” (1998) 39 *S. Tex. L. Rev.* 735; Coolidge & Duncan, *supra* note 40.

<sup>48</sup> See *Re North*, *supra* note 19.

<sup>49</sup> *Supra* note 23 at para. 227.

<sup>50</sup> *Supra* note 25 at para. 21.

<sup>51</sup> Of particular importance, *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356, 6 W.W.R. 728 (S.C.[T.D.]) [hereinafter *Knodel* cited to B.C.L.R.]. Kuykendall, *supra* note 6, is a brilliant essay on linguistic change with specific reference to same-sex marriage.

<sup>52</sup> *Re Section 24 of the B.N.A. Act*, [1930] A.C. 124; [1930] 1 D.L.R. 98 (P.C.).

<sup>53</sup> See e.g. *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) [hereinafter *Loving*]. See also Casswell, *supra* note 17 at 229-30.

example of “child” has been subject to considerable legal flux over time. His fixed definitional attitude would in fact have prevented advances in all sorts of rights areas. Anne Woolley has also argued against the simplicity of a definitional approach:

I have made the claim that our case law must take a more universalist stance if it is to adjudicate same-sex marriage cases adequately and fairly. It is because the definitional approach makes at most a claim based on popular acceptance of the court's definition, fails to explore that definition's conceptual underpinnings, and provides us with no broader principle through which to understand why marriage should be limited to a particular kind of human experience, that I have argued for its inadequacy.<sup>54</sup>

The “argument” from *tradition* is little more than an assertion that marriages have always been opposite-sex and so there can be no change. In fact, it is not clear that this has always been the case.<sup>55</sup> Tradition, by itself, however, is no answer to a question raised in the modern Canadian rights context. At the very least, the *Charter* has put paid to such arguments. A more nuanced argument from tradition is that heterosexual marriages provide social stability and the glue for social stability that homosexual relationships do not. This argument is illustrated in *M. v. H.*, where Gonthier J. thought heterosexual relationships quite different from homosexual ones. According to this judge, those in heterosexual relationships develop a “dynamic of dependence” that is not usual in homosexual relationships. At one point, commenting on the possibility of a man in a heterosexual relationship making a support claim, Gonthier J. said, “Although the dynamic of dependence unique to opposite-sex relationships plays out differently for men, it flows from similar factors: in essence, the dynamic of dependence reduces autonomy and increases attachment in heterosexual relationships.”<sup>56</sup> Behind this attitude lies perhaps more than a trace of the idea that homosexual relationships are not so stable or committed as heterosexual relationships.<sup>57</sup> One wonders where the support for this

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<sup>54</sup> Woolley, *supra* note 10 at 523. Another problem with using the definitional approach to marriage has been noted by M. Bailey, “How Will Canada Respond”, *supra* note 16. She says that though the definitional approach has been used by judges to refuse to permit same-sex marriage in Canada (e.g. In *Re North*, *supra* note 19), its application to recognition cases is questionable: *supra* note 16 at 108 - 112). She continues by stating, *ibid.* at 110: “As well, the contested nature of marriage within Canada renders the definitional approach increasingly inadequate – it is no longer satisfactory simply to say that same-sex marriage does not meet the traditional definition of marriage when the traditional definition is under challenge”. M. Bailey cites B. A. Allen, who writes, *ibid.* at n. 26:

The argument that, by definition, marriage can involve only a man and a woman because it has always included only opposite-sex couples, is tautological and reminiscent of anti-miscegnation laws. The fact that marriage has not included same-sex couples in the past does not explain why that cannot be so now anymore than anti-miscegnation laws that prevented interracial couples from marrying justified continuation of those laws.

<sup>55</sup> See Boswell as well as Eskridge, Jr., *supra* note 29.

<sup>56</sup> *M. v. H.*, *supra* note 23 at para. 239.

<sup>57</sup> Gonthier J. appeared to have no grasp of the concept that his diminishment of same-sex relationships might in fact be part of the cause of whatever greater lack of commitment there might be in a same-sex relationship as compared with an opposite-sex relationship. There is in what Gonthier J. said what must for heterosexual couples be an alarmingly high standard to meet up to. A related idea of marriage as necessarily heterosexual comes from John Culhane's analysis

almost mystical conception of the heterosexual couple in marriage comes from. How does it square with the *reality* of heterosexual married couples (let alone homosexual couples)? Gonthier J. might have profited by considering what Iacobucci J. said in *Egan* in the context of the denial of spousal allowances for members of same-sex couples: "Whereas there is a presumption of interdependence in heterosexual relationships, there is a presumption against interdependence in same-sex relationships. The latter presumption is not only incorrect, but it is also the fruit of stigmatizing stereotypes."<sup>58</sup> In *M. v. H.*, in an oblique reference to his earlier views in *Egan*, Cory J. noted that "Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely."<sup>59</sup>

One of the difficulties in changing the definition of marriage is that it is an institution that, for many people, still carries with it strong *religious* connotations which argue against its opening up to same-sex couples.<sup>60</sup> Not surprisingly, those who argue against any admission of same-sex couples to marriage tend to have conservative religious connections. Vancouver's Roman Catholic Archbishop Adam Exner has said, "We are deeply concerned that equating homosexual partners with married and common-law couples could lead to a redefinition of marriage."<sup>61</sup> There is often no explanation as to why that itself is such a terrible thing. The use of religious tradition to defend the status quo of marriage (or any other status quo) is not an acceptable legal approach in Canada.<sup>62</sup> Religious ideology cannot be used to determine what people who

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of justifications for heterosexual marriage: Culhane, *supra* note 32 at 1188-98. His conclusions are, like Gonthier J.'s, negative in regards to heterosexuality. He lists three purportedly non-religious reasons sometimes made why same-sex marriages would "wound" society. They are: a) the institution of marriage would be destabilized by extending it to include same-sex couples, b) women domesticate men, c) marriage is for procreation and child rearing.

<sup>58</sup> *Supra* note 25 at para. 197.

<sup>59</sup> *Supra* note 23 para. 60. Cory J. in the Supreme Court of Canada, took a more realistic look at couples, both heterosexual and homosexual. In *Egan*, *supra* note 25 at para. 169, Cory J. said that gay and lesbian couples do not have to have the perfect relationship in order to make a relationship-based claim in the courts. Their relationship does not have to show perfect compliance with the traditional heterosexual ideal of what it means to be a couple in order to make a relationship-based claim in the courts. Their relationship does not have to be textbook perfect; heterosexual relationships rarely are.

<sup>60</sup> W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can. J. Fam. L. 114 at 125.

<sup>61</sup> D. Todd, "Archbishop challenges PM on same-sex couples" *The Vancouver Sun* (28 January 1999) A3. The classic study of the Christian Right is Herman, *supra* note 7.

<sup>62</sup> See *Brillinger v. Brockie* (No. 3) (Feb. 24, 2000), Dec. No. 00-003-R (Ontario Board of Inquiry: McNaughton). Not all religious views are opposed to same-sex marriages, of course, but the religious institutions that venture there often face extraordinary internal opposition. The Anglican Bishop of New Westminster was prepared in January 1999, according to press reports, to bless same-sex unions, but because of pressure he announced a delay in the decision for two years: "Same-sex ruling postponed" *The [Toronto] Globe and Mail* (18 January 1999) A5. See also H. Klotz, "United Church's service book may include gay couples" *National Post* (30 October 1999) A1; "Reform rabbis expected to vote in favour of gay marriages" *The Globe and Mail* (28 March 1996) A9; Eskridge, Jr., *supra* note 29 at Appendix; Sullivan, *supra* note 29 at c.2.

are not of that religion can do or how they should lead their lives.<sup>63</sup> Permitting same-sex marriage would in no way impinge upon religious freedom. Recognizing true equality for homosexuality does not impair religious freedom. As B.C.'s Attorney-General, Andrew Petter, has said: "This is not an attempt to determine the legitimacy of marriage in the eyes of religious groups. Marriage is also a civil institution."<sup>64</sup>

Arguments from religion are closely linked to those from tradition. Apologists for tradition do, however, try to disconnect the arguments and suggest instead that there is some sort of non-religious basis for marriage as heterosexual and for heterosexuality as being "special". Such arguments are usually described as "morality" (or "natural law") arguments.<sup>65</sup> Raymond Marcin, for example, argues that the condemnation of conduct contrary to nature, including same-sex marriages, "went far beyond majoritarian distaste for homosexual conduct. Those cases were invoking a body of scholarship and a theory that formed the basis of Western civilization for more than a millennium."<sup>66</sup> Even he recognizes, however, that in early cases, the "laws of nature" to which marriages were supposed to conform were "the laws of nature as generally recognized in Christian countries"<sup>67</sup>. Another author, Richard S. Myers, says: "The argument against recognizing same-sex 'marriages' goes well beyond a simple citation to Biblical sources. There are well-developed moral theories that reject treating such unions as marriages that are more than sufficient to remove any Establishment Clause arguments."<sup>68</sup> Despite his claim, however, he cites no arguments that are not essentially religious in nature. The arguments from tradition, definition and morality are, in fact,

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<sup>63</sup> In my opinion, it should not even be used to judge those who are of that religious persuasion. Even children being raised in a particular religious tradition should not be exposed to ideology that excludes and refuses to accommodate homosexuality in their education. The state has an interest in all education of the young and the state ideal should prevail. Those who defend the special place of religion in the law now attempt to argue that "secular" views and values are "disconnected" or meaningless without their religious basis (which usually happens to come from the religion of the author). See I. T. Benson, "Notes Towards a (Re)Definition of the 'Secular'" (2000) 33 U.B.C. L.R. 519. They also argue that the mighty religions are somehow being hard done by when institutions of the state (including the courts) do not continue to privilege those religions and their views. See D. M.. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C. L. R. 551.

