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POSTDOCTORAL STUDIES**

Heather E. Shipley

AUTEUR DE LA THÈSE / AUTHOR OF THESIS

Ph.D. (Religious Studies)

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TITRE DE LA THÈSE / TITLE OF THESIS

Naomi Goldenberg

DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

Lori Beaman

Peter Beyer

Pierluigi Piovanelli

**Pamela Dickey Young (Queen's
University)**

Gary W. Slater

Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

**The Religious Construction of Sexual Citizenship: The Role of Religious
Ideologies in Canadian Law**

Heather E. Shipley

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the PhD degree in Religious Studies

Department of Classics and Religious Studies
Faculty of Arts
University of Ottawa

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Canada

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ABSTRACT

The central focus of this thesis is to examine the construction of the following categories of identity; religious ideology, sexuality and sexual orientation and the subsequent use of these categories of identity to create standards of acceptance in law which are then framed as natural and normal. This thesis uses interdisciplinary theoretical methods and analysis to expose and analyze discursive constructs regarding interveners' facts. The focus of this analysis is the normalizing and marginalizing discursive processes of law in relation to legal and cultural standards regarding sexual normativity and sexual difference. Although same-sex marriages have been legal in Canada since 2005 and equality rights based on sexual orientation read into the *Charter* since 1995, the construction of homosexuality as inherently other to normative heterosexuality continues in legal and public discourse. The problem under examination is the means by which acceptance is granted in Canadian law and how the language of sexuality and same-sex relationships is structured via the religious interests of the interveners and judges. The influence of religious beliefs and religious groups has maintained structures of sexual normalcy in law and public discourse so that the sexually other must be desexualized to access rights and freedoms. Framed within these parameters, homosexual difference is constructed only as taboo unless it can be enveloped in the category of the normal. This analysis is accomplished through the application of multi-disciplinary theoretical approaches and analysis to legal discourse. Other forms of discourse are incorporated into the discussion to demonstrate the intertwined relationships of law and society with a specific view to language which co-opts sexual difference within a heteronormative vernacular.

For Billy.

INTRODUCTION

I would go so far as to say that even before slavery or class domination existed, men built an approach to women that would serve one day to introduce differences among us all.
(Claude Lévi-Strauss)¹

The ambivalences created by the disjuncture between same-sex marriage as a public institution and as a personal experience confuse the landscape of sexual citizenship. Same-sex couples can now say “I do” in Canada. Yet, what are the conditions placed on social belonging once the legal document of marriage is procured within its heavily coded frame of heterosexist presumptions?

(Fumia, 2007: 190).

BACKGROUND

During the tenure of my Master of Arts degree, two very important events occurred that have subsequently shaped the direction of my doctoral studies. Same-sex marriage was legalized in Canada in 2005, after a long stretch of discussion and speculation at public, policy and legal levels. During Ottawa’s annual Gay Pride Parade, in July 2005, on the heels of the legalization of same-sex marriage I overheard numerous gay and lesbian individuals being asked if this meant they would be getting married.

And the answer, which seemed surprising to some at the time, was not overwhelmingly “yes.” Although some of the fear-based rhetoric that was spun by opponents to the legalization of same-sex marriage hinged on the idea that gay and lesbian couples would begin storming churches and civil marriage halls, the reality was that, like many heterosexual couples, not everyone desires to be legally or religiously wed.

The second event, a year after the same-sex marriage legislation was passed, was Stephen Harper’s Conservative Party minority win at the Canadian federal government level. Within the first few weeks of Harper taking the office of the Prime Minister, he began discussing proposed legislation titled the “Defense of Religions Act.” I discuss this Act in more detail in Chapter 4, but for the purposes of providing the background toward my doctoral study, I will summarize what struck me about DORA. Although purportedly this Act would cover any number of situations in Canada in which religious beliefs and opinions were under attack, the main thrust of the argument in support of DORA, as outlined by then Justice Minister Victor Toews and Stephen Harper, was that it would protect religious groups and individuals who oppose same-sex unions from being “forced” into performing marriages for homosexual couples or renting halls owned by religious organizations to homosexual couples. DORA would also protect individuals opposed to homosexuality from being charged under the hate speech laws if they spoke out against homosexual unions.

Ignoring for a moment that there is already a provision in the same-sex marriage legislation to prevent religious officials from being forced to marry same-sex couples, this proposed Act provided an immediate and direct challenge to the steps made toward securing equality for gays and lesbians secured only a year earlier. What became clear through the proposal of this legislation, and further the comments made about it by

Conservative Party members such as Harper and Toews, is that there is a commonly held assumption that religion and homosexuality are incompatible identity markers and further that religion needs to be “protected” from the threat of homosexuality.

Through the academic study of psychoanalytic theory, specifically feminist theories, psychoanalytic theory and deconstruction, also undertaken during my M.A. degree, I found a theoretical jumping off point for my PhD dissertation in the work of Luce Irigaray (1985; 1993; 2000). Although Irigaray’s work is not the main theoretical paradigm of my PhD dissertation, her analysis of the feminine subject, or more accurately the subjectivity of women in society, and subsequently her critique of systems of governance launched me into the place I am now; analyzing and deconstructing legal discourse with a particular eye to the intersections of religious ideologies and sexual orientation. Irigaray’s critique is embedded in this dissertation, which has as its focus an analysis and critique of the regulation of sexual difference in Canada.

While reading Irigaray’s *democracy begins between two* (2000), my conceptual model for the use of Irigaray’s critique of society’s inability to accept difference, specifically sexual difference, shifted from ways this is demonstrated in such rituals as the Eucharist, to the ways in which we are governed by a system that permits or rejects the possibility of difference; the law. I moved in my thinking from discussing how difference is constructed in examples that repetitively reaffirm concepts of normativity to viewing this cycle as reciprocal. The larger governing body (in this case, law) that determines for citizens what is right or wrong, acceptable or not, is not simply top down, but is informed by the social climate through which protest and challenge does or does not happen.

I undertake in my thesis an analysis of the inclusion of religious ideologies in Canadian law in reference to sexual difference, specifically sexual orientation rights. I will examine the use of these ideologies to identify and construct categories of sexual normativity which are then used in law as the guidelines for acceptance. The construction of sexual normativity, here in regards to sexual orientation, further perpetrates the sameness/difference divide originally articulated in feminist theory.

My dissertation is an analysis of the influence of religious interests in framing standards in the regulation of sexuality and sexual difference in Canadian law, both through an examination of the facts of religious interveners as well as the discursive constructs used by judges in their decisions. My argument is that these ideologies, which are purported to be religious, are used to defend discriminatory views and permit a permissible scope of discrimination. The sameness/difference divide, here as sameness (heterosexuality) and difference (homosexuality), is demonstrated in legal discourse through linguistic constructs which co-opt references to homosexuality within the heterosexual vernacular. For example, sexual orientation rights often enjoy success in court if the parties within the case can be construed as family (not lovers) and thus distanced from the sexual aspects of their sexual difference. In this way sexual difference is implicitly dissuaded and the hegemonic heterosexual institution is subtly supported.

Legal and religious discourses are powerful tools in influencing standards of normalcy and permitting the possibility of acceptance in a legal and societal context. While in Canada same-sex marriage has been legal since 2005 and sexual orientation read into the *Canadian Charter of Rights and Freedoms* since 1995, the construction of homosexuality as inherently “other” prohibits the acceptance of sexual diversity.

SAMENESS/DIFFERENCE:

A PROJECT OF FEMINIST THEORY

The quote by Claude Levi-Strauss at the beginning of this introduction demonstrates for me what the sameness/difference analysis in feminist theory has been working to illuminate since its inception; the differences that are constructed among us originated in the location of the category of **same** as male and **different** as female. This model of sameness and difference has been replicated to delineate a hegemonic category embedded with power and value (male) and a category of other, unmarked, and based in a subordinate position (female). The categories of the two sides of the spectrum change as social, legal and religious (among other) structures are modified. What remains constant is that the category of the same is always created from a position of power, by the group or individual who has the authority to define themselves as ideally located, and thus position themselves as the model to which others should strive. For the purposes of this dissertation I examine the constructions of sameness and difference as based on normative versus non-normative sexuality.

Feminist theory and feminist critique embodies a wide range of disciplinary approaches and is constantly shifting and evolving in its methodologies and approach. My project stems from feminist theories and methods related to psychoanalytic theory regarding gender and even more specifically to the work of Luce Irigaray and other feminist psychoanalytic theorists. My research originally was located within feminist

theories which critiqued what are often constructed as binary oppositions in the sameness/difference divide, more specifically focused on the systematic exclusion of women based on their “different-ness.” This theoretical grounding has been developed as I have also delved into feminist and critical works within the fields of religious studies, queer theory, post-structuralism and critical theory.

Building on Irigaray’s arguments from *This Sex Which is Not One* (1985) and *Ethics of Sexual Difference* (1993) I critique the categories of same and different as a way of examining sexual difference regarding sexual orientation. The hegemonic category of “same” forms the basis for the heteronormative citizen in Canada, with access to rights and privileges based solely in their conformity and identification to constructed parameters of what a heterosexual should be like. The construction of heteronormativity will be examined in contrast with the category of the sexually other, specifically the homosexual. However, simply ascribing to the category heterosexual is not enough because there are also problematic behaviours within the dominant sexual orientation such as swingers and polygamists, cases which will be discussed briefly as well.

Ongoing debates about same-sex marriage and the protection of the institutions of marriage and the family have been circling whether homosexual parenthood and familial relations will violate these institutions, which are embedded with a particular constructed sanctity. The protection of the sanctity of marriage and family, which really only supports particular types of marriage and family, assumes that the ideological value marriage holds in Canadian society will be irreparably damaged should homosexuals being given, or be allowed to keep, the privilege of marriage. Or, phrased differently,

have access to a right that is unquestionably assigned to the dominant and normative sexual orientation of heterosexuality.

The second quote, by Doreen Fumia, demonstrates the challenge faced by sexual difference once the legal victory is in hand. According to Fumia, there is a particular idealized construction of national identity that is challenged by the acceptance of difference. Often fear-based responses to acceptance of diversity hinge on the notion that somehow everyone's identity and investment in institutions such as marriage and family will shift if "they" are allowed to participate. Although this is consistently demonstrated not to be the case, nevertheless, Fumia summarizes some of the resistance that is expressed to sexual difference in public spaces and argues further that the challenges faced by same-sex couples who marry are not eradicated because of the ability to say "I do" in Canada.

SOME LEGAL CONCEPTS AND TERMINOLOGY:

CASE SELECTION AND METHODS

Because I will be examining and critiquing the category of the sexually other within Canadian law, it is important to define and clarify some of the legal terminology that has embedded itself into this dissertation. I will outline the main documents I examine in order to provide some foundations for the legal theory and methods used in this project as well as the reasons for incorporating the cases I discuss.

There are two main legal documents that are examined in this dissertation; legal decisions, which include statements of the facts of the case at hand, the law and the decisions of the judges, and interveners' facts. Case law transcripts are, quite simply, the court transcription and official publication of the cases that come before the courts, at any level of the court system in Canada. This includes the court's summary of the case and results and the full text of the cases and judges' statements.

Interveners' facts are documents submitted to the court outlining the effects a particular case will have, positive or negative, on the group or community outlined in the factum. Legal interveners are granted status by the courts in cases to which they can demonstrate to the court that the case and results of the case will have a significant impact on their persons or their community. Intervenors can submit their opinions on a case in support or in opposition of the claimant's petition. Two main intervenors whose facts I will examine are the Evangelical Fellowship of Canada and the Interfaith Coalition on Marriage and Family.

I also include and discuss the House of Commons Legislative Committee regarding Bill C-38 (The Civil Marriage Act), held June 2, 2005, with a specific eye to comments made by Margaret Sommerville regarding same-sex marriage and same-sex parenting. Sommerville's comments in the House Committee meetings regarding Bill C-38 demonstrate common tendencies promoted by opponents to same-sex relationships. Sommerville argues that children of same-sex parented couples will suffer long-lasting detriments as a result of their parentage. Sommerville's concerns regarding the passage of same-sex marriage legislation as having a long lasting negative impact on the institution of family demonstrate some of the arguments that have been used to oppose same-sex unions, both in historic and contemporary discourse

The cases I include in this dissertation demonstrate embedded assumptions regarding normative sexuality, framed within a particular notion of morality, embedded assumptions which I critique as a goal of this project. The cases are included both in correspondence with my challenge to the constructed nature of identity categories, within legislation, and in order to demonstrate the normative assumptions embedded in specific identity categories. I have also examined a number of cases in Canada that have not been included in this dissertation, solely because the goal was to include legal decisions, interveners facta, as well as media and public discourses examples to demonstrate the arguments, not overwhelm the reader. I mention additional cases in footnotes and subsections as a means of referencing the additional examples of normative claims regarding sexual difference and the challenges that the construction of normative religiosity pose to the acceptance of sexual difference.

The methodology employed in this dissertation is an interdisciplinary textual analysis of legal decisions and interveners' facta, primarily to counter normative claims about identity categories, specifically regarding religion, sexuality and sexual orientation. The Interfaith Coalition's factum regarding *Halpern et al.* provides the groundwork for critiquing normative claims regarding religious ideologies and the acceptance of the common assumption that being religious necessarily equates to being anti-homosexual. *Labaye* is included to provide another challenge to the construction of sexual normativity, in this instance when speaking about non-normative heterosexual relationships. The case of *Chamberlain* demonstrates that religious ideologies are assumed to be opposed to same-sex relationships, and specifically same-sex parented couples. Both *Egan* and the *Reference re Same-Sex Marriage* decisions are incorporated because they provide the background to and grounding for the acquisition of rights for

homosexual couples as they also demonstrate some of the ways homosexuality is 'normalized' and religious groups are seen as needing protection from sexual difference. The *Hall* case demonstrates the collision of all the problematic constructions and assumptions in the identity categories under examination in this dissertation however the decisions and facts included in other chapters demonstrate that these problematics are repeated and replicated regarding same-sex marriage debates and sexual orientation equality rights.

Incorporating diverse theoretical and disciplinary approaches provides the analysis with a more wide-ranging and complex set of analytic tools in the examination and critique of linguistic constructs and it also provides challenges and critiques to the specific theoretical approaches themselves. The analysis of legal decisions and facts is done through legal theory and methods, as well as from feminist, critical theory and religious studies perspectives, because the linguistic devices I examine are, can be or have been applied and argued from within a broad range of disciplines, as well as in media and public discourses. Subsequently, the analysis of normative claims and constructed categories requires a broad range of academic approaches as well as the inclusion and discussion of non-legal and non-academic discourses.

CHAPTER OUTLINES

In **Chapter 1** I deconstruct one of the categories of reference focused on within my dissertation, the category of religion. More specifically I examine the use of religious ideology as a defense for anti-homosexual views. For the analysis undertaken in this dissertation it is imperative to apply critical theory to the category of religion and examine the systems of power and latent assumptions that exist within that category. The project of “critical religion” is also part of the larger goal of this thesis in exposing embedded ideologies within language. I will examine the problematic category of religion and demonstrate the way this problematic category is used to support discriminatory views, which are then subtly supported within Canadian law.

The structure of this chapter is such that I first outline the theoretical foundations used for examining the category of religion and the means by which dominant ideologies are embedded and coded in discourse. I then apply these theoretical foundations to the judge’s decision in, and the facts presented by the Interfaith Coalition on Marriage and Family, regarding *Halpern et al. v. Attorney General of Canada* (2003). *Halpern et al.* is an Ontario case brought by Hedy Halpern and 13 other individuals who protested the common law definition of spouse as relating solely to heterosexual couples. While one might expect a religious organization to demonstrate and discuss their religiously founded opposition to a case regarding same-sex relationships, I wish to examine the means by which the IFC constructs their ideological arguments, resulting in a coalition of very strange bedfellows, who have created a community based solely in opposition to the legal recognition of same-sex relationships.

The framework of **Chapter 2** provides the same critical analysis as outlined in Chapter 1, but with another category of identity that is often problematic, largely

because it also resists definition: sexuality. This chapter examines the ways in which religion (and religious morality) frames the regulations for normal versus abnormal sexuality. This chapter looks at sexuality and constructions of normal sexuality as an important category of identity. Chapter 3 will analyze homosexuality specifically, however in Chapter 2 I discuss other constructions of sexual difference, those which do not subscribe to mainstream heteronormative identity production, and the threat that sexual difference poses to the Canadian community.

In this chapter, I discuss two different cases, *R. v. Labaye* (2005) and *Chamberlain v. Surrey* (2002), to demonstrate that sexual difference is not solely categorized by homosexuality. *Labaye* is a case from Montréal, where Jean-Paul Labaye was accused of operating a “common bawdy house” in his apartment for the purposes of sexual activities of members of his Club L’Orange, located on the two floors below his apartment. The provincial court ruled that his apartment should be considered a public space and therefore subject to Criminal Code laws pertaining to public spaces and sexual conduct. *Chamberlain* is a case from British Columbia, in which James Chamberlain petitioned to have three books depicting same-sex parentage added as supplementary reading material to teach the family life portion of the K-1 curriculum. The case of *Labaye* demonstrates that heterosexuality is not a unified and accepted category of identity. Chamberlain’s case demonstrates the ways religion and homosexuality are posited as always already in conflict.

Chapter 3 focuses on sexual orientation, specifically homosexuality as a problematic sexual orientation, both historically and as a category of identity. While people do not experience the world solely as one part of identity, i.e. as only a female or as only homosexual, personality is often reduced to categories of identity to define and

analyze behaviour and to determine or promote guidelines. While being female commonly bears universal similar traits and characteristics, the experience of being female in Canada versus Uganda or Brazil will make for very diverse standards and understandings. The diversity of experiences regarding standards and understanding is also true for homosexuality, not only country to country but in examination of historical treatment of homosexual relationships and same-sex marriage.

In this chapter I analyze *Egan v. Canada* (1995) as a means of examining the process by which equality rights based on sexual orientation were acquired in Canada, bearing in mind that Egan actually lost his legal claim. Prior to *Egan* discrimination based on sexual orientation was not seen as a legal issue. After *Egan*, sexual orientation was “read into” section 15 of the *Canadian Charter of Rights and Freedoms*, which has allowed for legal defense against discrimination based on sexual orientation. However, Egan and Nesbitt did not in fact win their case regarding spousal support for pensioners, which was a very real outcome of the case for them. *Egan* is a landmark case regarding sexual orientation equality rights however there are other implications of this case specific to Egan and Nesbitt that get lost in the equality provision. What also warrants examination is that once a verdict such as *Egan* has passed, there is still a lot of work to be done regarding legislation, policy documentation and a broader sense of societal standards of acceptance and non-discrimination. Discrimination against gays and lesbians is certainly not eradicated simply because the Supreme Court of Canada argued that sexual orientation be read into section 15 of the *Charter*.

Chapter 4 focuses on the legal system, specifically in Canada, both regarding how the court system is structured provincially and federally and also with an eye to the function of the legal system as an arbiter of disputes. I begin the chapter with an outline

of the three different court systems in Canada (purely provincial, provincial superior and purely federal) and then examine the role of the court as interpreter of law and as an institution that designates and guides societal regulations and standards.

In this chapter I discuss the *Reference re Same-Sex Marriage* decision from 2005 in light of the language used within the decision and by the religious interveners in the case. The language in the reference demonstrates the implicitly religious context of the legal system, which certainly has historic roots but which is in direct contradiction with the notion that Canada has separated church and state (which it does not), and also the tendency to provide protection for religious groups in light of extending rights to the sexually other. I also discuss DORA and the implications of creating new legislation to protect “the religious” from “the homosexual.”

The intention of **Chapter 5** is to examine how constructions of sexual normativity based in religious ideologies are used to provide a defense for the heterosexual institution of marriage, commonly defined as a religious institution. The purpose of marriage is used as a tool for defining the normal family and thus normal sexuality. I examine the shifting dynamics of family, historically and in contemporary society, arguing that narrow categorizations of family serve to promote a particular idealized notion of what the institution of family should be, rather than recognizing the fluidity of family units.

In this chapter I discuss the ways groups have defined family as providing the purpose of marriage and examine the construction of family in the case of *M. v. H.* (1999) and the definition of spouse in the *Family Law Act*. I argue that the court works to construct same-sex couples as family by removing sexuality from the relationship in order to reframe the couple within an acceptable picture of marriage. The difference

here is that opposite sex couples are not reconstructed as non-sexual in order to be categorized as recognizably family.

In **Chapter 6** I will apply the theories outlined and developed in previous chapters regarding religious ideology, sexuality and sexuality orientation and the so-called impact sexual difference has on the institutions of marriage and family to the case of *Hall v. Powers* (2002) to demonstrate the discursive constructs outlined in the previous chapters in the ruling of Justice MacKinnon and how these constructs co-opt homosexual references within a heterosexual vernacular, thus rendering it safe for societal consumption because it can be seen as the same as and not different from the normative standard.

Marc Hall's case challenges the typical constructions of the categories of identity by the courts that have been outlined in this dissertation, (religion, sexuality and sexual orientation) because Hall is gay and Catholic. The diversity of opinions evidenced in Catholicism on the subject of same-sex relations is part of the reason Justice MacKinnon rules in Hall's favour. However, Justice MacKinnon's arguments in support of Hall still demonstrate the tendencies I argue that courts invoke in order to desexualize the sexually other and grant access to equality rights based on sexual orientation.

The **concluding chapter** of this thesis will tie together the theoretical framework used in analyzing and critiquing those categories of reference used as identity constructs within legal discourse in order to display the constructed framework of sexual normativity as based in a set of religious ideologies and parameters which in fact seek to reframe sexual difference to be recognizably family. Rather than conceptualizing difference as solely problematic and reframing it within the category of the same, we can

strive to find ways and means to look at sexual diversity not as a problem to be addressed but as demonstrative of variety of individuals within a culture or nation.

Religious groups, including the religious interveners discussed in this dissertation, have a vested interest in policing sexual norms in their desire of producing religious families, with religious children. What is not given any room for possibility within that framework is that homosexual couples are capable of being religious and adopting (if not having children through artificial insemination or surrogacy) children that would be raised within a particular religious, moral community. The necessity to make homosexuality the other (binary opposite/incompatible) to normative heterosexuality must not be disturbed by an acceptance of homosexual congregants. As a result, homosexuality is posited as contradictory to religiosity such that one cannot be both, but only one or the other.

CONTRIBUTION

The originality of this project is encompassed primarily in the furthering of analysis and discussion regarding sexual difference, initiated for me by Luce Irigaray's work. I propose to develop Irigaray's critique of the treatment of the sexually different by examining the regulation of sexual difference in Canada *vis à vis* the use of religious ideologies in promoting standards of sexual normativity in legal and public discourse. This thesis accomplishes this goal through an interdisciplinary analysis and critique of the following categories of identity; religion through a construction of religious

ideology, sexuality and sexual orientation, specifically sexual difference and homosexuality. These categories are often framed as static and unchanging in legal and public discourse; however they are often fluid and dynamic across groups and individuals and over a life time. The narrow categorizations of these identity markers propose a set of acceptable and unacceptable trait exhibitions which are framed in discourse as “natural” or “normal.” Their reified and persistent dominant constructions also demonstrate the use of particular discursive strategic devices aimed at supporting institutions; in this case, and under examination in this dissertation, are the institutions of marriage and family.

This analysis will demonstrate the importance of the application of theory and the use of deconstructive methodologies in the linguistic medium of the law. This project will further examine the ways in which religion (and religious morality) is posited in legal and public discourses, among other venues, as contradictory to other forms of sexuality, those which do not subscribe to heteronormative identity production.

The central thesis of this work argues that in a Canadian context religion and sexuality are in constant flux, especially in reference to law. It can also be demonstrated that sexual normativity and sexual difference are constructed in reference to religion and thus that both should be recognized as mutable and thus maybe problematic in relation to serving as a basis for Canadian law. This work is situated during a process of change in linguistic constructs which can be demonstrated by examining the dialectic relationship between law and society so that ways of speaking and talking about or to topics are better addressed.

Lynda Hosking (2007: 1-2) states:

Theory teaches us about the world, about each other, and about ourselves. I want to make the case that theory has politically transformative goals. And, that it is a necessary component of any sociopolitical effort because theory can unveil hidden ideological commitments that shape individuals and groups.

I take Hosking's argument as a way of structuring the use and application of theoretical models to a powerful linguistic medium in Canada, the law. This dissertation is an interdisciplinary project aimed at exposing the construction of the category of normal sexuality as related to a particular, mainstream ideal based on religious ideologies that has been replicated and repeated so that the construction is argued by religious interest groups as unchanging and "natural." This is demonstrated through a critique of the categories of religion, sexuality and sexual orientation and the corresponding institutions of marriage and family. The theoretical critique is then demonstrated in the discursive constructs used in legal decision making regarding sexual difference.

My approach, as I have demonstrated so far, is to structure each chapter with the theoretical foundations to the work I am doing and then apply the theory to a specific case in order to demonstrate 1) how the theory is necessary and effective in achieving the goals of analysis and 2) the particular problematic and its construction within Canadian law, all of which be integrated in analysis of the Marc Hall case in Chapter 6.

The particular categories of interrogation are religion, sexuality, sexual orientation and sexual normativity, and each has one or more corresponding case law example to demonstrate how these categories are assumed to be and constructed as definitive, unchanging boundaries of reference and identification. I incorporate other

case examples to demonstrate that the Marc Hall case is not a one-off, as it were, but that these tendencies and biases are replicated across different cases, all pertaining to sexuality, and specifically sexual relationships. I also discuss two groundbreaking cases in Canada, *Egan* and *Reference re Same-Sex Marriage*, as a means of exploring the use of precedent and the changing of the status quo, because law is often constructed in public discourse as static and unchanging.

CHAPTER ONE

Regarding Religion: The Construction of Religious Ideologies

INTRODUCTION

Recent critical works about the category of religion are central to my project about interrogating attitudes toward homosexuality in Canadian law. Theorists whose works are relevant to this interrogation include S.N. Balagangadhara, Russell McCutcheon, Timothy Fitzgerald, and Stuart Hall, among others. I will briefly summarize the points made by these theorists that inform important principles for my critique of the language of the law in Canada. Often religious ideologies are constructed as in opposition to same-sex relationships. I will use the work of Hall to examine the entrenchment of dominant ideologies in media, public discourse and public policy. McCutcheon, Fitzgerald, and Balagangadhara's work will provide foundations for interrogating the category of religion as an evolving application of beliefs. These theorists work will also be used to critique the idea, constructed by religious interest groups analyzed in subsequent chapters, that religion necessarily stands in opposition to same-sex relationships. I will demonstrate this critique by examining the construction of religious ideologies as set out by the Interfaith Coalition on Marriage and Family in their

factum regarding *Halpern et al v. Attorney General of Canada* (2003).² I argue here, as it has been argued elsewhere, that being religious is not tantamount to being opposed to sexual diversity or same-sex couples. However, the Interfaith Coalition is one of the religious groups consistently intervening in same-sex and sexual orientation cases in Canada. As a result, I examine and deconstruct their arguments because they are often seen as representative of ‘the’ religious opposition to same-sex relationships, a point I also examine and critique.

Before I analyze the problems inherent in constructing an anti-homosexual standpoint based in religious ideologies, it is important to discuss why and how these ideologies cannot be framed as representative of one religious worldview and should be regarded as the personal application of religious beliefs. There is a tendency in contemporary discourse to reify the category of religion based partly in reverence for the sacred. There is also the assumption that we all know what we are talking about when we talk about religion. However diversity within and across traditions challenges the construction of normative religiosity. I will critique the idea that the religious values of a group are always in unity with one another. I will also critique the tendency to claim a stance, such as anti-homosexual attitudes, as a justified religious attitude. As will be demonstrated, there is not one religious view regarding homosexuality but still the category of religious values that oppose same-sex relationships is left uncontested and accepted as a sanctioned religious standpoint.

There is a wide body of literature on the discrepancies between religious texts and lived religion.³ These discrepancies demonstrate one part of the puzzle in examining the fluidity of religious ideologies, across and within religious groups. As well, as diverse religious groups continue to cohabit in closer proximity to one another,

it has become increasingly evident in public discourse that there is not one unified understanding of what being religious means, again within a tradition or across different traditions.⁴ The need to interrogate and explain the category of religion is increasingly important, particularly when discussing ambiguous delineations of what it means to “be religious.” For example, legislation, immigration policies, and human rights documentation that outline standards regarding religion can be problematic when a person in charge of applying the law or policy has a very different concept of what does or does not count as religious compared with the person seeking equality or refuge.

Noha Wagdy’s (2008) work provides an example of this problem. Wagdy analyzes the application of the 1951 Refugee Convention in cases regarding religious discrimination, stating that because religion exists both as a category of identity as well as a ground for rights protections the parameters of “religion” are not defined within legislation, which Wagdy argues has proven problematic. Wagdy explores the limits of freedom of religion in immigration and refugee cases when the individual seeking asylum is doing so based on their religious beliefs, which are not considered to be “truly religious” according to the individual applying the 1951 Refugee Convention.

Wagdy examines two cases; *Hinzman* (2005),⁵ involving Jeremy Hinzman an American soldier and Buddhist, who sought refuge in Canada as a conscientious objector to the Iraq war; and *Fatin* (1993),⁶ in which Parastoo Fatin contended a fear of persecution in Iran based on her refusal to wear the veil, to discuss limitations of the category of religion in immigration law and policy. Hinzman claimed that his Buddhist beliefs and attendance at Quaker services (Religious Society of Friends) led him to feel that he could not be violent on the offensive. In reviewing Hinzman’s refugee claim, the Immigration Refugee Board was not convinced of his religious commitment or that his

views were “genuine” (para 34-36), stating that Hinzman’s “moral code is an evolving one” (para 85). When pressed further about his religious convictions, Hinzman said he was not a strict Buddhist and was not officially a member of the Quakers but rather was an “attender.” Both of these statements by Hinzman were seen by the court as further evidence of a lack of religious sincerity on Hinzman’s part. How then does one access protection for those rights when their belief systems do not fall into the definitions of what counts as religion?

The brief example given from the *Hinzman* case demonstrates Naomi Goldenberg’s argument that “social and political agendas and institutions construct ‘religion’ in different times and places in relation to other equally unstable concepts such as secular and profane” (2009 : 1). The fluid nature of religious ideologies, based in a set of legislative or policy doctrine as responding to public or cultural demands, demonstrates the ways social and political agendas construct the place and role of religion at any given time.

In social scientific literature and the humanities, the category of religion is often unproblematicized, with some notable exceptions, a few of which I will discuss in this chapter. Studies of religion, in psychology for example, often determine religiosity to be a set of behaviours that can be measured, such as frequency of prayer or church attendance.⁷ There are problems with limiting religious belief or being religious to types of actions. One problem is the Christo-centric framework because not all religious groups or individuals would count prayer or church⁸ attendance as being primary or even as constituting any part of the expression of their faith tradition. And while Canadian news media often correlate lower church attendance with a decline in religious

affiliation (CBC, 2000), data from the 2001 Statistics Canada Census posits that less than 16% of individuals' surveyed claim "no religious affiliation."⁹

Narrow categorizations of religious affiliation as related to a rigid set of behaviours also ignores the conscientious application of ethical and moral belief systems that do not hold to the same rules or doctrine as determined by particular forms of mainstream Christian tradition.¹⁰ The result is that studies of who is considered religious and who is not considered religious often pertain solely to practitioners of particularized Christian faith systems and therefore ignore an array of other religious traditions. While non-Western traditions are obvious examples of the traditions that are ignored, Native or Aboriginal traditions also do not fit within the standards set out by Western policy makers and scholars (Beaman, 2002).

The problem of accepting the category of religion without critical analysis then can be seen to colour both social scientific research and the application of social policy pertaining to belief. Leaving the category of religion unproblematized also allows for certain types of permitted standards of religion to become representative of the norm as articulated and supported by groups such as the Interfaith Coalition, while all others fall into the category of non-normative and are thus perhaps invalid. I say this by way of opening up a critique and examination of the religious ideologies within specific Canadian legal discourses and interveners' *facta* to argue against both the idea that there is one religious approach to homosexuality and to critique the standard that discrimination is acceptable when based on a religious defense.

The systematic application of discriminatory viewpoints, and thus the reperformance of accepted standards of normativity and non-normativity, is not justified as a standard by which society should live; it might be a means for an individual to

define what he or she does or does not agree with but becomes a problematic means by which systems of power impose standards and create public policy. In Canada the separation of church and state is argued as authentic fact in public discourse and media,¹¹ a statement which has been widely critiqued in academia, even though the preamble to the *Canadian Charter of Rights and Freedoms* pays homage to the supremacy of God. I will discuss the separation of church and state as a myth in further detail in Chapter 4, but will say here that the need to expose the mechanisms of discrimination (specifically those founded in religious ideologies) regarding sexual difference is integral in critiquing the notion that Canada has separated church and state.

I will first outline the theories I will use to examine the category of religion as well as the means by which dominant ideologies are embedded and coded in popular and academic discourses. I will then apply these theories to the factum presented by the Interfaith Coalition on Marriage and Family regarding *Halpern et al.* Although it might not be surprising that a religious organization openly discusses their religiously based opposition to same-sex relationships, I wish to examine the means by which their ideologies are constructed. The Coalition creates a religious community, albeit temporary in its existence, a community of very strange bedfellows, founded solely in opposition to the legal recognition of same-sex relationships.

The Coalition's religious ideologies will be compared with analysis and discussion of biblical passages specific to same-sex relationships, to examine what the Coalition claim as the religious justification for their views. If the Coalition wishes to argue that their religious beliefs forbid the acceptance of the legal recognition of same-sex relationships, the biblical prescription for these beliefs, and others, needs also to be outlined and critiqued. Examining the biblical prescription for non-homosexual sinners

raises questions as to how the Coalition feels towards other biblical categories of sinner, such as hypocrites or children who curse their parents, but I will elaborate on that later. First I will outline the theories relevant to this analysis.

RELEVANT THEORISTS

Critical theory developed through the 1960s and 1970s as means of analyzing language, symbolism and texts in the humanities and social sciences. Previous philosophical and psychoanalytic work had been striving for similar goals, although using different approaches and terminology. In contemporary psychoanalytic theory, particularly the French school developed by Jacques Lacan, language is a central cultural product of analysis. The French school has been developed from Lacanian theory to examine further embedded traits and assumptions within linguistic discourse. Similarly, critical theory has developed to promote textual and linguistic analysis through other media. Relevant to the topic of this dissertation is the analysis of religious ideologies embedded in language, which have promoted and shaped sexual normativity regulations and definitions.

In this chapter, I will begin by using the theoretical tools derived from Balagangadhara, McCutcheon, Fitzgerald and Hall to examine the embeddedness of dominant ideologies. This analysis will be conducted in reference to the category of religion as it has been developed in academia, media and public discourses in the West, in order to open up a critical analysis of the use of so-called religious ideologies to

justify discriminatory viewpoints regarding sexual orientation and norms relating to sexuality. Janet Jakobsen and Ann Pellegrini also provide insightful arguments in the creation of a protestant Christian category of religion contrasted against the notion of a universal secularism. Their critique will be incorporated to discuss misnomers inherent in the dominant narrative of secularism.

Hall (1980; Morley and Chen, 1996) uses critical theory and critical studies as a way of interrogating and analyzing what he calls dominant ideologies. These dominant ideologies are embedded in language and reinforced through frameworks of power, such as politics, economics, the media and other authoritative institutions. Dominant ideologies are supported and reinforced through such institutions in a cyclical pattern so that these dominant ideologies can be viewed either as created by the system of power or as created by the culture to which the system of power is responding. It is therefore possible for institutions of power to manipulate and code language to serve the beneficiaries of any given situation. Ian Barnard states pointedly, “knowledge is never benign, and, certainly, apparatuses and institutions of knowledge production will always contextualize any knowledge thus produced” (2004: 4).

An example of the coding and contextualization employed by systems of power would be claiming that opposition to homosexual relationships is not related to sexual difference but that homosexual relationships are problematic for society because of the inability of a homosexual couple to reproduce. Homosexual relationships are therefore constructed as detrimental to a society or group which would not be able to sustain its population and would die out if homosexual relationships became the norm.¹² The problem of homosexuality is then coded by an institution of authority, such as law or by the media, as concern for the greater good and not simply homophobia.

Hall argues that it is through this linguistic coding that the widespread acceptance of dominant ideologies transforms into hegemony. He specifically examines the use of mass media in reperforming these ideologies stating that “media appear to reflect reality while in fact they construct it” (1980: 48). An example related to this thesis would be the representation of gays and lesbians on film and television. While films such as *Brokeback Mountain* (2005) have a more sympathetic audience than they might have had even 10 years ago, it can be argued that one of the main characters in the homosexual relationship had to die in the film because a contemporary audience would not accept a homosexual couple ‘living happily ever after.’¹³

Hall writes that “ideologies are not really produced by individual consciousness but rather individuals formulate their beliefs, within positions already fixed by ideology, as if they were their true producers” (1996: 49). Hall’s analysis of dominant ideologies is relevant to an examination of law as a dominant structure composed of ideologies that are based in Christianity. The legal structure can be seen to reinforce a particular set of religious ideologies although the legal system is framed as a neutral system of arbitration (Beaman, 2002). I will incorporate Hall’s work to examine linguistic coding and power in reference to the factum of the intervener written by the Interfaith Coalition on Marriage and Family regarding *Halpern et al.*

I wish to include here an argument made by Tomoko Masuzawa as entranceway into the critique of the category of religion and Western scholarship of religion.

In the social sciences and humanities alike, ‘religion’ as a category has been left largely unhistoricized, essentialized, and tacitly presumed immune or inherently resistant to critical analysis. The reasons for this failing on the part of the academy, this general lack of analytic interest, and the obstinate opacity of the subject of religion, are no doubt many and complex. But the complexity may begin to yield

to critical pressure if we are to subject this discursive formation as a whole to a different kind of scrutiny, a sustained and somewhat sinuous historical analysis (Masuzawa, 2005: 1-2).

Masuzawa is succinct in her summary of the project of the critique of scholarship on the category of religion, highlighting the failure of the academic study of religion as resistance to critical analysis. However, much work has been done in academia to examine and critique the historical resistance to critical analysis regarding religion. I will summarize some of that work here.

