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**RECOGNIZING LESBIAN OPPRESSION
AS SEX DISCRIMINATION
UNDER THE CHARTER**

Masters Thesis Submitted to Professor William Black
In Fulfillment of the Requirement
of the Master of Laws Program

Faculty of Law
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Submitted by Daphne Budge
May, 1993

 Daphne Budge, Ottawa, Canada, 1993



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I. GLOSSARY OF TERMS.

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Coming Out of The Closet: A lesbian "comes out of the closet", or "comes out", when she talks to others about being a lesbian.

Discrimination: Discrimination toward lesbians consists of acts based on unsubstantiated beliefs and biased attitudes. Prejudice expressed in discriminatory acts may occur not only at the individual level but also at the institutional and systemic levels. Institutional discrimination consists of institutional acts based on a discriminatory institutional policy. Systemic discrimination is unintentional discrimination which occurs when a prejudiced society becomes permeated with structural and cultural forms of discrimination.¹ "Adverse impact" discrimination, which is also unintentional discrimination, occurs when a neutral rule has the unintended effect of discrimination.

¹ Evelyn Kallen, Label Me Human: Minority Rights of Stigmatized Canadians (Toronto: University of Toronto Press, 1989) at 70-71.

Gay: I use the term "gay" to refer to the experiences, concerns, values and culture of gay men, that is, men who self-identify as gay or who form emotional and sexual bonds exclusively with other men. "Gay" is so frequently used to denote men only that I do not use the term "gay" to include lesbians. Lumping lesbians together with gay men renders invisible the different social contexts, histories, cultures and political priorities of lesbians. Being lesbian has a different source and meaning than being gay² and is "a profoundly female experience".³ When referring to lesbians and gay men, I will refer to "lesbians and gay men" or "the lesbian and gay communities".

Gender: Gender denotes the social meaning of biological sex categorisation. Biological sex is determined through physical assessment, usually external genitalia; gender refers to the social consequences for the individual of that assessment.

Gender Identity: Gender identity is the psychological experience of being female or male; it is the sense of oneself as belonging to one gender category.⁴

² Lyndall MacCowan, "Review of 'The "New Gay" Lesbians' by Lillian Faderman" (1987) 14:3/4 Journal of Homosexuality 173 at 174.

³ Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence (Denver, Colo.: Antelope Publications, 1980) at 22 (emphasis in original) first published in (1980) 5:4 Signs: Journal of Women in Culture and Society.

⁴ Katherine O'Donovan, Sexual Divisions in Law (London: Weidenfeld and Nicolson, 1985) at 62.

Gender Roles: Gender roles, also known as social sex-roles, refer to the physical and psychological features that are society's view of appropriate behaviour for women and men. There are six aspects of gender roles: physical appearance, personality, mannerisms, speech, interests, and habits for females and males.⁵

Heterosexism: Heterosexism means a value system that prizes heterosexuality, assumes it is the only valid expression of love and sexuality, and devalues lesbian and gay love and sexuality. It is the belief in the inherent superiority of heterosexuality and its right, therefore, to dominate. It is the belief that heterosexuality is "natural" and that homosexuality is "unnatural".

Heterosexual Privilege: The social status that attends heterosexual status is heterosexual privilege. Heterosexual privilege encompasses a vast array of assumptions and behaviours. Often, like white privilege or male privilege, it is not recognized as privilege by those who enjoy it. Heterosexual privilege means that a woman is deemed a "normal" woman. If she is married, she is respected for making the "normal" adjustment to adulthood.

Heterosexual privilege is the freedom to act without having to plan ahead. A heterosexual woman never gives a second thought to the visibility of her relationship with her husband because she and the rest of heterosexual society assume that heterosexual marriage is normal and natural. She takes her husband to office parties, introduces him to her friends, and discusses their leisure pursuits

⁵ Eli Coleman, "Assessment of Sexual Orientation" (1987) 14 Journal of Homosexuality 9 at 15.

with co-workers. For heterosexual women, none of these activities seem in the least bit out of the ordinary.

Heterosexual privilege is also the material benefits and legal rights that accrue to heterosexuals such as tax benefits and rights which flow from the marital relationship such as the ability to adopt step-children. In contrast, the non-biological parent in a lesbian relationship has no legal rights whatsoever with respect to the child borne to her lesbian partner through donor insemination, even if the child was planned by the lesbians after they began their relationship and even if both women were equally responsible for the child's care and welfare.

Homophobia: Homophobia, meaning the fear of sameness, has both popular and pathological meanings. Coined in the 1970s, its popular meaning is negative reactions and prejudices by heterosexuals toward lesbians and gay men. Its scientific meaning is a pathological (e.g., intense and irrational) fear and hatred of lesbians and gay men.⁶ Lesbians, having been defined in medical terms of pathology, should avoid nomenclature which pathologizes heterosexuals unless a true pathological hatred and fear of lesbians exists.⁷ Therefore, when referring to negative attitudes or prejudice against lesbians, I will use the terms "negative

⁶ Gregory M. Herek, "The Social Psychology of Homophobia: Toward a Practical Theory" (1986) 14 NYU Rev. L. & Soc. Change 923 at 924.

⁷ I thank Mary Eaton for this insight - that lesbians, who have themselves been medicalized, should avoid gratuitously medicalizing and pathologizing heterosexuals. Mary Eaton, "Confronting Heterosexism: Sexual Orientation, the Law, and Legal Education", a talk given at the Faculty of Law, University of Ottawa, Ottawa, Ontario, March 21, 1990.

attitudes" and "prejudice" instead of "homophobia".

Homosexual: The word "homosexual" was coined in 1869 and soon acquired negative meanings of perversity and sickness. "Homosexual" was a popular term until the gay rights movement popularized the terms "lesbian" and "gay" in the 1970s. Although the terms "lesbian" and "gay" have specific contemporary meanings which do not apply across historical boundaries, for the sake of consistency, I use the terms "lesbian" and "gay" when referring to women and men in history whose primary emotional and sexual bonds were with members of their own sex.

Despite unfortunate historical overtones of pathology and emphasis on sexual activity, the terms "homosexual" or "homosexuality" are still widely used.⁸ In my view, "homosexual" bears the same relation to "lesbian" that "negro" bears to "black".

Lesbian: The term "lesbian" has numerous definitions. There are definitions lesbians apply to themselves which are accepted by an increasing number of non-lesbians; there are neutral and apolitical (e.g., clinical) definitions; and there are heterosexist definitions of lesbians which devalue lesbianism or view it as an abnormal sexual practice.

Of the former, some emphasize characteristics of lesbian relationships such as intense emotional ties with women which may

⁸ As the quotations in the text of this thesis and footnotes will attest, the term "homosexuality" presently enjoys wide-spread use by psychologists, lawyers, and lesbian and gay activists.

or may not include sexual experiences involving genital contact;⁹ others define "lesbian" solely in political terms.

A lesbian

...gives her primary energies to women, ...[and] puts on record that she lived with or loved another women.¹⁰

"Lesbian" as a definition of a relationship means one

...in which two women's strongest emotions and affections are directed toward each other. Sexual contact may be part of the relationship to a greater or lesser degree, or it may be entirely absent. By preference the two women spend most of their time together and share most aspects of their lives with each other.¹¹

The term "lesbian" has political definitions. Lesbians are said to be "supremely liberated" women.¹²

A lesbian is the rage of all women condensed to the point of explosion. She is the woman who...acts in accordance with her inner compulsion to be a more complete and freer human being than her society...cares to allow her.¹³

[S]he is a woman who loves herself, a woman, in a culture that denigrates and despises women.¹⁴

For purposes of this paper, I define contemporary lesbians as

⁹ Lesbian feminists are exploring the limits of female eroticism, passion and desire which encompass a much wider spectrum of experiences than genital sex - and may not even include it.

¹⁰ "Introduction" in Lesbian History Group, ed., Not A Passing Phase: Reclaiming Lesbian History 1840-1985 (London: The Women's Press, 1989) 1 at 15 [hereinafter "Not A Passing Phase"].

¹¹ Lillian Faderman, Surpassing the Love of Men: Romantic Friendship and Love between Women from the Renaissance to the Present (New York: William Morrow, 1981) 17-18.

¹² Susan Elizabeth [Reese], "The Forgotten Sex: Lesbians, Liberation, and the Law" (1974-75) 11 Willamette Law Journal 354.

¹³ Ibid. at 359, quoting a paper presented in 1970 by the New York Radicalesbians in Come Out magazine, cited by D. Teal, The Gay Militants (1981) 183-184, reprinted in "The Woman Identified Woman" in Notes from the Third Year: Women's Liberation (1971) 81.

¹⁴ Ibid., citing "What Every Lesbian Should Know" (Fall 1972) Motive at 4 (special issue on lesbianism).

women whose primary emotional, intellectual, spiritual, and/or sexual bonds are with other women and who self-identify as lesbian.

Adrienne Rich coined an expanded definition of lesbianism in the phrase "lesbian continuum" which recognizes how all women enjoy the rich tapestry of woman-identified experiences that are non-sexual.

[T]he term lesbian continuum...include[s] a range — through each woman's life and throughout history — of woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman. If we expand it to embrace many more forms of primary intensity between and among women, including the rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support...we begin to grasp breadths of female history and psychology which have lain out of reach as a consequence of limited, mostly clinical, definitions of "lesbianism".¹⁵

The phrase "lesbian continuum" has been criticized by other lesbians for sweeping within the definition of "lesbian" all woman-centered activity, bonding and resistance and thereby ignoring lesbian sexuality and the specific oppression experienced by women who identify as lesbians.

Lesbianism cannot be subsumed beneath the good feelings of hand-holding sisterhood. This leaves no space to talk about specifically lesbian oppression and gives us little chance to build up the history and culture of lesbianism which we need for our pride and our survival. In this context Adrienne Rich's idea of the lesbian continuum is problematic; her argument that all women's friendships with women are some shade or gradation of lesbianism inevitably confuses attempts to analyse lesbian oppression. Women who simply have 'best friends' who are women share neither lesbian oppression nor lesbian experience. So long as we keep the definition of lesbianism open enough to include heterosexual women who love their women friends, it will be hard to articulate what is specific about the experience and oppression of lesbians and to develop the strength to fight compulsory

¹⁵ Rich, supra, note 3 at 20-21.

heterosexuality and the invisibility of lesbians.¹⁶

Self-definitions which describe lesbianism as natural or innate are referred to as "essentialist". The opposite view, that lesbianism is socially constructed, is referred to as "constructionist". Essentialism and constructionism are further described in Section III. Whereas Adrienne Rich sees love between women as primary (or "essential"), Professor Lillian Faderman sees bisexuality as essential and suggests that male domination of women causes women to respond by rejecting their bisexuality in favour of lesbianism. Faderman argues that, when women are no longer subordinate to men, bisexuality will be viewed as normal.¹⁷

The most commonly encountered heterosexist definition of lesbianism is the deviant-sexuality model which views lesbians as women with an "abnormal" sexual orientation towards women instead of the "normal" one towards men.¹⁸ Sexual liberals, on the other hand, believe that lesbianism is one of the many varieties of human sexual behaviour, not better or worse than heterosexuality, but simply a matter of personal preference in that some women happen to prefer relating sexually to other women. The liberal definition of lesbianism, which assumes that the choice to love another reflects one's personality which has been allowed to develop free of sex-role stereotyping, masks the reality that the choice for lesbians

¹⁶ Sheila Jeffreys, "Does It Matter If They Did It?", Not A Passing Phase, supra note 10, 19 at 22.

¹⁷ Faderman, supra, note 11 at 15.

¹⁸ "Introduction", Not A Passing Phase, supra, note 10 at 9-10. Relegating lesbianism to the category of abnormal sexual activity (along with bestiality and paedophilia) serves to maintain the status quo because the political dimensions of lesbianism disappear.

is not free and equal.¹⁹

The definitions which view lesbianism as neutral or abnormal construct lesbianism as primarily a sexual status meaning that a lesbian, even if she is known to be single and sexually inactive, is seen nonetheless as primarily a sexual being whereas a married woman's primary characteristic is respectability even though she is presumed to be sexual with her husband.

Once this label ("lesbian") is applied to a woman, both she and the larger world may feel that no other fact about her rivals her sexual identification. In that framework, no matter what she achieves, her sexuality will remain her primary identity.²⁰

So long as lesbianism is only a sexual practice it is not a threat. However,

[l]esbianism as an emotional universe which provides an alternative to women from slotting into the heterosexual system, on the other hand, is a threat. It is anarchic and threatens the organising principle of male supremacy.²¹

The reductionist definition of "lesbianism" as primarily a sexual activity is unsatisfactory for two other reasons. First, it trivializes lesbianism. Second, lesbianism can be expressed politically as well as personally; some women identify as lesbians because they reject heterosexual privilege, not because they have intimate sexual relations with other women.

Lesbian Community: Historically, lesbians have bonded with gay men for social and political reasons, but lesbian oppression has been

¹⁹ Ibid. at 12.

²⁰ [Reese], supra, note 12 at 357, citing B. Abbot and S. Love, Sappho Was a Right-On Woman (1972) 7.

²¹ Jeffreys, supra, note 16 at 24.

profoundly different from the experience of gay men. Gay male values and political objectives, in and of themselves, divide lesbians from gay men. For example, the emphasis on exaggerated norms of "beauty," the preoccupation with images of youth and sex, and gay humour which caricatures women (e.g., "drag") are often seen as central to gay culture and alienate lesbians because these values reinforce and celebrate the very "ideal" of being female that lesbians reject. Further, many lesbians are frustrated when gay men view themselves solely as a sexual minority and reject any analysis of male supremacy and the institution and ideology of heterosexuality. Consequently, lesbians suspect that, for gay men, the civil-rights struggle is primarily an attempt to achieve heterosexual male privilege.

Lesbians have historically been deprived of a political existence through "inclusion" as female versions of male homosexuality. To equate lesbian existence with male homosexuality because each is stigmatized is to deny and erase female reality once again. To separate those women stigmatized as "homosexual" or "gay" from the complex continuum of female resistance to enslavement, and to attach them to a male pattern, is to falsify our history. Part of the history of lesbian existence is, obviously, to be found where lesbians, lacking a coherent female community, have shared a kind of social life and common cause with homosexual men.... In defining and describing lesbian existence I would hope to move toward a dissociation of lesbians from male homosexual values and allegiances. I perceive the lesbian experience as being, like motherhood, a profoundly female experience with particular oppressions, meanings, and potentialities we cannot comprehend as long as we simply bracket it with other sexually stigmatized existences.²²

Lesbian Identity: I use this term to refer to the status of a woman who self-identifies as a lesbian. The process of self-

²² Rich, supra, note 3 at 22.

identification is discussed in Section III. See also "Sexual Orientation" in this glossary.

Lesbian "Militancy": Whereas men are praised for challenging social injustice, a lesbian is criticized for being "militant" if she walks in a march to protest the degrading treatment of lesbians in Canadian society. Ironically, a lesbian may be accused of "militancy" for merely being visible as a lesbian - if she displays on her desk at work a photograph of her lesbian partner or if she chats to heterosexual co-workers about her lesbian social activities. A lesbian who is involved in the struggle for social change and who is comfortable with herself as a lesbian when she mingles socially with heterosexuals has made a healthy adjustment to being a lesbian in a heterosexist society. However, behaviour evidencing mental health is considered aggressive and threatening by heterosexuals who think that lesbians belong in the closet, should suffer society's judgments of them without complaint, and should not "rub our noses" in it by making a public display of their lesbianism.

Patriarchy: I adopt Diane Polan's definition of patriarchy as

...a system of social relations in which men as a group have power over women as a group; it is a system that is characterized by relationships of domination and submission, power and powerlessness, based on sex.²³

Sex: Sex is both an activity and a biological status. The word

²³ Diane Polan, "Toward a Theory of Law and Patriarchy" in David Kairys, ed., The Politics of Law: A Progressive Critique (New York: Pantheon Books, 1982) 294 at 302, note 1.

"sex", as an activity, will be used in the traditional patriarchal sense to signify both the complex psychological stimuli and the genital stimulation which can lead to orgasm. "Sex" will not refer to non-genital acts such as kissing and embracing or emotional experiences of eroticism, passion and desire which include feelings of intense closeness.

Sexual Orientation: The term "sexual orientation" emphasizes and perpetuates the notion that sexual activity is central to the experience of being lesbian and suggests that one's status as a lesbian is immutable. The term "sexual orientation" ignores the complexity and ambiguity inherent in the dichotomy lesbian/heterosexual and clashes with theories of sexual identity as socially constructed and with psychological studies involving lesbian identity which are discussed in Section III, subsection H. Consequently, when referring to the status of a woman who identifies as lesbian, I use the term lesbian identity instead of lesbian sexual orientation. I use "sexual orientation" when referring to sexual orientation as a legal category or when referring only to sexual object choice.

"Lesbian identity" encompasses the personal, social and political aspects of being lesbian - "personal" being broadly defined as the intellectual, emotional, spiritual and sexual aspects of a lesbian's relationships with other lesbians.

Many writers use the terms "lesbian identity" and "lesbian sexual orientation" interchangeably. However, a woman with a lesbian sexual orientation chooses women for sex partners, bonds emotionally with other women, or has erotic fantasies about women.

But she differs from a woman who, in addition, self-identifies as lesbian and therefore has a lesbian identity.

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A. Introduction.

The injustice of sexism is not irrationality; it is domination.²⁴

The legal status of lesbians in Canada today can be compared to the legal status of women in Canada 100 years ago when numerous laws existed which blatantly discriminated against women. Just as a concept of formal equality was used in the past to overturn laws which explicitly discriminated against women, Canadian lesbians can benefit today by relying on formal equality. For example, equality claims under the Charter which are based on sexual orientation and which argue for equal treatment (formal equality) will likely succeed in overturning explicitly discriminatory immigration laws.

The benefits, however, of using a contextualized equality model far outweigh the short-term benefits of formal equality based on the legal category of sexual orientation. Therefore, I propose in this thesis that lesbians frame their equality claims under section 15 of the Canadian Charter of Rights and Freedoms²⁵ using

²⁴ Katherine O'Donovan, "Engendering Justice: Women's Perspectives and the Rule of Law" (1989) 39:2 University of Toronto Law Journal 127 at 140.

²⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canadian Act 1982 (U.K.) 1982, c.11 [hereinafter "the Charter"].

the numerated category of sex rather than basing equality claims on the unenumerated category of sexual orientation.

Women's struggle for equality is a struggle to maximize women's freedom, autonomy and choice²⁶ and against rigidly and arbitrarily assigned roles. Feminists have long recognized that male resistance to female autonomy is often framed in essentialist terms - that women occupy traditional roles because of nature and not because women's roles are imposed on them to maintain male authority over women.

Analysing traditional female roles and working to expand women's roles has been the central project of feminism. Sex-discrimination analysis can recognize the socially constructed nature of women's traditional roles and the arbitrary assignment of social, gender or sexual roles based on biological sex; it can expose the sexist, heterosexist and patriarchal assumptions which enforce these roles and stigmatize and marginalize lesbians in Canadian society; and it can recognize the political characteristics of lesbian existence.

Sexual orientation, as a legal category, has gained popular acceptance as the vehicle which explicitly addresses the equality rights of lesbians and gay men. However, sexual-orientation discourse accepts the majority's viewpoint that lesbianism is primarily a sexual activity which is either an innate and unchangeable characteristic setting lesbians apart as a distinct

²⁶ Eisenstein notes that all feminisms contain core values taken from liberalism such as "the demand for equality, freedom of individual choice, and the recognition of woman as an autonomous being". Zillah Eisenstein, Feminism and Sexual Equality: Crisis in Liberal America (New York: Monthly Review, 1984) at 12.

species of person or a freely made choice which is neither more nor less moral and normal than heterosexuality. However, there are other numerous, contradictory, and sometimes more compelling considerations that lead a woman to identify as lesbian. Sexual-orientation analysis masks the sources of lesbian oppression by assuming that it is an issue of sexual diversity which is personal and apolitical, thereby ignoring how lesbian oppression serves male domination.

The appeal of sexual orientation as a legal category is tied to the appeal of the idea that society should not punish persons for a personal trait over which they have no control. Instead society should be tolerant of innate personal differences. The unfairness of discrimination based on an irrelevant and immutable trait is a concept that is by now very familiar; following well-established anti-discrimination principles, lesbians argue that heterosexuals should accept them as equals the same way that whites should accept non-whites and men should accept women as equals.

The second justification for adopting the legal category of sexual orientation is that, when lesbianism is portrayed as natural and innate for those who are lesbian, the debate more easily sidesteps counter arguments based on society's right to legislate morality. Morality arguments emerge with greater force when lesbianism is presented as a matter of personal choice.

Third, immutability jives with many women's experience of the psychological, emotional, spiritual and sexual "fit" that they experience in their relationships with another woman. Lesbian identity is often experienced as something which just is, not as something chosen.

Fourth, the sexual-orientation model is popular because lesbians themselves have come to accept sexual-orientation discourse as true, to fit themselves into the legal category, and therefore to see themselves as members of a disadvantaged sexual minority.

Conceptualizing lesbian oppression as discrimination based on sexual orientation makes it possible for a lesbian to mentally compartmentalize her oppression as a lesbian as separate and distinct from her oppression as a woman. Thus she will experience her status as a woman as her primary oppression and her oppression as a lesbian as secondary. I argue that the oppression of a lesbian as a lesbian is embedded in, not separate from, her oppression as a woman because all women are oppressed by the false consciousness and male violence which maintain the ideology and institution of heterosexuality. Analysing lesbian oppression under the rubric of sex discrimination can recognize this unity.

Sex discrimination, as a legal theory, is better suited to acknowledge the institution of heterosexuality as one of the enforced conditions under which women live subject to men, to expose the historical roots of lesbian oppression, to focus the analysis on the patriarchal construction of "masculinity" and "femininity" that perpetuates male authority over women, and to acknowledge the social and psychological functions of prejudice and male violence in maintaining "masculinity".

My central argument - that lesbian oppression should be addressed as sex discrimination under the Charter - is based on my view that lesbian oppression is a social construction designed to serve the patriarchy by maintaining traditional social, gender and

sexual roles for women. The dehumanizing stigma attached to lesbianism is a social construction which maintains male domination of women and is accomplished through the ideology of heterosexuality expressed in a myriad of institutional and social practices including religion, science, law, literature and the media.

In this section, I briefly summarize how women's subordination in Canadian society is maintained and reinforced by the institution and belief system of heterosexuality and its role in normalizing that oppression. I also explore the psychological and social functions of male violence in enforcing heterosexual arrangements for all women by confining women to restrictive social roles, propping up "masculinity", perpetuating male authority over women, and enforcing "women's total emotional, erotic loyalty and subservience....to men".²⁷ Although lesbians are oppressed by the invisibility and isolation imposed on them by society's denial of lesbian existence, lesbians are also oppressed by blatant forms of discrimination, including explicitly discriminatory laws, and by the closet which is the protective mechanism lesbians use to avoid blatant discrimination. Drawing on psychological data, I describe the negative effects of the closet on self-esteem and on a lesbian's relationships, particularly her relationship with her partner.

In Section III, the history of lesbian oppression demonstrates how male anxieties and attitudes about women's independence and non-conformity have been expressed by male-dominated institutions

²⁷ Rich, supra, note 3 at 9-10.

which have defined, controlled and punished nonconforming women thereby maintaining and reinforcing compulsory heterosexuality. This history shows how lesbian oppression - the church's construction of lesbian acts as sin, medical science's construction of lesbianism as illness, and the state's construction of lesbian acts as criminal - has coerced female conformity with traditional social, gender and sex roles and should therefore be recognized as sex discrimination.

The history of lesbian oppression is important for a second reason. It shows how the category "sexual orientation" has gained currency as the legal model which is specific to discrimination against lesbians and gay men as a sexual minority. History demonstrates (1) why lesbians are grouped with gay men as a minority group, (2) how definitions of lesbianism which emphasize sexual activity have fostered lesbians being viewed as members of a sexual minority, (3) how using the category of sexual orientation allowed lesbians and gay men to fit themselves within existing anti-discrimination discourse which prohibited discrimination based on traits such as race and sex, and (4) why the sexual-orientation model, which is based on the assumption that lesbianism is a trait that is merely different yet morally neutral emerged as the legal category that is specific to lesbian and gay oppression.

I discuss lesbian oppression in history by tracing that history in the broadest sense, starting with lesbianism in Greece and proceeding through historical periods when lesbianism was successively constructed and managed as sinful, criminal and then sick. This history encompasses "passing" women, many of whom were executed for living outside male authority, rejecting male control,

dressing as men, and adopting what was thought to be the male role in sex. Also included is a discussion of the tradition of romantic friendship between women who conformed to their assigned social, gender and sexual roles and had passionate friendships which were considered completely normal. Romantic friendship was transformed by the pronouncements of the early psychiatrists that love between women was sick. The development of psychiatric, sociological, and psychological models of lesbianism are included in this chronology.

Section IV deals generally with the history of women's unequal status in Canada. I trace the emergence of classical liberalism and how male supremacy and the ideology of heterosexuality are assumed at the foundation of liberal political and legal theory, especially the concepts of formal equality and the public/private split. I review the development of Canadian human-rights consciousness, including the effects of post-liberal thinking, leading to the enactment of human rights codes, the Canadian Bill of Rights, and the Canadian Charter of Rights and Freedoms.

In Section V, I discuss recent Supreme Court of Canada equality decisions evidencing a commitment to a purposive, contextual and results-oriented interpretation, survey feminist critiques of both liberal political and legal theory (especially the public/private distinction), and discuss feminist models of equality and critiques of rights-assertion. I emphasize how separate-spheres ideology influenced women's legal status and why the public/private split maintains lesbian oppression.

In Section VI, I discuss Canadian cases brought by lesbians and gay men which were framed as discrimination based on sexual orientation, family status, and/or sex discrimination. Although,

in the past, Canadian courts have rejected claims based on sex discrimination, feminist equality theory offers hope that sex-discrimination analysis may succeed in the future as the strong analysis for addressing lesbian oppression under the Charter.

Section VII is the conclusion.

B. Women's Subordination in Society.

Feminists seek to change the historic use of power as a mechanism to exclude, marginalize, or degrade women, and simultaneously to treat the very exclusion and marginalization it has brought about as a natural or objective judgment that is true and valuable.²⁸

Women constitute 51% of the population. Women are exploited, dominated, and controlled by men, male-centered belief systems and male-dominated institutions. Women do more than half of the world's work, control a minuscule percentage of the world's wealth, and perform almost all of the world's unpaid domestic labour. In Canada, a disproportionate number of families living in poverty are headed by women; women represent a disproportionately large share of the elderly poor; a shocking percentage of girls will be victims of male sexual violence before they reach majority; and an equally alarming percentage of women will be raped, sexually abused, or battered by men at some time in their lives. Nowhere has patriarchy so effectively denied women liberty, autonomy and self-determination than in the sphere of reproductive and sexual choice.

The changes most commonly considered necessary to address women's subordination to men are

- (1) freedom from male violence, including freedom from the violence of degrading depiction of women as sexually subjugated and dominated by men,
- (2) income-support programmes to allow women to escape from abusive husbands without moving into poverty,
- (3) women's control of their own sexuality and

²⁸ Martha Minow, "Beyond Universality" (1989) The University of Chicago Legal Forum (Issue on "Feminism in Law: Theory, Practice and Criticism") 115 at 120.

- reproductive function (including the right to terminate pregnancy),
- (4) state-support of the economic costs of raising children (e.g., universal, state-supported day-care),
 - (5) equal responsibilities for men and women in the home,
 - (6) unrestricted participation of women in the labour force with equal pay for work of equal value,
 - (7) pension programmes that adequately provide for older women regardless of earnings in the labour force,
 - (8) education and consciousness raising for boys/men which shows them how socialization into masculinity abuses them, how their behaviour is oppressive, and how to directly experience emotions (e.g., grief, rage and love) which their need for masculinity denies, and
 - (9) education and consciousness raising for girls/women to show them how their socialization teaches an unhealthy passivity which cheats them of their dreams and achievements and instills a willingness to tolerate abuse from men.

The structures that perpetuate this gross inequality of men and women are the institutions and belief systems of liberal political theory, organised christian religions, and the ideology and institution of heterosexuality which teach that male authority over women's consciousness, activities and bodies is natural and

inevitable, hence unchangeable. These institutions and belief systems glorify the male role as essentially a project of self-realization through domination and control of women, children, other men and nature. Self-realization for women means helping men (and children) fulfill their needs.

Our very definitions of "masculinity" and "femininity" are based on the notion that women must function as nonthreatening helpmates and ego builders to men lest men feel castrated and weakened.²⁹

The first premise of this thesis is that social, gender and sexual roles are "imposed, managed, organized, [and] propagandized by force"³⁰ on the basis of biological sex, without reference to individual talents and preferences. This is the central function of the ideology and institution of heterosexuality – both to require arbitrary assignment of rigid roles and to hide and normalize the process. The assumptions which support the ideology of heterosexuality and the male violence which enforces heterosexual arrangements for all women are the subjects discussed in subsections C. and D. respectively. Finally, subsection E explains how many lesbians respond to the climate of violence and discrimination by retreating to the safety of the closet.

²⁹ Harriet Goldhor Lerner, The Dance of Anger (New York: Harper & Row, 1986) 96.

³⁰ Rich, supra, note 3 at 20.

C. The Ideology and Institution of Heterosexuality.

The test of strength of any ideology is the extent to which its basic presuppositions remain not merely unquestioned but literally unrecognized. The more such assumptions appear to be simply a part of the fabric of fact, the stronger the intellectual hold of the ideology they support and the greater the difficulty of changing the practices arising out of it.³¹

The ideology of heterosexuality presumes that heterosexuality is fulfilling, natural and pleasurable for women. The institution of heterosexuality is the organising principle of male supremacy.

Heterosexuality as an institution, not just a sexual preference, exists to subordinate women and wrest from them their physical and emotional energies for men's use. To create this political institution women...are deliberately conditioned into heterosexuality by being deluged with heterosexual images and role models (lesbian images and models being systematically excluded or distorted), and by being taught that heterosexuality is normal and natural.³²

A simple illustration of the institution of heterosexuality is the existence of seventy-nine statutes, in Ontario alone, which govern the economic and social relations of heterosexual life-partner relationships.³³

Heterosexuality is...an institution documented by written statutes and is a cultural universe sustained by, and signified in, countless rituals, histories, art, literature, and religious and social ideologies. Trying to pretend that heterosexuality or homosexuality are (sic) simply, or mainly, sexual practices, is to ignore politics entirely. There is now an enormous and growing body of published work written by feminist theorists:

³¹ Lorene M. G. Clark, "Politics and Law: The Theory and Practice of Male Supremacy; or, "It Wasn't God Who Made Honky Tonk Angels" in David N. Weisstub, ed., Law and Policy (Toronto: Osgoode Hall, 1976) 35.

³² "Introduction", Not A Passing Phase, supra, note 10 at 13.

³³ Mary Eaton, "Lesbians and the Law" in S.D. Stone, ed., Lesbians in Canada (Toronto: Between the Lines, 1990) 109 at 110, citing Andrews v. Ontario (Minister of Health) (1988), 64 O.R. (2d) 258 at 261 (H.C.J.).

historians, philosophers, sociologists, literary critics and others, which explains and illustrates the ways society is organised to conform to heterosexual stereotypes. Heterosexuality, it becomes clear, is the organising principal of male supremacy.³⁴

The presuppositions supporting the ideology and institution of heterosexuality are so embedded in Canadian society, institutions and law because these presuppositions, assumed to be rooted in nature, are accepted as fact and therefore go unquestioned. "Heterosexuality is natural and inevitable for women" is an essentialist position, a false conviction that the belief system of heterosexuality and the social practices which promote and maintain it have evolved from what is innately and irreducibly female.

Adrienne Rich describes the institution and belief system of heterosexuality, what she refers to as "compulsory heterosexuality", as the "law of male-sex right to women"³⁵ which is maintained and enforced by "wrench[ing] women's emotional and erotic energies away from themselves and other women and from woman-identified values".³⁶ Compulsory heterosexuality prevents women from liberating themselves from male domination and forces countless women "to fit mind, spirit and sexuality into a prescribed script" and results in "blocked options, broken connections, [and] lost access to self-definition freely and powerfully assumed".³⁷

Heterosexual ideology characterises alternative forms of

³⁴ Jeffreys, supra, note 16 at 24.

³⁵ Rich, supra, note 3 at 17.

³⁶ Ibid. at 9-10.

³⁷ Ibid. at 29.

sexuality as sinful, criminal and sick, thereby setting up heterosexuality as the only socially acceptable, normal and natural form of intimate adult relationship. Stigmatizing lesbian desire is functional for male domination of women because it supports the myth of heterosexual relations as inevitable. Lesbianism is

...the unthinkable alternative, the nonchoice of heterosexuality...To be wrong, so the other can be right; to be bad, so the other can be good; to be unnatural, so the other can be natural...³⁸

Characterising lesbianism as the "unthinkable alternative" is a strategy to divide women. Yet the means by which the ideology and institution of heterosexuality are maintained, including brutality and the control of consciousness, "suggest that an enormous potential counterforce is having to be maintained".³⁹

So many of the pressures of the patriarchal system push toward consciousness the sense of something wrong, bad, not natural about its arrangements, that the need to demonstrate the opposite, and divide women, is constant - and growing...⁴⁰

Rich disputes the innateness of heterosexuality for women. She argues that woman-bonding and lesbianism are natural and primary for women. She reasons that the concept of the innateness of female heterosexuality is a manifestation of the male desire to control women sexually. Rich links this desire for control to the male fear that women will not take men seriously and will ignore them.⁴¹

³⁸ Pamela Farley, "Lesbianism and The Social Function of Taboo" in Hester Eisenstein, and Alice Jardine, eds., The Future of Difference (Boston: G.K. Hall & Co., 1980) 267 at 270.

³⁹ Rich, supra, note 3 at 12.

⁴⁰ Farley, supra, note 38 at 270.

⁴¹ Rich, supra, note 3 at 15.

Rich relies on the work of Nancy Chodorow who maintains that woman-bonding is essential, intrinsic and primary for women, in part because mothering by women affects childhood psychological development so that both sexes are primarily woman-identified.⁴² Thus, heterosexual relationships are usually secondary for women whereas heterosexual relationships are primary for males because they recreate the male-female model of childhood.

Chodorow implies that heterosexuality fragments "the erotic from the emotional in a way that women find impoverishing and painful".⁴³ Women, therefore, have learned to deny that their relationships with men lack richness and intensity. Chodorow believes that women fill the emotional void by bearing children to recreate the intense mother-child relationship.⁴⁴

Professor Lillian Faderman also disputes the essentialism of female heterosexuality but proposes that bisexuality is the natural sexual status for women.

[I]n a utopia men would not claim supremacy either in social or personal relationships, and women would not feel that they must give up a part of themselves in order to relate to men. Women with ambition and strength and a sense of themselves would have no reason to see men as the enemy out to conquer and subdue them. Nor would there be any attempt to indoctrinate the female with the notion that to be normal she must transfer the early love she felt for her mother first to her father and then to a father substitute — a man who is more than she is in all ways: older, taller, better educated, smarter, stronger. Women as well as men would not select their love objects on the basis of sexual politics, in surrender or in reaction to an arbitrary heterosexual ideology. They would choose to love another only in

⁴² Ibid. at 7-9, citing Nancy Chodorow, Reproduction of Mothering (Berkeley: University of California Press, 1978).

⁴³ Ibid. at 8-9.

⁴⁴ Ibid. at 8.

reference to the individual needs of their own personalities, which ideally had been allowed to develop untrammelled and free of sex-role stereotyping. Potential or actual bisexuality, which is today looked on by lesbian-feminists as a political betrayal and by heterosexuals as an instability, would be normal, both emotionally and statistically.⁴⁵

Regardless of whether lesbianism, bisexuality or heterosexuality is innate and natural for some or all women, the assumption of female heterosexuality "is an enormous assumption to have glided so silently into the foundations of our thought".⁴⁶ The assumption of female heterosexuality is tenable

...partly because lesbian existence has been written out of history or catalogued under disease; partly because it has been treated as exceptional rather than intrinsic; partly because to acknowledge that for women heterosexuality may not be a "preference" at all, but something that has had to be imposed, managed, organized, propagandized, and maintained by force, is an immense step to take if you consider yourself freely and "innately" heterosexual. Yet the failure to examine heterosexuality as an institution is like failing to admit that the economic system called capitalism or the cast system of racism is maintained by a variety of forces, including both physical violence and false consciousness.⁴⁷

The basic presuppositions of the ideology of heterosexuality, which go largely unquestioned and unrecognized, appear so much as part of the fabric of fact that the ideology of heterosexuality and the practices which arise from it will be extremely difficult to change. Many of these presuppositions assume that biology and nature play decisive roles. These basic presuppositions can be summed up as follows:

- (1) women are innately and inevitably sexually attracted to

⁴⁵ Faderman, supra, note 11 at 415.

⁴⁶ Rich, supra, note 3 at 9.

⁴⁷ Ibid. at 20.

men,⁴⁸

- (2) women need men for psychological completion,
- (3) a woman's sexual experiences are the core experiences that define her,
- (4) important relationships are necessarily sexual and other relationships are secondary or inferior,⁴⁹
- (5) only heterosexual relationships are normal for women even if they are emotionally unsatisfying and physically violent,
- (6) the heterosexual nuclear family is the basic family unit,
- (7) heterosexual marriage is the crowning achievement of a woman's life,
- (8) a woman's highest fulfillment is in her role as wife and mother,
- (9) women need men for economic support and as protectors,
- (10) women who do not bond heterosexually lead pathetic, lonely, and meaningless lives,
- (11) women who bond with women are man-haters, and

⁴⁸ In adolescence, both girls and boys learn that "the locus of sexual power is male" and that, once triggered, the male sex drive is uncontrollable. For both boys and girls, sexuality means the eroticization of female submission to the uncontrollable male sex drive. For girls, this is part of their indoctrination that men are above women in credibility, status and importance. Ibid. at 17.

⁴⁹ Because the ideology of heterosexuality views sex as the organizing experience for important relationships, self-described heterosexual women are prevented from acknowledging that their intense emotional yet asexual bonds with other women are the sustaining relationships in their lives. Women who do acknowledge that their intense yet asexual relationships with other women are the most sustaining are forced to consider both the sexual implications of those relationships and the degrading meanings ascribed to those sexual implications.

(12) "lesbian existence is a mere refuge from male abuses rather than an electric and empowering charge between women".⁵⁰

These largely unexamined assumptions constitute the false consciousness which preserves the institution of heterosexuality under which women live subject to male authority.

The next subsection explores the psychological and social functions of male violence in enforcing heterosexual arrangements for all women by confining women to restrictive social roles, propping up "masculinity", and enforcing women's emotional, erotic loyalty and subservience to men.

⁵⁰ Rich, supra, note 3 at 30.

D. The Psychological Function of Violence for Men: The Enforcement of Heterosexual Arrangements for All Women.

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1. Introduction.

a. Male Violence Toward the Self 34
b. Male Violence Toward Other Men. 34
c. Violence Against Women 36

Male domination, which is embedded in and plays an important part in the political and ideological stability of society, can be changed by no less than the radical transformation of society through fundamental economic, social, political, psychological, and legal changes. Male domination is expressed in its most extreme form in male violence which is often tolerated, excused, and even glorified. Violence in the form of fighting is excused. War, which is glorified, is considered a normal form of conflict resolution. Also considered normal, although reprehensible, is rape. Violence is tolerated in the devastation and ruin of colonial expansion and in the conquest of the environment.

Male violence maintains male dominance by enforcing heterosexual arrangements for all women. Through violence men maintain their authority over women and prop up their masculinity because violence "proves" masculinity. Men are also reassured of their masculinity by having their masculinity constantly affirmed in gendered relationships with women. The causes and psychological functions of male violence are briefly analysed below.

Michael Kaufman believes violence has become so pervasive that it is institutionalized "in the operation of most aspects of

social, economic, and political life" and will require "a dismantling of the social feeding ground of violence: patriarchal, heterosexist, authoritarian, class societies".⁵¹

Kaufman analyses male violence as a triad of violence against women, against other men, and against themselves. He traces the development of masculinity in males from childhood when a boy compensates for the prolonged experience of childhood powerlessness and insecurity by repressing his desire to be nurtured, by strongly identifying with male figures, and by embracing "the project of controlling himself and controlling the world" through accentuating activity and repressing passivity or powerlessness.⁵² The psychological mechanisms underlying male violence are the "surplus repression" of sexual and emotional desires and the transformation of the resulting violence into emotionally gratifying experiences.⁵³ Although masculinity is already established for males by the age of six, it is during adolescence that males develop an adult sense of masculinity.

In adolescence the pain and fear involved in repressing "femininity," and passivity, start to become evident. For most of us, the response to this inner pain is to reinforce the bulwarks of masculinity. The emotional pain created by obsessive masculinity is stifled by reinforcing masculinity itself.⁵⁴

⁵¹ Michael Kaufman, "The Construction of Masculinity and the Triad of Male Violence" in Michael Kaufman, ed., Beyond Patriarchy: Essays By Men on Pleasure, Power, and Change (Toronto: Oxford University Press, 1987) 1 at 2.

⁵² Ibid. at 9, 11.

⁵³ Ibid. at 2, citing Herbert Marcuse, Eros and Civilization (Boston: Beacon Press, 1975; New York: Vintage, 1962); Gad Horowitz, Repression (Toronto: University of Toronto Press, 1977).

⁵⁴ Kaufman, supra, note 51 at 12.

Education and consciousness raising for boys and men can give them an awareness of their oppressive behaviour, strengthen them to discuss their repressed feelings, and provide space for and encourage them to directly experience grief, rage and love – emotions that their need for masculinity denies.

a. Male Violence Toward the Self.

Male violence to self represents the constant vigil against the feelings and behaviours men associate with passivity such as tenderness, embarrassment and fear. Men become pressure cookers and end up feeling so distanced from themselves that they transform maleness into a thing instead of an essential part of their humanity.⁵⁵

b. Male Violence Toward Other Men.

The traditional definition of masculinity requires exclusive heterosexuality which demands the repression of gay attraction. Because there are no models for active erotic love among males, gay erotic desire is synonymous with passivity, femininity, loss of power and control, and castration.⁵⁶

Men deal with their gay desires by repression, derivative pleasures (e.g., body building, male comradeship, religious rituals, war and sports) and either occasional overtly gay eroticism or gay fantasies as shown in Kinsey's sex research.

Freud theorizes that men cannot avoid what they repress and

⁵⁵ Ibid. at 22.

⁵⁶ Ibid. at 19.

therefore all highly charged male activities only serve to reawaken repressed gay desires.⁵⁷ Kaufman identifies male bonding and patriarchal power as a means for experiencing male closeness and attraction.⁵⁸ But the closer the bonds, the greater the need to repress gay desire. This explains the obsessively anti-gay attitudes held by the military and by police agencies which are bastions of male solidarity.