<sup>64</sup> R. Mickleburgh, "B.C. to fight for same-sex marriage rights" *The [Toronto] Globe and Mail* (21 July 2000) A4. One writer says: "As a matter of law, however, it is now a secular institution, even though there [are] many who refuse to recognize that fact. If we are to have any progress in this area, it will be necessary to emphasize the secular aspect of marriage and to separate that from the religious aspect, which will continue to be within the purview of the religious group in question." Holland, *supra* note 60 at 125-26 (emphasis in original). On using the Bible, John Culhane, *supra* note 32 at 1187, notes the problem: "Once the Bible is acknowledged as an indirect source of morality, the question must be addressed: What independent moral reason remains for opposing same-sex unions? This crucial step is tellingly missing from most of the religious objections to same-sex marriage." (emphasis added)

<sup>65</sup> In a well-reasoned article, Mark Strasser demonstrates how natural law theories do not necessarily present an objection to same-sex marriage and may even support them: Strasser, *supra* note 47.

<sup>66</sup> R. B. Marcin, "Natural Law, Homosexual Conduct, and the Public Policy Exception" (1998) 32 Creighton L. R. 67 at 68.

<sup>67</sup> *Ibid.* at 67 (emphasis in original).

<sup>68</sup> R. S. Myers, "Same-Sex 'Marriage' and the Public Policy Doctrine" (1998) 32 Creighton L. R. 45 at 65.

all religiously rooted. The argument that marriage as heterosexual is somehow important for *children* is so flimsy that it is astonishing how often it appears. Again, this position appears rooted in religion and morality, and tends towards the lyrical and mystical. One such argument is made by Richard F. Duncan, who states:

Homosexual unions are inherently non-procreative....No one claims that conventional marriage laws are designed to maximize procreation. Instead, traditional marriage laws are designed to license procreative sexual acts and direct them into stable, committed, and (hopefully) loving relationships. Society has a far greater stake in procreative sexuality than it does in other kinds of sexual behavior, because procreative sexual acts can result in new human lives. Of course, there is no "necessary link between marriage and procreation." Procreation can and (all too frequently) does take place outside of marriage; but isn't that precisely the point? Surely it is not irrational to think that procreation within marriage is preferable to procreation outside marriage.<sup>69</sup>

Judges, too, are sometimes still comfortable repeating such assumptions.<sup>70</sup> In *Egan*, La Forest J. spoke of "the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual."<sup>71</sup> La Forest J. saw no embarrassment in making a leap from heterosexual couples having children to the "nature" of marriage. Such views, on the face of it "traditional", tend to overlook inconvenient legal authority such as that from the House of Lords denying that "procreation of children is the principal end of marriage."<sup>72</sup> In *M. v. H.* too, Gonthier

<sup>69</sup> R. F. Duncan, "The Narrow and Shallow Bite of *Romer* and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman" (Winter 1997) 6 *Wm. & Mary Bill Rts. J.* 147 at 159-60 [footnotes omitted].

<sup>70</sup> Children feature in the arguments of some Members of Parliament who advocate the superiority of heterosexual unions. Eric Lowther, a Calgary Reform MP, said: "Marriage provides a healthy biological design for procreation. Other types of relationships are technically incomplete. Marriage provides children with parental fullness. Versus the gender-deprived parenting of same-sex relationships." S. Alberts, "Reform marriage motion betrays undercurrent of homophobia" *The National Post* (9 June 1999) A7.

<sup>71</sup> *Supra* note 25 at para. 21.

<sup>72</sup> *Baxter v. Baxter*, [1948] A.C. 274, [1947] 2 All E.R. 886 (H.L.). The case is also remarkable for its connection of marriage and religion. Viscount Jowitt L.C. said at 286:

Again, the insistence on the procreation of children as one of the principal ends, if not the principal end, of marriage requires examination. It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principal end of marriage as understood in Christendom, which, as Lord Penzance said in *Hyde v. Hyde* [(1866), L.R. 1 P.&D. 130, 133], "may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." As regards the phraseology of the marriage service in the Prayer Book, this House in the recent case of *Weatherley v. Weatherley* [[1947] A.C. 628, 633] pointed out the dangers of too strict a reliance upon these words. In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that



J. privileged heterosexual relationships because of their supposedly special connection with children. They are the “unique” and “natural” place for raising children. For both Gonthier and La Forest JJ., the fact that children can be, and many are, raised outside heterosexual relationships appeared to be irrelevant. The fact that historically there is little evidence that a sole male/female couple together was responsible for raising children was irrelevant. The fact that in many heterosexual relationships one of the couple often has very little to do with raising the children was irrelevant. The fact that same-sex couples can quite easily conceive and raise children was irrelevant. The fact that many people in heterosexual relationships do not have children was irrelevant. Like La Forest J., Gonthier J. went beyond heterosexuality as a basic requirement to raising children; he cast marriage in that role, reinforcing its heterosexual nature. He said: “marriage is a fundamental social institution because it is the crucible of human procreation and the usual forum for raising children.”<sup>73</sup> As La Forest J. did in *Egan*, Gonthier J. allowed that his sweeping statements do not always hold true. They both conceded that some married couples do not have children. Single people or even same-sex couples can have children. These were, however, “exceptional.”<sup>74</sup>

The argument against same-sex marriages is often based on the harm it might do to children in the relationship. There is plenty of evidence, however, that children reared or raised or both outside a traditional heterosexual marriage are well placed.<sup>75</sup>

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word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit.

<sup>73</sup> *M. v. H.*, *supra* note 23 at para. 228. This is quite clearly the judicial imposition of a particular religious ideology to decide national social issues and it has no place from the highest court. See *Queer Judgments*, *supra* note 2 at c. 3. Although he is not cited, this judgment seems four-square with the ultra-conservative views of John Finnis whose approach to homosexuality has been criticized even by his fellow Roman Catholics. See J. Finnis, “Law, Morality, and ‘Sexual Orientation’” (1995), 9 Notre Dame J. L. Ethics & Pub. Pol’y 11; Michael J. Perry, “The Morality of Homosexual Conduct: A Response to John Finnis” (1995), 9 Notre Dame J. L. Ethics & Pub. Pol’y 41.

<sup>74</sup> *M. v. H.*, *supra* note 23 at para. 236; *Egan*, *supra* note 25 at para. 26.

<sup>75</sup> For example, in the Alberta adoption case of *Re C.* (1999), 74 Alta. L.R. (3d) 1 (QB) at 16-17, 181 D.L.R. (4th) 300 at 317-318, Martin J. accepted the evidence of a Dr. Froberg, which included, inter alia: 1) lesbians are no less inherently stable or committed than heterosexual women in intimate relationships; 2) children raised in lesbian-headed families do not differ systematically on factors such as gender identity, gender role behaviour, sexual orientation, intellectual ability, psychological or social functioning from those raised in two-parent or single-parent heterosexual families and typically do not experience high levels of stigmatization due to having two mothers; 3) lesbian women are no less committed to the role of mother nor any less able to function effectively in this role than are heterosexual women and often strive to create strong families which do not differ systematically from heterosexual families on any of the factors allowing children to develop in a healthy fashion; 4) the literature pertaining to the best interests of the child has noted how comforting and security-enhancing it is for children to feel they are part of a “forever family” and that their belonging to a particular nuclear and extended family unit is legally recognized, supported and will be protected under conditions of adversity such as death, disability or dissolution of the relationship. See also C. A. Ball and J. F. Pea, “Warring with

The arguments relating to children needing a particular type of marriage have been used and dismissed in other contexts. Compare what was said about children raised in miscegenous marriages in 1948 in California in *Perez v. Sharp*:

If they do [suffer from such harassment], the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior. If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.<sup>76</sup>