Russell McCutcheon's book *Manufacturing Religion* (1997) also provides example of the ways in which the field of religious studies is embedded in its own particular assumptions and political strategies. He argues that the claim that religion is a *sui generis* phenomenon, or unique unto itself, is a mechanism used in the field to avoid sociopolitical analysis of religion and to protect the category of religion from deconstruction. He states, "Few critics have questioned the political implications of exclusively (and in circular fashion) understanding the sui generic status of religious phenomena as an essentially religious claim" (1997: 16).

McCutcheon argues that the study of religion has been hostage to the replication of categories of sameness as a result of a lack of critical scholarship and a tendency in Western scholarship to deemphasize difference. This results in the scholarly reification of religion, which is supported and maintained in public discourse (McCutcheon, 1997: 4-5). McCutcheon specifically analyzes the history of the study of religion in the West, deconstructing work of scholars in the discipline (such as Clifford Geertz and Mircea Eliade) who are often cited without critical analysis or interrogation of their own religious or cultural biases. The political, social and faith based biases of scholars in the

study of religion have led to the field as it exists today, which for McCutcheon is constrained by implicit ideologies.

The study of religion as such is bound by its own assumptions and is blind to them. McCutcheon's work attempts to unravel some of the beliefs embedded within the study of religion, arguing that these ideologies render scientific claims problematic. He also critiques what has been accepted within the category and study of religion and developed through academic study. In support of this argument, McCutcheon states, "Like all items of culture, words have a history; meanings and usages change over time. So too, 'religion,' and the assumption that the world is neatly separated between religion and non-religious spheres (i.e., Church/State), is a product of historical development and not a brute fact of social life" (2004b: 1).

The idea that religion should be protected from examination in its unique construction allows and promotes the dominance of normalizing Christian scholarship, both in Europe and North America (McCutcheon, 1997: 59). Timothy Fitzgerald (2003) furthers this argument in his examination of assumptions specific to the field of religious studies scholarship and the academics that have embedded their own religious ideologies in what they have claimed to be neutral and objective scholarship. He argues that "religious studies, as an agency for reproducing a mystifying ideology, attempts to construct a decontextualized, ahistorical phenomenon and divorce it from questions of power" (Fitzgerald, 2003: ix).

Fitzgerald's critique of the concept of religion begins with the argument that:

there is no coherent non-theological theoretical basis for the study of religion as a separate academic disciplines [and that] the major assumption lying behind much comparative religion...is that 'religion' is a universal phenomenon to be

found in principle in all cultures and all human experience
(2003: 3).

Fitzgerald's analysis challenges the assumption that religion is a phenomenon distinct and separate from other fields of study. He argues that it is the tendency to consider religion as unique and separate that perpetuates the non-critical study of religion and promotes the notion that religion is a "genuine crosscultural category" (2003: 4).

The result of what McCutcheon terms the manufacture of religion as that which cannot be analyzed and Fitzgerald's critique of religion as a cross-cultural category leading to the ideological protection by scholars within the discipline is a normativized category of religion, repetitively reformed as natural. The reperformance of the category of religion as natural further allows the category to maintain its position of hegemonic dominance. The ideological protection of religion then transforms into the hegemonic dominance of Christianity in Western scholarship. Fitzgerald describes the process as such: "ecumenical liberal theology has been disguised (though not very well) in the so-called scientific study of religion" (2003: 7).

Built into this normalizing scholarship is a specific model of religiosity, Christianity. S.N. Balagangadhara (1994) argues that the dominance of Western categories of reference in the study of religions have imposed a Christian framework on all other religions. The determination of what does or does not constitute a religion is categorized in relation to Christianity. While some religions, such as Hinduism, bear almost no resemblance to the Christian belief system, the smallest resemblances become the basis of similarity. Thus Christianity accepts other religions only if they look like that which is recognizable as normative.

Balagangadhara's work complements the work of McCutcheon and Fitzgerald by examining how the Christian discourse of Western scholarship has imposed its language and referents on the study of Eastern religions. What is then defined as a valid religion is based on Christian categories, a move Balagangadhara describes as the "mistake of using emic categories of Christian thought as though they were etic categories of description and analysis in the academic study of religions" (1994: 15). The inability of Western scholarship to define religious difference outside Christian categories again reinforces a dominant system of rules and categories and reduces that which is different to being the same as the system in power.

Jakobsen and Pellegrini ask; "How did it come to pass that secularism as a 'world' discourse was also intertwined with one particular religion?" (2008: 1). They argue that the secularism narrative mistakenly posits secularism as a universal trait somehow different from particularized religion when in fact "secularism remains tied to a particular religion, just as the secular calendar remains tied to Christianity" (Jakobsen and Pellegrini, 2008: 3). Jakobsen and Pellegrini critique some commonly held assumptions about secularism and secularity as being the binary opposite of religious ideologies and rather state:

Our argument is not that this secularism is really (essentially) religion in disguise, but rather that in its dominant, market-based incarnation it constitutes a specifically Protestant form of secularism. The claim of the secularization narrative is that the secularism that develops from these European and Christian origins is, in fact, universal and fully separate from Christianity (2008: 3).

The following is an example of the ways these tendencies to understand religions in relation to Christianity can be evidenced, as argued by Balagangadhara and which

Jakobsen and Pellegrini term the Protestant heuristic from which a religion is determined (2008: 8). Using this model, Islam becomes seen as a “valid religion” by its ability to fall under, or be aligned within, definitions specific to Christianity, for example an imam will be described as being like a bishop.¹⁴ While an imam is actually not like a bishop, Islamic difference can be incorporated within the Christian vernacular, enough to be categorized.¹⁵

I wish to further Balagangadhara, Jakobsen and Pellegrini’s analyses to provide an example of this critique in reference to Canadian law. I will argue that the implicitly Christian language of the law therefore only recognizes that which is deemed as normative sexuality. While same-sex marriage is legal and sexual orientation rights are read into the *Charter*, I argue the acceptance of sexual difference is permissible only when the other dons the façade of normativity. This point will be elaborated subsequently but briefly what I mean by that is that homosexuality becomes an accepted category of identity when it can be framed as something similar to heterosexuality. The result of this reframing is that access to rights becomes possible only for normalized gay and lesbian individuals and couples, a point I will elaborate on in future chapters.

These and other theories of religion and religious studies provide a necessary platform for discussing the implicitly Christian language of the West, a critique that is specific to my work in the language of the law. Such theorists examine embedded ideologies and constructed categories of what counts as a religion. This stance is a starting point toward examining constructed ideologies within legal discourse. The assumptions inherent in the study of religion serve to inhibit critical perspectives and discussions of the non-normative, both of which further reinforce hegemonic standards of normativity. I incorporate Hall, McCutcheon, Fitzgerald, Balagandghara, and

Jakobsen and Pellegrini's work, among many others, in regard of the law as a system of power only capable of speaking the language of Christianity and further framing religious ideologies as the normative ideal. Heteronormativity thus becomes supported within a religious ideological framework. I will use these theorists' work as background to examine the construction of religious ideologies as posited by the Interfaith Coalition in the case of *Halpern et al.*

For this project, it is imperative to apply critical theory to the category of religion and examine the systems of power and latent assumptions that exist within that category, through the use of the theoretical foundations outlined in this section, which will be developed on further in this thesis. I will now turn to the specific case to be examined in this chapter, the case of *Halpern et al.*

THE CASE:

HALPERN ET AL V. ATTORNEY GENERAL OF CANADA

Using the theories described in the previous section, I will examine religious ideologies as constructed by the Interfaith Coalition on Marriage and Family in the factum regarding *Halpern et al. v. Attorney General of Canada* (2003). I argue that fluid boundaries of religious ideology work to maintain a hegemonic construction of normative sexuality and are not in fact universal beliefs of a religious tradition but rather are constructed to support discriminatory worldviews and dissuade sexual diversity. The provision of equality rights based on sexual orientation has been framed by some

religious interest groups as a potential threat to particular communities, often defined as colliding with religious ideologies. The groups involved in the Coalition, who work to create and maintain a representation of religion fundamentally opposed to homosexuality, make for a group of very strange bedfellows. I argue that the Coalition's stance on same-sex relationships demonstrates their particular views on the institution of marriage; it does not demonstrate a universal religious approach to sexual difference but the Interfaith Coalition's argument have become constructed as representative of religious views regarding sexual difference in media and public discourses. First I will provide details of the case and then I will examine the Coalition's factum, with a view to the critiques provided by theorists earlier in this chapter.

In 2003, seven gay and lesbian couples, Hedy Halpern and thirteen other applicants, challenged the common law definition of marriage in Ontario as requiring a heterosexual relationship in hopes of securing the right to get married in civil ceremonies themselves. The case went to the Ontario Superior Court, on appeal from the Ontario Divisional Court in 2002. According to the Ontario Superior Court:

This appeal raises significant constitutional issues that require serious legal analysis. That said, this case is ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada (at para 2).

The outcome of this case allowed for civil marriage for same-sex couples and formed some of the basis for argument in support of the legal redefinition of marriage at the federal level in Canada.

The Interfaith Coalition on Marriage and Family is made up of three conservative religious groups: the Evangelical Fellowship of Canada, the Catholic Civil Rights League, and the Islamic Society of North America. The Coalition's focus is on

the preservation of marriage as a religious institution, and more specifically, marriage as it was defined in Canada prior to challenges posed by gay and lesbian couples (one man, one woman, to the exclusion of all others). The Coalition argues that marriage is primarily a religious institution, that it has existed for millennia as such, and that it is supported by all major faiths as being comprised of one man and one woman. The central point of their argument, here and in other related facts, is that changing the definition of marriage in legislation would cause permanent damage to society, including a decline in reproduction as well as a decline in the moral values of Canadian citizens (Robinson, 2005).

The Coalition's factum regarding *Halpern et al.* provides an outline and discussion of what the Coalition feels is pertinent to the discussion of changing the common-law definition of marriage. They summarize the Roman Catholic, Islamic, Jewish and Protestant Evangelical conceptions of marriage and then discuss the negative effects that the re-definition of the religious standard of marriage would have on these communities and the larger Canadian community. They further state that the heterosexual definition of marriage is not discriminatory, arguing that section 15 of the *Charter* (the equality rights provision),¹⁶ is still relatively undeveloped with respect to competing equality rights. They further state,

Marriage confers the status of husband and wife, and has been recognized by all major religious faiths and societal groups as existing uniquely between one man and one woman. The role of the law has been simply to acknowledge this pre-existing institution and describe its universal features. Because it was not created by law, neither the heterosexual nature of marriage nor its legal recognition can be a violation of s. 15(1) of the *Charter* (IFC, 2003: 1).

According to the Coalition, the role of the law is simply to acknowledge the pre-existing religious institution of marriage – it certainly does not have the power or place to change that definition.

In their factum regarding *Halpern et al.*, the Interfaith Coalition defines their coalition as being made up of members of the Protestant, Roman Catholic, Muslim, and Sikh communities. “The communities represented by the Interfaith Coalition include millions of Canadians, with almost 50% of Canadians identifying as Roman Catholic” (IFC, 2003: 1). The Coalition implies that because they represent members of particular faith communities, all members identifying with these communities make up their numbers. It was demonstrated by Justice MacKinnon in *Hall v. Powers*¹⁷ that the Catholic community is clearly not of one mind regarding sexual orientation (to be discussed further in Chapter 6) and further the list of interveners in the *Reference re Same-Sex Marriage* demonstrates the diversity of opinion regarding same-sex relationships (Appendix A).¹⁸ The same is true here regarding the Interfaith Coalition’s implication that all Catholics, Protestants, Muslims and Sikhs feel the same regarding same-sex relationships. The Coalition falsely implies that over 50% of Canadians support their beliefs, which the Coalition argues makes their views the majority view of the Canadian population.¹⁹

The Coalition states that marriage “is not a legal construct. It is an institution that was not created by law...It is a pre-existing societal and, primarily, religious institution which has existed for millennia and has been recognized by legislation only recently” (IFC, 2003: 1) and that “marriage is necessarily exclusive. Not being a product of law, marriage itself cannot be found to be discriminatory towards those who do not come within its parameters” (IFC, 2003: 17). According to Pamela Dickey

Young (2005: 1), marriage is a “socially constructed relationship that varies over time and geography” and is not inherently religious as church officials did not become involved in marriage until the Middle Ages.

Marriage existed long before the Christian church. In the Roman world, marriage was the preserve of families. Marriages (and divorces) were made by the agreement of families and, primarily, by the consent of the couple (Dickey Young, 2005:2).

The religious institution of marriage has also seen shifting dynamics, from biblical prescriptions regarding marital relationships to contemporary frameworks of marriage and family. For example, the bible records many relationships in ancient Israel as being polygynous. David is recorded as having many wives (2 Samuel 12:7-9),²⁰ Solomon is said to have had 700 (1 Kings 11:1-6),²¹ and Jacob was said to have at least two wives in Rachel and Leah (Genesis 29: 20-30).²² These plural marriages were not without controversy, but it is not necessarily the taking of many wives that is the problem. Rather the nationality of the wives, or the means by which they were acquired, is the issue. A further challenge to statements made by the Coalition is that “within Islam, a marriage is restricted to one man and one woman. However, most Islamic states and the religion of Islam itself, permit a man to marry up to four wives.”²³

Although prior to the constitutional challenges in Canada it was considered standard for marriages to be between one man and one woman, that specification in Canada was introduced in *Hyde v. Hyde*²⁴ in the 19th Century as a response to polygamous marriage and therefore is not recorded in law until the late 1800’s. Further to that, as articulated by Dickey Young, the nature and shape of marriage is constantly evolving. The church did not officially become involved in the legislation of marriage until the middle ages. Although the Coalition is creating a religiously institutionalized

version of marriage which predates a legal definition, the nature of a contractual relationship between couples existed prior to the religious guidelines they outline.

Defining marriage as a historically religious institution, while inaccurate, is a common argument promoted by religious interest groups who seek to preserve the heterosexual institution of marriage. This religious definition ignores the history of the institution of marriage and seeks to create a binary division between the religious/heterosexual and the non-religious (read: immoral)/homosexual. A community is then created based in opposition to sexual difference. This is problematic for several reasons. It presupposes that one cannot be both religious and gay or lesbian. This claim is clearly inaccurate (Boisvert, 1999; 2006), and will be discussed momentarily. As well, the Coalition proposes that a foundational message of the religions involved is anti-homosexual – which is a disservice to those who are religious and not opposed to sexual diversity and because no one tradition is monolithic, a skewed picture of Christianity, Judaism, Sikhism and Islam are created.

Additionally, the Coalition sets up the standards for what they consider a reasonable applicant by outlining that:

The ‘reasonable applicant’...in determining whether his or her initial feelings of discrimination were reasonable, would have to take into account the pre-existing nature of the institution of marriage, its fundamental religious character, and the legitimate need for society to recognize marriage through law (IFC, 2003: 17).

According to the Coalition’s factum, individuals or groups who argue for a change in the definition of marriage, and seek equality rights for homosexuals, are no longer reasonable members of society. The Coalition argues that there is legitimacy in the legal support for a religious, heteronormative standard in marriage. Therefore, they

feel that the unreasonable applicant is a threat to the institution and to the community under the protection of the church or the law. Note here that the Interfaith Coalition has created a problematic applicant in their defense of the religious history of marriage. The applicant who questions this institution and supposedly does not recognize its history is no longer reasonable and his or her feelings of discrimination are constructed as unreasonable. If the reasonable applicant were aware of the pre-existing religious nature of marriage, and what the Coalition defines as the legitimate need for this to be upheld, the Coalition feels they would drop their claims and would no longer interfere with the institution of heterosexual marriage.

The Coalition also argues that “the accommodation of same-sex relationships within marriage, Catholics believe, would necessarily exclude [them] from [their] own institution as a result of [their] religious faith and traditions” (IFC, 2003: 5). Should the legal system support sexual orientation rights and same-sex marriage, both the heterosexual institution of marriage will be destroyed as will membership in the Catholic community. Following this logic, because the institution of marriage is seen as a strictly religious institution, permitting the other to participate in it would invalidate, taint and exclude the religious from their own institution. It is not only Catholics who would have a problem, “such a fundamental redefinition of marriage would make it harder for Muslims to participate in Canadian society...[which] would cause confusion for Muslim children and youth in Canada, where marriage would be redefined to directly conflict with Islamic teachings” (IFC, 2003: 6).

The religious are therefore denied the exclusivity of their tradition and the institution of marriage is defined solely as a religious institution. Both of these arguments presuppose that one cannot be both gay and religious. What are we to make

of homosexual Muslims or Catholics, or anyone who identifies as homosexual and religious? The Coalition's approach essentializes sexual identity, which does not allow for possibilities across different boundaries of identity, such as religious affiliation and sexual orientation. The tendency to categorize individuals as one aspect of identity permits for an approach in which humans are framed as categories of identity, which "narrow our field of vision...[as we don't] experience this complex world as only a gender or a race or a class or a nationality or a sexuality, and so on" (Winnubst, 2006: 17).

The Coalition not only seeks to relegate the sexually other as non-religious, and demonstrate the possibility of alienating the religious community from their institutions, they also analyze the purpose of the benefits sought in challenging the definition of marriage. "The benefit sought is, in reality, unavailable to the Applicants, while its deleterious effect on these Interveners, though uncertain in its extent, is real" (IFC, 2003: 22).

According to the Coalition, the threat of harm to the religious community is real and would have substantive impacts on the religious communities mentioned in the factum. The Coalition feels that there is no threat posed by maintaining the status quo. In the eyes of this group of religious interveners, the unreasonable (homosexual) applicant of the Coalition's factum can be made reasonable upon examination of what the Coalition argues is the valid, and therefore real, religious history of the institution of marriage. The Coalition argues that changing the pre-ordained, religious institution of marriage, as solely between a man and a woman, will have long lasting negative impacts on religious faithful, the extent to which is uncertain at this time. The applicants

understanding of the Coalitions argument would provide the necessary background and foundation in support of the Coalition's argument.

In response to the Coalition's argument of the religious nature of marriage, and the religious condemnation of homosexuality, both posited as valid religious viewpoints, I will analyze other problematic categories within the bible. This analysis will demonstrate the fluid nature of the ideologies set out by the Coalition and the problems inherent with using biblical passages as justification.

WHAT DOES THE BIBLE SAY?:

CONSTRUCTING RELIGIOUS IDEOLOGIES

Daniel Helminiak (2000) dedicates his book, *What the Bible Really Says About Homosexuality*; "To lesbian women and gay men who believe in a good God and reverence the Bible and who also want to be able to believe in themselves" (2000: 7). Although a popular construction of the religious individual is heterosexual, this stereotype is partly based on the assumption that everyone is heterosexual. The mistake that one cannot be both gay or lesbian and religious is made frequently. The heteronormative tendencies of many religious traditions, which have been modified, developed and strengthened over time, are seen as natural and homosexuality is very clearly, and in many ways, constructed as unnatural.

Before discussing Helminiak's work on biblical interpretation and homosexuality, I wish to highlight this notion of the naturalness of heterosexuality,

which is often demonstrated by a comparison with the animal world. There is a standard misconception that animals do not engage in homosexual behaviour. If animals don't, then humans shouldn't. However, it has been proven repeatedly that animals do in fact engage in homosexual behaviours. Same-sex pairings have been observed among penguins, monkeys, dolphins and other species, a fact that has led zoologists and scientists to the conclusion that not all animals are driven by reproductive desire, but are also in fact in search of sexual gratification (Owen, 2004). Even without the growing evidence of homosexual relationships in the animal world, John Boswell writes that humans tend to pride themselves on not being like animals, using the example of literacy to emphasize that the "behavior humans tend to most admire is unique to humans" (Boswell, 1980:13). Thus the contra nature argument opposing homosexuality runs into scientific opposition, aside from Boswell's apt observation about humans' tendency to pride themselves on being unlike animals.

In critiquing arguments against homosexual relationships, I have come to realize that the arguments, often constructed as religious beliefs, are in fact amorphous applications of parts of the bible seen to oppose homosexuality, not a foundation that has been incorporated into an ethical belief system.²⁵ There are more instances in the New Testament of Jesus preaching compassion and loving everyone equally than any clearly anti-homosexual statements. In fact the two most often cited biblical passages used to oppose homosexual relationships are from the Old Testament, Leviticus 18:22 and 20:13. The Coalition argues more generally that religious groups named in their factum use their interpretation of scripture to define the unique status of marriage as between a man and a woman. However, the Leviticus passages named above often appear in media articles regarding religious opposition to same-sex marriage.

Boswell demonstrates in *Christianity, Homosexuality and Social Tolerance* (1980) that there are more instances of biblical condemnation of hypocrites than there are passages condemning homosexuality, and yet the reality of discrimination against same-sex couples far outweighs what the bible seemed to emphasize. In the Roman world, same-sex marriage existed *de facto* until 342 C.E. (Boswell, 1980), and it was not until the “middle of the eleven hundreds [that]...Peter Cantor campaigned for the condemnation of gay love affairs among the clergy” (Helminiak, 2000: 23).

Helminiak provides a historical-critical reading of many biblical passages, all of which have been used as evidence of the condemnation of homosexuality. He specifically references Leviticus 18:22: “You shall not lie with a male as with a woman; it is an abomination” and Leviticus 20:13: “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.” While these passages seem fairly clear in their intention, Helminiak points out that many other sexual sins merit the death penalty, such as adultery, incest and bestiality – as well as non-sexual sins, for example cursing one’s parents (2000: 52).²⁶

Helminiak stresses two important points in this argument and throughout his book. First, the context associated with biblical passages, and especially the Old Testament passages of which we have very little knowledge of what life was like, need to be considered when reading and interpreting the laws set out for people to follow. Second, as we attempt to apply these ideas and ideals in contemporary society, we must also consider that it would be far from socially sanctioned for the death penalty to be applied if a child were to curse his or her parents – in fact, this could be seen as deleterious to the advancement of humanity, because many children would likely be put to death. Why is it acceptable to contextualize some biblical passages, in recognition

that the social climate today is far removed from what it was when the passages were written, but on the other hand, accept that an individual who kills a gay or lesbian out of religious disgust can be justified?²⁷ Or, how can it be claimed that the Old Testament passages regarding homosexuality are still valid (as claimed by groups such as the Interfaith Coalition), and that others (even from the same book, such as Leviticus) are ignored?²⁸

Martha Nussbaum, in *Hiding from Humanity* (2004), argues that part of the function of the law is to provide a place in which public humiliation is allowable. “Societies inflict shame on their citizens. They also provide bulwarks that protect citizens from shame. Law plays a significant role in both parts of this process” (Nussbaum, 2004: 223). The law has the capacity to publicly inflict shame and humiliation on a citizen through either explicit or implicit condemnation. This punishment is informed by society (by society I mean a somewhat amorphous sense of people within a particular country or nation) and it is also sanctioned or prescribed through the legal system. The cyclical relationship of standardized norms is not simply a top-down process in which the law dictates and citizens obey. Particularly in Western societies, specifically to Canada, dissent and protest have played major roles in the formation of standards of acceptance, including such notable cases as the *Persons* case in the early 1900’s.²⁹

The Interfaith Coalition is allowed anti-homosexual views because they base them in religious ideology, without critical inquiry into the construction of those viewpoints or the selective application of religious defense mechanisms. Therefore, “I hate gays because I’m a Christian” (or Muslim or Jew), is argued by the IFC, among others, to be a valid statement of religious identification and a valid application of

religious standards. Religion and sexual difference are regularly posited as being in conflict with one another. These stereotypes and rigid categories of identity are reperformed through the construction of sexual normativity and the framing of standards of accepted sexuality, whether or not equality rights based on sexual orientation have been granted or same-sex marriage has been legalized. The acceptance of stereotypes and rigid categories of identity further perpetrates a sameness/difference divide, which will be explored in the next chapter.

CONCLUSION

The permissible scope of discrimination related to same-sex relationships is safeguarded in the assumption that being opposed to same-sex relationships is a normative religious belief. I have been working toward the deconstruction of that assumption and the deconstruction of what is often termed as normative religiosity, using critical theory and historical-critical analysis to demonstrate that standards of normativity are not unshakeable facts based in scripture or religious teaching as argued by groups such as the Interfaith Coalition, but rather are created and shaped over time.

While the Interfaith Coalition has the right to oppose the legalization of same-sex relationships, my goal is to deter anyone from accepting that these views are any more than a specific application of doctrine. The views of the Coalition do not represent all Canadians identifying as Protestant, Catholic, Sikh or Muslim, as the Coalition is not made up of all members of those religious organizations. Nor do the Coalition's views

represent the sole understanding and sentiment toward same-sex relationships as defined by those faith traditions, as demonstrated by organizations like Salaam Canada and the United Church of Canada.³⁰ The Coalition's delineation of religious ideologies should not be seen as a universally accepted application of religious ethics but rather as a means by which sexual diversity is dissuaded in an attempt to maintain an idealized notion of community.

If the members of the Coalition were placed together in a room on a different topic, say religious freedom related to religious arbitration,³¹ their coalition might not maintain the same sense of community found in their opposition to sexual diversity. It is necessary to examine and analyze the ways in which arguments are developed and supported, to displace the primacy of hegemonic normative standards and promote what is often only given lip-service, a sense of equality for that which is considered other or different.

The theorists included in this chapter critique the implicit religious content of academic, social and public institutions based in the historical development and subsequent personal convictions of individuals who developed these fields. I incorporate and outline these theoretical critiques as a means of demonstrating the biases and assumptions that can be embedded in non-religious arguments, assumptions and biases that are further demonstrated in religious arguments such as the Interfaith Coalition.

This chapter marks the beginning point of this thesis, outlining theories relevant to the analysis of dominant ideologies specific to the category of religion and religious ideology and furthering the theories in application to a specific example, the Interfaith Coalition's factum regarding *Halpern et al.* The Interfaith Coalition is not the sole

religious view regarding sexual difference however the Interfaith Coalition and the Evangelical Fellowship of Canada (to be discussed in later chapters) have become seen as representative of religious opposition to same-sex relationships. The project of the theorists outlined in this chapter continues in subsequent chapters, in examination and critique of legal discourse and constructions of sexual normativity founded in religious ideology. The work of this chapter is to tie together some of the relevant elements of the category of religion and the construction of religious ideologies to serve as a pathway into the next chapter, which will examine the category of sexuality.

CHAPTER TWO

Regarding Sexuality: The Foundational Role of Sexuality in Identity

INTRODUCTION

Chapter 1 focused on interrogating the category of religion, which frames much of public discourse, with a specific view to the framing of anti-homosexual stances. Chapter 2 turns to the second category of identity relevant to this thesis: sexuality. Sexuality, like religion, is a problematic category of identity because it also is not one unified category, but rather exists conceptually as ideals and consequences with which individuals do or do not identify. Sexual normalcy, as defined in law, demonstrates arguments made in Chapter 1 regarding the construction of religious ideologies and how these religious ideologies problematically form the basis of legal standards.

In the early part of the twentieth century, Sigmund Freud began the project of defining sexuality as intrinsically related to an individual's identity. Freud's theory was that identity formation is directly related and impacted by a child's understanding of his or her own sexuality, first understood by the identification of male or female genitalia. In Freudian theory, sexual identity formation begins shortly after birth but becomes

more important with age and the understanding that not all humans are genitally alike. An individual's development is directly related to his or her ability to resolve potential conflicts posed by his or her genitalia. Freud's work is not without critique but his theoretical models regarding the constructedness of heterosexuality and the intrinsic relationship of sexuality in identity formation are important developments in sexual identity theory (Eliason, 1995: 821).

Freud's work has been developed by social scientists, psychologists, and critical and feminist theorists. I will highlight more current theoretical work on the topic of sexuality, including Michel Foucault, Luce Irigaray and Ian Barnard, to name a few, to outline contemporary notions and understandings regarding sexual identity. I will then turn to two cases in Canada to demonstrate the use of religious constructions to define sexual normalcy and sexual difference in law.

Defining sexuality is always problematic, because sexuality rarely has clearly marked parameters. Much contemporary theory about the topic of sexual identification regards sexuality as a continuum of possibilities of identification, without rigid boundaries as to what is or is not sexual identification (Dickey Young, 2008). Canadian law has not taken on the task of creating a definition of sexuality, but rather has framed regulations regarding standards and norms related to sexual identification and sexual behaviours.

Although Alfred Kinsey's (1948; 1953)³² illuminating work on sexual orientation was originally published over 50 years ago, it is still a relatively recent development to accept the category of sexuality on an identity continuum, rather than as two binary sets of identity: heterosexuality versus homosexuality (Burn, 1996; Dickey Young, 2008). While the examination of sexuality as a continuum of identifications, and not solely as

rigid categorizations, is accepted to some extent within the social sciences and humanities, this notion of a sexuality continuum is not without controversy. And although categorizing sexuality as a continuum of identification might have reached a level of acceptance in academia this is not absolutely true in legal discourse. Law requires set categories with which to classify individual or group claims for rights protection. Problems inherent in legal categories will be elaborated on further in this chapter.

The term “heteronormative” has become more frequently used in the social sciences and humanities when discussing standards of sexual normativity. But it is important to note that not everyone who identifies as heterosexual is accepted in the category of the sexually normal. To demonstrate this, I will discuss two court cases in Canada, one as an example of sexual difference pertaining to heterosexuality and one as an example of sexual difference pertaining to homosexuality: *R. v. Labaye* (2005) and *Chamberlain v. Surrey* (2002).³³ Both cases illustrate the use of religious ideologies in framing standards of sexual normativity in the law. Both court judgments also delineate a particular standard of morality as impugned by sexual difference.

First I will outline important theoretical constructions related to the topic of sexuality and sexual difference. I will then summarize the cases and focus on aspects of these cases that illustrate the ways in which the court constructs sexual normativity as based in a set of assumptions about sexuality. The cases are analyzed as a way of grounding the theoretical constructs in a contemporary lived application and to provide parallel examples to those outlined by the theorists I discuss.

I will then frame these cases within a broader Canadian context to analyze what the results of such legal battles really³⁴ mean. By using textual analysis within a legal

framework I will demonstrate how behavioural norms regarding sexual normativity are governed through the creation of an ambiguous moral community.

The cases to be examined were both decided in favour of the defendants, Labaye and Chamberlain. Although Labaye and Chamberlain won at the Supreme Court level, it is important to examine the construction of the sexually normal as outlined in these cases and how these constructions both repeat a set of biases and create problems in governance by using religious standards. First, I will discuss sexuality and sexual identity theories, with a specific eye to the construction of sexual difference.

SEXUALITY AND IDENTITY:

SEXUAL DIFFERENCE

Some of the current work on the construction of identity stems from Michel Foucault's work on subjective selves and self-constitution. Foucault argues that knowledge of the self is predetermined by a regime of rules governing what one can be (1978). The self is created and maintained, not by a biological imperative, but by the influence of social constructions defining what a subject of society should be. These social constructions are regulated through discourse. It is therefore not an internal projection of biological characteristics that determines who an individual is but rather an individual is constituted through external discursive ideologies. Standards regarding how a female should dress or how a male should act are externally constructed ideologies. These are not inherent biological traits but are demonstrations of internalized

societal expectations which have been reframed as natural projections of biological traits.

Further, Foucault argues that sex and sexuality are not repressed as subjects of public discourse but are elevated subjects of discourse through their construction as taboo (1978: 7). He argues that discussion regarding sex is controlled by a system of power that permits certain types of knowledge to make their way into the public vernacular and subverts or represses that which it does not permit (1978: 11). This system of repression can be most easily classified as censorship.

Foucault's work focuses on how the increase of the power of the state over the individual has been developed in the modern era. In *The History of Sexuality* (1978; 1980; 1984) he argues that the rise of medical and psychiatric science created a construction of sexuality as deep, instinctual and mysterious. Public discourse regarding sexuality becomes restricted to discussion of sexual taboos. In this way the human subject's experience of her or his own sexuality is shaped and controlled by the discourses that purport to explain it. The search for knowledge does not simply uncover pre-existing objects; it actively shapes and creates them (1980).

Foucault was critical of meta-theory: beliefs that claimed to give an exclusive objective explanation of reality. For Foucault there was no ultimate answer waiting to be uncovered. Discursive practices of knowledge are not independent of the objects that are studied and must be understood in their social and political context. Further to Foucault's critique, I do not wish to propose a singular solution to the regulation of sexuality and sexual difference. Rather I will demonstrate how sexual regulation is continually occurring and show its relationship with particular notions of religious standards of acceptance.

Luce Irigaray's work (1993; 2000) about sexual difference regarding gender provides an important jumping off point to examine the varied constructions of the sexually different. Irigaray uses psychoanalytic theory to examine and critique the categorization of sexual difference as a product of culture, history and academic thought. She analyzes and articulates the ethics of sexual difference as being typified by male as normative, female as other. Throughout history, whether religious, academic or societal, the boundaries of normalcy have been dictated and modeled upon a masculine standard without women figuring into the equation except as different from men. She states: "The question of the other has been poorly formulated in the Western tradition, for the other is always seen as the other of the same, the other of the subject itself, rather than an/other subject" (1993: 8). As a result, little work has been done to conceptualize woman as a subject in her own right. Rather, women are regarded as wives, mothers and daughters of someone else (male). Irigaray also looks at systems of governance as typifying this gendered imbalance, postulating that these systems of regulation reinforce the hegemony of male normativity (2000).

Irigaray's work extends into an examination of the standards of sexual difference developed by religious ideology. Specifically she argues that religious ideologies are used in framing standards of acceptance for women as created and imposed by patriarchal religious traditions. Irigaray explores the use of Christian ideology and ritual³⁵ to subsume the roles of women and further enforce a gendered hierarchy, with a male god at the top. "In Genesis, the feminine has no conception. She is figured as being born from man's envelope, with god as midwife. Whereas woman envelops man before his birth" (1993: 93).

However, Irigaray does not promote melding sameness and difference into a category of the same. She argues for more accurate definitions of the other, as a subject in its own right, not categorized solely as different from, and therefore unequal to, the same: “We need difference and negativity in order to perceive things” (Irigaray, 2000: 17). Similarly, I am not arguing for the sexually different to be incorporated within the category of the same. Rather, I think that it is possible to discuss difference and diversity in ways beyond the current model as the “problematic category of the other.”

Gayatri Spivak (1996) incorporates into her critique of colonialism and colonial subjects the work of Irigaray by discussing the notions of difference that lay embedded in language and cultural production. Spivak argues that embedded concepts of difference demonstrate not simply a sexual (gendered) binary opposition, but an intertwined relationship between politics, history and sexuality. “The extended or corporate family is a socioeconomic (indeed, on occasion political) organization, which makes sexual constitution irreducibly complicit with historical and political economy” (Spivak, 1996: 60).

Spivak’s use of deconstruction is not an attempt at creating a rigorous definition but a move to displace accepted notions and assumptions within a text. She argues that “the trick is to recognize that in every textual production, in the production of every explanation; there is the itinerary of a constantly thwarted desire to make the text explain” (Spivak, 1996: 33). Law, as a text, is a powerful authoritative control for subjects which ought to be held to the same expectation of explanation. Or put more simply, the law as a text also stands in need of explanation.

Pamela Dickey Young (2008: 88-89) states: “Much theory about sex and gender today contends that sex, like gender, is a matter of interpretation – that the idea of sex

bifurcated as male and female is not an unquestionable matter of natural importance, but an interpretation.” The categorizations of male and female, heterosexual and homosexual, are not as rigid now as they were conceptualized when demarcated as only pertaining to biological characteristics. Rather the socially constructed parameters of sexual identifications allow fluidity in the categorization of these aspects of identity. But although the category of the normal is constantly shifting, it is through the continued performance of accepted standards of sexual identity that certain stereotypes of what is acceptable maintain a position of privilege.

Naomi Goldenberg argues that “‘sexuality’ and ‘religion’ have to be thought about together within religious studies in order to advance critique about each one” (2009: 2). Constructions about normative sexuality have often been framed in public and legal discourse within a set of standards determined by notions of religious morality. These constructions are then argued, often by religious interest groups, to be the natural or normal performance of sexual identity. As a result, Goldenberg argues that work about sexuality needs necessarily also to examine and critique the category of religion and its involvement in sexual normativity and sexual difference demarcations.

Incorporating the work of Foucault, Irigaray, Spivak, Dickey Young and Goldenberg, the rest of this chapter will explore the ways in which sexuality has been categorized and framed in law. I will explore the categorization of sexuality in law through a discussion of the construction of sexual normativity, reflecting on whether and how sexual diversity is accommodated or dissuaded. Although sexual difference is commonly categorized by gender or sexual orientation, and constructed as a binary difference (male/female, heterosexual/homosexual), sexual normativity is not simply relegated to heterosexual/male (normal) and homosexual/female (different). Before

analyzing *Labaye* and *Chamberlain* I will discuss theoretical work specific to the topic of sexual difference in the field of Queer Theory. Like religion and religious ideologies, sexual difference and the sexually other do not exist as unified categories of identity. Queer Theory problematizes the acceptance of the sexually normal and demonstrates levels of difference within the category of the sexually different.

QUEER THEORY:

DIFFERENT DIFFERENCES

In 1991 Teresa De Lauretis, writing about critical approaches to gay and lesbian sexualities, coined the term Queer Theory. Queer Theory in its development has come to encompass “problemat[izing] the multiple differences in the production of dominant and normative categories of sexuality” (Schipper, 2005: 90). Embracing the term queer, often applied derogatorily to gay and lesbian individuals, queer theorists examine concepts of the production of the normal and dominant approaches in organizing sexuality. The focus of Queer Theory is to examine sexuality not as an intrinsic or inherent trait but rather to critique “discursive productions of sexual identity” (Schipper, 2005: 91) in relation to other categories of meaning.

Schipper summarizes it as such:

Most queer theoretical work adopts Foucault’s skeptical stance toward the modern organization of power and seeks to construct interventions (in texts or practices) that might resist the pervasive influence of normalizing power operations (2005: 94).

Queer Theory is a field of study that can be intersected with other bodies of theory, such as feminism, psychoanalysis, postmodernism, and liberation theology to name a few. The inclusions are not necessarily accepted or free of criticism. For example, feminist liberation theologian Marcella Althaus-Reid writes that during a public lecture, members of the audience questioned her inclusion of sex and sexual orientation into feminist liberation theology. The participants challenged the inclusion of the word “sex” by a liberation theologian, claiming that by doing so she had abandoned her identity as a liberationist (Althaus-Reid, 2004: 1).

The general project of Queer Theory is to explore the categorization of gender and sexuality, arguing that these categorizations are based in socially constructed ideologies and are used to oppress that which is categorized as different than the norm (Schipper, 2005). Queer Theory seeks to disrupt standard gender categories. “Sexual ideologies are foundational in economic and political structures of oppression, just as they remain foundational in our understanding of ourselves and ourselves in relation to God” (Althaus-Reid, 2004: 4).