[T]ightly-knit groups of men, who need both to deny any sexual component to their bonding and who can increase their solidarity...turn[] violently on "fags" or "queers" who are defined as completely alien.⁵⁹

Kaufman sees negative attitudes toward gay attraction as a coping mechanism:

Homophobia is a means of trying to cope, not simply with our unsuccessfully repressed, eroticized attraction to other men, but with our whole anxiety over the unsuccessfully repressed passive sexual aims, whether directed toward males or females.⁶⁰

Negative attitudes toward gay attraction are more than an individual response; they are a social construction that is essential to the acquisition and maintenance of masculinity. Masculinity depends on the excessive denial of gay attraction, a denial that is expressed in male violence against other men which

...is one of the chief means through which patriarchal society simultaneously expresses and discharges the

⁵⁷ Ibid. at 20.

⁵⁸ Ibid. at 21.

⁵⁹ "Fear and Loathing," (November, 1989) The NI Internationalist: Pride and Prejudice: Homosexuality 18 at 19. Interestingly, in Sparta in ancient Greece it was thought that sexual love between men promoted courage in battle. Yves Caron, "The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy" (1969) 15 McGill Law Journal 9 at 43, note 101.

⁶⁰ Kaufman, supra, note 51 at 21.

attraction of men to other men.⁶¹

c. Violence Against Women.

Masculinity is "terrifyingly fragile" because it is not real in the same sense that biological sex is real and yet ideology equates them. A male's insecurity about his masculine credentials is soothed by having his masculinity constantly nurtured and affirmed in gendered relationships with women, hence the male interest in preserving rigid heterosexual roles. Another way to affirm masculinity is to "prove" it through violence because aggression is equated with masculinity.

[G]iven the fragility of masculine identity and the inner tension of what it means to be masculine, the ultimate acknowledgement of one's masculinity is in our power over women.⁶²

Males tend to simultaneously hide and express feelings through violence. Fears of weakness and passivity in their relationships with other men are one reason men are so excessively dependent on women for their emotional needs. Men experience the build-up of anxiety and hostility which tend to be discharged in unthreatening environments, that is, in their relationships with women whom they experience as less powerful and who are themselves operating within a pattern of surplus passivity resulting from the belief that femininity equates with passivity.⁶³ Patterns of male violence,

⁶¹ Ibid. at 21.

⁶² Ibid. at 22.

⁶³ Ibid. at 11, 17. Kaufman views the acquisition and maintenance of masculinity as dehumanizing to men. In marked contrast with Kaufman's male psychology are George Gilder and Roger Scruton's theories which support traditional gender roles. Gilder believes that biology is destiny, men are inherently violent and

and how they maintain male domination, should be acknowledged and emphasized in legal discourse. Using sex-discrimination as the model for lesbian Charter claims can employ insights about how male violence functions to maintain heterosexual relations and male domination.

2. The Causes and Psychological Function of Male Violence Against Lesbians.

One out of every ten lesbians experiences some form of violence (being punched, hit or kicked) because of prejudice.⁶⁴ Individual prejudice against lesbians is caused by acceptance of negative stereotypes based on ignorance of lesbian existence, by fear of one's own latent attraction to persons of the same sex, or by insecurity in one's role as a man or a woman.⁶⁵ A person's prejudiced attitudes – whether caused by stereotypes, ignorance or insecurity – serve different psychological functions which can

aggressive, and

...female sexuality domesticates and civilizes men...Male dominance and heterosexuality is (sic) essential to familial stability, he argues, "because of the long evolutionary experience of the race in hunting societies, the provider role accords with the deepest instincts of men. When they are providing for women and protecting them, men feel masculine and sexual...

Sylvia Law, "Homosexuality and the Social Meaning of Gender" (1988) 2 Wisconsin Law Review 187 at 219, citing George Gilder, Sexual Suicide (1973) at 35. Roger Scruton, a moral philosopher, argues that gender roles are not biologically determined but society nonetheless has a strong interest in them because erotic attraction (and thus family stability) depends on extreme gender distinctions. Ibid. at 220.

⁶⁴ Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law (New York: Columbia University Press, 1988) 27-28.

⁶⁵ Herek, supra, note 6 at 923.

influence the person's reaction to personal contact with lesbians. Those who most strongly condemn same-sex intimate relationships usually hold strong beliefs that men and women should adhere to traditional sexual and social roles.⁶⁶

Negative attitudes toward lesbians can be classified as either experiential or expressive. Experiential attitudes are what people use to interpret the world based on actual experiences; positive attitudes will result from positive experiences with lesbians provided the contact is close and ongoing, there are shared beliefs and values, and conditions exist which foster cooperation and shared values. People with no personal social experiences with lesbians are far more apt to accept degrading stereotypes as the truth about lesbians.

In contrast to experiential attitudes, are expressive attitudes which focus on the goals achieved in expressing negative attitudes. Three types of expressive attitudes have been identified: value-expressive, social-expressive, and defensive attitudes.⁶⁷

The violence generated by value-expressive attitudes arises from a value system that condemns lesbianism as perversity. Male violence against lesbians discharges male anxiety about same-sex sex acts as "perverse", wrong, bad and unnatural, defined as the

⁶⁶ Law, supra, note 63 at 221, citing Dunbar, Brown and Amorosco, "Some Correlates of Attitudes Towards Homosexuality" (1973) 89 Journal of Social Psychology 271; Krulewitz and Nash, "Effects of Sex Role Attitudes and Similarity on Men's Rejection of Male Homosexuals" (1980) 38 Journal of Personality & Social Psychology 67; Laner and Laner, "Personal Style of Sexual Preference: Why Gay Men Are Disliked" (1979) International Review of Modern Sociology 215.

⁶⁷ Herek, supra, note 6 at 927-928.

choice of forbidden sexual partners, the choice of the "active" rather than the "passive" role in sex, and the rejection of men and male authority. Lesbianism as perversity stems from the belief that, rather than supporting traditional patriarchal "family values", lesbians lead licentious lives of self-indulgence and gratification.

Homosexuality is viewed as perverse not because it destroys human life but because it deviates from the arbitrarily defined norm – heterosexuality. As a result, for those holding these [anti-lesbian and gay] values, heterosexual violence is less offensive against the moral order than...homosexual love...[T]he violation of nature comes from the meaning of being perverse – not from being violent, evil, or dangerous.

Accordingly, sexual perversions are those sexual acts or experiences that are not heterosexual. Rape is predominantly heterosexual, so it is not perversion; but two women tenderly making love is a perversion. The glorification of rape in Clockwork Orange was heterosexual, but Radclyffe Hall's absorbing, tender novel of lesbian love, The Well of Loneliness, was declared obscene. Incest is predominately heterosexual, but, as evil as it seems to many, it is not in these terms considered a perversion. It is in fact socially sanctioned. Wife battery is heterosexual, but one court after another declares a woman unfit as a mother because she chooses to live her life with another woman.⁶⁸

Lesbianism as perversity is fed by popular misconceptions about lesbians as predators of the young. Despite the fact that the overwhelming percentage of child molestations are perpetrated by heterosexual men, lesbians are nonetheless linked with gay men who are presumed to be pedophiles. Sometimes the image of the lesbian as child molester arises from the imagined aggression of lesbians as man-like and therefore prone to seduce the unwary. This notion is illustrated in a news article about women's

⁶⁸ Kathleen Barry, Female Sexual Slavery (New York: New York University Press, 1979) at 265.

professional tennis.

NEW GAY SEX SCANDAL ROCKS TENNIS: Lesbian Stars Stalk Young Players in Showers, Teens Lured to All-Girl Hot-Tub Parties⁶⁹

Enquirer Probe Reveals: Gay players ruthlessly prey on lonely teen newcomers; They invite youngsters to all-night parties of porn movies and open gay sex; Teens are too frightened to undress in locker rooms.⁷⁰

The best strategy for eliminating value-expressive attitudes is appealing to another parallel value system, not contact with lesbians. For example, Geraldine Ferraro, former Democratic Party candidate for the United States Vice-Presidency, was able to separate her religious objections to abortion from her support of United States Supreme Court precedent recognizing a woman's constitutional right to abortion.

Male violence is caused by social-expressive attitudes when a man who does not have personal negative opinions about lesbians commit acts of violence toward lesbians because he thinks that hostility toward lesbians is the social norm. Here the root cause is a man's desire to be held in esteem by others. Violence serving a social-expressive function will be reduced when men perceive that important others approve of lesbianism.⁷¹

The male violence produced by defensive attitudes concerning lesbianism stem from a man's insecurity about his masculinity and fear of his own latent same-sex attraction. Defensive attitudes are difficult to influence unless defensive people learn to accept

⁶⁹ National Enquirer magazine (July 31, 1990), front-page headline.

⁷⁰ Ibid., inside headline, at 20.

⁷¹ Herek, supra, note 6 at 931.

new and expanded roles for men and women.⁷² Violence based on defensive attitudes is motivated by a man's desire to prove or reaffirm his masculinity and therefore his heterosexual credentials. Violence stemming from a man's insecurity has two psychological functions. First, it is an assertion of male power over women, and second, it discharges male anxiety over female autonomy.

With respect to the assertion of power over women, male violence against lesbians, like brute force toward heterosexual women, is concrete evidence of masculinity and therefore domination over women.

Violence against lesbians discharges male anxiety concerning female autonomy.

Men generally entertain an unreasoning, often unstated, fear of the vague, and potentially calamitous consequences that would result if women escaped from their prescribed position.⁷³

Additionally, lesbians are sexually autonomous women who challenge masculine, heterosexist power and control over women. By "rejecting" men and excluding them from sexual access to other women, lesbians are seen as usurpers of male prerogative. As pretenders to the status of other men, lesbians are potential humiliators, enemies and competitors. Men who experience their masculinity as under perpetual siege from other men do not easily tolerate women as threatening competitors.

The ideology of heterosexuality teaches that men are indispensable to the happiness of women and therefore it follows

⁷² Ibid. at 933.

⁷³ [Reese], supra, note 12 at 368, footnote omitted.

that lesbianism must stem from unjustified female bitterness toward men, hatred of men due to past mistreatment, or a woman's inability to attract a man. It is incomprehensible to some men (and too threatening to acknowledge) that women love each other, not because they have been abused by men or cannot attract a man, but because a relationship with a man is pale in comparison or distasteful because of pervasive male exploitation of women. The equation of lesbianism with some flaw or short-coming on the lesbian's part constructs lesbians as defective women. Nonetheless, lesbianism represents female autonomy in the form of economic, sexual and emotional detachment from men.

Yet another form of male violence toward lesbians is so-called "lesbian pornography", consisting of sex scenes between women which are packaged by men to appeal to male eroticism. Ironically, "lesbian sex" is the pornography that men find most exciting. The sexual offender programme in Kingston, Ontario, measures the sexual reactions of its clients by showing them "lesbian" pornography to enable the staff to induce a full erection in a client as a standard for subsequent treatment techniques.⁷⁴

3. Conclusion.

This section has briefly summarized the sources of male violence, its psychological functions, and how male violence props up masculinity by reassuring men of their masculine credentials. Sex-discrimination discourse can foster change by acknowledging the role of male violence in the construction of masculinity, by

⁷⁴ Eaton, supra, note 7.

showing how male violence enforces traditional heterosexual arrangements for all women, and by recognizing the role of male violence in creating and maintaining the social climate that is hostile to lesbian existence.

Having described lesbian oppression in terms of the hostile social climate created by the ideology of heterosexuality and the male violence which enforces compulsory heterosexuality, in the next subsection I discuss why many lesbians respond to the hostile social climate by retreating into the closet.

E. Lesbian Invisibility.

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1. Introduction.

If lesbians were truly perceptible in society, then the idea that women can survive without men, do not need to put up with men, might work its way into social reality. And it is to avoid this and maintain primary access to females that male-dominated society attempts to render lesbianism nonexistent.⁷⁵

Lesbians are rendered nonexistent and invisible because society formally denies lesbianism and presumes that all women are heterosexual. Lesbian invisibility goes undisputed because most lesbians live secret lives for their own safety. Solely because a woman is lesbian, she knows she may be spit on, punched, insulted, marginalized, ostracized, harassed, or even murdered.⁷⁶ Threats to personal safety and the rhetoric of prejudice force women to collaborate in their own erasure by retreating into the closet to survive.

Lesbian-feminist philosopher Sarah Hoagland describes the denial of lesbianism.

The society of the fathers...formally denies lesbian existence: A lesbian is said to be a (heterosexual) woman who hates men (a manhater); lesbianism is said to be a phase in some (heterosexual) women's lives; a

⁷⁵ Sarah Lucia Hoagland, Lesbian Ethics: Toward New Values (Palo Alto: Institute of Lesbian Studies, 1988) 6.

⁷⁶ Lisa Troshinsky, "Second Trial Begins for Man Accused of Killing Lesbians" (February 2, 1990) The Washington Blade, (two women stabbed to death in New Hampshire by a man who admitted killing the women because they were lesbians).

lesbian is said to be a (heterosexual) woman who cannot get a man; a lesbian is said to be a man in a heterosexual woman's body...And the idea of women loving women is impossible, inconceivable.⁷⁷

The assumption of universal heterosexuality means that a lesbian is presumed to be heterosexual in every new social setting, except among her lesbian friends. In each of those new social settings, she must decide if, when, how, and to whom she will come out. Even though presumed heterosexual, almost all lesbians, in at least some circumstances, consciously attempt to pass as heterosexual as a survival strategy. The conscious effort to camouflage oneself and the dishonesty of managing a protective pseudo-identity are both fatiguing and a painful denial of self.

One lesbian academic has quipped that being lesbian is like having "one foot in the closet, the other on a banana peel".⁷⁸ This comment captures some of the flavour of the precariousness of privacy which a lesbian often manages at different levels simultaneously.

A lesbian's degree of openness ranges from keeping it secret and being scared to death others will find out, to observing a lifetime of caution, to informing a select few, to never discussing it yet feeling that it is generally known, to openly acknowledging it. And each woman may be on a different place on the scale with regard to her neighbourhood, her workplace, heterosexual social groups, and her own children.⁷⁹

Before a woman experiences either isolation or invisibility as a lesbian, she must first identify as a lesbian. Habituation to

⁷⁷ Hoagland, supra, note 75 at 4.

⁷⁸ J. Wine, "Lesbian Academics in Canada" (1983) 12:1 Resources for Feminist Research 9.

⁷⁹ Martha Barron Barrett, "Double Lives: What It's Like To Be a Lesbian Today" (Sept. 1989) Glamour 316 at 356.

lesbianism (that process by which lesbianism becomes ordinary rather than unusual) plays a significant role in self-definition. However, lesbian stereotypes are so degrading that many women never self-identify as lesbians or describe as lesbian their long-term primary relationship with another woman.

The ideology of heterosexuality and its negative myths, stereotypes and misinformation about lesbianism, which create a hostile social environment for lesbians, also create a hostile internal environment because women internalize these negative attitudes which then manifest as a woman's own negative reactions toward her attraction to women, to herself as a lesbian (if she self-identifies as such), and toward other lesbians. Other external factors which create internalized prejudice are the lack of a nurturing environment for lesbian expression, few healthy role models, and scarce information about how to form a positive lesbian identity and about survival techniques for living in a prejudiced society either in the closet or out of the closet. To identify as a lesbian, a woman must acknowledge and reduce or eliminate her internalized negative attitudes toward lesbianism so that she can accept her lesbian feelings and experiences without a loss of self-esteem.

In the next sub-section, I discuss the dehumanizing effects of the closet, how the closet is painstakingly organised and maintained, consumes exhausting amounts of energy, negatively affects a lesbian's self-esteem, interferes in the intimacy dynamics of a lesbian's relationship with her partner, and has particularly sinister implications for lesbian adolescents.

2. The Privacy of the Closet: A Survival Strategy.

Passing as heterosexual demands continuous identity management and self-censorship.

The strategy of passing involves the construction of a 'straight front' in terms of details of dress, speech, affect, and demeanour. The heterosexual mask necessitates the use of both verbal and non-verbal identity cues. Non-verbal cues include dress management to construct an overtly feminine front. Because the lesbian stereotype is that of a 'butch' or 'diesel dyke,' dressed in manly attire, passing requires the fabrication of an unmistakable feminine facade. Verbal cues may be overt or covert. Overt cues may include the deliberate reference to a boy-friend...or bringing a male friend to a social gathering for (assumed heterosexual) couples. Covert cues may involve maintaining an indifferent front in the face of homophobic remarks or laughing at jokes about 'queers' or 'dykes.' For the closeted lesbian, then, passing demands a continuous process of identity management in order to maintain a public heterosexual front.⁸⁰

For the closeted lesbian, privacy becomes isolation and pretense habit. Outside her lesbian networks, a lesbian often feels unauthentic, unknown and non-participatory in the presumed heterosexual social life going on around her. Her relationships with non-lesbians might have offered benefits such as validation of self and essential contacts for career advancement, but for the lack of honesty and intimacy.

A lesbian, no matter how out she is, will be aware of the privacy needs of her lesbian friends, will guard their secrets, and will alter her behaviour for their sake. For example, two out lesbians who are walking down the street with a closeted lesbian friend will repress all overt signs of affection in public that could lead to assumptions about the friend if the three are seen

⁸⁰ Kallen, supra, note 1 at 109.

together.

Coming out is a multi-faceted issue. Closeted lesbians may wait years for the right moment to come out to a particular person and may develop elaborate strategies which enlist the aid of third persons. Even a very out lesbian must still deal with the assumption that she is heterosexual and she too must decide whether and how to come out to people she meets.

Although coming out can enhance a lesbian's self-esteem and her relationship with her partner, her family of origin and other heterosexuals, the decision to come out involves risks that honesty will be punished with hostility, jokes or loss of friendship. Coming out may be misunderstood as a disclosure of one's sexual activities only. Lesbians also fear no reaction (e.g., "I don't care if you are a lesbian. You are just a person to me.") which trivializes the pain of lesbian oppression.⁸¹ A heterosexual friend can be superficially accepting yet may accuse the lesbian of "flaunting it" or "rubbing my nose in it" if the lesbian talks about her personal life as a lesbian. Coming out also means losing control of who "knows" because heterosexuals often do not understand the importance of confidentiality.

Part of the pain of living in the closet is the awareness that hiding perpetuates negative myths and stereotypes. Coming out to friends, family and co-workers is an important step but public education is also critical. Efforts to educate the public are seriously impaired because many lesbians cannot afford to come out

⁸¹ Lorie Rotenberg, "Impact of Homophobia, Heterosexism and Closeted on Intimacy Dynamics in Lesbian Relationships" (1989) 18:2 Resources for Feminist Research 3 at 8.

in ways that would assist in the work of public education. Women whose professional standing would, in and of itself, tend to undercut negative stereotypes are often the least inclined to publicly identify as lesbians because coming out might damage their careers.

3. The Effects of Privacy on Relationships.

The management of a camouflage consumes enormous energy and has toxic side-effects for the individual lesbian and for her relationships, particularly her relationship with her partner. These side-effects are often characterised as personal failures and blamed on the individual or on her lesbianism when they should be recognized as the inevitable cost of survival in a world that is hostile to lesbian existence.

Lesbians need social contact with other lesbians; positive lesbian role models; family, friends and co-workers who are supportive of lesbianism; and accurate information about lesbian lifestyles and identity – including information about survival skills.⁸² Closeted lesbians, especially those who are in the process of self-identifying as lesbians, are often severely handicapped by the intensely private and hidden nature of lesbian existence because other lesbians are hidden and therefore socially inaccessible.

A lesbian may be out to none, some or all of her family of origin and she may experience degrees of acceptance/support/comfort/understanding from each family member which will affect the

⁸² "Introduction" (1987) 14:1/2 Journal of Homosexuality 1.

frequency of her visits with them and whether her partner accompanies her on those visits. A negative reaction by even one parent can force a lesbian to choose between her family of origin and her partner.⁸³

Living in a society that is hostile to lesbian existence can lead to the intense intimacy in some lesbian relationships known as "merger". Merger can feel smothering to some women. Based upon interviews in a limited study, however, Lorie Rotenberg concludes that merger can be highly satisfying for a lesbian couple.⁸⁴ Interestingly, the male model of self-development, which equates maturity with independence and immaturity and pathology with embeddedness in relationships, suggests that the solution for merger is separation and autonomy.

Where merger behaviour was experienced by lesbians as problematic, Rotenberg identified three factors: (1) women's socialization to nurture others at their own expense; (2) women's socialization to repress anger, conflict and difference and (3) external factors of prejudice and heterosexism which

...may push the lesbian couple towards a more intense relatedness. The degree to which the lesbian relationship is visible and recognized by others may affect the so-called merger within it. If the partners experience denial or overt or subtle hatred and rejection from their families, heterosexual friends and/or co-workers, they will have greater difficulty establishing their own sense of themselves as individuals within the relationship. They may pull together in a "two against a threatening world" stance and be unable to tolerate differences in their lover's attitudes or perceptions. Couple unity may be demanded at the expense of individual growth.

If the two women lack lesbian friends or connection

⁸³ Rotenberg, supra, note 81 at 7.

⁸⁴ Ibid. at 3.

to any lesbian community, then they will have only each other to turn to for affirmation of their sexuality and their life-style. The degree of closetedness of both partners will deeply affect the element of interdependence. Viewed as a structure which serves to protect the lesbian couple from a hostile environment, merger assumes a different complexion from that described in the psychological literature. It can be seen as an adaptive survival mechanism, but one which may lead to an intimacy borne of hiding, rather than one of open and joyous emotional connection.⁸⁵

Tension also may arise because, if one partner wants to be more out than the other, she may feel restrained and the other may feel threatened.⁸⁶ Even when both women have similar privacy needs, relationship tensions may occur because both women repress the normal and joyful impulse to publicly express their affection for one another.

The constant censorship involved in maintaining a facade, dealing with the continual possibility of inadvertently identifying oneself as lesbian, and the tension of "dealing with the continual choices about whether or not to 'come out' syphons off emotional energy, while reducing the lesbian's capacity for vulnerability and spontaneity with her partner".⁸⁷ Women who spend all day carefully maintaining a pseudo-identity may find it hard when they come home at night to relax and be self-revealing. Self-censorship can also intrude into the intimacy dynamics of a lesbian couple because it is difficult to nurture a positive image of one's intimate love relationship while continually denying its existence.⁸⁸

⁸⁵ Ibid. at 3.

⁸⁶ Ibid. at 5.

⁸⁷ Ibid. at 6.

⁸⁸ Ibid. at 8.

Rotenberg suggests that

...the pain we must endure as lesbians is so overwhelming that we often find it necessary to deny it (even to ourselves) in order to survive. Because lesbian relationships are so privatized and because we have so few places where we can share our anguish, it seldom feels safe enough to really experience it nor (sic) to examine its overall impact on our lives. In addition, to fully acknowledge our pain would lead to recognition of the depth of both our rage and our terror, neither of which we can afford to consciously experience on an ongoing basis.⁸⁹

4. The Effects of Privacy on Lesbian Youth.

Children, as society's hope for the future, deserve an environment that minimally meets their basic needs. Clearly, the needs of lesbian adolescents are not being met. Handicapped by their immaturity and isolated from lesbian peers because they and their peers live within heterosexual nuclear families, lesbian teens are more vulnerable to prejudice than adult lesbians and the personal cost for them can be devastating. Lesbian teens attempt suicide at a rate that is three times the average for heterosexual youth.⁹⁰ This is probably related to the fact that, while teenagers live with their parent(s) and siblings, they are more isolated than after high school when they have more freedom to make contact with lesbians peers.⁹¹ The problems encountered by lesbian

⁸⁹ Ibid. at 9.

⁹⁰ Mohr, supra, note 64.

⁹¹ Emery S. Hetrick and A. Damien Martin, "Developmental Issues and Their Resolutions for Gay and Lesbian Adolescents" (1987) 14 Journal of Homosexuality 25 at 34. This article is based upon the authors' experiences at a New York City social services agency established to meet the needs of lesbian and gay adolescents and their families. Their article describes 329 adolescents who came to the centre during the first year of its operation.

youth are discussed below.

The biological and cognitive changes of adolescence are the same for heterosexual and lesbian teens. However, lesbian teens have a very different psychological and social developmental issue, that is, entry into a stigmatized social identity.⁹² Lesbian teens are forced to come to grips with their new identity while burdened by internalized negative myths and stereotypes about what it means to be lesbian in an environment that is hostile to lesbian identity. They must adjust all alone, without the support of parents and family, without any positive lesbian role models, and without accurate information about lesbian identity and lifestyles – in short – without the supports that heterosexual youths take for granted in developing heterosexual identities in an environment that validates and encourages heterosexuality.⁹³ Lesbian identity formation is discussed further in Section III, subsection H.

One of the greatest difficulties for lesbian teens is that their parents are not lesbian or gay. Whereas the parents of, say, a black teenager can serve as role models for her and can provide her with important information about group identity and the meaning of being black⁹⁴, the parents of a lesbian often do not know their daughter's sexual identity and so cannot provide the same understanding and support. In reality, prejudice often prevents parents from accepting their daughter's lesbianism once it becomes known and can even result in lesbian teens being excluded from the

⁹² Ibid. at 26.

⁹³ Ibid. at 29-32.

⁹⁴ Ibid. at 29-30.

home.⁹⁵ In Hetrick and Martin's study group of lesbian and gay youths, one third of the teens had experienced some form of violence due to their sexual identity and 49% of that violence was inflicted by family members.⁹⁶

The primary coping or survival strategy for dealing with the stigmatization of lesbian identity is for teens to conceal their lesbianism. The camouflage of self, necessitated by fear of discovery,

...has inevitable intrapsychic and social effects, both on the adolescent who must learn to dissimulate, and on the adult who represents the end result of the process.⁹⁷

The monitoring of the self to guard against accidental disclosure reinforces a lesbian teens's sense of inferiority which has a negative impact on self-esteem.⁹⁸ Having to hide her lesbianism may cause a teenager to suffer "anxiety, alienation, self-hatred and demoralization".⁹⁹ Hetrick and Martin characterise this daily need to camouflage oneself as a "corrosive" denial of self-respect and self-worth.¹⁰⁰

The chief effect of stigmatization for the lesbian and gay teens in the Hetrick and Martin study involved isolation on social,

⁹⁵ Joan Sophie, "Internalized Homophobia and Lesbian Identity" (1987) 14 Journal of Homosexuality 53 at 61; Hetrick and Martin, supra, note 91 at 29.

⁹⁶ Hetrick and Martin, supra, note 91.

⁹⁷ Ibid. at 36.

⁹⁸ Ibid. at 36, citing H. Perry, M. Gawell and M. Gibbon. Clinical Studies in Psychiatry (New York: Norton, 1956).

⁹⁹ Hetrick and Martin, supra, note 91 at 41.

¹⁰⁰ Ibid. at 28.

emotional, and cognitive levels. Socially isolated teens had no one to talk to about their new social identity. As discussed above, emotional isolation meant that adolescents felt cut off from the emotional support of all their social networks, particularly their families.¹⁰¹ Their experience of cognitive isolation was due to their lack of access to accurate information about lesbian lifestyles and identity, including lack of adult lesbian role models. Hetrick and Martin report an appalling ignorance of what it means to be lesbian including internalized prejudice and stereotypes about lesbians.¹⁰²

Lesbian and gay teens need a non-threatening and non-erotic setting where they can (1) interact with other lesbian and gay teens, (2) obtain accurate information about lesbian and gay lifestyles and identity in order to develop a positive lesbian or gay identity and reduce internalized prejudice, and (3) interact with adult lesbian and gay role models. Furthermore, lesbian and gay youths need an environment that is free of the rhetoric of prejudice which portrays lesbians and gay men as dangerous and perverted.¹⁰³

5. Conclusion.

The ideology of heterosexuality, supported by male violence, maintains the social construction of lesbianism as a stigmatized identity. Dehumanizing stereotypes create the hostile social

¹⁰¹ Ibid. at 31.

¹⁰² Ibid.

¹⁰³ Ibid. at 41.

climate which constitutes a lesbian's daily experience. For most lesbians, retreating into the closet is a survival strategy to protect them from the hostile social climate.

Lesbian relationships, trivialized as merely sexual activity, remain hidden in the private sphere. Lesbians experience privacy as invisibility, self-censorship, coping mechanisms, survival strategies, and the construction and maintenance of protective pseudo-identities to avoid the threat of harassment or violence. The stultifying effects of maintaining privacy are apt to cause relationship difficulties and isolate lesbians from essential emotional support, social interaction and information. Even women who merely acquiesce in society's denial of lesbianism and assumption of universal female heterosexuality collaborate in their own erasure and the degrading stereotypes and myths which support their oppression.

The next section, which deals with lesbian history and how male supremacy and the ideology of heterosexuality have affected the treatment of lesbians in history, summarizes lesbian history in its broadest sense. It is a history of persecution including the execution of "passing" women who dressed and passed as men to escape the confinement of restrictive social roles. Conformity to one's assigned gender role (e.g., physical appearance, personality, mannerisms, speech, interests, and habits) was more significant for women than conformity to norms of sexual conduct until the beginning of the twentieth century when the early psychiatrists began describing love between women as sick and perverted.

The history of lesbian oppression includes the catholic church's view of lesbianism as sinful. Then the medical community

pronounced that lesbianism is sickness and perversion. Then the state assumed jurisdiction by criminalizing lesbian sex. Lesbianism as sickness gave rise to the lesbian "type" – a woman who is deemed fundamentally different from other women.

Lesbian history poignantly demonstrates the courage of women who, lacking any political analysis of sexism or heterosexism to give them strength, nonetheless charted their courses through life to achieve greater freedom. Non-conforming women posed such a radical challenge to existing orthodoxies, and excited such intense male anxieties, that some women were executed.

The next section attempts not only to describe how male supremacy and heterosexism have influenced the treatment of lesbians in the past, it attempts to show how social-science disciplines grapple with lesbianism. I have drawn on psychology, sociology, and lesbian/gay studies for material on lesbian-identity formation, the dispute over whether lesbianism is "essential" or socially constructed, and the genesis of the category "sexual orientation" as a symbol of the lesbian and gay human-rights struggle. Lesbian history is important to the argument that lesbian oppression should be addressed as sex discrimination under the Charter because history shows that lesbian oppression has served the patriarchy by coercing women into traditional female roles, into heterosexual relations, and into heterosexual family units. Moreover, history demonstrates how the category of sexual orientation arose as the legal model that is specific to lesbian oppression.

III. LESBIAN HISTORY.

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A. Introduction.

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Just as the central question of feminist history is how men have kept women in subordination¹⁰⁴, the central question for lesbian history is how men have kept women in subordination through the imposition of compulsory heterosexuality.¹⁰⁵ Historically, love between women has been both valued and vilified. Until the late nineteenth century/early twentieth century, these two seemingly contradictory social reactions were concurrent and compatible themes. One is the history of passionate yet asexual love ("romantic friendship"), which enjoyed an almost hallowed social status, the other a history of the persecution and execution of "passing" women who stepped out of the female social role by passing as men and claiming male privileges.

1. Cross-Dressing, Sexuality and Persecution.

I use the terms "cross dressing" and "transvestitism" in the

¹⁰⁴ "Introduction", Not a Passing Phase, supra, note 10 at 1.

¹⁰⁵ Ibid. at 16.

narrow sense to refer to women disguising themselves in men's clothes to pass as men. My use does not refer to women who dress in a masculine style with no intention of hiding their true biological sex.

Transvestites were, in a sense, among the first feminists. Mute as they were, without a formulated ideology to express their convictions, they saw the role of women to be dull and limiting.¹⁰⁶

A non-passing woman who adopts masculine dress and social mannerisms does so as a blatant warning to men that she does not accept a subordinate position to men and does not desire male patronage. These messages resonate with lesbian existence.

If some women...present themselves as masculine, it is because they have repudiated any appearance of complicity with passive femininity: Their "masculinity" is protection against any potential attempts to transform them into fleshly prey.¹⁰⁷

A woman who remained dependent on a man and followed the rules of her assigned female social role had enormous freedom to experience intense love with another woman. Women who cross-dressed and claimed male freedoms and prerogatives were dealt with harshly.

It would seem...that they were punished less for unorthodox sexual pleasure than for a usurpation of male prerogatives. What was most threatening to both Europe and America from the sixteenth to the eighteenth centuries was not lesbian sex by itself, but male impersonation and all that was implied in rejection of the feminine status.¹⁰⁸

There are few extant records suggesting that non-transvestite

¹⁰⁶ Faderman, supra, note 11 at 61.

¹⁰⁷ Ibid. at 386, citing Simone de Beauvoir, The Second Sex (1949; reprinted New York: Vintage Books, 1974) at 456-58.

¹⁰⁸ Faderman, supra, note 11 at 54.

women were punished for discrete sexual intimacies if they otherwise lived within the boundaries of their prescribed social role (e.g., usually heterosexual marriage). The only records of lesbian acts in colonial America indicate that in Plymouth in 1649 a Mrs. Norman received lenient punishment for "leude behavior...with...[an unmarried woman, Mary Hammond]...upon a bed". Hammond received no punishment and Norman was merely required "to make public acknowledgement...of her unchaste behavior."¹⁰⁹

Although romantic friendships between women who were in heterosexual marriages often lasted for many years, cross-dressing women who loved women debunked the most cherished male assumption — that passionate relationships between women are secondary to heterosexual arrangements in women's lives. Proof that love and passion between women could be a life-long commitment that excluded men produced such intense anxiety and fear that many cross-dressers were executed, particularly if they "usurped the male role" by using a dildo in love-making.

Usurpation of male roles and rejection of male authority was inextricably woven into the cases which received the harshest punishment. Cross-dressing was punished because first it was connected with pre-Christian religions and later because of its connection with lesbian acts.

The term "cross-dressing" hides or minimizes the personal and social implications of the lived experience. Outside the male/female model, there was no legitimate alternative for women seeking

¹⁰⁹ Ibid. at 50, citing Records of the Colony of New Plymouth, Nathaniel Shurtleff, ed. (Boston: Published by the Order of the General Court, William White, Printer, 1855-61) vol. II, at 137.

freedom from the confinement of the narrow female social role. Women who cross-dressed rebelled against stifling constraints placed on women and had the courage and strength to cross the barriers of rigid gender stereotypes, to risk exposure as sinful and criminal frauds, to endure the immense difficulties of a false social identity, and to withstand the pain and isolation of choices that freed them to lead more self-realized lives than women were allowed.

Justifications for punishing lesbian acts varied. For example, one justification for the death penalty for lesbian acts under canon law was that god would otherwise send earthquakes and pestilence. Canon and secular law distinguished between sex acts, some warranting execution and others banishment or imprisonment. Sex involving penetration with a "material instrument" was sufficient to constitute the crime of sodomy although one court queried whether fleshy union or the spilling of seed was required. The spilling of semen was considered a grave evil because the male seed was thought to be the sole entity from which a child grew, the mother acting merely as a receptacle. An enlarged clitoris was sometimes noted as evidence of the crime of sodomy because it was evidence of inherent deviance which would allow fleshy union to occur. Later, the early psychiatrists promoted the idea that an enlarged clitoris was biological evidence of lesbianism.

Male writers have observed that a disproportionately small amount of information concerning lesbianism in history has survived (or ever existed), as compared with historical data concerning gay

men.¹¹⁰ Because lesbianism has been defined primarily as an abnormal sexual practice, to be called a lesbian has been perceived as an insult. Consequently, there is very little explicit historical information about lesbians and much important material has been suppressed or its significance overlooked. This has created a very difficult problem for the lesbian historian.¹¹¹ Suppression may take the form of minimizing women's feelings for other women, exaggerating women's feelings about men, or outright denial of women's close and passionate relationship with other women.¹¹² One major problem has been society's willingness to assume a woman is heterosexual in the absence of evidence as compared with society's reluctance to acknowledge that a woman is a lesbian unless there is a high degree of certainty of her lesbianism.¹¹³

Questioning the view that genital contact is crucial to the definition of lesbianism rouses passionate controversy among lesbian feminists.

How can we question that definition whilst protecting our identity as lesbians? If we do not question it, then lesbians will remain a tiny minority of women, defined by genital contact, fitting neatly into the category the lords and masters have assigned us. The ramparts of heterosexuality will not be breached, and the heterosexual foundations of male supremacy will remain firm. If we do question it, then we question our own security too, inasmuch as our security and identity have been based on this definition. We need an identity that

¹¹⁰ John Boswell, Christianity, Social Tolerance and Homosexuality (Chicago: University of Chicago Press, 1981) at xvii.

¹¹¹ "Introduction", Not a Passing Phase, supra, note 10 at 3.

¹¹² Ibid. at 5.

¹¹³ Ibid. at 7.

is strong, revolutionary and lesbian.¹¹⁴

Rich's "lesbian continuum" and Faderman's view that lesbian identity does not necessarily include genital contact is controversial for two reasons. It has been criticized as a false reading of history and as disloyalty to the memory of the women described in Surpassing The Love of Men because they did not and would not recognize themselves as lesbians. Second, Faderman has been criticized for "desexualizing" lesbianism.¹¹⁵

We should feel free to examine all the evidence and make our interpretation based on all the relevant issues: lifestyle, friends, interests, ideas, politics, as well as sexuality. If we cease to consider the word 'lesbian' as an insult or to imagine that it refers solely to sexual practice, there can be no problem in hypothesizing from the evidence that a given woman may have been, or probably was, a lesbian.¹¹⁶

The history of lesbian persecution is multi-faceted. It is partly the project of dispelling the myth that lesbian acts were not persecuted whereas, in fact, women were executed for a constellation of non-conforming behaviour almost invariably including non-reproductive sex. It is partly a history of how successive institutions have defined, managed and suppressed lesbian desire – first the church, then the state and then the medical profession. It is a history of rebellion and resistance to the institution and ideology of heterosexuality which exploits differences by defining those differences as inherently evil, sick or criminal so as to stifle, control and direct women (and men) into heterosexual arrangements.

¹¹⁴ Jeffreys, supra, note 16 at 28.

¹¹⁵ Ibid. at 21.

¹¹⁶ "Introduction", Not A Passing Phase, supra, note 10 at 8.

Lesbian legal history has been obscured in women's history, gay history and even in lesbian history by contemporary women writers who have erroneously assumed that lesbians have somehow gone unnoticed, existed outside or beneath the law, or were unimaginable and therefore "censured by silence".¹¹⁷ The problem of suppression of lesbian history has been exaggerated. And it is not true that lesbian acts in history escaped persecution.¹¹⁸ There is a growing body of scholarship disproving this assumption.

Assembling the full historical record will present challenges for lesbian historians. In addition to misconceptions that lesbians escaped persecution, there are "enormous challenges of defining lesbian relationships, decoding closeted sources, and transcending layers of censorship". Lesbian legal history may be visible only by looking beyond the records of executions, beyond the love letters of romantic friendships, and across class (or race) lines in unexpected places like the law of vagrancy, lewd and lascivious acts or prostitution.

2. Romantic Friendship.

I use the terms "sex", "sexual activity", "sexual acts", to refer to genital sex. I use the term "erotic", "erotic activity", "erotic acts", to mean non-genital erotic acts such as kissing, hugging, holding hands, and lying in one another's arms. Romantic

¹¹⁷ Ruthann Robson, "Lesbianism in Anglo-European Legal History," (1990) 5 Wisconsin Women's Law Journal 1 at 2-3, commenting on Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada" (1989) 3 Canadian Journal of Women and the Law 18 and Law, supra, note 63.

¹¹⁸ Farley, supra, note 38.

friends in past centuries often engaged in erotic activity which, by twentieth-century standards, would indicate that the women were lesbians, hence presumed to have a sex relationship.

Before the early psychiatrists, women were free to hug and kiss one another without the slightest false consciousness that they were doing something unnatural. Indeed, social convention permitted verbal and physical expressions of passionate feelings between women that were identical to the emotions which today would typify an intense sexual relationship. Because women did not have freedom of sexual expression in earlier centuries, however, romantic friends probably sublimated their sexual feelings. Thus, because love between women was presumed to be spiritual and asexual love, women could freely express all-consuming feelings for one another and engage in erotic behaviour such as hugging and kissing. This was to change dramatically in the twentieth century.

[The twentieth] century has a passion for categorizing love, as previous centuries did not, which stems from the supposedly liberalized twentieth-century view of sex that, ironically, has created its own rigidity. In our century the sex drive was identified, perhaps for the first time in history, as being the foremost instinct – in women as well as men – inescapable and all but uncontrollable, and invariably permanently intertwined with real love. As a result, romantic friendships of other eras, which are assumed to have been asexual since women were not given the freedom of their sex drive, are [deemed] manifestations of sentimentality and the superficial manners of the age. Throughout most of the twentieth century, on the other hand, the enriching romantic friendship that was common in earlier eras is thought to be impossible, since love necessarily means sex and sex between women means lesbian and lesbian means sick.¹¹⁹

Lillian Faderman, in her book, Surpassing the Love of Men¹²⁰,

¹¹⁹ Faderman, supra, note 11 at 311.

¹²⁰ Ibid.

traces the history of attitudes about love and passion between predominantly white, middle- and upper-class women in Europe and North America, from the Renaissance to the present. As long as women remained attached to and dependent on men, passionate asexual love between women was thought to be an ennobling experience and usually a rehearsal for or an adjunct to "the main event" of heterosexual marriage. Faderman argues that the first wave of feminism and nineteenth-century French literature graphically depicting sex between women created a climate of anxiety which set the stage for the late-nineteenth-century sexologists to invent and promulgate the category of "lesbian," which the sexologists defined as perverted and which they and other anti-feminists linked directly with women's desire for autonomy. Passionate love between women, which for centuries had been accepted and encouraged by society, eulogized in literature, and discussed openly and unself-consciously by women themselves, was thereby transformed into something freakish.¹²¹

The key factors contributing to the popularity and public acceptance of romantic friendships between women were: (1) the myth of male superiority, (2) female economic dependence on men, (3) women's affinity for one another, and (4) the assumption and fashion of female sexual passionlessness.

Male Superiority. Today it is recognized that there is more variety among men and among women than between men and women. However, prior to the turn of the century, the differences between men and women were thought to be so great that the sexes viewed

¹²¹ Ibid. at 238.

each other almost as different species. The socialization of men and women reflected and perpetuated the assumption of innate and dramatic gender difference. The environment of childhood was more homosocial than is common today (e.g., girls and boys were educated separately and were educated into stereotypical gender roles). The exclusion of the sexes from one another's interests and activities and the schooling of children to believe both that boys and girls were fundamentally different and that males were innately superior was common. The resulting polarization made relationships based on equality between the sexes almost impossible. The inferior status of women actually fostered love and friendship between women.¹²²

Female Economic Dependence on Men. When employment possibilities outside the home were few, women had almost no hope of independence from their birth families unless they married. Hence female dependence on men was a matter of economic necessity. When divorce was virtually unknown, women turned to other women if they felt lonely and isolated in loveless marriages.¹²³

Affinity of Women for One Another. In a world that openly patronized female strengths, women saw one another as kindred spirits and relied on one another for affirmation of their intelligence, creativity and wholeness as human beings.¹²⁴

Female Sexual Passionless. Romantic friendships between women did not pose a risk of pregnancy and "dishonor" in a world which placed inordinate importance on female virginity and where birth

¹²² *Ibid.* at 85-86, 102 and 157-58.

¹²³ *Ibid.* at 157.