Connected to the argument about children is the argument that a marriage requires a particular type of sex. This argument is not made directly but is disguised in the children argument. Bruce Ryder has explained that there are several difficulties with the argument that differences in the capacity to procreate can justify discrimination against same-sex couples. On the present point, he notes that historically, an ability to procreate has never been a precondition to capacity to marry. "A marriage is voidable in a nullity action if it cannot be consummated. Consummation is defined as the man experiencing orgasm while engaging in vaginal intercourse."<sup>77</sup> Karla C. Robertson argues that a review of case law and statutes reveals "that the central criterion for the validation, creation, and recognition of legal marriage is not love, not companionship, nor heterosexual identity, but instead the potential to engage in PVP [penis-vagina penetration]".<sup>78</sup> Not even those who would exclude same-sex couples from the institution of marriage would be pleased if the status quo were upheld on the explicit basis of the need for "PVP". This fact, however, illustrates the double standard often employed for homosexuality and heterosexuality. While it is apparently legitimate to assert sex and sexuality as the primary component of homosexuality, heterosexuality is something more elevated.<sup>79</sup> In *Egan*, La Forest J. conceded that homosexual couples differed from "other excluded couples" in that their relationships "include a sexual aspect", but "this sexual aspect has nothing to do with the social objectives for which Parliament affords a measure of support to married couples and those who live in a common law relationship."<sup>80</sup> Sex is relevant to the nature of a couple but provides no basis for a legal distinction between same-sex and opposite-sex relationships. This is particularly the case when it must be conceded that the vast majority of heterosexual sex

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Wardle: Morality, Social Science and Gay and Lesbian Parents" (1998), 2 U. Ill. L. Rev. 253.

<sup>76</sup> *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) at 26, cited in S. Cavazos, "Harmful to None: Why California Should Recognize Out-of-State Same-sex Marriages under its Current Marital Choice of Law Rule" (1998) 9 UCLA Women's L.J. 133 at 173.

<sup>77</sup> B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at 84 - 85.

<sup>78</sup> K. C. Robertson, "Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory" (1998) 75 Denver U. L. Rev. 1375 at 1376.

<sup>79</sup> The contradiction of sex-act based arguments for excluding same-sex couples from the institution of marriage has not been lost on writers. See C. Ball, "Communitarianism and Gay Rights" (2000), 85 Cornell L. Rev. 443 at 501: "Moreover, while critics often accuse gay men and lesbians of being obsessed with sex, it is the opponents in the same-sex marriage debate who focus on the notion that a couple must engage in the correct type of sexual act—vaginal-penile intercourse—before they can deem an intimate relationship "marital". Alternatively, supporters of same-sex marriage argue that the love and commitment that exist within a relationship is important regardless of the types of sexual acts involved.

<sup>80</sup> *Supra* note 25 at para. 26.

acts have nothing to do with procreation. Andrew Coyne has pointed to the true place of sex in the idea of marriage:

But surely the more profound objection [to a watered down version of marriage for gays] is this: The whole basis of conservative morality is rooted in the notion that sex *is* a big deal—that sexually intimate relationships are fundamentally different than others, not only for their procreative potential, but for the psychological wholeness the couple enjoys. That is why marriage was invented: to harness the sexual urge in the service of society—as an act of commitment, rather than consumption.<sup>81</sup>

#### IV. WHAT EQUALITY MEANS

If we accept, as I argue we should, that there is no legally relevant connection between child-rearing and heterosexual marriage, no place for particular religious views to define marriage, no historical fixity of definition for marriage, no legitimate place for a particular sex act to define whether a marriage legally exists, then all that can really support the exclusion of same-sex couples from the institution of marriage is the simple fact that historically gays and lesbians have been excluded from the institution. It would not, in fact, matter much if marriage were “simply” the traditional indicator of the union of a man and a woman. The fact, however, that people get so worked up about the application of the label means that it is more than just a label describing a male/female couple. This celebration of a union between two people is an enormous symbolic benefit conferred on the people in the union. Aside from possible economic benefits,<sup>82</sup> it accords, as we have seen, priceless social respect, cachet and honour. It is the signifier of societal approval for a relationship. It is the signifier that society expects a sort of stability from the relationship. It is the signifier that certain privacy and benefits are expected for and within the relationship. It is society’s way of *celebrating*—not just recognising—the union of two people. The exclusion of same-sex couples from this social institution is, in my opinion, a denial of equality based on sexual orientation.

In what way is the exclusion of same-sex couples from the institution of marriage a denial of legal equality? What process of achieving equality requires inclusion in symbolic institutions of those not before considered equal? If marriage is a celebratory institution, as I have argued, what role does *celebration* play in the

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<sup>81</sup> A. Coyne, “Watering down marriage won’t help gays or straights” *The Vancouver Sun* (24 March 2000) A19.

<sup>82</sup> This might include access to benefits immediately upon marriage and not be dependent on a cohabitation requirement which would probably be associated with some other form of union. Also the federal government would still require a cohabitation period for a non-Canadian resident partner to immigrate whereas such a requirement is not necessary for married persons. The *Modernization of B & O Act*, *supra* note 12, does not deal with the right to sponsor a same-sex partner for immigration. Under Bill C-31, *An Act to Amend the Immigration and Refugee Protection Act*, 2d. Sess. 36<sup>th</sup> Parl., 2000, the informal policy of admitting same-sex partners on “humanitarian and compassionate grounds” will be codified. This perpetuates problems gays and lesbians have long had. See e.g. S. Bindman, “Gay couple fighting to wed face border split” *The Vancouver Sun* (26 June 1992) A2; S. Bindman, “Gay couple ordered to live apart while court fight is settled” *The Vancouver Sun* (27 July 1992) A3. Another benefit spouses have is that they cannot be convicted of conspiracy. This has been extended to opposite-sex partners: *Thompson v. Canada (A.G.)* (1998), 23 C.R. (5th) 347 (Que. S.C.).

achievement of legal equality? Ten years ago, Bruce Ryder wrote an article where, in the context of an analysis of heterosexual family privilege, he drew a distinction between a court showing compassion and one showing condonation of homosexuality.<sup>83</sup> I adopt Ryder's categories as labels to apply to a construction of the content of legal equality. I extend the construction so as to add a third level: celebration. These three categories—compassion, condonation, and celebration—are what I term, for the purposes of the present essay, sites in the field of rights discourse. They describe the underlying nature of the particular issues fought for at any given time, when a group like gays and lesbians seeks legal equality. They form, in a rough way, a progression (or regression) along a continuum towards (or away from) positive legal integration, that is equality, of the members of a group into the fabric of society.<sup>84</sup>

By a site of discourse, I mean a place which is contentious at any given time for members of a particular group to occupy. It is there that discussion or litigation (from or about the group) is largely centred. It is there that debate tends to take place. Discourse can take place on any number of fields, one of which is legal equality, in our case, gay and lesbian equality. The result of the discourse will affect the members of the group, and others too. Discourse in the field of legal equality, or equality rights, will result in consequences for the members of the group, in our case gays and lesbians. Equality rights are incrementally gained, or not gained, or lost, as discourse on the field moves from site to site producing some result or other.

I divide the field of discourse about legal equality into three main sites: compassion, condonation, and celebration. These sites move away from condemnation, the beginning place, yet they blur. They are not black-and-white or completely distinct. To have full legal equality within a society, members of a (minority) group need: 1) to be free from discrimination, 2) to have access to benefits others have and 3) to be included as a *valuable* group by the society. The third category can be seen as an extension of the second and the second as an extension of the first. They all move away from the beginning place where the members of the group are somehow condemned. In my opinion, these steps represent a progression from the beginnings of formal legal equality to the attainment of real legal equality. They are, as I have said, a progression away from condemnation to 1) compassion, 2) condonation and 3) celebration.<sup>85</sup>

That debate in Canada with respect to gay and lesbian rights has moved to

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<sup>83</sup> Ryder, *supra* note 77. He says at 43-44:

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

The compassion/condonation dichotomy provides the discursive framework through which the social and legal construction of heterosexual privilege is placed beyond critical examination.

<sup>84</sup> I recognize that I am much more optimistic than some others, for example, Lahey, *supra* note 1.

<sup>85</sup> More than one person has commented on the "alliterative overkill" of these terms. The author can only protest that the alliteration or, rather, the superabundance of initial c's is not by design.

symbolic issues such as marriage, means discussion is now at the site of celebration. Pride day proclamations,<sup>86</sup> content in school curricula,<sup>87</sup> and marriage are largely symbolic matters for gay and lesbian groups, as they are for other groups.<sup>88</sup> Success on these matters would represent state, that is legal, acceptance and celebration of the group. It would represent state approval of a group in a positive, active, and symbolic way that other state actions, such as non-discrimination protection and conferral of benefits, do in a non-public or less public and more individualized way. Probably the most potently symbolic of my list is marriage. What do these sites of discourse mean and what do they contain? Why should the site of celebration be the current site of discourse in homosexual rights discourse?