However, Ian Barnard (2004) argues the categories of sexual identity developed in Queer Theory already denote a position of privilege. He states: “Only white people [in western society] can afford to see their race as unmarked, as an irrelevant or subordinate category of analysis” (2004: 4). In his book, *Queer Race*, Barnard proposes a further queering of Queer Theory to include race as a category of queer identity that has not been conceptualized in the field. He does not wish to dismantle the work of the field of Queer Theory but feels that narrow categorizations of gayness have been

internalized and accepted as all inclusive. As a result, the subjectivities of queers of colour are not incorporated in the project of the fight for gay rights.

He states:

I do want queer and queer theory to be about sex – I am not willing to give up queer theory’s antihomophobic commitment – while also wanting it equally to not be only about sex, to be about how sex can never be ‘only’ (Barnard, 2004: 16).

Barnard uses the example of gay pornography to demonstrate that queers of colour are subordinated in ways that white queers are not. He argues that black men are eroticized for their colour *and further* are eroticized as queer. Barnard demonstrates this by arguing that the agents of desire in film and magazine pornography are always white men, the subjects of desire are always men of colour (2004: 37-39).³⁶

Annamarie Jagose similarly questions the category of Queer Theory as containing a hegemonic construction of its own, asking whether Queer Theory has reinstated a generic masculinity in the ostensibly gender-neutral category of “queer” (1996: 1). She points out that Teresa de Lauretis abandoned the term Queer Theory “on the grounds that it had been taken over by those mainstream forces and institutions it was coined to resist” (Jagose, 1996: 1).

Shannon Winnubst’s book *Queering Freedom* (2006) also interrogates the category of queer and notions of freedom in her examination of power dynamics, sexuality and discursive positioning in a Western, colonial context. Winnubst argues that the “politics and rhetorics of freedom have wholly displaced the politics and rhetorics of imperialism” (2006: 2). The referents of the power institution have been modified to seem less domineering and more concerned with the welfare of the state. This

construction allows the members of society to be engaged in the rhetoric that they are “freedom fighters” even though the power institution might be more heavily involved in limiting freedoms, or put differently, only promoting the freedom of certain privileged individuals. Winnubst defines the dominant individual as white, male, Protestant, propertied and straight and states that rights discourse relies on the same foundations as property ownership; it is the “properly propertied” individual who has access to their rights (2006: 42).

Highlighting a position of privilege is important in the examination of petitions for protection of rights in Canada. The claimants contesting discrimination based on their sexual difference are at a disadvantage when compared to the hegemonic category of the normal, but exist in a comparative place of privilege in relation to other minorities, whether religious or sexual. By this I mean that in order to wage a legal fight for equality rights or to challenge the constitution as exclusionary, the petitioner needs to already be in a certain place of privilege financially and emotionally and to have support systems from which to fight.

I integrate a discussion of power and privilege in this chapter to demonstrate that the category of sexual difference, like the category of religion, is not a homogenous category of identity. It too contains individuals of a variety of diverse views and identifications and does not exist as a unified community. I will now turn to the two cases to be examined in this chapter which will further demonstrate the diversity of what is categorized as sexually different.

R. V. LABAYE:

WHAT CONSTITUTES HARM?

In a case in Montréal, Jean-Paul Labaye was convicted of keeping a common “bawdy-house,”³⁷ called L’Orage, for the practice of acts of indecency. Labaye’s club occupied the first two floors of a building in Montréal. The third floor of the building was his private apartment. Club members were found to be engaging in sexual acts in Labaye’s apartment. This was determined through an undercover police investigation. The case was brought against Labaye at the provincial level, where it was argued that his apartment should be considered a public space, and that the sexual activity in his apartment should therefore be found in contradiction with legislation relating to public spaces.

The provincial court of Québec ruled that his apartment did constitute a public place which was kept or used for the purposes of prostitution, as outlined in section 197(1) of the *Criminal Code of Canada*.³⁸ The trial judge termed the acts performed in this apartment to be indecent and declared that social harm³⁹ occurred as a result of the sexual exchanges taking place in the presence of members of the club. These sexual acts were defined by the Québec provincial court as degrading, dehumanizing and inducing anti-social behaviour in disregard for moral values, as well as raising the risk of sexually transmitted diseases, presumably among members of the club.

In 2005, the Supreme Court of Canada acquitted Labaye, stating that because the club was located in an apartment, members of the general public would not be faced with unwanted confrontation with the sexual conduct in question; the autonomy and

liberty of members of the public would not be compromised; and furthermore, that the risk of STDs is conceptually and causally unrelated to indecency.⁴⁰

The dissenting opinion in the Supreme Court judgment, written by Justices Bastarache and LeBel, provides a framework for discussing what constitutes harm, who determines public morality, who the general public consists of and where the general public's opinion resides. However, I will look first to the majority judgment, written by Chief Justice McLachlin.

In the majority judgment, Chief Justice McLachlin outlines the need for a new harm-based approach to discuss the elements of the case of Labaye, whereby:

the Crown must prove beyond a reasonable doubt that 1) by its nature the conduct of the club members causes harm or presents significant risk of harm, and 2) harm or risk of harm is to a degree that is incompatible with the proper functioning of society (at para 3).

Because these two requirements were not met by the case against Labaye, the behaviours of the members of the club were not seen as inflicting harm on society.

Mariana Valverde (1999) argues that the notion of harm in legal discourse has been constructed to describe a potential threat to the community the law is described as protecting. This construction of the function of law is modified from previously held notions that the law was intended to uphold sovereignty and act as a disciplinary measure (Valverde, 1999: 187). This construction of the potential of harm to the community, and the law's function to protect from harm, implicitly engages the participation of the community in setting standards of normalcy and acceptance.

The notion of harm and protection from harm raises the question of who defines what constitutes harm (Beaman, 2008). Lori Beaman argues that harm is a variable term used to support a particular standard in any given framework. While what Beaman terms

the “sites of harm” are always in constant flux, what remains the same is that the construction of the community causing the harm is embedded in power relations and discursive constructs of otherness which “we” need protection from. In her analysis of the *B.H.*⁴¹ case, Beaman argues that the discursive framework of harm is often constructed as a response to otherness; in this case, religious otherness represented by a Jehovah’s Witness who refused blood transfusions after being diagnosed with leukemia.

Pointedly, Judith Butler asks: “with so much protection, what do we have to fear?” (1996: 219). Protection from the potential threat of harm is an important strategic tool that can be used to define what harm is and how harm is defined. Harm in the case of Labaye is the potential threat of swinger’s sexual acts in his apartment as being problematic for the Canadian community. Standards of sexual normalcy are constructed in the legal decision within a set of moral parameters. As famously stated by Pierre Trudeau, “the state has no business in the bedroom of the nation” (d’Entrèves and Vogel, 2000:87). The case against Labaye is brought forth because it is argued that the sexual acts in his apartment do in fact impinge on the functioning of society outside his private dwelling, which is why his apartment needs to be classified as a public space. As will be shown by Justices Bastarache and LeBel, there is a moral community that needs to be taken into account in this case.

Turning to the dissenting opinion,⁴² Justices Bastarache and LeBel state: “this new harm-based approach also [outlined by Justice MacLachlin] strips of all relevance the social values that the Canadian community as a whole believes should be protected” (at para 5). This statement raises the question as to who is considered to constitute this “Canadian community as a whole.” It certainly excludes all of the paying members of

Club L'Orage as well as the judges who make up the majority judgment in this case. Evidently, then, there would be some dispute as to the wholeness of this community.

The larger implication is such that those who do not fit within the standards of this community, by adhering to the social values prescribed, have failed in some morally disreputable way and thus do not belong. The problem, according to the framework set out by Justices Bastarache and LeBel, is that the harm-based approach applied in the majority decision does not adequately reflect the real harm being done to this Canadian community as a whole. Thus the problem would seem to centre on harm, specifically an underestimation of the harm of the sexual practices occurring in Labaye's apartment.

Justices Bastarache and LeBel then contradict themselves in their dissenting opinion regarding the importance of the harm L'Orage is causing by stating:

The existence of harm is not a prerequisite for exercising the state's power to criminalize certain conduct: the existence of fundamental social and ethical considerations is sufficient (at para 7).

The state then no longer has to determine that social harm is occurring to exercise its power on behalf of the demoralized Canadian community as a whole. Even though it has been determined that the apartment in which sexual conduct was occurring is not accessible to the public, since only paying members of the club who undergo an interview process prior to admittance can enter, it appears that simply the knowledge that these sorts of sexual interactions occur impacts on the Canadian community sufficiently to impugn their fundamental social and ethical values. Let's face it: we are all unaware of innumerable acts that occur. However, the "fact" of the existence of such acts in this case is problematic.

Furthermore, “[t]he public and commercial dimensions of the sexual practices in issue would lead to the conclusion that those practices were indecent even if there were no harm” (at para 7). Justices Bastarache and LeBel argue that because members have to pay to belong to the club, and that members of the club then have access to sexual services (either performance of sexual acts or viewing of sexual acts), the membership fee they pay therefore constitutes payment for sex. The commercial aspect (whereby members pay for membership in the club and then some perform sex acts in the apartment) is also contradictory to the public morality of the Canadian community, further proving the sex acts to be indecent. Irrespective of the potential harm (which as we have learned does not need to be an element anymore), this indecency that is (somehow) imposed on the morally superior community to which the participants do not belong therefore exemplifies the criminality of the conduct of said establishment.

Valverde (1999: 194) claims that “[m]oral regulation is as historically variable as economic and social regulation.” Stating that moral regulation is static and unchanging would provide it with a desired consistency and would also further substantiate the supposed neutrality of legal decision making. But it can be evidenced that moral standards and regulations imposed on society change and have fluidity over time. Although judges and society might like to view the standards of the law as consistent and successful, rather than subject to change as societal attitudes change, Valverde argues this is not the case. To view these standards as variable would make them seem less authoritative and overarching and more subject to human control and value systems.

I will now turn to the second case to be discussed in this chapter in order to examine the construction of sexual difference pertaining to homosexuality and what makes up an ideal picture of family in Canada. I will bring together themes of sexual

difference and moral regulation in my conclusion at the end of the chapter, drawing on the parallels between *Labaye* and *Chamberlain*.

CHAMBERLAIN V. SURREY:

DEFINING THE FAMILY

Chamberlain v. Surrey School District No. 36, a Supreme Court case from 2002, involved James Chamberlain, a Kindergarten-Grade One (K-1) teacher, who had asked the British Columbia School Board for approval of three books to be used as supplementary material to teach the family life education curriculum portion of his class. The books were *Asha's Mums*, *Belinda's Bouquet* and *One Dad, Two Dads, Brown Dads, Blue Dads*. All depicted same-sex parented families which Chamberlain argued were necessary both to reflect realities of today's families and to promote diversity and tolerance in the classroom. The British Columbia School Board declined approval of the books for the curriculum, claiming the inclusion of these books would:

engender controversy in light of some parents' religious objections to the morality of same-sex relationships. The Board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; that children of this age were too young to learn about same-sex parented families; and that the material was not necessary to achieve the learning outcomes in the curriculum (at page 3).

The B.C. *School Act* grants school boards the authority to approve supplementary materials for classes and confers on the Minister of Education the power to approve

educational resources and materials used in teaching in public schools. The B.C. Supreme Court overruled the Board's resolution, stating that board members were influenced by their own religious beliefs and not the best interest of teaching the public school curriculum, which they argued was contrary to section 76 of the *School Act*.⁴³ The B.C. Court of Appeal set aside the B.C. Supreme Court decision, stating that this type of resolution (to accept or reject teaching materials) lies within the Board's jurisdiction. The case was then brought to the Supreme Court of Canada.

The concern outlined by the school board was "that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents" (at para 3). There is only one set of beliefs considered in this statement and that is the set of beliefs that would be in conflict with teaching tolerance toward sexual diversity. Parents who support teaching tolerance toward same-sex parented families and non-traditional family models are not the group whose beliefs are considered as needing protection. The lack of consideration for the possibility of religiosity and homosexuality to be compatible categories of identity further perpetrates a standard of belief/good/normative (religious/moral) contrasted with unbelief/bad/non-normative (non-religious/immoral). Implicitly framed in this set of categorizations is that religious beliefs necessarily oppose same-sex parentage. There is no consideration that some Board members might adhere to religious doctrine and support same-sex parentage.

Another illustration of this problem is the articulation by Chief Justice McLachlin that the "Board must act in a way that promotes respect and tolerance for all the diverse groups it represents and serves, no matter their religious convictions" (at page 4). What are not considered here are the religious convictions of same-sex parented couples and their children. Teaching that some religious beliefs oppose same-

sex parented couples infers that to be homosexual is to be something other than religious. The set of religious convictions outlined in this case represents only one side of the groups concerned. Further to the discussion in Chapter 1 regarding the diversity of religious ideologies, the set of convictions outlined in *Chamberlain* would also not represent all members of religious traditions. The judges in this case do not question whether religious opposition is a valid form of discrimination because religion is already given a place of privilege regarding sexual difference. The judges also do not consider that religious convictions could be used to argue in support of respect and tolerance for same-sex parented families.

Argued in the dissenting opinion, written by Justice LeBel, is that “there is no evidence that the parents who felt that the three books were inappropriate for five- and six-year-old children fostered discrimination against persons in any way” and further that “‘tolerance’ ought not be employed as a cloak for the means of obliterating disagreement” (at page 10). Justice LeBel argues that homosexuality and same-sex parented families are not being discriminated against in their absence from the family life portion of the curriculum, but that the incorporation of these texts was simply inappropriate for young children. He feels that the use of tolerance of diversity seeks to cloak disagreement but that tolerance of religious convictions should be upheld.

The language regarding religion and sexual difference in the decision of this case is problematic, outlined above. Religious morality is constructed as separate from people in same-sex partnerships, as though being homosexual is tantamount to an inability to also be religious and uphold religious morality. Same-sex relationships are framed here as incompatible with an ability to maintain religious belief systems. Children of same-sex parented families are confronted with a set of standards of the

acceptable family, to which their family unit does not comply. And all children in the classroom to which these categorizations of same-sex relationships as unreligious are being taught intolerance toward difference and diversity. An unrealistic standard of the acceptable family is repeated and reaffirmed and worse, same-sex relationships are categorized as immoral.

Children who have same-sex parented families can be made to feel as though their family model is something immoral or shameful to discuss. The problem of their family model is perpetrated by the construction of same-sex parented families as being a particular, un-religious model which children might not be able to understand. This sets up same-sex parented families as something incoherent and in need of explanation. And further, family models are constantly evolving.

While I agree with the decision to uphold the Supreme Court ruling in favour of Labaye, it is demonstrated through a careful reading of the supporting and dissenting decisions that religious beliefs, dogma and morality are considered as clearly distinct and incompatible with homosexuality and same-sex parentage and are seen to hold an unquestioned place of privilege. The discriminatory framework of the case does not only refer to the Board's decision that religious parents would be opposed to the material and should be supported in their opposition. The ruling frames religious morality and homosexuality as separate and incompatible world views. As outlined in Chapter 1, I question the supposed static nature of religious belief systems that only represent one view of a religious tradition.

NORMATIVE VALUE SYSTEMS:

CONSTITUTING DIFFERENCE

What we are left with is ambiguous notions of 1) who the morally superior community is, 2) whether harm is in fact relevant or not, and 3) whether it is even possible to be both religious and homosexual. We are not confused about the declaration of a hegemonic normative value and behaviour system to which the Canadian community is meant to subscribe. According to Foucault, legislative bodies (organizations of power) are made up of people employed to regulate the conduct of human behaviour (Foucault, 1981). Law is reliant on adherence to the embedded nature and power of language, specifically the language of the law which assumes its own normalcy and “preserves the presentation [that] law [is] a neutral and objective arbiter capable of producing the truth” (Beaman, 1999: 175). The significance of particular words or texts exists within a community that has implicitly agreed upon the meaning of those words and the ability of those words to conduct, control and determine appropriate behaviour. These agreed upon meanings are then supported by a set of consequences when members of the community challenge or oppose the meaning of the words or argue to redefine the terms and standards of behaviour.

Janet Jakobsen and Ann Pellegrini, examining the legal treatment of homosexuality in the United States, argue that homosexuals and their advocates have been asking for too little in their rights claims, stating:

Lesbian and gay advocates have been asking for tolerance and equal rights, not freedom and equal justice. They have accommodated their political arguments and legal strategies to the us-them structure of tolerance. They haven't challenged the exclusionary

nature of the 'general public' in which difference from dominant norms must be minimized as a condition of belonging or membership (2003: 75).

The problem of embedded notions of power within the language of tolerance and accommodation is a current topic of debate in Canada, partially as a response to the Bouchard-Taylor Commission Report in Québec.⁴⁴ This is a topic outside the scope of this dissertation, but Jakobsen and Pellegrini's point is taken seriously in the context of this work. Justice LeBel might see the use of tolerance as an argument which whitewashes disagreement but there is clearly a disparity between the theory of equality rights and the means by which rights are accessed. I question a system that is argued to grant equality to "all" and yet individuals who challenge the norm are made to fight in order to access equality, or to be accommodated. And while here I am arguing a particular case about the topic of sexual diversity, these arguments can be framed to include religious difference, racial difference, gender difference, not simply sexual difference.

The sexual acts that occurred in Labaye's apartment are no longer legal fodder. However, some of the public responses to Labaye's acquittal included newspaper headlines such as "Sexy 'swingers' clubs are okay, Supreme Court rules" (CTV News, 21 December 2005) and "Supreme court 'swings' in favour of group-sex clubs" (CanWest News Service, 21 December 2005). Predictions were made that bath houses would be safe from prosecution and there was a level of speculation regarding the installation of a legalized red light district somewhere near "us."

Responses to the Chamberlain outcome bear an apocalyptic flavour with articles such as "Christian parents flee public schools" (Christianity Today, 1 March 2003), and the creation of a website called "British Columbia Parents and Teachers for Life Views

Opposing the Pro-Homosexuality Agenda.” This website posts articles such as “Gay Sex Kills” and “Forced Education in Homosexuality and Evolution Leads to Exodus of Mennonites from Quebec” (<http://www.bcptl.org/gay.htm>, accessed 9 September 2008).

The responses given above permit approaches to sexual difference constructed as socially harmful even when the actions of the individuals in question have no bearing on people who are not involved in the case. These public responses and constructions of the sexually different further create an acceptance (allowance) of animosity toward people who are somehow other, in this case not part of the normative heterosexual binary opposition of one man and one woman. Animosity is then justified by reasoning that purports itself to be a rational response to fear (Boswell, 1980). In response to Labaye, what if everyone then becomes a swinger? Will this result in a complete destruction of marital values, family values and normative identity across Canada because the Supreme Court did not support the designation of Labaye’s apartment as a public place? If this language sounds familiar it is because it is the same language is used in some venues (academic, public and media) to discuss the downfall of Canadian society now that sexual orientation is read into the equality rights provisions of the *Charter* and homosexual couples are legally allowed to marry.

The results of these legal outcomes are actually quite minimal. The denigration of the Canadian family has not been a result of the case, no matter what the purported fears of the opposition to Labaye or Chamberlain’s acquittals might have stated. What has happened is that Labaye’s apartment was not classified as a public place and therefore he could not be charged under the Criminal Code with violating regulations concerning public places. The result here is that swingers clubs will continue to exist, without widespread public knowledge, and society will continue to function without

collapsing. The strength of normative identity production relies in the constant resistance to any other possibility. Although Labaye's club is allowed to remain open, Labaye and club members are demonstrated through the decision to be seen as unequivocally immoral and unethical.

What has happened as a result of the Chamberlain case is that three books have been admitted to the curriculum to be used as supplementary material, should K-1 teachers in B.C. decide to use them. Parents who support or oppose this decision will react in any manner of ways.

Perhaps assuming a clean sweep of anti-discriminatory behaviour regarding sexual difference is an unrealistic expectation. What, then, should the public expect when precedents are set in a court room? Historically, some major changes have occurred as a result of precedents, for example the outcome of the *Persons*⁴⁵ case in Canada at the turn of the twentieth century, which coincidentally posed another problematic regarding language and meaning, in reference to the meaning of the word "person" and whether the word applied to both men and women.⁴⁶

While legal and social change are occurring regarding protection against discrimination for homosexuals, and the legalization of same-sex marriage, the language surrounding what homosexuality or sexual difference is, or more accurately what it is not, and the means by which the changes occur are more subversively constructed. The influence of religious beliefs and religious groups have helped maintain mainstream categories of heteronormativity. Incorporating Brenda Cossman's (2002) discussion of sexual citizenship, which will be elaborated in Chapter 5, the non-normative subject thus must be transformed into a desexualized subject and framed within a recognizable context of the same to acquire sexual citizenship within a Canadian context.

According to Martha Nussbaum:

The category of the 'normal'...is already heavily normative. In many circumstances, this normativity is *moral* normativity. Condemnation of the 'deviant' group is particularly effective if it takes the form of invoking cherished moral values, to which the deviant group is allegedly a threat (2004: 55).

Through linguistic analysis of the legal decision it can be evidenced that the framework of moral normativity is posited as clearly contradictory to the (indecent)⁴⁷ behaviour of participants of L'Orage, and definitely Labaye himself. The standard of morality outlined also demonstrates that religious ideologies and identification are clearly separated from homosexuality. The necessity to make homosexuality the other (binary opposite/incompatible) in contrast to normative heterosexuality must not be disturbed by an acceptance of the religious homosexual. As a result, being homosexual is posited in legal decision making as contradictory to religiosity with the result that one cannot be both religious and homosexual, but only one or the other. As referred to earlier, animosity is often purported to be a rational response to danger. When the hegemonic, heteronormative system faces a challenge, it responds by drawing very clear lines in the sand, between us and them.

Canadian law further provides a place of privilege for religious ideologies by recognizing religious opposition to sexual difference as a valid stance. An ill-defined position of religious morality is allowed to determine what is considered acceptable as a standard of sexuality and also provides a safe space to discriminate against that which it does not accept. In Chapter 4 I will elaborate and critique legal discourse and the

construction of normative standards in a discussion of legislation regarding sexual orientation and same-sex marriage.

CONCLUDING REMARKS

Rule governed systems provide frameworks intended to order categories of us and them, accepted and unaccepted. Where, then, does equality reside? The reality of a legal outcome is limited to what follows the judgment. The power of the legal text is evidenced by a system of consequences, enforced in the belief that law produces truth, truth that is neutral and equally applied to members of society (Beaman, 2002). Human behaviour and norms are created and regulated by powerful linguistic constructions of ideals and consequences. What is considered normal is created and maintained through legal discourse, ever evolving as a result of challenges to the system. It is necessary to analyze and examine the system, questioning the hegemonic structure to expose the vulnerability of the categories and definitions used to create groupings of same and different, normal and other. As already mentioned, the function and role of the law will be outlined and critiqued further in Chapter 4.

The purpose of this chapter has been to examine the diversity encompassed within the category of sexual difference. I have also argued that the sexually different, while not a homogenous group, is constructed as such through a particular type of moral regulation. The sexually different are further constructed as problematic to the larger community. As argued groups such as the Interfaith Coalition and Evangelical

Fellowship of Canada, and upheld in legal decision making, if those categorized as different are permitted or are accepted, sexual difference could therefore collapse the Canadian community – and more specifically, a particularly moral Canadian community. The category of the sexually different as embodied by “the homosexual” is the basis for the next chapter, which will examine sexual orientations as problematic in relation to law and religious traditions.

CHAPTER THREE

Problematic Sexual Orientations: Sickness and Sinners

INTRODUCTION

The focus of this chapter is the categorization of homosexuality as a problematic sexual orientation in Canadian law and public discourse and its historico-religious constructions. Building on the work done in Chapters 1 and 2, I will discuss the construction of acceptable versus unacceptable sexual orientations and how these categories become represented in law and public discourse. I argue here again that sexual orientations, specifically homosexuality, do not exist as unified categories of identity but rather as a socially constructed set of parameters defining largely what the homosexual is not or how homosexuals should not act. I will also examine how religion has been given a place of protection to argue against the acceptance of homosexuality. This privilege results in the definition of the queer subject as a quintessentially secular subject (McGarry, 2008: 248). Religious ideologies are provided a protected place for

anti-homosexual views - a situation which demonstrates that religion and homosexuality are seen as two distinct and separate sets of identifications and not as coherent or compatible. Furthermore, religion is permitted to be a justified stance to oppose equality rights for sexual orientation in legal decision making.

The place of privilege afforded to religious views will be demonstrated first by examining historical construction of the category of homosexuality which moved from sinner to sickness and back to sinner again. The constructions of homosexuality as problematic will be further critiqued as I demonstrate the incorporation of these categorizations into legal decisions. I will also review some relevant theories of identity.

As stated by Helminak,

The scientific study of sexuality is barely a century old. We now know that homosexuality is a core aspect of the personality, probably fixed by early childhood, biologically based, and affecting a significant proportion of the population in virtually every known culture. There is no convincing evidence that sexual orientation can be changed, and there is no evidence whatsoever that homosexuality is in any way pathological (2000: 39).

Even though individuals do not experience the world solely through one aspect of their identity, for example as only a female or as only homosexual, personality is often reduced to categories of identity in order to define and analyze behaviour and determine or promote guidelines. Although being female bears similar traits and characteristics, the experience of being female in Canada versus Uganda or Brazil will make for diverse standards and understandings. This is true also regarding homosexuality as a potential set of traits and characteristics, individually and across cultures. Understanding the diversity of homosexual individuals also spans over time and in the examination of

historical treatment of homosexual relationships and same-sex marriage, as knowledge and understanding about sexual difference and sexual diversity changes.

Theorists relevant to the topic of sexual orientation and its historical treatment include John Boswell and Gary Kinsman. I will summarize work done by Donald Casswell and Kathleen Lahey about the treatment of homosexuality within law and use this work to draw parallels between the religious and legal constructions of homosexuality as well as to argue against acceptance of religious standards as currently upheld within the law.

To demonstrate the acceptance of religious standards regarding sexual normativity, I will analyze the case of *Egan v. Canada* (1995)⁴⁸ which led to the inclusion of sexual orientation as protected from discrimination in section 15 of the *Canadian Charter of Rights and Freedoms*.⁴⁹ My interest regarding the *Egan* case is twofold. I will examine the common classification in discourse of *Egan* as a landmark case for gay and lesbian rights, bearing in mind that James Egan and John Nesbitt's claim to be considered spouses was actually denied. I am also interested in the variety of ways the judges construct the acceptance of homosexuality within the majority and dissenting opinions. While the court argues for respect and tolerance of sexual difference, procreation, which is seen as contributing to Canadian society, is emphasized as the purpose of marriage, a purpose which homosexuals are unable to further.

John Boswell's book, *Christianity, Social Tolerance and Homosexuality* (1980), traces the treatment of gay people in Western Europe as defined by Christian standards. He examines the relationship of homosexuality and the Christian tradition based in scriptural teachings, social attitudes and subsequent scholastic tendencies. Boswell demonstrates that social attitudes toward homosexual relationships and same-sex

couplings have varied dramatically over time with multiple justifications. His work will be reviewed as a part of my project to examine important intersections between the category of identity termed sexual orientation and the way sexual orientation is regulated in Canadian law.⁵⁰

Building on Boswell's work, other theorists have taken up the project of examining both historical and contemporary approaches to homosexuality. Gary Kinsman, using Michel Foucault's analysis of linguistic devices as creating the regulations we term to be internal, argues that the category of the "homosexual" has a historical trajectory that can be followed. Kinsman's argument will build the framework for an analysis of the category of problematic sexual orientations. I will then turn to *Egan* to discuss the legal creation of a new precedent and the real outcome of this case for Egan and Nesbitt.

As stated in Chapter 2, while some contemporary theorists use identity continuums to understand sexuality, it can still be evidenced that there is a paradox between the understanding of one's own personal sense of sexual identification and cultural prescriptions of sexual normativity. According to Donald Boisvert, this paradox is evidenced in the ways that "societies in the West tend to respond to homosexuality: we accept and tolerate it, but it certainly should not become too mainstream or visible in an everyday way. Committed queer bodies simply make 'us,' the married normal ones, look bad" (1999: 173). This opinion is evidenced in Canada: although sexual difference and sexual orientation have gained ground and are protected by the *Charter* but this protection is 'enough.' Tolerating sexual difference does not mean infiltration of "them" into the privileged category of "us" and the possibility of "them" sweeping the nation and out-numbering "us" provides continual fear and a source for backlash against the

gay and lesbian community. The use of fear based responses to the acceptance of homosexuality, often framed within the idea that Canadian society would die out if homosexuality was accepted, will be discussed later in this chapter after a discussion of historical attitudes toward homosexuality.

THE CONSTRUCTION OF THE HOMOSEXUAL OTHER:

RELIGION AND HISTORY

Gary Kinsman (1987) asserts that systems of power, such as the law, have the ability to determine what is or is not normative and permitted. These systems then create the category of difference as though it were pre-existing. Kinsman argues that biological sexuality is simply a set of potentialities as are aspects of human genetic makeup like eye or hair colour. However, sexual potentialities have been streamlined into acceptable and unacceptable trait exhibitions.⁵¹ While heterosexuality is only one possibility stemming from biological sexuality (XX or XY),⁵² it has been defined as the “natural” result or performance of sexual identity, rather than one of many displays. As already argued, not all types of heterosexual behaviour are allowed or permitted in the public arena. Heterosexuality too is regulated within a defined set of parameters as demonstrated by *Labaye* (Chapter 2).

Historical constructions of homosexuality as a problematic other will be examined in this section. First I will outline Boswell's historical review of the treatment of gays and lesbians in relation to Christianity and social standards of tolerance.

Boswell states,

If religious texts are widely supposed to have been the origin of a medieval prejudice, their role in determining the attitude in question must be carefully examined; if it is assumed that scholastic opinions on a subject were an inevitable response to the force of the preceding Christian tradition, a historian who wishes to present an alternative explanation must examine the force of the previous tradition in minute detail (1980: xv).

Boswell surveys the relationship of homosexuality and Christianity through history as he interrogates the validity of anti-homosexual discrimination based in an ambiguous and fluid religious ethics system. In contemporary discourse, Boswell contends that what has been constructed as a religious opposition to homosexuality is in fact one particular application of Christian beliefs, which then is used to justify intolerance and anti-homosexual stances. Boswell claims that arguments applied to justify this intolerance function by constructing the problem (in this instance homosexuality) as posing a threat to society – a process which then creates an atmosphere of fear around the intended target. As a result, arguments that have been made in news media and public discourse claiming that Canadian society would die out if everyone became homosexual promote a fear-based response to sexual difference. This 'logic' assumes that everyone given an option would choose homosexuality and falsely correlates sexual desire and procreation. The unnaturalness of homosexual desire is translated into a vernacular of social harm.

Boswell argues that what originally were social restrictions on sexual activity have been developed over time with the result that attitudes toward homosexuality have become increasingly hostile and intolerant. He claims that religion is manipulated to justify hostile attitudes even though religious attitudes are varied and religious doctrine is no more hostile to homosexuality than it is toward hypocrisy (Boswell, 1980:120). He also points out that it is always homosexuality that stands in need of explaining itself since the origins of heterosexuality are never questioned.

Kinsman's book, *The Regulation of Desire: Sexuality in Canada* (1987), also reviews historical viewpoints related to same-sex relationships. Kinsman asserts that the term "homosexual" is a category created to oppress the sexually other and not a *sui generis* category on its own. He states that "knowledge is produced so that ruling institutions can formulate legal codes, policing policies, and social policies" (Kinsman, 1987: 28). The category of the homosexual has been constructed and maintained as problematic by institutions which have sought to maintain policies and codes regarding what is normal and what is different. Therefore, the identity category of homosexuality does not have a definition that has been created internally and yet has a set of consequences, regarding so-called "homosexual" behaviours, which are regulated externally.

Kinsman demonstrates that "social 'structures' cannot be seen as separate from human activity; they are organized by, and at the same time organize social interaction" (1987: 29). It is through the reperformance of hegemonic categorizations of the normal that the category of the normal maintains a place of privilege. This category of the normal is then used to order human activity and behaviour in accordance with guidelines of accepted behaviours.

Incorporating Michel Foucault's articulation of the influence of power dynamics regarding sexuality and sexual regulation, Kinsman claims the category of the deviant is not absent from discourse, but is only permitted to speak from a subordinate position (1987: 67). Homosexuals are not removed from public discourse but are always already placed at a disadvantage and, as a result, the fight for gay rights embeds itself within the language of tolerance and accommodation as mentioned briefly in Chapter 2. Because homosexuality is relegated to a subordinate position, homosexuals are constantly required to defend their sexual orientation. While Kinsman argues that it is homosexuality that stands in need of explanation, I would add that certain "types" of non-normative heterosexuality are also required to explain themselves (for example swingers).

Boswell concludes his book with this summary of the treatment of homosexuality by the early Christian church. He states,

Roman society, at least in its urban centers, did not for the most part distinguish gay people from others and regarded homosexual interest and practice as an ordinary part of the range of human eroticism. The early Christian church does not appear to have opposed homosexual behavior per se. The most influential Christian literature was moot on the issue; no prominent writers seem to have considered homosexual attraction "unnatural," and those who objected to physical expression of homosexual feelings generally did so on the basis of considerations unrelated to the teachings of Jesus or his early followers. Hostility to gay people and their sexuality became noticeable in the West during the period of the dissolution of the Roman state...due to factors which cannot be satisfactorily analyzed, but which probably included the disappearance of urban subcultures, increased governmental regulation of personal morality, and public pressure for asceticism in all sexual matters. Neither Christian society nor Christian theology as a whole evinced or supported any particular hostility to homosexuality, but both reflected and in the end retained positions adopted by some governments and theologians which could be used to derogate homosexual acts (Boswell, 1980: 333).

In contemporary public and legal discourse, homosexuality is posited as *fundamentally* in opposition to Christian (and other religious) teachings by groups such as the Interfaith Coalition, which are then accepted as justified religious stances in legal discourse. Here, I will take up again the argument I make in Chapter 1. There is a clear misrepresentation in public and legal discourses of what it means to be religious. Being religious is framed, by certain religious groups, as tantamount to being opposed to equality rights regarding sexual orientation and same-sex marriage legislation. As argued by Boswell above and demonstrated by Fitzgerald's work (2000), the multiple usages of the category of "religion" are ambiguous and imprecise and require examination. Upon examination, it is evident that it is impossible to sustain the view that religion is a universal, unchanging, and therefore justified challenge to homosexual relationships and acceptance.

Molly McGarry summarizes the religion-homosexuality dichotomy in this way:

The political spectrum that positions "religion" as always already at odds with queer subjects not only construes the idea of religious homosexuals (for example) as either oxymoronic or just moronic but also erases significant structures of beliefs that, at least in moments, sustain progressive politics (2008: 248).⁵³

McGarry's statement makes obvious the inherent bias in the construction of queer subjects as always already unreligious. McGarry also argues that many religious organizations have been foundational in evoking social and political change. Therefore the stance that religion and sexual difference are necessarily in opposition to one another does a disservice to both categories of identity and affiliations.

Janet Jakobsen and Ann Pellegrini (2004: 5) contend that "currently [in the U.S.], it seems that religious views are taken into public account only around sex and then only

if they are conservative views.” According to Jakobsen and Pellegrini, the regulation of sexuality has been founded in particular, conservative religious viewpoints and is not just about the problem of sex. Sexual regulation is also constructed to regulate family life and social relations more broadly (Jakobsen and Pellegrini, 2004: 7). As will be discussed further in this dissertation, Jakobsen and Pellegrini wish to have included in these discussions the possibility of religious voices who support sexual difference and sexual diversity; voices that do not oppose homosexuality from a religious point of view.

While the Evangelical Fellowship of Canada, the Interfaith Coalition on Marriage and Family and other conservative religious groups claim that there is a justifiable historical precedent for discriminatory attitudes toward homosexuality, religious beliefs are in fact shifting and fluid. As with the other categories of identity discussed in this thesis, I argue that it is evident that one can identify themselves as religious and gay or lesbian as it is also true that an individual can identify as religious and argue in support of same-sex relationships.

I will now briefly discuss some historical constructions of homosexuality as a problematic sexual orientation. I will then focus on contemporary public discourse regarding homosexuality by incorporating a discussion of recent events in Canada and the United States regarding homosexuality. I will also examine the discrepancies in public attitudes toward homosexuality before I turn to a discussion of *Egan v. Canada* and its impact on equality rights in Canada.

PAST AND PRESENT DEFINITIONS:

FROM SINNERS TO SICKNESS

From the early to mid-1900s a shift occurred in social attitudes toward homosexuality in North America. What began as a commonly held belief that homosexuals were sinners was replaced, to some degree, by the belief that homosexuals were “sick” (Crooks and Baur, 2002: 271). As late as 1951, lobotomies were performed on homosexuals as a means of “curing” their deviance. Then in 1973 the American Psychiatric Association removed homosexuality per se from its diagnostic categories of mental disorders (Crooks and Baur, 2002: 272). Today, homosexuality is not seen as a mental disorder according to mental health associations. But clearly homosexuals do not occupy the mainstream in terms of acceptance or acknowledgement.⁵⁴

These details are mentioned as a way of demonstrating some of the changes that have taken place regarding how homosexuality is categorized within the brief span of one hundred years. However my project is not simply to engage in a historical discussion of problematic constructions of homosexuality but to argue that the passing of discriminatory legislation and the framing of the problematic sexual deviant, with roots in religiously defined standards of acceptance, is very much a contemporary debate.

In the United States, some religious organizations today still have rehabilitation centres dedicated to “gay conversion.” A recent well-publicized case is that of American evangelical preacher Ted Haggard who, in 2006, admitted to soliciting prostitution for homosexual sex and using methamphetamines. Haggard spent three weeks in intensive counseling overseen by four ministers. Four months after he was caught soliciting homosexual prostitution, one of the ministers involved in his counseling announced that

Haggard had been cured of this sexual immorality and was “completely heterosexual” (Associated Press, 6 February 2007). Haggard now states that he is a heterosexual with “homosexual thoughts” (*The Trials of Ted Haggard*, 2009).

Lesley Northrup (2006) states that the early part of the twentieth century found Christian churches decidedly quiet on the subject of homosexuality. As a result of more open discussions on sexuality in general, (Northrup highlights the work of Sigmund Freud and Alfred Kinsey specifically), churches had to make a public declaration on the subject. Previous to that date, it was understood that sexually deviant activities were condemned by god and religion and not something “polite” Christians talked about (Northrup, 2006: 175).