¹²⁴ *Ibid.* at 101.

control was unreliable and abortion dangerous. Whereas friendship between members of opposite sexes was suspected of being sexual, a friendship between two women, no matter how all-consuming their passion for one another, was assumed to be asexual because "decent" women were not supposed to experience sexual desire and were expected to view sex as either a wifely duty or a necessity for procreation.¹²⁵

3. Historical Models of Lesbianism.

The term "lesbian" has historically contingent meanings. Woman-identified women in history did not see themselves in the same way that present-day, self-identified lesbians do. I therefore hesitate to refer to women in history as "lesbians" and will, instead, try to refer to behaviour rather than identity, referring to sexual acts between women as "lesbian acts" and attraction between women as "lesbian desire".

Contemporary notions of lesbian identity, with its undue emphasis on sex and sexual object choice as an integral aspect of personality, had no historical counterpart until the latter part of the nineteenth century when the medical profession transformed love between women into "sickness". Thereafter, women-loving women were considered a distinct species of person.

We do not know how women in history thought about their intensely emotional, intellectual, spiritual and erotic bonds with one another. We are left to puzzle through the meaning of historic events, stranded within our own historical context. We can make

¹²⁵ Ibid. at 156.

connections between lesbian sexual acts and other nonconformist behaviours by women such as rejection of male authority, deep emotional bonds between women, women choosing to live together rather than with men, women cross-dressing and adopting male gender and social roles. Unfortunately the precise social meaning of those violations of heterosexual norms may always remain somewhat obscure.

Women were executed in history for transgressing social, gender- and sex-roles. For Joan of Arc, gender and social-role issues resulted in her being burned alive. Other women were executed for cross-dressing, marrying, living as men, and having sexual relationships with women, particularly if sex involved a dildo. However, sex alone was sufficient cause for the execution of nuns living within a feminine social role who acted on their lesbian desires and used a dildo.

There are five historic models of lesbianism that are explored herein: sin, sickness, gay liberation (or neutral difference), the social-construction, and lesbian feminist. These models are important because of their influence on legal discourse. The category of sexual orientation encompasses the neutral-difference model of lesbianism. The sex-discrimination model proposed in this thesis is based on the lesbian-feminist model.

The "Sinful" Model: The condemnation of lesbian acts as "sinful" stems from the construction of sin by religion. Prior to the late nineteenth century, there was no concept of sexual orientation as we know it today. Until 1920, gender not sex was the over-riding concern of those seeking to preserve the status quo. Consequently, a sex act between women was seen as behaviour

only, as a freely chosen departure from morality and virtue, and not as a manifestation of a particular personality type. The idea that lesbian acts were sinful arose from the belief that non-marital and non-procreative sex was evil, a belief which was widely accepted until the turn of the century when the "sickness" model of lesbianism was invented and promulgated by the sexologists.

The "Sickness" Model: The model of homosexual pathology had two permutations: the genetic and the psychoanalytic. The genetic model viewed lesbianism as an identity stemming from an inborn and incurable biological defect. The psychoanalytic model viewed lesbianism as an identity which is a curable defect of personality, namely a failure to mature caused by childhood trauma.

The Gay-Liberation Model: This third conception has other names: the "neutral difference" model¹²⁶, the civil-rights model and the reformist model. It arose in the 1960s in the climate produced by the black civil-rights movement, the women's movement's attack on traditional gender roles, and the openness created by the sexual revolution in the 1960s. This model rejects the concepts of sin and sickness and promotes the idea that lesbians and gay men deserve legal protection as lesbians and gay men. It embraces the dichotomy of lesbian/heterosexual; it is an essentialist position.

Those within the neutral difference framework ground their arguments for the legal protection of gay men and lesbians in the immutability of homosexuality or argue from the proposition that sexual orientation is intrinsic

¹²⁶ "Developments in the Law: Sexual Orientation and the Law" (1989) 102:7 Harvard Law Review 1508 at 1512 [hereinafter "Harvard Note"]].

to personhood.¹²⁷

The civil rights position has an essentialist tradition for two reasons: from the earliest days of homosexual activism in Germany in the mid and late nineteenth century, many lesbians and gay men have been attracted to the idea of immutability because it seemed to be a good "sales" strategy. If lesbians cannot change the way they are, it makes no sense to persecute them or enact laws to oppress them. If lesbianism is a choice, there is room for debate about the propriety of society's involvement in personal moral choice.

There were similar incentives to argue immutability in Charter equality litigation because the Supreme Court has held that it is a factor to be considered in determining whether a non-enumerated ground of discrimination, such as sexual orientation, is analogous to the grounds enumerated in section 15 of the Charter and therefore deserving of its protection. Second, essentialism accords with the experience of many lesbians who believe that they "were born lesbian" or that the development of their lesbian identity was a process of discovering something innate about themselves.

The civil-rights model has inspired lobbying efforts to persuade mental health professionals to revise their characterisation of homosexuality as sickness, to persuade legislatures to decriminalize lesbian and gay acts and to pass civil-rights legislation prohibiting private acts of discrimination

¹²⁷ Ibid. at 1517, n. 45, citing Mohr, supra, note 64 at 39-40; Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification" (1985) 98 Harvard Law Review 1285 at 1300-05.

against lesbians and gay men, and to challenge anti-lesbian-and-gay state action.

The Social-Construction Model: Social constructionists view lesbianism as an identity that is the product of social forces and self-labeling. They are not comfortable with the argument that sexual orientation is immutable and recommend against reinforcing the lesbian/heterosexual dichotomy.¹²⁸

Labeling individuals based on the gender of their sexual partners reinforces prejudice by making sexual orientation appear fundamental to their identity. Adherents to the social construct conception reject the civil rights model of neutral difference, and argue that basing legal protection for gay men and lesbians on the fundamental difference of their sexual orientation reinforces the very repression sought to be removed.¹²⁹

Social constructionists argue that society has attached titanic meanings to the sex of a person's partner by the institutionalization of heterosexual privilege and lesbian/gay persecution. Basing legal protection on lesbian/gay sexual orientation only reinforces the stigmatized label as a mark of difference and perpetuates the socially ascribed meanings of the

¹²⁸ Ibid. at 1512-17.

¹²⁹ Ibid. at 1517-18, quoting John D'Emilio, "Making and Unmaking Minorities: The Tensions Between Gay Politics and History" (1986) 14 New York University Review of Law and Social Change 915 at 920. ("[C]entral to the oppression of lesbians and gay men, and to society's ability to shape and enforce it, are the homosexual and heterosexual categories themselves".) and Jed Rubenfeld, "The Right of Privacy" (1989) 102 Harvard Law Review 737, who, at 781, argues against reification of dichotomous categories:

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

labels. The social-construction model supports a mass movement to radically transform society by changing concepts of gender and sexual orientation.¹³⁰

In the U.S., some social constructionists argue in favour of assertions of privacy rather than equality, and hang their hat on a limits-of-state-power argument.

People do not meaningfully govern themselves if their lives are subtly but pervasively molded into standard, rigid, normalized roles.¹³¹

¹³⁰ Gregory M. Herek, "On Doing, Being, and Not Being: Prejudice and the Social Construction of Sexuality" (1985) 12:1 Journal of Homosexuality 135 at 137. Herek refers to the two models as "liberationist" and "reformist". Liberationists (social constructionists) view coming out as a strategy to release the bisexual potential in everyone and view prejudice as the rejection of one's own same-sex desires. In contrast, the reformist or civil-rights model supports minority-group status for lesbians and gay men and efforts to secure legal protection for group needs, goals and interests.

¹³¹ Rubinfeld, supra, note 129 at 805. However, in 1986, in Bowers v. Hardwick, the U.S. Supreme Court refused to find a right of privacy protecting same-sex sex under the Fifth Amendment Due Process Clause of the U.S. Constitution and upheld Georgia's sodomy law as it applied to a gay man. In his scathing dissenting opinion, however, Justice Brennan adopted the social-construction model of choice - rather than the essentialist model based on immutability.

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

Bowers v. Hardwick, 478 U.S. 186 at 205, 106 S Ct. 2841 (1986) (Brennan J., dissenting) (emphasis in original).

Recent claims in the U.S. seeking to overturn state criminal laws prohibiting lesbian and gay sex on the basis of state constitutional privacy grounds have succeeded in Kentucky and Michigan. "Ky. Appellate Court Rules Sodomy Laws Unjust," (July 23, 1990) Au Courant Magazine; "Mich. Sodomy Law Ruled Unconstitutional; called 'important victory'" (July 23, 1990) Au Courant Magazine 10.

The Lesbian-Feminist Model: Lesbian feminism arose in the 1970s when women recognized that the gay-liberation movement was primarily a gay men's movement and that the women's movement was primarily a heterosexual women's movement. It rejects the social-construction model of a stigmatized lesbian identity in favour of defining lesbianism according to the lived experience of lesbians which is based on a robust sense of being special and upon feminist analysis of male domination, gender relations and the institution of heterosexuality. The sex-discrimination model proposed here as the legal model to address lesbian oppression is based on the lesbian-feminist model.

4. Essentialism Versus Social Construction.

The essentialist/constructionist debate discussed in this subsection is important because of how essentialism has influenced civil-rights strategy and how constructionism explains the social function of lesbian oppression.

[M]ost little girls feel outraged at their lack of privilege, at the limitations imposed on them by their sex. The real question is not why some females refuse to accept those limitations (i.e. become lesbians), but rather why most do accept them and become wives. Women conform through docility and timidity,...but when their ego sense is too strong or their ambitions too absorbing or the compensation offered by society for being the second sex too inadequate, they refuse to conform and choose lesbianism.¹³²

Essentialism and social constructionism are important concepts for legal strategists because immutability (essentialism) has played a major role in previous strategies, yet it denies choice

¹³² Faderman, supra, note 11 at 386, citing de Beauvoir, supra, note 126 at 456-58.

and agency and is therefore anti-feminist.¹³³ Claims based on sexual orientation and family status either reinforce the dichotomous categories of lesbian/heterosexual and/or perpetuate the idea of immutability.

Whereas essentialists argue that sexual orientation is nothing more than one's awareness of an immutable biological or psychological trait, social constructionists argue that sexual orientation is not a biological condition; it is not innate; it is socially produced.¹³⁴

¹³³ Feminists have argued that "femininity" is socially constructed.

The crux of the problem may be found in misunderstandings surrounding the "naturalness" of a woman as "feminine." The "true woman" is an artificial product created by civilization, as eunuchs once were made. A woman may feel inferior because the very requirements of "femininity" belittle her. If a woman spontaneously chooses to be a complete person, a subject rather than an object, a free being with the world and the future open before her, and "if this choice has a virile cast, it is so to the extent that femininity today means mutilation".

[Reese], supra, note 12 at 360, quoting Simone de Beauvoir, "The Lesbian" in H. Ruitenbeek, ed., The Problem of Homosexuality in Modern Society (1963) at 227, 231-32.

¹³⁴ Essentialism and social constructionism are twin concepts that have attracted sustained feminist analysis.

Essentialism is classically defined as a belief in true essences - that which is most irreducible, unchanging, and therefore constitutive of a given person or thing...Most obviously, essentialism can be located in appeals to a pure or original femininity, a female essence, outside the boundaries of the social and thereby untainted (though perhaps repressed) by a patriarchal order. It can also be read in the accounts of universal female oppression, the assumption of a totalizing symbolic system which subjugates all women everywhere, throughout history and across cultures. Further, essentialism underwrites claims for the autonomy of a female voice and the potentiality of a feminine language (notions which find their most sophisticated expression in the much discussed concept of écriture feminine).

Essentialism and social constructionism are relevant concepts to psychologists studying lesbian identity. Carla Golden's studies of self-identified lesbians suggest that the seeming dichotomy is really a continuum which may change over time. Two categories emerged in Golden's studies: "primary" lesbians, who felt that they had always been lesbians and had not exercised control or choice (essentialists), and "elective" lesbians, who felt that they had

Essentialism emerges perhaps most strongly within the very discourse of feminism, a discourse which presumes upon the unity of its object of inquiry (women) even when it is at pains to demonstrate the differences within this admittedly generalizing and imprecise category.

Constructionism, articulated in opposition to essentialism and concerned with its philosophical reiteration, insists that essence is itself a historical construction. Constructionists take the refusal of essence as the inaugural moment of their own projects and proceed to demonstrate the way previously assumed self-evident kinds (like "man" or "woman") are in fact the effects of complicated discursive practices...What is at stake for a constructionist are systems of representations, social and material practices, laws of discourses, and ideological effects. In short, constructionists are concerned above all with the production and organization of differences, and they therefore reject the idea that any essential or natural givens precede the process of social determination.

Essentialists and constructionists are most polarized around the issue of the relation between the social and the natural. For the essentialist, the natural provides the raw material and the determinative starting point for the practices and laws of the social. For example, sexual difference (the division into "male" and "female") is taken as prior to social differences which are presumed to be mapped on to, a posteriori, the biological subject. For the constructionist, the natural is itself posited as a construction of the social. In this view, sexual difference is discursively produced, elaborated as an effect of the social rather than its tabula rasa, its prior object. Thus while the essentialist holds that the natural is repressed by the social, the constructionist maintains that the natural is produced by the social.

Diana Fuss, Essentially Speaking: Feminism, Nature and Difference (New York: Routledge, 1989) at 2-3 (footnotes omitted) (emphasis in original).

chosen to be lesbians either for political or erotic reasons (constructionists). Some of the "elective" lesbians felt that their self-identification as lesbians had been a process of discovering their true and essential selves that had previously been suppressed. Some "primary" lesbians, who once thought they had not chosen to be lesbians, later developed a sense that they had chosen their sexual identity.¹³⁵

Minton and MacDonald have suggested an essentialist model of lesbian identity development involving three stages. the "egocentric" stage of personal lesbian behaviour, which may or may not include sexual behaviour, followed by the "sociocentric" stage of being aware of oppression, and then finally the "universalistic" stage involving the critical evaluation of social norms.¹³⁶

Lillian Faderman asserts that many women have developed, or chosen, a lesbian identity in reverse order through the feminist movement by first becoming aware of social norms, followed by an awareness of oppression and only when experiencing the "egocentric" stage of personal lesbian behaviour.¹³⁷ Faderman suggests that even those lesbians who did not have the support of the feminist movement (e.g., older lesbians) also may have developed a lesbian identity along the same lines, starting first with a critique of heterosexuality as a belief system (the "universalistic" stage)

¹³⁵ Carla Golden, "Diversity and Variability in Women's Sexual Identities" in Boston Lesbian Psychologies Collective, ed., Lesbian Psychologies: Explorations and Challenges (Urbana, Ill.: University of Illinois Press, 1987) 19 at 25-28.

¹³⁶ Minton & MacDonald, "Homosexual Identity Formation as a Developmental Process" (1983/84) Journal of Homosexuality.

¹³⁷ MacCowan, supra, note 2.

before going through the sociocentric stage to the egocentric stage of personal experience.¹³⁸

These twin concepts are significant for students of lesbian and gay history and suggest complexities that are important for the lesbian history set forth herein.

The oldest position, essentialism, makes a limited break with the medical model, rejecting only the pathology attributed to homosexual behavior. In the essentialist view, "homosexuality" is a constant in human behavior that appears predictably across diverse social and historical contexts.¹³⁹

Essentialists usually focus on behaviour, namely genital sex, as the constant. Others, like historian John Boswell, focus on identity, defined as "consciousness of erotic inclination", as the meaningful constant. The distance between an implicitly asexual and an explicitly sexual model of lesbianism presents the lesbian historian with a dilemma. Although emotionally appealing to many women, an all-encompassing model like Rich's 'lesbian continuum' collapses lesbian oppression into women's oppression. Nevertheless, it is equally unsatisfactory if the sole criterion for allowing a woman a place in lesbian history is proof that she had or wanted to have genital sexual contact with another woman.¹⁴⁰

From the field of lesbian and gay studies, Will Roscoe criticizes reliance on genital sex or consciousness of erotic

¹³⁸ Ibid.

¹³⁹ Will Roscoe, "Making History: The Challenge of Gay and Lesbian Studies," (1988) 15:3/4 Journal of Homosexuality 1 at 3.

¹⁴⁰ Pamela Johnson, "'The Best Friend Whom Life Has Given Me.' Does Winifred Holtby have a place in lesbian history?", Not A Passing Phase, supra, note 10, 141 at 157.

inclination. Roscoe proposes a multidimensional model that recognizes acts and behaviour and "the specific beliefs and social forms that lend meaning to these acts".¹⁴¹

Whether drawing on biology or psychology, essentialist definitions of gay and lesbian experience disconnect facts from social context. Variations and discontinuities are overlooked to reveal the universal cause behind all historical types. But the types and the agents that essentialism refers to are not observable phenomenon. Only acts can be empirically observed, so essentialism resorts to acts as the basis for its definition. Invariably, these are sexual acts, as these alone – in their raw, genital form, stripped of social meaning – link the Keraki [of New Guinea], the Chuckchee [of Siberia], the North American berdache, the Romans, the medieval monks, and contemporary gay and lesbian identity.¹⁴²

In some North American Indian cultures a woman who chooses a male social role is defined within the culture as a mediator between social, economic and gender divisions, not in terms of her genital sexual behaviour with other women.¹⁴³ The sexual behaviour of Greek and Roman males, so commonly categorized as "homosexual," is more analogous to contemporary bisexuality except that, in Classical Greece and pre-Christian Rome, bisexuality was the cultural norm for certain classes of males. Consequently, those males were more concerned with the distinction between active and passive roles and with their partner's age and class than with their sex partner's biological sex.¹⁴⁴

Roscoe criticizes both essentialism and constructionism as reductionist. He faults the former for being "antihistorical" in

¹⁴¹ Roscoe, supra, note 139 at 19.

¹⁴² Ibid. at 4-5.

¹⁴³ Ibid. at 5.

¹⁴⁴ Ibid. at 6.

treating the subject of lesbian and gay studies as "a function of natural (universal, intrinsic, genetic, and interior) causes, governed in turn by natural laws"¹⁴⁵, the latter for asserting that one's sexual orientation is a complex developmental process – "the consequence of an interactive process of social labelling and self-definition".¹⁴⁶

For the constructionist, homosexual acts are potential behaviors for which all humans are equally equipped...In a marriage of sociology and Freudianism, human sexuality is viewed as an undifferentiated drive shaped and channeled by family and society. Out of amorphous potential, society "constructs" a specific sexual reality...Instead of psychological "drive" or "inclination," constructionists speak of social "role" and "regulation."

* * *

Deviance is "constructed" by giving it a name and requiring individuals to use that name to identify themselves. Labeled and treated as members of a class, deviants orient their lives around their label; a subculture can result. "Social regulation provides the conditions within which those defined can begin to develop their own consciousness and identities."¹⁴⁷

Roscoe observes, however, that the gay subculture existed before the 1950s when the sexual labels for lesbians and gay men gained pre-eminence thus disproving one of the central premises of constructionism, that lesbian and gay identity depends on sexual labels and that all content and social meaning flows from "society" alone. He criticizes constructionist historians for turning their attention from lesbian and gay actors and their experiences to

¹⁴⁵ Ibid. at 7.

¹⁴⁶ Didi Herman, "Are We Family? Lesbian Rights and Women's Liberation" 1990 Osgoode Hall Law Journal 789 at 812, quoting Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism" (1987) 17:93-94 Socialist Review 9 at 17.

¹⁴⁷ Roscoe, supra, note 139 at 7-8, quoting Jeffrey Weeks, Sex, Politics and Society: The Regulation of Sexuality Since 1800 (London: Longman, 1981) at 97.

"society" and "social regulation".¹⁴⁸ If labels were a prerequisite for lesbian or gay identity formation, why is anyone willing to accept a stigmatized identity when avoidance is possible?

This "willingness" suggests that the individual is not merely a blank slate awaiting a label to activate his or her consciousness.¹⁴⁹

The constructionist model of lesbianism "emphasizes the social and economic regulation of women in general, not just sexuality,...as a special case of resistance to sexism and therefore related to every other instance of female bonding and feminist protest". Roscoe queries, "do lesbians, past and present, have nothing to distinguish themselves from other women besides the degree of their reaction to sexism?"¹⁵⁰

While essentialism and constructionism offer distinct definitions and conceptual unities for the field of gay and lesbian studies, both are stymied by the range of data they encounter and resort to reductionism. In the hope of bringing order to the conflicting evidences of homosexual expression, they turn to a priori agents ("nature" and "society") and mechanical causality (biological/psychological "cause" and social "regulation"). Both lead to a cul-de-sac in which gay and lesbian history is negated. To the essentialist, history is only a version of the present, while the constructionist offers the present as the only history lesbians and gay men have.¹⁵¹

Roscoe urges the field of lesbian and gay studies to challenge the popular and official sexual definitions of lesbians and gay men and to adopt a definition of lesbian and gay studies that will

¹⁴⁸ Roscoe, supra, note 139 at 9-10.

¹⁴⁹ Ibid. at 9-10.

¹⁵⁰ Ibid. at 8, 10.

¹⁵¹ Ibid. at 10.

allow for "inclusion of cross-cultural and transhistorical data without violating the principle of cultural relativity".¹⁵²

Michel Foucault has strongly influenced gay studies by arguing that "sexuality" itself is a social construction stemming from the sexual discourse which started in the nineteenth century. Foucault disagrees with theorists who believe that discussing sex reduces repression. He thinks that talking about sex constitutes it in our lives.

Roscoe argues for a definition of lesbian studies that goes beyond sexual discourse and agencies of social regulation.

The containment of lesbian and gay studies within sex and the models of lesbian and gay experience that deny intentionality and subjectivity must be exploded.

* * *
Our vision narrowed through sexual discourse, our imagination constricted by the lingering grip of deterministic models, the social and sexual variations of other cultures appear to us in terms of modern homosexuality or not at all.¹⁵³

Roscoe proposes going beyond the "knot of social control, regulation, and construction" to develop a methodology which substitutes sex with "sociosexual specialization" – "sexual" being defined as acts, roles and gender status – to free lesbian and gay studies from reference to the medical model and the ethnocentrism of contemporary sexual terminology.¹⁵⁴ He proposes six dimensions of specialization: sexuality, subjectivity and identity, gender status, social roles, economic roles, and religion and

¹⁵² Ibid. at 11, 14.

¹⁵³ Ibid. at 18.

¹⁵⁴ Ibid. at 19-20.

spirituality.¹⁵⁵

Sexuality: The multidimensional approach uses a continuum to describe sexuality, but not the Kinsey scale which plots a continuum based on sexual object choice.¹⁵⁶ The Kinsey poles of exclusive lesbianism or exclusive heterosexuality are relative to modern, Western society and are therefore culture-bound. A continuum of historical and cross-cultural examples of sexual specialization must have variable poles because different cultures recognize different norms and variations.¹⁵⁷

What concerns lesbian and gay studies in all these cases is not the presence of sex, but the possibility of meaning — meaning that might expand our understanding of human sexual potentials, and of the emotional, social, and spiritual possibilities of sexual specialization — denied or ignored in contemporary Western culture, but recognized and developed in others.

* * *

[I]t is apparent that in societies other than contemporary Western society, patterns of female intimacy exist that are not defined in sexual terms and do not preclude heterosexual marriage or child-rearing, yet often include lesbian relations, and for this reason are of concern to lesbian studies. Faced with patterns like these, women's studies has decentered sexual behavior in its model of lesbianism, and, in this respect, has moved ahead of gay male studies. Adrienne Rich, for example, introduces the concept of lesbian continuum, which she defines as "a range — through each woman's life and throughout history — of woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman."¹⁵⁸

Subjectivity and Identity: The subjective approach is taken by Lillian Faderman in Surpassing the Love of Men. If lesbianism

¹⁵⁵ Ibid. at 21.

¹⁵⁶ See the discussion of Kinsey's studies in Section III H. 5.

¹⁵⁷ Roscoe, supra, note 139 at 21.

¹⁵⁸ Ibid. at 22, quoting Rich, supra, note 3.

is defined as primarily a sexual experience, then romantic friendships were not lesbian. However, if lesbianism is conceived as

...an all-consuming emotional relationship in which two women are devoted to each other above anyone else, these ubiquitous...romantic friendships were lesbian.¹⁵⁹

Identity is one dimension of the subjective. Essentialists and constructionists fail to recognize that identity derives from self-awareness of degrees of sociosexual variance, not as an absolute.¹⁶⁰

The self-application of the term "gay" or "lesbian" is little indication of the lifestyle that individual adopts, their involvement in the gay [or lesbian] subcultures, or the meaning the term holds for them. Identity is an important dimension, but on its own cannot explain all cases, past or present.¹⁶¹

Subjective and individual factors interact with social construction and the awareness of being different is not contingent on one's awareness of labels.¹⁶²

Gender Status: Western culture is characterised by gender dualism, the notion that there are two mutually exclusive statuses of "female" and "male". Popular attitudes still conceive of lesbians as mannish and gay men as effeminate, but those images are deceptive and inaccurate. The mannish lesbian image is offset by glitter dykes and lipstick lesbians, the effeminate gay image is offset by leathermen and gay corporate executives. Roscoe cautions

¹⁵⁹ Roscoe, supra, note 139 at 23-24, quoting Faderman, supra, note 11 at 142, 331, 19.

¹⁶⁰ Roscoe, supra, note 139 at 25.

¹⁶¹ Ibid. at 24-25.

¹⁶² Ibid. at 25.

against projecting such gender dualism onto non-Western cultures which may recognize a broader range of gender statuses. Behaviour deemed feminine by Western standards is not necessarily effeminate in another culture or during another historical time.¹⁶³

Social Roles: Here the inquiry should focus on "[h]ow societies assimilate variance into their values and belief systems, or, conversely, deny or negate it". In Classical Greece, male same-sex relations were "situational and transitional roles configured around age and social status".

Stripping away the philosophical façade of Greek homosexuality, we have an institution not unlike that of the Keraki: homosexual acts performed as magical transference of adult male strength, courage, and wisdom through semen.¹⁶⁴

Economic Roles: An exploration of the economic factors that foster the emergence of lesbian subcultures might include an analysis of what occupations lesbians engaged in, both in the present and historically.

Economic ramifications constitute one of the most important, and most overlooked, dimensions of sociosexual variation. Rich's definition of lesbianism as a form of marriage resistance, for example, attributes it with a specifically economic dimension. Indeed, historical and cross-cultural data reveal two common lesbian patterns that incorporate strategies of economic independence. One involves changing gender status to gain access to male occupations and social prerogatives and to form relationships with other women – represented by female berdaches [in some native North American cultures] and cross-dressing women in European and American society. The other common strategy involves the exchange of mutual aid within a lesbian relationship. In China, beginning in the nineteenth century, a significant number of women gained economic independence through jobs in silk production. Called sou hei, they formed sisterhoods based on shared living arrangements, mutual support, and

¹⁶³ Ibid. at 28.

¹⁶⁴ Ibid. at 29.

lesbian bonds.¹⁶⁵

Religion and Spirituality: Some cultures attribute religious and supernatural powers to sociosexual variation. Lesbian and gay studies can explore the religious roles assumed by lesbians and gay men, whether sociosexual specialization appears in myths and rituals, and whether there are magical, religious, and philosophical beliefs surrounding these practices.¹⁶⁶

Feminist scholars...have been reevaluating evidence on the history of European witch hunts and the nature of the practices and customs targeted by the Inquisition, practices that some believe included woman-identified bonding and sexuality. While these historical interpretations are often controversial, the evidence regarding goddess religions, from the neolithic era of the Near East and Europe until, perhaps, the early modern period, is not easily dismissed. That sexuality and the status of women within goddess-oriented belief systems were valued differently than in patriarchal and caste- and class-based cultures is an observation bound to be elaborated on in future studies, along with the role of female bonding in these belief systems.¹⁶⁷

Roscoe's model, based on historical and social constructs, acknowledges individual and subjective factors as well. These factors should assist in the understanding of the lesbian history which follows. Constructionists correctly recognize the importance played by social labeling in the formation of contemporary social roles and identities. This does not mean, however, that individuals in other periods and societies who lacked contemporary terminology necessarily lacked both formal social roles and the

¹⁶⁵ *Ibid.* at 30, citing Rich, *supra*, note 3 at 21.

¹⁶⁶ Roscoe *supra*, note 139 at 32.

¹⁶⁷ *Ibid.* at 32, citing Z. Budapest, *The Holy Book of Women's Mysteries: Part Two* (Los Angeles: Susan B. Anthony Coven Number One, 1980); Starhawk, *Dreaming the Dark: Magic, Sex and Politics* (Boston: Beacon Press, 1982); and Judy Grahn, *Another Mother Tongue: Gay Words, Gay Worlds* (Boston: Beacon Press, 1984).

means to interpret their social and sexual behaviour.

"Homosexual," "gay," and "lesbian" did not shatter a silence; they merely redirected a conversation already in progress.¹⁶⁸

¹⁶⁸ Roscoe, supra, note 139 at 30.

B. Greece, Rome and Early Christianity.

Lesbianism is named for the Isle of Lesbos, which lies in the Aegean Sea off the coast of Turkey. There, in the early sixth century B.C., lived Sappho, a famous Greek poetess who is said to have established a school for girls and who wrote poetry which celebrated the raptures of passionate love between women.¹⁶⁹ Thus, apparently, lesbian eroticism was accepted in ancient Greece.

Ancient pre-Christian Roman secular law considered the lesbian acts of a married woman adulterous and a husband had the right to kill his wife if he found her in bed with another woman.¹⁷⁰ Lesbian acts were generally excused as the result of drunkenness.¹⁷¹

Christian Rome looked to Biblical sources for much of its secular law.¹⁷² Interestingly, lesbian acts are not mentioned in the Old Testament¹⁷³, yet cross-dressing is specifically prohibited.

¹⁶⁹ Del Martin and Phyllis Lyon, Lesbian/Woman (San Francisco: Glide Publications, 1972) at 15.

¹⁷⁰ Diane McConkey, "Legal, Police, and Social Attitudes Toward Female Homosexuality", Master's Dissertation submitted to Centre of Criminology, University of Toronto, August, 1973, at 82-83, available in Morisette Library, University of Ottawa; Robson, supra, note 117 at 21-22, citing A. Ide, Loving Women: A Study of Lesbianism to 500 CE, 53 (1985) at 49-50.

¹⁷¹ Robson, supra, note 117 at 22, citing Ide, supra, note 170.

¹⁷² Robson, supra, note 117 at 22.

¹⁷³ Ibid. Under Jewish law, lesbian acts were not a crime but "it was regarded as an unspeakable form of immorality which ought to be punished by whipping and the exclusion of the offenders from the company of 'decent' women". McConkey, supra, note 170 at 14, citing Karl M. Bowen and Bernice Engle, "A Psychiatric Evaluation of Laws of Homosexuality" (1956) 29 Temple Law Quarterly 273 at 276.

A woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment, for all that do so are abomination unto the Lord thy God.¹⁷⁴

Witchcraft is also prohibited ("Thou shalt not suffer a witch to live."¹⁷⁵).

There are, however, several acknowledgements of lesbianism in the New Testament. One of these references by Saint Augustine, cautions that love between nuns should be spiritual only and that married women and virgins should refrain from shameless and immodest "playing with each other".¹⁷⁶ The passage that has provided the primary basis for Christian condemnation of lesbian acts is Saint Paul's Epistle in Romans 1:26, dating from the early first century A.D.¹⁷⁷

God gave them up into vile affections: for even their women did change the natural use into that which is against nature.

The condemnation of lesbian acts as "unnatural" or "against nature" stems from interpretations of this passage by early Christian commentators.¹⁷⁸ In the sixth century A.D., both lesbian and gay acts were made punishable by death in the Corpus Juris Civilis, an encyclopedic collection of law in Christian Rome, which later became the basis of both the ecclesiastical law of the

¹⁷⁴ Robson, supra, note 117 at 22 and note 87 therein, quoting Deuteronomy 22:5.

¹⁷⁵ Robson, supra, note 117 at 22 and note 86 therein, quoting Exodus 22:18.

¹⁷⁶ Boswell, supra, note 110 at 158, citing Epistles 211.

¹⁷⁷ McConkey, supra, note 170 at 10-11; Boswell asserts, however, that "the New Testament takes no demonstrable position on homosexuality". Boswell, supra, note 110 at 117.

¹⁷⁸ Boswell, supra, note 110 at 360; Robson, supra, note 117 at 23 (citations omitted).

Roman church and the civil law of both Europe and England.¹⁷⁹

Lesbian acts were specifically mentioned in the seventh and eighth centuries in celtic church penitentials which were collections of uniform penances (spiritual duties such as prayer or attendance at mass) for priests to give a penitent for every sin that might be confessed.¹⁸⁰ These penitentials suggested that priests give three years of penance to lay women and seven years to nuns who indulged in lesbian acts.¹⁸¹

According to historian John Boswell, "shifts in social patterns, ascetic philosophers and Christian revulsion against Hellenistic hedonism" resulted in a period of enormous ecclesiastical hostility toward sexual matters for the centuries during and after the fall of Rome with the climate growing progressively more tolerant during the early Middle Ages.¹⁸²

¹⁷⁹ Vern L. Bullough, Homosexuality: A History (1979) at 31-32.

¹⁸⁰ Boswell, supra, note 110 at 180-81.

¹⁸¹ McConkey, supra, note 170 at 12, citing Derrick S. Bailey, Homosexuality and the Western Christian Tradition (London: Longmans, Green & Co., 1955) at 76; Boswell notes, however, that the eighth century penitentials of Pope Saint Gregory specified only 160 days for lesbian acts. Boswell, supra, note 110 at 180.

¹⁸² Boswell, supra, note 110 at 206.

C. The Middle Ages.

The catholic church was a primary figure in the most blatant and violent repression of lesbian acts. Several medieval church sources reiterate the church's condemnation of lesbian acts, including church penitentials which continued to censure lesbian acts. More severe penances and more detailed descriptions of the proscribed conduct were set forth in eleventh-century germanic penitentials which suggested five years of penances for lay women and seven years for nuns who used a dildo.¹⁸³

Despite the catholic church's central role in the persecution of women, nuns over the centuries could be considered our separatist foremothers, many of whom might identify as lesbian if living today.¹⁸⁴ Throughout history, nuns have resisted male domination and rejected heterosexuality by rejecting male society, sex with men and marriage to men. Today, lesbians and nuns share certain freedoms: both groups are oblivious to male attention, eschew the commercially promoted feminine mystique, and have the time and energy which heterosexual women devote to men for self-

¹⁸³ McConkey, supra, note 170 at 74, citing Arno Karlen, Sexuality and Homosexuality (New York: W. W. Norton & Co., 1971) at 80.

¹⁸⁴ Lesbian philosopher, Sarah Hoagland, is one of many lesbians who urge separation into women-only communities instead of challenging the system from within.

Separatism is a chosen response, separatists having taken cognizance of our environment, an affirmation of what we hold valuable to ourselves. Separatism is a challenge to what counts as fact and the beginning of the creation of new value.

Sarah Lucia Hoagland, "Introduction" in Sarah Lucia Hoagland and Julia Penelope, eds., Lesbians Only: A Separatist Anthology (London: Onlywomen Press, 1988) 1 at 5.

development and communal projects.¹⁸⁵ As we shall see, however, lesbian history includes church recognition and repression of "particular friendships" between sisters.¹⁸⁶

In the thirteenth century, Saint Thomas Aquinas condemned as sinful both lesbian and gay acts in his very influential treatise, the Summa Theologia.¹⁸⁷ Ecclesiastical law shaped medieval secular law. For example, the secular law in Orleans, France, required sexual mutilation as the penalty for lesbian acts for the first two offences and burning for the third, with the worldly goods of those convicted going to the king. The law reads, in part, as follows:

A woman who [is a sodomite] shall lose her member each

¹⁸⁵ Rosemary Curb, "What is a Lesbian Nun?" in Rosemary Curb & Nancy Manahan, eds., Lesbian Nuns: Breaking Silence (Tallahassee, FL: The Naiad Press Inc., 1985) xix at xx. Curb describes her experience in religious life between 1958 and 1965.

In many ways religious life offered us a learning and growing experience beyond our parents' aspirations for themselves or perhaps for us. In addition to formal education, degrees, and job experience, religious life enabled us to develop positive traits: greater self-knowledge, ability to lead and to take risks, greater sense of community and belonging, personal power, poise, independence, creativity, integration, finesse with authority.

Unfortunately we also developed the less desirable traits fostered by our religious rule and superiors: blind obedience, self-denial, discipline, custody of the senses, and perfect self-control.

The opportunity to receive an education and to live in community with other women must have been very attractive to women in other eras who rejected the limited options available to women in secular life.

¹⁸⁶ Nancy Manahan, "What Silence Does This Book Break?" in Lesbian Nuns, supra, note 185, xxxv at xxxviii.

¹⁸⁷ Robson, supra, note 117 at 24 (citations omitted).

time, and on the third must be burned.¹⁸⁸

Starting in Bologna in the eleventh century, there was a revival of Roman law and tradition which also strongly influenced medieval law. Like Blackstone is to the common law, in the Middle Ages, the opinions of certain jurists who were knowledgeable about Roman law were considered valid secular authority. In 1314, Cino da Pistoia published his Commentary on the Code of Justinian, which interpreted an imperial Roman edict of 287 A.D. as referring to lesbianism. The edict was apparently intended

...to protect the rights of rape victims by removing them from the class of unchaste women (prostitutes, etc.) whom Romans of the upper ranks were legally forbidden to marry.¹⁸⁹

For five centuries, however, the execution of non-conforming women was based, in part, on medieval jurists' interpretation of the Roman edict which reads as follows:

...[t]he laws punish the most foul wickedness [Latin phrase omitted] of women who surrender their honor to the lusts of others, although not the blameless will of those who are defiled by violence, since it was properly decreed that they should be of inviolate reputation and that marriage to them should not be forbidden to others.¹⁹⁰

Without citing any prior authority, Cino states in his Commentary that

This law can be understood in two ways: first, when a woman suffers defilement in surrendering to a male; the other way is when a woman suffers defilement in surrendering to another woman. For there are certain

¹⁸⁸ Louis Crompton, "The Myth of Lesbian Impunity" (1980/81) 6:1/2 Journal of Homosexuality 11 at 13.

¹⁸⁹ Ibid. at 15.

¹⁹⁰ Ibid. at 15-16, citing Paul Krueger and Theodor Nommsen, eds., Corpus Juris Civilis: Codex Justinianus, 2 vols. (Frankfurt am Main: Verlag Weidmann, 1967) vol. 2 at 375.

women, inclined to foul wickedness, who exercise their lust on other women and pursue them like men.¹⁹¹

Another jurist relied upon to condemn lesbianism was the Italian Bartholomaeus de Saliceto, whose fifteenth-century commentary on Roman law prescribed the death penalty for lesbian acts. Da Pistoia and Saliceto were relied on by later authorities in Italy, France, Spain, Germany and Scotland.¹⁹²

In Italy the influence of Roman law was all-pervasive; in Spain the Partidas were largely based on it; in France the kings fostered its revival; and even in Germany, after 1500, and in Scotland, after 1600, it enjoyed remarkable if belated triumphs. Thus, throughout the continent, lawyers trained in Roman law and imbued with Levitical-Pauline principles were encouraged to write provisions for the killing of lesbians into the civic, regional, and imperial codes they drafted during the late Middle Ages and the Renaissance.¹⁹³

¹⁹¹ Crompton, supra, note 188 at 16, citing Cino da Pistoia, In Codicem Commentaria, 2 vols. (Frankfurt am Main: S. Feyerbrandt, 1578; reprinted ed., Turin: Botega d'Erasmus, 1964) vol. 2 at 546A.

¹⁹² Crompton, supra, note 188 at 13-16.

¹⁹³ Ibid. at 16, citing Hans Julius Wolff, Roman Law: An Historical Introduction (Norman, Okla.: University of Oklahoma Press, 1951).

D. The Fifteenth Century.

- 1. The Execution of Joan of Arc 95
- 2. The Execution of Witches 98

Between 1400 and 1800, there was a gradual shift toward enlightenment thinking which rejected reliance on church doctrine as supreme. Until 1400, church and secular law had been closely related. Gradually, human reason instead of divine revelation began to preside over human affairs.¹⁹⁴ However, the catholic church continued to support violence against non-conforming women who ventured across the strictly observed and rigidly enforced line between female- and male-social roles. In the period from 1400 to the French Revolution, lesbian sex acts were generally deemed the equivalent of sodomy and were punishable by death in France, Spain, Italy, Germany and Switzerland.¹⁹⁵ One such execution occurred in 1477 when a girl was drowned at Speier, Germany, for "lesbian love".¹⁹⁶

1. The Execution of Joan of Arc.

The life, trial and burning of Joan of Arc in 1431 demonstrates the flavour of institutional male reaction, disguised as solemn religious duty, to a strong and assertive female, even in the absence of proof of lesbian acts.

Joan's short life demonstrated the quixotic, potent effects of men's fears of women who confidently claimed authority and who acted independently. Those perceived as supporting men's institutions found themselves honored

¹⁹⁴ J. H. Hallowell, The Decline of Liberalism as an Ideology (New York: Howard Fertig, 1971) at 4-5.

¹⁹⁵ Crompton, supra, note 188 at 11.

¹⁹⁶ Ibid. at 17.

and valued, those thought of as threatening or opposing dishonored and condemned to death. Joan was one young woman perceived as challenging men's authority.¹⁹⁷

Joan of Arc (1412-1431) adopted social behaviours which were then considered appropriate for men only, but only for men of a higher caste. She was born into a peasant family. At sixteen she claimed she heard voices directing her to dress in men's clothes and to lead armies to save France which was in the midst of the Hundred Years War with England.¹⁹⁸

After being credited with France's victory at Orleans, the Dauphin of France was crowned in 1429. A lull in the war followed - but not for Joan. She was bent on retaking Paris from the English. In May, 1430, Joan was captured by the English while fighting without the French king's authority. The English turned her over to ecclesiastics in Paris who were hand-picked for the task of proving that Joan's voices were the voice of the devil and that she was a witch. Joan was not declared a witch but the church excommunicated her as a "schismatic" and she was burned at the stake by secular authorities.¹⁹⁹

Although there is no direct evidence of erotic or sexual links between Joan and other women, it was enough that Joan was independent in an age that severely condemned independence in women. She wore men's clothes, adopted a male lifestyle as a soldier and advisor to the leader of armies, had close

¹⁹⁷ Bonnie S. Anderson and Judith P. Zinsser, A History of Their Own: Women in Europe from Prehistory to the Present (New York: Harper & Row, 1988) vol. 1 at 161.

¹⁹⁸ Ibid. at 151.

¹⁹⁹ Ibid. at 156-57.

relationships with other women, including prostitutes, and was attached to the two female saints on whom she relied for guidance and strength. Her story emphasizes how male power mobilized to retaliate against a non-conforming yet apparently celibate woman who claimed male privilege, autonomy and power.²⁰⁰

²⁰⁰ An inquisitor who questioned Joan of Arc described the process leading to her execution.

There was lately in France, within the last ten years a maid named Joan, distinguished, as was thought, both for her prophetic spirit and for the power of her miracles. For she always wore man's dress, nor could all the persuasions of the Doctors of Divinity bend her to put aside these and content herself with woman's garments, especially considering that she openly confessed herself a woman, and a maid. "In these masculine garments," she said, "in token of future victory, I have been sent by God, to help Charles, the true King of France, and to set him firm upon his throne from whence the King of England and the Duke of Burgundy are striving to chase him"; for at that time the two were allied together and oppressed France most grievously with battle and slaughter. Joan, therefore, rode constantly like a knight with her lord, predicted many successes to come, and did other like wonders whereat not only France marvelled, but every realm in Christendom.