Before examining the site of celebration in homosexual equality rights discourse however, the two other sites of discourse I have identified beyond condemnation—compassion and condonation—should be looked at more closely. Compassion is the site where the members of the group are asking for protection from society from the discrimination which they have suffered because of their condemned state. Protection from discrimination is a first stage in legal equality, but is not full equality. It is simply protection. Discourse at this site is a request for compassion. Though the state and society might not approve of the group and might actually dislike it, the group or members of it, request or demand compassion to prevent the harm arising from being actively discriminated against or condemned. If the discourse generates the compassion requested, the effect is essentially a statement by the state that one ought not to be mean to members of a particular group; whatever their problem, perhaps they cannot help it. Compassion in the form of non-discrimination does not necessarily entail state recognition of the members of the particular group as harmless or equals of the members of the dominant group. The group per se is also of little importance. The focus of compassion is on the individual members, a not so subtle reminder that the group itself may have little value. Compassion in the form of non-discrimination protection works mainly in the context of individual cases. Non-discrimination protection in favour of the whole class of homosexuals is not particularly feasible, though small groups within the larger group might be protected - for example the local gay activist group or the local lesbian softball association. In Canada, the result of the discourse at the site of compassion for gays and lesbians has been almost universally successful (from the gay and lesbian perspective) if we accept that success means the establishment of the principle of non-discrimination.<sup>89</sup> The discourse in

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<sup>86</sup> See M. Jimenez and C. Gillis, "Taking the 'pride' out of Gay Pride Day" *The National Post* (21 December 1998) A3; "Sarnia hosts its first gay-pride parade" *The Globe and Mail* (23 August 1999) A6; J. Barber, "Gay Pride Parade gains mainstream acceptance" *The Globe and Mail* (26 June 1999) A6; "Regina gets gay-pride week" *The Globe and Mail* (17 June 1999) A5. But see M. Hume, "Gay parades hit rural barrier" *The National Post* (2 August 2000) A9.

<sup>87</sup> See e.g. *Chamberlain v. Surrey School Dist. No. 36* (1998), 60 B.C.L.R. (3d) 311 (S.C.); J. Steffenhagen, "Parents oppose 'pro-gay' clubs" *The Vancouver Sun* (23 February 2000) B3.

<sup>88</sup> There are many such things which could count here. For example, being counted in a census—see "Census to ask Canadians about sexual orientation" *The Globe and Mail* (1 November 1999) A3; school proms—see "Gays, lesbians plan first prom at high school" *The Vancouver Sun* (2 May 1996) A10; museum presentations—see A. Maynard, "Alberta opposes grant for gay study" *The Vancouver Sun* (16 August 1997) A6.

<sup>89</sup> See Casswell, *supra* note 17; Yogis *et al.*, *supra* note 1; *M. v. H.*, *supra* note 23; and less enthusiastically, Lahey, *supra* note 1.

Canada to achieve such compassion was, however, long and frustrating.<sup>90</sup>

Condonation involves a different dynamic from compassion. Compassion deals with protection; condonation deals with benefits and is therefore more positive. Discourse at the site of condonation, in the sexual orientation context, involves arguing for state involvement in, and acknowledgement of, homosexuality to the extent that they involve the conferment of benefits on homosexuals or at least homosexuals in particular situations. Often these benefits are conferred in the context of same-sex relationships or in the context of custody or adoption rights. At least some members of the group begin to be perceived in a positive light or they would not be entitled to equal benefits. On the other hand, the state is not really celebrating the existence of the whole group. It is only conferring benefits on particular members of it. The benefits do, however, have symbolic value for all members of the group, but they are not primarily symbolic in the way the issues of celebration will be. The state is, nevertheless, more involved in the nature of the group than it is at the site of compassion, because a class has to be defined in some way in order for benefits to be conferred on some of its members.<sup>91</sup> Condonation, thus, entails a greater level of acceptance of homosexuality because it involves not just protection but the conferment of benefits. It is not, however, because of its limited nature, full acceptance of members of the group.

There are those who argue at the site of discourse on condonation that such benefits should not flow to gays and lesbians and that legal equality demands are satisfied, to the extent that they need to be satisfied at all, simply with the passage of non-discrimination laws.<sup>92</sup> Such arguments against granting same-sex benefits are essentially based on the idea that homosexuality can be tolerated but not condoned. It may be acceptable to have compassion for the status homosexuals find they have (often, so long as they have not *chosen* to be that way) but it is not acceptable to condone activity flowing from such homosexual status, in particular doing something homosexual like being in a same-sex union or adopting a child to live in a "homosexual environment". Condonation would mean positively acknowledging an activity, while compassion is more concerned with mere status. Acceptance of status but not activity fits neatly into the Roman Catholic Church's idea that being homosexual may be tolerated but homosexual action cannot.

Condonation is also challenged by those who are opposed to it not only for its symbolism but also for its cost. Compassion may be cheap for the state, but condonation in the form of benefits can begin to cost something. The expenditure is, it is argued in the discourse at this site, not worth making on the members of the particular group. In the current context, are gays and lesbians actually *worth* the expense?<sup>93</sup> If homosexuals are condoned, that is, if some members are given benefits, only because it costs the state little or nothing, then it is clear that the condonation is still far from a celebration of the group. In Canada, the various levels of government are,

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<sup>90</sup> See Casswell, *ibid.*; Lahey, *ibid.*; G. Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities*, 2d ed. (Montreal: Black Rose Books, 1996); D. W. McLeod, *Lesbian and Gay Liberation in Canada: A Selected Annotated Chronology, 1964-1975* (Toronto: ECW Press, 1996).

<sup>91</sup> Compare Lahey's discussion of a shift from "personal" to "relational" rights. Lahey, *ibid.* at 98.

<sup>92</sup> The most recent example is Gonthier J. in *M. v. H.*, *supra* note 23.

<sup>93</sup> See *M. v. H.*, *supra* note 23, particularly the reasons of Major J., and *Egan*, *supra* note 25 particularly the reasons of Sopinka J. at para 103.

to differing extents, executing policies that demonstrate the condonation of homosexuals.<sup>94</sup>

Celebration is a more complex site than the other two I have discussed because it involves more ephemeral issues and affects more people but in a less direct way than compassion or condonation. It is also difficult to get agreement, even from those on the "same side" of the discourse, about what it contains if achieved. These problems of content and definition will be spoken of in more detail later. Celebration largely flows from the other two sites; it would be difficult to conceive of it without them, especially compassion, for a group which was earlier condemned. Usually its contents, whatever they are, cost little in money terms, unlike condonation. Arguments at this site will only peripherally be about cost, if at all, as is evident in the marriage debate. Furthermore, discourse about sympathy seems out of place here, unlike at the other two sites, because the prerequisite to celebration is not sympathy but pride and respect. The issues, as characterized on both sides of the discourse, will be about the symbolism involved; the symbolism of marriage, the symbolism of pride proclamations and the symbolism of curriculum content. These are highly symbolic things. For the state to be involved in celebration means that what is celebrated is not just *acceptable* but in fact is *good*. In the context of a group like gays and lesbians, celebration means that society not only accepts or condones this group but *approves* of it. The members of the group are not inferior; they may be different, but of a difference that merits celebration. This celebration is public, unlike compassion and condonation which are, at most, only partly public and mostly or entirely private. The members of the minority group are now permitted not just to rest in comfort in private but are able to celebrate and be celebrated as a group in public. This is more than just "toleration".<sup>95</sup> Many laws allow for non-discrimination on the basis of what goes on in private but forbid public acknowledgment

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<sup>94</sup> On the struggles to reach that position, see: P. Lefebour, "Same Sex Spousal Recognition in Ontario" (1993) 9 J. L. & Soc. Pol'y 272; Casswell, *supra* note 17, especially c. 9; Yogis *et al.*, *supra* note 1, *passim*; Lahey, *supra* note 1, *passim*; D. M. McAllister, "Egan: A Crucible for Homosexual Rights" (1994) 5 N.J.C.L. 95; J. P. McEvoy, "The Charter and Spousal Benefits: The Case of the Same-Sex Spouse" (1994) 2 Rev. Constit. Studies 39; C. Gear, "The Evolution of Same-Sex Benefits Entitlement" (1998) 8 E.L.L.R. 37.

<sup>95</sup> A critique of the limitations of "toleration" is found in an article by Larry Catá Backer. Backer says:

Selective social blindness, the construction of our social safety valves, has produced a series of perversities: liberal democratic states in the West permit sexual minorities to exist, but only as long as they keep their identities submerged and participate in their own public obliteration, and only as long as society's public and private institutions remain free to condemn the group they tolerate.