Northrup also outlines some social and legal developments, specific to the United States, regarding sexual orientation rights. Some of these developments include the 1996 Defense of Marriage Act,⁵⁵ passed by the United States Congress and signed into law by then President Bill Clinton,⁵⁶ which prohibits federal recognition of gay marriages and demonstrated, according to Northrup, the impact that religious groups have on legislation. Northrup states that President Clinton’s “Don’t Ask, Don’t Tell” policy regarding accepting gays and lesbians into the military in the United States is simply another form of discrimination. While it is generally realized that homosexuals are allowed in the military, the “Don’t Ask, Don’t Tell” policy makes it evident that it is the verbalization of this reality that would make it unbearable to the public.⁵⁷

Henry Minton (2002) further argues that the advance of scientific studies of homosexuality (such as those of Freud and Kinsey) have provided what he terms the “emancipatory science” which has promoted and allowed for access to homosexual rights in America. Minton claims that homosexuals have been allowed a place from

which to claim rights based on social, political, critical and emancipatory social sciences. He states, "From the origins of the first homosexual rights movement...there has been an ongoing effort to use scientific knowledge as one means to emancipate homosexual men and women from the tyranny of moral ostracism, legal punishment, and medical treatment" (Minton, 2002: 3).

Minton points out, though, that Freud's work on sexuality was not a sweeping acceptance of homosexuality. Rather, Freud believed that everyone had the capacity for homosexuality as a result of innate bisexuality. Nevertheless, Freud viewed homosexuality as "a form of arrested psychosexual development" (Minton, 2002: 12). Minton examines the historical development of the study of sexuality, arguing that while there is much historical evidence of same-sex relationships, including the aboriginal "berdache" (cross-dressers) in North America, prior to the 18th century, there was not a developed sense of homosexual identity as it exists today (2002: 8). The emancipatory science developed in the last one hundred years has helped create a space for homosexual identity, and the possibility for acceptance and equality rights.

Where Are We Today?

Although advancements have undoubtedly been made, there is still a strong backlash regarding the acceptance of homosexual relationships. This section will outline some contemporary responses, both positive and negative, to same-sex marriage and sexual orientation equality rights, both in Canada and the United States. I include these responses as a way of demonstrating some of the implicit ideological constructions and standards used today to discuss sexual difference.

Witness the November 2008 U.S. Election. Arizona, Florida and California all passed propositions banning same-sex marriage. In California, the proposition to ban same-sex marriage challenged a California Supreme Court decision from May 2008, which had struck down that state's previous ban on same-sex marriage. Proposition 8, as the ban was titled, was funded largely by the Mormon Church but also had a great deal of private support.

Arkansas passed a proposition to ban same-sex marriage and also passed a proposition to ban unmarried or same-sex couples from becoming adoptive or foster parents (CNN, 5 November 2008). The Arkansas Department of Human Services had announced, prior to the 2008 election, that they were contemplating removing the existing ban placed on unmarried couples (opposite and same-sex), because the policy restricted the number of good homes available to foster children (Associated Press, 10 October 2008). The proposition to have the ban passed again in the 2008 election was supported by conservative groups such as the Arkansas Family Council. While the ban names unmarried couples, it had originally been written to restrict only gay and lesbian couples. The Arkansas Supreme Court ruled the original ban naming only same-sex couples unconstitutional. The ban was then changed to read "unmarried couples," although the Arkansas Family Council has not been shy about stating that the measure was to specifically target gay couples.⁵⁸

Clearly, a tension exists in public approaches to homosexuality. This can be demonstrated by examining public responses to the 1998 murder of Matthew Shepard, an openly gay student at the University of Wyoming. Russell Henderson and Aaron McKinney were convicted of Shepard's murder, both serving two consecutive life sentences, McKinney without the possibility of parole, after pistol-whipping Shepard

and leaving him tied to a fence post. While candlelight vigils were held during Shepard's hospital stay before he died as a result of his injuries, others picketed his funeral with signs that read "Matt Shepard rots in Hell" (ABC News, 26 November 2004).

In Canada, from Confederation to 1969 homosexuality was punishable with up to 14 years in prison under the *Criminal Code of Canada*.⁵⁹ Arguments made in the public arena against homosexual relationships are generally framed using a slippery slope analogy; if homosexuality is accepted, bestiality could be next. If same-sex marriage is legal; polygamy could be next. If we allow homosexual couples to marry and protect their equality rights, what next, are we to teach children in schools that is an acceptable type of sexual relationship?⁶⁰

Although in Canada, public policy and legislation have been revised in order to decriminalize homosexuality and also to officially divorce homosexuality from being labeled as an illness, in the promotion of the idea that Canada accepts sexual diversity and difference regarding same-sex couples, the construction of the sexually other is still problematic. Mariana Valverde (2006) claims that during the debates surrounding same-sex marriage legislation in Canada a new media representation of "the homosexual" was depicted. She terms this new depiction the "Respectable Same-Sex Couple" (RSSC). The RSSC is divorced from any potential sexual relationship and rather portrayed as two employed, loving individuals planning their eventual wedding. Gone from public scrutiny was the gay, the queer, the problematic sexual deviant of previous media portrayals. Sexual orientation thus came to represent a political-consumerist urban lifestyle, rather than a sexual identity (Valverde, 2006: 160).

Leo Bersani claims that gays have been de-gayng themselves in the process of making themselves visible (1995: 32). The strategy of becoming “like” a heterosexual couple, or a “good” soldier, or a “good” parent, all in comparison to a heterosexual standard of identity, serves to erase “our identity [so that] we do little more than reconfirm [our] inferior position within a homophobic system of differences” (Bersani, 1995: 42). Bersani argues that in this process of being seen as the “same as” a heterosexual, homosexuals have denied their own identities, and denied what he terms their “homo-ness.” Bersani promotes the very different-ness of homosexuality which, in itself, is not a unified category.

Miriam Smith’s *Lesbian and Gay Rights in Canada* (1999) traces lesbian and gay activist movements pre- and post-*Charter* from 1971-1995. She examines the way the *Charter* has influenced the political direction of lesbian and gay movements in Canada. One of the challenges faced by lesbian and gay movements is the “fractured status of the subject” (Smith, 1999:9). Within the categories lesbian or gay or homosexual there is not a streamlined type of individual nor does everyone within the movements strive for the same demands or want the same outcomes. However, Smith suggests the new rights talk model available as a result of the *Charter* has allowed for a new level of group cohesiveness amongst gay and lesbians. The rights that have been sought, although in many different forms from many different approaches, were focused on an end to discrimination and the opportunity for gays and lesbians to be treated equally.

Social activism based on sexual orientation also exposed the activists in a way that had not been publicly possible before, because sexual orientation is not a visible characteristic. During the 1970’s when equality for many different oppressed groups

was being vocalized, outrage at the treatment of gays and lesbians became an issue that found support in public activism and through the creation of equality seeking movements. This does not mean that lesbian and gay activists automatically made headway in achieving equal rights or consideration, however.

Smith states,

Rights talk assumes that changing or strengthening the law is in itself a means to the achievement of social change and those legal changes are thus the proper goal of political struggle and organizing. Rights talk thus defines social and political change as legal change (1999: 75).

Although the equality provisions outlined in the *Charter* allow for a new approach to activism through rights talk, the social and political struggle that preceded this rights talk and legal change are the influencing factors of access of rights through the courts. Smith argues that human rights should be maintained no matter which politician is seeking, or in, office.

The following is an illustration of a way policies can be created to discriminate against a group covertly. In 1982, Canada reported its first AIDS case. By 1983 there were 30 reported cases in Canada and 70% of the victims of AIDS had died. It wasn't until 1989 that the Canadian HIV/AIDS Information Centre was set up and it took even longer for a national health line to be created (CBC News, 19 November 2007).

Contrast the above health response with "The Mussel Crisis," which occurred in November 1987 in Atlantic Canada. As a result of eating bad mollusk shellfish 3 Canadians died and 100 others became sick. The mollusk health crisis was made a priority so that by Christmas of that same year a phone health line had been set up and safe practices in fishing inspection of mussels ensured; industries could be reopened and the crisis was averted (Canada School of Public Service, 19 November 2007).

A comparison of these two cases demonstrates the stigma that the HIV/AIDS crisis was seen as the “gay plague” and that homosexuals were clearly not enough of a priority to call for an immediate health response.

There has been a detrimental impact on the acquisition of rights for homosexuals as a result of the categorizing of HIV/AIDS as a gay disease. According to Bersani,

Nothing has made gay men more visible than AIDS. If we are looked at more than we have ever been looked at before...it is because AIDS has made us *fascinating*. The normal fear of homosexuality has been promoted to a compelling terror (1995: 19).

Fear of the gay community is constructed as a response to the potential threat this community has for Canadian society. Many conservative religious groups as well as non-conservative members of the public who argued that AIDS is a “gay disease,” used the disease as an additional reason to oppose same-sex relationships and felt their views regarding same-sex couples were justified as a logical response to the AIDS virus and the need for protection from “them.” However, the supposed threat homosexuality poses extends beyond AIDS of course. The threat of the homosexual other extends beyond potential for the spread of AIDS to “us” because it is also argued by religious interest groups that homosexuality poses a threat to the good of society and morality.

Lawrence Thomas (1999) states that arguments against homosexual relationships have been framed within the rubric of the “good society.” The good society is a society in which the participants are actively involved in creating and maintaining a level of group coherence. However, there is contradiction in this construction of the good society. For Thomas, this contradiction is exemplified in the U. S. where the Ku Klux Klan is a protected group legally and yet homosexuals are not. Thomas argues that neither the U.S. nor Canada guarantees protection for people only if they live morally

impeccable lives, as is evidenced by the protections of rights for groups such as the KKK. Further Thomas states that “feelings of unhappiness toward a behavior do not indicate that the behavior is morally objectionable” (1999: 26). That some people might not approve or condone homosexuality or homosexual relationships does not mean that there is something fundamentally immoral about homosexuality. If a group such as the KKK can find protection in the United States, why not homosexuals?

Also argued by Sheila Cavanagh, “Nations depend on ‘good citizens,’ which are produced through the regulation of sexuality, gender, family, kinship, race, citizenship, and desire” (2008: 15). As a result of standards dictated as to what constitutes a good citizen, individuals who do not fall into those prescribed standards (or cannot be reframed to fit within the boundaries of the standards of acceptance) are framed as deviant from the norm, and no longer considered good citizens. What is evidenced is that deviance from accepted standards of the good citizen permits an allowance of discriminatory attitudes towards the person or groups who deviate and therefore are no longer guaranteed the same rights and protections as others.

Homosexuality constructed as a social harm is also framed within the context of reproduction and societal contribution. Homosexual couples cannot reproduce in the physiological way that heterosexuals are said to be able. Therefore, the argument made by religious interest groups (among others) that the “problem” with acceptance of homosexual relationships is that the society that accepts them would not survive because reproduction would slow or eventually halt. But Thomas asks “if both homosexuals and heterosexuals fail to have children, just how does it turn out that the former display maladaptive behavior, whereas the latter merely exercise a choice?” (1999: 20). Thomas critiques what he sees as the difference between the recognition of personal beliefs (such

as religious opposition to same-sex relationships) versus the institutionalization of those beliefs in law and public policy.

Cavanagh argues that the supposed harm caused by the inability of homosexual couples to reproduce causes a fracture in what she terms “heterosexual time.” Heterosexual time is consistent with human reproduction, developmental growth and life stages. Homosexual, queer couples threaten heterosexual time. “Reproductive fantasies of colonial succession are troubled” by queer bodies and queer relationships, which do not make identifications with the reproductive futurity of the culture or society that accepts them (Cavanagh, 2008: 33-34).

I will turn now to an examination of the treatment of homosexuality and same-sex marriage in Canadian law. The following section will further analyze constructions of homosexuality as problematic, particularly when used and supported within law. While I argue that opposition to sexual difference is not a unified religious view, a larger problem is the legal support certain religious categorizations receive when they are left unquestioned or, worse, incorporated in legal decision making.

HOMOSEXUALITY IN THE LAW

This section will summarize some critical thought on the treatment of homosexuality in Canadian law. Donald Casswell (1996) argues that in Canadian law heterosexuals are treated as better people than homosexuals simply by virtue of orientation. Kathleen Lahey (1999) claims the fight for personhood for gays and

lesbians is a fight akin to the *Persons* case mentioned already, asking whether Canadian law in fact regards homosexuals as persons or not. The categorization of homosexuality in law will be examined in relation to the religious constructions outlined already. I will then use the case of *Egan v. Canada* to further examine homosexuality in a Canadian context.

Casswell's book, *Lesbians, Gay Men, and Canadian Law* (1996), examines the treatment of gays and lesbians in Canada with a focus on post-*Charter* cases. He describes what he sees as the "four main conceptualizations of homosexuality; sin (wrong/immoral), illness (potentially curable), neutral difference (identity), social construct (rejects categorization of same-sex as different from opposite-sex)" (Casswell, 1996: 10). These conceptualizations provide foundations for the varied ways homosexuality is treated, both legally and socially. While it is possible, according to Casswell, for Canadian legal decision making to view homosexuality as no different from heterosexuality, he states "the heterosexual individual and the heterosexual family are the paradigms upon which Canadian law is based" (Casswell, 1996: 13). Casswell argues that the laws that have changed to accommodate sexual diversity and equality in regard to sexual orientation have done so begrudgingly.

Kathleen Lahey (1999) examines the construction of gay and lesbian personhood in Canadian law. She draws on the *Persons* case as a parallel between the treatment of women at the turn of the twentieth century and the contemporary treatment of homosexuals by asking whether or not gays and lesbians are qualified "persons" in contemporary legal discourse. Lahey articulates that, "in law-based states/societies the exercise of rights is contingent upon admission to the category of 'legal persons'" (1999: xv). Before the entrenchment of the *Charter* (to be discussed further in Chapter 4), not

one case brought by a lesbian or gay complainant had been resolved in their favour (Lahey, 1999).

Lahey argues that during the framing of the equality rights section of the *Charter*, it was posited that sexual orientation need not be specifically named. The argument to that end was that the categories named (gender, race, and religion) were merely examples of all the categories that fell under the protection from discrimination clause. As a result it was considered unnecessary to name *all* the possibilities. It took until 1995, 13 years after the *Charter* was entrenched, for sexual orientation to be considered an analogous ground for section 15 purposes, and therefore protected from discrimination.

Argued by Lahey, “not to state the obvious, but if heterosexuality were so ‘natural’ and normative, the state would not be called upon to subsidize it so heavily” (1999: 238). That homosexuals have had to fight to acquire protection from discrimination within the context of the *Charter* demonstrates further the ways anti-homosexual views have been supported within legislation. Homosexuality is confronted with problems because it is not a visible characteristic and because there are still debates as to whether it is a biological characteristic or not. As demonstrated by the recent case of Ted Haggard, homosexuality as an inherently biological trait is not necessarily accepted and is viewed by some as changeable, such as those involved in gay rehabilitation programs. The framing of homosexuality as potentially harming society by the homosexual couple’s inability to bear children, which therefore depletes future generations, provides support for anti-homosexual views without being explicitly religious. There are many ways of co-opting religious opposition to homosexual

relationships, such as reproductive capabilities and the ideal family, which I will discuss in further detail in Chapter 5.

I turn now to the *Egan* case to demonstrate the use of categorizations of the normal and subsequent social expectations when discussing homosexual relationships in Canadian law. I am also interested in discussing the disparity between the actual result of this case and how this case was used to support equality rights regarding sexual orientation. The focus of this section is to demonstrate how homosexuality is treated in Canadian law. This will be done through an examination of how legal constructions of homosexuality display religious ideologies and how legal constructions of homosexuality are used by religious interest groups to defend their own arguments.

EGAN V. CANADA:

SEXUAL ORIENTATION AND LAW

The background to the acquisition of sexual orientation equality rights is as follows. James Egan and John Norris Nesbitt had been living together in a homosexual relationship since 1948. When Egan turned 65 he became eligible for his pension, and when Nesbitt turned 60, he applied to receive a spousal allowance which is supposed to be available to pensioner's spouses between the ages of 60 and 65 as outlined in the *Old Age Security Act*. Nesbitt was denied a spousal allowance because he and Egan did not fall into the definition of spouse outlined in the *Old Age Security Act*, which specifies a

male-female union. Egan and Nesbitt brought their case to the Federal Court of Appeal, which upheld the heterosexual definition of spouse in old age security legislation.

In 1995 Egan and Nesbitt brought their appeal to the Supreme Court of Canada challenging the constitutionality of the definition of spouse in the *Old Age Security Act*. Their lawyer argued that the definition of spouse, pertaining only to heterosexual couples, infringed Egan and Nesbitt's equality rights and that Nesbitt should be eligible to receive spousal allowances as provided under the *Old Age Security Act*. Egan and Nesbitt did not win spousal allowance. However, this case is considered a landmark in Canada because the result of this case is that sexual orientation is 'read into' section 15 of the *Charter* and thus is considered a prohibited ground of discrimination.

The Supreme Court ruled that the definition of spouse in the *Old Age Security Act* was constitutional and denied Egan and Nesbitt's claim for spousal support. However, it was outlined in the decision supported by Justices La Forest, Gonthier and Major that "Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds [of the equality rights provision]" (at page 4).

However, in the same decision they go on to state that,

Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in 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 (at page 4).

Thus, according to the decision, sexual orientation is a category of identity that deserves to be protected because of its inherent characteristics and yet homosexuals can not be seen as a valid married couple because marriage is naturally heterosexual. The justices further maintain that a fundamental difference between homosexual and heterosexual couples is that homosexual relationships include a “sexual aspect” that has nothing to do with social objectives that are supported through legislation. Simply put, the sexual aspect of a homosexual relationship does not produce children.

Justices LaForest, Gonthier and Major state,

Neither in its purpose nor in its effect does the legislation constitute an infringement of the fundamental values sought to be protected by the *Charter*. None of the couples excluded from benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. While these couples undoubtedly provide mutual support for one another, and may occasionally adopt or bring up children, this is exceptional and in no way affects the general picture. Homosexual couples differ 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 (at page 5).

A parallel can be made between Justice LaForest’s commentary on the unique nature of heterosexual marriage and the Interfaith Coalition on Marriage and Family’s outline of the nature and purpose of marriage as an exclusively heterosexual institution. In fact, in their factum regarding *M. v. H.* (1999)⁶¹ (to be discussed in Chapter 5) the EFC, IFC and other religious interest groups⁶² use Justice LaForest’s quotations to support the argument that “The most important contextual factor [regarding the institution of marriage] is the legal, social, philosophical and religious basis for

recognizing the fundamental role that heterosexual conjugal relationships fulfill in Canadian society” (IFC, 2002: 5).

While the groups named in the *M. v. H.* factum state that they do not support any form of discrimination against homosexuals, or any other identifiable group in society, this does not mean “that members of the Interfaith Coalition accept that ‘spousal rights’ ought to be granted to anyone that seeks them on the basis of ‘coupleness’” (IFC, 2002: 1). The Coalition argues that homosexual couples do not have a valid claim to the institution of marriage and that any redefinition of marriage would have a radical, negative impact on an institution which has been built on “millennia of religious and philosophical understanding” (IFC, 2002: 3).

In their 2006 marriage handbook “When Two Become One: The Unique Nature and Benefits of Marriage,” the EFC defines the unique properties of marriage outlined in religious texts as a relationship between a man and a woman, for the purposes of procreation. The EFC argues that the government’s redefinition of marriage to include same-sex couples has in fact put additional pressures on marriage, and reduced its meaning and significance because if everyone is allowed to get married it is no longer a unique institution. The EFC incorporates the same techniques as the IFC in their defense of the religious institution of marriage, by quoting statements made by Justice LaForest (among others) to argue in support of a particular moral (religious) framework to Canadian law.

Prior to *Egan*, discrimination based on sexual orientation did not have legal support. *Egan* has allowed for legal defense against discrimination based on sexual orientation. However, Egan and Nesbitt did not in fact win their case regarding spousal support for pensioners. Justice L’Heureux-Dubé’s comments in support of spousal

rights for gay and lesbian couples were used in future cases regarding same-sex equality rights and same-sex marriage.⁶³ The case demonstrates the power of dissenting opinions in challenging precedents in future cases and the paradox of the victory of a case when the decision did not support the claimants.

While *Egan* is clearly an important case regarding sexual orientation equality rights there are other implications of this case specific to *Egan* and *Nesbitt* that get lost in the equality provision. What also warrants examination is that once a verdict such as *Egan* has passed, there is still a lot of work to be done regarding legislation, policy documentation and more broadly regarding social standards of acceptance and non-discrimination. Discrimination against gays and lesbians is certainly not eradicated simply because the Supreme Court terms sexual orientation to be read into section 15 of the *Charter*.

These problems necessitate an examination of the system of law that creates and maintains the guidelines and regulations of sexuality. Chapter 3 concludes by questioning how we have come to understand the category of homosexuality, as it has been developed and maintained through social structures, such as Canadian law. The case of *Egan* is one piece of a much larger struggle for equality rights in Canada.

DEFINING DIFFERENCE:

WHAT DOES ACCEPTANCE MEAN?

Acquiring the rights outlined within legislation is not an easy task. *Egan* has provided gays and lesbians with a place from which to fight for equality rights. There is a discrepancy between the theoretical existence of rights in a legal text and the actual lived experience of equality. Lahey states that “[a] person is such, not because he [sic] is human, but because rights and duties are ascribed to him [sic]” (1999: 311). Evidenced by the definition of marriage in *Egan* is that a homosexual couple is unable to perform the expected duties of a married couple – that is, they are unable to create children. There is a false correlation between an aspect of identity (sexual orientation) and a perceived set of duties (procreation) delineated here, which I will elaborate in Chapter 5 when I discuss the creation of the ideal family.

For the purposes of this chapter what is clear is that even when homosexuality is claimed to be inherent and argued to be protected it is still constructed as a social failure in some way, as outlined by Justices LaForest, Gonthier and Major. The category of ideal heterosexual identity emphasizes non-sexual, although reproductive (to be demonstrated in Chapter 5), characteristics by claiming that the most important duty of a couple is to further Canadian society. Thus the acceptance of homosexuality is always linked to the continuing problem of sex.

As has been discussed, parallels exist between the legal definition of marriage and the religious definition of marriage. As Margaret Denike states,

The judicial and legislative responses to the same-sex marriage question in Canada and the United States have thrown into relief the conflict between human rights and other values born of religious doctrine, especially when sexuality and sexual relations are at stake, and the extent to

which the realization of human rights, and the fundamental principles of justice that underpin them, demand the expulsion of such ideology from state politics (2007: 72).

Demonstrating this point, Justice LaForest provided an intertwined legal, religious, moral definition of marriage that was subsequently adopted by the religious interveners in *M. v. H.* (to be discussed in Chapter 5) to support their opposition to granting spousal acknowledgement to a lesbian couple. The law is obliged to act as a moral guideline for behavioural standards in Canada. However, that moral guideline has long been influenced by specific instances of religious viewpoints and must slowly be divorced from those particular ideologies. It is possible to live a moral, ethical life without adhering to one type or strand of religious ideologies. Thus, the law in Canada is capable of outlining behavioural standards without identifying with or supporting one stream of religiosity.

In subsequent chapters I will examine historical and contemporary constructions of the family to critique the underpinnings of family as the “natural” result of marriage. But I turn now to the law as an institution, to examine historical development and contemporary critique of the influence of particular ideologies as constructed in legal discourse. The categories of identity examined so far, which are problematically constructed in reference to themselves, further provide the court with difficult analysis when presented as cases. The next step in the fight for rights once legal acceptance is granted is not simple; provincial and federal policies all must be modified to reflect the changes decided by the court. My argument is that when progress is made, such as in the case of *Egan*, the framing of difference is not eradicated, it is just more implicitly constructed. As will be evidenced in examination of post-*Egan* gay and lesbian rights claims, the framing of homosexuality as other is still evident, in modified form.

CHAPTER FOUR

Is Law Religious?: How Law Privileges (Certain) Religions

INTRODUCTION

Chapters 1, 2 and 3 have focused on critiquing the supposed static nature of the following categories of reference and identity; religion, sexuality and sexual orientation. In Chapter 4 I turn to the subject of the law in Canada. The categories of identity mentioned above are problematic in their construction in a social context and it is also problematic when these categories are used and framed as “natural” within a powerful discourse such as the law. In this chapter I will provide a brief outline of the development of the Canadian legal system and also will summarize some of the approaches and aims of legal theory and method, before I turn to the *Reference Re Same Sex Marriage* decision from 2005. There is a popular misconception in media and public discourse that the legal system in Canada (and likely any country) exists outside human involvement and beyond human critique. The law then can become reified as a system of governance beyond critique. However the law is a system of ideals and consequences created, maintained and modified by individuals and groups. The

changing nature of legal discourse includes the work of judges, lawyers and citizens. In this dissertation I examine equality rights and protection of those rights in law. However, of course, the law covers a much broader scope. Relevant theorists who examine legal discourse include Peter Edge, Andrei Marmor, Mariana Valverde, Mary Jane Mossman, Rebecca Johnson, Lori Beaman and Brenda Cossman, among others.

Legal discourse analysis uses diverse approaches with subsequently a diverse range of topics. The theorists mentioned in this chapter incorporate a variety of socio-legal and socio-historical approaches to the law to demonstrate assumptions and social constructions that exist within legal texts. Mossman (1987) examines the use of precedent to demonstrate the influence of judges in legal decision-making. Johnson (2007) exposes some implicit characteristics of the law, analyzing the ways the law engages members in society through the creation of an ideal community. Beaman (2008) analyzes the privileging of particular mainstream religious ideologies in her examination of the treatment of diverse religious groups in Canada. Cossman's (2002) work focuses on the assumptions surrounding sexuality and sexual citizenship in Canadian law.

The focus of this chapter is the law itself, from historical development to current content, theory and methods. While some argue that church and state have been separated in Canada,⁶⁴ it has also been argued, and will be again here, that certain types of religiosity are supported within the legal system (Beaman, 2002; Hamilton, 2005). This religious context in the law is simply better disguised in implicit linguistic devices. This chapter will provide a brief outline of the court system in Canada, followed by an outline of legal theory and method which provide entranceway into a discussion of the 2005 *Reference Re Same-Sex Marriage* decision in Canada.

The theory and application in this chapter are intended to demonstrate how certain forms of religious belief systems are provided a place of privilege and incorporated into legal decision making regarding rights claims based on sexual orientation. If religious interest groups claim that church and state have been separated in Canada, this religious privileging is a problematic that needs to be uncovered and questioned. Through an analysis of the same-sex marriage legislation in Canada I will argue that certain types of religious beliefs are protected and provided a place to be considered “acceptable” defences for discriminatory attitudes. Although I do not think that basing discrimination in religious beliefs is acceptable on a personal level, I am intent on discussing what I see as a much larger problem; the acceptance of discriminatory attitudes based in religious ideologies and supported in law and public policy.

First I will provide a brief outline of the court system in Canada and the development of the Canadian legal system from its British roots to its current model. Most of the cases I discuss in this dissertation are at the Supreme Court level, however the main case I examine, *Hall v. Powers* (Chapter 6), is an Ontario Provincial Superior Court case. It is relevant therefore to include a brief synopsis of the levels of the court system in Canada and the responsibilities of the courts as a means of providing foundation for a critique of the system.

THE COURT SYSTEM IN CANADA:

A LITTLE HISTORY

The Supreme Court of Canada (SCC), and all courts in Canada, acts as an interpreter of the law. The courts are designated to arbitrate disputes and guide law enforcement. They do not create or enforce the law themselves, although their interpretations can provide grounds in future cases for changes, modifications or amendments to legislation. A legislative body exists that creates and amends the law and opinions from cases can be used to argue for amendments to law. At all levels the courts are responsible for deciding the meaning of key concepts. There are three main court systems in Canada. They are as follows (diagram on following page):

1. Purely provincial courts: this includes provincial and municipal courts of each province. It is up to the provinces alone to establish and maintain these courts, as well as appoint and pay their judges.
2. Provincial superior courts: this includes provincial superior trial courts and provincial courts of appeal. These courts are established and maintained by their respective provincial governments. Their judges are appointed and paid by the federal government.
3. Purely federal courts: this includes the SCC and the federal courts (which are a special set of courts that deal exclusively with matters specified in federal statute). This includes the Federal Court of Appeal, the Federal Court Trial Division, the Tax Court of Canada and military courts. The federal government alone establishes and maintains the SCC and the federal courts and appoints and pays their judges (McCormick, 1994).

The Supreme Court of Canada was created in 1875 after the passage of the *Supreme Court Act*. Initially the SCC was not the highest court in Canada, that place was reserved for the Judicial Committee of the Privy Council, which advised the British

monarch and served as the final court of appeal for the British Empire. As of 1949 appeals to the Judicial Committee of the Privy Council were abolished and the SCC became what it exists as today, the last court of appeal in the nation (McCormick, 1994).

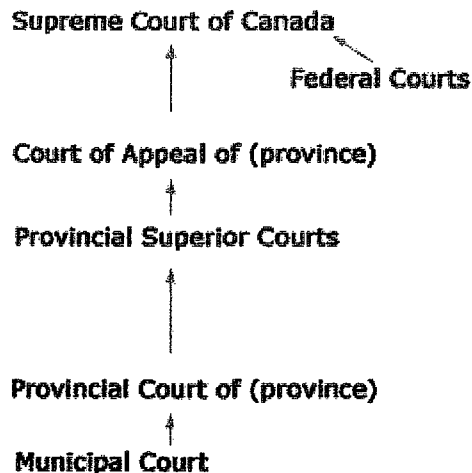
As the highest court in Canada the SCC plays a central role in the evolution of Canadian judicial interpretation and analysis. Decisions put forth by the SCC often include broader views as to how particular laws should be interpreted and applied by the Canadian court system as a whole. The lower courts, the purely provincial and provincial superior courts, in Canada are obliged to follow the Supreme Court's lead or otherwise risk having their decisions overturned on appeal (McCormick, 1994).

The following is a diagram of the court system in Canada, outlining the various levels of the courts, with the final decision making space granted to the SCC.

Federal Courts

Provincial Superior Trial Court

Provincial Courts



(Diagram taken from McCormick, 1994: 24)

This brief outline serves as an overview of the court system and the obligations of the court. The following section turns specifically to legal theory and method as a

way of opening up critiques of legal decision making and assumptions embedded in the law. Legal discourse analysis and critique applies to all levels of the court system, in Canada and elsewhere.

DOMINANT IDEOLOGIES: LEGAL THEORY AND METHOD

Legal theory and method provide an entranceway into analysis and interrogation of what is both a system of governance as well as a set of ideas and consequences that demonstrates its ability to change and adapt as the social climate changes and challenges standards and norms. Peter Edge argues that it is increasingly misleading to refer to legal discourse in the singular as “legal scholarship is a diverse and increasingly difficult to define field of academic work” (2006: 11). This section will outline some of the legal theories and methods to be incorporated into this dissertation, recognizing that there are a multiplicity of scholarships related to legal theory that are not being included here.

The theorists outlined in this section demonstrate particular strategic tools that are useful when examining problematic legal disputes and categories related to religion and sexuality. While not all of the theorists in this chapter examine specifically one or the other, or both, of those categories they employ discursive analysis that is important in unpacking the linguistic constructions in law pertaining to my dissertation topic. “Law can be used to keep order; resolve disputes; respond to social problems; regulate broader social relationships; control State power; or empower individuals” (Edge, 2006: 5).

These important characteristics of the law have significant impacts on rights of individuals and groups which will be discussed here regarding religion and sexual difference.

Anthony Amsterdam and Jerome Butler (2000) outline three focal points to bear in mind when analyzing legislation, the law and court judgments. They state that the law is not only a system of ideas, but a set of consequences that humans impose as a response to that set of ideas. As such, law does not exist in a vacuum devoid of human action and interference. Amsterdam and Bruner also argue that all except the most trivial legal statements⁶⁵ are interpretive in nature and are not reliant on somehow logically unique solutions to the problems presented within, even though there might be standard or commonplace solutions. And finally, Amsterdam and Bruner describe law as being adversarial. They argue that to pick a position in relation to a legal subject is to pick a side on a battlefield by using existing precedents or attempting to forge new ones (Amsterdam and Bruner, 2000: 6-7).

Amsterdam and Bruner argue that the legal system has a conventional but implicit narrative structure that ultimately spills over into explicit judicial rule-formulation (2000: 13). The law creates a set of scripts by which individuals and groups are intended to abide. Legal narratives are therefore about the problems encountered by people who do not follow the prescribed scripts, who deviate from the standards outlined in the law. Amsterdam and Bruner critique these prescribed scripts as a category of systems that masquerade as real or normal, even though they are constructed categories based on sets of opinions and assumptions that have made their way into the legal system over time. As a result, standards of right and wrong, while created and modified throughout the history of the legal system, are described as the

natural or normal behavioural standards to which individuals and groups should adhere. The language of the court assumes its own biases as normative, which becomes a repetitive script defining the ways citizens “ought” to be.

Mary Jane Mossman (1987) claims that by their very ontology feminist ideas pose a challenge to the status quo. In this way she sees feminist endeavors in analyzing the law as a direct challenge to the tendency toward upholding precedents and are thus aimed at evoking change. She states that in the legal system “decision making takes place according to a form that usually ‘sees’ present questions according to patterns established in the past, and in a context in which ongoing consistency in ideas may be valued more often than their future vitality” (1987: 322). In this way law supports a particular status quo by repetitively claiming that decisions made in the past are successful because they have a proven track record. This line of argumentation claims that evoking change is problematic because it is untested.

However judges’ decisions to maintain the status quo do not always reflect objective legal method. These ideas often reflect the cultural and professional standards by which they live (Mossman, 1987: 325). This further emphasizes the critique of the neutral and objective applications of the law, by exemplifying the personal influence of the judges’ opinions in deciding whether they wish to challenge or uphold the status quo.

If a precedent is required to uphold a claim, it is only existent to claims that will receive legal recognition; the doctrine of precedent then becomes a powerful tool for maintaining the status quo and for rationalizing the denial of new claims (Mossman, 1987: 329).

Judges can use precedents to support the denial of claims as a way of maintaining their own worldviews supported by the authority of the law as justification. Whether there are grounds to change the status quo or not, the ability to rely on past

examples allows for biases to become authoritative decisions. According to Mossman this demonstrates the use of choice in judicial decision making.

Mossman summarizes it as such:

What does, of course, seem clear is the existence of judicial choice in the application of precedents. In the process of choosing earlier cases and deciding that they are binding precedents, judges make choice about which aspects of earlier cases are “relevant” and “similar,” choices that are not neutral but normative (1987: 330).

Mariana Valverde notes the change in the rhetoric of the law from discipline and sovereignty to harm and protection from harm. Critiquing the gendered nature of the law in creating regulations specific to obscenity and women’s breasts, Valverde asks, “Is it harm to ‘society’ and its smooth, organic functioning that is the main concern?” (1999: 189). Or is it the imposition of a set of cultural norms, embraced by the judiciary, reframed as societal harm and further imposed for the protection of society? Valverde claims that the courts frame the existence of a “national” community standard in order to engage the community they are seeking support from.

Rebecca Johnson’s work (2007) provides insights into traits embedded in law. She draws a comparison between magic and law in their power to evoke change in the world. At the same time she differentiates that law’s power is in its capability of preventing the change from occurring. Johnson states that the “[l]aw...works its magic notwithstanding the resistance of its objectors” (2007: 1). While magic performed to an audience incorporates them into the show, the law is separate and acts over the participants with or without their consent or agreement. Law can change the world through the changing of legislation, which then changes the regulations placed on behaviour and societal standards. However, legislation can be framed and subsequently

interpreted by the courts in order to keep change from occurring, by the ability of the justices to support (selected) status quo and restrict the standards and boundaries in society. According to Johnson, law has an intimidating and powerful resonance that is rarely questioned and demands to be obeyed. And yet it is a system of rules created, maintained, administered and adjusted by humans, based on cases, decisions and dissent.

Johnson describes the function of law as a system that invites us into a community, into a way of being, a way of understanding others in certain ways and demonstrates that we should feel a particular way about others and about community. The law therefore creates the standards by which we are supposed to *want* to live by, framed as that which any sane person would *want* to be a part of (Johnson, 2007: 2). To question this system renders the resister outside the community, outside the society from which they stem. It therefore can exclude an individual, or a group, from the support of their community if they are seen as troublemakers, causing discontent and challenging a system that is reified as neutral and objective. Framing ideologies in this context perpetrates the tendency to essentialize categories of us versus them, whoever they might be as posing danger to our community.

Marie-Claire Belleau and Rebecca Johnson (2008) examine the role of dissenting opinions as powerful tools in shaping future case outcomes and legislation. Dissenting opinions may inspire other lawmakers to act in line with the changes suggested because “[l]egislators can make real that which is imagined in the space of dissent” (Belleau and Johnson, 2008: 176-177). Belleau and Johnson analyze the function of dissenting opinions in their influence on the case at hand and, at a broader scope, in influencing lawmakers and legislators external to the case they are written for. They state,

Judges, work in that space on the edge of meaning, are called upon not merely to settle claims of particular litigants, but also to participate in the stabilization and/or re-imagination of the world in which we live (Belleau and Johnson, 2008: 172).

In challenging the status quo, or setting new precedents, judges are involved in the creation of new societal standards. They are active players in shaping the way individuals behave and respond to behaviour. It is the “role of judges, like the role of literary critics, to decide what certain texts mean” (Marmor, 2005: 36). The interpretative work of judges consists of the “attribution of *meaning* to an object” (Marmor, 2005: 22).

Marmor examines historical critiques of the nature and purpose of law, specifically those postulated by H.L.A. Hart and Ronald Dworkin.⁶⁶ Marmor argues that a legal system is a system of norms to which members both of the profession and the community the law governs must be able to agree, in some measure, to the validity of the statement of norms the law is proposing. Legal disputes often result in a disagreement over the validity of the legal proposition (Marmor, 2005).

In the following section the assumptions and use of judicial decision making will be demonstrated through specific case examples, regarding both religious, and sexual, diversity.