At last this Joan came to such a pitch of presumption, that layfolk and ecclesiastics, Regulars and Cloisters began to doubt of the spirit whereby she was ruled, whether it were devilish or divine. Then certain men of great learning wrote treatises concerning her, wherein they expressed adverse opinions as to the Maid. After she had given great help to Charles the King and placed him securely upon the throne, she was taken by God's will and cast into a prison. A great multitude were then summoned of masters both Canon and Civil law, and she was examined for many days. She at length confessed that she had a familiar angel of God, which, by many conjectures and proofs, and by the opinion of the most learned men, was judged to be an evil spirit; so that this spirit rendered her a sorceress; wherefore they permitted her to be burned at the stake by the hangman.

Elizabeth G. Gould, The First Sex (Baltimore: Penguin Books, 1972) at 265-66, emphasis in original, quoting from Johann Nider, "Formicarius" (1438) in G. G. Coulton, ed., Life in the Middle Ages, vol. I (New York: Macmillan, 1910) at 212-13. This quote suggests that Joan was burned for being a witch. According to Anderson and Zinsser, Joan was executed for being a "schismatic" -

2. The Execution of Witches.

Widely discrepant estimates have been made concerning the number of witches executed. One of the more conservative estimates suggests that, between 1450 and 1700, some 200,000 people were killed as witches in western Europe, four-fifths of them women.²⁰¹

In 1486, two Dominicans, Heinrich Kramer and Jacob Sprenger, published Malleus Maleficarum. It has been regarded as the most important work in the history of witchcraft. It linked "the traditional peasant sorcery of spells and charms to an organized diabolical conspiracy to overthrow Christendom" by turning "isolated, ignorant and often senile elderly women in distant villages, far away from the centres of political power, into the security problem of the era". In a papal bull of 1484, the problem of witchcraft was described as the renunciation of faith, contracting with the Devil, and using spells to hinder procreation, destroy the off-spring of humans and animals, and ruin crops.²⁰²

By the mid-1500s, church and secular authorities agreed that "a heresy of devil worship" existed. All agreed that the only defence against witches was to find and kill them.²⁰³ The Frenchman Bodin warned in his 1580 demonology that failure to kill

one who has divided the church by failing to accept its authority. Anderson and Zinsser, supra, note 197 at 156-57 and 476, note 1.

²⁰¹ G. R. Quaiffe, Godly Zeal and Furious Rage: The Witch in Early Modern Europe (London: Croom Helm, 1987) at 79.

²⁰² Ibid. at 22.

²⁰³ Anderson and Zinsser, supra, note 197, vol. I at 166.

the witches would result in "pestilence, famines and wars".²⁰⁴

The witch hunts have been variously explained as the catholic church and the middle class persecuting the paganism that was still practiced by the lower classes;²⁰⁵ the emerging medical profession's response to a dramatic decline in population by persecuting women who had knowledge of birth control techniques;²⁰⁶ and the church's response to witchcraft's threat to the church's sugar industry (witches believed that sugar caused illness).²⁰⁷ Alternatively, the witch hunts are said to have marked "the social thresholds of eccentricity tolerable to society and [to] register[]...a fear of a socially indigestible group, unmarried women..."²⁰⁸ Women, being pre-deceased by their plague-stricken male relatives, were thought to be prone to feel alone and helpless in a changing society, and therefore inclined to antisocial frenzies and the rites of witches.²⁰⁹

Witches were stereotyped as living independently of men and beyond male authority and as leading younger women into lesbian

²⁰⁴ Ibid., quoting Alan C. Kors and Edward Peters, Witchcraft in Europe 1100-1700: A Documentary History (Philadelphia: University of Pennsylvania Press, 1972) at 215.

²⁰⁵ Arthur Evans, Witchcraft and the Gay Counterculture (1978) at 49, 61.

²⁰⁶ Quaiffe, supra, note 201 at 12.

²⁰⁷ Mary Daly, Gyn/Ecology (1978) at 195-96.

²⁰⁸ Ibid. quoting H. C. E. Midelfort, Witch Hunting in Southwestern Germany, 1562-1684: The Social and Intellectual Foundations (1972) at 3. "Until single women found a more comfortable place in the concepts and communities of Western men, one could argue that they were a socially disruptive element." Ibid.

²⁰⁹ J. B. Russell, Witchcraft in the Middle Ages (1972) at 202 (footnote omitted).

acts.

No woman was content without sex. Those that were most deprived, the isolated elderly, would do anything for sex — even sell their soul to the Devil. The Devil deliberately chose the old and, by implication, the ugly for his sexual pleasure. It degraded sex and revealed to the world the depth to which sex-crazed women would sink. Women became more evil the older they became. Old women, having failed as sex objects in their youth and vindictive toward men, led girls into the joys of lesbianism.²¹⁰

A 1460 tract associates lesbian and gay acts with witchcraft:

Sometimes indeed indescribable outrages are perpetrated in exchanging women, by order of the presiding devil, by passing on a woman to another woman and a man to other men, an abuse against the nature of women by both parties and similarly against the nature of men, or by a woman and a man outside the regular orifice in another orifice.²¹¹

Because lesbian sexuality was considered to be evidence of being a witch, women who engaged in lesbian acts may have been disproportionately represented among those who perished. One commentator has observed that cross-dressing and paganism were intertwined because transvestitism was considered a rite of witchcraft in the religion of Europe before christianity.²¹²

Given the historic use of circumlocutions ("the unmentionable crime," "unnatural acts," "unimaginable crime") by church and state to avoid mentioning lesbian acts and the connections between lesbian acts and witchcraft, it may well be that the inquisitors preferred to try women for "heresy" as a proxy for lesbian acts.

²¹⁰ Quaiffe, supra, note 201 at 94.

²¹¹ Evans, supra, note 205 at 76, citing R. Robbins, Encyclopedia of Witchcraft and Demonology (1959) at 468.

²¹² Evans, supra, note 205 at 11, citation omitted.

E. The Sixteenth and Seventeenth Centuries.

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1. The Revival of Same-Sex Love in Literature.

Women writers of the sixteenth and seventeenth centuries were inspired by male Renaissance writers who, borrowing from the Greeks and Romans, idealized passionate asexual love between men. Greek and Roman men regarded friendship as a fundamental aspect of adult male existence and many ancient male writers made no distinction between friendship and love. Renaissance writers borrowed from Greek and Roman sources, not only the ideals but even the language of male friendship/love.²¹³ For example, in his essay, "On Friendship," Montaigne characterised the love between men as motivated by an "inexplicable and fatal force" that caused them to merge with one another such that each "with like desire and consent...[did] dive and disappear...[in the being of the other]". Love between men caused them to "mix and blend in each other with so complete a mixing that they efface and never again find the seam that joined them". Montaigne distinguished this love from both heterosexual love and Greek homosexuality because the latter is usually based on desire and disparity in age and/or in vocation and thus can rarely support true friendship. In Montaigne's view, a woman was incapable of friendship with a man because a woman's "ordinary capacity 'is not sufficient for that confidence and self-

²¹³ Faderman, supra, note 11 at 66.

disclosure which is the nurse of this sacred bond'" between men.²¹⁴

The idealization of friendship/love between men in the Renaissance did not represent public acceptance of male homosexuality. Indeed, male writers extolled passionate asexual love as superior to sexual love, emphasizing the importance of the soul over the body.

Renaissance literary works describing intense friendships between women "suggest that women were permitted emotional attachments as all-consuming as those between men". Any desire for sexual expression in Renaissance same-sex relationships was probably repressed or sublimated -- except that in romantic friendships between women, those desires were allowed to be expressed through non-genital erotic behaviour such as kissing, hugging and holding hands.²¹⁵

The romantic friendships described by women writers in the sixteenth and seventeenth centuries often consisted of highly charged emotional experiences, like today's intense sexual relationships: intense love, eternal devotion and the ecstasy and union of souls through poetry, professions of love and noble actions. While some men viewed women's romantic friendships as ennobling, others viewed such relationships as "playful tool[s] with which [women]...tease their male lovers". However, men who believed that women did not possess the qualities required for

²¹⁴ Ibid. at 65, citing Michel de Montaigne, "On Friendship", in Montaigne's Essay on Friendship and XXIX Sonnets by Estienne de la Boëtie, trans. Louis How (Boston: Houghton Mifflin Co., 1915).

²¹⁵ Faderman, supra, note 11 at 67.

friendships worthy of men had no reason to be jealous of friendships between women.²¹⁶

2. Sixteenth-Century Libertine Writers.

If there were any female sixteenth-century libertine writers who dealt with love and sexual intimacy between women, their work has not survived. Male French libertine writers were naïve in their portrayal of sexuality between women and trivialized women lovers merely as one another's sexual playmate. "If a man were not present in fact, one of those who was present must simulate him". Hence, the "missionary position" with vaginal penetration by some object seemed to captivate the male imagination as the position of choice for two women.²¹⁷

Male acceptance/approval for sex between women in libertine literature was based on certain assumptions: sex between women lacks the components of a serious heterosexual relationship (e.g., longevity, loyalty, concern for the welfare of one's beloved); sex between women is a mere apprenticeship for sex with men because women cannot possibly find sexual fulfillment in a partner who has no penis²¹⁸; and it is an aphrodisiac for the male spectator.

In the sixteenth century, men were confident that they were necessary to women because women had to form heterosexual bonds with men in order to survive. Love between women was then insignificant in comparison to the overwhelming importance of men.

²¹⁶ Ibid. at 72.

²¹⁷ Ibid. at 31.

²¹⁸ Ibid. at 23-25, 37.

It was also inconceivable to men that women could have sexual pleasure without a man.²¹⁹

English writers during this period equated love with heterosexual sex. Love without a penis was impossible. Consequently, women could be very demonstrative toward one another without the slightest stigma being attached to their behaviour.

[A] narrower interpretation of what constitutes eroticism permitted a broader expression of erotic behavior since it was not considered inconsistent with virtue.²²⁰

3. The Persecution of Passing Women.

In the 1500s, the state assumed jurisdiction over "moral legislation [including laws relating to lesbian and gay acts] which had been under the control of the medieval church".²²¹ The 1532 Constitution of the Holy Roman Empire, which encompassed present-day France, Spain, Italy, Germany and Switzerland, criminalized lesbian acts, making them punishable by death by burning.²²² Between 1532 and the French Revolution, lesbian acts in continental Europe were generally punishable by death.²²³ In 1533, English secular law assumed jurisdiction from the church for male sodomy, making it punishable by death.²²⁴ Since that time, lesbian acts have not been prohibited under the criminal law of the United

²¹⁹ Ibid. at 29.

²²⁰ Ibid. at 33.

²²¹ Bullough, supra, note 179 at 34.

²²² Crompton, supra, note 188 at 18.

²²³ Ibid. at 11.

²²⁴ O'Donovan, supra, note 4 at 105.

Kingdom. In continental Europe, however, the death penalty was sometimes specifically reserved for lesbian sex with a dildo whereas other lesbian acts were treated more leniently.²²⁵

In 1566, Henri Estienne reported the execution of a cross-dressing woman from Fontaines who worked as a stable boy, then a vineyard master, had married another woman, and was arrested after living with her wife for two years. The cross-dressing woman confessed to having "counterfeit[ed] the office of a husband" with a dildo and was burned alive.²²⁶

In 1568, a lesbian in Switzerland was drowned for acts described as "a detestable and unnatural crime, which is so ugly that, from horror, it is not named here".²²⁷ Aversion to naming the "crime" of lesbian acts makes it impossible to determine exactly what constituted the crime and may have led to prosecutions for other crimes, as proxies, or outright misnaming of lesbian crimes in judicial records.

There were several recorded executions for lesbian acts and cross-dressing in the sixteenth century.

In Spain, two nuns were burned for using "material instruments." In France, a transvestite was burned in 1536 for "counterfeit[ing] the office of husband," a case of lesbian sexuality was brought before the parliament of Toulouse in 1553 and another in 1555, while two other women were tried and tortured but eventually acquitted

²²⁵ Robson, supra, note 117 at 25-31. (footnotes omitted).

²²⁶ Faderman, supra, note 11 at 51, citing Henri Estienne, Apologie pour Herodote (1566; reprinted Paris: Isidore Liseus, 1879) vol. I at 178.

²²⁷ E. William Monter, "Sodomy and Heresy in Early Modern Switzerland" (1980/81) 6:1/2 Journal of Homosexuality 41 at 46.

for insufficient evidence.²²⁸

Records in the State Archives in Florence, Italy, document the case of Sister Benedetto Carlini of Vellano, the abbess of the Theatine nuns in Pescia, Italy, who was sentenced to life and served 35 years for lesbian acts consisting of kissing and mutual masturbation without a dildo.²²⁹

An entry in the diary of Montaigne told of a 1580 hanging in the Marne District in France of a cross-dressing woman known only as Marie who, after marrying and living with another woman for four months, was executed for "having, by illicit devices, supplied the defects of her sex".²³⁰ Dutch researchers studying female transvestitism discovered 119 court cases in the Netherlands between 1550 and 1839.

The authors posit that cases of cross dressing were treated very differently when the woman had a relationship with another woman; such women were suspected of sodomy or tribadry which was a capital offense.²³¹

The Dutch historians found records of numerous prosecutions. In 1606, Maeyken Joosten, who cross-dressed, and her lover,

²²⁸ Robson, supra, note 117 at 28 (footnotes omitted) (quotations in original).

²²⁹ Ibid. at 28-29 (footnotes omitted).

²³⁰ Crompton, supra, note 188 at 17.

²³¹ R. Dekker and L. van de Pol, The Tradition of Transvestitism in Early Modern Europe (1984) at xi. "Tribadry" comes from the Greek word "tribein" meaning to rub one's body against the body of another and was used pejoratively by the Greeks to refer to women who were erotically attracted to one another. Susan Cavin, Lesbian Origins (San Francisco: Ism Press, 1985) at 245-46, note 7, quoting Richard Lewinsohn, A History of Sexual Customs (Greenwich, Conn.: Premier-Fawcett, 1961) at 60-61. The dictionary defines tribadism as lesbianism. Webster's New World Dictionary, 2d ed. (New York: Prentice Hall Press, 1986).

Bertelmina Wale, were married and engaged in unspecified acts of sex. Joosten was tried in Leiden, Holland, and the death penalty was requested but instead she was sentenced to exile for life.²³²

In 1641, Hendrickje Lamberts van der Shur and Trijntje Barents were both tried for tribadism. After their relationship began, van der Shur began to cross-dress. Their sentence was whipping for both, twenty five years of exile for van der Shur with Barents ordered to remain in the city to insure the separation of the women.²³³

In Amsterdam in 1600s, a cross-dressing woman was punished for unspecified lesbian acts by banishment from the city for 24 years.²³⁴ In Leiden in 1688, a cross-dressing woman was punished for unspecified lesbian acts by exile for 12 years.²³⁵

²³² David F. Greenberg, The Construction of Homosexuality (Chicago: University of Chicago Press, 1988) at 313.

²³³ Dekker and van de Pol, supra, note 231 at 52-53.

²³⁴ Ibid. at 61-62.

²³⁵ Ibid. at 59-60.

F. The Eighteenth Century.

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1. Eighteenth-Century Platonic Love.

The influence of Platonism survived and flourished in the eighteenth century and reached its height in the nineteenth-century "fashion" of female romantic friendships among the English middle and upper classes. Women were allowed to have passionate asexual love affairs partly because women's relationships were considered ephemeral and therefore non-threatening and partly because romantic friendships occupied women's attentions in times when women were not permitted significant contact with men before marriage.²³⁶

Since females were socialized to be sexually passive and only men and "bad" women were permitted to be sexually aggressive, women in romantic friendships probably were not aware of their sexual inclinations even though they kissed and caressed and were "totally open in expressing and demonstrating emotional and spiritual love".²³⁷

The language and behaviour of romantic friends is almost unfathomable to the contemporary male sensibility which has been influenced by "expert" wisdom concerning female sexual "perversion" and has been socialized to deny and repress same-sex love. Modern male scholars characterise expressions of devotion and love by romantic friends of the past as either "lesbian", or trivialize

²³⁶ Faderman, supra, note 11 at 74-77.

²³⁷ Ibid. at 80.

them as merely the excessive sentimentality of the age.²³⁸

Romantic friendship reached its height in the eighteenth century for numerous reasons. First and foremost was women's devotion to high ideals and nobility of spirit. Women of ambition took their own and one another's intellectual pursuits seriously and encouraged one another's intellectual development whereas men thought women were inferior and discouraged their intellectual pursuits. There existed a mutual distrust between the sexes that arose from the homosociality which resulted from the socialization of men and women to occupy "separate spheres".

Meaningful friendships between men and women were rare unless the pair was contemplating marriage. Parents were portrayed in fiction as preferring their daughter's death to the loss of her virginity prior to marriage.²³⁹ As a result of the inordinate value placed on virginity, girls who valued themselves learned early to distrust men.

Arranged marriages in the upper classes meant that many women often did not have a marriage based on love. They survived emotionally barren marriages by developing intense romantic friendships. Due to women's lack of economic independence, marriage – even marriage to a tyrannical husband – often provided the only way to leave the family home and become an adult.²⁴⁰

The romantic friendships described in then-contemporary novels were characterised by the spiritual love. The diaries and letters

²³⁸ Ibid. at 81.

²³⁹ Ibid. at 93.

²⁴⁰ Ibid. at 85-102.

of eighteenth-century literate women contain vows to love one another eternally and to live and die together, yearnings and plans to elope together to sweet retirement, and willingness to suffer great sacrifices for one another. Although these are the emotions and dreams associated with heterosexual love in the twentieth century, the repression of female sexuality characteristic of the day probably ruled out sexual expression between romantic friends.

Among the most famous romantic friends of the eighteenth century were two upper-class Irish women, Sarah Ponsonby and Eleanor Butler, whose relationship was immortalized in The Ladies of Llangollen.²⁴¹ Ponsonby and Butler eloped together and set up a household in a cottage in the Welsh town of Llangollen where they lived happily together for 53 years. Their home became a shrine to romantic friendships, their relationship was eulogized by contemporary poets, and they were admired and befriended by noted figures of the day.²⁴²

The ladies of Llangollen were among the fortunate few who had sufficient economic independence and strength of character to depart from the custom of heterosexual marriage to consummate the goal of many romantic friends: to live with one another.

Romantic or passionate friendship, which was pervasive among female intellectuals, also became an institution among women in general throughout the middle and upper classes in France and

²⁴¹ Elizabeth Mavor, The Ladies of Llangollen: A Study in Romantic Friendship (1971; reprinted New York: Penguin Books, 1976).

²⁴² Faderman, supra, note 11 at 121.

England.²⁴³

2. Eighteenth-Century Literature.

Contemporary male-conceived lesbian pornography may have found its prototype in L'Espion Anglois by eighteenth-century French writer Mairobert. The book's main characters are gorgeous women in lavish surroundings who engage in graphic depictions of sex, including bizarre acts like flagellation. Jealousy is portrayed as the primary emotion between the women. In the end, the older woman loses the younger woman to a man.²⁴⁴ L'Espion Anglois is the first literary example of "lesbian baiting" – the practice of criticizing a woman's non-sexual behaviour by accusing her of lesbianism. Its female characters are based on caricatures of real people –

...[w]omen who were...aggressive and unretiring, not at all like the conventional eighteenth-century ideal of femininity...they had stepped out of line and behaved in an unwomanly fashion, either by attempting to outsmart a man, or by imposing themselves on male business, or simply by not extending to a man the deference he believed due him. What better way to shame such a woman than to attribute to them fierce sexual appetites at a time when it was not proper for women to have them.²⁴⁵

Books of this genre did not attack sexual love between women *per se*. Instead, the books attacked the aggressiveness of certain women outside the sexual sphere, using aggressive sexuality as a metaphor.

By the second half of the eighteenth century, in England and

²⁴³ Ibid. at 85-102.

²⁴⁴ Ibid. at 38.

²⁴⁵ Ibid. at 41, 45.

the U.S., romantic friendship had become a popular theme in fiction. The most complete fictional account of a romantic friendship, published in 1762, went through four editions in sixteen years.²⁴⁶

Romantic friends regarded themselves as whole people who loved one another not for their weakness, but for their strengths, nobility of mind and goodness of heart. The height of bliss for romantic friends was the opening of their souls, the sharing of secrets, speaking their love, and seeking autonomy and control of their destinies in relationships with equality, respect and mutual understanding. The following excerpt is illustrative.

You honored me once, you know, with your company for one night. How delighted was I...Shall I ever forget that night! We talked till past three; and such unbosoming of all your feelings, and all your pleasures and cares, and what you called your foibles; spots in the sunny brightness of your character. Ever since that night I have been a new creature; to be locked in your arms; to share your pillow with you, gave new force, new existence to the love which before united us; often shall we pass such nights when thou and I are safe together at Wortleyfield [where they planned to retire].²⁴⁷

3. The Persecution of Passing Women.

In contrast, consider the treatment of women who escaped the restrictions of the female social role. These women were predominately poor women who may have had few prospects for marriage and were thus destined for lives as independent females.

²⁴⁶ Ibid. at 103, citing Sarah Scott, A Description of Millennium Hall (1762).

²⁴⁷ Faderman, supra, note 11 at 108, 111, citing The Life of Charles Brockden Brown, Together with Selections from the Rarest of His Printed Works, from His Original Letters, and from His Manuscripts Before Unpublished, William Dunlop, ed. (Philadelphia: James P. Parke, 1815), vol. 1 at 107-69.

In those days, that usually meant prostitution and abject poverty.

The Linck-Mühlhahn trial demonstrates the plight of two poor women, one a cross-dresser, and how an eighteenth-century court grappled with moral theology, medical evidence, Saxon law, and psychological theory to reach its verdict. In 1721, Catherina Linck and Catherina Mühlhahn were tried for sodomy in Halberstadt, located in what is present-day Germany. The surviving transcript is in the nature of an appellate court's affirmance of Linck's sentence to death by beheading and a reduction of Mühlhahn's sentence from "second-degree torture" to three years of imprisonment followed by banishment from the country. It is translated from an account of the trial found in the Prussian Secret Archives and was published in 1891 by a Bavarian physician, Dr. F. C. Muller. Muller claimed to have found records of over 200 sodomy trials but it is unknown how many involved women.²⁴⁸

The transcript furnishes evidence of myths about lesbianism which have survived to the present day: that lesbians dress like men, prey upon and seduce "normal" heterosexual women, use dildos and play male roles in sexual relations with women, behave like men, pretend they are men, and want to be men.

As a young woman, Linck cross-dressed "to lead a life of chastity" after which she joined the Inspirants, a Christian religious sect. She became a prophet within the sect after she was baptized and had an experience of ecstasy or possession.²⁴⁹ After

²⁴⁸ "A Lesbian Execution in Germany, 1721: The Trial Records", trans. Brigitte Erikson, (1980/81) 6:1/2 Journal of Homosexuality 27 at 27 and 40.

²⁴⁹ Ibid. at 28-29.

travelling and worshipping with the sect for two years, she lost her gift for prophesy and left the sect. In 1705, she joined the Hanoverian troops as a musketeer but deserted three years later, was condemned to death by hanging for desertion, and was reprieved in part because her true sex was discovered.²⁵⁰

She lived alternately as a woman (in women's attire) and as a man (in men's attire) for the next nine years, during which time she had other stints in the military, always concealing her biological sex. During these years, she fluctuated between Catholicism and Lutheranism. In 1717, she donned male attire and went to work for a French stocking-maker where she met Catherina Mühlhahn, age twenty two. The two were married that year with Linck pretending to be a man.²⁵¹

Linck and Mühlhahn lived together almost continuously for four years, mostly in poverty. Mühlhahn discovered that her husband was a woman a year after their marriage. They engaged in intercourse with Linck wearing a dildo which Linck admitted making while in the Hanoverian troops. Linck also admitted that, while a soldier, she had stimulated many other women with it, including prostitutes. Eventually, Mühlhahn's mother reported to the authorities that Linck was a woman.²⁵²

Theology and medical science at that time maintained that men were solely responsible for the propagation of children by depositing their seed in women who were considered mere

²⁵⁰ Ibid. at 30.

²⁵¹ Ibid. at 30-31.

²⁵² Ibid. at 31-33.

receptacles.²⁵³ This mythology supported the then-prevailing view that the spilling of male seed was a very serious evil; hence the crime of sodomy, which the reviewing court defined as follows:

Sodomy comprises various types of vice: firstly, the one so despicably perpetrated on oneself; secondly, more despicably yet, the one with the same sex, as man with man and woman with woman; and thirdly and most despicably, the one committed with nonreasoning animals.....

It is only fair to determine the penalty according to the seriousness of the crime. According to Carpzow [an eminent secular Saxon jurist], the first crime used to be punished with death by hanging, the second with the sword [beheading], and the third with fire.²⁵⁴

The fact that Linck and Mühlhahn did not actually spill seed gave the court pause as to whether they had committed the crime of sodomy. The court also cited Carpzow for the proposition that oral intercourse warrants capital punishment but, again, since semen was not spilled or wasted when Linck had once placed the "leather instrument" in Mühlhahn's mouth, the court questioned whether the death penalty was appropriate.²⁵⁵

In affirming the death penalty for Linck, the court relied upon Carpzow, the criminal code of Charles the Fifth of the Holy Roman Empire²⁵⁶, and the court's reading of the Bible:

Even though the Holy Scriptures do not specifically mention that women committed lewd acts with each other, suffice it that therein punished sin of women is of the same kind as that committed between men, that is, for those who commit unnatural acts. The effect is the same, for although the semen, which is normally sent into another part of the spouse, is not truly mixed, at least there is rubbing and a search for the extinction of the

²⁵³ McConkey, supra, note 170 at 80.

²⁵⁴ Erikson, supra, note 248 at 39.

²⁵⁵ Ibid. at 37.

²⁵⁶ Ibid.

libido. This case is also stated unambiguously in the Bible when mention is made that a natural custom is changed into an unnatural one...²⁵⁷

Why did the court, after reviewing the conflicting legal and religious definitions of sodomy, choose to adopt the broadest definition and conclude that Linck deserved to be beheaded? The transcript notes several facts about Linck that are not expressly relied upon in the court's final judgment but the recitation and condemnation of these facts suggest that they played a part in her execution. Linck's "misdeeds" either relate to violations of norms of female conduct ("having acted as a man with her alleged wife", wearing men's clothes, her military desertions and perjuries concerning her biological sex to gain admittance to military service) or to sacrilegious acts (joining the Inspirants, allowing public readings of the banns of marriage to Mühlhahn, having embraced the Catholic religion for gain, having let herself be baptized twice, and having married Mühlhahn in two separate church ceremonies).²⁵⁸

Not all of the judges agreed to the execution of Linck; some would have shown "leniency" because

...with these types of instruments actual fleshly union is not possible, much less can semen be released – both processes being required for the real offense in regard to the act of sodomy...The other crimes, however, such as the abuse of holy baptism and the frequent apostatizing, do not in themselves require the death penalty, and the accused should be shown the mercy of the law which could be effected by way of flogging and subsequent incarceration for life in a penitentiary or a spinning room

²⁵⁷ Ibid. at 39.

²⁵⁸ Ibid. at 33-34.

where she should be made to work.²⁵⁹

Linck's more severe punishment, probably stems from her usurpation of the male role as soldier, seducer, husband and lover. Mühlhahn's culpability was minimized and she was given a lighter penalty because she was assumed to be a normal woman who was weak and susceptible to the sexual aggressiveness of Linck who was assumed to be man-like.

Henrica Schuria, another eighteenth-century German, also disguised herself as a man to serve as a soldier. On her return home from soldiering, she resumed living as a woman and began a sexually intimate relationship with another woman. Although the celebrated lawyer, Johannes Poponius, opined that women like Schuria should be executed, she was only "whipt with Rods" and banished because she had not attempted to conceal her gender from the community and had not used a dildo. Her partner received unspecified punishment and was allowed to remain in the city.²⁶⁰

In the mid-eighteenth century, Anne Grandjean of Grenoble, France, donned male attire when she was fifteen and later married a woman but did not use a dildo. When her true sex was discovered, she was initially placed in stocks as "the defiler of the sacrament of marriage" and then imprisoned. She was subsequently released on condition that she resume her female identity and not have future

²⁵⁹ Ibid. at 40. Doctors who examined Linck's anatomy looked for an enlarged clitoris and finding her anatomy normal commented nonetheless that "her female member...during her extensive vagabonding...undoubtedly had been disgracefully misused". Ibid. at 37.

²⁶⁰ Faderman, supra, note 11 at 53, citing Robert James, Medicinal Dictionary (London, 1745), vol. III, "tribades".

relationships with other women.²⁶¹

In 1751, Maria van Antwerpen was tried in Antwerp, Belgium, and banished for "gross and excessive fraud in changing her name and quality and mocking holy and human laws concerning marriage". She was tried again for these offences in 1769.²⁶²

In 1792, the trial of two Dutch women for the murder of a third woman in a lesbian love-triangle sensationalized lesbianism and cross-dressing in Holland and resulted in ten other arrests of women in Amsterdam during the next six years. These women and the 119 women in the cross-dressing study referred to above were almost all marginal women who were "street vendors, prostitutes, women with no sure means of support".²⁶³

During the French Revolution, Marie Antoinette's lover, Madame de Lamballe, was executed and her genitals mutilated. To try to understand this execution, one must take into account the intense class hatred of the French Revolution.²⁶⁴ In 1791, the French National Assembly abolished sodomy as an offence between consenting adults, relegating it, in effect, to the same category of offence as witchcraft, heresy, and blasphemy. This reform was later incorporated into the Napoleonic Code.²⁶⁵

²⁶¹ Faderman, supra, note 11 at 53-54, citing O. P. Gilbert, Women in Men's Guise, trans. J. Louis May (London: The Bodley Head, 1932) at 36-140.

²⁶² Dekker and van de Pol, supra, note 231 at 1-4.

²⁶³ Myriam Everard, "Lesbian History: A History of Change and Disparity" (1985-86) 12 Journal of Homosexuality 123 at 127.

²⁶⁴ Greenberg, supra, note 232 at 321, note 127 therein.

²⁶⁵ Crompton, supra, note 188 at 22.

In England, where no capital laws prohibited lesbian acts,²⁶⁶ Mary Hamilton, an adventurer who married women three times in the mid-1700s, was punished for her transvestitism and use of a dildo. She was whipped publicly in several towns and then imprisoned.²⁶⁷

In 1777, another female adventurer was sentenced in London to be pilloried and to serve six months of imprisonment for cross-dressing and marrying women three times (her sexual techniques were not discussed).²⁶⁸

A transvestite woman who loved women might avoid legal entanglements if she were wealthy or influential (e.g., Queen Christina in sixteenth-century Sweden), a valuable member of the community (especially if she were past childbearing age), or a member of the artistic community.²⁶⁹ Nonetheless, between 1761 and 1815, fifteen women were prosecuted in England for merely dressing as males.²⁷⁰

²⁶⁶ Sodomy involving two men was a capital offence in England beginning in 1533 and many Englishmen lost their lives in the ensuing 300 years. The last sodomy execution in Europe was the hanging of a man in England in 1835. *Ibid.* at 22.

²⁶⁷ Faderman, *supra*, note 11 at 52, citing Henry Fielding, The Female Husband: or the Surprising History of Mrs. Mary, alias George Hamilton, Convicted of Marrying a Younger Woman of Wells (1746; reprinted England: Liverpool University Press, 1960).

²⁶⁸ Faderman, *supra*, note 11 at 53, citing Poalo Mantegazza, The Sexual Relations of Mankind, trans. Samuel Putnam (New York: Eugenics Publishing Co., 1935) at 83.

²⁶⁹ *Ibid.* at 54.

²⁷⁰ Karlen, *supra*, note 183 at 141.

G. The Nineteenth Century.

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1. Nineteenth-Century Romantic Friends.

Platonic love between women continued to flourish as the fashion in the nineteenth century. Until the end of the nineteenth century, decent ("good") women were thought essentially incapable of sex with one another because they were thought to be essentially asexual or sexually dormant. The Victorian aversion to sex meant that decent women perceived sex as antithetical to the most important aspect of their passionate relationships with other women – the spiritual union.

A nineteenth-century libel case demonstrates then-contemporary attitudes toward love between women. In 1811, Miss Marianne Woods and Miss Jane Pirie, the mistresses of a girls' boarding school near Edinburgh, Scotland, sued Dame Helen Cumming Gordon, the grandmother of a pupil who claimed to have seen Woods and Pirie having sex together. Gordon, it was alleged, had repeated her granddaughter's remarks to the families of other pupils forcing the school to close.²⁷¹

During the trial, the romantic friendship of the two women served as a badge of their upright character and moral purity. Plaintiffs' counsel introduced a letter from Pirie to another

²⁷¹ Faderman, *supra*, note 11 at 147.

female friend in which Pirie professed that she loved Woods

...as my soul: and would willingly have laid down my existence to increase her comforts...I can never conquer my affection [for her], should she even declare herself my enemy. I have loved her for eight years with sincere and ardent affection, and have accustomed my mind to contemplate her as the model of very virtue.²⁷²

Since virtuous women in the nineteenth century did not engage in sex except to satisfy their husbands or to procreate, it was inconceivable to the judges that these two middle-class women had made love together. This was plainly stated by Lord Justice-Clerk Hope, one of the judges in the Woods and Pirie case, who said

...according to the known habits of women in this country, there is no indecency in one woman going to bed with another.²⁷³

In the late nineteenth century, the term "Boston marriage" was used in New England to describe a long-term monogamous relationship between two financially independent women. Such relationships were based on the women's common interest in feminism, their pioneering professional ambitions, and their involvement in culture and in social betterment.²⁷⁴ Boston marriages were held in high esteem because it was assumed that love between women was unsullied by carnality. Society could view such a relationship as ideal and admire it. Many Boston marriages achieved equality because each woman was self-sufficient in her own career, understood the professional demands on her partner because she also experienced

²⁷² Ibid. at 151, citing Miss Marianne Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon (New York: Arno Press, 1975) at 152-53, (emphasis in original).

²⁷³ Faderman, supra, note 11 at 152, quoting Miss Marianne Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon (New York: Arno Press, 1975) at 60.

²⁷⁴ Faderman, supra, note 11 at 190.

them, and desired a marriage of equals, including respect for her own accomplishments.

2. Social Change: Nineteenth-Century Feminism and the Backlash of Anti-feminism.

Perhaps love between women was permitted to flourish unchecked in the nineteenth century because the fact of the New Woman and her revolutionary potential for forming a permanent bond with another woman had not yet been widely impressed upon the popular imagination, as after World War I when New Women emerged in great numbers. It was then that love between women came to be generally feared in America and England. The emotional and sensual exchanges between women, which correspondence and fiction tell us were a common form of affectional expression for centuries, suddenly took on the character of perversion.²⁷⁵

Neither men nor women in the nineteenth century treated as abnormal the emotional and physical closeness characteristic of female relationships because such behaviour was the norm. Romantic friendships were accepted because women saw themselves and were seen as kindred spirits with shared interests, needs, values, and sensibilities – and as fundamentally different from men. Close bonds between women arose as an affirmation of nineteenth-century women's values and reflected women's belief in their spiritual superiority to men and higher moral standards. Much of the reform work accomplished by women in the nineteenth century consisted of women being motivated to work for social and personal betterment in a world that they perceived as having been corrupted by men.²⁷⁶ Intense bonds between women were strengthened by male resistance to women's efforts to gain autonomy and to enter all-male

²⁷⁵ Ibid. at 176-77.

²⁷⁶ Ibid. at 160.

preserves.²⁷⁷

The first wave of feminism succeeded in opening up jobs for women and served as a support group to help women claim their independence. Financial independence from men, and therefore, from the demands of heterosexual marriage, made possible the dream of so many romantic friends: the dream of living together.

The rise of the feminist movement in the U.S. was influenced by the Civil War, the growth of the middle class, liberal idealism, and women's access to higher education. Civil War casualties reduced the population of males leaving large numbers of women to support themselves and therefore to lobby for greater employment opportunities. The growth of the middle class and the homosociality of "separate spheres" produced women with their own distinct set of values – spirituality, moral purity and sentiment. Less apt than working-class women to marry for survival and less apt than upper-class women to marry because of family pressure to unite powerful families, middle-class women had the leisure time to meet and discuss social injustices. Women increasingly sought admission, as a group, to the ideals of the liberal state and were politically radicalized by nineteenth century reform movements such as suffrage and abolition. Finally, admission of women to higher education meant that increasing numbers of women were exposed to ideas and could articulate them.²⁷⁸

As women's articulation of the injustice of male domination grew into a movement, an anti-feminist movement arose to oppose it.

²⁷⁷ Ibid. at 160-64.

²⁷⁸ Ibid. at 179-80.

Some of the most vehement critics of feminism were themselves women with an investment in maintaining the status quo. The nineteenth century had its share of Phyllis Schlaflys, female critics of women aspiring to public and professional life who were themselves writers and public figures.²⁷⁹ After the rise of an organised national feminist movement in the U.S. in the mid 1800s, U.S. women were increasingly cautioned to give up their ambitions for education and the vote – and to remain subordinate to men.

As the world changed to accommodate women in the public sphere, the specter of women having sufficient financial independence to make a choice about marriage began to threaten the social fabric. Some male critics warned that women's demands would undermine the institutions of marriage and the family. Other male critics seized on anxieties about gender distinctions and accused feminists of trying to make men lady-like and warned that the education of women and female assertiveness would make women unattractively masculine.²⁸⁰ Later, the sexologists provided additional ammunition for the anti-feminists by asserting that masculinity in a woman is one of the key indicators of the "disease" of lesbianism. "Lesbian baiting" became a major strategy to undermine women's just claims for equality, autonomy and independence by equating those claims to psychological abnormality and sexual perversion.

²⁷⁹ Ibid. at 233.

²⁸⁰ Ibid. at 235-36.

3. Nineteenth-Century Literature: Before the Sexologists.

The subtlety and variety of human emotions expressed in early nineteenth-century writing changed dramatically when the sexologists' theories were promulgated. By comparison, twentieth-century writing is two-dimensional due to this century's passion for "scientific" categorization of women into dichotomous categories. In the twentieth century, if a woman loves another woman passionately, she is a lesbian and is therefore abnormal.²⁸¹

Until the end of the nineteenth century, however, many women writers expressed an elevated view of romantic friendships as joyful, passionate and spiritually uplifting, with none of the short-comings of heterosexual relationships such as the lack of shared interests and male exploitation of women's sexuality and women's unpaid domestic labour.

Until the end of the nineteenth century, male writers portrayed romantic friendships in a positive light because they underestimated the revolutionary potential of such relationships. They saw only

...[t]wo sweet females uplifting each other morally, but ultimately entirely dependent on men whether that dependence brought them joy or tragedy.²⁸²

In response to the birth of French feminism in the early 1800s, French aesthete writers used images of genital sex between women to exploit the sexual ambiguity implicit in the image of a

²⁸¹ Some biographers have rewritten the letters of nineteenth-century writers (e.g., Emily Dickinson's letters to Sue Gilbert) lest evidence of passionate female relationships, once eulogized and publicly acclaimed, should sully the reputations of their subjects. Ibid. at 174-77.

²⁸² Ibid. at 157.

beautiful middle-class woman behaving in an aggressively – and therefore masculine – sexual manner. These images which shocked and titillated the French middle class, characterised love between women as primarily a sexual experience bearing no resemblance to the reality of women's lives.

The benign public acceptance of French libertine literature in the sixteenth century contrasts with the more anxious public reaction to nineteenth-century French aesthete literature at a time when anti-feminist anxiety and fear had arisen in response to the first wave of feminism.

4. The Sexologists: Lesbianism as Congenital Taint.

The German sexologists provided "scientific" evidence that women's resistance to male dominance was perverse and sick. Whereas men are glorified as heroes for resisting the yoke of oppression, women's desires for autonomy and self-development were characterised as mental illness and perversion.

The idea that a person with same-sex desires and sexual experiences is a distinct entity, a species of person, was first popularized by the German lawyer, Karl Heinrich Ulrichs who influenced K. M. Benkert, a journalist, and Magnus Hirschfeld, the physician and scholar who led the German homosexual rights movement. Using the pseudonym Kertbeny, Benkert coined the term "homosexuality" in 1859.²⁸³

In the 1860s, Karl Heinrich Ulrichs, the German exponent of "third sex" theory, coined the term Urning (male) and Urningin

²⁸³ John P. De Cecco, "Definition and Meaning of Sexual Orientation" (1981) 6:4 Journal of Homosexuality 51 at 55.

(female) [in English, "Uranian"] to refer to persons trapped inside the body of the opposite sex. Ulrichs' terms came to refer to persons who were sexually attracted to members of their own sex but his model was gender, not sexuality. Hence a female Uranian was a male "soul" trapped inside a woman's body.²⁸⁴

Gender eclipsed sexuality well into the twentieth century. Krafft-Ebing, Ellis, Hirschfeld, and Carpenter all conceived of the homosexual as an individual who inverted, transposed, or bridged male and female gender status...And when the early sexologists wrote about lesbianism, they cited cases of women whose relationships with other women were often nongenital.²⁸⁵

Homosexuality was originally conceptualized as a natural condition that is in-born, not acquired. Evidence of the occurrence of homosexuality in all known human cultures supported this view. It was argued that homosexuality is as natural for those with homosexual desires as heterosexuality is for those with heterosexual desires. Consequently, it was argued that

²⁸⁴ Roscoe, supra, note 139 at 11. "Third sex" theory was not new. Plato invented a theory or myth of a third sex which he described through the voice of Aristophanes in the Symposium:

...for the original human nature was not like the present, but different. In the first place, the sexes were originally three in number, not two as they are now; there was man, woman, and the union of the two, having a name corresponding to this double nature; this once had a real existence, but is now lost, and the name only is preserved as a term of reproach...Men who are a section of that double nature which was once called Androgynous are lascivious; adulterers are generally of this breed, and also adulterous and lascivious women; the women who are a section of the woman don't care for men, but have female attachments; the female companions are of this sort.

Cavin, supra, note 231 at 43-44, quoting Plato, "Symposium", The Republic and Other Works of Plato trans. Jowett (Garden City, NY: International Collectors Library).

²⁸⁵ Roscoe, supra, note 139 at 12.

homosexuality should not be seen as a threat to society and should not be punished by the criminal law.²⁸⁶ However, this view did not prevail.