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*This is the kind of toleration the liberal world is quite used to. Practiced by a culture "holding its nose," this was the toleration permitted the Jews until after Europe nearly succeeded in exterminating them. It was the sort of relationship Western society had with its citizens of African descent until recently. It is the sort of "matrix of rights" or "social place" official society reserves for groups it despises but does not yet have the power or the will to eradicate. Thus, the world has wrestled with the "Jewish problem" the "Negro problem" and now wrestles with the "homosexual problem."*

"Toleration, Suppression and the Public/Private Divide: 'Homosexuals' through Military Eyes" (1998-99) 34 Tulsa L. J. 537 at 540-41 (footnotes omitted and emphasis in original).

of homosexuality. This is a denial of full legal personality.<sup>96</sup> The classic example of this is “don’t ask, don’t tell” in the U.S. military.<sup>97</sup> It is also the basis of the Wolfenden Report which proposes opening the closet to gain protection in the home but not onto the street.<sup>98</sup> At the site of celebration, gays and lesbians demand that equal rights protect them not just in the closet or in the home and office, but also on the street and at the altar as well.<sup>99</sup> Benefits may follow from the celebration,<sup>100</sup> but the point of discourse at this site is not merely these benefits but the celebration itself and what that means for the members of the group and the group itself. Didi Herman has suggested that this symbolism is what many perceive as of the essence of equality. She says: “From the perspective of many lesbians and gay men, human rights struggles were, therefore, not about rights per se, but about what rights were thought to signify—public/official recognition, social citizenship, and identification.”<sup>101</sup>

Of course, anybody can be involved in the discourse at the various sites, but what changes is the nature of the roles to be played by various actors in the issues involved. If compassion is attained, there is a fairly passive situation on the part of the individual homosexual. The individual homosexual will be involved only in so far as status is acquired. The state will be defender, and the action defended against will be from a third party or the state itself. With condonation, the state and the homosexual will both be actively involved, the latter to create the situation condoned and the former to condone. Outsiders (third parties) will not be particularly relevant. With celebration, however, many more people will be involved. There will be activity that involves the homosexual, the state and society generally. Homosexuality will be celebrated (opponents will say flaunted) in a public way. Society in general will be involved in a greater sense than with compassion and condonation.

I argue that in order for the discourse in the field of legal equality for homosexuals to result in full equality, the discourse at all three sites—compassion, condonation, celebration—should result in decisions for inclusion.<sup>102</sup> A result that gives compassion but neither condonation nor celebration, for example, would mean that equality is not really achieved. The same would apply for condonation without celebration. Without celebration, the symbolic and public legal inclusion of the group and its members will not be attained. Equality has all these facets—protection, benefits and respect/affection. True equality has not been achieved for a minority if one of those elements is missing. Stopping short denotes inferiority; it indicates that there is thought to be something problematic with the group and its members.

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<sup>96</sup> See Lahey, *supra* note 1, c. 5.

<sup>97</sup> There is much literature here. See e.g. C. M. Damiano, “Lesbian Baiting in the Military: Institutionalized Sexual Harassment under ‘Don’t Ask, Don’t Tell, Don’t Pursue’” (1999) 7 *Am. U. J. Gender, Soc. Pol’y & L.* 499; K. Yoshino, “Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of ‘Don’t Ask, Don’t Tell’” (1998) 108 *Yale L. J.* 485; P. Siegel, “Second Hand Prejudice, Racial Analogies and Shared Showers: Why ‘Don’t Ask, Don’t Tell’ Won’t Sell” (1995) 9 *Notre Dame J. L., Ethics & Pub. Pol’y* 185.

<sup>98</sup> U.K., Home Office & Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution*, by Sir John Wolfenden et al. (London: Her Majesty’s Stationery Office, 1957).

<sup>99</sup> Usually a civil “altar.”

<sup>100</sup> Many look on the debate as a way to get the benefits and privileges of marriage rather than the status of marriage itself. See Sarantakos, *supra* note 42.

<sup>101</sup> *Supra* note 7 at 19.

<sup>102</sup> See *Queer Judgments*, *supra* note 2 at 129-35.



Though in the context of gay and lesbian rights in Canada, I have discussed the three sites—compassion, condonation, and celebration—as a progression or continuum away from the initial site of condemnation, such a course or situation is not an inevitable progression. Discourse can be occurring at different sites at the same time. There might be regression. In the context of homosexual rights discourse in Canada, however, one appears to lead to another and the focus has appeared to shift from one site to another. This analysis of the process and content of the achievement of real equality through discourse is not, it should be obvious, the language adopted by Canadian courts in setting out tests to satisfy equality guarantees under s. 15 of the *Charter* or under human rights legislation. This analysis is simply a useful description of the content of legal equality. It is a description of the issues that will be the subject of the discourse in this field. It is, however, I believe, consistent with recent Supreme Court of Canada pronouncements on equality under s. 15 of the *Charter of Rights and Freedoms* which is the larger context in which fields of discourse about legal equality in Canada are set, along with some cases on human rights legislation.<sup>103</sup>

In the most recent general consideration of s. 15 by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*<sup>104</sup> the Court stated that the s. 15(1) equality guarantee is to be interpreted and applied in a purposive and contextual manner and a formalistic or mechanical approach should be avoided. According to *Law*, a court should make three broad inquiries in assessing a s. 15(1) claim. The first inquiry asks whether there is differential treatment which is assessed on the basis of whether the impugned law draws a distinction on the basis of a personal characteristic, or fails to take into account the claimant's already disadvantaged position within Canadian society. The second broad inquiry under *Law* is whether the claimant was subject to differential treatment on the basis of s. 15(1)'s enumerated or analogous grounds. *Egan* had already definitively stated that sexual orientation is an analogous ground.<sup>105</sup> The third broad inquiry is whether the differential treatment discriminates in a substantive sense, bringing into play the purpose of s. 15(1) to remedy such ills as prejudice, stereotyping and historical disadvantage.

The rather elaborate test in *Law* can be applied at each of the sites of discourse. It is suitable for the particular issues at each site. However, unless it is applied *at all (and not just one or two) sites* then full equality has not been achieved. Cory J. in *M. v. H.* and Iacobucci J. in *Law* appeared to recognize these various factors of equality: non-discrimination, access to benefits broadly interpreted, and social signification. These judges recognized the importance of symbolism. In *M. v. H.*, Cory J. rejected the view in that case that there was no denial of a *benefit* of the law, but only the opportunity to gain access to a court-enforced process. According to Cory J. that was too narrow a view of benefit, which should not be limited to an immediate economic benefit, but should also include access to a process that could confer an economic or

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<sup>103</sup> On the evolution of equality law in Canada, see C. D. Bavis, "*Yriend v. Alberta, Law v. Canada, Ontario v. M. v. H.*: The Latest Steps on the Winding Path to Substantive Equality" (1999) 37 *Alta. L. Rev.* 683.

<sup>104</sup> [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*].

<sup>105</sup> Note that Robert Wintemute has argued forcefully that the Canadian *Charter* could protect against discrimination for things like same-sex marriages by using sex as the basis for analysis. See R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Oxford University Press, 1995) especially at 219-222.

other benefit.<sup>106</sup> Furthermore, of relevance was the fact that the denial of that benefit contributed to the general vulnerability experienced by individuals in a same-sex relationship and contributed to the idea that being in a same-sex relationship meant being in an impermanent or non-conjugal relationship. The majority of the Supreme Court of Canada has thus indicated that symbolism is important and is related to whether a benefit is available or not. Cory J. asked whether: "The exclusion of same-sex partners from the benefits of s. 29 of the *FLA* promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection."<sup>107</sup> To paraphrase for the context of the same-sex marriage discourse what Cory J. said, does the exclusion of same-sex couples from the institution of marriage imply that same-sex couples are "less worthy of recognition and protection"? To continue Cory J.'s language from *M. v. H.*, does "such exclusion perpetuate the disadvantages suffered by individuals in same-sex relationships and contribute to the erasure of their existence"?<sup>108</sup> While *M. v. H.* was a benefits case, the language of the majority indicates how issues relating to benefits relate to symbolism and what I call celebration.