ASSUMPTIONS EMBEDDED IN LAW:

SPECIFIC EXAMPLES

Lori Beaman (2006; 2008) examines claims of diversity in Canada and the United States, stating: "It is my contention that religious choice exists only within a narrow range of products" (2006: 311). What social scientists seem determined to claim as religious diversity is simply a diversity of the same, as a diversity of types of Christianities. Beaman further argues that these types of Christianities maintain their position of privilege, as demonstrated in the preamble to the *Charter* which recognizes the supremacy of god,⁶⁷ as well as through examination of court cases to which religious difference (minority religions) must face definitional challenges not posed of most mainstream Christian groups. Beaman challenges the notion that church and state are separate in Canada, using the above examples to demonstrate the implicit and pervasive mainstream Christian content to the law and legal decision making.

Further to the problematic privileging of particular mainstream Christian groups, Marci Hamilton (2005) argues that a diversity of Christian faiths can be evidenced in the United States, some of which she says are "downright scary." Hamilton uses the Ku Klux Klan and other white supremacists as examples of often violent groups who trace their racist beliefs back to the Bible (2005: 177). Hamilton argues that there is an "unrealistic belief that religion is always for the good, however, [which] is a hazardous myth" (2005: 3).

Hamilton argues that the recent claim of the secularization of western society has permitted organized religion to "don the garb of the underdog, when in fact its political power has been quite potent, even if usually behind the scenes" (2005: 6). The political power of certain religious organizations is evidenced in its incorporation into

authoritative institutions such as law. Hamilton states, “their [religious groups] horizons are defined by their religious belief, and they transport those horizons into the public square as though they should delineate good and bad public policy by themselves” (2005: 65-66).

Peter Edge summarizes the problem of examining religious claims in law as such:

In a context where it is seen as legitimate for the State to determine religious truths, no special problem is posed to State authority...in recognizing that multiple religion systems can exist within the jurisdiction, and that it is inappropriate for the legal order to choose between their competing views of reality, that legal order is faced with a particular problem. What are the courts to do when faced with a religious claim whose truth must be determined as part of the resolution of the dispute before them? (2006: 9).

Edge argues that legal decision making allows for judges to choose to either accept characteristics in previous cases that are similar to the case at hand or to focus on differences. This can be evidenced when cases come before the court involving religious claims. If the current case relates to Islam, the judges can look to a similar previous case regarding Christianity and are then able to make the decision as to whether they will focus on similarities (monotheistic) or differences (use of Old and New Testament). “If we say that X is like Y, we implicitly define the commonality” (Edge, 2006: 31). This is expected in a legal tradition that is being presented with cases regarding religious traditions that have never come before the courts before, but it still exemplifies the way legal decision making and the use of precedent demonstrate the human involvement in the law and not a separated, neutral system of application (Sullivan, 2005).

Brenda Cossman (2002; 2007) examines cases involving gay and lesbian rights in Canada, post-*Charter*. She claims that gay and lesbian rights have been advanced in Canada within the caveat that gays and lesbians, as legal subjects, can be incorporated into the dominant sexual hegemony of heterosexuality. She states,

The first twenty years of the *Charter* is a legacy of transgression and normalization; these new legal subjects [gays and lesbians] are both challenging dominant modes of legal subjectivity and its insistence on heterosexuality, while being absorbed into them (2002: 223).

Sexual difference therefore is less about being different and more about reframing and normalizing what previously was considered transgressive. Her work will be discussed in further detail in Chapter 5, but for the purposes of this chapter Cossman's work complements Beaman's quite nicely. Beaman examines and critiques the idea that religious diversity is in fact anything more than different "brands" of Christianity, Cossman claims that,

While the heteronormativity of law and the legal subject has been increasingly challenged, lesbians and gay men have been partially absorbed into dominant modalities of legal subjectivity. The complex processes of inclusion and exclusion have led to the emergence of new legal subjects who are both normalized and transgressive (2002: 225).

Nancy Levit and Robert Verchick make the following argument:

Feminist theory is, at its core, an exploration of the actual. Whatever the appeal of broad principles or abstract rules, such tools cannot lead to justice unless they are understood and applied in ways that acknowledge the real-life experiences of those affected (2006: 45).

The theorists in this section demonstrate what Levit and Verchick see as the feminist challenge in legal theory, which is also incorporated in critical legal theory in an attempt to balance the philosophical principles and challenges of the law with the

lived reality of the consequences the law can have. While the theorists do not examine the same cases or embedded traits within the law, different approaches to analyzing properties of legal discourse demonstrates the variety of disciplinary approaches to analyzing a public institution such as the law.

The following section will incorporate both an examination of assumptions about religion and a specific means of accepting sexual difference as religiously problematic. I turn now to the specific case to be discussed in this chapter, the same-sex marriage reference from 2005, as a means of demonstrating the place of privilege religion is given within Canadian law. The language in this reference allows the possibility for a common stereotype that religion and homosexuality are only capable of a conflicting relationship with one another, without room for religious organizations that might want to support or marry same-sex couples. The decision also provides space for the assumptions that religion and religious groups need protection from the sexually other.

REFERENCE RE SAME-SEX MARRIAGE:

PROVIDING A RELIGIOUS DEFENSE

The legal text to be discussed in this chapter is the *Reference re Same-Sex Marriage*⁶⁸ decision from the Supreme Court of Canada, 2005. This reference was the cumulative result of many legal decisions, mostly at the provincial level, in which same-sex marriage challenges were brought forth and the constitutionality of the existing definition of marriage was questioned in light of equality rights for gays and lesbians.

This reference represents the culmination of gay and lesbian court challenges since the inception of the *Charter* in 1982, with specific landmarks (i.e. *Egan*) providing groundwork along the way.

A legal reference is a question or set of questions posed by the Government of Canada to the Supreme Court of Canada, in order to get the court's opinion on a piece of legislation before it becomes law. First the government must file the questions it wants answered with the Supreme Court and then wait for the attorney general to file a motion asking how the Supreme Court will proceed with the questions.⁶⁹

Four questions were posed to the Supreme Court as part of this reference. They were:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent? (at page 2-3).

In brief, the Supreme Court answered the questions:

Question 1 is answered in the affirmative with respect to s. 1 of the proposed legislation and in the negative with

respect to s. 2. Questions 2 and 3 are both answered in the affirmative. The Court declined to answer Question 4 (at page 3).

The Supreme Court judges argued in their decision that the definition of marriage, as it had been conceptualized based on the *Hyde v. Hyde and Woodmansee*⁷⁰ decision (to be discussed momentarily), was no longer appropriate in governing contemporary society. Chief Justice MacLachlin highlighted the living tree analogy⁷¹ of the Constitution as a means of using progressive interpretation to apply or amend legislation to correlate to the “realities of modern life” (at para 22).

It was further argued that the definition of marriage as relating only to one man, one woman, based on the *Hyde* decision was not applicable to contemporary family models. *Hyde v. Hyde* was a divorce petition brought by an Englishman named Hyde after he left the Mormon faith in which his wife was still a member. Because he was excommunicated from the faith, his wife was declared single and available to marry again, which she did. The court in the *Hyde* case debated the validity of a polygamous marriage, which was upheld in the state of Utah where Hyde and his wife were married, but is not upheld elsewhere. The judge in this case declared,

What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. 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 (at para 21).

The definition of marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others” then became cemented as the legal definition of

marriage in Canada, the United States, the United Kingdom and elsewhere. It is this definition facing challenge, both in provincial claims previous to the marriage reference and specifically within the marriage reference in Canada. The wording has since changed in Canada to read “the voluntary union of two persons to the exclusion of all others,” as a way to end the heterosexist bias of the previous definition.

What caused a great deal of concern, and the language to which I turn now, is the provision that was included in order to protect the “freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs” (at para 1). I have included the long list of interveners for this reference as Appendix A to this dissertation. Many of the religious groups on this list were concerned that changing the definition of marriage would both permanently alter the nature of marriage and that they would be forced to marry gays and lesbians against their will. However in contrast to the religious groups concerned about the imposition same-sex marriage might cause in their churches, religious organizations such as the Canadian Coalition of Liberal Rabbis for same-sex marriage and the United Church of Canada are included in this list of religious interveners. These are religious groups arguing in favour of same-sex marriage rights, demonstrating that this is not simply a religious versus non-religious debate; it is much more personalized than that.

Built into the legislation that proposes freedom from discrimination is a place of protection for religious groups, in order to shield them from being forced to marry gay and lesbian couples. First, nowhere was it ever argued in media or in Canadian legislation that churches would be forced, or even could be forced, to change their status regarding marriage. Divorce is legal in Canada and yet every church has the right not to perform a marriage for a divorcee if they so choose. Same too with same-sex marriage,

there was never a proposition to change religious organizations to allow for gay and lesbian marriages; there was a fight to change the legal definition of marriage. This also assumes that gay and lesbian couples would have an interest in invading religious institutions, institutions in which their unions are not welcomed, and would demand to be married there. To date, there has yet to be a case in which a gay or lesbian couple demanded to be married by a religious institution that does not support their union.⁷²

The threat religious groups argue they are faced with when confronted by sexual difference however demonstrates the tendency in Canadian law to provide a space of privilege and protection for religion as a category to which homosexuality may pose a threat. It is important to look at a governmental system that has been created and codified in an implicitly Christian context. This examination can be used to demonstrate part of the taken-for-granted nature of “religion” when discussing Canadian law and legislation. Whose religion are we talking about anyway? And are those “other” religions being treated in the same way Christianity is being treated by the courts? Tying in to this debate is the implicit privileging framework of the legal system in Christian ethics. Certain categories of religion, religious speech and religious beliefs are privileged in a system built out of those particular ethics, which also creates difficulty for minority (religious) groups to receive the same equal treatment, under law that claims impartiality. Although religious minorities are not the focus of this thesis, this problematic can be demonstrated across minority groups and is not just restricted to sexual minorities.

Further, Margaret Denike states, “As if freedom of conscience does not include the freedom of churches and church officials to sanction same-sex marriages if they wish” (2007: 73). The possibility that religious individuals would support same-sex

couples is not given room within the same-sex marriage legislation, because it is assumed that “the religious” will be opposed to same-sex marriage and therefore are in need of provisions and protections to ensure *they* are not discriminated against, which assumes that religious groups are going to want or need protection from marrying same-sex couples. Denike argues that “to the extent that we’re talking about rights, at stake are the claims of individuals against the state that risks violating them, not the claims of a church against the individuals they abhor” (2007: 74). Why then is religion in need of protection in this debate, when the group that is being discriminated against is same-sex couples?

According to Hamilton, religious organizations who have become increasingly vocal in the case of same-sex marriage legislation have in essence demanded that “marriage be constructed to reflect their worldview...they feel entitled to have the law of marriage determined by their own lights” (2005:65). As the Interfaith Coalition and the Evangelical Fellowship of Canada argue in their statements, law and religion have an inseparable relationship and the law therefore should reflect religious morality. What is implicit in the claims by these groups is that the law should not reflect just any religious morality (certainly not Mormon or Wiccan) but specifically *their* construction of religious morality. The Coalition and EFC thus equate their views on marriage with the proper, moral standards of marriage to which Canadian society should adhere, and which Canadian law should uphold.

As stated by Lesley Northrup: “The push for gay rights is not merely a pressing social issue but, for many homosexual Christians and their supporters, a crucial religious issue as well” (2006: 203). As I argue in Chapter 2, religion and homosexuality are not antithetical categories of identity, because there are many examples of people being both

religious and gay. And yet it is assumed, and supported by religious interest groups and implicitly in the provision of protection for religious groups in law, that religion and homosexuality are mutually exclusive and even antagonistic.

The following section provides an example of the levels to which the protection of religion can reach in the framing of new legislation to defend against homosexuality and same-sex marriage.

Defence of Religions Act

In October 2006, the Conservative Canadian government, led by Stephen Harper, announced plans for proposed legislation that would be titled the Defence of Religions Act (DORA). The government stated it was waiting to put forth this legislation pending a vote in the House of Commons regarding re-opening the debate on same-sex marriage to reinstate the traditional definition of marriage as pertaining to union between one man and one woman. The main purpose of DORA would be to decriminalize hate speech, provided that the hate speech in question was based in religious conviction (although there is already a provision for this in the *Criminal Code of Canada*, to be discussed momentarily). This would allow individuals to voice their beliefs (presumably discriminatory) on any one of the following topics: race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, sexual orientation. This discrimination would be allowed without apprehension of equal rights discrimination charges or legal ramifications.

At the time, Justice Minister Victor Toews, who first discussed this proposed legislation to the media on October 4, 2006, further explained the need for it by stating

that it would allow people of religious conviction the freedom to refuse to marry couples of a same-sex orientation. People who did not wish to rent halls to same-sex couples would also be protected by this legislation (CanWest News, 5 October 2006). Therefore, while the Constitution of Canada permits same-sex marriage, DORA would protect those who are opposed from having to compromise their own religious convictions.

As outlined in section 319 of the *Criminal Code of Canada*, everyone who communicates statements in public that leads to a breach of the peace, or in private that willfully promotes hatred, is guilty of an indictable offence.⁷³ However, there is already provision for the defence of hate speech within the *Criminal Code* for those who are basing their statements in religious conviction. And in a 2005 case in British Columbia, *Smith and Chymyshyn v. Knights of Columbus and others*⁷⁴ the Knights of Columbus decision to refuse a rental hall to a same-sex couple for their wedding reception was upheld by the courts, based in their right not to violate core religious convictions by using space owned by the Catholic Church to hold a same-sex wedding reception.

There are a number of problems associated with this type of legislation. It implies a relationship between being religious and wanting to participate in hate speech, and only refraining from it due to fear of legal ramifications. The implicit content of DORA is offensive to many religious organizations and individuals, who do not want their belief systems to be corrupted by the assumption that they are also involved or wanting to be involved in hate speech and propaganda. Which leads to another bone of contention: what is allowed by this legislation precisely? The *Criminal Code* defines hate speech only as “communicating statements, publicly or privately.” By lack of clear

definition alone, this then allows people to make any public statement in a discriminatory manner and protect themselves by citing religious conviction.

DORA has since been put to rest by Stephen Harper's government. Canada's MPs were asked to vote on whether same-sex marriage legislation should be open for debate. They voted 175-143 against re-opening the same-sex marriage issue at which time Harper declared the issue closed (CTV News, 12 November 2008). After his 2008 re-election as Prime Minister of Canada, Harper has stated that he will put his more controversial policy questions on the back burner and focus his attention on Canada's economic and environmental concerns (CTV News, 20 December 2008).

As recently as October 2008, a lesbian couple in British Columbia filed a complaint with the *British Columbia Human Rights Tribunal*, claiming they were turned down as renters of a basement suite because they were gay. The two women claim they were asked about the nature of their relationship after it had been indicated to them that they were successful in renting the apartment. When they told the owner of the building that they were gay, the owner asked them if they would feel comfortable living in a home with Christian beliefs and suggested they might prefer to live somewhere else (CTV, 31 October 2008).⁷⁵ Presumably a lesbian couple would feel more "comfortable" in a non-Christian home.

These Canadian examples demonstrate the ways religion and religious groups frame themselves as under threat by acceptance of the sexually other, though the terminology can be much more innocuous than that. As in the example of the apartment rental, it was suggested that a lesbian couple wouldn't feel "comfortable" living in a Christian home. Regarding DORA, religious groups are framed as in need of protection from a variety of other types of people in Canada. Whether explicitly or implicitly, it is

evident that legislation is constructed to privilege certain religious groups in light of an apparent threat they face when confronted with difference. Even when measures of progress have been made, provisions are put into place to secure a spot for religion and religious ideologies. Legislation and legal decisions subsequently provide the space for religious groups and individuals opposed to homosexuality the freedom to discriminate against same-sex couples, which is 'justified' by their religious ethics system.

CONCLUSION

Canada's legal and social history has deep roots in Protestant and Roman Catholic traditions, based on migration and settlement patterns from the early days of Canada's history. This historical religious history maintains its influence in public policy, law and public discourse as a result of the widespread acceptance and incorporation of religious ideologies in many public institutions. The tendency in legal discourse to privilege religious ideologies, implicitly through the acceptance of religious critiques and perspectives, is demonstrated in the *Reference Re Same-Sex Marriage* decision and elsewhere in Canadian law and public policy. While the legislation ostensibly advances homosexual rights through the legalization of same-sex marriage, it also provides a space free from discrimination for religious opposition. This apparent need to protect religious ideology from the sexually other in legislation allows for the framing of religion and homosexuality as antagonistic, not compatible, to one another. Canada's history has a strong religious influence and maintains Christian foundations,

even as policy, public and legal discourse attempt to work through issues of diversity. As Canada continues to become an increasingly multicultural nation⁷⁶ and one in which the separation of church and state is argued to be in effect in law and governance in media and public discourses,⁷⁷ there is an increasing need to recognize the implicit religious context of legal and public discourse as a means of opening up categories of sameness and difference, in particular reference to sexuality.

Does Canada need to protect religious groups from same-sex marriage? What is the “need” for the religious defense of marriage, argued by religious interest groups? This chapter has outlined and applied legal theory and methods by way of examining and critiquing the embedded assumptions in Canadian legal discourse. By analyzing an authoritative system such as law in Canada, the use of legal theory and methods serves to open up the system to demonstrate its dialogical nature with the culture it seeks to govern. The law is not static and unchanging, but informed by the people that it seeks to govern. Johnson demonstrates that the law creates a system by which we are supposed to want to live, with an implicit sense of control and power, corroborating Foucault’s use of the panopticon⁷⁸ and the illusion of being monitored at any given time.

As demonstrated through the use of legal theory, method and critique, the law creates categories of systems framed as “normal” and “abnormal,” which are then used as foundation for their regulation by law. These categories of right and wrong, accepted and unaccepted are then claimed as “real” or “natural” categories or narrative scripts to which individuals within any society should want to adhere. As Canada, and of course other nations, grows and changes and adapts itself to the ever diverse population, it is necessary to find better ways and means of framing narrative scripts within the legal system and understanding the contours of the legal system in reference to law, religion

and sexuality. The following chapter will look at the changing dynamic of family, both as a social structure and in response to legal parameters of what constitutes the normal family.

CHAPTER FIVE

Creating the Ideal Family: The “Natural” Purpose of Marriage

INTRODUCTION

This chapter will focus on boundaries and limitations embedded in the construction of the ideal family⁷⁹ in a Canadian context. Family, and more specifically the creation of children, is an ideological social institution that has been argued to be in peril with the advent of same-sex marriage legislation and rights based on sexual orientation.⁸⁰ This chapter will examine historical constructions of the family, the religious ideologies embedded in these constructions and how these ideologies are argued by specific religious groups to be in need of protection and therefore necessarily should be granted a place in law. I argue that family has always been a shifting dynamic, with changing parameters over time and geography, similar to religion, sexuality and sexual orientation, without one unified categorization of what family is universally. The notion of the “ideal family” exists as an ideological construct and is used by religious interest groups to define a purpose for sex and sexuality and to defend anti-homosexual attitudes in same-sex marriage and equality rights cases.

I will also examine constructions of sexual normativity based in religious ideologies as providing a defense of the heterosexual institution of marriage, commonly defined as a religious institution. The creation of children as the purpose of marriage is used as a tool for defining the normal family and thus normal sexuality. This use of the ideal family model in cases regarding same-sex couples serves to co-opt the sexually different within a recognizable category of family and thus render homosexual sexual relationships “safe” for society.

Mona Gleason (1999) argues that the construction of the normal family was produced through discursive constructs that reinforced gender roles and created an idealized standard of family life. This normalized and idealized family was largely unattainable because it entrenched and reproduced a dominant “Anglo/Celtic (as opposed to ‘ethnic’) middle-class, heterosexual and patriarchal” value system (Gleason, 1999: 4).

The desexualization, or separation from procreation, of the sexually other is seen as a necessary tool in order for homosexuals (and other non-normative groups) to be accepted as something other than sexual deviants (Cossman, 2002; 2008). Doreen Fumia states “sexual others are not identified by who they are but by what they do” (2007: 179). As a result, the sexually other must be reframed within the category of the same and what they do (namely engage in sexual relationships that are deemed deviant or non-normative) must be downplayed and displaced in order to grant them equal access to citizenship. The categorization of being “like” heterosexuality demonstrates what Luce Irigaray argues is the tendency to replicate the other into an “economy of the same” and what S.N. Balagangadhara terms the continual recreation of “another of the

same.” By co-opting difference the hegemonic “same” is continually repeated and replicated.

The sexually other includes anyone who does not fall into the heterosexual standard as defined and reinforced through popular constructions of sexual normativity. The purpose of this heterosexual standard is the repetition of a specific type of family which subsequently furthers a particular type of Canadian society. Groups such as the Evangelical Fellowship of Canada and the Interfaith Coalition on Marriage and Family argue in support of a religiously institutionalized version of marriage with procreation as the fundamental purpose of the marital contract. There is a socially sanctioned notion that the creation of family is the “natural” result of the ideological contract of marriage. This ideological contract has been designed and supported as a means of dissuading sexual diversity and difference as well as defending anti-homosexual views without being labeled homophobic. As such, a false correlation has been created between an aspect of identity, sexuality, and the perceived expectations of societal relationships, namely family.

I will use the case of *M. v. H.* (1999),⁸¹ the first homosexual divorce case at the Supreme Court level in Canada, to demonstrate the ways homosexual difference is reconstituted within the picture of the normal family by desexualizing the difference. It is through the categorization of being the same as heterosexuals that homosexuals gain access to rights and privileges within the law. I will also discuss the Evangelical Fellowship of Canada’s response to the changing dynamics of family and their prescription for what they see as a positive change in a Christian familial context. I draw on parallel discourses, specifically Margaret Sommerville’s response to Bill C-38 (The Civil Marriage Act) in 2005 and the Interfaith Coalition’s factum regarding *M. v.*

H. to analyze and discuss responses to the legal recognition of the changing dynamic of family in Canada.

First, I will outline and discuss the changing dynamic of the family unit, as an institution that is constantly evolving. I will then turn to constructions of the family in law before I expose the ways family is used to reframe sexual difference in *M. v. H.* in order to classify the difference within the normalized category of the same. I then highlight some of the responses to these changing dynamics and conclude with a discussion of the changing nature of family.

SEX AND MARRIAGE, RELIGION AND HISTORY:

WHAT IS THE PLACE OF FAMILY?

Theorists' whose work examines the changing nature of the family unit includes Lyle Larson, Walter Goltz and Brenda Munro. They provide a comprehensive history of the family unit evolving from religious prescriptions and church directives in Europe and England and subsequently as developed in Canada in response to settlement, industrialization and the feminist movement. Changing dynamics of marriage and family is further examined in a contemporary context and in light of policy implications by Maureen Baker, Kevin McQuillan, Paula Chegwidden and Doreen Fumia.

Larson, Goltz and Munro (2000) examine the evolution of the family in Europe, England and subsequently Canada as a response to religious (Christian) ethics and industrialization. They argue that views on sexuality, marriage and family life began to

shift in the 3rd century CE as a result of the Catholic Church's reinterpretation of Paul's epistles regarding sexual passion. The Catholic Church began to construct sexual passion as contrary to spirituality, which resulted in the privileging of celibacy and the stricture that sexual intercourse was to be performed only for procreation. It was during this shift that marriage as a permanent sacrament was officially declared by the church (Larson, Goltz and Munro, 2000: 75).

As a result of the advent of Protestantism in the 16th century the family was further reshaped. Protestant ministers did not hold the same spiritual powers as Catholic priests and, subsequently, the power of church directives on congregations was reduced. In 17th century France the church insisted on consent of the couple to be married prior to the marriage ceremony and further changes occurred in the 18th century as a response to industrialization which created a greater demand for a labour force resulting in a change in familial roles and relationships. In addition, between the years 1725–1850 Europe saw a sexual revolution, with a dramatic increase in premarital sexual relationships (Larson, Goltz and Munro, 2000: 78).

In Canada, the family underwent further transition from its construction and inherent link with religious tradition to becoming part of a larger working economy to which members of the family were to participate. The Canadian family was modified both because of varied settlement patterns and because of the need for children to work to contribute to the family economy. With men moving toward external work environments and women staying at home, increasingly children learned from their same-sex parents, boys learning from fathers in the work force and girls learning from mothers at home. The changing familial roles resulted in the development of particular standards in gender roles and relationships.

The late 19th and early 20th centuries in Canada saw the development of diverse feminist movements, although with contrasting agendas, which were very influential on family trends. Women responded to the prescribed role of the “good wife” by demanding to no longer be treated as property, to gain control over property ownership and to participate in the working economy which led to dramatic changes in family models (Larson, Goltz and Munro, 2000: 79-83). Betty Friedan’s *The Feminine Mystique* (1963) had a profound impact on the women’s movement, in her analysis of women in their restricted roles as housewives and mothers, an oppression she termed “the problem without a name.”

Further to the specific modifications to the family model, there are other elements of the dynamics of family that also influenced standards of normalcy. One is that the family unit consists of a paradoxical relationship with both public and private components. Kevin McQuillan summarizes it as such:

A family, while occupying a separate private sphere, is also fully integrated into society’s economic and political systems, and thus, what are often seen as ‘private decisions’ are shaped by economic and social influences. This is particularly so in the case of childbearing, the decisions about which are made by couples, but which reflect prevailing social and economic pressures (2006: 4).

In Canada today there are still further changing patterns from traditional notions of marriage and family to an increasing trend in cohabitation and common-law partnerships. As a result of economic and social pressures, individuals often choose to have fewer children. Access to birth control has made long-term sexual relationships possible without the inevitability of children. Higher divorce rates and single parent

families have also changed the face of the traditional standard of family (Larson, Goltz and Munro, 2000).

While this is only a brief summary of some history related to family dynamics, these developments demonstrate that the nature and role of the family has been in constant transition, even though the category of family bears sets of ideals and consequences and standards of normalcy and deviancy. There is no one universal family unit model because families are made up of groups of individuals with constantly changing relationships. However an ideal family unit, which was first introduced in the 1960s, has had a pervasive resonance in North American culture as embodying particular traits to which family units ought to ascribe.

The category of the ideal, normal or natural family bears a similar relationship to the problematic categorizations of religion, sexuality and homosexuality. The notion of the normal family rests on idyllic standards largely created during the 1950s and 1960s in North America. The nuclear family as an ideal family unit was a standard developed in the 1960s, during an economic and social boom post-1950s, but this ideal has had a lasting impact on social norms related to family units. McQuillan states,

Looking back, we can see that the early years of the 1960s marked the beginning of the end for a model of family life that was relatively short-lived but had a profound influence on our social institutions and on popular perceptions of the contours of family living (2006: 293).

The family unit has always been in transition, continually influenced by changing social standards, dynamics, the economy and the increasing diversity of the members of any given population. But the idea of the nuclear family of the 1960s, with an externally employed father, housewife mother and stereotypically gender-“normal” children, has permeated social norms as what family units should strive to be like. The ideal nuclear

family, while short-lived and not a widespread embodied type of family unit, was marketed so well that it became a brand of idyllic living. Although few, if any, families actually resemble that family unit, it has been sold as an attainable and ideal goal. This nuclear family unit, like religion, is based on constructed ideas but that has not diminished the value placed on buying into the brand of family that has been promoted in North America.

However, this family unit was the basis of much feminist critique from the 1970s onward. The role of women was restricted to being mothers and housewives and women were framed as being only capable of those roles, a condition which formed the basis of protest and demands for equal treatment and equal rights. Women fought to earn a place in the work force arguing that they were just as or more capable as men in regard to contributing economically to the family and society.

Under the banner of the feminist movement of the 1970s was the demand for other rights and equal treatment based on sexuality, that of the gay and lesbian equality movement. Cheal states that, “after decades of political mobilizing and many legal battles, same-sex families in Canada have gone from being illegal, to being invisible, to being recognized and counted as marriages and families in the 2006 Canadian census” (2007: 2).

The legalization of same-sex marriages and the protection of sexual orientation from discrimination have not been and still are not without controversy and opposition.⁸² Opposition to the legal recognition of same-sex marriages has often been posited in the form of the destruction of the institution of marriage and further the institution of the family. Although it can be evidenced that the family unit and standards of marriage have been constantly shifting and changing, “many North Americans find these changes

disturbing and mistakenly assume that family life in some distant past was the way 'real' family life is supposed to be..[but] family life is always changing and adapting and will continue to do so" (Chegwidden, 2007: 37).

Shannon Winnubst (2006) argues that all structures of power inevitably find themselves under perceived attack. In this context, structures of heteronormativity (via a particular standard of marriage and family) must stand in defense of perceived attack and must reinforce themselves as the standards by which normalcy is defined. By doing so, through legal and religious discourse, the more "normalized and omnipresent [heterosexuality] becomes" (Winnubst, 2006:15).

Laurence Thomas argues "valorizing family is not the same as creating a monolithic society – as valorizing the priesthood does not mean recommending it to all men" (Thomas, 1999: 5). That there has historically been a traditional construction of marriage does not necessitate continuation of that same model. The definition of family is constantly evolving and the nuclear family of the mid-20th century has long been replaced with a less rigid, less singular approach to what family means for different people.

Further controversy over the legalization of same-sex marriages have been framed in response to the need to modify all levels of family policies, provincially and federally; simply put, it requires an immense amount of paperwork. However, arguments regarding the modification of family policies as problematic because of the amount of work required to make the modifications has roots in another problem, according to Maureen Baker. Baker describes the controversy about family policy as based in two different traditions.

An attempt to create a more explicit and cohesive family policy arises from two separate traditions. One tradition is based on the realization that families are changing, with more two-income and lone-parent families, that parents make an important contribution to society in having children and that they increasingly need social support to combine more effectively family life with earning a living. The other tradition assumes that “the family” is deteriorating and attempts must be made to legislate supports to help the traditional nuclear family maintain its position against the intrusion of alternative lifestyles (1994: 4).

As mentioned, Winnubst argues that fear-based responses to the change in the family unit are the result of the perceived threat these changes pose. Benedict Anderson (2006 [1983]) examines what he calls the paradox of nationalism. He claims that the nation is an imagined political community: the paradox lies in the fact that this community is imagined as both inherently sovereign and limited (Anderson, 2006: 5-6). In Canada, Anderson’s critique can be demonstrated by the use of an imagined community of moral participants who, on one hand, distance themselves from difference and yet also seek to distinguish themselves from a totalitarian nation by promoting the notion of diversity and claiming to support diversity. However, as I argue in this dissertation and as has been argued elsewhere regarding minority groups, the acceptance of diversity is continually problematically contained within the language of tolerance and accommodation (Beaman, 2008). Toleration and accommodation are not the same as acceptance and equality.

Fumia argues that being recognized as the “same as” heterosexuals is a strategic tool used by homosexuals as a survival tactic and that “the purpose served is to be recognized as part of a national imaginary” (2007: 184). Fumia argues that resistance to same-sex couples is in response to ideological constructions of the national imaginary as

a (heterosexual) community of families to which individuals wish to participate and engage. This identity is disrupted by sexual difference. The disruption of this national identity requires that the difference must be reframed as the same as that which the national identity has been constructed to represent. She states,

A nation that has a heterosexual identity is deeply troubled when such images are disrupted by non-heterosexual images that emerge to represent 'the family,' 'the soldier,' and 'the politician.' It is in this way that we can understand how private issues of sexual identity are indeed public issues of national identity (Fumia, 2007: 183).

Fumia argues that the emphasis in court challenges brought by homosexual couples has been reliant on the right to be included, rather than the right to be different, and the right to be recognized as an acceptable construction of family with correspondent family values. However, the strategy of being recognized as the same as the heterosexual family is more attainable for the normalized lesbian or gay than for transgendered, intersexed, two-spirited⁸³ or other sexually diverse groups whose sexual difference is not easily reframed (Fumia, 2007: 182).

These changes to the family unit have not gone unnoticed or unquestioned by religious interest groups, such as the Evangelical Fellowship of Canada. As already mentioned in Chapter 3, the EFC has published a handbook on marriage titled "When Two Become One: The Unique Nature and Benefits of Marriage" (2006). This handbook outlines the purpose, definition, religious roots and contemporary legal definitions of marriage according to the EFC. The EFC summarizes same-sex relationships as follows:

Same-sex sexual relationships, which have the same legal status as heterosexual common-law relationships, are not the same as the union of a man and a woman. Biologically,

these unions do not have the potential to produce children. In this way, they are more similar to close relationships between friends, siblings, or parents and adult children which are non-sexual and are not capable of procreating children. Socially, these are also different relationships. The companionship of a same-sex relationship is different from the complementarity of a heterosexual union. God made us male and female, and capable of entering into a complementary physical union with a member of the opposite sex (2006: 10).

While the courts might have legalized same-sex marriage the EFC does not recognize these unions as anything more than sexual relationships with similarities to non-sexual adult relationships. They are not “marriages.” And the EFC argues that the changing dynamics in the Canadian family, including the legal access to divorce, will have long-lasting detrimental impacts on Canadian society.

The EFC further argues in their marriage handbook that as a result of the redefinition of spouse in Canada a floodgate has been opened which can include recognition of other problematic relationships, such as polygamous unions⁸⁴ or “the abandonment of the marriage institution all together [sic]” (2006: 23). The EFC argues that the government must reinstate the traditional definition of family, “for the good of Canada” and that “where government refuses to do this, churches and individual Christians must be ever more intentional about living out, in their own lives, God’s desire for marriage and family” (EFC, 2006: 23).

While it is not surprising that a conservative religious organization would support a traditional definition of marriage as relating to heterosexual couples, the apocalyptic tone to their statement displays another common tendency in arguments against accepting sexual difference. Predicting the downfall of the marriage institution as a response to same-sex marriage legislation demonstrates a common tendency to use a

slippery slope argument and to predict the results of these changes in law will be the radical and irreversible destruction of society. Relationships between same-sex couples are not only “not marriages,” they are also evidence of a permanent detriment to Canadian society.

The Interfaith Coalition on Marriage and Family in their factum regarding *Halpern et al.* holds a similar view but puts more emphasis on the role and relationship between religion and law by stating:

There is a necessary relationship between law and morality. This is not to say that law and morality are co-extensive, but rather that there can and must be a basis of moral conceptions informed by religious and philosophical traditions underlying the law (IFC, 2003: 13).

What the Coalition argues for here is a specific strand of religious and moral influence and involvement in the law. There is no room in their arguments, or the facts they submit in other sexual orientation and same-sex marriage disputes, for the religious voices of those in support of same-sex marriage and equality on the basis of sexual orientation. The Coalition links morality in law to a particular standard of morality to which they subscribe and to which they believe all Canadians should subscribe.

In this section I have outlined some of the historical changes in the family unit that show how the family unit is constantly evolving. I have also examined some contemporary religious influences, specifically the EFC and IFC, about the current ideological construction of family. I have also discussed how notions of identity, law and morality are challenged by difference and changing family dynamics. I turn now to how the family is constructed in Canadian law with a specific view to same-sex relationships.

THE PLACE OF THE FAMILY IN CANADIAN LAW

Brenda Cossman, Marie-Claire Belleau and Rebecca Johnson make plain the common categorizations of normal family in Canadian law with a view to the construction of the homosexual family as being the “same as” the heterosexual family. Their work unveils some of the implicit religious context to the framing of what is acceptable sexually and how the model of acceptable sexuality is repeated within a dominant public discourse that at the same time is being shaped by changing standards in law and society.

The construction of the family has undergone shifts within Canadian law. The dynamics of what a family is, who belongs to a family and how wide the family unit stretches has been the subject of debate in relation to a number of legal claims, beyond solely the recognition of homosexual relationships.⁸⁵ As the dynamics of family units have evolved, lawmakers and legal institutions have been required to examine and adjust standards of the family unit to correspond to social change and have also been influential in directing the social dynamics of the family.

Larson, Goltz and Munro describe the following influences on Canadian law:

Three legal systems have made significant contributions to Western marriage law, and thus to Canadian law. Roman matrimonial law contributed the requirement of monogamous marriages with spousal consent, and the expectation that marriages would be concluded at once, rather than in different phases. Canon law added the prohibitions of marriage between close relatives,

introduced ecclesiastical marriage, and since, 1184, has defined marriage as a sacrament that could not be dissolved by the spouses. Secular law introduced the concept of marriage as a civil contract between two parties. This concept was adopted by Protestant law, which later allowed divorce and civil marriage (2007: 71).

Religious interests and influence have had a strong presence in the development of Canadian law and Canadian social expectations. While this influence has undergone changes, the implicit religious content of the law has remained in effect both as a result of religious values of the judges and because mainstream Christian values have had fairly wide support in determining values and ethics in Canada.⁸⁶ Legal theory and methods can be used to display the historical influences on legal decision making and also to critique contemporary influences and assumptions.

Marie-Claire Belleau and Rebecca Johnson examine and deconstruct the language of the majority and dissenting opinions in *Mossop v. Canada* (1993).⁸⁷ *Mossop* was the first decision of the Supreme Court of Canada to consider equality rights for gays. Brian Mossop sought bereavement leave from his job to attend the funeral of his same-sex partner. He was denied the leave by his employer because same-sex couples did not have “family status” under the *Canadian Human Rights Act*. While Mossop did not win his case, the power of dissenting opinions was demonstrated because Justice L’Heureux-Dubé argued for an evolving model of family. Justice L’Heureux-Dubé’s opinion in *Mossop* was influential in future decisions, including the case of *Egan* mentioned previously.

According to Belleau and Johnson, in *Mossop*, “Chief Justice Madame L’Heureux-Dubé sets Mossop inside the narrative of family, setting up the facts in a manner which emphasizes the ordinary dimensions of what are commonly seen as family issues”

(2008:182). Mossop and his same-sex partner are defined as a family unit by Justice L'Heureux-Dubé who further argued that as a family unit Mossop and his partner ought to be eligible for the same rights and benefits that are available to heterosexual family units. While Justice L'Heureux-Dubé was not in the majority, her arguments in *Mossop* and *Egan* became very influential in the fight for sexual orientation equality rights and the legalization of same-sex marriage.

It can be evidenced that in order to allow homosexuality to gain ground legally and socially there is a need to frame homosexuality as the same as or wearing the disguise of heterosexuality. Therefore when rights claims of homosexual parties are discussed in law, it becomes important to desexualize the relationship and discuss the ways in which the couple are a family and not just lovers. Belleau and Johnson compare Chief Justice L'Heureux-Dubé's comments to those of Justice Lamer's:

Justice Lamer presses us away from legitimated narratives of 'family' and towards an individualized (with an edge of taboo) 'sexuality' – something perhaps to be tolerated, but not something to be confused with 'family' (2008:183).