By the end of the nineteenth century, the term 'homosexual' had become widely adopted by...authorities, particularly doctors and psychiatrists. But, as employed by these...'experts,' the term soon acquired modified connotations that accorded with their generally agreed-upon view that homosexuality was a less acceptable form of sexual behaviour than was heterosexuality.²⁸⁷

Previously there had been periods in history when eroticism between males had been widespread and visible but the modern social meaning attached to homosexual status as a dichotomous category dates only from the late nineteenth century.²⁸⁸

Both Ulrichs and Hirschfeld believed that there were relatively few "homosexuals". Ulrichs, believing that homosexual men and women constituted a third sex, set forth his views in twelve volumes on the subject of homosexuality. Although Ulrichs meant to provide a defence to lesbians and gay men by showing that "Uranians" were merely different from but not inferior to others, he actually assisted in the medicalization of homosexuality by helping the medical profession extend its managerial power over sex by "implanting 'perversion'".²⁸⁹

Foucault describes the process of the personification of the

²⁸⁶ Kallen, supra, note 1 at 139-40, citing J. Lauristen and D. Thorstad, The Early Homosexual Rights Movement (1864-1935) (New York: Times Change Press, 1974) at 6-7.

²⁸⁷ Kallen, supra, note 1 at 140, citing D. Altman, The Homosexualization of America and the Americanization of the Homosexual (New York: St. Martin's Press, 1982) at 4.

²⁸⁸ Boswell, supra, note 110.

²⁸⁹ De Cecco, supra, note 283.

"homosexual".

The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology...The sodomite had been a temporary aberration; the homosexual was now a species.²⁹⁰

Benkert's conceptualization of the word "homosexuality," as referring to a natural human condition, was reversed by the medical "experts" who transformed the term by giving it negative meanings.²⁹¹ In 1869, Carl von Westphal, a German psychiatrist, published a case study of a young woman who was attracted to other females and who, since childhood, had enjoyed masculine clothing and pursuits. Von Westphal identified his subject as a new type, a "congenital invert", whose abnormality was a degeneracy resulting from heredity. Soon, similar articles were published by other doctors. The hypothesis of these articles provided a new medical pathology to explain women's demands for independence. Hence, the medical community established its jurisdiction over the regulation of love between women.

A lesbian, by the sexologists' definition, was one who rejected what had long been woman's role. She found that role distasteful because she was not really a woman — she was a member of the third sex. Therefore, she did not represent women.²⁹²

Von Westphal's disciples were Richard von Krafft-Ebing and Havelock Ellis. Ellis was possibly the most important single influence on British views of homosexuality. Krafft-Ebing, author

²⁹⁰ Michel Foucault, The History of Sexuality. Volume I: An Introduction, trans. R. Hurley, (New York: Random House, 1978) at 43.

²⁹¹ Kallen, supra, note 1 at 139-40.

²⁹² Faderman, supra, note 11 at 240.

of Psychopathia Sexualis (1886), viewed homosexuality as congenital but felt that, like all the other perversions he studied, it was a sign of degeneration and vice.²⁹³ Krafft-Ebing promulgated the notion that lesbians suffer "cerebral anomalies" as a result of a hereditary disease of the central nervous system which is a "functional sign of degeneration". Both Krafft-Ebing and Ellis created the modern stereotypes of lesbian propensity for murder, suicide and depression.²⁹⁴ When popular literature took up the sexologists' theories, lesbians became identified with disease, insanity and tragedy.²⁹⁵

To challenge Krafft-Ebing's view, Ellis extensively surveyed sexual practices in his seven-volume Studies in the Psychology of Sex (1896-1928), beginning with Sexual Inversion. Ellis created the categories of the "true invert" who is born that way (and is "incurable") and the "pseudo-invert", who is really a normal heterosexual who gets involved in inverted behaviour through circumstances rather than natural inclination. Ellis used the label "homosexual" to refer to "pseudo-inverts".²⁹⁶ The distinction between true and pseudo-inverts fed into fears that innocent people might be recruited into lesbianism by predatory lesbians.

Before starting work on his influential chapter entitled

²⁹³ "Introduction", Not a Passing Phase, supra, note 10 at 9-10.

²⁹⁴ Faderman, supra, note 11 at 241.

²⁹⁵ Ibid. at 252.

²⁹⁶ "Introduction", Not a Passing Phase, supra, note 10 at 9-10.

"Sexual Inversion in Women", Ellis visited Paris for three months with an English aesthete writer. During his visit, he met French aesthete writers and discussed with them their work on lesbianism. Ellis opens his chapter on lesbianism with examples of lesbianism taken from French literature and French life, making what Faderman considers "little distinction between them".²⁹⁷

Those literary images, which became incorporated in Ellis' views and in the views of many who regarded his work as "medically" accurate and reliable, were based on a reaction by male French writers to some dramatic signs of female independence, as well as those writers' fascination with exoticism and their express desire to shock the stiff, prudish [French] bourgeoisie.²⁹⁸

Ellis argued that the "true invert" or "true lesbian" could be identified based on three factors: girlhood crushes on other females, family history of neurosis ("congenital taint"), and at least a trace of masculinity.²⁹⁹ Ellis designated all other forms of lesbianism as "spurious", such as women who consciously chose to love women as part of their awakening as feminists or after a heterosexual marriage – unless they were born with the appropriate "taint".

Then-contemporary Italian and American studies demonstrated the widespread practice, considered fashionable among young women in schools and colleges, of cultivating intense same-sex love relationships known as "raves", "flames" and "crushes". For Ellis, such widespread phenomena were not "real" lesbianism because the women later formed relationships with men.

²⁹⁷ Faderman, supra, note 11 at 254.

²⁹⁸ Ibid. at 254.

²⁹⁹ Ibid. at 242-43.

...Ellis rejected as being "spurious imitations" all manifestations of same-sex love that proved it was entirely common; he characterized as being indicative of "true inversion" any trait that could be identified as morbid – a marked neuropathic heredity, a strain of violence, a penchant for transvestitism – and he coupled these ills with feminism.³⁰⁰

The "congenital taint" theory was welcomed by gay men who saw the medical explanation for their feelings as a potentially cogent argument against actively enforced criminal laws which prohibited gay sex. Criminal prohibitions were based on the assumption that, because gay sex was a vice freely chosen, it could be suppressed by legislation. The "third sex" theory, based on "congenital taint" theory, supported the idea that men who are born without the "taint" are not at risk to become gay and men who are born with the "taint" should be allowed to lead what for them is a normal life. If gay sex were a matter of heredity not choice, society need not fear that repeal of criminal penalties would result in an increase in gay sex or "recruitment" of heterosexual men.³⁰¹

The sexologists provided woman-loving feminists with a reason – a plausible theory – to justify their whole-hearted pursuit of their goals and relieved them of the temptation to wonder if indeed they were fighting a futile battle against human nature. When lesbianism was branded as genetic taint, the same-sex love which had previously been viewed as ennobling and spiritual for women was transformed. The sexologists' theories on the subject of women's passionate relationships forced women, whose lives were based on romantic friendships, to deal with the implications of their

³⁰⁰ Ibid. at 247.

³⁰¹ Ibid. at 248.

intense feelings for one another in light of the new "wisdom" of science that labeled them sick and perverted. Many women, no doubt, denied or loathed the love that was central to their lives. For some the effects were devastating mental illness and suicide.

The present-day significance of sex was unknown to women who were raised in the nineteenth century. Ironically, it was gender, not sexual object-choice, that was the decisive factor in a woman's self-identification as a heterosexual or as a "Krafft-Ebinger".³⁰²

5. Development of Lesbian and Gay Enclaves.

Prior to the industrial revolution of the late nineteenth century, the family was the basic economic and social unit. Industrialization brought more people to the cities which decreased the control of family units in determining morality.³⁰³ Due to the exclusion of women from many all-male careers, cross-dressing among women became more widespread in Canada and the United States and these women often entered into relationships, even marriages, with other women.³⁰⁴ Gary Kinsman describes one of the many reports of cross-dressing women in Canada in the nineteenth century:

Before the emergence of specific homosexual and lesbian categories these women were seen as odd for challenging gender roles but were not necessarily considered sexually suspect. By the 1880s, there were already, in some circles, "two distinct types of womanhood." On the one hand, there was the "timid, confiding, trusting woman"

³⁰² Ibid. at 250-51.

³⁰³ Boswell, supra, note 110 at 35.

³⁰⁴ Gary Kinsman, The Regulation of Desire: Sexuality in Canada (Montreal: Black Rose Books, 1987) 95; Bullough, supra, note 179 at 118.

who "comes to realize that her mission in this world is a domestic one." On the other, there were "the self-confident, self-asserting, self-reliant, fearless, masculine women" for whom "domestic duties have but a secondary attraction." With the emergence of the "homosexual" and the "lesbian," same-gender passionate friendship became suspect. Cross-dressing now became associated with sexual inversion...³⁰⁵

Between the 1870s and the 1930s, gay and lesbian enclaves arose in Canadian and U.S. cities and continued to flourish during and after the Second World War.³⁰⁶

During these years of transition in sex/gender relations, the same general features discerned for England and the U.S. can also be uncovered for Canada. The emergence of capitalist socialist relations led to increasing urbanization and created the opportunity for men, and later women, to live outside the family or on its margins...Networks of homosexuals and later lesbians took up the category of "homosexual" to identify their own wants and needs.³⁰⁷

6. Nineteenth-Century Literature: After the Sexologists.

It was the lesbian novel, The Well of Loneliness³⁰⁸, which popularized the genetic-taint theory, giving it life for many years after those ideas had been debunked. Stephen, the book's central female character, laments, "And there are so many of us – thousands of miserable, unwanted people...hideously maimed and ugly – God's cruel; he let us get flawed in the making".

Stephen is described as a man trapped in a woman's body whom

³⁰⁵ Kinsman, supra, note 304 at 95, citing "The Higher Education of Women", Medical and Surgical Reporter (May, 1893) Canadian Lancet 285.

³⁰⁶ John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983) 11-13, 23-39.

³⁰⁷ Kinsman, supra, note 304 at 98.

³⁰⁸ Radclyffe Hall, The Well of Loneliness (1928).

society should pity rather than persecute. Hall "believ[ed] that her novel would provide lesbians with a moral and medical defence against a society which viewed same-sex love as immoral or curable". However, an American judge ruled that the book was obscene, "antisocial and offensive to public morals and decency" because it "seems to justify the right of the pervert to prey upon normal members of the community".³⁰⁹

[The Well of Loneliness] reinforced the notion that some women would not marry not because the institution was often unjust, that they sought independence not because they believed it would make them whole people, that they loved women not because such love was natural — but instead because they were born into the wrong body. To be born into the wrong body was freakish. Many a woman must have decided to tolerate even the worst heterosexual inequities rather than to view herself in such a way.³¹⁰

Criticism of romantic friendship first appeared in North American in the mid 1890s when the medical profession began to pay attention to the sexologists' theories. Fears of love between women did not take root sufficiently to appear as popular sentiments in magazines until the 1920s when "[l]ove between women, openly treated, was dead as a popular literary theme".³¹¹

³⁰⁹ Faderman, supra, note 11 at 317-18, 321-22.

³¹⁰ Ibid. at 322.

³¹¹ Ibid. at 308.

H. The Twentieth Century.

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1. Introduction.

The twentieth century brought the medicalization of lesbianism with psychiatric definitions of lesbianism being used as a weapon against women's healthy aspirations for autonomy and self-realization. Medical theories of healthy female adjustment were rooted in patriarchal notions of traditional social, gender and sexual roles for women, demonstrating how male domination shaped these fledgling sciences which in turn constructed lesbianism.

In the 1920s two high-profile lawsuits in England brought lesbianism into the media as a menace to society. Meanwhile, in France, lesbianism was equated with cosmopolitan decadence. The world wars brought enormous changes in opportunities for women. However, despite these huge gains, both post-war eras were marked by public opinion against women's independence as a dangerous threat to men and the family. World War II marked a dramatic moment when mass labeling of Canadian military recruits gave large numbers of lesbians and gay men an unprecedented sense of identity as a sexual minority.

In the late 1940s and early 1950s the Kinsey studies, which used a single continuum to demonstrate degrees of same-sex desire and behaviour, promoted a more liberal tolerance of same-sex sex by revealing that it was far more common than had been previously suspected. Simultaneously, however, lesbians and gay men were being harassed in Canada as security risks because of their "sexual perversion".

Moves toward decriminalization, which began in England in 1954, succeeded in Canada in 1967, based on the right to privacy.

Since the 1960s, psychologists have exploded Kinsey's single continuum and now identify numerous factors which affect sexual attraction and lesbian-identity formation. Each factor can be quantified on its own continuum and each factor may vary over time.

Finally, social science models promote the idea that lesbian and gay identity is a social construct and that lesbians and gay men constitute a sexual minority.

History helps explain why lesbians and gay men, who have been persecuted as a sexual minority, have banded together to promote equality based on sexual orientation, a model which has its roots in twentieth century medical concepts of sexual perversion.

2. Freud's Psychoanalytic Theory: Lesbianism as Early Childhood Trauma.

For women, psychology, like so many other progressive intellectual movements before it, reiterated in new language the oldest and most limiting structures about our lives. It bolstered the ancient male-dominant traditions anew with the authority of the youngest of sciences. Moreover, psychology, claiming to be the science of the human psyche and its motives, confronted

its critics with a closed system.³¹²

For women who loved other women, the new science of the human psyche devised particularly sinister explanations for women's healthy yearnings for emergence and self-fulfillment. Prior to 1920, gender variation, also known as "gender inversion", was the predominant defining characteristic of lesbians and gay men, not sexual behaviour. Thus a woman who did not display the physical appearance, personality, mannerisms, speech, interests and habits culturally associated with females was considered lesbian. Gradually, sexual behaviour became the determining characteristic and, by the 1950s, the sexual definition was pre-eminent.³¹³

In the nineteenth century, a decent woman was free to publicly kiss another woman but not a man. By the 1920s, a woman could publicly kiss a man but not a woman. In the course of a few decades, the joyous and healthy possibilities of love between women were transformed into morbid, degenerate and dangerous desires.

Krafft-Ebing's notion that lesbianism is a congenital defect continued to be a major influence well into the twentieth century. By 1920, however, Freud's theory that lesbianism is arrested development caused by childhood trauma superseded the congenital-defect concept.

Freud proposed that the normal sexual development for men and women was essentially heterosexual. He described how girls take the difficult path to femininity by giving up their mothers as love object and transferring their attentions to men in their search for the penis that has been denied them. Failure to negotiate this route

³¹² Anderson and Zinsser, supra, note 197, vol. II at 217. This is but one of many examples of "science" maintaining the status quo.

³¹³ Roscoe, supra, note 139 at 12.

successfully might lead to lesbianism: 'They might remain arrested in their original attachment to their mother and never achieve a true change-over to men'. Or they might fall victim to the 'masculinity complex': 'Thus a girl may refuse to accept the fear of being castrated, may harden herself in the conviction that she does possess a penis, and may subsequently be compelled to behave as though she were a man'.³¹⁴

Thus a genetic theory of cause was replaced by a psychoanalytic theory. Nurture replaced nature. Freudianism treated love between women, not as a natural impulse and/or a healthy response to one's environment, but as a failure to develop normally – not as a fetus but as a child.³¹⁵ Freud himself warned against confusing natural instincts and cultural teachings yet he and his followers proceeded to create a psychology which accepted uncritically the patriarchal traditions of European culture.³¹⁶

On several points Krafft-Ebing and Freud agreed: that "butch/femme" roles characterise lesbian relationships³¹⁷, that same-sex love is an undesirable medical condition, and that men who love men and women-loving women constitute a single group. Neither considered that lesbianism might be natural for women or a healthy resistance to male domination and the dehumanizing limitations of traditional female roles.

³¹⁴ "Introduction", Not A Passing Phase, supra, note 10 at 11, citing Sigmund Freud, "Female Sexuality" (1931); "Some Physical Consequences of the Anatomical Distinctions Between the Sexes" (1925); "Femininity" (1933) in Jean Strouse, ed., Women and Analysis (New York: Laurel, 1974).

³¹⁵ Faderman, supra, note 11 at 323.

³¹⁶ Anderson and Zinsser, supra, note 197, vol. II at 217.

³¹⁷ Freud believed that "the active invert" usually exhibited masculine characteristics both mentally and physically and looked for femininity in a partner. He did not grasp the possibility that women might be emulating heterosexual role models and attempting to fit themselves into the only roles that were visible.

Even though Freud himself opined that lesbianism is almost impossible to "cure", his theory of childhood trauma seemed to suggest otherwise and indeed the medical community quickly assumed jurisdiction for the new malady, reaped profits and reported cures.³¹⁸

The only lesbian described by Freud in any detail is an eighteen-year-old girl who had never engaged in genital sex with another female. Like generations of romantic friends in the past, Freud's subject had kissed and embraced her beloved and dreamed of retiring with her to a harmonious existence away from the world they knew. Despite Freud's conviction that lesbians are masculine, his subject did not fit the stereotype except, as Freud put it, for her mental attributes of "acuteness of comprehension and...lucid objectivity".³¹⁹ Approximately one-third of the subjects discussed in Havelock Ellis' work had not engaged in genital sex with another female. Ironically, however, the popular wisdom by 1930 was that all intense love between adult women was expressed in genital sex and that genital sex was the lesbian's primary interest.³²⁰

The case history of Lucille Hart, a young medical student, shows how psychiatry and its offshoot, clinical psychology, have defined "...what is normal in human sexuality and what should be

³¹⁸ Faderman, supra, note 11 at 314-17.

³¹⁹ Sigmund Freud, "The Psychogenesis of a Case of Homosexuality in a Woman" (1920) The Standard Edition of the Complete Psychological Works of Sigmund Freud, vol. XVIII (London: Hogarth Press, 1955).

³²⁰ Faderman, supra, note 11 at 326-28.

exposed to the cornucopia of treatment and cure".³²¹

Lucille Hart, a lesbian patient suffering from guilt, underwent major surgery, the adoption of male attire and the adoption of a male social identity due to psychiatry's impact on her life.³²² In 1917, Hart was a young woman in her second year of medical school (the only woman in her class) when she sought the help of a psychiatrist, Dr. J. Allen Gilbert, to rid herself of an unspecified phobia.

As a very young girl, Hart had been attracted to other girls, had had numerous sexual fantasies concerning these girls, but had not acted on her feelings until her first year of college. She apparently felt no shame or guilt about her first lesbian experiences until she read about her "true condition" in medical textbooks and was plunged into self-condemnation and misery.³²³ This prompted her to seek the psychiatrist's "help". His rather extensive notes show an energetic, intelligent and ambitious young woman who clearly did not fit the contemporary image of the stay-at-home woman.

By the time Hart consulted the psychiatrist, she already knew that her relationships with other women were the sustaining emotional and erotic relationships in her life and that men held no such interest for her whatsoever, although she enjoyed and

³²¹ John P. De Cecco, "Preface", John C., Gonsiorek, ed., A Guide to Psychotherapy with Gay and Lesbian Clients (New York: Harrington Park Press, 1985) at 3, originally published at (1981/82) 7:2/3 Journal of Homosexuality.

³²² Jonathan Katz, Gay American History: Lesbians and Gay Men in the U.S.A. (New York: Thomas Y. Crowell Co., 1976) at 267.

³²³ Ibid. at 273-74.

respected individual men. Due to the combination of her psychiatric therapy and her reading of medical texts, she resolved to be cured of her lesbian desires. She changed her mind, however, when Dr. Gilbert could give her no assurances that his therapy (suggestive therapy in the hypnoid state), would leave the rest of her personality in tact.³²⁴

After reaching this decision, Hart asked Dr. Gilbert to help her adopt a male social role so that she could, in Gilbert's words, "try to face life under conditions that might make life bearable". Hart requested that Gilbert remove her uterus because, in Gilbert's words, "she realized and urged the advisability of sterilization of herself as well as any individual, afflicted as she was".³²⁵

After Hart graduated at the top of her medical school class, Gilbert performed the hysterectomy. Hart then donned male attire, married another woman and settled down in a neighbouring state to practice medicine.

Gilbert described Hart as follows:

[Hart's] natural male instincts carried her into associations with the female sex and positive attractions were unavoidable. Women of normal sex life felt themselves attracted by her because of her aggressive male characteristics. One, to whom she is now married, fell in love with her because of her male psychological characteristics...[Hart] is now married to a normal woman of high degree of mentality and decided physical attraction. All parties to the deal were fully cognizant of all the facts involved before entering into the contract and they now have a home apparently happy and peaceful based upon psychological attractions with such ministration to the physical as existing conditions can render possible.³²⁶

³²⁴ Ibid. at 275.

³²⁵ Ibid. at 276.

³²⁶ Ibid. at 276-77.

This is the "sickness" model: healthy attributes are deemed abnormal masculinity in a woman, Hart's life-partner is thought to be "normal" because she has the culturally approved gender role, the women's sexual relationship is inadequate because a penis is absent, and the relationship is assumed to be built on a male-female polarity.³²⁷

3. Twentieth-century Literature and the Media as a Weapon.

In Britain, media interest in lesbians began during World War I. In 1918, a scandal hit the headlines when the dancer Maude Allan failed in her libel action brought in response to claims that she was a lesbian. Radclyffe Hall's victory in her action for slander in 1920 was also reported in the press. In 1921 lesbianism was discussed in the press because Parliament failed in its attempt to bring sex acts between women within the scope of the criminal law in the same way as sex acts between men. However, it was media coverage of the 1928 obscenity trial of Radclyffe Hall's novel, The Well of Loneliness, which aroused an enormous amount of media publicity about the existence of lesbianism and which caused single women to be suspect.³²⁸

Particularly in France but elsewhere as well, lesbianism became the cosmopolitan chic of bohemian and literary circles in the early twentieth century. Through the 1930s, many lesbian writers adopted the literary style of nineteenth-century decadence

³²⁷ Ibid. at 258-73.

³²⁸ Alison Oram, "'Embittered, Sexless or Homosexual': Attacks on spinster teachers 1918-39", Not A Passing Phase, supra, note 10, 99 at 106.

and exoticism which thus became associated with lesbianism. Characters who were portrayed as tortured and living in hell, were also glamorous – their lives filled with excitement as they boldly rejected middle-class values in favour of exotic tastes and voracious sexual promiscuity.³²⁹

Lesbian fictional characters were power-hungry and unscrupulous, invariably preying upon young girls with a sadistic pleasure designed to destroy the younger woman's life. Often the lesbian-vampire spouted feminist philosophy. Held captive by the ruthless and loveless control of an older woman, the young victim's life is ruined; she suffers abject misery and loneliness, and attempts suicide.³³⁰ The Regiment of Women, a novel written in 1917 by the English author, Clemance Dane, warned mothers of the dangers of lesbian teachers in the schools.³³¹

In most of the anti-lesbian novels written in the first half of the twentieth century, the lesbian is a feminist, a woman with a powerful ego, frequently in a position of authority over innocent girls. Almost invariably she is "twisted." While in most cases her perversity has turned her into a vampire, sometimes she is nothing more than a confused sickie. Generally the message is that such women need to be put away, either for society's good or their own...[W]ith women's increasing mobility, [fiction with this message] became increasingly common.³³²

4. Social Change: the World Wars and the Second Wave of Feminism.

World War I fostered the breakdown of sex discrimination in

³²⁹ Faderman, supra, note 11 at 358-61.

³³⁰ Ibid. at 341-56.

³³¹ Anderson and Zinsser, supra, note 197, vol II at 221.

³³² Faderman, supra, note 11 at 341.

employment, as women competently performed jobs previously reserved for men. Despite the panic in some quarters that more freedom for women would destroy the family and threaten civilization, U.S. women won the right to vote immediately after the war.

The medical view – that women who wanted independence were neurotic and confused lesbians – served those who felt threatened by women's new freedom and those who had an investment in the old order. After World War I, when women had proven by their participation in the war effort that there were no biological reasons to exclude them from the public sphere, the biological (congenital) explanation for lesbian attraction lost public support in favour of Freud's psychoanalytic theory.³³³

Sexual activity outside of marriage, which dramatically increased in the 1920s, was a backlash to the repression of Victorian thinking and a response to Freud's teaching that human beings are either sexual or repressed. Birth control devices reduced the fear of pregnancy and the back seat of the now-affordable automobile provided privacy.³³⁴

In 1920, the 238,000 American women in college constituted almost half the college population. Almost nine million women worked outside the home. But the sudden independence of women caused a violent reaction. Predictably, there was a concerted effort after the war to persuade women of their natural passivity and to induce them to return to their roles as wives and mothers. Aspiring women were portrayed as masculine, therefore abnormal,

³³³ Ibid. at 332.

³³⁴ Aron Krich, The Sexual Revolution: Seminal Studies in Twentieth Century Sexual Behavior (New York: Dell, 1964).

therefore lesbian. Feminism was vilified for encouraging women to become more assertive and independent, thereby interfering with heterosexual attraction, which was described as requiring exaggerated differences between the sexes.³³⁵ By the end of the decade, negative public opinion that female independence would destroy men and the institution of the family brought about a marked decrease in female ambitions.

Heterosexual responsiveness began to get a reputation as mental hygiene. This resulted in the stigmatization of single women and increased pressure on women to perform heterosexually. In Britain, one of the consequences of "heterosexuality as mental hygiene" was the persecution of spinster teachers.

Hostility toward spinster teachers in Britain during the interwar period focused on their failure to marry and produce children, on their unhealthy influence as celibates or lesbians in the schools, on their earning power and on their feminist politics.³³⁶

* * *
...[T]he perceived image of the spinster suffered an increasingly negative change, resulting in the stereotype of an embittered, thwarted, sexually frustrated or deviant woman.³³⁷

The 1931 German film "Madchen in Uniform" cautioned mothers to be wary of sexually aggressive lesbian teachers.³³⁸

In the early 1920s, schools operated under regulations requiring women teachers to resign if they married. Consequently, during the 1920s and 1930s most British women teachers were unmarried. The censuses of 1921 and 1931 show that approximately

³³⁵ Faderman, supra, note 11 at 335-36.

³³⁶ Oram, supra, note 328 at 117-18.

³³⁷ Ibid. at 99.

³³⁸ Anderson and Zinsser, supra, note 197, vol II at 221.

85 per cent of all women teachers were unmarried.³³⁹

Increased sexual freedom translated into increased pressure on women to actively engage socially and sexually with men. "Companionate" marriage, idealized in the 1920s as "a bond of creative companionship and interdependent cooperation", gained popularity as the cure for the oppressiveness of Victorian marriage. Whereas women were not expected to be sexually responsive to their husband in a Victorian marriage, now their mental health depended on and was measured by their sexual responsiveness. The 1920s and 1930s

...was a period when the notion of marriage as a psychological as well as social necessity for women was introduced. Popular sexology texts proclaimed that sexual relations with men was the only way to psychological health and fulfillment for women. They characterised women without male partners as frustrated, a prey for complexes and neuroses.³⁴⁰

Women who did not enjoy sex with their husbands were now blamed for being "frigid" or suspected of worse. The new and idealized emphasis on social and sexual relations with men transformed female companionship and solidarity into something menacing, thereby enhancing negative views about love between women.³⁴¹

Before World War I, many British feminists argued that remaining single was important because celibacy and a career, or work within the women's movement, was more rewarding than

³³⁹ Oram, supra, note 328 at 100.

³⁴⁰ Ibid. at 104.

³⁴¹ Christina Simmons, "Companionate Marriage and the Lesbian Threat" (Fall 1979) IV:3 Frontiers: A Journal of Women's Studies 54-59.

subordination to men in marriage. They believed that spinsterhood gave women a real alternative to marriage and would eventually improve the conditions of marriage. A different feminist attitude developed just before World War I and became popular between the wars. Influenced by the writings of Havelock Ellis, these British feminists argued that women had a right to pleasure in heterosexual sex – consequently they supported "free unions", divorce law reform and the use of birth control. Unfortunately, in accordance with growing sentiment which stressed the necessity of heterosexual intercourse for women and the harm of sexual repression, they attacked lesbians and spinsters who remained outside heterosexuality.³⁴²

Despite anti-lesbian sentiment, two 1929 studies found erotic love between women to be more common than Kinsey's findings 20 years later. In one study of 2200 married and unmarried women, 50.4% responded that they had experienced "intense emotional relations with another woman" and 26% reported that those relations had been accompanied by sex or were recognized as sexual in character. Between 75% and 80% of these experiences occurred in women over 30 years of age.³⁴³ In the second study involving 100 married women, 27% of the study group reported being sexually attracted to other women.³⁴⁴

The fate of the British schoolgirl story is tangible proof

³⁴² Oram, supra, note 328 at 111.

³⁴³ Katherine Bement Davis, Factors in the Sex Life of Twenty-Two Hundred Women (New York: Harper & Row, 1929) 247-48, 257.

³⁴⁴ Gilbert von Tassel Hamilton, A Research in Marriage (1929; rpt. New York: M. D. Lear, 1948) 496.

that heterosexuality became compulsory in twentieth-century Britain.³⁴⁵ The schoolgirl stories, whose popularity spanned forty years and reached its heyday in the 1920s and 1930s, are concerned with women's struggles to relate in a mature, loving and non-possessive way.³⁴⁶ The demise of these stories was caused by the growing sentiment that women in close friendships were sexually perverted. Elsie J. Oxenham's novels of the Abbey Girls exemplified the world of intense female friendship.

As a source for attitudes to women's friendships over forty years, the Abbey books are remarkable. They show how in the 1920s schoolgirl story writers had a unique freedom to explore all the dimensions of women's love for women. As the years passed this freedom was progressively curtailed, with writers becoming more and more confused and restricted by the new heterosexual demands and the negative image of lesbianism. In later decades critics looked back and sneered at their naivety, or amused themselves by exposing (or denying) the homosexual tendencies of their schoolgirl heroines and their creators.³⁴⁷

During the forty years that these stories flourished, lesbianism was progressively redefined, finally encompassing all intimate relationships between women, whether sexual or not, and represented as a scientific fact.³⁴⁸

During World War II, women repeated the work experiences of World War I and they entered professional schools as never

³⁴⁵ Rosemary Auchmuty, "You're a Dyke, Angela! Elsie J. Oxenham and the rise and fall of the schoolgirl story", Not a Passing Phase, supra, note 10, 119 at 140.

³⁴⁶ Auchmuty, supra, note 345 at 128.

³⁴⁷ Ibid. at 138.

³⁴⁸ Ibid. at 139.

before.³⁴⁹ At the war's end, women were again ushered out of the work place to make room for the returning soldiers, scared into retreat by accusations of lesbianism. Books were now more specific in claiming that feminism was a dimension of emotional illness, arrested development and lesbianism. One book suggested that society protect itself from lesbians by preventing lesbians from projecting their distortion onto society; hence, as a precautionary measure, unmarried women should be banned from school teaching because they might set a poor example for children.³⁵⁰

5. Development of Lesbian and Gay Enclaves.

World War II has been described as a "national coming out experience" for the United States.³⁵¹ Family ties were weakened as millions of Americans were uprooted and sex-segregated in the armed forces and in industry. In the U.S., all recruits were routinely screened at induction with probing questions about their sexual desires and experiences. Standardized psychiatric tests developed during World War I were also used to ferret out those men and women who admitted being homosexual or ever having been in love with someone of their own sex. For many, it was the first time they had thought about their lives in these terms. Mass labeling by the U.S. military hastened the process of self-identifying and thousands of men and women who had either been refused admission or

³⁴⁹ Elaine Kendall, Peculiar Institutions: An Informal History of the Seven Sister Colleges (New York: G.P. Putnam's Sons, 1976) at 204.

³⁵⁰ Ferdinand Lundberg and Marynia Farnham, Modern Woman: The Lost Sex (New York: Harper and Row, 1947) at 296, 365-66.

³⁵¹ D'Emilio, supra, note 306 at 80-81.

terminated from service for same-sex conduct joined the lesbian and gay networks in New York, San Francisco and Los Angeles. Those deemed sufficiently heterosexual to serve their country saw the official enforcement of the "homosexuality as sickness" model and witnessed the resulting ostracism of lesbians and gay men.³⁵²

Sex-segregation brought the same opportunities for Canadians to have same-sex intimacy. Yet Canada did not experience the development of lesbian and gay networks during the war to the same degree as the U.S.³⁵³ Kinsman suggests that this may be due to the less specific sexual classification of men and women excluded from the Canadian military. Women and men who were excluded for homosexuality were not classified in a separate and specific category of "homosexuals". Instead, lesbians and gay men were categorized

...as "anti-social psychopaths" and "psychopathic personalities" with "abnormal sexuality".³⁵⁴

After the war, the renewed emphasis on heterosexual arrangements in Canada and the return to pre-war sexual divisions of labour strengthened lesbian and gay networks by distancing them from the social mainstream.³⁵⁵

In the U.S., relatively secret "homophile" organizations formed to support and educate their membership. The Mattachine

³⁵² Kinsman, supra, note 304 at 109-10.

³⁵³ Ibid. at 109, 113.

³⁵⁴ Ibid. at 110, quoting "Clinical Subjects" in W. R. Feasby, ed., Official History of the Canadian Medical Services, 1939-1945, vol. 2, published by the authority of the Ministry of National Defence (Edmund Cloutier, Queen's Printer, 1953) 85-86.

³⁵⁵ Kinsman, supra, note 304 at 113.

Society, a gay men's organization, was founded in 1948; the Daughters of Bilitis, a lesbian organization, was founded in 1955. Both organizations rejected the illness and sin models in favour of a civil-rights model which viewed lesbians and gay men as an oppressed minority.³⁵⁶

In the late 1940s and early 1950s there were simultaneous events with opposite effects. The Kinsey studies liberalized attitudes by revealing the startling fact that same-sex sex is common. Then came an increase in anti-homosexual public sentiment and official harassment which portrayed the homosexual as a national security risk.³⁵⁷

6. The Kinsey Studies: "Gender Inversion" Debunked.

In the late 1940s and early 1950s, Alfred Kinsey and his co-researchers studied sexual behaviour and attraction, first in males and then in females, demonstrating that the number of people who were attracted to or engaged in sex with members of their own sex was much larger than anyone imagined. Kinsey's report promoted a liberal tolerance of same-sex sexual contact but did not analyse gender roles or challenge the primacy of the heterosexual couple.³⁵⁸

Kinsey did not study sexual identity, as such, so he did not correlate behaviour and fantasy with self-identification.

³⁵⁶ Harvard Note, supra, note 126 at 1517; Katz, supra, note 322 at 336.

³⁵⁷ Kinsman, supra, note 304 at 113.

³⁵⁸ Pam Johnson, "Edith Simcox and Heterosexism in Biography: a lesbian-feminist exploration" in Not A Passing Phase, supra, note 10, 55 at 61.

He was not interested in questions of sexual meaning, identity, consciousness, or how sexual experiences were socially organized, but only with what he saw as the development of a "scientific" classification of sexual behaviour.³⁵⁹

The results of Kinsey's studies showed how widespread same-sex sexual intimacy was and debunked the notion that homosexuality was gender inversion. Based on the significant percent of people who experience psychological arousal to and overt sexual experiences with members of their own sex, Kinsey concluded that the ability to enjoy same-sex sex or sexual fantasy is an inherent capacity. He exploded as myth the notion that normal men and women are exclusively heterosexual and that lesbian and gay attraction is either gender inversion or caused by childhood trauma.

The world is not divided into sheep and goats. Not all are black nor all things white. It is fundamental of taxonomy that nature rarely deals with discrete categories and tries to force facts into separated pigeon holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behaviour the sooner we shall reach a sounder understanding of the realities of sex.³⁶⁰

By measuring the incidence of psychologic reaction and/or overt sexual behaviour, Kinsey and his associates found that human sexual experience traverses a continuum. Kinsey developed a seven-point scale on which zero represents exclusive heterosexuality and six represents exclusive same-sex sexual behaviour and attraction. An individual who rates "3" on the scale is said to be equally attracted to, and sexually active with, members of either

³⁵⁹ Kinsman, supra, note 304 at 114.

³⁶⁰ A. C. Kinsey, W. B. Pomeroy, and C. E. Martin, Sexual Behaviour in the Human Male (Philadelphia: W. B. Saunders, 1948) at 639.

biological sex. See Figure 1.³⁶¹

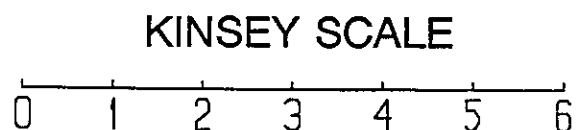


Figure 1

³⁶¹ Alfred Kinsey, Wardell B. Pomeroy, Clyde Martin, and Paul H. Gebhard, Sexual Behaviour in the Human Female (Philadelphia: W.B. Saunders Company, 1953, reprinted 7/66 and 9/68) 469-70, Figure 93.

The categories on the Kinsey Scale relating to women are defined as follows:

"0" denotes that all psychologic responses and all overt sexual behaviour are directed toward men.

"1" denotes that psychological responses and/or overt experiences are directed almost entirely toward men, with incidental psychosexual responses and/or incidental sexual contacts with women. Lesbian reactions and/or experiences are usually infrequent, may mean little psychologically, or may be initiated accidentally and rarely are there any deliberate attempts to renew lesbian contacts.

"2" denotes that the preponderance of psychosexual responses and/or overt experiences are heterosexual with "rather definite[]" responses to lesbian stimuli and/or more than incidental lesbian experiences. Some may have a small amount of lesbian experiences, some a considerable amount, but heterosexual experiences always predominate. "Some...may turn all of their overt experience in one direction while the psychosexual responses turn largely in the opposite direction; but they are always erotically aroused by anticipating homosexual experience and/or in their physical contacts with...[women].

"3" denotes being equally heterosexual and lesbian in psychologic response and/or overt experience and enjoying equally both types of contact without a strong preference for one over the other.

"4" denotes a preference for and a preponderance of psychosexual responses and/or overt behaviour with other women accompanied by an ability to respond with men, perhaps even coupled with a fair amount of contact with men.

"5" denotes almost exclusive lesbian psychologic response and/or overt activities with only incidental psychologic response or overt acts with men.

"6" denotes exclusive lesbian psychologic response and/or overt acts. This may mean exclusive psychologic response even without overt acts. "6" means never having either psychologic response or erotic pleasure from overt acts with men.

"X" denotes no erotic response to either heterosexual stimuli or lesbian stimuli and no erotic pleasure from overt acts with women or men. Ibid. at 471-72.

Kinsey discovered that, by 45 years of age, 28% of all women in his study group had experienced psychologic sexual arousal with other women (hereinafter "arousal"), 19% had had physical contact of a sexual nature (hereinafter "experience") whether or not they had been erotically aroused by it, and 13% had been aroused to the point of orgasm (hereinafter "orgasm") by their physical contact. See Figure 2 below.³⁶²

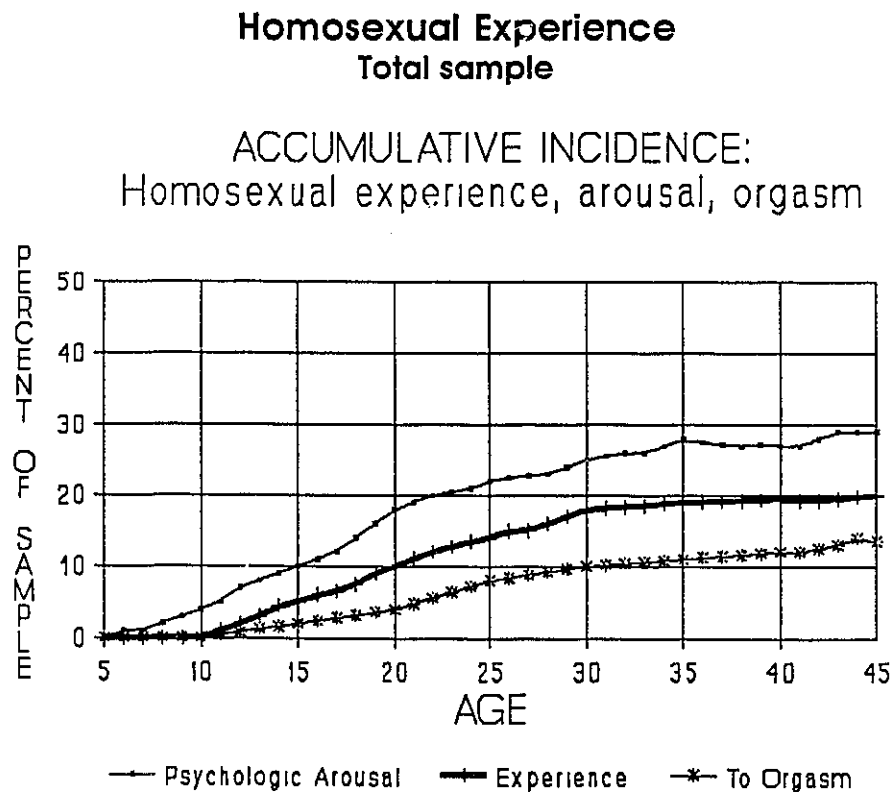


Figure 2

³⁶² Ibid. at 452-53, Figure 82. The figures and tables reproduced here are all from Sexual Behaviour in the Human Female, supra, note 361.

Kinsey found that marital status was significant. By 45 years of age, 24% of single women, 9% of "previously married women" (widowed, separated or divorced), and 3% of married women had had contact with member(s) of their own sex. See Figure 3 below.³⁶³

Homosexual Contacts Experience

ACCUMULATIVE INCIDENCE:
Homosexual experience, by marital status

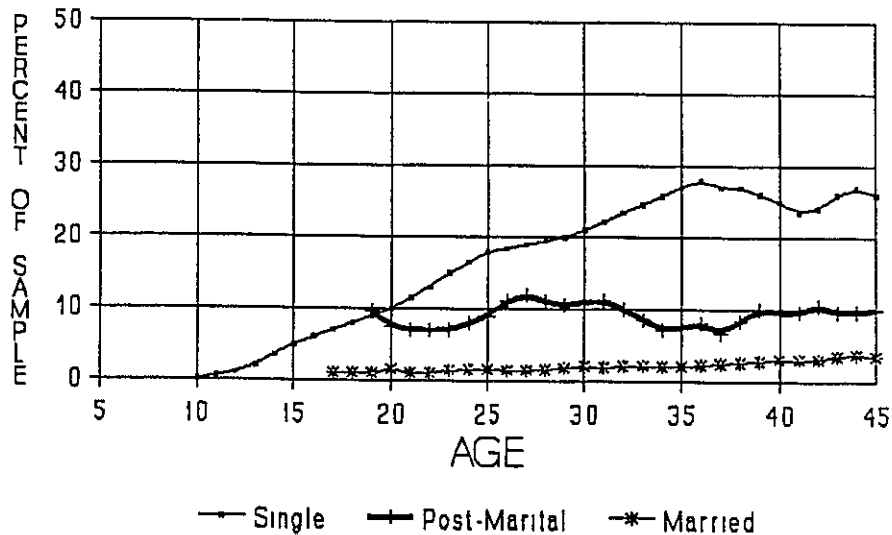


Figure 3

The time periods during which lesbian contacts took place are shown in Table 1 below. Thirty-one percent of those in the 41-50 year-old age group reported contacts extending four years or more. Those for whom lesbian contacts spanned one year or less constituted 47% of the study group and 25% had experiences spanning

³⁶³ Ibid. at 453-54, Figure 83.

a two- to three-year period.³⁶⁴

Number of Years Involved in Homosexual Contacts
Including activity with and without orgasm

NUMBER OF TIMES OR YEARS	TOTAL SAMPLE	AGE AT REPORTING			
		Adol-20	21-30	31-40	41-50
		<i>Percent</i>			
1-10 times	32	26	35	32	33
1 year or less	47	48	51	44	44
2-3 years	25	26	27	21	25
4-5 years	10	15	7	9	9
6-10 years	9	11	11	8	7
11-20 years	7		4	14	8
21+ years	2			4	7
Number of cases	709	137	202	202	122

Table 1

Table 2 below shows arousal, contacts and orgasm by education level. The most highly educated women are most apt to have experienced arousal (36%), contact (27%) and orgasm (19%).³⁶⁵

³⁶⁴ Ibid. at 492, Table 129.