In *M. v. H.*, the court addressed the issues of gay and lesbian access to equal benefits and the place of homosexuals under Canadian law and in Canadian society. Other recent Supreme Court of Canada cases can be analyzed in terms of compassion/condonation/celebration. Two are particularly relevant. In *Vriend v. Alberta*,<sup>109</sup> the court gave some meaning to the protection under s. 15(1) by saying that sexual orientation ought constitutionally to be included in human rights laws. In *Egan*, where the court recognized the principle of non-discrimination against homosexuals, the issue of benefits arose. Gay and lesbian citizens will not fail to note that such equal benefit was denied by the majority in *Egan* where at least some of the judges were fearful of the cost of implementing the machinery of equal benefits where it would cost the state something. It is curious that the Supreme Court of Canada in *M. v. H.* rather enthusiastically endorsed equality rights for same-sex couples when the cost to the public purse was at the same time notionally reduced. In neither case was there any actual analysis of what the precise savings or cost would be. Just the notion of cost or saving seemed to be adequate to deny or to grant equality. Equality protection should not be predicated on cost-effectiveness.<sup>110</sup>

Judges should be aware that discourse resulting in inclusion at one site does not mean the job of achieving equality is done. At least some Supreme Court of Canada judges seem to believe that compassion or condonation is sufficient to fulfill legal equality expectations. For example, in *M. v. H.*, Gonthier J. would have denied to homosexual couples, as La Forest J. did in *Egan*, equal benefits. But although Gonthier J. reiterated the validity of *Vriend*, it is to be noted that *Vriend* was a case involving non-discrimination. *M. v. H.* was a case that involved benefits. Apparently, non-

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<sup>106</sup> *M. v. H.*, *supra* note 23 para. 66.

<sup>107</sup> *Ibid.* para. 73.

<sup>108</sup> *Ibid.*

<sup>109</sup> [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [hereinafter *Vriend*].

<sup>110</sup> Somewhat disturbing too is the sense that the equality provisions of the *Charter* only come to the assistance of a person who was, in a sense, fortunate enough to have a financially secure partner. A person who had a similarly poor partner or in fact no partner at all (at least not one of any permanence or conjugality) derives nothing from this decision of the court. Given the concern of judges about not making demands on the public purse, it seems they might hesitate before going to the court with claims that might end in public expenditure.

discrimination was sufficient for Gonthier J., but freedom from discrimination is just the first step in achieving equality. A court cannot say that it has done what it can to achieve equality for members of a particular group just by ensuring that there is no discrimination against the members of that group. That is bare formal equality. It is simple compassion. Members of a group will not truly be equal while they are simply treated with compassion. They must be entitled to the same social and legal benefits as others. The state must, that is, *condone* them and their activities (including the formation of relationships). And beyond that, the state must *celebrate* them and that which flows from their status, including their relationships.<sup>111</sup>

## V. ALTERNATIVES AND OTHER FIELDS OF DISCOURSE

Could not the celebration take the form of some alternative to marriage? There have been many advances in benefits to same-sex couples and most of the benefits that go along with marriage are available to same-sex couples. In many places, they are now being offered the prospect of recognition as a couple in some form of alternative to marriage.<sup>112</sup> These varied arrangements usually mirror options for opposite-sex couples

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<sup>111</sup> It may be that this connotation of same-sex marriage as a celebration of homosexuality, is what distinguishes the push for same-sex marriage from the push for polygamous marriage. Compare D. L. Chambers, "Polygamy and Same-Sex Marriage" (1997), 26 Hofstra L. Rev. 53. On same-sex marriage and polygamy, see Sullivan, ed., *supra* note 29, c. 8.

<sup>112</sup> See O.L.R.C. "Report on the Rights and Responsibilities of Cohabitants under the *Family Law Act*" (Toronto: Ministry of The Attorney General, 1993); Report on Recognition of Spousal and Family Status (1998), online: British Columbia Law Institute <<http://www.bcli.org>> (date accessed: 26 March 2001) examined by T. G. Anderson, "Models of Registered Partnership and their Rationale: The British Columbia Law Institute's *Proposed Domestic Partnership Act*" (2000) 17 Can. J. of Fam. L. 89; Bill 32, *An Act to amend various legislative provisions concerning de facto spouses* 1<sup>st</sup> Sess., 36<sup>th</sup> Leg., Quebec, 1999 (assented to 16 June 1999, S.Q. 1999, c.14) examined by M. Roy, "Same-Sex Equality" (2000) 19 Est., Tr. & Pensions J. 203. On 12 June 2000 BC introduced omnibus legislation to ensure same-gender partners legal standing equal to unmarried heterosexual partners: Bill 21, *The Definition of Spouse Amendment Act*, 2000, 4<sup>th</sup> Sess., 36<sup>th</sup> Leg., B.C. 2000. On its website, [www.lcc.gc.ca](http://www.lcc.gc.ca), the Law Commission of Canada has an ongoing project on Close Personal Relationships between Adults, which has generated several background and discussion papers.

On the situation elsewhere, see Lahey, *supra* note 1 at c. 11; J. Millbank and K. Sant, "A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in New South Wales" (2000) 22 Sydney Law Rev. 181; D. Borrillo, ed., *Homosexualités et droit* (Paris: PUF, 1998) (especially chapters by K. Waaldijk, N. Pérez-Canovas and E. Errante); C. A. Sloane, "A Rose by any other Name: Marriage and the Danish Registered Partnership Act" (1997) 5 Cardozo J. Int'l & Comp. L. 189; B. E. Graham-Siegenthaler, "Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe" (1998) 32 Creighton L. Rev. 121; S. Morgan, "Legal Recognition of Gay and Lesbian Relationships" (1993) 3 Austl. Gay & Lesbian L.J. 57; M. Kirby J., "Same Sex Relationships – Some Australian Legal Developments" (1999) 19 Austl. B. Rev. 4; E. Brumby, "What Is in a Name: Why the European Same-sex Partnership Acts Create a Valid Marital Relationship" (1999) 28 Ga. J. Int'l & Comp. Law 145; R. Graycar and J. Millbank, "The Bride Wore Pink ... To the *Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales*" (2000) 17 Can. J. Fam. L. 227. On homophobia in the debate on same-sex unions, see D. Borrillo, "L'homophobie dans le discours des juristes autour du débat sur l'union entre personnes de même sexe" in *Homosexualités, expression/répression*, L.-G. Tin and G. Pastre, eds., (Paris: Stock, 2000) at 156-179; D. Borrillo,

who do not choose to marry.<sup>113</sup>

There have been many people and bodies that have argued that such proposals solve the inequality problem. Almost invariably such arguments are prefaced by statements noting the unfairness of the exclusion of same-sex couples from marriage. Still their proponents also usually fail to advocate full integration of same-sex couples into marriage. For these people, a substitute for marriage such as some form of same-sex union or registered domestic partnership should be sufficient. For example, Nicholas Bala thinks that the federal government should act but should call the relationships it then legally recognizes something besides "marriage". He says:

Thus, I think that the federal power could extend to the recognition of the rights of same-sex partners, the right to enter a relationship that is called something other than marriage, such as a "same-sex partnership" or "domestic partnership," as long as the rights and obligations conferred by the status are fully equivalent to marriage for all purposes of Canadian law. The relationships would then be formalized in accordance with a process determined by provincial law, enacted under the "solemnization of marriage" power. Such full legal recognition of same-sex marriage in "all but name" would address some of the political, social, religious and psychological concerns.<sup>114</sup>

Linda S. Eckols similarly concludes that, "the legalization of same-gender marriage is too big of a step" and suggests instead, "enactment of smaller benefits packages to mitigate economic and legal discrimination against same-gender couples,

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"Homosexualité et liberté matrimoniale" (1998) 12 *Revue témoin* 75.

There is a good list of articles to 1998 on same-sex marriage recognition in the U.S.A. in L.D. Wardle, "Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition" (1998) 32 *Creighton L. Rev.* 187. See also M. Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca: Cornell University Press, 1997); M. Strasser, *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protection* (Westport: Praeger, 1999). Probably the most significant recent development was when the Vermont House of Representatives and Senate passed a bill in 2000 granting the full benefits of marriage to same-sex couples. In December 1999, the state's highest court (Vermont Supreme Court) rules that gay people are entitled to the same marriage benefits as heterosexuals. Couples can go to their town clerks for licences. Then they will have their unions certified by a justice of the peace, judge or member of the clergy. Breakups will be handled in family court, just as divorces are, although they will be called dissolutions. "Gay marriage bill to become law" *The Globe and Mail* (26 April 2000) A11. Vermont has passed a law that allows couples of the same-sex to enter into a "civil union" which will be "certified" (rather than "sanctified"). A. Cohen, "Vermont a pioneer in approving gay 'marriages'" *The Globe and Mail* (5 May 2000) A10.

<sup>113</sup> That non-married couples are entitled to the same benefits as married couples flows from the decision in *Miron*, *supra* note 35, which says that it offends the *Charter* to distinguish between the rights of married persons and persons in marriage-like relationships. *Miron*, *supra* note 35. This case was released along with *Egan* and Lahey has argued that their release together may limit the impact *Miron* has had on same-sex couples. See Lahey, *supra* note 1 at 77.