According to Cossman, the “new legal [homosexual] subject is a familialized subject” (2002: 246). The gay and lesbian legal subject must live in a monogamous, “respectable” relationship with a focus on mutual care and commitment.⁸⁸ This legal subject is a projection of the ideal heterosexual legal subject, constituted in and through ideologically dominant discourses of familialism even though they are at the same time reshaping these discourses (Cossman, 2002: 246). The constitution of the gay and lesbian legal subject replicates the heterosexual nuclear family as the natural site for social reproduction.

The normalized gay and lesbian legal subject can also be demonstrated in the *Egan* case, because Egan and Nesbitt are clearly categorized by Justice L'Heureux-Dubé as representative of a particular type of family; a family that can be recognized as "acceptable" and is thus divorced from the difference of their sexuality.⁸⁹ Egan and Nesbitt are desexualized and framed within a recognizable context of family in order to be granted equality rights even though they lose their right to spousal benefits. According to Chief Justice McLachlin:

"spouse", in relation to any person, includes a person who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife or as in an analogous relationship (at para 231).

The place and role of the institution of family has seen shifting dynamics in law and still can be demonstrated to be a category of contention according to the ideals of various court judges. Within any particular case, the role and responsibilities of the family are not necessarily agreed upon by the judges, regardless of the outcomes of the case on a micro or macro level. This is evidenced in *Egan*, in which family is actually a subject of disagreement between the judges.⁹⁰ Egan and Nesbitt lost their case but grounds for equality rights protection emerged. Furthermore, dissenting arguments were used in future cases to secure further rights for gays and lesbians.

Nan Hunter (1991) argues that the regulation of family life in legal decision making is a response to what she terms the "sexual dissent" of non-normative sexuality. She states,

The theme of cultural anxiety about forms of sexuality not bounded and controlled by the family runs through a series of recent judicial decisions. In each case, the threat to norms did not come from an assault on the prerogatives of family by libertarian outsiders, a prospect often cited by

the right wing to trigger social anxieties. Instead, each court faced the dilemma of how to repress, at least in the law, the anomaly of unsanctioned sexuality within the family (1991: 103).

While it is the responsibility of the courts, provincial and federal, to define the legal obligations of the family, and then further the policies that are subsequently relevant to family law regulations, there is clearly a cultural fear about non-normative sexuality that permeates family law regulations and decisions.

I turn now to the case of *M. v. H.* to demonstrate the ways the court desexualizes M and H's relationship in order to establish the couple as representing a particular construction of family.

M. v. H.:

NON-SEXUAL CONJUGAL RELATIONSHIPS

In the case of *M. v. H.* (1999), M and H were two women who had lived together in a same-sex relationship since 1982. They had accumulated a number of joint assets during their relationship. Upon their separation, M sought spousal support and challenged the constitutionality of the definition of "spouse" in the *Family Law Act*, a challenge which was supported by the motions judge but which H and the Attorney General for Ontario appealed. The Court of Appeal upheld the decision, without awarding costs to M, but rather permitted a year's grace for the Ontario legislature to amend the FLA. As part of M's stance in challenging the definition of "spouse" as

being exclusive, she stopped fighting for financial support. Subsequently while the *M. v. H.* case is also considered a landmark for gay and lesbian rights, the reality of the case is that M never received spousal support from H.

Martha McCarthy and Joanna Radbord, M's lawyers, state,

we can tell you that in *M. v. H.*, and in our practice since then, we have seen nothing but persistent contrast between the theoretical and the practical, between lofty case law and the lived realities of lesbians, on a daily basis (2005: 226).

Much of the rhetoric in *M. v. H.* which was used to determine what constitutes a cohabitating couple circled around the issue of conjugality. While a conjugal relationship was defined by the court to be an important determining characteristic of a common-law or cohabitating couple, the court determined that a conjugal relationship is not necessarily marked by a sexual relationship. According to Brenda Cossman and Bruce Ryder, "sex, once the hallmark of a conjugal relationship, has become legally less important, to the point that the Supreme Court has suggested that a relationship may be conjugal even if the individuals do not have a sexual relationship" (2001: 273).

One of the key aspects of the judgment was the emphasis that M and H had not been sexually intimate for a long time, thus their sexual status (as lesbians) is removed, allowing for them to be viewed as a married couple with benefits pertaining to married couples, rather than as sexually deviant. The court argued that any couple, after many years together, could be considered to be in a conjugal relationship, even without children or sexual relations by stating "courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible" (at para 60). As a result, it was argued that M and H should be considered to be in a conjugal relationship, irrespective of an actual sexual relationship.

Furthermore, Justice Gonthier in his dissenting opinion articulates what he sees as the advantage that M and H have societally by arguing:

Although the claimant is a member of a group that suffers pre-existing, historical disadvantage, the claimant's group is relatively advantaged in relation to the subject-matter of the legislation. Individuals in same-sex relationships do not carry the same burden of fulfilling the social role that those in opposite-sex relationships do. They do not exhibit the same degree of systemic dependence. They do not experience a structural wage differential between the individuals in the relationship. In this sense, individuals in same-sex relationships are an advantaged group as compared to individuals in opposite-sex relationships, and there is thus no need to consider whether the legislation aggravates or exacerbates any preexisting disadvantage (at page 18).

Justice Gonthier claims that same-sex relationships can be seen as privileged in society because they are not "burdened" with the responsibility of producing children and therefore are not expected to contribute to society in the same way heterosexual couples are. But as a result of this "privileged" status, homosexual couples should not be eligible for social supports granted to heterosexual couples.

Furthermore, Justice Gonthier states,

a reasonable person in the circumstances of the claimant who has regard to all of these contextual factors would find that the restrictive definition of 'spouse' in s. 29 of the *FLA* does not constitute a violation of his or her human dignity. To the contrary, acknowledging individual personal traits is a means of fostering human dignity. By recognizing individuality, and rejecting forced uniformity, the law celebrates differences, fostering the autonomy and integrity of the individual (at page 19).

Justice Gonthier informs us as to what does or does not constitute a reasonable person, a reasonable applicant, and that while individuality is recognized it seems that only a particular (heterosexual) type of individuality is legally supported.

Part of the psycho-social definition of culture is that the roles within it are developed to ensure the survival of that culture (Matsumoto and Juang, 2004). David Matsumoto and Linda Juang state: “culture is as much an individual, psychological construct as it is a social construct” (2004: 14). However, when a heterosexual couple decides not to have children, they are seen as exhibiting a choice, a choice granted to heterosexuals. When homosexuals want to marry, and perhaps have children themselves, they are demonstrating immoral conduct (maladaptive behaviour) that threatens the future of the culture in which they live. In the language of Justice Gonthier, they are not required to contribute anyway and so should enjoy that “privilege.”

Cossman analyzes the acquisition of sexual citizenship in Canada which she contends is done by transforming the non-normative subject (homosexual) into a desexualized and depoliticized subject in order to acquire sexual citizenship rights. Through an analysis of two cases in Canada (*M. v. H.* and *Little Sisters Book Store*⁹¹) Cossman argues that the parameters of sexual citizenship, and acceptance as a sexual citizen, are permitted only when the sexually other are desexualized. For Cossman (2002: 483), the “modality of sexual citizenship produced by rights struggles has been one in which sexual subjects are privatized, de-eroticized and depoliticized.”

Little Sisters was a case brought to the Supreme Court of Canada in which books ordered by Little Sisters Bookstore were being circumvented at the border by Canada Customs and were banned from the country based on their sexual content. As a result, the *Little Sisters* case was unsuccessful because it pertained to lesbian pornography and could not be separated from the otherness of lesbian sexuality. It therefore could not be framed outside of or removed from sexual otherness. *M. v. H.* was successful in the

courts because M and H could be classified as non-sexual and therefore seen as a “family.”

Through the process of desexualizing and de-eroticizing the other, these non-normative citizens can then be integrated into the dominant group; sexual outlaws are reconstituted through assimilation into dominant sexual citizenship (Cossman, 2002). Because the two sides of difference do not have equal weighting or privilege, the other must don the façade of the same, “normalizing other aspects of self so that sexual identity becomes the minor difference... [n]ormalizing operates to both desexualize politics and depoliticize sex” (Cossman, 2002: 486-487).

It is through the repetition and reperformance of heteronormative hegemony that the status quo is upheld and precedents gain foundation. Groundbreaking judgments about rights disrupt the status quo, but only to the extent that the other can fit in as part of the same, normalizing that which would otherwise threaten the standards of heterosexual citizenship. As stated by Peggy Phelan, “unable to bear [sexual] difference, the psychic subject transforms this difference into the Same” (1993: 5).

In the following section I will outline the discursive constructs and standard arguments used by interveners in cases which stand in opposition to sexual orientation equality rights and same-sex marriage legislation. Their arguments draw on statements made by judges such as LaForest and Gonthier and incorporate a variety of research about family studies. The arguments posed by the opposing interveners demonstrate the use of rhetoric and restrictive standards arguing for heterosexual marriage and family.

PARALLEL ARGUMENTS:

SOMMERVILLE, THE EFC AND THE IFC

I wish to draw a parallel between the problematic constructions of the normal family outlined in legal discourse and the constructions of the normal family as outlined by interveners who support the religious, heteronormative institution of the family. This parallel is important because the interveners use judges' comments about previous cases to bolster their arguments and because these voices, no matter the outcome of the case, are voices that are often represented in public discourse and media and have become representative of the opposition to same-sex equality.

The Interfaith Coalition make similar arguments to those outlined above by Justice Gonthier in their factum regarding *M. v. H.*⁹² The Interfaith Coalition and the Evangelical Fellowship of Canada have both taken the words of Supreme Court justices to support their arguments against the legalization of same-sex relationships. Once again it can be evidenced that the IFC intertwines the legal reasoning provided historically in previous cases with their own specific religious ideologies.

Regarding the nature of the relationship of spouses the IFC states:

The Interfaith Coalition submits that there are significant biological and social realities which underlie the limitation of the definition of "spouse" to heterosexual unions, which are the only relationships biologically capable of procreating children, and these principles must be considered in this public policy debate.... [and further argue in support of the] continuing role of the heterosexual

spouses which are uniquely, biologically capable of procreating children. This concept is rooted in the notion of the complementarity between male and female persons and the unique biological fact of procreation, as a fundamental good in our society, in the tradition of western philosophy and throughout the world's major religions.... As well, heterosexual spouses fulfill the essential societal function of procreation and child rearing (at paras 2, 5, 11).

These remarks bear a striking resemblance to remarks made by Justice LaForest and Justice Gonthier in cases pertaining to same-sex relationships and the “nature” of the heterosexual union quoted previously in this dissertation.

The Evangelical Fellowship’s handbook on marriage correlates same-sex parented families with single-parented families. This is a common comparison, however inaccurate, and single-parented family studies are often used as ammunition regarding the supposed likelihood of harm of same-sex parented families. Specifically the EFC states:

In the book *The Case for Marriage*, the authors argue that married parents create stronger bonds with their children than divorced or single parents due to more frequent parental contact afforded by the traditional nuclear family. When asked to rate their relationship with their parents, adult children raised by married parents describe their current relationships with both their mothers and fathers more positively than do children raised in unwed or divorced families (2006: 15).

The EFC uses this line of argumentation to draw a parallel between same-sex parented families and divorced or unmarried families, equating the dissolution of a relationship with the assumed instability of a same-sex relationship. As already mentioned, they argue that same-sex relationships do not bear the traits of a marriage and therefore should not be considered as such. The impact of single-gender households, according to the EFC, has had long-lasting detrimental effects on the ways male and

female children interact with the opposite sex and their ability to nurture their own children (2006:15-17).

In 2005, the Legislative Committee on Bill C-38 (The Civil Marriage Act) met to hear arguments in opposition to the proposed changes to the Act which would subsequently allow same-sex marriages in Canada. Margaret Sommerville was one of the concerned individuals who spoke before the House of Commons to express her response to the proposed legislation and to respond to questions posed to her by the House Committee.

Sommerville stated that her opposition to the legalization of same-sex marriage was based solely on her concern for the rearing of children, children who she feels have a right to a mother and a father, preferably their own biological parents, and stated “That’s not only my primary concern, it’s my only concern in this matter” (2005: 1-2).

When Sommerville was asked about her concerns regarding parenting skills of homosexual couples, by Bill Siksay of the New Democratic Party, she had this to say:

We've got some extraordinary new genetic research showing that we're born with genes to be able to exhibit certain behaviour. This research was done on nurturing behaviour in rats, as it happened, but there's no reason to think we're not occasionally the same as a rat. What we now know about this is that you've got to have a certain kind of contact for that gene to be imprinted, meaning to be activated. If it's not imprinted within a very short set time period, it shuts down for life. My guess is that we will find there are genes in humans, some of which will be activated by maternal behaviour and some of which will be activated by paternal behaviour towards the baby. There's a complementarity in the parenting between the two sexes. There are studies and literature on that. That's one of the things that concerns me (2005: 3-4).

Aside from the comparison of humans to a study of rat behaviour, which is still a subject of controversy,⁹³ Sommerville’s comments raise other problematic associations

and ignore certain trends in child rearing historically. Thomas discusses the welfare of the innocent child in debates regarding sexual orientation equality and same-sex marriage as follows:

Much fanfare is made over the welfare of the innocent child, this being advanced as the basis for the in-principle objection to same-gender parents. But there is no way that an orphanage could be better for an innocent child than two loving and caring parents, whatever their gender might be. What is more, religious orphanages are typically run by members of the same sex, yet no one objects that in principle such orphanages are unacceptable because they warp the self-concept of children. Of course, the responses that come quickly to mind here is that a religious orphanage is teaching children morally upright values, whereas this cannot be the case with homosexual couples. What one who advances this argument implies is that, by virtue of having two parents of the same gender, a child is more likely than not to become homosexual...well, what certainly follows is that such a child is more likely to be accepting of homosexuals (1999: 52).

When questioned, Sommerville could not provide evidence that children raised by same-sex parents were in any way more likely to become homosexuals or that children raised by same-sex parents were in any way neglected or given fewer values by which to orient themselves. What Sommerville could attest to was that some children who had been orphans felt disconnected because of a lack of contact with their biological parents; however most of this information was derived from a website titled “Tangled Webs” and personal anecdotes, not from in-depth qualitative studies.

Other opponents to same-sex marriage legislation critiqued the potential cost to the government and subsequently tax payers that would be required to amend all the necessary legislation.

It was immediately evident that married same-sex couples would require access to divorce and family law financial settlements...[and] new paradigms of child custody and

shared parenting will also be required since traditional preference for custody to the mother is still overwhelmingly followed in social practice but is not particularly relevant in the same-sex context (McKie, 2007: 95-96).

These cases illustrate the use of child protection advocacy as a means of dissuading same-sex parentage and same-sex marriage. A point which Siksay poses to Sommerville is that the case of child rearing is not in fact the issue at hand regarding the extension of marital rights to homosexual couples.

Maureen Baker argues that “in a culturally diverse society such as Canada, it is inaccurate to talk about ‘the family’ as though a single type of family exists or ever did exist” (2009: 210). It is the court’s responsibility to determine the legal obligations of the institution of the family and subsequently arbitrate disputes regarding family law policy. However, changes in family structures historically have made it evident that there is not one type of family to which all Canadians must adhere in order to be recognized as belonging to a family unit. Baker’s arguments are helpful here because she claims that “few people anticipate the ways that work requirements, money problems, social policy changes, new ideas and the actions of other people shape their family experiences” (2009: 226).

CONCLUDING REMARKS

All of these discussions and arguments regarding the ideal family unit provide public and legal disputes with ever-expanding challenges to the boundaries, ideals and expectations of the family unit in Canada. Courts do not create discrimination but as active players regarding standards in society they have the power to accept or reject rights claims and equality cases. The permissible scope of discrimination can be supported through use of legal precedent to reject rights claims based on sexual orientation and sexually normative standards that further influence acceptable and unacceptable standards about family life in Canada. The history of the institution of marriage as a solely religious institution as argued by religious interveners, the purpose of which is to create family, is a value-laden categorization used both by religious interest groups and justices to protect and perpetuate the standard of the “normal” or “ideal” heterosexual family in Canada. Legally the possibility of homosexual civil marriages has been possible since 2003⁹⁴ however religious interest groups (and law sometimes) argue these are unions, not marriages.

It is evident that the institution of the family has been in flux and continues to be redefined and shaped through both interpersonal dynamics and changing policies in Canada. However, family is often constructed by certain religious groups as a static and unchanging category, much like sexuality, sexual orientation and religious ideology. As the role and nature of family changes, governance and regulation of family necessarily must shift and change to adhere to contemporary dynamics. Claims that establishing a family and having children argued as the natural result of marriage are tools used to reinforce heterosexual standards of marriage and heterosexual standards of family. There is no evidence to demonstrate that children are in any way harmed by being raised

in a same-sex parented family. As Thomas points out, evidence so far only concludes that they will be more accepting of homosexuals. Homosexuals of course mostly come from heterosexual relationships.

The next chapter will focus on the *Hall v. Powers* case, which further demonstrates the implicit assumptions and categorizations developed thus far in this dissertation.

CHAPTER SIX

*Marc Hall: Religious and Gay! What next?:
Family, religious ideology, “acceptable” homosexuality, and religious
opposition to sexual difference*

INTRODUCTION

The final chapter of this dissertation applies the theory developed so far to the case of *Hall v. Powers* (2002).⁹⁵ I will integrate the themes regarding identity constructions outlined in previous chapters in my discussion of Justice MacKinnon’s ruling in *Hall* to illustrate the way these constructs co-opt homosexual references within a heterosexual vernacular. The co-opting of homosexuality as “like” heterosexuality then permits the possibility of acceptance of the normalized gay individual in Canadian legal and public discourse. Embedded in the legal victory for Marc Hall is the construction of acceptable homosexuality that is equated with a monogamous relationship and compared to familial relationships.

I will examine the way Justice MacKinnon’s ruling creates an “acceptable” homosexual relationship, done both by comparing Hall and his boyfriend, Jean-Paul Dumond, to a familial relationship and by demonstrating a diversity of opinion in the

Catholic community regarding homosexuality. The construction of acceptable homosexuality implied by Justice MacKinnon reaffirms Mariana Valverde's depiction of the Respectable Same-Sex Couple portrayed in media and law (2006, as outlined in Chapter 3). The comparison Justice MacKinnon draws between Marc Hall and his boyfriend to brothers and sisters who attend school events as dates demonstrates Brenda Cossman's argument that the courts need to reframe and desexualize sexual difference in order for homosexuality to be seen as acceptable. This is done frequently by making links with familial relationships (Cossman, 2002, discussed in Chapter 5).

However, Hall's case differs dramatically from the cases I have previously discussed because Hall makes clear that he is both gay and Catholic. The diversity of opinions regarding homosexuality within Catholic communities informs Justice MacKinnon's ruling in favour of Hall. Therefore what can be evidenced in other similar cases in Canada regarding the supposed clash between homosexual difference and religion is not supported by Justice MacKinnon in his ruling because it is evident that religiosity does not necessarily mean an anti-homosexual worldview.

I will discuss and analyze what is implied by Justice MacKinnon's comparison of Hall and Dumond to family members who attend the prom, a tool which is used to outline acceptable displays of homosexual relationships. It is apparent through an examination of Canadian legal decision making that judges have a tendency to reframe sexual difference as the same as sexual normativity in order to grant access to homosexual petitioners. Critical analysis of the cases in this dissertation, and beyond, also demonstrates that there is an assumed conflict between religious beliefs and the acceptance of homosexuality in Canadian legal discourse. The reframing of sexual

difference and the assumption of a clash between religion and homosexuality can be exhibited in Justice MacKinnon's ruling in the Marc Hall case.

The Catholic Church's 1986 "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons" ("Letter") will also be outlined and discussed. The "Letter" provides both a guideline for the Catholic Church's care of homosexuals and evidence of the Church's contradictory approach to homosexuality and morality, with particular reference to the church's teaching to "love the sinner, hate the sin." The current pope, Benedict XVI, recently made controversial statements regarding homosexuality in a year-end speech.⁹⁶ He also wrote the "Letter." While the "Letter" is from 1986, the Catholic Church's official views on homosexuality seen as a moral evil are reaffirmed in the more current statements from the Vatican regarding sexual difference.

The Catholic Church's views regarding homosexuality are pertinent in part because of the challenge the Catholic School Board posed in response to Hall's request to bring his boyfriend to the prom as his date. The School Board argued that Hall's request contradicted Catholic teaching. However, Hall emphasized that he is Catholic and gay, the two categories of his identity were not in question by him nor were they in conflict for Hall. Identifying as a gay Catholic was the reason Hall felt so strongly about attending his high school prom and bringing his boyfriend. Justice MacKinnon felt that the "Letter" demonstrated a conflicting approach toward homosexuality by the Church and that the diversity of opinion within Catholic communities demonstrated that there is not a singular Catholic view on homosexuality.

The result of the case is that Hall was granted an interlocutory injunction,⁹⁷ which allowed him to attend the prom at this high school. However, Hall dropped his

subsequent case, which would have focused on the “clash” between religious freedom and equality rights. I will draw a link between Hall dropping his case and a recent news article outlining Edmonton’s Third Annual Queer Prom (The Edmonton Journal, 6 June 2009), as a place where another gay Catholic, Bryan Mortensen, found acceptance.

First I will summarize the *Hall* case and then I will examine some of the aspects of this particular case which illustrate constructed standards regarding identity markers and the framing of acceptable homosexual relationships. I will also demonstrate how the framing of acceptance regarding homosexuality in Canadian law and public discourse really only pertains to the normalized gay and lesbian couple, which still excludes bisexual, transgendered or other non-normative sexual groups. I will further place this fight within a Canadian context for homosexual youths to show what the results of such a legal battle “really”⁹⁸ mean, as evidenced in media coverage regarding homosexual youths in Canada.

THE CASE:

HALL V. POWERS

In 2001, the year prior to Marc Hall’s senior prom, Hall asked one of his teachers at Monsignor John Pereyma Secondary School whether he would be allowed to bring his boyfriend, Jean-Paul Dumond, to the prom as his date. His teacher counseled him to follow the Church’s teachings, but did not tell him whether he should or should not bring Dumond to the prom. Hall later asked the school principal, Michael Powers, the

same question. Hall's request was refused by Principal Powers. This refusal was upheld by the Durham Catholic School Board in a statement in which the Board claimed that interaction between romantic partners was a form of sexual activity and that permitting same-sex couples to attend the prom would be seen "both as an endorsement and condonation of conduct contrary to Catholic church teachings" (at para 4).⁹⁹

Students of Monsignor John Pereyma Secondary School who wish to purchase tickets to the prom are obliged to submit to the school a list of potential prom dates for approval. The school therefore knows who will or should be in attendance should there arise a problem in which they would need to contact an attendee's parents and also in order to weed out known "troublemakers" from being present at the prom.

On April 8, 2002, the School Board refused to reverse Principal Powers' decision regarding Hall's date for the prom. The case then went to the Ontario Superior Court of Justice. The Board's defense of their decision to uphold Powers' initial refusal was based within the protective auspices of section 93 of the *Constitution Act*, 1867¹⁰⁰ and their right to exercise freedom of religion, as guaranteed under section 2(a) of the *Canadian Charter of Rights and Freedoms*.¹⁰¹

Section 93 of the *Constitution* allows that within each province the legislature may exclusively make laws in relation to education, that do not need to be supported by other provinces and can be case specific. Therefore, the Board believed that its decision to refuse Hall's request would be protected under the school's right to religious freedoms in combination with educational matters specific to Catholic teachings. The Board argued that the prom, as an event of Monsignor John Pereyma School, falls under the rubric of Catholic education and therefore the allowance of Hall and Dumond to attend as dates would contradict Catholic teachings. Further, the Board argued that married

person(s) are also not allowed to attend the prom as a student date; therefore they did not discriminate against Hall in particular as a homosexual but claimed the permission of attendance would condone homosexual behaviour.

Hall's lawyer, David Corbett, argued that by not permitting Hall to bring his boyfriend to the prom, the school was violating Hall's section 15 rights,¹⁰² which state that individuals are protected from being discriminated against based on, among other things, sexual orientation. Sexual orientation as a protected category under section 15 of the *Charter* has been read in since *Egan* in 1995, as mentioned in Chapter 3. As discussed in that chapter, one of the outcomes of that case was the determination that homosexuality is a personal characteristic that is unchangeable or only changeable at unacceptable personal costs. Therefore, while the Catholic Church's stance on homosexuality is that it is an immoral behaviour that can be rehabilitated,¹⁰³ Canadian law does not support that opinion.

According to the judgment, in which Hall was allowed to bring Dumond to the prom, Justice MacKinnon had the following to say regarding the school and School Board's decision:

The Church's Catechism, in three paragraphs, first declares that homosexuality is contrary to natural law and can under no circumstances be approved, but goes on to direct both that homosexuals should be accepted with respect, compassion, and sensitivity and also that every sign of unjust discrimination should be avoided (at para 23).

Justice MacKinnon argued that the contradictions in the Church's teachings regarding homosexuality demonstrated to him that the school and Board could not make the argument that there is one Catholic approach to homosexuality. Justice MacKinnon

therefore felt that it was important to incorporate into his decision the diversity of beliefs and opinions of members of the Catholic community regarding homosexuality.

Justice MacKinnon also argued that, although the Board felt that allowing Hall and Dumond to attend as dates would contradict their teachings 1) the Prom is not part of a religious service nor is it part of a religious education provided by the school and 2) it is also not held on school property nor is it educational in nature. Therefore, concern about contradicting Catholic views about homosexuality was not considered a reasonable argument against permitting Hall to bringing his boyfriend to the prom, according to Justice MacKinnon. Because opinions on the subject of homosexual behaviour vary widely across the Catholic population, there was not one Catholic viewpoint on the subject that Justice MacKinnon felt could substantiate the refusal for Hall and Dumond to attend together.

Among the parties represented during the hearing May 6-7, 2002 was the Ontario English Catholic Teacher's Association, in support of Hall both in the determination that there was a substantial legal issue to be tried and also concerned with the protection against discrimination of gay and lesbian students (at para 10). For Justice MacKinnon, the involvement of this Teacher's Association in support of Hall further demonstrated the diversity of opinion regarding homosexuality within the Catholic community.

Justice MacKinnon also determined that it is the job of the court, and people using legislation, to address the changes that have occurred in Canadian society since the *Constitution Act* of 1867, which is foundational but needs contextualization. Responding to the Board's argument for protection based on section 93 of the *Act*, Justice MacKinnon argued that the "proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense" (at para 43). Part of the 2002

common sense to which Justice MacKinnon referred was that the Catholic School Board is part of Ontario's provincial public educational system, which is both publicly regulated by the province and publicly funded by tax dollars (at para 43). Therefore, Monsignor John Pereyma, while a separate school, is not separate from provincial regulation.

Justice MacKinnon did not find the Board's argument that allowing Hall and Dumond to attend the prom together to be indicative of the Catholic Church condoning homosexual behaviour. Rather, Justice MacKinnon stated that by not allowing Hall and Dumond to attend, they would miss a formative experience that could not be recaptured.

In his ruling, Justice MacKinnon discussed social stigmatization of gay men and inaccurate stereotypes as important aspects of the case that warranted consideration.

Stigmatization of gay men rests largely on acceptance of inaccurate stereotypes - that gay men are mentally ill, emotionally unstable, incapable of enduring or committed relationships, incapable of working effectively and prone to abuse children. Scientific studies in the last fifty years have discredited these stereotypes (at para 18).

Further, objections to public expressions of homosexual relationships, such as dancing at a prom, were also addressed by Justice MacKinnon:

In my opinion, a fully informed ordinary citizen would consider public dancing fully clothed and under the supervision of teachers, to be chaste behaviour. At public events, family members often dance together with one another without religious objections (at para 49).

Contrary to the objections of the school and School Board, Justice MacKinnon argued that heterosexual couples who attend the prom together are not asked whether they are having sexual intercourse, even though premarital sex is clearly admonished by

the Catholic Church. Students who wish to bring family members to the prom as their date are not questioned whether they are having a sexual relationship nor is it assumed that they will be seeking a marital relationship with their family members. Therefore, according to Justice MacKinnon, the case against Hall was specific to the “issue” of homosexuality as determined within the parameters of Principal Powers’ and the School Boards’ religious objections.

Furthermore, Justice MacKinnon states:

The evidence in this record clearly demonstrates the impact of stigmatization on gay men in terms of denial of self, personal rejection, discrimination and exposure to violence. In Ontario this stigma has been ameliorated by the inclusion of sexual orientation in the Ontario Human Rights Code as a prohibited ground. The cultural and social significance of a high school Prom is well-established. Being excluded from it constitutes a serious and irreparable injury to Mr. Hall as well as a serious affront to his dignity (at para 53).

Therefore, Justice MacKinnon argues that it is unacceptable to deny Hall the right to attend the prom with his boyfriend and suggests that Hall is acting in a way contrary to religious teachings. Hall is a Catholic and a gay one. Protected under the equality rights of the *Charter*, Hall has the right to be treated with dignity. Furthermore, Justice MacKinnon claims a hallmark of Canadian society is a value of tolerance and respect for others.¹⁰⁴ Justice MacKinnon granted an interlocutory injunction order that Hall be allowed to attend the prom with Dumond and further ruled that the school not cancel the prom. Justice MacKinnon did not decide on the larger equality rights and religious freedom issues raised by the case, which were to be heard at a later trial.

EXAMINING THE JUDGMENT: OMISSIONS AND ALLOWANCES

Justice MacKinnon's ruling, while in favour of Hall, demonstrates some of the discursive assumptions and strategies regarding sexual difference outlined so far in this dissertation. Normative constructions of identity markers mentioned in the previous chapters of this dissertation regarding religion, sexuality and sexual orientation are evident in Justice MacKinnon's judgment. As mentioned previously, Justice MacKinnon states that "at public events, family members often dance together with one another without religious objections" (at para 49). Justice MacKinnon also outlines some of the inaccurate stereotypes about homosexuals which have encouraged stigmatization, one of which is that homosexual couples are "incapable of enduring or committed relationships" (at para 18) which he states is demonstrated to be untrue.

That Justice MacKinnon feels the need to argue that gay men are capable of, among many other things, enduring and committed relationships and further that he draws a parallel between Hall and Dumond and family members who dance together reinforces arguments developed so far in this dissertation. Justice MacKinnon uses these arguments as support for equal treatment of gay and lesbian couples. However, neither of these things needs to be demonstrated or evidenced by heterosexual couples who attend the prom together. These arguments therefore demonstrate the need in legal and public discourse to desexualize homosexuality by drawing comparisons with familial relationships but also to insist that homosexual pairings be monogamous pairings. While it does not seem to be required for heterosexual students to demonstrate that they

are in a monogamous pairing with their prom date, monogamy and commitment on the part of homosexuals becomes an important aspect of homosexual relationships to argue in support of “equal” treatment. These constructions, used by Justice MacKinnon, further serve to perpetuate heteronormative standards regarding what is considered to be an acceptable display of sexuality.

What Justice MacKinnon does not explicitly state in his judgment provides another dimension of analysis of this case. Justice MacKinnon rules in favour of Hall and argues that the formative experience of the prom and Hall’s section 15 rights override the claim of the Catholic School in defense of their religious freedom. However, Justice MacKinnon does not state that there is any need for the school or School Board to change their policy regarding same-sex couples for future cases, even with evidence of conflicting opinions within the Catholic tradition. Rather, Justice MacKinnon highlights the importance of this experience for this student.

Justice MacKinnon references the *Egan* case as being determinative of rights protection for individuals based on sexual orientation but neglects to mention that “the majority decision of the Court was to agree that sexual orientation is an analogous ground under the equality provision of the *Charter*, but that the treatment of ‘spouse’ under the [*Old Age Security*] *Act* does not constitute discrimination under Section 15” (Beaman, 1999: 183). In short, Justice MacKinnon’s use of *Egan* neglects to mention that Egan and Nesbitt lost.

Robert Leckey (2009) argues that addressing the losses as well as the wins in gay rights cases is crucial. Leckey examines the way legal scholars analyze gay rights cases, in Canada and the United States, arguing that by ignoring the losses legal scholars are really only telling one story. Justice MacKinnon, by ignoring the loss of *Egan* and only

framing it as a success for homosexual equality rights, is telling one story while ignoring the other; that Egan and Nesbitt never won their claim and were in fact told they were not “spouses.”

Part of the justification used by Justice MacKinnon in his ruling is that the prom is not part of a religious service or religious education, it is not held on school property nor is it educational in nature. This implies that if it were any of these things, the discrimination of the Catholic Church would be permitted under their right to exercise religious freedoms and Hall’s section 15 rights would not longer be protected. Discriminatory world views are not under fire in this case, rather the question of what determines Catholic education versus protection of equality rights comes to bear on the judgment. Justice MacKinnon does not admonish Catholic education that homosexuality is disordered and immoral in support of the protection of the rights of homosexual youth.

Again, reiterating a point I have made previously in this dissertation. I am not claiming that religious groups or individuals cannot be opposed to homosexual relationships; I am arguing that the use and construction of their religious ideologies needs to be examined. Justice MacKinnon already stated that Monsignor John Pereyma School should be subject to provincial regulation because it is funded partially by public tax dollars. Why then would it be acceptable for the school to permit discriminatory attitudes toward homosexuality in an educational context?¹⁰⁵

Although Justice MacKinnon argues that Hall should be treated with dignity, it would be permissible for the school to condemn homosexuality and bar Hall and his boyfriend from attendance (and presumably all other homosexual youth) from activities which the school and School Board determine represent Catholic education.

Although Hall won the right to attend the prom with his boyfriend, Dumond, this victory is embedded with normative constructions of sexuality. As will be discussed further on in this chapter, gay Catholic teens are no more likely to be accepted or treated with equality at their high schools now as a result of *Hall v. Powers* than Marc Hall was in 2002.

THE PLACE OF RELIGIOUS VIEWS:

THE CATHOLIC CHURCH AND HOMOSEXUALITY

The contradictory approach the Catholic Church has taken regarding same-sex relationships is illuminated in the Vatican's 1986 "Letter" also known by its opening words *Homosexualitatis problema* or, by its opponents, as the *Halloween Letter*.¹⁰⁶ The letter was written by then Cardinal Joseph Ratzinger as an address given by Ratzinger and Archbishop Alberto Bovone and was approved for publication by then Pope John Paul II.¹⁰⁷ The full text is included as Appendix B of this dissertation.

In the letter, homosexuals are determined to be intrinsically disordered with a tendency toward moral evil. However, the "Letter" also states that the Catholic Church does not condone discrimination and violence toward homosexuals, whether they are determined to be intrinsically disordered by the Church or not.

The issue of homosexuality was brought forward as a result of an increasingly public debate regarding the church's stance on homosexual persons in public discourse and media. Some Catholics in the debate stood in clear contradiction of Catholic

teachings about morality regarding sexual difference. Other statements consisted of what are seen as more “common” Catholic views on homosexuality. These state that homosexuality is a disease to be cured and a sin. Public discourse about homosexuality and challenges to the treatment of homosexuals as disordered demonstrated a range of religious views on the subject, with many individuals and groups from the Catholic community arguing in support of equality and recognition for gays and lesbians. The “Letter” was written as a response to the debates, to make clear the Catholic Church’s stance on homosexuality.

Incorporating particular biblical passages to support the Catholic stance on homosexuality as a morally evil behaviour, this letter “clarifies” that the call to life-giving is the essence of Christian living, which is clearly not possible in a homosexual relationship because same-sex couples cannot procreate. The “Letter” emphasizes that a Bishop’s utmost responsibility is to defend and promote family life, and by family life, it is evident that what is promoted is a particular type of Catholic family life. The following passage from the letter demonstrates the Catholic Church’s contradictory approach, while illuminating the Church’s fundamental views of homosexuality:

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.

But the proper reaction to crimes committed against homosexual persons should not be to claim that the homosexual condition is not disordered.

When such a claim is made and when homosexual activity is consequently condoned, or when civil legislation is

introduced to protect behavior to which no one has any conceivable right, neither the Church nor society at large should be surprised when other distorted notions and practices gain ground, and irrational and violent reactions increase (section 10).

Although the Catholic Church does not condone violence against homosexuals it is made clear that “homosexual behaviour” is clearly not acceptable. The Church claims that individuals or groups who argue that the “homosexual condition” is not disordered, and subsequently condone homosexuality, act as triggers for other “distorted notions and practices” to gain ground - which leads to an increase in “irrational and violent reactions.” Condoning homosexual activity becomes the source for irrational reactions against homosexual behaviour. It is the acceptance of homosexuality and the introduction of civil legislation to protect homosexuals that inspires violent reactions to sexual difference.

According to the “Letter,” the imposition of civil legislation on behaviour to which “no one has any conceivable right” and condoning this behaviour as acceptable that becomes the springboard for distorted reactions resulting in violence toward homosexuals. Outlining the morally deplorable and unnatural state of homosexuality is not enough; it is the acceptance of homosexuality that leads people to react violently towards homosexuals. By framing the acceptance of homosexuality as responsible for violence towards homosexuals, the authors of this letter have managed to frame the “problem” of homosexuality as a problem of social acceptance of a behaviour they consider clearly distorted.

Through examination of the framework the Catholic Church uses to categorize homosexuality, it is not surprising that Monsignor John Pereyma Catholic Secondary School has its own contradictions to explain. Hall had clearly identified himself as a

homosexual youth. This was not a surprise to the teachers or the principal when Hall sought to bring his boyfriend to the prom. Nor is there any record that the school attempted to counsel Hall regarding his identification as homosexual, which is considered by the Church to be a morally evil condition which ought to be remedied. There has not been any indication that the school or School Board sought to rehabilitate Hall's homosexual identification or even critique or discriminate against him in support of Catholic teaching that homosexuality is a behaviour and that it is immoral.

It becomes clear that the message of the school is that it is acceptable to be gay, as long as you do not act gay in public. Hall's homosexual identification was not the problematic issue for the school. Rather, it was the potential public display of this homosexuality that caused adverse reaction from the school and School Board. Had the school been acting on the "Letter" it would have taken steps to advise Hall of the disordered and unnatural nature of homosexuality, rather than creating a problem solely when it became a matter of seeing a gay couple together and a gay couple behaving in an admittedly chaste manner, according to Justice MacKinnon.

The contradictions in the school's approach to homosexuality goes to the heart of the debate surrounding the teaching love the sinner, hate the sin,¹⁰⁸ which allows for discriminatory worldviews under the guise of universal love of the individual. According to the Church, it is because of the deeply felt love for the individual that the Church seeks to free individuals from their unnatural behaviour, to gain a sense of freedom through religious truth.¹⁰⁹ "In the place of love of the same, there is the same love for all: Jesus Christ's" (Jakobsen and Pellegrini, 2004: 82).