³⁶⁵ Ibid. at 493, Table 131.

Accumulative Incidence: Homosexual Arousal, Experience, or Orgasm By Educational Level

AGE	TOTAL SAMPLE	EDUCATIONAL LEVEL				TOTAL SAMPLE	EDUCATIONAL LEVEL			
		0-8	9-12	13-16	17+		0-8	9-12	13-16	17+
HOMOSEXUAL AROUSAL										
	%	<i>Percent</i>				<i>Cases</i>	<i>Cases</i>			
8	2	1	1	1	2	5720	179	999	3226	1124
10	3	2	3	2	4	5699	179	999	3226	1124
12	5	3	6	4	6	5674	179	999	3226	1124
15	10	11	10	9	11	5614	173	998	3226	1124
20	17	13	14	17	21	4267	127	849	2168	1123
25	23	9	16	24	28	2743	117	678	1020	928
30	25	10	18	25	33	2017	109	494	697	717
35	27	10	21	28	33	1447	91	317	487	552
40	27	10	18	28	32	937	67	189	301	380
45	28		17	28	36	565		124	165	231
HOMOSEXUAL CONTACTS: EXPERIENCE										
	%	<i>Percent</i>				<i>Cases</i>	<i>Cases</i>			
12	1	2	1	1	1	5733	179	1007	3267	1142
15	5	9	5	4	4	5685	175	1006	3267	1142
20	9	11	7	9	12	4318	129	854	2194	1141
25	14	8	8	14	19	2779	119	683	1035	942
30	17	9	10	17	24	2045	111	500	707	727
35	19	9	12	17	25	1470	93	322	493	562
40	19	10	10	19	24	951	68	193	304	386
45	20		8	20	27	572		127	166	234
HOMOSEXUAL CONTACTS TO ORGASM										
	%	<i>Percent</i>				<i>Cases</i>	<i>Cases</i>			
12	1	2	1	--	--	5779	178	1012	3301	1152
15	2	9	3	1	2	5733	174	1011	3301	1152
20	4	8	4	3	6	4359	128	860	2220	1151
25	7	5	5	7	10	2803	118	687	1046	952
30	10	6	5	10	14	2058	110	502	713	733
35	11	7	5	11	15	1480	92	323	498	567
40	12	7	5	13	15	956	68	194	305	389
45	13		6	13	19	574		127	166	236

Table 2

Table 3, shown below, shows the distribution of women on the Kinsey Scale, by marital status. The highest incidence of lesbian psychologic response or overt acts is among single women. Seventeen percent of single women who are 37 years old score from "1" to "6" on the Kinsey Scale (incidental to exclusive lesbian history) and 3% score "6" (exclusive lesbian history). Eight percent of married women reported at least incidental lesbian history and 14% of previously married women reported at least incidental lesbian experience. Surprisingly, by 37 years of age, 22% of single women, 4% of married women, and 10% of previously married women scored in the "X" category, meaning no erotic response to either heterosexual or lesbian stimuli and no erotic pleasure from sexual acts with either sex.³⁶⁶

³⁶⁶ Ibid. at 499, Table 142.

Active Incidence: Heterosexual-Homosexual Ratings By Marital Status

AGE	0 1-6		RATING						X	
	0	1-6	1	2	3	4	5	6		
SINGLE FEMALES										
	<i>Percent</i>		<i>Percent</i>						<i>%</i>	<i>Cases</i>
5	7	6	--	--	2	--	--	3	87	5914
10	7	11	--	1	2	--	--	8	82	5820
15	34	6	2	1	1	--	--	2	60	5714
20	72	11	5	2	1	1	1	1	17	3746
25	72	14	4	3	1	3	1	2	14	1315
30	67	18	5	4	2	3	2	2	15	622
35	61	20	6	3	3	2	3	3	19	370
37	61	17	5	3	2	2	2	3	22	290
MARRIED FEMALES										
	<i>Percent</i>		<i>Percent</i>						<i>%</i>	<i>Cases</i>
17	80	11	9	1	0	0	0	1	9	89
20	89	8	5	1	1	--	--	--	3	545
25	90	8	6	1	--	--	--	--	2	1331
30	90	9	6	2	--	--	--	--	1	1215
35	89	10	7	2	--	--	--	--	1	908
40	89	9	6	2	--	0	--	--	2	569
45	89	9	6	2	--	0	--	1	2	311
50	88	8	4	3	0	0	1	0	4	154
PREVIOUSLY MARRIED FEMALES										
	<i>Percent</i>		<i>Percent</i>						<i>%</i>	<i>Cases</i>
20	80	14	6	1	3	3	0	1	6	81
25	75	17	7	3	0	1	3	3	8	178
30	78	14	6	2	1	2	1	2	8	224
35	78	17	9	3	0	1	2	2	5	204
40	76	14	8	2	2	0	1	1	10	177

TABLE 3

Since 62% of all women are exclusively heterosexual ("0") and only 1 to 3% of all women are exclusively lesbian ("6") until their thirty-fifth year, and after accounting for the approximately 6% of all women (age 35) who have no psychologic response and/or pleasurable erotic contact with men or women³⁶⁷, 29% of all the thirty-five-year-old women in Kinsey's study had both lesbian and heterosexual desires and/or engaged in both lesbian and heterosexual activities (from "1" to "5").³⁶⁸ Thus, considering behaviour and psychologic response only (but not self-identification), 29% of the women in the study could be called bisexual.

Kinsey's research proves that, for many women, lesbian desire and sexual acts are a significant aspect of their sexuality. For these women, the real world is a changing mixture of lesbian and heterosexual desire and sexual acts.

Kinsey's studies legitimized the discussion of sexuality in the media and prompted a further shift toward a sexual definition of homosexuality away from the gender-inversion theory promulgated by the sexologists.

Although Kinsey did not study the formation of lesbian identity and culture, significantly, his "findings implicitly point

³⁶⁷ According to Table 142, at 35 years of age, 19% of 370 single women (70.3 women), 1% of 980 married women (9.8 women) and 5% of 204 previously married women (10.2 women) scored "X." Thus, 90.3 of 1554 women, or 5.8% of all women in that age group rated "X."

³⁶⁸ The statistics for men experiencing gay desire and/or overt acts are even higher. Only 50% of men are exclusively heterosexual ("0") throughout their lives and 4% are exclusively gay ("6"). Hence nearly half (46%) of all men experience both gay and heterosexual desires and/or gay and heterosexual overt sexual acts (from "1" to "5"). De Cecco, supra, note 283 at 56.

to a complex form of mutability – the possibility for change in the ways people conceptualize and label their sexual behaviour".³⁶⁹ His work is also tremendously significant because of the reaction it generated. Kinsey's work is

...important to an examination of the social organization of sexual knowledge and the social and political struggles over meanings and consequences of this knowledge.³⁷⁰

7. The Homosexual as National Security Risk.

The release of...[Kinsey's] findings was met with moral outrage. Sexual conservatives simply refused to believe them. The most vehement attacks were levelled at the volume on female sexual behaviour. Some U.S. conservatives used the findings to magnify the danger of homosexuality, arguing that it was an epidemic. The findings were used in the context of the cold war scare and the McCarthyite witch hunts to whip up hatred and fear against lesbians and gay men. On the other hand, the relatively small percentage of those engaged in exclusively homosexual acts was used to denigrate homosexuality as "deviant" behaviour practiced by only a small minority of the population, thus buttressing notions of heterosexual normalcy for the vast majority.³⁷¹

A series of English trials and scandals connected spying and homosexuality.³⁷² Many lesbians and gay men were either fired or resigned from the U.S. Civil Service as security risks.

The U.S. news media in the late 1940s and early 1950s plainly shows the relationship of the Cold War and anti-communist and anti-

³⁶⁹ Janet E. Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity" (1989) 36:5 U.C.L.A. Law Review 915 at 940.

³⁷⁰ Kinsman, supra, note 304 at 114.

³⁷¹ Ibid. at 114-15, citing D'Emilio, supra, note 306 at 36, 37, 42.

³⁷² Elizabeth Wilson, Women and the Welfare State (London: Tavistock, 1980) 67.

homosexual witch hunts. For example, Guy George Gabrielson, Republican National Chairman, in an article entitled "Gabrielson, G.O.P. Chief, Says They Are as Dangerous as Reds" was quoted in the New York Times on April 19, 1950:

Perhaps as dangerous as the actual Communists are the sexual perverts who have infiltrated our Government in recent years. The State Department has confessed that it has had to fire ninety-one of these. It is the talk of Washington...³⁷³

Kinsman notes that, in Canada, the witch hunts against lesbians and gay men were far more vigorous than against communists.³⁷⁴ The "anti-homosexual" scare prompted a Canadian security panel to formulate an "anti-homosexual" policy in 1946 which resulted in numerous dismissals and resignations.

The firings were carried out at the urging of the security panel, a small, secret committee of top civil servants and Mounties, and were based on confidential reports.³⁷⁵

At the height of the national security scare in 1952, the Canadian Parliament passed a new immigration act barring the admission of gay men as subversives. The previous law provided for the exclusion of lesbians and gay men if they had been convicted of crimes of moral turpitude.³⁷⁶

The Royal Canadian Mounted Police [hereinafter "RCMP"], took on the task of ferreting lesbians and gay men out of its own ranks

³⁷³ Katz, supra, note 322 at 91.

³⁷⁴ Kinsman, supra, note 304 at 121, citing Philip Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act, 1952-1977," June, 1985, unpublished paper prepared for the Sex and the State lesbian/gay history conference.

³⁷⁵ Kinsman, supra, note 304 at 121.

³⁷⁶ Ibid. at 123.

as well as out of the government, in general. These efforts reached their peak at about the time when, in 1967, Justice Minister Pierre Trudeau proposed the decriminalization of lesbian and gay acts.³⁷⁷

8. Decriminalization of Lesbian and Gay Sex Acts.

- a. Decriminalization in The United Kingdom . . . 164
- b. Decriminalization in Canada 168

This section briefly summarizes the developments of the criminal law which resulted in the decriminalization of lesbian and gay acts in Canada. The historical background of decriminalization takes us to the United Kingdom.

a. Decriminalization in The United Kingdom.

Before 1533, sodomy was an ecclesiastical offence. In that year, gay acts were prohibited and made punishable by death in English secular law. Lesbian acts have never been an offence under English secular law. Criminalizing gay acts in England was a moral decision heavily influenced by religious prohibitions and concepts of appropriate gender roles. Criminalization simultaneously diminished freedom and conferred a criminal identity onto gay men.

In 1861, sodomy and attempted sodomy were made punishable by life imprisonment and ten years' imprisonment respectively. In 1885, the degree of the crime was reduced to a misdemeanor

³⁷⁷ Ibid. at 121-22. The RCMP's position on the employment of lesbians and gay men softened in 1986 to accept candidates who are "out". The change in policy was occasioned by the federal government's 1986 statement that the equality rights set forth in section 15 of the Charter would be interpreted to include lesbians and gay men. Ibid. at 122-23.

punishable by imprisonment for two years.³⁷⁸ It was suggested that a paragraph be included in The 1885 Criminal Law Act which would have penalized lesbian acts. Queen Victoria is reported to have expressed complete ignorance of lesbian acts and refused to sign the bill unless all such references were deleted.³⁷⁹

In 1921, a similar amendment was rejected by the British House of Lords.

Speaking on the issue, one member warned, "You are going to tell the whole world that there is such an offence, bring it to the notice of women who have never heard of it, never dreamed of it. I think it is a very great mischief." Lord Birkenhead added: "I would be bold enough to say that out of every thousand women, taken as a whole, 999 have never even heard whisper of these practices. Among all these, in the homes of this country...the taint of this noxious and horrible suspicion is to be imparted".³⁸⁰

In the late 1800s and early 1900s, the new medical definitions and regulations fostered public discourse which in turn fostered the development of a gay and lesbian social identity.³⁸¹ Psychiatry, jurisprudence and literature spawned a public discourse where "homosexuality began to speak on its own behalf...[and] to demand that its legitimacy or 'naturalness' be acknowledged..."³⁸²

The Committee on Homosexual Offences and Prostitution, appointed in August, 1954, submitted the Wolfenden Report three

³⁷⁸ O'Donovan, supra, note 4 at 105.

³⁷⁹ Arnup, supra, note 117 at 19.

³⁸⁰ Jeffrey Weeks, Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present (London: Quartet Books, 1977) 106-07.

³⁸¹ O'Donovan, supra, note 4 at 105-06.

³⁸² Ibid. at 106, quoting Michel Foucault, The History of Sexuality, vol. 1 (London: Allen Lane, 1979).

years later in August, 1957, in which it recommended that private consensual gay sex be decriminalized.³⁸³ In the report, the committee adopted the position that laws should not try to govern "private moral conduct" unless such conduct affects the public good.

There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral and immoral conduct is to emphasize the private and personal responsibility of the individual for his own action, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.³⁸⁴

The concept of sexual acts inhabiting the realm of private morality has become deeply ingrained in debates concerning decriminalization, with the implication being that lesbian and gay acts are a matter of private immorality. In England, Lord Devlin and Professor H.L.A. Hart debated the issue as "the enforcement of morals" in what has come to be known as the Hart-Devlin Controversy.

In very brief summary, Hart criticized the Wolfenden Report because it took the position that the individual deserves protection from the state whereas Devlin believed that all morality is public and that society's moral structure needs protection.

³⁸³ Caron, supra, note 59 at 14, note 18 therein, 16.

³⁸⁴ Ibid. at 15-16, quoting the Wolfenden Report, para. 61.

Hence, if a reasonable person considers the private behaviour harmful to society, such conduct is properly criminalized. In contrast, Hart argued that law and morality should not be confused and that state power should never be exercised over the individual to prohibit immoral acts unless to prevent harm to others. In effect, immoral acts should only be punishable if there is harm to third persons.³⁸⁵

Ten years after the Wolfenden Report was completed, the Sexual Offences Act of 1967 decriminalized private gay acts involving men over twenty-one in England and Wales. Scottish law conformed with passage of The Criminal Justice (Scotland) Act 1980. Northern Ireland retained prohibitions against consensual gay sex until 1982 when the European Court of Human Rights ruled, in Dudgeon v. United Kingdom³⁸⁶, that men over twenty-one are protected under the private-life provision of Article 8 of the European Convention on Human Rights. The court said that some degree of regulation of male homosexuality is "necessary" in a democratic society but that the United Kingdom had failed to show the existence of a "pressing social need" for differentiating between Northern Ireland and the rest of the United Kingdom to outweigh Dudgeon's interest in "a most intimate aspect of private life".³⁸⁷

Today, consensual and private gay acts for men twenty-one or older are decriminalized throughout the U.K. except on the Isle of Man, the Channel Islands and in Gibraltar where criminal penalties

³⁸⁵ Caron, supra, note 59 at 21-25, 28 (citations omitted), 35.

³⁸⁶ Dudgeon v. United Kingdom (1982), 4 E.H.R.R. 149.

³⁸⁷ Ibid.

still exist.³⁸⁸

The age of consent for heterosexual sex is sixteen throughout the United Kingdom; hence all gay teens between the ages sixteen and twenty-one, but not heterosexual teens, still run the risk of criminal prosecution.

The Army³⁸⁹, Air Force³⁹⁰, and Navy³⁹¹ all prohibit "disgraceful conduct of a cruel, indecent or unnatural kind". Between 1976 and 1984, there were 947 administrative discharges and 272 dismissals with disgrace of both men and women on the basis of these articles.³⁹²

b. Decriminalization in Canada.

In Canada, where criminal law is a matter of federal jurisdiction, only gay acts were criminalized until 1953-54 at which time lesbian sex acts were included in the criminal code.

In North America, when settlers in New England drew up their first criminal code, they seriously contemplated breaking the English tradition of treating only gay sex acts as capital offences and making lesbian acts capital offences as well. In 1636, the Reverend John Cotton proposed a body of laws to the General Court of Massachusetts which contained a provision making "carnal

³⁸⁸ The Second ILGA Pink Book: A Global View of Lesbian and Gay Liberation and Oppression (Utrecht, The Netherlands: Interdisciplinary Gay and Lesbian Studies Department, Utrecht University, 1988) 232 [hereinafter "The Pink Book"].

³⁸⁹ Section 55 of the Army Act of 1955.

³⁹⁰ Air Force Act 1955.

³⁹¹ Navy Discipline Act 1957.

³⁹² The Pink Book, supra, note 388 at 232.

fellowship of...woman with woman" a capital offence. These laws were never adopted.³⁹³

Apparently New Haven did adopt in 1655 a capital law punishing "any woman [who shall] change the naturall (sic) use into that which is against nature". A few years later New Haven became part of Connecticut and the law was superseded. The only record of a woman being prosecuted in colonial America was in 1648-49 in New Plymouth when two women were prosecuted for "luede behaiour each with other vpon a bed".³⁹⁴

In 1890, the crime of gross indecency first appeared in Canadian law with the enactment of section 5 of chapter 37, which prohibited "gross indecency" only between males.³⁹⁵ This statute was borrowed from the Criminal Law Amendment Act, 1885 (U.K.) c. 19, s. 11.³⁹⁶ The crime was punishable in England by a two-year term of imprisonment but Canadian law set the penalty at five years imprisonment and a whipping. In 1927, the statute was renumbered section 206.

In 1953-54, the Criminal Code Commission amended the statute to prohibit sex between women, deleted "whipping" from the statute

³⁹³ Crompton, supra, note 188 at 19.

³⁹⁴ Ibid. at 20.

³⁹⁵ C. S. 1890, c. 37, s. 5 provided:
Every male person, who in public or private, commits, or is a party to a commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, is guilty of a misdemeanor and liable to five years imprisonment, and to be whipped.

³⁹⁶ Robson, supra, note 117.

and renumbered it as section 149.³⁹⁷

In 1968-69, The Criminal Law Amendment Act, S.C. 1968-69, c. 38, s. 149A, decriminalized private same-sex sex acts between consenting adults aged twenty-one or more years. An act of gross indecency was not indictable if each person was over the age of 21 and the act occurred in private. An act was deemed committed in public "...if it is committed in a public place, or if more than two persons take part or are present".³⁹⁸

This law reform followed a ruling in Klippert v. The Queen³⁹⁹, wherein the Supreme Court of Canada reached a particularly harsh result. Klippert, admittedly gay during the preceding 24 years, was convicted of four charges of gross indecency involving private gay acts with four different consenting men. Klippert was sentenced as a "dangerous sexual offender" to an indefinite preventive sentence which could last for life. The question before the Supreme Court was whether Klippert had been lawfully sentenced as a "dangerous sexual offender".

The statutes in question provide in relevant part as follows:

(b): "dangerous sexual offender" means a person who, (i) by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and (ii) who (a) is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or (b) is likely to commit a further sexual offence, ...⁴⁰⁰

³⁹⁷ C. S. 1953-54, c. 51, s. 149 states:
Every one who commits an act of gross indecency with another person is guilty of an indictable offense and is liable to punishment for five years.

³⁹⁸ C. S. 1968-69, c. 46, s. 162.

³⁹⁹ Klippert v. The Queen, [1967] S.C.R. 822.

⁴⁰⁰ Canadian Criminal Code, s. 569.

Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.⁴⁰¹

The Supreme Court rejected a humane construction of the statutes in favour of a draconian result. The Court considered but rejected the reasoning of the Wolfenden Report and the new Act just passed by the British Parliament in 1967.⁴⁰² The Klippert holding meant that in Canada, a gay man who engaged in a private act of anal intercourse with a consenting male partner was deemed both a danger to others and a criminal who cannot control his sexual impulses, hence a "dangerous sexual offender" deserving of incarceration for life.

A few weeks after the Klippert ruling, Pierre Trudeau, who was then Minister of Justice, introduced a series of new amendments to the Criminal Code, which resulted in the decriminalization of private and consensual lesbian and gay sex acts for persons twenty-one and older.⁴⁰³ Trudeau expressed his view succinctly in the famous quip: "The State has no business in the bedrooms of the Nation".⁴⁰⁴ As Prime Minister of Canada, Trudeau called the vote in Parliament along party lines and the amendments passed.

Decriminalization in Canada did not mean that lesbians and gay men were suddenly on an equal footing with other Canadians. The

⁴⁰¹ Canadian Criminal Code, s. 661.

⁴⁰² Klippert, supra, note 399 at 836 (Fauteux, J.).

⁴⁰³ Caron, supra, note 59 at 13.

⁴⁰⁴ Ibid. at 15, note 23 therein.

reforms meant only that regulation of "private sphere" adult lesbian and gay sexuality was transferred from the police and the criminal law to psychiatrists and medicine. John Turner, then Minister of Justice, stated this view when he said that decriminalization did not "legalize homosexuality"; it merely exempted certain conduct from prosecution.⁴⁰⁵

In 1987, the age of consent was lowered to eighteen years of age.⁴⁰⁶

9. The Rise of Lesbian-Feminism.

It was up to lesbians themselves to wrest the definition of love between women away from the medical and literary worlds, to reclaim the images of women loving women and to redefine them according to the reality of women's lives. Lesbians slowly discarded the image of themselves as primarily sexual outlaws and began to define themselves in accordance with their lived experiences as women who make women prime in their lives by giving their energies and their commitment to other women rather than to

⁴⁰⁵ Kinsman, supra, note 304 at 168 and 171-72.

The struggle for decriminalization in the U.S. is still ongoing in twenty-three states. As late as 1961, laws criminalizing lesbian and gay sex remained in force in every state. During the 1950s, the American Law Institute drafted a Model Penal Code which decriminalized all nonviolent consensual sexual activities between adults in private. The Pink Book, supra, note 388 at 207. Twenty-seven of the fifty states have since either adopted the Model Penal Code provision or otherwise decriminalized lesbian and gay sex acts. Although the U.S. Congress has not seen fit to prohibit lesbian and gay acts under the U.S. federal criminal code, one of the notable jurisdictions that retains criminal sanctions is the District of Columbia, the nation's capitol, for which the U.S. Congress sits as the state legislature. Bowers v. Hardwick, supra, note 113 at 147-48 (L.Ed.2d).

⁴⁰⁶ R. S. C. 1985, c. c-46, s. 159(2).

men.

As early as February, 1958, an article appeared in The Ladder, the magazine for the Daughters of Bilitis (the first national lesbian organization), which described lesbianism as

...a protest against domination by the male...a withdrawal from the heterosexual market of glamour... Emphasis is placed rather upon independence of the individual and the development of the full personality.⁴⁰⁷

In 1963, the same magazine stated that lesbianism provides an "escape from being cast into a social stereotype which degrades [a woman's] individuality..."⁴⁰⁸

The negative climate toward lesbianism maintained by the literary establishment and medical "experts" only began to change palpably in the 1970s. This was a time when the second wave of feminism had developed a mass audience that was receptive to the idea of women loving and supporting other women. Feminists had learned to distrust male descriptions of female experience and had developed a body of feminist scholarship to help deconstruct the ideology supporting male domination and the taboos against lesbianism. The black civil rights movement had confronted the U.S. with demands for equality. The sexual revolution had made sexual experimentation more acceptable. The emergence of the gay and lesbian liberation movement had inspired society to re-examine its views about same-sex love. Finally the time had come for lesbians to be seen as pioneers rather than advocates of unorthodox

⁴⁰⁷ Faderman, supra, note 11 at 381.

⁴⁰⁸ Ibid.

sex.⁴⁰⁹

Lesbians began to speak for themselves. In place of the old guilt and fear instilled by the sexologists and decadent writers, lesbians developed a healthy if not robust sense of their own specialness. Feminist analysis of male domination, gender relations and the institution and ideology of heterosexuality gave lesbians a coherent self-defence to the degrading views of lesbians based on medical or fictional opinions.

[L]esbians no longer internalize those views since feminism has crystallized for them the meaning of their choice. The reasons for the choice were probably always the same — at the height of Krafft-Ebing's influence, at the height of Baudelaire's influence, at the height of Freud's influence; but because women listened to those who had observed externally and superficially and with a male bias, and because they seldom talked to large numbers of other women, they often forgot their original reasons and accepted those of the experts. It was only when they began talking in large groups, often in feminist consciousness-raising sessions, that they saw that others had made the same choice through the same reasons.⁴¹⁰

In 1974, the U.S. lesbian and gay liberation movement challenged "the psychiatric hegemony over homosexuality". With the help of allies and supporters — some of whom were psychiatrists and clinical psychologists — the American Psychiatric Association "somewhat timidly but nonetheless officially, ...depathologized homosexuality".⁴¹¹ In removing it from the list of mental disorders, the Association declared that

"in the reasoned judgement of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease" and that "homosexuality *per se* implies

⁴⁰⁹ Ibid. at 377-78.

⁴¹⁰ Ibid. at 387-88.

⁴¹¹ De Cecco, supra, note 231 at 3.

no impairment in judgment, stability, reliability or general social or vocational capabilities".⁴¹²

Similar resolutions were passed by the American Psychological Association and the American Public Health Association in 1975.⁴¹³

10. Recent Psychological Models of Lesbian Identity.

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a. Introduction.

The removal of lesbianism from the list of mental disorders has only mildly destigmatized lesbian identity. Many women still do not identify as lesbian because the label's socially-ascribed meaning clashes so dramatically with their intensely rewarding erotic and loving relationships with women. In contrast, many women self-identify as lesbians without ever having had a sexual experience with another woman.

Self-identifying as lesbian is important to the individual because

...labels seem to be an important part of identity development and psychological well-being...[and] the meaning of sexual labels is a summing up of one's sexual and affectional experiences and interests.⁴¹⁴

However, the variables that may influence sexual orientation and identity are so numerous, incongruent and changing that

⁴¹² Law, supra, note 63 at 214, note 131 therein.

⁴¹³ Ibid.

⁴¹⁴ Coleman, supra, note 5 at 19, citing J. P. Paul, "The Bisexual Identity: An Idea Without Social Recognition" (1983/1984) 9:2/3 Journal of Homosexuality 45 at 56.

dichotomous categories such as lesbian, gay, bisexual and heterosexual are "a massive over-simplification of our current understanding of sexual orientation".⁴¹⁵

Kaplan and Rogers argue that

[w]estern society stylizes and channels sexual practice into rigid 'norms' by focussing on genital sex and, in doing so, fosters heterosexual practice.⁴¹⁶

They also suggest that "oppression of homosexuality has largely worked successfully by concentration on the genitalia".⁴¹⁷

b. Psychology Moves Beyond Biological Determinism to Study The Multiple Dimensions of "Sexual Orientation".

This subsection explores the many dimensions of sexual identity. Biological determinism injects into sexuality theory "genital concepts of sexual identity [that may] mask real questions of sexual attraction".⁴¹⁸ However, psychologists have identified numerous other factors which affect sexual attraction and self-identification.

Sexual identity, considered to be an integral aspect of the individual, is defined in terms of the physical sex of sexual partners. Moreover, since the assignment as male or female is made purely on the basis of genital morphology, the concepts upon which we construct theories of sexuality are confined to the physical sex of the partners of choice. Definitions of heterosexuality and even bisexuality are based on this one criterion. Therefore, it is no surprise that theories of homosexuality and bisexuality, which are based on biological determinism, win easy acceptance, even in the

⁴¹⁵ Coleman, supra, note 5.

⁴¹⁶ Gisela T. Kaplan and Lesley J. Rogers, "Breaking Out of the Dominant Paradigm: A New Look at Sexual Attraction" (1984) 10:3/4 Journal of Homosexuality 71 at 73.

⁴¹⁷ Ibid. at 74.

⁴¹⁸ Ibid. at 73.

absence of supporting evidence.⁴¹⁹

Kaplan and Rogers argue that sexual arousal may transcend genital categories and be more dependent on non-genital physical characteristics of masculinity and femininity – including secondary sex characteristics – and how a person expresses herself in her dress.⁴²⁰ Often women and men have behaviours that are both very masculine and very feminine; hence masculinity and femininity do not constitute a continuum but rather two separate dimensions that should be represented by two separate scales.⁴²¹ Hence, "[c]ultural uneasiness with sexual ambivalence and ambiguity...may result from the premonition that an amalgam of male and female attributes may be more sexually arousing".⁴²² If this is so, one of the functions of the extreme polarization of the sexes may be to minimize male anxieties concerning their own homosexual desires. Exaggerated differences between the sexes, glamorized as romantic and erotic, may allay men's gay anxieties which might be aroused if men allowed themselves to be sexually attracted to and aroused by androgynous women and/or men.

c. Since the Kinsey Scale.

The Kinsey Scale, as a single scale of measurement, assumes that the biological sex of an individual's actual sex partner(s)

⁴¹⁹ Ibid. at 71-72.

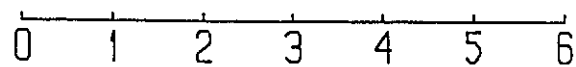
⁴²⁰ Ibid. at 72-73.

⁴²¹ Ibid. at 72-73, citing S. L. Bem, "The Measurement of Psychological Androgyny" (1974) Journal of Consulting and Clinical Psychology 42 at 155-62.

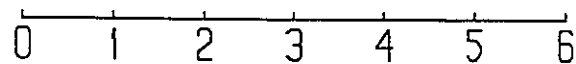
⁴²² Kaplan and Rogers, supra, note 416 at 74.

and fantasied sex partner(s) is the same. In 1978, Bell and Weinberg remedied this deficiency in their Modified Kinsey Scale consisting of two seven-point scales of measurement, one for sexual behaviour and one for erotic fantasy. It has the added advantage of registering discrepancies between erotic desire and conduct.⁴²³ See Figure 4 below.

MODIFIED KINSEY SCALE



BEHAVIOR



FANTASY

Figure 4

In 1977, Shively and De Cecco suggested that interpersonal affection, whether or not accompanied by sex, be added as a third seven-point scale to the concept of sexual orientation.⁴²⁴ Klein, Sepekoff and Wolff went further by including sexual attraction,

⁴²³ Coleman, supra, note 5 at 10, 12, citing A. P. Bell and M. S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women (New York: Simon and Schuster, 1978).

In Paul's study in 1983-1984, one-third of the study group saw their sexual behaviour as more same-sex than their erotic feelings. Coleman, supra, note 5 at 10, citing Bell and Weinberg, supra.

⁴²⁴ M. Shively and J. De Cecco, "Components of Sexual Identity" (1977) 3 Journal of Homosexuality 41.

social preference, self-identification, and heterosexual/homosexual lifestyle preference.⁴²⁵ Each category is ranked according to the Kinsey method from "zero" to "six" and each category is ranked for past, present and future. Klein's grid has the flexibility to show discrepancies between categories and discrepancies in the same category, over time. See Klein Sexual Orientation Grid below.

Klein Sexual Orientation Grid

	PAST	PRESENT	IDEAL
SEXUAL ATTRACTION			
SEXUAL BEHAVIOR			
SEXUAL FANTASIES			
EMOTIONAL PREFERENCE			
SOCIAL PREFERENCE			
SELF IDENTIFICATION			
HETERO/GAY LIFESTYLE			

Shively and De Cecco have broadened the scope of the study of sexual orientation by including it as one of four factors in the broader concept of sexual identity. The four factors are: (1) sexual orientation, (2) biological sex, (3) gender identity, and

⁴²⁵ F. Klein, The Bisexual Option (New York: Arbor House, 1978); F. Klein, "Are You Sure You're Heterosexual? or Homosexual? or Bisexual?" (December, 1980) Forum Magazine 41; F. Klein, B. Sepekoff and T. J. Wolf, "Sexual Orientation: A Multivariate Dynamic Process" (1985) 11:1/2 Journal of Homosexuality 35.

(4) social sex-role identity (also known as gender role identity).⁴²⁶

The first component, sexual orientation, is defined as overt sexual acts (erotic body contact that may or may not involve genital contact), love and affection (associations involving varying degrees of love and trust with friends, coworkers, marital partners, lovers), and erotic fantasy (mental images of persons engaged in physical sexual contact or in idealized romantic relationships). Shively and De Cecco use three Kinsey continua to measure the dimensions of sexual orientation.⁴²⁷

The second component, biological sex, refers to external genitalia and chromosomal sex which are usually but not always congruent. The third, gender identity, refers to an individual's sense of being male or female. For example, a biological female with a male sexual identity feels that she is a man trapped inside a woman's body.

The fourth component, social sex-role identity, refers to the physical and psychological features that are culturally associated with females and males. The six aspects of social sex-roles are the culturally appropriate physical appearance, personality, mannerisms, speech, interests, and habits for females and males. Shively and De Cecco use two continua for social sex-role, one to

⁴²⁶ Coleman, supra, note 5 at 15, citing Shively and De Cecco, supra, note 424 at 41-48.

⁴²⁷ Individuals with sharply divergent aspects of sexual orientation experience considerable pain if they seek homogeneity. A man who is very satisfied in his sexual relationships with other men yet has strong emotional attachments to a wife or girlfriend may seek therapy to be functional in his sexual relationships with women. J. P. De Cecco and S. Kellogg, Rape in the County Jail (1980).

measure masculinity qualitatively and quantitatively and one to measure femininity qualitatively and quantitatively.⁴²⁸

With these factors in mind, why is the genital morphology of a heterosexual married couple determinative of the label used to describe their sexually and emotionally intimate relationship? If she has a male-gender identity and a male-social-sex-role identity and he has a male-gender identity and a female-social-sex role identity, why is their relationship described as a heterosexual? If both individuals have a sense of being male, why not consider this a gay relationship? Since they have opposite gender roles (she has a male and he has a female gender role), their relationship could even be considered in the nature of a reverse-heterosexual relationship.

The various scales of the foregoing models all incorporate references to biological sex. Any assessment of an individual's sexual identity should also recognize the qualitative differences in lifestyles, whether heterosexual or lesbian, and the individual's adjustment thereto. The five categories described by Bell and Weinberg⁴²⁹ are:

1. monogamous couples;
2. non-monogamous couples;
3. non-coupled sexually active individuals who are adjusted to their sexual orientation;
4. dysfunctional sexually-active individuals who are not adjusted to their sexual orientation;

⁴²⁸ M. Shively, J. Rudolph and J. P. De Cecco, "The Identification of the Social Sex-Role Stereotypes" (1978) 3:3 Journal of Homosexuality 225.

⁴²⁹ Bell and Weinberg, supra, note 423.

5. asexual individuals who are not adjusted to their sexual orientation.

These categories take into account the importance of psychological adjustment and include measures of self-esteem and self-acceptance.

Shively and De Cecco have suggested a shift from defining one's sexual orientation based on genitalia to choices that are a reflection of one's attitudes and expectations. To avoid the definitional emphasis on biological sex of partners, Shively and De Cecco have suggested studying the structure of sexual relationships which would allow researchers to consider the similarities between lesbian and heterosexual relationships.⁴³⁰

Ross has proposed a list of factors and their possible social meanings for sexual relationships. Ross' list, as yet un-researched, is shown below.⁴³¹

Theoretical Aspects and Meanings of Sexual Relationships.

<u>Aspects</u>	<u>Meanings</u>
1. Reproduction	- continuation of species
2. Religious	- symbolic of union
3. Emotional	- extension of love for partner

⁴³⁰ Kaplan and Rogers, supra, note 416 at 72, citing J. P. De Cecco & M. G. Shively, "From Sexual Identity to Sexual Relationships: A Contextual Shift" (1983/1984) 9:2/3 Journal of Homosexuality 1-26; However, Kaplan and Rogers disagree at p. 72

Because genital categories are still incorporated into our living and thinking, we do not believe that their elimination would lead the way to studies that would have theoretical and methodological importance. The psychological, economic, and social consequences of defining relationships as either heterosexual or homosexual are as yet too important to eliminate or minimize.

⁴³¹ M. W. Ross, "Beyond the Biological Model: New Directions in Bisexual and Homosexual Research" (1984) 10:3/4 Journal of Homosexuality 63.

- | | |
|---------------------------------|---|
| 4. Release of sexual urge | - release of frustration or libido |
| 5. Financial | - prostitution |
| 6. Duty | - socially expected |
| 7. Anti-social statement | - rejection of parental values |
| 8. Ritual | - during particular ceremonies
symbolic |
| 9. Hedonistic
(Recreational) | - enjoyment |
| 10. Experimental | - exploration of sexual feelings |
| 11. Relational | - part of social affinities |
| 12. Dominance | - rape; difference in power |
| 13. Peer-sanctioned | - normative; status-associated |
| 14. Forbidden or taboo | - related to guilt or punishment |
| 15. Dynastic | - cementing relations between
families or groups |
| 16. Mentor | - teaching sexuality to younger
individuals |

Psychology, in its focus on the individual, ignores the social and political context of sexual identity. Thus psychology offers no analysis of the effects of male supremacy and the institution and ideology of heterosexuality in partner choice.

11. Sociology Models.

The medical model assumed that some "identifiable psychological abnormality or mental disorder" in the individual was the cause of the individual's behaviour.⁴³² Traditional sociology originally accepted the medical model and was concerned primarily with finding the cause of homosexuality in individual pathology.

⁴³² Kallen, supra, note 1 at 27.

Social scientists began to question a definition of homosexuality based on diagnosing so-called "deviant" behaviour as evidence of mental abnormality without taking into account the social nature of the label. Social scientists shifted their focus away from the medical model and began to look at the sociological determinants.

In 1971, social-scientific concepts of majority/minority relations (e.g., the themes of negative, group-based judgments; collective discrimination; collective consciousness of oppression; and subordinate social status) which traditionally had focused on racial and ethnic minorities, were applied to stigmatized non-ethnic groups.⁴³³ One of the new approaches developed by social scientists is conflicts theory, which

...posit[s] the social creation of deviance by majority authorities with the power to define, treat, control, and punish what they view as social deviance. Majority authorities create society-wide policies and laws that reflect their own moral and ideological values and serve their own instrumental interests. In their role as official gatekeepers for society-wide norms, majority authorities are able 'officially' to label non-conformist behaviour as socially deviant. Once deviant labels are imposed, majority authorities can discredit and control 'deviant' (non-conforming) behaviour, which is perceived to threaten their moral, ideological, political, and economic hegemony.⁴³⁴

Having created minority status, heterosexual society legitimatizes its dominance, power, privilege, and prestige by control, exploitation, and discrimination.⁴³⁵ This is the heart of the sex discrimination argument — that society enforces

⁴³³ Kallen, supra, note 1 at 27, citing Conrad, P., and Schneider, J., Deviance and Medicalization: From Badness to Sickness (St. Louis: C.V. Mosby, 1980).

⁴³⁴ Kallen, supra, note 1 at 28.

⁴³⁵ G. C. Kinloch, The Sociology of Minority Group Relations (Englewood Cliffs, NJ: Prentice-Hall, 1979) at 44.

heterosexuality by promulgating negative and dehumanizing lesbian stereotypes which is a form of social engineering that perpetuates male domination of women.

Labelling theory, widely adopted by North American social scientists, is based on conflict theory but goes farther in offering explanations for the psycho-social consequences for the individual of being stigmatized with a negative label.

Briefly, this is how it happens. Majority labelling creates minority status by the act of officially defining persons as deviant...Once labelled as deviant, minority members are subject to degrading experiences on virtually every occasion in which they come into confrontation with majority authorities (degradation ceremonies)... [S]tigmatization leads to minority ostracization, discrimination, and degradation. Thus, a self-fulfilling prophesy of stigmatization is set in motion, whereby the systemic denial of opportunities and of human dignity blunts capabilities, breeds apathy, and eventually creates dependency.⁴³⁶

Labeling theorists see lesbians and gay men as a stigmatized sexual minority, whose group status was created by the majority through "control, exploitation and discrimination".⁴³⁷

According to labeling theorists, the process of destigmatization, delabelling and relabeling can be accomplished by three mechanisms: (1) changing majority norms, (2) "status-return ceremonies" for lesbians and gay men as a sexual minority and (3) lesbian and gay self-help organizations designed to encourage positive self- and group-identities as members of a sexual minority.⁴³⁸ Clearly, labeling theory supports the category of

⁴³⁶ Kallen, supra, note 1 at 30.

⁴³⁷ Ibid. at 28.

⁴³⁸ Ibid. at 33, citing H.M. Trice and P.M. Roman, "Delabelling, Relabelling and Alcoholics Anonymous," (1970) 17:4 Social Problems 539-46.

sexual orientation as the model for asserting the equality rights of lesbians.

The brief history of women's unequal legal status in Canada in the next section shows how male supremacy and the ideology of heterosexuality are assumed at the foundation of liberal political and legal theory. I argue that the public/private split, a central tenet of classical liberalism, maintains men's authority over women in the heterosexual nuclear family and the invisibility of women's victimization. This background is important because one of the main arguments for addressing lesbian oppression as sex discrimination is that the proposed equality model will undermine the public/private split because it is based on women's private-sphere experience of subordination which is usually deemed legally irrelevant.

IV. THE HISTORY OF WOMEN'S UNEQUAL LEGAL STATUS IN CANADA.

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A. Introduction.

Section II briefly analysed the ideology of heterosexuality, its roots in male psychology, the resulting invisibility, victimization and marginalization of lesbians and how lesbians experience their oppression.

Section III, dealing with lesbian history, showed the evolution of social attitudes toward woman-bonding through Anglo-European history with emphasis on the last 100 years during which the categories "lesbian" or "heterosexual" arose. Social-science investigations of lesbian identity-formation, the debates about essentialism and social constructionism, and the genesis of the category "sexual orientation" as the symbol of lesbian and gay civil rights illustrate the deficiencies of "sexual orientation" as a legal category.

I now turn to the history of women's inequality in Canada and the history of Canadian equality theory which shows how male supremacy is assumed at the foundation of liberal political and legal theory. In the liberal view, society consists of a collection of autonomous, self-interested, aggressively enterprising, decidedly male individuals who possess free will to shape their destinies without undue interference from the state. Out of liberalism emerged two concepts: the "rule of law", which

ostensibly makes all persons equally subject to the law, and the public/private distinction, which limits state power and which laid the groundwork for the liberal concept of formal equality.

The false assumptions of the ideology of heterosexuality, which viewed women's nature as justification for women's exclusion from the public sphere, have served to slot women into individual heterosexual family units and to bar them from participation in the public sphere.

The public/private ideology served two distinct and identifiable purposes. One was to convince women, by use of assertions about their natural domesticity and their primary role as childbearers and child rearers, to stay at home and out of the workplace. Equally important was the function that this ideology played as a justification for actually barring women from participation in the world outside the home. The manipulation of this ideology within the legal system performed both these functions.⁴³⁹

Women's exclusion from the public sphere meant their automatic exclusion from the formal equality provided by the rule of law. Women were totally denied the most precious and basic of the liberal rights, the right to participate "as equals" with men in the public sphere of the political process through the exercise of the right to vote. Although women were never banned altogether from paid employment outside the home, they were banned absolutely from certain kinds of paid employment. This is exemplified by early case law which, based on separate-spheres ideology, rejected women's claims to access to all-male preserves in the public sphere.⁴⁴⁰

⁴³⁹ Polan, supra, note 23 at 298.