<sup>114</sup> N. Bala, "Alternatives for Extending Spousal Status in Canada" (2000) 17 *Can. J. Fam. L.* 169 at 179 (emphasis in original). Christine Davies considers the advantages of registered domestic partnerships in "The Extension of Marital Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods" (2000) 17 *C.F.L.Q.* 247. See also Cossman & Ryder, *supra* note 27.

while society prepares for same-gender 'marriage.'"<sup>115</sup> These writers accept that there is legitimacy to arguments to the effect that same-sex couples and the institution of marriage do not or should not mix.

Separate "but equal" institutions, however, are not true celebration. Such alternatives only underline the diminished role that is assigned to members of the group who are linked to such institutions. Homosexuals are excluded from the primary legally recognized institution for celebrating relationships. The authors who advocate alternative institutions for homosexuals fail to deal with the effects of exclusion. They fail to explain why gays and lesbians are properly seen as somehow inherently hazardous or inimical to the institution, which attitude must underlie their conclusion to exclude them from it. In *Egan*, Iacobucci J. said: "it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat?"<sup>116</sup> Those who would deny marriage to same-sex couples fail to consider that opening marriage up might in fact be nurturing the institution by expanding it. Those who would have same-sex couples settle for an "alternative" do not advocate abolishing marriage altogether. They do not deal with the fact that even with their "alternative" proposals opposite-sex couples have a choice same-sex couples do not and this inequality is based on the sexual orientation of those in the same-sex relationship.<sup>117</sup> The judges who wrote in *Miron* made much of the issue of marriage as a choice for opposite-sex couples. L'Heureux-Dubé J. said the decision whether or not to marry can be: "one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance,

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<sup>115</sup> *Supra* note 33 at 358. The author of "Love in a gay climate" *The National Post* (8 March 1999) A19 (editorials) while recognizing the importance of marriage to a relationship, concludes that gays not be allowed to marry but to have access to a partnership law that is similar. It says: "This solution would address the legitimate economic appeals made by liberals, while simultaneously strengthening traditional marriage. Gay rights advocates may see this as a halfway measure but it is still preferable to a leap in the dark. It would be irresponsible to go further with a social institution that currently needs nurturing rather than the turmoil of further experimentation."

Roderick Macdonald thinks it is a good idea to extend benefits not just to same-sex couples but to people in all sorts of relationships. He writes: "In general, the more diverse a society, the better it is for legislation to directly address the social policy being pursued. This is especially the case where traditional legal concepts are grounded in custom, religion and morality. Acrimonious debates are common when such concepts are analogically extended beyond their accepted socio-cultural reference points." He continues: "However important the definition of marriage might be for consecrating certain relationships between adults, it is both under- and over-inclusive as the basis of legislative policy intended to promote the physical, emotional, economic and psychological security of adults in stable relationships. It is under-inclusive because it excludes many such relationships of dependence and interdependence that deserve to be supported by Parliament. ... Conversely, the concept can be over-inclusive because some married couples have never lived together, or only married for strategic reasons having nothing to do with mutual support." R. Macdonald, "To have and to hold ... whoever" *The National Post* (11 June 1999) A18.

<sup>116</sup> *Supra* note 25 at para. 211.

<sup>117</sup> One writer proposes that marriage not be associated exclusively with legitimacy. She proposes that states offer all couples several forms of and alternatives to marriage in endowing a relationship with legal consequences. See H. L. Hughes, "Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality" (1998) 33 *Harv. C.R. - C. L. L. Rev.* 237.

one's citizenship or even one's religion."<sup>118</sup> Gonthier J. said: "Marriage is an institution entered into by choice which carries with it certain benefits and burdens."<sup>119</sup> This is a choice he would deny homosexual persons. That the marriage option would continue to exist in its present form would only confirm it as an institution quite separate from the "alternative" partnership. It would continue to have a separate symbolism. That there are institutions for heterosexuals short of marriage, however, shows that marriage is not the only institution for representing heterosexuality or heterosexual union. Marriage should not be seen as synonymous with heterosexuality. Heterosexuality does not depend on marriage.

Homosexuals do not want separate buses, or separate schools, or separate drinking fountains. They do not want relationship apartheid.<sup>120</sup> In answering the question of whether separate institutions are an equal celebration, it is, I submit, valuable to compare the answer to the answer one would get if one replaced "same-sex couples" with "mixed race couples" and "mixed religion couples" and so on. Such couples were at various times and places excluded from the legally recognized institution of marriage.<sup>121</sup> What if such couples were offered the alternative of a "registered domestic partnership" or a "civil union" but were excluded from the definition of marriage by some preamble passed by the government?<sup>122</sup> The result would surely be seen today in Canada as intolerable.

The celebration of homosexuals and homosexuality by allowing them to celebrate in the institution of marriage does not end discourse about gay and lesbian rights. It does, however, tend to move it to a different field. It may also fracture any sense of unity in what I, and most others involved in legal discourse, have (artificially)

<sup>118</sup> *Supra* note 35 para. 95.

<sup>119</sup> *Ibid.* at para 2.

<sup>120</sup> Ontario's same-sex law has been called "sexual apartheid". One of the parties to the *M. v. H.* litigation is reported to have been angry at the Ontario government's purporting to comply with the ruling, "effectively segregated gays and lesbians from heterosexual couples by referring to them as 'same-sex partners'". K. Makin, "Lesbian wants court to rehear historic case" *The Globe and Mail* (8 April 2000) A5. M. McCarthy, one of the lawyers in *M. v. H.*, says that rather than giving same-sex spouses equality to heterosexual, common-law spouses, the legislation sets up a separate category of "same-sex partners" and does not recognize that they can form families". R. Mackie, "Ontario bill called 'sexual apartheid'" *The Globe and Mail* (25 November 1999) A3. Note that South African apartheid was based on religious views. See M. Prozesky, ed., *Christianity Amidst Apartheid: Selected Perspectives on the Church in South Africa* (London: Macmillan, 1990), especially c. 4: J. Kinghorn, "The Theology of Separate Equality: A Critical Outline of the DRC's [Dutch Reformed Church's] Position on Apartheid" in M. Prozesky, ed., *Christianity in South Africa* (Cape Town: Southern Book Publishers, 1990) 57.

<sup>121</sup> It was not until 1967 in *Loving*, *supra* note 53, that the U.S. Supreme Court held that interracial bans violated the Equality Protection Clause of the 14th Amendment of the U.S. Constitution. See M. Strasser, *Challenge of Same-Sex Marriage*, *supra* note 111 at 6. There are many examples of queer marriage rules to be found if one peruses W. P. Eversley and W. F. Craies, *The Marriage Laws of the British Empire* (London: Stevens and Haynes, 1910) including an example of a ban on certain mixed religion marriages at 231.

<sup>122</sup> For a large part of U.S. history, marriage between the races was regarded as "unnatural". J. G. Culhane, *supra* note 32 at 1130. Culhane has remarked that the same-sex marriage debate is a little different from the different-race marriage debate because of the speed with which it has risen to the public agenda.

treated as a monolithic group—gays and lesbians.<sup>123</sup> There is an assimilationist quality about the discourse relating to legal equality, particularly at the site of celebration. The issue of celebration gives rise to many questions left mainly for gays and lesbians to answer. Divisions within the group will appear as they already have over the question of marriage.<sup>124</sup>

The site of celebration raises problems for those who advocate celebration. It raises questions of what one is celebrating, who is being celebrated, who is being left out, how do those celebrations work with other celebrations, how is it appropriate to celebrate? If the state is to be involved in the celebration, then presumably it has to consult with some homosexuals. Who are they to be? How are certain people supposed to speak for the whole varied lot of homosexuals? Celebration is different from arguing for protection against discrimination at the site of compassion, where the mere fact of homosexuality is all that is required and whatever other characteristic the person has or what type of homosexuality is involved is irrelevant.<sup>125</sup> Similarly, if there are benefits to same-sex couples arising from discourse on condonation, then anything else about them, beyond being homosexual and being in a couple, is largely irrelevant. For celebration, however, the issue is more complex. Are we celebrating mere

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<sup>123</sup> I have pointedly not dealt with the issue of legal equality of transsexuals and transgendered persons. Discourse about them has tended to be on a different field. Others are more apt to include them in gay and lesbian treatment. See e.g. Lahey, *supra* note 1.

<sup>124</sup> See Sullivan, *supra* note 29 at c. 4. See also Eskridge Jr., *supra* note 29 c. 3. Interestingly, arguments from tradition are often those used by gays and lesbians who oppose the fight for same-sex marriage. It is as controversial for some within the gay community for gays and lesbians to be pursuing the goal of marriage as it is among social conservatives for such a thing to be occurring. The reasons are superficially quite different but at heart similar. Some gays and lesbians will see the pursuit of marriage as symbolic in nature, but symbolic of co-option by the mainstream and celebration of assimilation. See Duclos, *supra* note 1. In any event, all these arguments from tradition might be misplaced. Our current notions of what constitutes a “traditional” marriage are quite recent. E. Brumby notes that state regulation of marriage is a relatively recent occurrence. E. Brumby, *supra* note 111 at 151. See also A. Gill, “The Price of Equality” *The Globe and Mail* (18 March 2000) R7.