Justice MacKinnon outlines the evident contradictory approaches of Catholicism to homosexuality but also allows that there would be an acceptable place for these

views, such as an event that is educational in nature. Justice MacKinnon's argument partly rests on the fact that the prom is not held on school property or part of a Catholic education. If the prom had been either of these things, Monsignor John Pereyma and the School Board would be supported in their decision, even though the contradictions of the school and the religious tradition are evident. This further reinforces the notion that religious opposition to homosexuality is seen as "valid" or acceptable, even when it can be demonstrated that there are diverse views within and across traditions toward same-sex relationships.

Further, when reading the case of *Hall v. Powers*, anti-homosexuality becomes the focal point of the School's discussion of Catholic teachings, creating the appearance that anti-homosexual viewpoints are the hallmark of the religious tradition. The rhetoric of the Catholic Church regarding homosexuality has created the (hopefully) inaccurate perception that a foundational teaching of the church is its anti-homosexual stance. What comes across as foundational is that the Church whole-heartedly opposes homosexuality, without any other reference to beliefs, teachings or catechism. It would seem that there is an entire religious organization dedicated to the eradication of public gay behaviour, which could be true, but I would argue that the majority of Catholic congregants asked would probably not list that as the core belief. Entrance to the Christian faith is not marked by an anti-homosexual stance, but generally is marked by baptism and an acceptance of Jesus as son of God and saviour¹¹⁰ (Theissen and Merz, 1996).

By foregrounding the content of the "Letter," the foremost message of the Catholic Church becomes one of policing sexual norms, in promotion of a hegemonic heterosexist worldview. So that while it is permitted for Hall to "be" homosexual this is

allowed as long as he can “act” heterosexual, which does not include publicly engaging in a romantic setting with his boyfriend. The contradiction of being homosexual and yet acting heterosexual implies that somehow the behaviour of someone homosexual is intrinsically different than the behaviour of someone who is heterosexual.

As outlined in Chapter 3, religious, social and medical approaches to homosexuality have changed over time from notions of sin to sickness; both conceptualizations promote the unnaturalness of homosexuality either by declaring it a physical, spiritual or mental disorder. The DMSIV-TR is the first diagnostic manual to have removed homosexuality as a mental illness; however psychologists and psychiatrists currently have admitted to attempting to “cure” homosexuality.¹¹¹ Religious organizations still dedicate resources to gay rehabilitation facilities and counseling and to the use of “formerly” gay congregants to promote the message that conversion from homosexuality is possible.¹¹² This promotes the rhetoric that one can be saved from homosexuality, either by the church or through psychiatric treatment and medication. As discussed in Chapter 2, I refer here to Kinsey’s continuum of sexual orientation (Figure 1) to emphasize that even in 1948 psychological studies were examining the “radical” notion that homosexuality and heterosexuality are not simply binary opposites.¹¹³

André Grace and Kristopher Wells (2005) critique the Catholic Church’s efforts to “privatize queerness as it segregates being religious from being sexual” in the Marc Hall case. Grace and Wells argue that Monsignor John Pereyma and the Catholic School Board police the queer body by institutionally creating consequences to living queer, without regard to broader public law and legislation in Canada regarding sexual orientation. They state:

We maintain that the Catholic Church continues to privatize queer by defining and setting parameters to it in institutional terms that segregate being religious from being sexual in ways that limit queer acceptability, access, and accommodation (Grace and Wells, 2005: 239).

Grace and Wells argue that the “Marc Hall Prom Predicament” politicized the prom and brought to light the challenges gay youth face when authoritative institutions work to keep hidden queerness in religion, education and culture by attempting to privatize their institutions, in this case by using the *Constitution Act* to defend their decisions.

Further, Grace and Wells state:

[Hall’s] story captures his struggle to be, become, and belong through a series of chosen, calculated, and uneasy acts of resistance that reflect key tenets of queer theory. These tenets include interrogating the hetero-regulated construction of normality that has traditionally placed queer on the margins of “normal”; deconstructing the cultural and power laden categories of sexuality, gender, and desire; and contesting the heterosexual/homosexual binary as an exclusionary organizing principle (Grace and Wells, 2005: 243).

In summary, as articulated by Grace and Wells, and in support of the central argument of this dissertation, Hall’s case demonstrates the use of normative constructions of sexuality, supported by a religious defense, in service of maintaining a hegemonic, heteronormative standard regarding acceptance and difference in human sexuality. Hall’s case makes plain that there is a multiplicity of views, within the Catholic tradition and across other religious traditions, regarding sexual orientation and same-sex relationships – including that Hall himself identifies as a gay Catholic. The School Board argues that permitting Hall and his boyfriend to attend the prom would contradict Catholic teachings, and yet it is pointed out by Justice MacKinnon that they allow other romantic couples to

attend without determining their intention to marry beforehand. The diversity of Catholic views toward same-sex relationships also challenges what the School Board argues as the singular (and perhaps therefore constructed as “true”) Catholic approach to homosexuality.

ACQUIRING A SENSE OF BELONGING

Particular words or texts, such as legal texts, acquire meaning because members of a community implicitly agree upon the meaning of those words and the ability of those words to conduct, control and determine appropriate behaviour. The reality of a legal outcome is actually quite minimal, when viewing it outside the context of the words on the documents produced by judges specific to the case at hand. What really happened as a result of the *Hall v. Powers* case? Marc Hall was allowed to attend his prom with his boyfriend. Does that mean that discrimination against homosexuals in high schools, or even just that high school, has been eliminated? Does it mean that the Catholic Church has modified its stance regarding homosexuality? Will the next youth at Monsignor John Pereyma Catholic Secondary School who wishes to bring his or her same-sex date to the prom have to fight, and if so, would the case be won?

In Edmonton, Bryan Mortensen did not have the opportunity to attend his own high school prom. After being bullied in junior high for being “different,” he dropped out of the Catholic school system and joined the Next Step Outreach senior high

program in Sherwood Park, where no prom was offered. On June 6, 2009 Edmonton hosted its 3rd annual Queer Prom, for LGBT youth who are unable to attend their own proms, either because of bullying or because their dates are deemed unacceptable. Bryan and more than 100 LGBT youth from Canada and the United States attended the prom, where Bryan was named Prom Queen (Sneh and Warnica, 2009).

Reiterating a point made in Chapter 3, it is only from a place of privilege that disadvantaged or minority groups are able to wage legal battles. Hall had the support of family and community in getting an injunction granted against his high school. However, lack of funds restricted Hall from continuing his battle regarding equality rights and discrimination. It is unclear what effect that might have had, had he won, on other Catholic schools. However, what is known is that in 2009 students such as Bryan Mortensen feel they have to leave their schools because of bullying about their sexuality. Some do not find a place of acceptance outside their school. This is demonstrated by the recent case of two eleven year old boys in the United States who committed suicide after being bullied at school, told by classmates that they “looked” and “acted” gay (Examiner, 25 April 2009).

Perhaps assuming a clean sweep of anti-discriminatory behaviour is an unrealistic expectation based on one court case regarding same-sex attendance at prom. What, then, should the public expect when precedents are set in a court room?

As has been demonstrated, through Kathleen Lahey’s examination of the framing of the *Charter*, it is not acceptable nor does it actually promote rights to “assume” that the categories outlined in the law are exemplary. As Lahey (1999) argues, although arguments were made at the time the *Charter* was being framed that the equality rights provisions would “of course” cover categories beyond those outlined (race, gender,

ethnicity and religion), not one case regarding equality rights based on sexual orientation was won until the courts ruled on it in 1995, 13 years later. The acquisition of equality rights based on sexual orientation was a fight that began at the time the *Charter* was being framed and was not won until 13 years later. The rights that are now read into the *Charter* regarding sexual orientation are still not all encompassing for those considered sexually different; this includes non-normalized bisexual and transgendered groups as well as non-normalized heterosexuals, such as polygamous groups.¹¹⁴

The Catholic Church has a vested interest in policing sexual norms in its desire to produce Catholic families, with Catholic children. What is not given any room for possibility within that framework is that homosexual couples are capable of being Catholic and adopting (if not having children through artificial insemination or surrogacy) children that would be raised Catholic. The Church's insistence on making (unreligious) homosexuality the other (binary opposite) to normative (religious) heterosexuality must not be disturbed by an acceptance of homosexual Catholic congregants. As a result, homosexuality is posited as contradictory to religiosity such that one cannot be both, but only one or the other.

Discussed in *Hall v. Powers*, Justice MacKinnon stated that Marc Hall was not only Catholic, but a gay Catholic teenager. What does not gain much emphasis in the ruling is the necessity for this specific high school, and all other high schools, to avoid the allowance of negative or derogatory associations in support of heteronormative identity production.

According to Grace and Wells:

As a hyper heterosexualized cultural event, the school prom has functioned not only to replicate the masculine, the feminine, and the heterosexual pairing of male and female,

but it has also operated to mark and police heterosexuality as the desired and assumed expression of sexuality (248-249).

The ruling that Hall and Dumond could attend the prom together distracts from the larger problem at hand. Should Monsignor John Pereyma Secondary School decide to refuse another same-sex couple 1) the school might not have a fight on their hands as they did with Hall and 2) there is no legislation to restrict their discrimination toward homosexuality.

HOW ARE RIGHTS UPHELD?

The analysis of the Marc Hall case raises another important point about the significance of equality rights. Equality rights are often framed in discourse as guaranteed to citizens but, as already argued and demonstrated in this dissertation, the question of how individuals acquire rights that should be guaranteed is a problem that non-normative individuals and groups face in Canada. The fight for the acquisition of rights in Canada is based on acceptance as a citizen. However, the acquisition of citizenship is not a battle easily won for non-normative groups and individuals.

Heterosexual couples do not have to fight to be allowed to attend a prom together, whether they are dating, having a sexual relationship or planning to be married. However, Monsignor John Pereyma Catholic Secondary School attempted to deny Hall

rights that he is supposed to be protected under and they did so by claiming an institutional defense in the *Constitution Act*. What does this say for the neutrality and supposed control the law has over the people, if rights that are Hall's are only his because of a legal battle? What does it say about individual versus institutional rights and the clash between the two areas of Canadian belonging and participation? This fight extends beyond the so-called clash of religion versus sexual orientation, however central those two aspects are to this case, and moves into the challenges posed by systems of authority that are also protected within Canadian law and legislation.¹¹⁵ Human rights become that when they are enforced, but the implication of the *Charter* is that once the victory is in hand (e.g. *Egan*), the fight is over.

In order to ensure the enforcement of one's rights, individuals must rely on the decision of the court to determine that their rights have been infringed upon and are left to the courts determination as to the appropriate measure of compensation for said infringement. Relying on case by case analysis regarding rights claims creates a series of possible pitfalls in attempting to determine legal outcomes. The case has to be made such that the court believes there is an infringement which assumes a level of neutrality on behalf of the judges reviewing the case at hand. Groups and individuals also must be recognized as citizens who have access to a certain set of rights and freedoms.

IN SUMMARY

A legal victory is not all it seems at a glance. Hall won his case; this provides for the appearance that somehow equality rights for gays and lesbians are strengthened in Canadian society, that somehow an element of truth has been produced in the language of the judgment. But upon further reading of the elements that make up the case, that determine the judgment, it becomes evident that what happened was the Catholic School Board was unable to demonstrate that the prom constituted Catholic teaching. The school and Board were unable to claim institutional protection in the *Constitution Act* over individual protection for Hall based in the *Charter*. Therefore, it was determined that Hall's equality rights were infringed upon, not the school's right to exercise religious freedom.

What is evidenced through examination of this case is the fallacy that the law is neutral or objective or that the law in fact applies to each of us equally. Given a different set of circumstances, the Catholic Church's discriminatory views regarding sexual difference would be permitted and protected under their right to religious freedom. Religious institutions can seek protection as private institutions and therefore are not subject to the same human rights legislation that public institutions are. The case of *Trinity Western University v. British Columbia College of Teachers* (2001)¹¹⁶ demonstrated that under the auspices of the Evangelical Free Church of Canada it is permissible ("does not constitute public harm") to deny entrance to the teacher education program to any individual who declares themselves homosexual.¹¹⁷

Justice MacKinnon argues both that tolerance and dignity for homosexual individuals are hallmark values for Canadian society¹¹⁸ and that under the umbrella of educational matters, discriminatory ideologies would be permitted by the Catholic

Church. The use of precedents to preserve and promote a homophobic status quo (Beaman, 2005) is permitted through a careful application of definition; there are a set of circumstances in which derogatory views toward homosexuals would be upheld, even though Justice MacKinnon very effectively argues that the Catholic Church's views are contradictory and discriminatory. Where, then, does equality reside? Would another judge have ruled the same, or would they have been able to use existing precedents to argue for the Catholic School Board's decision and protection under section 2(a)? We do not know and will not have any other responses to this question until this debate confronts the courts again.

However, it is important to emphasize what Anthony Amsterdam and Jerome Bruner (2000) illuminate. The law has demonstrated a set of consequences based on a system of ideas; the School Board was unable to prove that its rights under section 2(a) and the *Constitution Act* of 1867 superseded Hall's section 15 rights, the consequence (for the school) of which is that Hall and Dumond attended prom together as dates. Legal statements are interpretive in nature, clearly through analysis of the judgment of Justice MacKinnon it can be noted that the victory of Hall is not the hallmark it gets made out to be, particularly by the media. Given a different set of circumstances, Justice MacKinnon might not have ruled in favour of Hall, but rather through interpretation of the issues at hand and use of precedent, Hall might have been denied claim to his section 15 rights.¹¹⁹

The reality of a legal outcome is limited to what follows the judgment. The power of the language used in law is enforced partially in the belief that law produces a truth, a truth that is neutral and equally applied. The tendency in public and legal discourse to reify the law as a neutral, objective entity ignores the human action and

involvement in law, which assists in determining both the appropriate applications of legislation and the outcome of the cases at hand. Human behaviour and norms are created and regulated by this powerful linguistic body of ideas, that which is “normative” is created through the legal system of ideas and consequences. It is necessary to analyze and examine systems of authority, questioning the hegemonic structure at hand in order to challenge the definitions and constructs embedded in the discourse.

CONCLUSION

The concluding chapter of this thesis ties together the theoretical frameworks used in analyzing and critiquing categories of reference used as identity constructs within legal discourse to display the constructed framework of sexual normativity as based in a set of religious ideologies and parameters which in fact seek to redress sexual difference to be recognizably family. This work is situated during a period of transition regarding the extension of human rights. This dissertation challenges categories of identity that are used in law and public policy during a process of change regarding language constructs, which can be demonstrated by examining the dialectic relationship between law and society so that ways of speaking and talking about or to topics are better addressed. Rather than conceptualizing difference as solely problematic and reframing it within the category of the same, it is possible to strive to find ways and means of looking at sexual diversity not as a problem to be addressed but as demonstrative of the variety of individuals within a culture or society. This work is situated within this time of transition within the field of religious studies in the

examination of the categories of religion, sexuality and sexual orientation, and further as used and applied in Canadian legal and public discourses.

Talal Asad states: “The modern nation as an imagined community is always mediated through constructed images” (2003: 4). Through examination of the construction of the sexually different in Canadian legal decision making and public discourse, it is evidenced that the construction of a “moral” community in Canada, imagined as a community of adherents, is done by using linguistic tools that repeat and reinforce categories of normal and abnormal. The categories of normal and abnormal that are reinforced through legal discourse have roots in so-called religious ideologies. Asad’s observation can therefore be demonstrated through interdisciplinary analysis of legal, social and religious discourses as demonstrated in legal texts, media and interveners’ facts. One of the goals of this dissertation has been to challenge the creation of a “moral” community in law and public policy in Canada.

Religious and legal discourses are very powerful tools, with explicit and implicit relation to one another, even though they are often argued to be separate and distinct, particularly in Canada. Benjamin Berger describes this relationship as: “[l]aw is essentialized and naturalized as something fundamentally different and separate from culture, while religion is essentialized and naturalized in the shape understood by law” (2009: 9). This dissertation has demonstrated the implicit ways that normative notions based on religious ideologies regarding sexual normativity influence and frame legal and social standards in Canada.

I argue that the path to acceptance and the granting of rights for the sexually other is through the façade of normalcy. As demonstrated, one must not act as a homosexual but rather be framed as that which is accepted as “normal” as created

through Canadian legal and social standards.¹²⁰ Framed within these parameters it is evident that homosexual difference is constructed only as taboo unless it can be enveloped in the category of the normal.

As already stated, same-sex marriages have been legal in Canada since 2005. Negative constructions of homosexuality and the cloaking of homosexuality to disguise it within the framework of the normal have resulted in a positive outcome in society and legislation in the extension of rights to gays and lesbians. The problem I have examined is the means by which acceptance is granted, what needs to be done to be granted the rights, and how the language of sexuality and same-sex relationships are structured *vis à vis* the religious interests of the interveners and supported in legal decision making. While legal and social changes are occurring regarding protection against discrimination for homosexuals, and the legalization of same-sex marriage, the language surrounding what homosexuality *is* and the means by which the changes occur are much more implicitly constructed. The influence of religious beliefs and religious groups have maintained structures of sexual normalcy, so that to access the rights provided in the law, the sexually other must be redressed as sexually normal to gain access as a sexual citizen.

Legal precedent can be seen to permit discriminatory ideologies by co-opting references to homosexuality within the heteronormative vernacular. These discriminatory biases are then subtly justified or supported by legal statutes. Both religious and legal stances seek to claim authority, the former through historical validation and the latter through the use of precedents, to buttress their arguments.

As was argued in Chapter 1, religion as a category of identity and as a framework for the development of social and cultural boundaries of acceptance and

difference has been demonstrated to be an increasingly diverse and fluid category. Religious ideologies are embedded with assumptions about normativity and difference, in this thesis as displayed through examination of use of religious ideologies in Canadian law and discourse regarding homosexuality. Although religious interest groups construct and create arguments to support the idea that religious ideologies are static and unchanging, it has been demonstrated that in fact ideologies change and modify across a tradition and over an individual's life time. It is therefore important that the assumptions about the supposed static nature of religious ideologies which are made in legal discourse are challenged in order to reflect the shifting dynamics of ideologies. Although some religious groups and individuals will continue to argue that religion necessarily opposes same-sex relationships, this is repeatedly evidenced to the contrary.

The other two main categories of identity that have been discussed and analyzed in this dissertation are the categories of sexuality and sexual orientation. Both of these categories are framed with notions of acceptable and unacceptable traits and behaviours as displayed in law, media and public discourse. The constructions of what constitutes acceptable or unacceptable sexuality has often been created by religious groups and individuals, who have argued that their framework of good versus bad sexuality and sexual orientation is in fact "natural" or "normal" as determined by a particular religious construction of normativity. However, as argued here and in many other works regarding sexuality and sexual difference, the category of the same is constructed from a place of privilege by groups and individuals based in a power relation between what is considered normal (embedded with value and power) and what is considered non-normal (lacking in value and power). Shifting notions and continuums regarding human

sexuality challenge the constructions of sexual normativity and allow for a broader conceptualization and understanding of human sexual relationships and behaviour.

The focus of this dissertation is to critique the constructs that are used and repeated in discourse, and further argued as natural and normal, regarding religion, sexuality and sexual orientation to demonstrate the manipulation of these categories as strategic devices, particularly within legal discourse. As I mentioned in the introduction, a goal of this project is to further Luce Irigaray's critique of the categorization and treatment of the sexually different; here, I analyze and critique the categorization and treatment of homosexuality within Canadian law and the ways religious ideologies have been used to justify and maintain negative categorizations.

Further to a discussion and analysis of religion, sexuality and sexual orientation are the institutions that are said to be in peril by the advancement of rights for same-sex couples; institutions that also have permeating, embedded religious involvement, the institutions of marriage and subsequently family.

The goal of this project has been to critique the use of inaccurate and fluid characteristics as forming the basis of narrative scripts used to prescribe and regulate sexuality. Demonstrated both through interdisciplinary theoretical engagement and by incorporating arguments of religious groups and individuals, it is clear that being religious is not tantamount to being opposed to sexual difference and sexual diversity. This dissertation has been undertaken at a point in the slow moving wheels in the process of change. Religious diversity as a topic of discussion and analysis has hit the landscape in Canada in an impressive way, in response to challenges the courts face regarding religious freedom and an increase in access to those considered religiously different by the media. While the tensions regarding religious diversity are nowhere

near being resolved or even framed in an encompassing theoretical framework, as a corresponding argument regarding challenges the courts face, sexual diversity also needs to be better and more broadly conceptualized in law, public policy and public discourse.

Assuming a clean sweep of anti-discriminatory behaviour would seem to be an unrealistic expectation based on one court case regarding same-sex attendance at prom or even based on a series of court cases regarding equality rights based on sexual orientation. By challenging the use of precedent to uphold discriminatory views, legal scholars have exposed the inherent biases in the legal system, which reflect particular cultural and social standards. Further, by examining the linguistic constructions used in decisions that challenge the status quo, the engagement of ideological views which are upheld by the judges involved in the cases are also exposed. The legal system necessarily reflects and at the same time shapes standards regarding acceptance and difference and is continually undergoing its own modifications as a result of challenges brought to the courts.

My goal in focusing on these particular categories of identity as constructed categories has been to develop a manageable research project and dissertation that effectively demonstrates the central focus of my thesis and best uses the interdisciplinary theorists I have incorporated.

As already mentioned, this dissertation is being written at a time when change is occurring rapidly, regarding the arguments made in this dissertation and of course on a number of other topics. On July 2, 2009, in India Delhi's High Court overturned a colonial law that criminalized homosexuality, almost 150 years after the law had been introduced into the Indian Penal Code. Although some are seeking to have this decision repealed and the decision only means that adults in a consensual homosexual

relationship cannot be discriminated against, it is a landmark that is still being celebrated (Biswas, 3 July 2009).

In Alberta, the *Alberta Human Rights Act* has recently been modified to allow parents to remove their children from classes they feel would contradict their religious beliefs. Bill 44 was introduced in April 2009 and has subsequently passed. Teachers must submit their course curriculum to the school if they are planning on covering any of the following topics; religion, sexuality or sexual orientation. Parents can then decide whether the teaching will contradict their religious beliefs, at which point students, if requested by parents, are excused from the class without academic penalty (CBC News, 30 April 2009). It is almost paradoxical that at a time when Canada's tolerance toward diversity is under scrutiny,¹²¹ we find ourselves with a province that might consider teaching that homosexuality is "okay" is considered justifiably offensive to parents and students.

These are just two of many examples across the globe of the challenges faced by homosexuality and most often when confronted with religious ideologies. It is through voices of dissent and protest that change occurs, whether controlled protest in the form of a court case, or more vocal, active protest embodied by marches and rallies. Challenge and change also comes in the form of dissenting opinions in case law, sometimes with very powerful results in future cases, such as demonstrated by Madame Justice L'Heureux-Dubé's comments from *Egan*.

This work has brought together diverse theoretical approaches in examination and critique of the identity markers of religion, sexuality and sexual orientation to critique the supposed unified, static nature of the categories of identity and demonstrate the fluidity with which we cross and mesh boundaries of identity and difference. I

further challenge what I see as the problematic use of the hegemonic standards of these categories when incorporated into public policy and legal decision making.

NOTES

Introduction

¹ Cited in Rich, 1995: 84.

Chapter One

² *Halpern v. Canada (A.G.)*, [2003] O.J. No. 2268.

³ This discrepancy is also demonstrated in the women's ordination debate in the Catholic tradition and by the development of gay and lesbian Muslim and Christian congregations and organizations. However, it is also studied by examination of the ways in which people practice, discuss and incorporate their faith into their day to day lives, which can often contradict religious doctrine.

⁴ This will be demonstrated using Daniel Helminiak's work, among others, but briefly groups such as Salaam Canada and the United Church of Canada demonstrate that religious organizations can be found to support same-sex relationships.

⁵ *Jeremy Hinzman v. Immigration and Refugee Board* [2005] (Can.).

⁶ *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993).

⁷ See for example, K. I. Pargament, 1997, *The Psychology of Religion and Coping: Theory, Research, Practice*. New York/London: Guilford Press; H. G. Koenig et al., 2001, *Handbook of Religion and Health*, Oxford/New York: Oxford University Press; and L.H. Powell, et al., "Religion and Spirituality: Linkages to Physical Health," *American Psychologist* 58(1): 36-52. These examples, among many others, are demonstrative of the tendency to categorize and measure religiosity by church attendance, frequency of prayer and other self-described, measurable behaviours, and then use these measures to determine effects or lack thereof on mental health, physical health, personal relationships, etc. While useful to a certain degree for creating psycho-social studies, they limit the possibility of religiosity to a type of behaviour, often conceptualized and in conformance with certain types of religious institutions, such as Christianity, and most frequently within a set of parameters related to western notions of religious practice.

⁸ Of course the narrow application of church is problematic as well.

⁹ I am not attempting to argue that Statistics Canada research is without criticism or that the data acquired is unquestionable. There are also social pressures placed on individuals' to claim a religious affiliation, whether they feel it to be a defining part of their identity or not. But it is still relevant to note that a majority of people surveyed identified with one of the religious affiliations made available on the survey.

¹⁰ The prevalence of mainstream Christian, often argued to be mainstream Protestant, values in Canadian social institutions such as law is a point argued very effectively by Beaman (2002; 2008) and Sullivan (2005), among others.

¹¹ Menendez (1996) is one example of particular comparative assessments between Canada and the United States which use the 'fact' that Canada has 'separated church and state' to make claims about the relationship of law and religion in the United States.

¹² This point, argued and supported by Canadian justices such as Justice LaForest, will be elaborated on in future chapters.

¹³ *Brokeback Mountain* (2005) depicts a love story between two men (Ennis and Jack) who meet while sheepherding in Wyoming, though both maintain public heterosexual relationships (both are married to women and have children). One of the two men, Jack, is subsequently killed for being “queer,” and Ennis ends up alone, having left his wife. While the plot is not unrealistic, it can be argued that the widespread public is not yet ready for a homosexual couple to live “happily ever after.” *Casablanca* (1942) provides an earlier example of cultural standards influencing film. Director Michael Curitz originally intended to have Humphrey Bogart’s character walk off into the sunset with Ingrid Bergman, however it was thought to be too racy to have the movie end with a marriage breaking up (Bergman’s character is married to another man).

¹⁴ Comparing an imam to a bishop became a popular way of ‘describing’ the role of an imam in Islam, specifically after September 11, 2001, in media and public discourse. The comparison was originally made as a way of illuminating the role of the imam in Islam, however has since become a more subtle form of comparison. A recent example can be evidenced by statements by U.K. Members of Parliament arguing that Islamic imams would not be subject to same level of rudeness as has been directed at Bishop Patrick O’Donoghue, regarding his decision to uphold Catholic teachings regarding sex education in schools. The statements of the MP’s implicitly make a connection between the position of the imam in Islam and a bishop in Catholicism.

¹⁵ I want to be careful, particularly when discussing Islam, to delineate the difference between being recognized as a religion and accepted as a “good” religion or defined as a “bad” religion. Clearly, there is more often the view post-September 11, 2001 that Islam is a “bad” religion, oppressive and fundamentalist. However, it still carries recognizable properties of religion.

¹⁶ Section 15 of the *Charter* reads: “Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” As a result of a 1995 decision by the Supreme Court of Canada, sexual orientation has been read into section 15 as an analogous ground for protection from discrimination; I will discuss this further in chapter 3.

¹⁷ *Hall (Litigation guardian of) v. Powers*, [2002] O.J. No. 1803.

¹⁸ To make the point, Justice MacKinnon noted in his ruling that the Catholic community clearly did not have one opinion on same-sex relationships, as one of the interveners in support of Hall was the Ontario Catholic School Teachers’ Association.

¹⁹ As a side note, the right of the majority to decide minority human or civil rights is currently a hot topic of debate in the United States, as a result of a vote on whether to legalize same-sex marriage was included on the Election 2008 ballots for California, Arizona and Florida. All three states returned results banning same-sex marriage legislation. In California the vote challenged a recent constitutional change because the California Supreme Court had ruled to legalize same-sex marriages in May 2008. The question posed is: should the majority have the power to determine civil and human rights for the minority? Or should the legal system be the neutral arbiter that supports minority rights claims, as has historically been the case?

²⁰ 2 Samuel 12:7-9: 7) And Nathan said to David, thou *art* the man. Thus saith the Lord God of Israel, I anointed thee king over Israel, and I delivered thee out of the hand of

Saul; 8) and I gave thee thy master's house, and thy master's wives into thy bosom, and gave thee the house of Israel and of Judah; and if *that had been* too little, I would moreover have given unto thee such and such things. 9) Wherefore has thou despised the commandment of the Lord, to do evil in his sight? Thou hast killed Uriah the Hittite with the sword, and hast taken his wife *to be* thy wife, and hast slain him with the sword of the children of Ammon.

²¹ 1 Kings 11:1-3; 1) King Solomon, however, loved many foreign women besides Pharaoh's daughter—Moabites, Ammonites, Edomites, Sidonians and Hittites. 2) They were from nations about which the Lord had told the Israelites, "You must not intermarry with them, because they will surely turn your hearts after their gods." Nevertheless, Solomon held fast to them in love. 3) He had seven hundred wives of royal birth and three hundred concubines, and his wives led him astray.

²² Genesis 29: 20-30; 20) So Jacob served seven years to get Rachel, but they seemed like only a few days to him because of his love for her. 21) Then Jacob said to Laban, "Give me my wife. My time is completed, and I want to lie with her." 22) So Laban brought together all the people of the place and gave a feast. 23) But when evening came, he took his daughter Leah and gave her to Jacob, and Jacob lay with her. 24) And Laban gave his servant girl Zilpah to his daughter as her maidservant. 25) When morning came, there was Leah! So Jacob said to Laban, "What is this you have done to me? I served you for Rachel, didn't I? Why have you deceived me?" 26) Laban replied, "It is not our custom here to give the younger daughter in marriage before the older one. 27) Finish this daughter's bridal week; then we will give you the younger one also, in return for another seven years of work." 28) And Jacob did so. He finished the week with Leah, and then Laban gave him his daughter Rachel to be his wife. 29) Laban gave his servant girl Bilhah to his daughter Rachel as her maidservant. 30) Jacob lay with Rachel also, and he loved Rachel more than Leah. And he worked for Laban another seven years. Of course, Jacob is said to have been tricked into polygamy by his father in law.

²³ "An analysis of the submission by the *Interfaith Coalition on Marriage and the Family* to the *Supreme Court of Canada* 2004-May," http://www.religioustolerance.org/hom_marb27.htm, accessed 25 November 2008.

²⁴ *Hyde v. Hyde and Woodmansee* [L.R.] 1 P. & D. 130 (1866).

²⁵ An excellent example of this in Boswell's book is his discussion of historical attitudes toward violence. Boswell argues that historically, killing Jews or pagans as heretics would be justified by a Christian ethic system. However, today stances against the death penalty are also justified using a Christian ethic system. Boswell uses this example to demonstrate the difference between the conscientious application of religious ethics, and the tendency to justify animosity and tolerance by means of religious 'ethics.' (Boswell, 1980).

26 On adultery: Deuteronomy 22:22; If a man is found sleeping with another man's wife, both the man who slept with her and the woman must die and Leviticus 20:10; If a man commits adultery with another man's wife – with the wife of his neighbor – both the adulterer and the adulteress must be put to death. **On incest:** Leviticus 18: 6-10; 6) No one is to approach any close relative to have sexual relations. I am the Lord. 7) Do not dishonor your father by having sexual relations with your mother. She is your mother; do not have relations with her. 8) Do not have sexual relations with your

father's wife; that would dishonor your father. 9) Do not have sexual relations with your sister, either your father's daughter or your mother's daughter, whether she was born in the same home or elsewhere. 10) Do not have sexual relations with your son's daughter or your daughter's daughter; that would dishonor you. **On bestiality:** Exodus 22:19; whosoever lieth with a beast shall surely be put to death. **On children who curse their parents:** Exodus 21:17; Anyone who curses his father or mother must be put to death.

²⁷ Martha Nussbaum (2004: 132-133) discusses the "reasonable provocation" defense, used in *Shick v. State*, a case in which the defendant claimed the homosexual advances made toward him by the victim he beat to death were sufficient provocation to explain the killing. The young man was subsequently charged with voluntary manslaughter, rather than first degree murder.

²⁸ One example is the tradition in Leviticus 1: 1-17 regarding animal sacrifices and burnt offerings made at the altar.

²⁹ The following is a brief outline of the *Persons* case (actual citation *Edwards v. Canada (Attorney General)* [1930] A.C. 124), a famous constitutional case in which it was decided that women were eligible to sit in the Canadian Senate, because they were deemed to be "qualified persons" in the law. This case will be discussed in further detail in Chapter 3.

³⁰ Salaam Canada is a pro-gay Muslim organization, while the United Church of Canada both marries same-sex couples and many specific congregations have been involved in promoting and protecting gay/lesbian rights.

³¹ A recent Canadian example of this exists in the Shari'a law debates in Ontario. The banning of Sharia law for family arbitration in Ontario subsequently led to the banning of all faith-based religious arbitration, which has been occurring under the radar for 20 years. Arguments against the acceptance of Sharia law, made by other non-Muslim religious groups, argued that Islam is a fundamentalist and oppressive tradition – Islam certainly was not framed as part of the Coalition created to oppose same-sex relationships.

Chapter Two

³² Kinsey's research about human sexual behaviour and sexual orientation led to the development of the Kinsey Scale, which ranges from 0 to 6 and is included as Figure 1 to this dissertation. On the Kinsey Scale, 0 is denoted as exclusively heterosexual, 6 as exclusively homosexual, and a later addition of 7 was made by Kinsey for asexual. What Kinsey's research led him to conclude was that most individuals interviewed did not rate themselves as exclusively homosexual or heterosexual. Most participants felt themselves to be somewhere more central on the scale of sexual orientation. But Kinsey's research methods and findings are not without controversy. It has been confirmed that some of his information was gathered from pedophiles, and that Kinsey chose not to report the pedophiles to the authorities. Kinsey is also reported, in Jones (1997) to have had unusual sexual practices himself and to have encouraged group sex involving his graduate students, wife and staff.

³³ *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 and *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

³⁴ A discussion of “reality” is beyond the scope of this dissertation, but the idea that something “real” results from court judgments will be discussed later.

³⁵ Irigaray describes how the ritual of the Eucharist subsumes the roles of women as such: “And that it is us, women-mothers, that he is giving to be eaten too. But no one must know that. That is why women cannot celebrate the eucharist...something of the truth which is hidden therein might be brutally unmasked” (1991: 46).

³⁶ One example Barnard gives is the intention of “you” as a white individual in the statement “Wanna be the middle in an Oreos Sandwich?” (2004: 39). The two sides of the sandwich, to which “you” should be erotically charged, are men of colour.

³⁷ A bawdy-house, in Canadian legislation, refers to a place used or frequented for prostitution or “for the purpose of acts of indecency,” *The Criminal Code of Canada*, s. 210 (1).

³⁸ A public place is defined as any place to which the public have access as of right or by invitation, express or implied. Section 197(1) specifically deals with disorderly public places, such as those used for the purposes of sex.

³⁹ Harm is an ambiguous and ill-defined notion within law and legislation, which generally refers to the idea that the actions of those in question will somehow negatively affect members of society and the functioning of society.

⁴⁰ The case of *Labaye* also marked the end of the community standards of tolerance test for obscenity and indecency. The modern formation of the community standards of tolerance test brought together the determination of “tolerance” with “undue exploitation of sex.” For detailed discussion see Jochelson, 2009.

⁴¹ Bethany Hughes, the Jehovah’s Witness who did not want blood transfusions, was eventually forced by court order to receive them to treat her leukemia. Beaman offers a critical socio-legal analysis of the case, the power relations evidenced and enforced in the case, and the specific manner in which religious freedom and religious citizens are governed when they do not hold mainstream values or beliefs.

⁴² Marie-Claire Belleau and Rebecca Johnson analyze the importance of dissenting opinions in their influence on the case at hand and, at a broader scope, in influencing lawmakers and legislators external to the case they are written for. “Judges, work in that space on the edge of meaning, are called upon not merely to settle claims of particular litigants, but also to participate in the stabilization and/or re-imagination of the world in which we live” (2008: 172). In challenging the status quo, or setting new precedents, judges are involved in the creation of new societal standards. They are active players in shaping the way individuals behave and respond to behaviour. This will be discussed further in chapters 4 and 5.

⁴³ Section 76 of the *School Act* reads: 1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles. 2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.

⁴⁴ In February 2007, Québec Premier Jean Charest announced the establishment of the Consultation Commission on Accommodation practices Related to Cultural Differences, as a response to public discontent across Québec over legal and public “obligations” regarding the reasonable accommodation of religious minorities. The Commission (commonly known as the Bouchard-Taylor Commission, for the two co-chairs, Gerard Bouchard and Charles Taylor) was mandated to: “take stock of accommodations

practices in Québec; analyze the attendant issues bearing in mind the experience of other societies; conduct an extensive consultation on this topic; and formulate recommendations to the government to ensure that accommodation practices conform to the values of Québec as a pluralist, democratic, egalitarian society” (<http://www.accommodements.qc.ca/commission/mandat-en.html>, accessed 4 February 2009).

⁴⁵ *Reference re Meaning of the Word “Persons” in S.24 of the BNA Act*, [1928] SCR 276.

⁴⁶ In that case, “Lord Sankey stated conclusively: ‘The word ‘person’...may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not. In these circumstances the burden is upon those who deny that the word includes women to make on their case’” (quoted in Mossman, 1986, 331).

⁴⁷ “Indecency” is also ill-defined, which allows for wide interpretative framework for judges, the media and the public reading the news.

Chapter Three

⁴⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513.

⁴⁹ Section 15(1) reads: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

⁵⁰ There have been some interesting challenges and critiques of Boswell’s work, some of which can be found in Mathew Kuefler’s edited collection *The Boswell Thesis: Essays on Christianity, Social Tolerance and Homosexuality*, 2006, University of Chicago Press.

⁵¹ This is reminiscent of Nazi Germany, where the blond haired, blue eyed Aryan was seen to be the best demonstration of acceptable biological traits.