⁴⁴⁰ N. Colleen Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms", in Charterwatch: Reflections on Equality (1986) 10:2 Dalhousie Law

Women's legal status in Canada has been affected by the human rights consciousness which developed in Canada after World War II and which was reflected in human rights legislation and the equality provisions of the Canadian Bill of Rights and then the Charter. Starting even in the 1930s, post-liberal thinking began to influence equality theory. Feminist analysis of equality theory offers some hope that a contextual and results-oriented sex discrimination jurisprudence will emerge under the Charter.

B. Liberal Political and Legal Theory.

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1. Introduction.

Classical liberalism is built on the concept of liberty defined as freedom from government regulation or control, hence the dichotomy known as the "public/private split" or "separate spheres" ideology meaning that men and women inhabit separate spheres, women belonging in the private sphere of home and family and men belonging in the public sphere of politics and the marketplace.

Originally conceived as reserving a sphere of private freedom from government intervention, "privacy" for men means a sphere of autonomy, choice, agency, freedom, and self-fulfillment. For women, the private sphere means non-regulation⁴⁴¹, invisibility and victimization. The private sphere has been the primary site of female subjugation to men's exploitation of women's unpaid labour in the home and women's reproductive function, defined broadly to mean not only the bearing of children but also their nurturance and care until they are autonomous.

Privacy has also been the legal and moral category used to protect certain sexual activity from state regulation. For example, in 1964 Prime Minister Trudeau successfully argued for decriminalization of lesbian and gay sex acts on the basis of privacy.

The following history shows how male supremacy and the

⁴⁴¹ A frequent explanation for non-regulation is that there are other agencies besides law that are more suitable to regulate "private" activities and that legal regulation and prohibition would be unenforceable. O'Donovan, supra, note 4 at 82.

ideology of heterosexuality are embedded in liberal political theory and liberal legal concepts of equality and privacy.

2. **Liberalism's Political and Religious Context.**

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a. The Greek Influence.

Separate-spheres thinking emanates from classical Greece where the world of ideas was deemed the male realm whereas the world of reproduction (and child rearing) was the female domain.

...[I]n Greek society, the appropriate products of creation were thought to be not the crass commodities of the marketplace but enduring ideas, and entities such as the polis itself, which can survive the vicissitudes of time and mutability, and serve as lasting monuments to man's higher capacities. To free themselves for these 'higher tasks', men relegated the reproductive function to women alone, and refused to take any account of it whatsoever as a political fact. They, and the theories they produced, then proceeded to deny to women any functions other than reproduction...⁴⁴²

Because women (and children and slaves) were confined to the private sphere they were "deprived of things essential to a truly human life",⁴⁴³

Women could have no excellence, no value, could not, by definition, achieve a significant and truly human life. This is the sexism that lies at the heart of our politics, and which must now, finally, be contended with.⁴⁴⁴

The liberal concept of equality derives from the concept of formal equality, given to us by Aristotle, which contemplates that

⁴⁴² Clark, supra, note 31 at 41.

⁴⁴³ Hannah Arendt, The Human Condition, (Chicago: University of Chicago Press, 1958) at 58.

⁴⁴⁴ Clark, supra, note 31 at 40.

likes should be treated alike and, conversely, those who are not alike should not be treated equally.⁴⁴⁵

b. Christian Theology.

Liberation-theologist Rosemary Reuther suggests that, through Christian theology, men attempted to negate or transcend nature and the female by projecting a "transcendent, immortal male deity...into the heavens far from the corrupt feminine world of [mother] nature".⁴⁴⁶ The public/private split is a reflection of the struggle of the male transcendent ego to free itself from the bondage of nature. Reuther sees men's need to master nature and the female as a "false development of maleness through the repression of the female".

Reuther views the division between public and private as the sublimation of the female and connects it with the cult of "true womanhood"⁴⁴⁷ which represents the "incorruptible female reality, wholly divorced from human nature".⁴⁴⁸

The real world is the realm of competitive egotism, where it is "unrealistic" to speak of morality. Religion and morality are privatized and sentimentalized, so as to lose all serious public power. Morality and religion

⁴⁴⁵ Aristotle, Ethica Nichomacea (1925) trans. W. Ross, Book 3V, at 1131a-6.

⁴⁴⁶ Josephine Donovan, Feminist Theory: The Intellectual Traditions of American Feminism (New York: Frederick Ungar Publishing Co., 1985) at 133, citing Rosemary Reuther, Liberation Theology (New York: Paulist Press, 1973) at 14.

⁴⁴⁷ Donovan, supra, note 446 at 134, citing Reuther, supra, note 446 at 11 and 21.

⁴⁴⁸ Donovan, supra, note 446 at 134, citing Reuther, supra, note 446 at 21.

become the realm of the home, of women.⁴⁴⁹

c. The Renaissance and Reformation.

The public/private division reappeared as a central tenet of classical liberalism which had its roots in the political, economic and religious climate of the Middle Ages and emerged in the fifteenth and sixteenth centuries with the Renaissance and the Reformation.⁴⁵⁰ Feudalism, the historical predecessor of liberalism, was a system of reciprocal personal rights and duties existing between men, with no distinction between the state and society.⁴⁵¹

During the Middle Ages, the universe was seen by men as harmonious with god and law was divinely ordained. Individual men were thought to participate in god's plan as agents and not as autonomous or free, except to sin.⁴⁵² The concept of individual autonomy for men in the private sphere, maximized by a social contract which limited government to the public sphere, emerged from this social climate. The market place later became part of the public sphere and subject to the state's jurisdiction.

At the end of the Middle Ages, divine revelation was replaced by the human reason of men as the source of law and morality. Natural law was based on a conception of men as possessing individual reason, autonomy, creativity, dignity and will, equal to

⁴⁴⁹ Donovan, supra, note 446 at 134, citing Reuther, supra, note 446 at 23.

⁴⁵⁰ Hallowell, supra, note 194 at 1, 3.

⁴⁵¹ Ibid. at 6.

⁴⁵² Ibid. at 4.

one another in moral worth by virtue of their god-given souls.

Animating liberal political theory was the notion that, through their god-given reason, men were capable of "restraining passion and emotion through the realization of a potential, rational, universal order".⁴⁵³ The desire to restrain passion and emotion through rationality – to transcend the female – is rooted in male values, experiences and needs.

Professor Sheila McIntyre describes and critiques the competitive male egotist whose attributes are assumed in the liberal model.

Male liberal theory begins with the fiction that all men are created equal, meaning equally possessed of free will and equally free to shape their destinies according to their self-interest without arbitrary external constraint from the state. Fleshed out, the liberal man is basically selfish, motivated like all other men by self-interest: the interest in maximizing his individual freedom to pursue self-determined goals; and his individual security to protect his gains without interference from others. This model of autonomous, aggressively enterprising rugged individuals assumes that conflict is inevitable in human – i.e. liberal – society: conflict over individual rights; conflict over visions of the political good or the social welfare; conflicts between liberty and security interests; conflict over limited resources; conflict over power.... The social contract demarcating public and private rights is... competitive, hierarchical, rule-bound, adversarial, and ultimately motivated by distrust of the "other".⁴⁵⁴

Liberalism's undue emphasis on rationality and abstraction – exemplified by ostensibly universal theories (especially the liberal concepts of public and private) which have been used under the guise of neutrality to defeat the just claims of women – is a

⁴⁵³ Ibid. at 4-5.

⁴⁵⁴ Sheila McIntyre, "The Maleness of Law and Its Impact on Women Students", a paper presented to the faculties of law at Windsor, Western, Osgoode Hall, Queen's, and McGill and the Department of Law at Carleton University, 1985, at 4-5.

feature of liberal political legal theory which has attracted sustained feminist criticism. These disembodied abstractions have been idealized and universalized far beyond their usefulness and to the detriment of the development of the law.⁴⁵⁵ By their very nature as principles of universal application, they are thought to yield the right answer when, in fact, they yield only the legal answer. Abstract, universal principles have prevented the law from developing creative alternate rules or sub-rules based on a careful consideration of the contexts of particular problems and the reality of women's subordination in society.

Classical liberalism invented the "rule of law" which abolished a system of overt special status based on social class or position by requiring that all be equally subject to the law. It was a significant development from the overt hierarchical relations that preceded it. However, the liberal theory of "equality before the law" applied only to men because law, at least rhetorically, applied only to the public sphere.

The emergence of the "rule of law," which proclaimed the formal equality of "individuals" to exercise the right to own property and to contract freely, embraced only male individuals. Women were excluded from the "rule of law" because its concern was exclusively in the public sphere. The private sphere of the home and the family was beyond the reach of the law where the father or husband was considered sovereign. Since women did not belong in the public sphere, the juridical equality of citizens did not apply to them. Women were denied the right to vote and the right to hold public office. Upon marriage, women lost their right to own property and contract on their own behalf.⁴⁵⁶

⁴⁵⁵ Carol Smart, Feminism and The Power of the Law (London: Routledge, 1989) at 68.

⁴⁵⁶ Sheppard, supra, note 440 at 208 (emphasis in original), citing Mary Eberts, "The Rights of Women," in R. St. J. MacDonald, ed., The Practice of Freedom, (Toronto: Butterworth, 1978) 225-26.

Not only a theory which limits the scope of government, the public/private split also signifies a division of labour which has deeply influenced the legal treatment of women and theories of gender equality. The decision to limit the power of the State to the public sphere has profound political meaning for women.⁴⁵⁷

By placing the operation of law squarely in the public realm and, at least rhetorically, removing itself from the "private realm" of personal life and the family, the legal system created a distinction between a public realm of life, which is the proper arena for legal and social regulation, and another, fundamentally different, personal sphere, which is somehow outside the law's or society's authority to regulate. Thus, the legal system has functioned to legitimate that very distinction by asserting it as natural, rather than socially imposed, ground for different treatment.

One practical result of the "hands off" rhetorical stance of the law toward activities within the "private realm of the family" has been to license men's exploitation of women within the family unit. In essence, by purportedly withdrawing itself from regulation of the private sphere, the legal system has lent its actual support to male supremacy by permitting men to completely dominate and control family life.⁴⁵⁸

Since separate-spheres thinking confers upon men the role of "king of the castle" to exercise unjustified power (often abusively) over women and children in the home, "privacy" has attracted sustained feminist criticism.

The very place (home, body), relations (sexual), activities (intercourse, reproduction), and feelings (intimacy, selfhood) that feminism finds central to women's subjection form the core of private doctrine.⁴⁵⁹

⁴⁵⁷ Clark, supra, note 31 at 36.

⁴⁵⁸ Polan, supra, note 23 at 298.

⁴⁵⁹ Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635 at 657. However, Professor Katherine O'Donovan has observed that "private" activities are not necessarily rendered invisible, uninvestigated and abusive or victimizing to a powerless group just because they are located in the private sphere. She cites, for example, the move from criminalization (public censure) to decriminalization

Separate-spheres thinking was outcome-determinative in the early cases brought to challenge women's exclusion from jobs.

(private liberty) of gay sex acts in England as a victory for individual freedom. O'Donovan, supra, note 4 at 81-82.

C. The Early Cases.

As late as 1905, Canadian women were denied the right to practice law when the Supreme Court of Canada upheld the denial by the Barristers' Society in New Brunswick of Mabel French's application for admission to practice law. Based on separate-spheres thinking, the Supreme Court of Canada ruled that the term "person" in the Barristers' Act did not include women because "it was never in the contemplation of the legislature that women should be admitted as an attorney to this Court".⁴⁶⁰

In 1928, in the famous "Persons" case, the Supreme Court of Canada affirmed the exclusion of women from the Senate on the grounds that women were not "persons" within the meaning of the British North American Act.⁴⁶¹ The decision was reversed on appeal to the British Judicial Committee of the Privy Council.⁴⁶²

⁴⁶⁰ In re Mabel P. French (1905), 37 N. B. R. 359 (N.B.S.C.). In 1883, the same decision was reached by the U.S. Supreme Court which held that

...the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of life. The constitution of the family organization, which is founded on the divine ordinance, as well as the nature of things, belongs to the function of womanhood.

Bradwell v. Illinois 83 U.S. 442, 21 L.Ed. 442 (1873).

⁴⁶¹ In the Matter of a Reference in the meaning of the word "Persons" in s. 24 of the British North American Act, 1867 (1928), [1928] S.C.R. 276.

⁴⁶² Edwards v. Attorney General of Canada, [1930] A.C. 124, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.).

The Supreme Court of Canada did not become the court of last resort in Canada until the abolition of Canadian appeals to the Judicial Committee of the British Privy Counsel in 1949. Dale Gibson, The Law of the Charter: Equality Rights (Toronto: Carswell,

Protective legislation was also animated by separate-spheres ideology.⁴⁶³

Many of the most blatant forms of legalized sex discrimination have been removed. In the private sphere, married women's disabilities have been abolished. In the public sphere of politics, the battle for the right to vote was finally won for most Canadian women after World War I. Nonetheless,

...[t]he State continues to legitimize and reinforce that exercise of unjust authority of men over women. It places upon women a double task: that of overcoming the domination of men in the private sphere of sexual and reproductive relations while simultaneously fighting for reform and renovation of a public sphere which condones and supports the very structure of private sphere relations from which they are attempting to escape.⁴⁶⁴

1990) at 11-12, footnotes omitted.

⁴⁶³ Sheppard, supra, note 440 at 209-10.

⁴⁶⁴ Lorene M. G. Clark, "Liberalism and the Living-Tree: Women, Equality, and the Charter" (1990) 18:2 Alberta Law Review 384 at 391.

D. The Influence of World War II.

1. International Human Rights Instruments 200
2. Domestic Human Rights Codes 201

The atrocities committed against the Jews during World War II had a profound impact on the rights-consciousness of Canadians. The war brought about a succession of international human rights instruments which in turn inspired domestic human rights legislation.⁴⁶⁵

1. International Human Rights Instruments.

In 1948, the United Nations adopted the Universal Declaration of Human Rights recognizing the "inherent dignity and...the equal and inalienable rights of all members of the human family".⁴⁶⁶

The right to equality is set forth in Article 7:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 2 specifies that every right and freedom set forth in the Declaration applies to

...everyone...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In 1966, the U.N. elaborated the rights set forth in the Declaration and established mechanisms for their enforcement in three supplemental covenants: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on

⁴⁶⁵ Gibson, supra, note 462 at 11-12, footnotes omitted.

⁴⁶⁶ U.N. Resolution 217A (III), December 10th, 1948.

Civil and Political Rights; and the Optional Protocol to the International Covenant on Civil and Political Rights.

The Covenant on Civil and Political Rights established the U.N. Human Rights Committee to hear complaints of states or individuals, provided the respondent state voluntarily accepted the jurisdiction of the Committee. Canada has accepted the Committee's jurisdiction.⁴⁶⁷

These four documents constitute the International Bill of Human Rights. However, there are more than sixty international agreements pertaining to human rights, most of which were created by the U.N. or its affiliates.⁴⁶⁸ This large and expanding body of international human-rights agreements is proof of the position that human rights occupies in the world's conscience.

2. Domestic Human Rights Codes.

The heightened rights-consciousness in Canada after the Nazi atrocities of World War II stimulated a movement which resulted in every Canadian jurisdiction implementing human rights codes to address discrimination. The codes prohibited discrimination in employment, housing and the provision of goods and services, on the basis of exclusive lists of prohibited grounds, including sex.⁴⁶⁹

The judiciary has interpreted human rights legislation to be "fundamental law" that is "quasi-constitutional" which has a

⁴⁶⁷ Gibson, supra, note 462 at 13.

⁴⁶⁸ Ibid.

⁴⁶⁹ Walter Tarnopolsky, Discrimination and the Law (Toronto: Richard de Boo, 1982) 255. In 1964, the U.S. enacted the Civil Rights Act of 1964 which prohibited sex discrimination in employment. 42 U.S.C. s. 2000 et seq.

"special nature" warranting an interpretation that will advance its "broad purposes". In the Craton case⁴⁷⁰, the Supreme Court of Canada held that the mandatory retirement provision of the Public Schools Act in Manitoba was impliedly repealed by the prohibition of age discrimination in the more recent provincial Human Rights Act. The Supreme Court went further to hold that even if the Human Rights Act had been enacted earlier, it still would have overridden the Public Schools Act⁴⁷¹ because

...[h]uman rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor any exceptions be created to its provisions, save by clear legislative pronouncement.⁴⁷²

* * *

To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.⁴⁷³

In Insurance Corp. of B.C. v. Heerspink⁴⁷⁴, Mr. Justice Lamer stated that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". Writing for an unanimous court, Mr. Justice McIntyre set out the governing principles of interpretation in Re Ontario Human Rights Com'n and Simpson-Sears

⁴⁷⁰ Winnipeg Sch. Div. No. 1 v. Craton (1985), 21 D.L.R. (4th) 1, [1985] 2 S.C.R. 150.

⁴⁷¹ Ibid. at pp. 6 (D.L.R.), 156 (S.C.R.) (McIntyre J.).

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Insurance Corp. of B.C. v. Heerspink (1982), 137 D.L.R. (3d) 219 at 229, [1982] 2 S.C.R. 145 at 158.

Ltd.⁴⁷⁵:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

The importance of human rights jurisprudence was felt later when the Supreme Court of Canada began to develop a framework for analysis of the equality provisions of the Charter which were drafted to overcome the limitations of the Canadian Bill of Rights.

⁴⁷⁵ Ontario Human Rights Comm and Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321, [1985] 2 S.C.R. 536.

E. The Canadian Bill of Rights.

One product of the heightened rights-consciousness in Canada was the Canadian Bill of Rights, enacted by the Parliament of Canada in 1960. The Bill prohibited sex discrimination.⁴⁷⁶ Despite its shortcomings, discussed below, it was an important step toward improved legal protections based on equality in Canada.⁴⁷⁷ The Bill was not repealed by the Charter. Its equality provision provides in section 1(b):

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely...

(b) the right of the individual to equality before the law and the protection of the law...⁴⁷⁸

The 1969 decision by the Supreme Court of Canada in R. v. Drybones⁴⁷⁹ was the only Supreme Court ruling in favour of an equality-seeker in the history of the Bill of Rights. The Supreme Court held that the federal Indian Act denied Indians equality before the law because Indians were treated more harshly than non-Indians for being unlawfully intoxicated off the reserve. Speaking for the majority in R. v. Drybones, Mr. Justice Ritchie stated at 297 (S.C.R)

[W]ithout attempting any exhaustive definition of

⁴⁷⁶ The United States equivalent, the Equal Rights Amendment, 86 Stat. 1523 (1972), was enacted by the U.S Congress but failed to receive the necessary approval of two-thirds of the state legislatures.

⁴⁷⁷ Gibson, supra, note 462 at 23.

⁴⁷⁸ Canadian Bill of Rights, 1960, S.C. 1960, c.44.

⁴⁷⁹ R. v. Drybones (1969), 9 D.L.R. (3d) 473, [1970] S.C.R. 282.

"equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed an offence or having been made subject to any penalty.⁴⁸⁰

A case having a significant impact on human right consciousness in Canada was brought by Lavell, a Maliseet Indian woman, who filed a complaint with the United Nations Human Rights Committee to challenge the Indian Act which stripped Indian women of their Indian-status rights if they married non-Indian men but did not affect the Indian-status rights of Indian men who married non-Indian women. Lavell had lost before the Supreme Court of Canada when she brought suit under the Canadian Bill of Rights claiming sex discrimination.⁴⁸¹ She won her claim based on the guarantees of cultural and sexual equality⁴⁸² under the

⁴⁸⁰ Ibid. at pp. 484 (D.L.R.), 297 (S.C.R.).

⁴⁸¹ Attorney General of Canada v. Lavell et al (1974), 38 D.L.R. (3d) 481, [1974] S.C.R. 1349.

⁴⁸² The equality guarantee set forth in Article 7 of the Declaration is elaborated in Articles 26 and 27 of the International Covenant on Civil and Political Rights:

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

27. In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Covenant on Civil and Political Rights. Although she won, her case demonstrates the time, cost and uncertainty of pursuing justice in an international forum. It is noteworthy that the Parliament of Canada complied with the Committee's ruling almost four years later, on the eve of the coming into force of the equality provisions of the Charter.

Canadian women were stunned when the Supreme Court of Canada held in the Bliss case⁴⁸³ that a statutory restriction to pregnant women's entitlement to regular unemployment benefits did not violate the Bill of Rights because it was a measure enacted to achieve a "valid federal objective".

Stella Bliss, a pregnant woman, would have been eligible for unemployment benefits after working eight weeks if her unemployment had been occasioned by something other than pregnancy and childbirth. The legislation treated pregnant women differently because they were entitled to maternity benefits after ten weeks of employment but were not eligible for regular benefits during a period extending from eight weeks before the week of confinement to six weeks after it. Bliss had worked eight weeks when, four days before delivery, she took time off to have her baby. When she was ready to come back to work two days after delivery of her baby, no work was available. Since she had not worked for the required ten weeks before taking maternity leave, she was not eligible for maternity benefits and she was not eligible for regular benefits because of the 15-week exclusion period for pregnancy and maternity. An unanimous Supreme Court found that the restriction

⁴⁸³ Bliss v. Attorney General of Canada (1978), 92 D.L.R. (3d) 417, [1978] 1 S.C.R. 1983.

on regular benefits which applied to pregnant women was not sex discrimination as it was enacted to achieve a "valid federal objective".⁴⁸⁴ The Bliss case is the source of that puzzling and infamous line:

Any inequality between the sexes in this area is not created by legislation but by nature.⁴⁸⁵

It was against this backdrop that women lobbied for broader equality provisions in the Charter.

⁴⁸⁴ Ibid. at 422 and 424 (D.L.R.) (Ritchie J.).

⁴⁸⁵ Ibid. at 422 (D.L.R.) (Ritchie J.).

F. The Canadian Charter of Rights and Freedoms.

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1. Introduction.

Canadian women battled long and hard to win explicit equality protection under the Charter. Many were appalled by the resistance to equality protections for women and were not naïve enough to think that winning the Charter battle meant that the war against male domination had been won. The Charter was intended to be primarily a self-enforcing document requiring adherence by the state without forced compliance by a court judgment.⁴⁸⁶

The legislative history of section 15 makes clear that section 15 was intended to overturn the cases decided under the Canadian Bill of Rights.⁴⁸⁷ The Charter was drafted at a time when human-rights jurisprudence had developed relatively clear meanings for the concepts of "discrimination" and "equality" and the Supreme Court of Canada has made it clear that it will make extensive use of human-rights jurisprudence in interpreting section 15.

In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination

⁴⁸⁶ Mary Eberts, "The Use of Litigation Under The Canadian Charter of Rights and Freedoms as a Strategy for Achieving Change" in Neil Nevitte and Allan Kornberg, eds., Minorities and the Canadian State (Oakville, Ont.: Mosaic Press, 1985) 53 at 62-63.

⁴⁸⁷ William Black and Lynn Smith, "Section 15 Equality Rights Under the Charter: Meaning, Institutional Constraints and a Possible Test" in Gerald-A. Beaudoin, ed. Your Clients and the Charter - Liberty and Equality (Cowansville, Que.: Les Editions Yvon Blais, 1988) 225 at 229.

under s. 15(1)...⁴⁸⁸

Further, the Supreme Court of Canada has consistently held that a purposive approach should govern the interpretation of Charter guarantees meaning that a Charter right should be analysed in terms of the purpose of the guarantee.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right of freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts.⁴⁸⁹

The Charter came into force within a particular historical and social context when liberal political and legal theory were entrenched yet yielding to post-liberal thinking.

2. Post-liberal Thinking and the Charter.

The liberal concept of equality is based on individualistic rights, a non-interventionist state, the assumption that the "rule of law" is neutral, and conservative views concerning women's

⁴⁸⁸ Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1 at 18, [1989] 1 S.C.R. 143 [hereinafter "Andrews v. Law Society"].

⁴⁸⁹ Ibid. at 14 (D.L.R) (McIntyre J.), quoting Hunter et al. v. Southam Inc. (1984), 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145.

subordinate role in society.⁴⁹⁰ The "rule of law" may have been only a shift from overt hierarchy to a legitimization of gross inequalities among so-called equals.⁴⁹¹

Society, in the liberal view, is a collection of autonomous individuals who have rights rather than as a community of individuals held together by duties and responsibilities.⁴⁹² The liberal state intervenes only when the state violates the rights of the individual or when the acts of one individual violate the rights of another individual. It does not secure substantive or distributive equality. Where it does intervene, its obligation is to treat likes alike.⁴⁹³

Sheppard notes that

...treating those who are unequal in terms of their access to power and resources as though they are the same allows economic and social disparities to persist, while an illusion of fairness is created. This formalistic conception of equality, in fact, contributes to substantive inequality and at the same time, helps to create a "consciousness that radically separates law from politics, means from ends, process from outcomes".⁴⁹⁴

Formal equality is also referred to as the "equal opportunity" model which

...asserts that each man should have equal rights and opportunities to develop his own talents and virtues and that there should be equal rewards for equal

⁴⁹⁰ Sheppard, supra, note 440 at 196-98.

⁴⁹¹ Frances Olson, "The Family and the Market: A Study of Ideological and Legal Reform" (1983) Harvard Law Review 1497 at 1515.

⁴⁹² Sheppard, supra, note 440.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid., at 198, quoting M. Horowitz, "The Rule of Law, An Unqualified Good!" (1977) Yale Law Journal 561; citing Robert Unger, Knowledge and Politics (New York: The Free Press, 1975) 151.

performances.⁴⁹⁵

Equal opportunity is oriented toward process meaning the equal application of rules; it is not concerned with equal results or the distribution of resources according to need.

The legal concept of formal equality works best when assigning fault based on a single incident where one actor's fault caused harm to another person and the one harmed can be made whole by the award of monetary damages or other relief. It works best when there is a single discrete act, a single wrong and a single remedy. The equal opportunity model does not work as well when the harm is caused by a multitude of factors for which society, in a broader sense, is responsible.

The concept of formal equality was restated by Tussman and tenBroek in 1949 as the "similarly situated" test⁴⁹⁶ which introduced the concept of "reasonable classification". The question they asked was: how can the constitutional guarantee of equal protection of laws be construed to allow laws to classify, when classification means inequality? Their answer was: a legislative classification is reasonable and therefore constitutionally valid if it applies to all those similarly situated with respect to the purpose of the law.

The outcome of the Tussman and tenBroek test is determined by a broad or narrow interpretation of the law's purpose and/or a broad or narrow definition of whether the plaintiff is "similarly

⁴⁹⁵ John H. Schaar, "Equality of Opportunity and Beyond" in J. Roland Pennock and John W. Chapman, eds., NOMOX IX: Equality (1967) 228.

⁴⁹⁶ Joseph Tussman and Jacobus tenBroek, "Equal Protection of Laws" (1949) 37 California Law Review 341.

situated" to others with respect to the purpose of the law. The focus on proceduralism reinforced the liberal idea of equality of treatment and was adopted as the test for claims challenging legislation on equality grounds under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.⁴⁹⁷ The "similarly situated" test has been rejected by the Supreme Court of Canada in Andrews v. Law Society⁴⁹⁸ in favour of a more results-oriented approach.

Gender neutrality in the form of laws and neutral application of the law achieves formal equality. The chief short-comings of the formal equality model are that equality becomes a question of sameness and difference. Women, in order to receive equality with men, must be like men; and inequality arising from women's unique characteristics cannot be addressed because there is no male parallel. Formal equality, being concerned with comparisons, does

⁴⁹⁷ The U.S. Supreme Court's application of the "reasonable classification" test has resulted in three levels of judicial scrutiny. Economic or social legislation receives the weakest scrutiny to determine if it has a "rational basis". Racial and ethnic classifications receive "strict scrutiny" which forces the state to prove a compelling state interest in the purpose of the legislation and a close fit between the legislative means chosen to achieve the legislative purpose and the ends sought to be achieved. Classifications based on sex undergo "intermediate scrutiny" which requires the state to prove that the legislative classification is "substantially related" to "important governmental objectives". Almost any legislation can pass the "rational basis" test. However, strict and intermediate levels of scrutiny incorporate results-oriented reasoning because heightened scrutiny recognizes that burdens imposed by law on certain groups are unfair in light of the intractable and historic disadvantages suffered by members of those groups.

⁴⁹⁸ Andrews v. Law Society, *supra*, note 488 at 11-13 (D.L.R.).

not notice male dominance and female subordination.⁴⁹⁹ And because it does not acknowledge inequality of condition, it can merely perpetuate inequality under the guise of equality.

The "similarly situated" concept of formal equality stands in stark contrast to the "post-liberal" approach to equality which acknowledges inequality of condition and which is oriented toward the eradication of social subordination and toward redistributive justice to ensure that all people have what is minimally necessary to live in dignity. It recognizes that unequal treatment may be necessary to insure equality of result. The "post liberal" model of equality assumes that all persons deserve to live and work in an environment that is free of prejudice and where they have a reasonable chance to develop their full potential without discrimination based on prejudice and stereotypes. It is concerned with attempting to create conditions for fulfillment and human development by eradicating discrimination, not by punishing the discriminator, but by making the victim of discrimination whole.

The "post liberal" model is based on broad concepts of social responsibility and is informed by the rise of the modern regulatory welfare state, the acknowledgement of the importance of social and economic equality, the development of theories of pluralism based on the recognition that society is composed of distinct and cohesive groups rather than undifferentiated individuals, the articulation of alternative visions of equality by oppressed minorities, and the realist critique which exposed the political

⁴⁹⁹ Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?, Canadian Advisory Council on the Status of Women, 1989, at 149.

underpinnings and indeterminacy of supposedly neutral legal rules.⁵⁰⁰

Since the 1930s, the Canadian State has assumed responsibility for social and economic welfare programmes. Since World War II, there has been a shift away from laissez-faire capitalism and a growing acceptance of government intervention in, and regulation of, the market.⁵⁰¹

The nineteenth century liberal belief in the importance of equal treatment of autonomous individuals is undermined as it becomes apparent that social welfare programs operate on the principle that those in need should receive greater social assistance.⁵⁰²

The United Nations Universal Declaration of Human Rights and the later human-rights covenants articulate liberal rights and reflect that social and economic rights are also important.⁵⁰³ These covenants and Canadian domestic human rights legislation were discussed above.

The recognition of distinct and cohesive social groups has important implications for equality theory because it undermines the liberal myth that society is composed of autonomous individuals.⁵⁰⁴

The differences manifested by numerous subordinated social groups foster social diversity. The rise of oppressed minorities'

⁵⁰⁰ Sheppard, supra, note 440 at 198-200.

⁵⁰¹ I. Gough, The Political Economy of the Welfare State (London: MacMillan, 1979); T. Lowri, The End of Liberalism - The Second Republic of the United States, 2d ed. (New York: W.W. Norton & Co., 1979) 42.

⁵⁰² Sheppard, supra, note 440 at 198-99.

⁵⁰³ Ibid. at 199.

⁵⁰⁴ Ibid. at 199.

collective consciousnesses has led to the articulation of different concepts of equality.⁵⁰⁵

At the core of these new visions [of equality] is both a re-affirmation of the distinctive skills, values, and cultures of subordinated social groups and a rejection of the white male world as universal.⁵⁰⁶

The realist critique challenged liberalism's underlying premises by "blurring the line between law and politics" and showing the historical contingency of legal doctrine and the indeterminacy of supposedly neutral legal rules.⁵⁰⁷ "Post-liberal" thinking poses such a serious threat to the liberal conception of equality that it has been only partially incorporated.

Examples of the effects of "post liberal" thinking on equality theory can be seen in the recognition of "adverse impact" discrimination, the duty to accommodate, systemic discrimination and affirmative action.

"Adverse impact" discrimination occurs when a facially neutral law has a disproportionately adverse effect on a protected group. It does not require proof of a discriminatory purpose. It signalled a direct departure from a liberal focus on procedures to a post-liberal concern with outcomes. In Griggs v. Duke Power

⁵⁰⁵ Ibid. at 199-200.

⁵⁰⁶ Ibid. at 199, citing Carol Gilligan, In a Different Voice, Psychological Theory and Women's Development (Cambridge: Harvard University Press, 1982) 132; Angela Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in Angela Miles and Geraldine Finn, eds., Feminism in Canada (Montreal: Black Rose Books, 1982).

⁵⁰⁷ Sheppard, supra, note 440 at 200.

Inc.⁵⁰⁸, the U.S. Supreme Court interpreted the racial equality guarantees of Title VII of the Civil Rights Act of 1964⁵⁰⁹ to prohibit neutral rules that had an adverse impact on blacks. In Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd⁵¹⁰, a case decided under the Ontario Human Rights Code⁵¹¹, and Bhinder v. Canadian National Railway Co.⁵¹², a case decided under the Canadian Human Rights Act⁵¹³, the Supreme Court of Canada construed both the Canadian Human Rights Act and the Ontario Human Rights Code to prohibit adverse-impact discrimination.

The duty to accommodate acknowledges the fact that people may require different treatment to promote greater equality of results. Thus an employer may be required to accommodate an employee for whom an employment policy or rule is burdensome if the policy or rule infringes on a protected human right. The Supreme Court of Canada has interpreted the Ontario Human Rights Code to impose on employers this duty which means that an employer must take reasonable steps short of undue hardship.⁵¹⁴

Another form of unintentional discrimination is systemic

⁵⁰⁸ Griggs v. Duke Power Inc. 401 U.S. 484 (1970).

⁵⁰⁹ Civil Rights Act of 1964, 42 U.S.C. 2000 et seq.

⁵¹⁰ Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd. supra, note 475 at 441 (S.C.R.).

⁵¹¹ Ontario Human Rights Code, R.S.O. 1980, c. 340, s. 4(1)(g).

⁵¹² Bhinder v. Canadian National Railway Co. (1985), 23 D.L.R. (4th) 481, [1985] 2 S.C.R. 561.

⁵¹³ Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 7 and 10.

⁵¹⁴ Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., supra, note 475.

discrimination which results when social disadvantage has become so embedded in social institutions and customs that it is system- or society-wide. Systemic discrimination was recognized by Dickson J., in Action Travail des Femmes v. Canadian National Railway Co.⁵¹⁵ and defined

...in an employment context...[as] discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination.⁵¹⁶

Affirmative action departs from the formal concept of equality because it expressly violates a central tenet of formal equality which requires that all individuals who are similarly situated be treated similarly. Subsection 15(2) of the Charter acknowledges that certain groups in Canadian society are disadvantaged and are deserving of affirmative assistance, at the group level, to make up for past discrimination. This contrasts with the traditional liberal myth that society consists of undifferentiated individuals. Subsection 15(2) provides as follows:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race,

⁵¹⁵ Action Travail des Femmes v. Canadian National Railway (1987), 40 D.L.R. (4th) 193 [hereinafter "Action Travail"]. Professor Judy Fudge cautions against becoming overly optimistic about the significance of Action Travail where the Supreme Court was asked to uphold an administrative tribunal's expansive interpretation of the Canadian Human Rights Act and the expansive remedy the tribunal had granted. Fudge warns that the Supreme Court may not be so proactive when asked to invalidate legislation on the grounds that it has a detrimental impact on women due to historic social and economic factors. Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25:3 Osgoode Hall Law Journal 485 at 501.

⁵¹⁶ Action Travail, supra, note 515 at 210 (D.L.R.).

national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Opponents of affirmative action argue that applicants who do not belong to the group favoured by an affirmative action programme are being penalized and are being denied equality in order to cure a social ill. While it is true that certain individuals may suffer as a result of affirmative action, selection processes which are designed to ensure that members of previously excluded groups will be proportionally represented have the valid objective of implementing equality at the group level.

Feminist critiques of liberal legal theory and formal equality have been influential in exposing the male bias inherent in process-oriented conceptions of equality.

The Charter was enacted against the post-liberal backdrop described above. The next section compares the Charter and the Bill.

3. Comparing the *Charter* with the *Bill*.

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The equality guarantees of the Charter go well beyond the Bill in significant respects that are enumerated below. The following

points are intended as an introduction to the equality guarantees of the Charter. The discussion of Supreme Court cases developing a framework of analysis for equality comes in later sections.

a. The Charter is Constitutional; the Bill is Statutory.

The Bill is a mere statute of the Parliament of Canada. Therefore it lacks the constitutional status of the Charter. Consequently it is a considerably less potent legal tool than the Charter.

b. "Frozen Rights" versus Guarantees.

Some judges had interpreted the Bill of Rights to protect only those rights in existence in 1960. The equality rights listed in section 1 of the Bill are not stated to be new legal entitlements. Instead, it is merely "recognized and declared" by the Bill that those rights and freedoms "have existed and shall continue to exist".⁵¹⁷ The drafters of the Charter were mindful of the "frozen rights" approach and, to avoid the problem, the Charter was "enacted" and the rights and freedoms set forth therein are expressed as "guarantees".

c. The Charter's Supremacy Clause.

Some of the conservatism of the Supreme Court of Canada in deciding equality cases brought under the Bill of Rights may be attributable to the doctrine of parliamentary supremacy which was not expressly limited in the Bill of Rights as it is in section 52

⁵¹⁷ Gibson, supra, note 462 at 24.

of the Charter, which provides that

...[t]he Constitution of Canada is the Supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁵¹⁸

d. The Charter's Expanded Equality Guarantees.

The equality rights set forth in the Bill of Rights are narrower than those contained in the Charter. The Bill refers to "equality before the law and the protection of the law". Section 15(1) of the Charter guarantees equality "before and under the law" as well as "equal protection and equal benefit of the law". The more sweeping language of subsection 15(1), set forth below, was deliberate.

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.⁵¹⁹

The Charter's four equality guarantees are discussed below:

(1) *Equality Before The Law.*

The guarantee of "equality before the law", which is similar to the provision in paragraph 1(b) of the Bill, guarantees procedural justice and requires equality of treatment in the enforcement and application of the laws of Canada by the ordinary courts.⁵²⁰ Although that Charter guarantee may be construed to encompass due process only, the Supreme Court overturned a racial

⁵¹⁸ The Charter, supra, note 25.

⁵¹⁹ Ibid.

⁵²⁰ Attorney General of Canada v. Lavell et al, supra, note 481 at 1373 (S.C.R.) (Ritchie J.).

classification in the Drybones case by interpreting the "equality before the law" guarantee in the Bill to reach the substance of legislation.

(2) *Equal Protection of the Law.*

The right to the "equal protection of the law" is similar to paragraph 1(b) of the Bill of Rights which guarantees the right to the "protection of the law". There is a parallel with the Fourteenth Amendment of the United States Constitution which states that no state shall deny any person within its jurisdiction the "equal protection of the laws". It has even been suggested that the phrase "equal protection of the law" will serve to incorporate the three-tier U.S. jurisprudence on equality into Canadian legal analysis.⁵²¹ Even before the Andrews case reached the Supreme Court of Canada, such a result would have seemed improbable because Canadians have studied the limitations of U.S. equal protection jurisprudence.

(3) *Equality Under The Law.*

The inclusion of "equality under the law" resulted chiefly from the narrow interpretation given to the Bill's guarantee of equality before the law by a majority of the Supreme Court of Canada in Attorney General of Canada v. Lavell et al⁵²², which held that equality before the law means only equality in the enforcement and application of the law and does not reach the

⁵²¹ Mary Eberts, "The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions" in Claire Beckton and A. Wayne MacKay, eds., The Courts and The Charter (Toronto: University of Toronto Press, 1985) 133 at 155-56.

⁵²² Gibson, supra, note 462 at 32, citing Attorney General of Canada v. Lavell et al, supra, note 481 at 1373 (S.C.R.).

substance of legislation.

(4) *Equal Benefit of the Law.*

Where a statute extends a benefit, the guarantee of equal benefit of the law ensures that the benefit will not be withheld on some arbitrary basis. Social welfare legislation which provides "benefits" to certain classes of people would potentially be subject to this equality guarantee. The "equal benefit of the law" guarantee was sought in response to the Supreme Court's holding in the Bliss case.⁵²³

e. The Charter's Direct Judicial Enforcement.

Section 24 of the Charter provides for direct judicial enforcement of Charter rights:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

f. The Charter's Application to Provincial Legislatures and Governments.

The extension of the Charter to provincial legislatures and governments was an expansion over the scope of the Bill of Rights which applies only to matters falling under the constitutional authority of the Parliament of Canada.

⁵²³ Eberts, supra, note 521 at 151.

g. The Charter Contains Additional Enumerated Grounds.

Although many of the cases brought under the Bill of Rights implicated grounds of discrimination which were not enumerated in the Bill,⁵²⁴ the grounds enumerated in section 15 of the Charter go beyond the Bill and include age, mental disability, and physical disability.

This is surely a sign of the temper of the Canadian public, for there has been an acceleration over the past 40 years in the speed and sensitivity with which Canadians respond to minority interests, and a willingness to offer strong, constitutional guarantees instead of mere legislative protections that are subject to short-term changes in the political environment.⁵²⁵

It is noteworthy that sexual orientation is not one of the Charter's enumerated grounds.⁵²⁶

h. The Charter Places the Onus on the Defendant and Requires a Higher Standard of Proof.

A substantial difference between the Charter and the Bill of Rights is that, under the Bill, the person challenging the law had the burden of proof. Under the Charter, the challenger must show only a prima facie case and then the onus shifts to the party seeking to sustain the legislation. This difference is critical, particularly because the defendant's standard of proof under the

⁵²⁴ Eberts, supra, note 486 at 58.

⁵²⁵ Eberts, supra, note 521 at 135.

⁵²⁶ For a discussion of the legislative history of this omission, see Arnold Bruner, "Sexual Orientation and Equality Rights" in Anne E. Bayefsky and Mary Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 457; see also, Equality for All: Report of the Parliamentary Committee on Equality Rights (Ottawa, 1985) and M. Leopold and W. King, "Compulsory Heterosexuality, Lesbians and the Law" (1985) 1 Canadian Journal of Women and the Law 163.

Charter is higher than required of the plaintiff under the Bill of Rights.

The Bill of Rights contains no "reasonable limits" clause as does the Charter. Consequently, the Supreme Court of Canada read into the Bill a restriction on equality whereby legislation "dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective".⁵²⁷ The "valid federal objective" standard is less demanding than the "reasonable limits" test of the Charter. Thus, in an equality case brought under the Bill, an equality-seeker had to show that the measure did not have a valid federal objective. Now, in a Charter case, the defendant must show that a limitation on equality is a "reasonable limit[...][which] can be demonstrably justified in a free and democratic society".⁵²⁸

i. Minimal Judicial Scrutiny under the Bill.

Analysis under the equality provision of the Bill calls for only minimal judicial scrutiny without reference to the validity of the means employed to achieve the legislative objective.⁵²⁹

The next section summarizes the equality jurisprudence of the Supreme Court of Canada as a prelude for the discussion of three sex-discrimination models. In this section, I explore theories and strategies for achieving feminist goals through Charter litigation,

⁵²⁷ Prata v. Min. of Manpower & Immigration (1975), 52 D.L.R. (3d) 383 at 387, [1976] 1 S.C.R. 376 (S.C.C.) (Martland J.).

⁵²⁸ Gibson, supra, note 462 at 25, citing R. v. Burnside (1974), 44 D.L.R. (3d) 584 at 594 (Martland J.).