<sup>125</sup> The judicial reluctance to explore homosexuality as a complex phenomenon will probably cause a court to avoid making the issue even more complicated by considering other issues, such as race, gender, national origin, along with homosexuality. Jody Freeman has studied how difficult it is to make what she calls “interactive discrimination” arguments in court. J. Freeman, “Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Legislation” (1994) 44 U. T. L. J. 41, especially at 74-80. For example, Freeman states at 74-75:

Conveying to a court how different “kinds” of discrimination overlap and intersect is an enormous challenge. Jurisprudence and legal scholarship about discrimination have not, as a rule, been geared to determining how discrimination on the basis of race and sex, for example, work together. Equality analysis has paid scant attention to the ways in which discrimination may occur on multiple grounds. And yet, people often experience discrimination in precisely this way. They are denied a benefit or an opportunity because of their gender *and* their race, or their disability *and* their sexuality, or their race *and* their class. (emphasis in original)

There is a particularly rich U.S. literature on “intersectionality”. See especially K. Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241, and the literature cited therein.

homosexuality? If so, what exactly is mere homosexuality? If not, what aspect(s) of homosexuality are we celebrating? How is one to celebrate homosexuality in all its diversity and just isolate the homosexual characteristics of the members of the group from the other diverse aspects of who they are?<sup>126</sup> Some of these questions will arise more strongly for some forms of celebration, for example pride parades, than for other forms, such as marriage.

Many of these questions arise because of an important shift in the conception of homosexuals and homosexuality once the site of celebration is reached. I have already elaborated to an extent on the move to positive identity. At the site of celebration, homosexuality is conceived of as a positive thing with homosexuals as having something to contribute to society. In the other two sites, particularly compassion, the emphasis is somewhat more negative, in the sense that homosexuals want concrete things they have not got. They are portrayed as (and are) victims in order to need to obtain these goals. It is because of this negativity—homosexual as victim and oppressed—that real equality cannot be obtained solely through success at those two sites of discourse.<sup>127</sup> In celebration, homosexuals are constructed as having something to give, to be proud of. The group is recognized in a positive way. This is quite a shift to move from victim to honour. One of the problems, along with assimilation, is that many in the group will clearly not have moved beyond victimhood. Some will be overlooked in the rush to integrate the group of homosexuals into the mainstream in a celebratory way. Furthermore, the achievement of celebration on the field of *legal* equality may cause some to have too high hopes for immediate achievement of full social equality. Duclos has said on this issue:

It is important not to overstate the magnitude of the consequences flowing from the issuance of a marriage license....There is still lots of room for *de facto* double standards, and lesbian and gay marriages could easily come to occupy one of the lower tiers of an already hierarchical social marriage system.<sup>128</sup>

The celebration of homosexuality, including the celebration of same-sex marriages, raises all those questions to which I have alluded above. This is a predicament, however, for which gays and lesbians should be thankful. No longer a *legally* victimized group, gays and lesbians have the privilege to sort out such problems of definition and inclusion like any other celebrated group. The focus can be on, for example, the attainment of social equality. In the context of marriage, so long as marriage is not mandatory—and it has never been so for opposite-sex couples—it is not an imposition on individuals within the gay and lesbian community. Those same-sex couples who do not want to marry need not. That legal equality does not equate with full social equality is no reason not to argue for legal equality. That marriage still has many flaws and a loaded history is no reason to require gays and lesbians to wait for across-the-board marriage reform before being admitted to the institution. It is possible

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<sup>126</sup> See Duclos, *supra* note 1 at 43-44; N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L. J.* 179.

<sup>127</sup> It is theoretically possible, of course, to celebrate victimhood. But an entrenched sense of being put down is an awkward thing to celebrate over the long term.

<sup>128</sup> *Supra* note 1 at 51. See also Herman, *supra* note 7. Herman expresses concern about the use of the liberal equality model.



that marriage is one of the social institutions that needs to be reformed, but gays and lesbians can participate in that reform from within rather than being required to wait on the sidelines until others have solved the problems.<sup>129</sup>

Furthermore, homosexuals as a group will not be celebrated for having lost a sense of distinctiveness. It would be naive to think that gays and lesbians will simply be absorbed into mainstream society and cheerfully disappear.<sup>130</sup> The long history of intolerance for and persecution of gays and lesbians will no doubt forever mark members of the group. The problem of integrating but remaining distinct will, of course, always pose challenges. It has for other groups. John Boswell's analysis of the situation of Jews (in comparison with gays) as a minority group in the US is instructional. Boswell posited a taxonomy of degrees of acceptance: "distinguishable insider," "inferior insider," and "outsider." According to Boswell:

"Distinguishable insiders" are persons who could be recognized as distinctive if someone had the desire to discriminate, but whose divergence from the norm is viewed in the society at issue as part of the ordinary range of human variation. They are therefore not disadvantaged or segregated, socially or conceptually. (And may in fact be admired: "heroes" are people who are distinctive from others but respected for precisely this reason.) The second category, "inferior insider," applies to persons whose divergence from some norm is considered tolerable, but who are thereby relegated to inferior social status.... "Outsiders" are either not tolerated at all (i.e., they are killed, or banished, or incarcerated) or conceptually relegated to non-existence.<sup>131</sup>

Boswell was of the view that Jews and gays have at various points in Western history occupied all three of these categories. He concludes that Jews have achieved the status of distinguishable insiders.

Jews might be insiders but they are not the norm. They still face discrimination. It is just that it is not state policy to encourage or condone this—quite the opposite. Martha Minow, has examined difference and argues for strategies to reduce its importance. She states:

A student in a wheelchair is different only in relation to those who are mobile on foot, and this difference is significant only in relation to institutions that have made this difference matter by placing steps before each entrance and by using doorways too narrow to be navigated by someone in a wheelchair. The meanings of many differences can change when people locate and revise their relationships to difference. The student in a wheelchair becomes less "different" when the building, designed without him in mind, is altered to

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<sup>129</sup> See Herman, *supra* note 7; P. Rusk, *supra* note 1 at 202-3. Compare B. Cossman, "Family Inside/Out" (1994) 44 U. T. L. J. 1.

<sup>130</sup> Recognising same-sex marriages would not in fact be out of step with the sentiments of Canadians. One poll in 1999 indicated that most Canadians are of the view that gay couple should be able to legally get married. An Angus Reid Group survey for *The Globe and Mail* found that 53 per cent of Canadians were in favour, 44 per cent were opposed and 3 per cent did not know or were undecided. Support was highest in Quebec with 61 per cent, while Saskatchewan was lowest with 42 per cent. A. McIlroy, "Most in poll want gay marriages legalized" *The Globe and Mail* (10 June 1999) A1, A8.

<sup>131</sup> J. E. Boswell, "Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities" (1989) 1 Yale J. L. & the Human. 205, 209.

permit him access.<sup>132</sup>

The parallels between that scenario and that of same-sex couples and marriage are striking. This is the challenge of success at the site of celebration: to participate positively without being completely subsumed. This may be particularly challenging in the context of an invisible minority, which gays and lesbians largely are, but it is a challenge for the minority group. It takes place on a different field of discourse from that about attaining legal equality. It is not an issue the court should be unduly concerned with when faced with discourse on legal equality and celebration. As Iacobucci J. said in *M. v. H.*:

Indeed, as noted by EGALE, given that the members of equality-seeking groups are bound to differ to some extent in their politics, beliefs and opinions, it is unlikely that any s. 15 claims would survive s. 1 scrutiny if unanimity with respect to the desired remedy were required before discrimination could be redressed.<sup>133</sup>

Moreover, as Anne Woolley says:

Even if pursuing the right to marry constitutes a politically problematic strategy for the gay and lesbian community, that does not mean that once such a claim has been made, the adjudication of it can be avoided. It would be both absurd and offensive if the court were to respond to a rights claim by a same-sex couple by telling them that the right they are pursuing is not the one they really want.<sup>134</sup>

The role of the state is to include and accommodate minority groups by fostering real equality. Real equality includes moving successfully from compassion and condonation to celebration. Celebration is facilitated by admission to the institutions of celebration, to existing institutions and not parallel or substitute institutions. For gays and lesbians that includes the institution of marriage.

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<sup>132</sup> M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990) at 12.

<sup>133</sup> *Supra* note 23 at para. 127.

<sup>134</sup> *Supra* note 10 at 473.