⁵² There are also chromosomal abnormalities, such as Turner and Klinefelter’s syndromes, that have not been included in this argument, but that also warrant attention and discussion. Turner syndrome, also known as Gonadal dysgenesis, encompasses several conditions, the most common is the deletion of an entire X chromosome. Klinefelter’s syndrome is a condition in which males have an extra X sex chromosome, resulting in at least two X chromosomes and one Y chromosome (Crooks and Bauer, 2002).

⁵³ One of many recent examples to this end would be Trinity St. Paul’s United Church in Toronto, which has sponsored Maassoum Abdah Mouhammad, a Syrian Kurd who had been held in Guantanamo Bay and is seeking refugee status in Canada (Toronto Star, 11 February 2009).

⁵⁴ In fact today, fifteen countries penalize homosexuality by life imprisonment or the death penalty.

⁵⁵ DOMA reads: 1. No state (or other political subdivision within the United States) need treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state. 2. The Federal Government may

not treat same-sex relationships as marriages for any purpose, even if concluded or recognized by one of the states. (Public Law No. 104-199, 110 Stat. 2419).

⁵⁶ Interesting to note, Defense of Marriage Act author, Georgia Representative Bob Barr, has since apologized for his sponsorship of DOMA (The Washington Times, 26 May 2008).

⁵⁷ “Don’t Ask, Don’t Tell” has made it to President Barack Obama’s priority list. He recently stated that he would “end ‘don’t ask-don’t tell’” at a Human Rights Campaign dinner. However, critics have noted that no firm timeline or commitment has been promised by President Obama, who could simply rescind “Don’t Ask, Don’t Tell” (Simmons, 10 October 2009).

⁵⁸ And of course it does overtly and covertly target gay couples, because they are not legally able to marry in Arkansas, or many places in the US.

⁵⁹ House Publications,
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332601&Language=E&Mode=1&Parl=35&Ses=2>, accessed 15 December 2008.

⁶⁰ This will be discussed further in the conclusion to this dissertation.

⁶¹ *M. v. H.*, [1999] 2 S.C.R. 3.

⁶² The groups named in the factum are the Interfaith-Coalition, the Evangelical Fellowship of Canada, the Ontario Council of Sikhs, the Islamic Society of North America and Focus on the Family.

Chapter Four

⁶³ Specific arguments made by Madame Justice L’Heureux-Dubé in support of same-sex couples argues for the case of considering same-sex couples as legal persons, stating “same-sex couples are a highly socially vulnerable group” and that the Old Age Security Act excludes couples who otherwise fit all criteria (pages 521-522).

⁶⁴ See for example Albert J. Menendez’s *Church and State in Canada* (1996). The separation of church and state has morphed linguistically into discussions of “western secular society,” a category to which Canada apparently belongs. This is of course in contrast to overtly religious governmental systems, found in the Middle East, but also finds comparative basis with the United States, a country with entrenched and much more explicit religious declarations, constitutionally and in public discourse.

⁶⁵ Trivial legal statements as defined by Amsterdam and Bruner constitute opinions from the bench, advocate’s arguments, treatises and philosophies of law (2000: 7).

⁶⁶ Specifically Marmor critiques Hart’s *The Concept of Law* (1961) and Dworkin’s *Taking Rights Seriously* (1977) though he does also examine other works by both prominent legal theorists.

⁶⁷ The preamble to the *Charter* reads: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

⁶⁸ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

⁶⁹ References: Reference to the Court, Part 9, Section 46: 1-12, Supreme Court of Canada, <http://www.scc-csc.gc.ca/ar-lr/rules-regles/2006/doc-eng.asp#n46>, accessed 10 December 2008.

⁷⁰ *Hyde v. Hyde and Woodmansee* [L.R.] 1 P. & D. 130 (1866).

⁷¹ The living tree analogy compares the Constitution Act of 1867 with a living tree, as something that is constantly growing and changing, and is therefore in need of constant progressive interpretation (at page 3).

⁷² There has been a case, however, in which a marriage commission, Orville Nichols, refused to marry a same-sex couple and subsequently faced a human rights complaint (CTV News, 23 July 2009).

⁷³ Section 319(2), Criminal Code of Canada: (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty... (4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. Defences: (3) No person shall be convicted of an offence under subsection (20); (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject.

⁷⁴ *Smith and Chymyshyn v. Knights of Columbus and others* 2005 BCHRT 544.

⁷⁵ The couple were subsequently denied the apartment rental.

⁷⁶ In 2006, the Canadian Census results reported that over 200 ethnic origins were reported by total population. This includes Canada’s Aboriginal peoples and groups that have settled in Canada. Between 2001 and 2006, the visible minority population of Canada increased by 27.2%, which Statistics Canada attributes largely due to high proportion of newcomers to Canada who belong to visible minority groups (Statistics Canada, 2006).

⁷⁷ The notion that Canada has effectively separated church and state makes its way into media and public discourses regularly. A recent example is the controversy surround Gary Goodyear, Canadian Science Minister, who refused to answer journalist’s queries as to whether he believed in evolution. Responses to this story often began by stating that the line of questioning was inappropriate ‘because Canada has separated church and state.’

⁷⁸ The panopticon is a type of prison building, first built by Jeremy Bentham in 1785. The design allows observers (prison guards, surveillance staff) to observe prisoners without the prisoners being able to tell that they are being watched. Michel Foucault uses the idea of the panopticon as a metaphor for Western society, with its emphasis on normalization, observation and to demonstrate the ways systems of power maintain control without visibility (Foucault, 1979).

Chapter Five

⁷⁹ For more detailed discussions of the creation of the ideal family and the normalization of the construct in society, see Tiya Miles, 2005, *Ties that Bind*, Berkeley: University of California Press and Mona Gleason, 1999, *Normalizing the Ideal: Psychology, Schooling, and the Family in Postwar Canada*, Toronto: University of Toronto Press.

⁸⁰ An example of the threat sexual difference poses to the institution of the family can be found in the 2009 Call for Papers publicized by the Religious Research Association, for their annual meeting in October. The title of the meeting is “Religion and Relations: Linking Faith with Marriage and the Family,” the call for papers reads as follows: “Major changes in marriages and families characterize the last several decades in the United States and many other societies, including increasing ages at marriage, higher

divorce rates, better and more widely available contraceptives, widespread cohabitation, more married women and mothers in the labor force, smaller family sizes, more childbearing outside of marriage, and more openness toward and acceptance of same-sex relationships. *Because faith and family are often intertwined, these changes have profoundly affected religious institutions and, in turn, been affected by them. As traditional norms regarding marriage and childbearing have come under threat by the conflicting behaviors of individuals, various denominational and societal struggles have ensued, most notably over abortion and same-sex marriage.* At the same time, individuals have had to reconcile their own beliefs with the changing behaviors of others—and in many cases, of themselves—in the context of the larger religious debates on the same subjects. Careful study of these and other links between faith and family issues is critical for understanding the current religious landscape and how it came to be,” <http://rra.hartsem.edu/conf2009call.htm>, accessed 13 March 2009 (emphasis added).

⁸¹ *M. v. H.*, [1999] 2 S.C.R. 3.

⁸² In his chapter “Rights and Recognition” from *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment*, Douglas Farrow argues that the redefinition of marriage in law has in fact divorced marriage from procreation and replaced marriage with another institution that simply affirms sexual commitment between adults. He states “Since marriage is between a male and a female, and all people are either male or female, marriage is in principle open to all people. The fact that for a wide variety of reasons – of which homosexuality is but one – not all people are cut out for marriage changes nothing” (Farrow, 2005: 99).

⁸³ Two-spirited is a term in Native traditions used to describe individuals who display both male and female characteristics, which is seen as a gift and privilege that the individual is able to house both male and female spirits in their bodies.

⁸⁴ In Mark Steyn’s recent *Maclean’s* article, “We’re in the fast lane to polygamy: Remember same-sex-marriage proponents rolling their eyes at talk of what might be next?”, he argues that the same-sex marriage legislation is directly responsible for what he sees as a trend toward the legalization of polygamous unions in Canada, which by implication will deplete Canadian social security funds and further destroy Canadian ‘morality,’ 3 April 2009.

⁸⁵ Currently the case of polygamous unions is challenging standards of what constitutes an acceptable family but so too have adoption, spousal and child support cases.

⁸⁶ As already argued and demonstrated in previous chapters, specifically Chapter 4.

⁸⁷ *Mossop v. Canada (Attorney General)*, [1993] 1 S.C.R. 554.

⁸⁸ And of course, implicit in this is that they adhere to a monogamous relationship.

⁸⁹ There are in fact conflicting constructions of the acceptable family in *Egan*, as evidenced by the following two quotations: “Viewed in the larger context, then, there is nothing arbitrary about the distinction supportive of heterosexual family units” (at para 25) and “On a broader note, 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?” (at para 211).

⁹⁰ Justices LaForest, Gonthier and Major argues that by virtue of reproductive capabilities heterosexual couples are unique in their ability as a family unit (at para 25)

while in the dissenting opinion it was argued that the use of a normative family model serves only to discriminate against same-sex couples (para 123).

⁹¹ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

⁹² *M. v. H. Supreme Court Intervention*, Definition of “spouse” to include same-sex partners. 1998. <http://files.efc-canada.net/si/Sexual%20Orientation/MvH.pdf>, Court File No. 25838, accessed 15 December 2008. This is the transcript of the facts posted on the Evangelical Fellowship of Canada website; the Coalition in this intervention is comprised of the Evangelical Fellowship of Canada, the Ontario Council of Sikhs, the Islamic Society of North America and Focus on the Family.

⁹³ Rats are often used as testing grounds for scientific study that can hopefully translate for use in human studies. Some of the results have proven effective, often with controversy over dosage translation, but some studies have been shown to demonstrate the lack of correlation between effectiveness of drugs in rats and effectiveness in humans. See for example S.A. Barnett’s *The Rat: A Study in Behavior*, Aldine Transaction, 2007. Also, there is very little agreement in the study of emotive possibilities and intentions in rats as having any positive correlation with human emotive intents and behaviours. Further, it is impossible to question a rat about their motivations or influences regarding the ways they respond to “single-parenthood” or same-gender rearing.

⁹⁴ In 2003, same-sex marriage was first legalized in Ontario at the provincial level, with other provinces following suit between 2003 and 2005, when it was legalized at the federal level.

Chapter Six

⁹⁵ *Hall (Litigation guardian of) v. Powers*, [2002] O.J. No. 1803.

⁹⁶ Pope Benedict XVI’s end of year speech he stated that “gender theory” blurred the distinction between male and female which could lead to the “self-destruction” of the human race, which he said was as devastating as environmental destruction, such as depleting rainforests, for the future of the human race. Responses to the Pope’s speech interpreted the remarks as a call to save mankind from homosexuals and transsexuals (BBC News, 23 December 2008).

⁹⁷ An interlocutory injunction does not have an impact of a determination of rights or rights violations, but rather is provisional in nature until a further hearing or order on the matter. In the *Hall v. Powers* case, Justice MacKinnon granted an interlocutory injunction order that Hall be allowed to attend the prom with Dumond and further that the school not cancel the prom.

⁹⁸ A discussion of “reality” is beyond the scope of this dissertation, but the idea that something “real” results from court judgments will be discussed later on.

⁹⁹ The Catholic School Board’s statement was included in the *Hall v. Powers* court transcript.

¹⁰⁰ Section 93 of the Constitution Act of 1867 deals specifically with the powers of education systems, and reads: 93 In and for each Province the Legislature may exclusively make Laws in relation

to Education, subject and according to the following Provisions: (1) Nothing in any such law shall prejudicially affect an Right or Privilege with respect to Denominational Schools which any Class of persons have by Law in the Province at the Union.

¹⁰¹ Section 2(a) of the *Charter* reads: 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.

¹⁰² Section 15 of the *Charter* reads: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁰³ Also discussed in Chapter 3, recently “outed” minister Ted Haggard has apparently effectively completed his rehabilitation for homosexuality, and been returned to the public as a heterosexual man per the following article: “After Rehab, Pastor in Gay Scandal ‘Completely Heterosexual’”(First Coast News, 6 February 2007). The Church’s views on homosexuality as an immoral ‘behaviour’ are also outlined in the “Letter.”

¹⁰⁴ I am not sure what is termed “Canadian society” would be agreed upon by all Canadians; however the emphasis that the court and the school need to value tolerance and respect is an important aspect of MacKinnon’s ruling.

¹⁰⁵ What is taught in public schools regarding homosexuality is currently a hot topic in media because the *Alberta Human Rights Act* has recently been modified to allow parents to remove their children from classes they feel contradict their religious beliefs. One of the main areas of contention discussed in media and public discourse has been regarding teaching that homosexuality is “okay” in schools. This will be discussed further in the conclusion, as part of a discussion regarding the larger framework of challenging linguistic constructs.

¹⁰⁶ It is sometimes referred to as the *Halloween Letter* because of the date it was issued (Long, 2004).

¹⁰⁷ In 2005 Joseph Ratzinger was elected pope, his papal title is Pope Benedict XVI.

¹⁰⁸ This teaching, which has been used by many religious leaders and congregants to discuss religious views about homosexuality, is actually based on a quote by Mahatma Gandhi. It is not found in any Jewish or Christian religious texts but has been adopted primarily by opponents to same-sex relationships who argue against homosexuality based on their religious ideologies. For an interesting discussion about the roots of the phrase as well as responses to it, visit the United Church’s online discussion forum, Wonder Cafe, <http://www.wondercafe.ca/discussion/religion-and-faith/love-sinner-hate-sin>, accessed 14 July 2009.

¹⁰⁹ This idea is taken specifically from a media campaign in the United States. In 1998 the Truth of Christianity campaign took out full-paged ads in newspapers, with titles such as “I’m living proof that Truth can set you free” (New York Times, 13 July 1998) illustrating “formerly” homosexual individuals who had been rehabilitated as part of “National Coming Out of Homosexuality Day,” Jakobsen and Pellegrini, 2004: 81.

¹¹⁰ Because there are many different denominations of the Christian faith, it would not be practical to introduce all the various beliefs and practices. The literature I have read on the subject list baptism and acceptance of Jesus as son of God and personal saviour as generally universal prerequisites to entrance to the faith. Of course, there is debate surrounding the baptism of infants and their knowledge of the entrance to Christianity, but it is argued that their parents are accepting the responsibility for their child, until

they are old enough to understand the message of the church and participate on their own (Theissen and Merz, 1996).

¹¹¹ *Diagnostics and Statistical Manual of Mental Disorders*, IV was published in 1994, but the text revision (which removed homosexuality as a mental disorder) was produced in 2000, V is currently in consultation, estimated release date set for 2011. Example of this is provided in the following article, "One in six therapists 'has tried to cure homosexuals'" (The Telegraph, 26 March 2009).

¹¹² For thorough discussion, see Tanya Erzen's book, *Straight to Jesus: Sexual and Christian Conversions in the Ex-Gay Movement*, University of California Press, 2006.

¹¹³ Figure 1 illustrates Alfred Kinsey's continuum of sexual orientation. The continuum goes from 0 (exclusive contact with and erotic attraction to the other sex) to 6 (exclusive contact with and erotic attraction to the same sex). While these studies have been updated, it is important to keep in mind that sexual orientation does not exist as two categories of binary opposites, which has problematically allowed for the misconception that somehow homosexual people are intrinsically "different" and opposite to heterosexual people.

¹¹⁴ The challenge of polygamous unions is currently before the Supreme Court of Canada.

¹¹⁵ The challenge of analyzing individual rights versus institutional rights in depth is beyond the scope of this dissertation. I mention it here because the Hall case demonstrates a clash between individual and institution. *The Corporation* (2003) is a Canadian film that explores the nature of corporations in North America, the rights of corporations as "legal persons" versus the rights of people and asks the question, "What kind of person is [a corporation]?"

¹¹⁶ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31.

¹¹⁷ For detailed discussion and analysis of this case see Beaman, 2005.

¹¹⁸ Quoted in Lahey, 1999, however, Hon. John Crosbie states: "However generously interpreted, section 15 represents only the legal minimum that must be respected by governments."

¹¹⁹ On June 27, 2005, the Ontario Superior Court granted Marc Hall permission to discontinue his legal action against the Durham Catholic District School Board. Hall stated he lacked the funds to continue the legal battle.

Conclusion

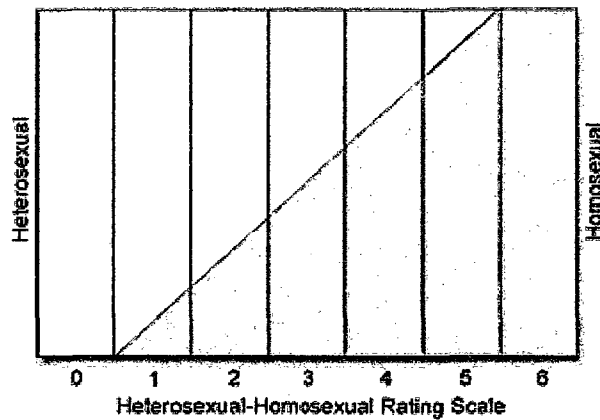
¹²⁰ Again, as stated in the introduction, it should also be made clear that not all homosexuals wish to participate in the institution of marriage, whether religiously or legally sanctioned. Like many other people, some same-sex couples oppose the involvement of the state/church in their personal lives in any context.

¹²¹ Canadian tolerance toward diversity is likely often under scrutiny, with many arguing that Canada has maintained a high standard of equality rights treatment toward non-Western, non-Christian groups. However, Canadian treatment of difference also faces scrutiny because of Michael Ignatieff's involvement in Canadian politics and his statements of the high standard Canada has as well as a result of the Bouchard-Taylor

Commission and report from Québec, specifically regarding the reasonable accommodation of religious minority groups.

FIGURE 1

Alfred Kinsey's Heterosexual-Homosexual Rating Scale



- 0 – Exclusively heterosexual with no homosexual
- 1 – Predominantly heterosexual, only incidentally homosexual
- 2 – Predominantly heterosexual, but more than incidentally homosexual
- 3 – Equally heterosexual and homosexual
- 4 – Predominantly homosexual, but more than incidentally heterosexual
- 5 – Predominantly homosexual, only incidentally heterosexual
- 6 – Exclusively homosexual

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The Kinsey Institute, <http://www.iub.edu/~kinsey/research/ak-hhscale.html>, accessed 18 June 2009.

APPENDIX A

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79

List of interveners:

Peter W. Hogg, Q.C., and *Michael H. Morris*, for the Attorney General of Canada.

Alain Gingras, for the intervener the Attorney General of Quebec.

Robert W. Leurer, Q.C., *Margaret Unsworth* and *Christy J. Stockdale*, for the intervener the Attorney General of Alberta.

Leslie A. Reaume, for the intervener the Canadian Human Rights Commission.

Cathy S. Pike and *Amy Hadibhai*, for the intervener the Ontario Human Rights Commission.

Aaron L. Berg, for the intervener the Manitoba Human Rights Commission.

Andrew K. Lokan and *Odette Soriano*, for the intervener the Canadian Civil Liberties Association.

Elliott M. Myers, Q.C., and *Rebecca Smyth*, for the intervener the British Columbia Civil Liberties Association.

James L. Lebo, Q.C., for the intervener the Canadian Bar Association.

William J. Sammon, *Kellie Siegner* and *Peter D. Lauwers*, for the interveners the Canadian Conference of Catholic Bishops and the Ontario Conference of Catholic Bishops.

Barry W. Bussey, for the intervener the Seventh-Day Adventist Church in Canada.

John O'Sullivan, for the intervener the United Church of Canada.

Kenneth W. Smith and *Robert J. Hughes*, for the intervener the Canadian Unitarian Council.

Mark R. Frederick and *Peter D. Lauwers*, for the intervener the Church of Jesus Christ of Latter-Day Saints.

R. Douglas Elliott, Trent Morris and Jason J. Tan, for the intervener the Metropolitan Community Church of Toronto.

Cynthia Petersen, Joseph J. Arvay, Q.C., Vanessa Payne and Kathleen A. Lahey, for the interveners Egale Canada Inc., Egale Couples (Melinda Roy, Tanya Chambers, David Shortt, Shane McCloskey, Lloyd Thornhill, Robert Peacock, Robin Roberts, Diana Denny, Wendy Young and Mary Teresa Healy) and B.C. Couples (Dawn Barbeau, Elizabeth Barbeau, Peter Cook, Murray Warren, Jane Eaton Hamilton and Joy Masuhara).

Martha A. McCarthy and Joanna Radbord, for the interveners the Ontario Couples (Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Carolyn Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper and Joyce Barnet), and the Quebec Couple (Michael Hendricks and René LeBoeuf).

D. Geoffrey Cowper, Q.C., for the intervener the Working Group on Civil Unions.

David M. Brown, for the intervener the Association for Marriage and the Family in Ontario.

Ed Morgan and Lawrence Thacker, for the interveners the Canadian Coalition of Liberal Rabbis for same-sex marriage and Rabbi Debra Landsberg, as its nominee.

Linda M. Plumpton and Kathleen E. L. Riggs, for the intervener the Foundation for Equal Families.

Luc Alarie, for the intervener Mouvement laïque québécois.

Noël Saint-Pierre, for the intervener Coalition pour le mariage civil des couples de même sexe.

Peter R. Jervis and Bradley W. Miller, for the interveners the Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively known as the Interfaith Coalition on Marriage and Family.

Gerald D. Chipeur, Dale William Fedorchuk and Ivan Bernardo, for the interveners the Honourable Anne Cools, Member of the Senate, and Roger Gallaway, Member of the House of Commons.

Written submissions only by *Martin Dion*.

APPENDIX B

CONGREGATION FOR THE DOCTRINE OF THE FAITH

LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS

1. The issue of homosexuality and the moral evaluation of homosexual acts have increasingly become a matter of public debate, even in Catholic circles. Since this debate often advances arguments and makes assertions inconsistent with the teaching of the Catholic Church, it is quite rightly a cause for concern to all engaged in the pastoral ministry, and this Congregation has judged it to be of sufficiently grave and widespread importance to address to the Bishops of the Catholic Church this Letter on the Pastoral Care of Homosexual Persons.

2. Naturally, an exhaustive treatment of this complex issue cannot be attempted here, but we will focus our reflection within the distinctive context of the Catholic moral perspective. It is a perspective which finds support in the more secure findings of the natural sciences, which have their own legitimate and proper methodology and field of inquiry.

However, the Catholic moral viewpoint is founded on human reason illumined by faith and is consciously motivated by the desire to do the will of God our Father. The Church is thus in a position to learn from scientific discovery but also to transcend the horizons of science and to be confident that her more global vision does greater justice to the rich reality of the human person in his spiritual and physical dimensions, created by God and heir, by grace, to eternal life.

It is within this context, then, that it can be clearly seen that the phenomenon of homosexuality, complex as it is, and with its many consequences for society and ecclesial life, is a proper focus for the Church's pastoral care. It thus requires of her ministers attentive study, active concern and honest, theologically well-balanced counsel.

3. Explicit treatment of the problem was given in this Congregation's "Declaration on Certain Questions Concerning Sexual Ethics" of December 29, 1975. That document stressed the duty of trying to understand the homosexual condition and noted that culpability for homosexual acts should only be judged with prudence. At the same time the Congregation took note of the distinction commonly drawn between the homosexual condition or tendency and individual homosexual actions. These were described as deprived of their essential and indispensable finality, as being "intrinsically disordered", and able in no case to be approved of (cf. n. 8, §4).

In the discussion which followed the publication of the Declaration, however, an overly benign interpretation was given to the homosexual condition itself, some going so far as to call it neutral, or even good. Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder.

Therefore special concern and pastoral attention should be directed toward those who have this condition, lest they be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not.

4. An essential dimension of authentic pastoral care is the identification of causes of confusion regarding the Church's teaching. One is a new exegesis of Sacred Scripture which claims variously that Scripture has nothing to say on the subject of homosexuality, or that it somehow tacitly approves of it, or that all of its moral injunctions are so culture-bound that they are no longer applicable to contemporary life. These views are gravely erroneous and call for particular attention here.

5. It is quite true that the Biblical literature owes to the different epochs in which it was written a good deal of its varied patterns of thought and expression (Dei Verbum 12). The Church today addresses the Gospel to a world which differs in many ways from ancient days. But the world in which the New Testament was written was already quite diverse from the situation in which the Sacred Scriptures of the Hebrew People had been written or compiled, for example.

What should be noticed is that, in the presence of such remarkable diversity, there is nevertheless a clear consistency within the Scriptures themselves on the moral issue of homosexual behaviour. The Church's doctrine regarding this issue is thus based, not on isolated phrases for facile theological argument, but on the solid foundation of a constant Biblical testimony. The community of faith today, in unbroken continuity with the Jewish and Christian communities within which the ancient Scriptures were written, continues to be nourished by those same Scriptures and by the Spirit of Truth whose Word they are. It is likewise essential to recognize that the Scriptures are not properly understood when they are interpreted in a way which contradicts the Church's living Tradition. To be correct, the interpretation of Scripture must be in substantial accord with that Tradition.

The Vatican Council II in Dei Verbum 10, put it this way: "It is clear, therefore, that in the supremely wise arrangement of God, sacred Tradition, sacred Scripture, and the Magisterium of the Church are so connected and associated that one of them cannot stand without the others. Working together, each in its own way under the action of the one Holy Spirit, they all contribute effectively to the salvation of souls". In that spirit we wish to outline briefly the Biblical teaching here.

6. Providing a basic plan for understanding this entire discussion of homosexuality is the theology of creation we find in Genesis. God, in his infinite wisdom and love, brings into existence all of reality as a reflection of his goodness. He fashions mankind, male and female, in his own image and likeness. Human beings, therefore, are nothing less

than the work of God himself; and in the complementarity of the sexes, they are called to reflect the inner unity of the Creator. They do this in a striking way in their cooperation with him in the transmission of life by a mutual donation of the self to the other.

In Genesis 3, we find that this truth about persons being an image of God has been obscured by original sin. There inevitably follows a loss of awareness of the covenantal character of the union these persons had with God and with each other. The human body retains its "spousal significance" but this is now clouded by sin. Thus, in Genesis 19:1-11, the deterioration due to sin continues in the story of the men of Sodom. There can be no doubt of the moral judgement made there against homosexual relations. In Leviticus 18:22 and 20:13, in the course of describing the conditions necessary for belonging to the Chosen People, the author excludes from the People of God those who behave in a homosexual fashion.

Against the background of this exposition of theocratic law, an eschatological perspective is developed by St. Paul when, in I Cor 6:9, he proposes the same doctrine and lists those who behave in a homosexual fashion among those who shall not enter the Kingdom of God.

In Romans 1:18-32, still building on the moral traditions of his forebears, but in the new context of the confrontation between Christianity and the pagan society of his day, Paul uses homosexual behaviour as an example of the blindness which has overcome humankind. Instead of the original harmony between Creator and creatures, the acute distortion of idolatry has led to all kinds of moral excess. Paul is at a loss to find a clearer example of this disharmony than homosexual relations. Finally, 1 Tim. 1, in full continuity with the Biblical position, singles out those who spread wrong doctrine and in v. 10 explicitly names as sinners those who engage in homosexual acts.

7. The Church, obedient to the Lord who founded her and gave to her the sacramental life, celebrates the divine plan of the loving and life-giving union of men and women in the sacrament of marriage. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore acts immorally.

To choose someone of the same sex for one's sexual activity is to annul the rich symbolism and meaning, not to mention the goals, of the Creator's sexual design. Homosexual activity is not a complementary union, able to transmit life; and so it thwarts the call to a life of that form of self-giving which the Gospel says is the essence of Christian living. This does not mean that homosexual persons are not often generous and giving of themselves; but when they engage in homosexual activity they confirm within themselves a disordered sexual inclination which is essentially self-indulgent.

As in every moral disorder, homosexual activity prevents one's own fulfillment and happiness by acting contrary to the creative wisdom of God. The Church, in rejecting erroneous opinions regarding homosexuality, does not limit but rather defends personal freedom and dignity realistically and authentically understood.

8. Thus, the Church's teaching today is in organic continuity with the Scriptural perspective and with her own constant Tradition. Though today's world is in many ways quite new, the Christian community senses the profound and lasting bonds which join us to those generations who have gone before us, "marked with the sign of faith".

Nevertheless, increasing numbers of people today, even within the Church, are bringing enormous pressure to bear on the Church to accept the homosexual condition as though it were not disordered and to condone homosexual activity. Those within the Church who argue in this fashion often have close ties with those with similar views outside it. These latter groups are guided by a vision opposed to the truth about the human person, which is fully disclosed in the mystery of Christ. They reflect, even if not entirely consciously, a materialistic ideology which denies the transcendent nature of the human person as well as the supernatural vocation of every individual.

The Church's ministers must ensure that homosexual persons in their care will not be misled by this point of view, so profoundly opposed to the teaching of the Church. But the risk is great and there are many who seek to create confusion regarding the Church's position, and then to use that confusion to their own advantage.

9. The movement within the Church, which takes the form of pressure groups of various names and sizes, attempts to give the impression that it represents all homosexual persons who are Catholics. As a matter of fact, its membership is by and large restricted to those who either ignore the teaching of the Church or seek somehow to undermine it. It brings together under the aegis of Catholicism homosexual persons who have no intention of abandoning their homosexual behaviour. One tactic used is to protest that any and all criticism of or reservations about homosexual people, their activity and lifestyle, are simply diverse forms of unjust discrimination.

There is an effort in some countries to manipulate the Church by gaining the often well-intentioned support of her pastors with a view to changing civil-statutes and laws. This is done in order to conform to these pressure groups' concept that homosexuality is at least a completely harmless, if not an entirely good, thing. Even when the practice of homosexuality may seriously threaten the lives and well-being of a large number of people, its advocates remain undeterred and refuse to consider the magnitude of the risks involved.

The Church can never be so callous. It is true that her clear position cannot be revised by pressure from civil legislation or the trend of the moment. But she is really concerned about the many who are not represented by the pro-homosexual movement and about those who may have been tempted to believe its deceitful propaganda. She is also aware that the view that homosexual activity is equivalent to, or as acceptable as, the sexual expression of conjugal love has a direct impact on society's understanding of the nature and rights of the family and puts them in jeopardy.

10. It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the

most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.

But the proper reaction to crimes committed against homosexual persons should not be to claim that the homosexual condition is not disordered. When such a claim is made and when homosexual activity is consequently condoned, or when civil legislation is introduced to protect behavior to which no one has any conceivable right, neither the Church nor society at large should be surprised when other distorted notions and practices gain ground, and irrational and violent reactions increase.

11. It has been argued that the homosexual orientation in certain cases is not the result of deliberate choice; and so the homosexual person would then have no choice but to behave in a homosexual fashion. Lacking freedom, such a person, even if engaged in homosexual activity, would not be culpable.

Here, the Church's wise moral tradition is necessary since it warns against generalizations in judging individual cases. In fact, circumstances may exist, or may have existed in the past, which would reduce or remove the culpability of the individual in a given instance; or other circumstances may increase it. What is at all costs to be avoided is the unfounded and demeaning assumption that the sexual behaviour of homosexual persons is always and totally compulsive and therefore inculpable. What is essential is that the fundamental liberty which characterizes the human person and gives him his dignity be recognized as belonging to the homosexual person as well. As in every conversion from evil, the abandonment of homosexual activity will require a profound collaboration of the individual with God's liberating grace.

12. What, then, are homosexual persons to do who seek to follow the Lord? Fundamentally, they are called to enact the will of God in their life by joining whatever sufferings and difficulties they experience in virtue of their condition to the sacrifice of the Lord's Cross. That Cross, for the believer, is a fruitful sacrifice since from that death come life and redemption. While any call to carry the cross or to understand a Christian's suffering in this way will predictably be met with bitter ridicule by some, it should be remembered that this is the way to eternal life for all who follow Christ.

It is, in effect, none other than the teaching of Paul the Apostle to the Galatians when he says that the Spirit produces in the lives of the faithful "love, joy, peace, patience, kindness, goodness, trustfulness, gentleness and self-control" (5:22) and further (v. 24), "You cannot belong to Christ unless you crucify all self-indulgent passions and desires."

It is easily misunderstood, however, if it is merely seen as a pointless effort at self-denial. The Cross is a denial of self, but in service to the will of God himself who makes life come from death and empowers those who trust in him to practise virtue in place of vice.

To celebrate the Paschal Mystery, it is necessary to let that Mystery become imprinted in the fabric of daily life. To refuse to sacrifice one's own will in obedience to the will of the Lord is effectively to prevent salvation. Just as the Cross was central to the

expression of God's redemptive love for us in Jesus, so the conformity of the self-denial of homosexual men and women with the sacrifice of the Lord will constitute for them a source of self-giving which will save them from a way of life which constantly threatens to destroy them.

Christians who are homosexual are called, as all of us are, to a chaste life. As they dedicate their lives to understanding the nature of God's personal call to them, they will be able to celebrate the Sacrament of Penance more faithfully and receive the Lord's grace so freely offered there in order to convert their lives more fully to his Way.

13. We recognize, of course, that in great measure the clear and successful communication of the Church's teaching to all the faithful, and to society at large, depends on the correct instruction and fidelity of her pastoral ministers. The Bishops have the particularly grave responsibility to see to it that their assistants in the ministry, above all the priests, are rightly informed and personally disposed to bring the teaching of the Church in its integrity to everyone.

The characteristic concern and good will exhibited by many clergy and religious in their pastoral care for homosexual persons is admirable, and, we hope, will not diminish. Such devoted ministers should have the confidence that they are faithfully following the will of the Lord by encouraging the homosexual person to lead a chaste life and by affirming that person's God-given dignity and worth.

14. With this in mind, this Congregation wishes to ask the Bishops to be especially cautious of any programmes which may seek to pressure the Church to change her teaching, even while claiming not to do so. A careful examination of their public statements and the activities they promote reveals a studied ambiguity by which they attempt to mislead the pastors and the faithful. For example, they may present the teaching of the Magisterium, but only as if it were an optional source for the formation of one's conscience. Its specific authority is not recognized. Some of these groups will use the word "Catholic" to describe either the organization or its intended members, yet they do not defend and promote the teaching of the Magisterium; indeed, they even openly attack it. While their members may claim a desire to conform their lives to the teaching of Jesus, in fact they abandon the teaching of his Church. This contradictory action should not have the support of the Bishops in any way.

15. We encourage the Bishops, then, to provide pastoral care in full accord with the teaching of the Church for homosexual persons of their dioceses. No authentic pastoral programme will include organizations in which homosexual persons associate with each other without clearly stating that homosexual activity is immoral. A truly pastoral approach will appreciate the need for homosexual persons to avoid the near occasions of sin.

We would heartily encourage programmes where these dangers are avoided. But we wish to make it clear that departure from the Church's teaching, or silence about it, in an effort to provide pastoral care is neither caring nor pastoral. Only what is true can

ultimately be pastoral. The neglect of the Church's position prevents homosexual men and women from receiving the care they need and deserve.

An authentic pastoral programme will assist homosexual persons at all levels of the spiritual life: through the sacraments, and in particular through the frequent and sincere use of the sacrament of Reconciliation, through prayer, witness, counsel and individual care. In such a way, the entire Christian community can come to recognize its own call to assist its brothers and sisters, without deluding them or isolating them.

16. From this multi-faceted approach there are numerous advantages to be gained, not the least of which is the realization that a homosexual person, as every human being, deeply needs to be nourished at many different levels simultaneously.

The human person, made in the image and likeness of God, can hardly be adequately described by a reductionist reference to his or her sexual orientation. Every one living on the face of the earth has personal problems and difficulties, but challenges to growth, strengths, talents and gifts as well. Today, the Church provides a badly needed context for the care of the human person when she refuses to consider the person as a "heterosexual" or a "homosexual" and insists that every person has a fundamental Identity: the creature of God, and by grace, his child and heir to eternal life.

17. In bringing this entire matter to the Bishops' attention, this Congregation wishes to support their efforts to assure that the teaching of the Lord and his Church on this important question be communicated fully to all the faithful.

In light of the points made above, they should decide for their own dioceses the extent to which an intervention on their part is indicated. In addition, should they consider it helpful, further coordinated action at the level of their National Bishops' Conference may be envisioned.

In a particular way, we would ask the Bishops to support, with the means at their disposal, the development of appropriate forms of pastoral care for homosexual persons. These would include the assistance of the psychological, sociological and medical sciences, in full accord with the teaching of the Church.

They are encouraged to call on the assistance of all Catholic theologians who, by teaching what the Church teaches, and by deepening their reflections on the true meaning of human sexuality and Christian marriage with the virtues it engenders, will make an important contribution in this particular area of pastoral care.

The Bishops are asked to exercise special care in the selection of pastoral ministers so that by their own high degree of spiritual and personal maturity and by their fidelity to the Magisterium, they may be of real service to homosexual persons, promoting their health and well-being in the fullest sense. Such ministers will reject theological opinions which dissent from the teaching of the Church and which, therefore, cannot be used as guidelines for pastoral care.

We encourage the Bishops to promote appropriate catechetical programmes based on the truth about human sexuality in its relationship to the family as taught by the Church. Such programmes should provide a good context within which to deal with the question of homosexuality.

This catechesis would also assist those families of homosexual persons to deal with this problem which affects them so deeply.

All support should be withdrawn from any organizations which seek to undermine the teaching of the Church, which are ambiguous about it, or which neglect it entirely. Such support, or even the semblance of such support, can be gravely misinterpreted. Special attention should be given to the practice of scheduling religious services and to the use of Church buildings by these groups, including the facilities of Catholic schools and colleges. To some, such permission to use Church property may seem only just and charitable; but in reality it is contradictory to the purpose for which these institutions were founded, it is misleading and often scandalous.

In assessing proposed legislation, the Bishops should keep as their uppermost concern the responsibility to defend and promote family life.

18. The Lord Jesus promised, "You shall know the truth and the truth shall set you free" (*Jn.* 8:32). Scripture bids us speak the truth in love (cf. *Eph.* 4:15). The God who is at once truth and love calls the Church to minister to every man, woman and child with the pastoral solicitude of our compassionate Lord. It is in this spirit that we have addressed this Letter to the Bishops of the Church, with the hope that it will be of some help as they care for those whose suffering can only be intensified by error and lightened by truth.

(During an audience granted to the undersigned Prefect, His Holiness, Pope John Paul II, approved this Letter, adopted in an ordinary session of the Congregation for the Doctrine of the Faith, and ordered it to be published.)

Given at Rome, 1 October 1986.

JOSEPH CARDINAL RATZINGER

Prefect

ALBERTO BOVONE

Titular Archbishop of Caesarea in Numidia
Secretary

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