⁵²⁹ Gibson, supra, note 462 at 25.

with emphasis on the problems of using the Charter, a liberal document, to overcome pervasive disadvantages which are entrenched because of liberal political and legal theory.

V. EQUALITY AND THE CHARTER.

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A. Introduction.

[E]qual laws can result in inequality if applied equally to persons in unequal circumstances.⁵³⁰

The Charter equality cases which have been decided by the Supreme Court of Canada demonstrate an emerging framework of analysis which relies heavily on the jurisprudence interpreting human rights legislation, particularly the definition of "discrimination". The "enumerated and analogous grounds" approach adopted by the Supreme Court in Andrews v. Law Society⁵³¹ shows that the central function of section 15 is to address the disadvantages suffered by persistently disadvantaged groups in Canadian social, political and legal systems.⁵³² Equality can require different treatment⁵³³ and section 15 applies to both intentional and "adverse impact" discrimination.⁵³⁴ Thus section

⁵³⁰ Walter Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Canadian Bar Review 242 at 250.

⁵³¹ Andrews v. Law Society, supra, note 488.

⁵³² Ibid. at pp. 16 (D.L.R.), 172 (S.C.R.); William Black and Lynn Smith, "The Equality Rights" in Gerald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms: Commentary, 2d ed. (Toronto: Carswell, 1989) 557; Black and Smith, supra, note 487.

⁵³³ Andrews v. Law Society, supra, note 488, pp. 15-16 (D.L.R.), 171 (S.C.R.).

⁵³⁴ Ibid. at 18 (D.L.R.), 174 (S.C.R.) (McIntyre J.).

15 is centrally concerned with the effects of a rule, regardless of the intent of the legislation.

But just how progressive will the judiciary be in defining Canadian equality? Will courts be willing to recognize the legal relevance of women's oppression in the private sphere to rid society of men's historic and unjustified authority over women and to implement women's full and equal partnership with men in all spheres of Canadian society?

The concept of liberty – freedom from government regulation – at the foundation of liberal political theory may act as a brake on the degree to which the equality guarantees of the Charter will be given a results-oriented focus.

On the whole, equality has taken a back seat to liberty which is unquestionably the core value of liberalism. Within classical liberal theory, equality was a value only as a purely formal concept, relating to issues of procedural fairness, and is virtually synonymous with, and exhausted by, the concept of "due process". Liberalism has not been centrally concerned with the promotion of substantive equality as even a long term social objective.⁵³⁵

A degree of optimism may be justified because the Canadian tradition of social assistance programmes, which are based on the recognition that government has a legitimate role to play to ensure a fair and equitable distribution of goods and services, offers hope that equality jurisprudence under the Charter may incorporate a results-oriented approach.

The Supreme Court of Canada's decision in Andrews v. Law Society⁵³⁶ suggests some answers.

⁵³⁵ Clark, supra, note 464 at 389.

⁵³⁶ Andrews v. Law Society, supra, note 488.

B. Andrews v. Law Society and Beyond.

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1. Andrews v. Law Society.

- a. The Test for a Violation of Section 15(1) . . 229
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In Andrews v. Law Society, the Supreme Court of Canada interpreted the open-ended nature of the Charter equality protections to incorporate "post-liberal" thinking in that both intentional and unintentional discrimination is covered; discrimination is defined in terms of the history of a group's social, political and legal disadvantage; and different individuals and groups are entitled to receive different treatment depending on the historical realities of their position in society. The Andrews case was a significant departure from most lower court judgments regarding equality and

...strongly orients section 15 in the direction of ensuring that the legal and governmental system does not exacerbate societal disadvantage of persistently disadvantaged groups...⁵³⁷

In Andrews, the plaintiff was a British subject who was refused admission to the B.C. Bar because he was a non-Canadian, even though he was a permanent resident of Canada. The applicable B.C. statute required Canadian citizenship for admission to the bar. Andrews challenged the citizenship requirement under section 15(1) of the Charter. His challenge failed in the trial court but succeeded before the B.C. Court of Appeal and the Supreme Court of

⁵³⁷ William Black and Lynn Smith, Case Comment, Andrews v. Law Society of British Columbia (1989) 68 Canadian Bar Review 591 at 614.

Canada.

Two of the issues raised in the Andrews case which are discussed below are (1) what is the test for a violation of section 15(1)? and (2) what is the relationship between sections 15(1) and 1?

a. The Test for a Violation of Section 15(1).

Both the Court of Appeal and the Supreme Court were concerned that the protections set forth in section 15 would be diluted by interpreting those protections too expansively. Prior to the Supreme Court decision in Andrews, the "similarly situated" test had gained wide acceptance.

The judgment of the Court of Appeal was written by McLachlin J.A. who was later appointed to the Supreme Court of Canada. In the Court of Appeal, McLachlin J.A. adopted the "similarly situated" test and interpreted the "without discrimination" language of section 15 to require the challenger of legislation to prove discrimination which she defined in terms of the reasonableness of the distinction and the fairness of the treatment of those adversely affected. She placed the onus on the challenger, on a balance of probabilities, and said:

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.⁵³⁸

When Andrews reached the Supreme Court, the Court rejected the

⁵³⁸ Black and Smith, supra, note 537 at 594, quoting Andrews v. Law Society of British Columbia (1986), 27 D.L.R. (4th) 600 at 610, 2 B.C.L.R. (2d) 305 at 315.

"similarly situated" test as "seriously deficient", defined discrimination, and limited the protection of section 15 to those traits enumerated in section 15(1) and analogous grounds.⁵³⁹ The reasoning of the majority of the Supreme Court concerning the application of section 15 appears in the judgment of McIntyre J. who enunciated a two-pronged test. McIntyre J. placed the onus on the challenger to show a denial of one of the four equality guarantees and to show that there has been discrimination.⁵⁴⁰ Criticizing the "similarly situated" test, McIntyre J. said that the four equality rights in section 15 signify a legislative intent to go beyond the "similarly situated" test which characterised Canadian Bill of Rights jurisprudence and to incorporate concepts of equal concern and respect and a large remedial component.⁵⁴¹

⁵³⁹ Andrews v. Law Society, supra, note 488 at pp. 23 (D.L.R.), 181 (S.C.R.).

⁵⁴⁰ Ibid. at pp. 23-24 (D.L.R.), 182 (S.C.R.).

⁵⁴¹ Ibid. at pp. 14-15 (D.L.R.), 170 (S.C.R.). The phrase "equal concern and respect" comes from Ronald Dworkin's formulation of equality which is more concerned with the decision-making process itself rather than comparing the consequences of a rule. Dworkin asks whether the decision-making process

...affords equal concern and respect for all those who will be affected. He describes this as the right to treatment as an equal as contrasted with the right to equal treatment, which is the right to equal distribution of an opportunity, resource or burden. Dworkin states that the right to treatment as an equal is the more fundamental of the two rights.

A comparison in terms of concern and respect highlights the need on occasion to treat people differently in terms of immediate consequences in order to achieve equality of results or of condition, and Dworkin uses the concept in his defence of affirmative action programs. The concept is also valuable in emphasizing the relationship between the principle of equality and the broader concept of human dignity. It may not, however, cover all claims that might come within a Canadian paradigm of equality. For example, a

With the support of the whole Court, McIntyre J. criticized the "similarly situated" test as too mechanical and rigid to handle the true complexity of equality because a test focusing on similarity of treatment for all belonging to a particular group, instead of on the law's effect on the complainant, is both too narrow and too broad. Identical treatment "may frequently produce serious inequality" and cannot account for the fact that some distinctions do not violate equality.⁵⁴² For McIntyre J., the ideal of equality is neither solely equal treatment nor is it solely

...a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which

selection process might be thought to reflect equal concern and respect even though it has the unforeseen consequence of excluding a particular group. Also, it is not easily translated into a workable test, since criteria like concern and respect are even harder to measure, and thus to compare, than are more tangible consequences of a rule.

Black and Smith, supra, note 487 at 237, citing Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977) at 227.

⁵⁴² David Elliott, "Comment on Andrews v. Law Society of British Columbia and Section 15(1) of the Charter: the Emperor's New Clothes?" (1989) 35 McGill Law Journal 235 at 238, footnotes omitted. Some commentators note, however, that the Court's express rejection of the "similarly situated" test is contradicted by the Court's apparent retention of much of the analytical framework of the "similarly situated" test.

The real movement here may be one of attitude, not linguistics. The Court is stressing that comparisons must be broadly applied, with an emphasis on inter-law, inter-group similarities and differences, and on effect rather than intention. The Court seems to be signalling that Charter equality must go beyond traditional, formalistic concepts, and include a more "post-liberal" emphasis on equality of condition.

Ibid. at 238-39.

the question arises.⁵⁴³

He was also concerned that a law not be more burdensome or less beneficial on some because of an irrelevant characteristic.⁵⁴⁴

McIntyre J. defined discrimination in broad terms, stating explicitly that the principles applied to human rights legislation are equally applicable to questions of discrimination under section 15 of the Charter.

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁵⁴⁵

Central to McIntyre J.'s analysis is his formulation of the limits on the concept of discrimination. McIntyre J. expressed concern that the Charter, unlike human rights statutes, does not contain an exhaustive list of prohibited grounds nor explicit limitations comparable to the defences contained in human rights statutes. Rejecting both the view that any distinction constitutes a violation of section 15 and the "reasonable and fair" test of the Court of Appeal, because it would leave almost no role for section 1, he adopted the "analogous grounds" approach.

The... "enumerated and analogous grounds" approach

⁵⁴³ Ibid. at 238, footnotes omitted.

⁵⁴⁴ Andrews v. Law Society, supra, note 488 at pp. 18 (D.L.R.), 165 (S.C.R.).

⁵⁴⁵ Ibid. at pp. 18 (D.L.R.), 174-175 (S.C.R.).

most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated ground. The effect of the impugned distinction or classification on the complainant must be considered...A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by the law but, in addition, must show that the legislative impact of the law is discriminatory.⁵⁴⁶

A majority of the Court agreed that the claimant must prove both inequality and discrimination under section 15(1). Although the Andrews decision does not contain extensive analysis of what constitutes an "analogous" ground, clearly non-citizenship, a legal classification, counts as an analogous ground because non-citizens are a "discrete and insular minority".⁵⁴⁷ McIntyre J. also cited stereotyping, historic disadvantage and prejudice as relevant to a finding that a trait is analogous.⁵⁴⁸

Lack of political power and "discreet and insular minority" status were cited by Madame Justice Wilson as additional considerations. She said that whether a trait is analogous should

⁵⁴⁶ Ibid. at pp. 23-24 (D.L.R.), 182 (S.C.R.). Black and Smith point out that the requirement of a discriminatory impact may be intended to screen out trivial and vexatious claims but it may actually import a test of "fair and reasonable" and may, in practice, be no different from recognizing any distinction as a violation of section 15 because "...the burden of litigation is itself almost always enough to screen out trivial cases where there is no real disadvantage to the challenger." Black and Smith, supra, note 537 at 603.

⁵⁴⁷ Andrews v. Law Society, supra, note 488 at pp. 24 (D.L.R.), 183 (S.C.R.).

⁵⁴⁸ Ibid. at pp. 22 (D.L.R.), 180 (S.C.R.), quoting Smith, Kline & French Laboratories v. Canada (Attorney General) (1986), 34 D.L.R. (4th) 584 at 591-92, [1987] 2 F.C. 359 at 368-369.

be assessed "in the context of the place of the group in the entire social, political and legal fabric of our society," not just in the context of the law under consideration.⁵⁴⁹

Political powerlessness was also important to La Forest J. who added immutability⁵⁵⁰, the arbitrary nature of the distinction, and its irrelevance.

b. The Relationship Between Sections 15(1) and 1.

The Supreme Court split on the appropriate test for section 1. Three of the judges – Wilson J. for herself, Dickson C.J. and L'Heureux-Dube J. – adopted the Oakes test as the test for section 1 and found that the distinction was not justified.

This test requires first that the government objective relate to societal concerns which are pressing and substantial. It then requires that the means adopted by government meet three proportionality requirements. First, they must be rationally connected to the government objective. Second, they must impair the relevant Charter right as little as possible. Third, there must be proportionality between the effects of the limiting measure and the government objective.⁵⁵¹

Three justices – McIntyre, Lamer, and La Forest – agreed on a less

⁵⁴⁹ Andrews v. Law Society, *supra*, note 488 at pp. 32 (D.L.R.), 152-53 (S.C.R.) (Wilson J.). The phrase "discreet and insular minority" is from Stone J.'s well-known fourth footnote in U.S. v. Carolene Products Co., 304 U.S. 144 at 152-53, note 4 (1938), wherein he suggests that prejudice against such minorities deprives them of the normal political process to repeal unfair legislation. Status as a discreet and insular minority has become one of the tests for whether a distinction between groups is a "suspect classification" deserving of strict scrutiny.

⁵⁵⁰ "Immutable characteristics" were first mentioned by U. S. Supreme Court Justice Brennan in Frontiero v. Richardson, 411 U.S. 677 at 686 (1973), as another criterion for determining whether heightened scrutiny under the U.S. Fourteenth Amendment is warranted.

⁵⁵¹ R. v. Oakes (1986), 26 D.L.R. (4th) 200 at 224-29, [1986] 1 S.C.R. 103 at 135-42.

stringent test for section 1 requiring the government objective to be "desirable" and its means "reasonable". Even under this less stringent standard, La Forest J. found that the statute was not justified. McIntyre J. and Lamer J. found that the statute was justified under section 1.

The three justifications advanced by the defenders of the statute were rejected by the Court:⁵⁵² the first two were that it is desirable for lawyers to be familiar with Canadian institutions and traditions and that it is desirable for lawyers to have a commitment to Canada. No empirical data about norms among citizen-lawyers concerning their knowledge of Canadian institutions and traditions and their commitment to Canada was in the record. Likewise, there was no data before the courts concerning the feasibility of educating non-citizens in those areas. Consequently, the Court of Appeal and the Supreme Court had to make assumptions about the extent to which citizens would be more likely than non-citizens to achieve desirable levels of knowledge and commitment.

The Court of Appeal and the majority in the Supreme Court of Canada were not persuaded that the first branch of the Oakes test was met because no "sufficiently rational connection" existed between the citizenship requirement and the proffered justifications. The exclusion of non-citizens was overbroad because the desired knowledge and commitment could be acquired through less intrusive means, namely education.

The third justification offered by the defenders of the law --

⁵⁵² Andrews v. Law Society, supra, note 488 at pp. 33-36 (D.L.R.) (Wilson J.).

that lawyers should be citizens because they play a fundamental role in the Canadian system of democratic government – was rejected by both the Court of Appeal and the Supreme Court because, in the courts' view, the practice of law is primarily a private profession.

2. The Workers' Compensation and the Turpin Cases.

In Reference re Sections 32 and 34 of the Workers' Compensation Act (1983)(Nfld.), the Supreme Court of Canada made clear that "enumerated and analogous grounds" are the only grounds for relief under section 15, except possibly in unusual or extreme circumstances.⁵⁵³

The Supreme Court again dealt with the question of analogous grounds in R. v. Turpin⁵⁵⁴. Madame Justice Wilson, writing for the Court, reaffirmed the Supreme Court of Canada's broad and purposive approach to interpreting equality rights under section 15⁵⁵⁵ by characterising section 15 as "intended to provide a framework for the 'unremitting protection' of equality rights in the years to come".⁵⁵⁶ She also anticipated that the Court may well be called upon to rectify discrimination that is entrenched and socially accepted.

The argument that s. 15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a

⁵⁵³ Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983 (1989), 56 D.L.R. (4th) 765.

⁵⁵⁴ R. v. Turpin (1989), 48 C.C.C. (3d) 8.

⁵⁵⁵ Ibid. at 35.

⁵⁵⁶ Ibid. at 30.

violation would be novel or disturbing is not, in my respectful view, an acceptable approach to the interpretation of Charter provisions.⁵⁵⁷

Madame Justice Wilson approved the analysis of McIntyre J. in Andrews – that the "enumerated and analogous grounds" approach accords with the purposes of section 15 and the Andrews definition of discrimination.⁵⁵⁸

Wilson J. quoted with approval the Andrews definition of discrimination and concluded that the appellants' right to equality before the law had been violated because the impugned provisions of the Criminal Code treated the appellants, and the class of non-Albertan defendants to which they belonged, more harshly than those charged with the same offences in the Province of Alberta.⁵⁵⁹ However, she found that, on the facts presented, non-Albertan criminal defendants were not analogous to the categories enumerated in section 15 because non-Albertan defendants could not be characterised as a "discrete and insular minority", had not "suffer[ed] social, political and legal disadvantage in our society", and could not be described as having indicia of discrimination, "such as stereotyping, historical disadvantage or vulnerability to political or social prejudice".⁵⁶⁰

One of the questions left unanswered by Andrews, namely whether the Charter's equality guarantees will be available to men

⁵⁵⁷ Ibid. at 32.

⁵⁵⁸ Ibid. at 34.

⁵⁵⁹ Ibid. at 33-34. The challenged statute permitted Albertan defendants to elect between a trial to a jury or to the bench whereas a jury trial was mandatory for Albertan defendants, the class to which the appellants belonged.

⁵⁶⁰ Ibid. at 35.

who experience discrimination based on sex. There are statements in Turpin which suggest that only disadvantaged subsets are entitled to judicial enforcement of the Charter's equality guarantees. Wilson J. stated that

...[a] finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.⁵⁶¹

Noting that the foregoing quote of Wilson J. is obiter, Professors Black and Smith caution that application of the Charter's guarantees to advantaged subsets

...would tend to weaken the protection afforded by section 15 to disadvantaged groups in much the same way that the section would be weakened by recognition of an unlimited list of distinctions. Second, the courts are only one vehicle for promoting equality, and the use of this vehicle has costs in terms of intrusion on the democratic process (as well as in terms of the burden imposed on the courts themselves). The legislature and the executive are also charged with the responsibility of promoting equality. When the detriment is to a group that has economic and political power, there is less reason to assume that the political process will be incapable of correcting the problem, and the costs of judicial activity become less justified.⁵⁶²

Do these Supreme Court decision suggest that Charter litigation can advance substantive results-oriented equality for Canadian women? Feminist models of equality, discussed in the next subsection, articulate models to eradicate men's unjust control over women's lives.

⁵⁶¹ Ibid. at 34.

⁵⁶² Black and Smith, supra, note 537 at 608, citing Black and Smith, supra, note 487.

C. Three Sex-Discrimination Equality Models.

The development of women's full potential demands a contextual and results-oriented model of equality which acknowledges the subordination of women in society rather than masking social reality in the rhetoric of "equal opportunity". The latter speaks in terms of the differential treatment of the sexes, ignores structural causes, and blames individual women for failing to achieve male-defined success.⁵⁶³

[I]t must be recognized that women systematically have been treated as inferior to men. As MacKinnon notes, "the imagery of hierarchy, not just of difference" must animate judicial decisions.⁵⁶⁴

The "equal opportunity" model of equality accepts the male standard of success as the unexamined and universal definition of humanity. This model perpetuates the subordination of women by denigrating the skills, activities, and values associated with women such as consensus leadership and the care and nurturing of the young and old. Equality theory must challenge the male standard as the universal standard, facilitate women's admission to male preserves, and affirm female values, activities and skills.

[The] process of validating female-based stereotypes entails a willingness to claim equality through the assertion rather than the denial of difference.

* * *
We need to celebrate and encourage the extension of many ...[female] stereotypes for their importance to the development of a caring, humane, and just society.⁵⁶⁵

Equality theory must incorporate an emphasis on creating conditions

⁵⁶³ Sheppard, supra, note 440 at 212-13.

⁵⁶⁴ Ibid. at 217, quoting Catharine MacKinnon, The Sexual Harassment of Working Women (New Haven: Yale University Press, 1979) 102.

⁵⁶⁵ Sheppard, supra, note 440 at 220.

of self-fulfillment which begins with

...[t]he premise...that all humans should have equal opportunity to develop their potential and to participate in society, even though that goal may require that different people be treated differently and though the forms of fulfillment and the degree of achievement may vary from individual to individual. The approach incorporates a presumption in favour of inclusion and participation in societal activities, and any exclusion would require special justification. Though the way a decision treats people and the consequences of the decision constitute useful evidence, the comparison ultimately is between the degree to which different individuals and groups develop their full potential.⁵⁶⁶

Judges must be educated about how, why and when women are oppressed because liberal legal theory and the abstract nature of legal reasoning has made it difficult for judges to see women's inferior treatment.⁵⁶⁷ Formal equality and the public/private split hide the true dimensions of women's unequal status. It is particularly difficult for judges to see the subordination and inferior treatment of lesbians. Judges must go beyond liberal legalism to identify and address forms of social domination.

Judges must adopt a results-oriented approach that seeks to eradicate male domination. Judges must therefore

- (1) ask whether the statute, policy, practice or action contributes to the social inequality of women;
- (2) affirm female values, activities and skills;
- (3) ask whether it is possible to eradicate the root causes

⁵⁶⁶ Black and Smith, supra, note 487 at 237, citing J. Bankier, "Equality, Affirmative Action, and the Charter: Reconciling Inconsistent Sections", (1985) 1 Canadian Journal of Women and the Law, 134 at 136-137; K. Nielsen, "Radically Egalitarian Justice". Paper presented to Legal Theory Meets Legal Practice Conference, University of Ottawa, May, 1987, generally and at 3-6.

⁵⁶⁷ Sheppard, supra, note 440 at 217, citing Antonio Gramsci, Prison Notebooks, eds. and trans. Q. Hoare and G. Smith (New York: International Publishers, 1972) at 419-25.

of female subordination rather than treat mere symptoms (e.g., enforced heterosexual relations for all women and maintenance of the sexist assumption that the care and nurturance of the young is irrelevant in the creation of significant life for men);

- (4) adopt an "imagine how it feels" approach to better understand women's subordination;
- (5) adopt a more positive theory of the self as sustaining and being sustained by caring relationships;
- (6) create conditions of self-fulfillment for women generally and lesbians in particular;
- (7) ensure substantive equality of outcomes; and
- (8) support a morality of care which emphasizes freedom as essentially a social and cooperative experience to replace the liberal model of men as aggressive and self-seeking individualists who see cooperation and interdependence through government as threats to their autonomy.

A results-oriented approach will necessitate differential treatment when it is aimed at securing equal results. Instead of trying to fit women into heterosexist male-dominated institutions by requiring women to conform to male-dominated standards or by creating special measures for exceptional women, courts should acknowledge the varied needs of women and seek to transform institutions, workplaces, and social structures to meet those needs.

Despite the need for a results-oriented equality model, most feminists recognize that formal equality may be necessary for

achieving substantive equality in some contexts. Women may benefit from relying on concepts of formal equality and privacy, which are central tenets of liberal legal analysis, in demanding equality and control of their own bodies.

Feminists successfully used the demand for formal equality under the Charter to enable married women to use their own names.⁵⁶⁸ The assertion of liberal rights was a viable strategy for substantive equality in R. v. Morgantaler.⁵⁶⁹ By defining the abortion debate as a conflict between the public interest in the protection of the foetus versus the private right of a woman to personal autonomy, the Morgantaler decision reinforced the liberal view rather than a feminist view of reproductive freedom.⁵⁷⁰

In these two cases, formal equality and privacy advanced the substantive equality of women. The battle to decriminalize same-sex sexual intimacy was also fought and won under the rubric of privacy.

Often, however, the only women who benefit from the equal-opportunity model are those who can meet the standards of the male-dominated world, that is, the "exceptional" woman. The overwhelming majority of women cannot compete successfully with men because of structural factors created and maintained by separate-

⁵⁶⁸ Fudge, supra, note 515 at 513, citations omitted.

⁵⁶⁹ R. v. Morgantaler (1988), [1988] 1 S.C.R. 30, 82 N.R. 1.

⁵⁷⁰ Fudge, supra, note 515 at 544. A feminist view of reproductive choice is based a woman's right to control her own body and therefore her right to decide the issues of abortion and child-bearing and to control her reproductive capacity because she is more affected by pregnancy and child care. R. P. Petchesky, Abortion & Women's Choice: The State, Sexuality and Reproductive Freedom (New York: Longman, Inc. 1984) at 2.

spheres ideology.⁵⁷¹

Judges have created a hybrid "equal opportunity" theory requiring that women and men be treated the same yet permitting women to be treated differently if such treatment is based on a biological difference. The hybrid theory has three flaws. Judges who continue to be influenced by separate-spheres ideology have trouble distinguishing between biological differences and differences that are socially determined.⁵⁷² Two other problems

⁵⁷¹ Women are not alone in criticizing the principle of equal opportunity because it operates to increase the gap between the "haves" and the "have nots" and reinforces the dominant values, institutions, and goals of society.

The doctrine of equal opportunity is the product of a competitive and fragmented society, a divided society, a society in which individualism, in Tocquville's sense of the word, is the reigning ethical principle. It is a precise symbolic expression of the liberal-bourgeois model of society, for it extends the marketplace mentality to all spheres of [masculine] life. It views the whole of human relations as a contest in which each man competes with his fellows for scarce goods, a contest in which there is never enough for everybody and where one man's gain is usually another's loss. Resting upon the attractive conviction that all should be allowed to improve their conditions as far as their abilities permit, the equal-opportunity principle insists that each individual do this by and for himself. Thus, it is the perfect embodiment of the Liberal conception of reform. It breaks up solidaristic opposition to existing conditions of inequality by holding out to the ablest and most ambitious members of the disadvantaged groups the enticing prospect of rising from their lowly state into a more prosperous condition. The rules of the game remain the same: The fundamental character of the social-economic system is unaltered. All that happens is that individuals are given a chance to struggle up the social ladder, change their position on it, and step on the fingers of those beneath them.

Schaar, supra, note 495 at 234.

⁵⁷² Sheppard, supra, note 440 at 210-11. A prime example of this tendency is the Supreme Court of Canada's decision in Bliss v. Attorney General of Canada, supra, note 483, where the Court ruled that differential treatment of women based on pregnancy under the

are inherent in the "equal opportunity" model itself: only exceptional women succeed and women's skills are denigrated.

Given the short-comings of the "hybrid" equality theory, two other approaches have emerged. One urges a return to the "equal opportunity" model of absolute gender equality out of concern that any permissible difference in treatment for women will "inevitably backfire to perpetuate gender stereotypes and discrimination against women".⁵⁷³ Absolute neutrality overcomes the first problem of the hybrid equality theory but does not address the other two problems.

Many feminists advocate a third or a contextualized approach to equality which blurs the line between the public and private by requiring judges to recognize women's private experience of

Unemployment Insurance Act was "not created by legislation but by nature".

⁵⁷³ Sheppard, supra, note 440 at 214. Some feminists have argued that basing sex discrimination theory on absolute gender equality would diminish gender distinctions and result in the eventual disappearance of the classes "male" and "female". Thirty years ago, Simone de Beauvoir

...underlined particularly the false consciousness which consists of selecting among the features of the myth (that women are different from men) those which look good and using them as a definition for women. What the concept of "woman is wonderful" accomplishes is that it retains for defining women the best features which oppression has granted us and it does not radically question the categories "man" and "woman." It puts us in a position of fighting within the class "women" not as the other classes do, for the disappearance of our class, but for the defense of "woman" and its reinforcement.

Monique Wittig, "One is Not Born a Woman," in Alison M. Jaggar & Paula S. Rothenberg, eds., Feminist Frameworks: Alternative Theoretical Accounts of the Relations Between Women and Men (New York: McGraw-Hill Book Company, 1978, 1984, 2nd ed.) 150.

subordination.⁵⁷⁴

The contextualized approach to equality requires the court to consider the socio-economic roots of current inequality. Thus the success of this approach depends, to a large extent, upon the court's rejection of the public/private split which is both implicit in the notion of formal legal equality and a cornerstone of liberal democracy and jurisprudence.⁵⁷⁵

This approach acknowledges the differences between men and women, the fundamentally different social experiences of the sexes, and the wide-spread sex-segregation that persists in society. The central task of this approach is achieving recognition in law, and encouragement in society, of values, skills, and activities associated with women and women's unique experience. This approach advocates differential treatment, such as maternity benefits for women, because women's special ability to bear children should be acknowledged and valued.⁵⁷⁶

However, judges must take into account the "difference dilemma" referred to by Martha Minow:

Identification or acknowledgement of a trait of difference, associated by the dominant group with minority identity, risks recreating occasions for majority discrimination based on that trait. Non-discrimination or non-acknowledgement, however, risks recreating occasions for discrimination based on majority practices, like tests, norms and judgments forged with regard solely for the perspective, needs, and interests of the dominant group.⁵⁷⁷

Equality theory must not only provide a means of opening the

⁵⁷⁴ Fudge, supra, note 515 at 496.

⁵⁷⁵ Ibid. at 497.

⁵⁷⁶ Sheppard, supra, note 440 at 215-16.

⁵⁷⁷ Martha Minow, "Learning to Live With the Dilemma of Difference: Bilingual and Special Education" (1985) Law and Contemporary Problems 157 at 160.

way to a judicial recognition of women's experience of male domination, it should also acknowledge the "relational morality", recognized in the work of Professor Carol Gilligan, which is based on opposition to dualism, valuation of concrete, every-day life, and connectedness and continuities with other persons and the natural world.

Gilligan defines a female morality — a morality of care — which contrasts with the liberal model of competitive egotism. In Gilligan's view, the morality of (liberal) rights, typifying male moral development, differs from the morality of responsibility, which is characteristic of female moral development, because the former emphasizes separation in its consideration of the individual whereas the latter emphasizes connection and relationship.⁵⁷⁸

For women to influence legal outcomes, we must articulate a "relational morality" while recognizing that it is not the language of the law.

The values contained in...[the] language [of law]...have been identified as liberty and autonomy. These are the values of sharply defined commitment, not open-ended obligation; of free choice, not of trusting relationship. It is on this that the distinction between present legal values and those of relational morality rests. Women's concern for others and for continuity and connection is an alternative model of justice.⁵⁷⁹

Since objectivity and impartiality are but a mask for the politics of law, judges must adopt the "imagine how it would feel" approach to better understand the social subordination of women generally and lesbians particularly.

Professor Katherine O'Donovan proposes a theory of justice

⁵⁷⁸ Gilligan, supra, note 506 at 19.

⁵⁷⁹ O'Donovan, supra, note 24 at 146.

that recognizes a plurality of perspectives and which can overcome the barriers to justice faced by lesbians. These barriers include the legal method that preserves the status quo under the guise of neutrality, equality theory based on "sameness" that impoverishes women by encouraging them to become like men, and liberal rights that are empty and based on liberal individualism.

The theory of justice that takes account of different perspectives and voices is the theory that allows for competing versions of reality. It is a 'no right answer' approach that defines justice as being dependent on strife. Absolutes are rejected. The struggle over meaning is out in the open. It is for all members of society to attempt to influence content. Putting forward one's viewpoint in an attempt to convince others is presented as an essential activity. This is an invitation to participation despite barriers; an invitation to expression despite difficulties; an invitation to hope rather than despair. It does presuppose an open, listening judiciary, and a legal method that helps rather than hinders the expression of competing viewpoints.⁵⁸⁰

"Relational morality" should win because women (especially lesbians), who have historically experienced discrimination, are in a better position to describe reality in an objective and unbiased manner – and therefore to define justice – than are men who have an interest in mystifying reality, perpetuating women's subordinate social position, and preserving male authority over women.⁵⁸¹

A morality of care-for-others must start with judges themselves. Judges must recognize how law legitimatizes, reinforces and perpetuates the social subordination of lesbians and the biases that mark lesbians as inferior human beings or inherently disordered women. Judges must "care" by imagining how

⁵⁸⁰ Ibid. at 147.

⁵⁸¹ Ibid. at 146, citing Alison Jagger, Feminist Politics and Human Nature (New York: Rowman and Allanheld, 1983) at 384.

it feels for lesbians to be marginalized and stigmatized based on their choice of female companions, allies and lovers.

Having sketched the ideal judicial response to a lesbian's Charter claim asserting a contextualized equality claim, in the next section I discuss the drawbacks to Charter litigation which should be considered before litigation is undertaken.

D. **Rights-Assertions: An Exhausted Rhetoric or a Vital Means of Raising Expectations?**

1. Rights-assertion constructs law as central and oversimplifies power relations; yet winning a right can re-order power relations and change norms 250
2. Winning a right may protect the weak from the strong and the individual from the state; yet Charter litigation is an inefficient, expensive, and slow method of addressing well-entrenched problems 252
3. Is it better to trust legislators or judges on women's rights? 253
4. Rights-assertion can re-order power relations and change norms but they may also backfire 254
5. Rights-assertion neutralizes discontent yet the symbolic value of forcing the legal system to recognize a right is fiercely motivational 256
6. Does the Charter protect only negative rights or can the Charter also confer positive rights? 258
7. Is the Charter's liberal model of equality so severely flawed that it cannot provide meaningful short-term progress toward sexual equality or, conversely, can the Charter incorporate a contextual and results-oriented model of equality? 261

Women fought long and hard for inclusion in the Charter's equality guarantees believing that Charter litigation would offer a means to eradicate men's unjustified authority over women in Canadian society. It was hoped that progress for women would be achieved because the judicial process would give women litigants a measure of freedom from the majority will. Canadian women also believed that, because litigation is a principled debate, Charter litigation would serve to educate the public.

But how realistic is it for women to rely on Charter litigation to achieve equality in Canadian society? Can a system driven by individual complaints have more than a minute effect on dismantling pervasive disadvantage for women, particularly

lesbians? Is it realistic to expect progress by delegating most of the job to non-elected and predominately male judges with limited access to information, limited resources, and an adversarial procedural format? Is the Charter's liberal model of equality so severely flawed that meaningful change is an unrealistic short-term expectation? Finally, the rhetoric of rights assertion exhausted?

1. **Rights-assertion constructs law as central and oversimplifies power relations; yet winning a right can re-order power relations and change norms.**

The decidedly male person embedded in liberal political theory reflects the needs, experiences and values of men. This autonomous, sharply individuated, and self-maximizing liberal man⁵⁸² is basically selfish and motivated by self-interest, seeks to maximize his individual freedom to pursue self-determined goals, and seeks security from interference from others. He possesses negative rights which exist to protect the individual from state intervention and from harms caused by other individuals.

It has been argued that rights cannot meet the needs of women because the liberal concept of rights

...reflect[s] the experience or power of men, and the moral or philosophical base which derives from men's experience of the world, or men's ability to define the world. Under such conditions, legal rights cannot meet the needs of women.⁵⁸³

Professor Catharine MacKinnon views law as a reflection of male power and argues that women cannot expect justice from "a

⁵⁸² O'Donovan, supra, note 24 at 130, 138.

⁵⁸³ Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986) International Journal of Sociology of Law 108 at 121.

system that 'sees and treats women the way men see and treat women' ".⁵⁸⁴

Carol Gilligan sees liberal rights as reflections of male moral development which focuses on the individual and emphasizes separation of individuals whereas female moral development emphasizes connection and relationship.⁵⁸⁵

Carol Smart rejects Gilligan's and MacKinnon's pessimism as immobilizing and proposes instead a vision of the law as a "site of power struggles". Otherwise, if the male supremacy assumed in law and political theory is psychologically determined and we must first change how men experience the world, we have no clear idea how to go forward:

If we reject the idea of law as a simple tool of liberation or of oppression, and look at how it constitutes a kind of institutionalized and formalized site of power struggles – one that can provide resources for women, children, and men, albeit differentially – then it is possible to acknowledge that it remains an important strategic element in political confrontations.⁵⁸⁶

⁵⁸⁴ Ibid. at 120.

⁵⁸⁵ Gilligan, supra, note 506 at 19.

⁵⁸⁶ Smart, supra, note 583 at 138. Smart argues against viewing law as monolithic:

The idea of the uneven development of law is an important one. It allows for an analysis of the law that recognizes the distinctions between law-as-legislation and the effects of law, or law-in-practice. It rejects completely any concept of law as a unity which simply progresses, regresses, or reappears as a cycle of history to repeat itself. It perceives law as operating on a number of dimensions at the same time. Law is not identified as a simple tool of patriarchy or capitalism. To analyse law in this way creates the possibility of seeing law both as a means of 'liberation' and, at the same time, as a means of reproduction of an oppressive social order. Law both facilitates change and is an obstacle to change...Law reform is both valued and

Demanding rights can be empowering because one is demanding full citizenship. However, struggles to establish rights construct law as the centre of the political campaign and construct law as a neutral arbiter by masking the degree to which law is implicated in oppression. Rights oversimplify complex power relations by giving the impression that winning a right equalizes a power difference. And rights define problems as having legal solutions whereas asserting rights may simply attract the state's attention but leave the complainant in a worse position.

2. **Winning a right may protect the weak from the strong and the individual from the state; yet Charter litigation is an inefficient, expensive, and slow method of addressing well-entrenched social injustice.**

The piecemeal solution to well-entrenched problems affecting whole classes of individuals through Charter litigation is slow, inefficient and expensive. While rights are formulated to deal with social injustice, it is the individual who must assert and prove her rights were violated.

Although the Charter is based on the recognition of group disadvantage, and a commitment to eradicate it, the Charter conceives of discrimination in isolation from other related problems that together create and maintain disadvantage. The Charter is structured to handle individual complaints and to formulate solutions on a case-by-case basis as if problems were unrelated and as if the complainants were isolated and autonomous individuals. Thus, where the judicial remedy merely redresses the

undervalued as a means of achieving social change.

Ibid. at 117.

individual situation of the complainant, the position of the disadvantaged group to which the complainant belongs may remain the same. Winning rights also can mean oppressive regulatory activity accompanying protection from the state.

3. Is it better to trust legislators or judges on women's rights?

It is argued that "...equality claims cannot be reduced to legal rules and that judges assume an unfamiliar role if forced to decide questions that may turn on subjective considerations".⁵⁸⁷ However, a broader conception of the role of the judiciary is also valid.

Undoubtedly, the judiciary will be affected by considerations of the proper role to be played by it in relation to the legislative branch.⁵⁸⁸ One of the strongest arguments for judicial restraint is that it undermines representative government.

In terms of section 15, the argument is that it is better to entrust the protection of equality to legislators than to judges, who are neither elected nor representative of the population in terms of race, gender, age or socio-economic status.⁵⁸⁹

However, the anti-democratic argument assumes that the legislative process is sensitive to the interests of disadvantaged groups.

Professor Andrew Petter argues that the Charter threatens to negate legislative reforms that have benefitted women because the judiciary will superimpose its interpretation of essentially a nineteenth-century concept of liberalism on a welfare state. He

⁵⁸⁷ Black and Smith, supra, note 487 at 243-44.

⁵⁸⁸ Ibid. at 231.

⁵⁸⁹ Ibid. at 243.

contends that progress in this century for socially and economically deprived persons has been won in Parliament, not in the courts because of the cost of access and the composition of the bench.⁵⁹⁰

Professor Lorenne Clark points out that Canadian women have fared about equally well either way. Women had to mount a pitched battle to ensure that Parliament included women in the Charter's equality protections and it was the judiciary that gave women their personhood in the Persons case⁵⁹¹ and protected women's rights over their own bodies in the Morgentaler case.⁵⁹² Hence, there is no reason to suppose that women's rights will be better served by the legislature than by the judiciary. In addition, to claim a right is to popularize it; rights are associated with democracy and freedom. Hence to assert a claim as a right is to give the claim legitimacy.⁵⁹³

4. Rights-assertion can re-order power relations and change norms but they may also backfire.

At a practical level, Charter guarantees may be invoked in inappropriate contexts which may result in the development of "bad law". Or, an adverse lower court ruling may be left standing by a plaintiff who cannot afford to appeal.

At a political level, the resort to rights can be frustrated

⁵⁹⁰ Andrew Petter, "The Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 The Advocate 857.

⁵⁹¹ Clark, supra, note 464 at 393, citing the "Persons" case, supra, note 461.

⁵⁹² Morgentaler v. The Queen, [1988] 1 S.C.R. 30.

⁵⁹³ Smart, supra, note 455 at 138-46.

by counter-assertions of rights, rights formulated to protect the weak from the strong or the individual from the state can be appropriated by the powerful, rights may lose their political purchase by becoming associated with the self interest of the claimant, and winning a right may mean a backlash of either violence or a counter-use of law to re-establish traditional power relations.⁵⁹⁴

There has indeed been a violent backlash to the assertion of rights by lesbians. One out of ten lesbians (and one out of five gay men) report having been punched, hit or kicked for being lesbian. One quarter of all lesbians and gay men have had something thrown at them, one-third have been chased, one-third have been sexually harassed and 14% have been spit on.⁵⁹⁵ Nonetheless, rights-assertions have immense symbolic value.

Law serves as a symbol of acceptable attitude and ideology...To force systems like the legal system to accommodate, to change, to capitulate, to recognize the existence of rights for any despised group is to reshape the perceptions of who that group is and how much their existence is valued or their plight is of concern to the collective conscience.⁵⁹⁶

⁵⁹⁴ Ibid.

⁵⁹⁵ Mohr, supra, note 64 at 27-28. This violence is excused by "blaming the victim" which is a strategy that justifies the violence as a reaction to the victim's behaviour (e.g., the male assailant thought the lesbians were taunting him). Alternatively, violence is excused by "blaming the assailant" who is either deranged or who "overreacted" to the situation - "over-reacted" to two women showing affection to one another or "over-reacted" to the increasingly visible lesbian and gay political struggle.

⁵⁹⁶ Roberta Achtenberg, "Introduction" in Roberta Achtenberg, ed., Sexual Orientation and the Law (New York: Clark Boardman, 1989) 2.

5. Rights-assertion neutralizes discontent yet the symbolic value of forcing the legal system to recognize a right is fiercely motivational.

...[A] history of struggle with milestones of victories is a vital element in sustaining the motivation for future political, economic and social change.⁵⁹⁷

Although motivational, the assertion of rights channels and neutralizes discontent, thereby reinforcing and legitimizing the existing social order. People become dependent upon the courts to grant them rights. Members of parliament and of the public may be misled into believing that a court decision in favour of an equality-seeker has "solved" the problem.

Critical Legal Studies ("CLS") argues that the assertion of rights is harmful because

...rights claims perpetuate the dichotomy between individual and community. Rights discourse seizes on what separates the individual from the group and thereby inhibits the development of social movements.⁵⁹⁸

Professor Patricia Williams notes that the CLS position springs from the unique experience of whites in the U.S. and

...seems to discount entirely the voice and the experiences of blacks in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights.⁵⁹⁹

Williams argues that blacks and whites experience rights

⁵⁹⁷ Smart, supra, note 455 at 120.

⁵⁹⁸ Herman, supra, note 146 at 804, citing P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Texas Law Review 1563; P. Gabel and P. Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-83) 11 N.Y.U. Review of Law & Social Change 369; D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo Law Review 209; M. Tushnet, "An Essay on Rights" (1984) 62 Texas Law Review 1363.

⁵⁹⁹ Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harvard Civil Rights - Civil Liberties Law Review 401 at 411-12.

differently. For blacks,

...the prospect of attaining full rights under the law has always been a fiercely motivational, almost religious, source of hope.⁶⁰⁰

This quotation resonates for lesbians who also have been dehumanized by prejudice and bias and deprived of their personhood and dignity.

CLS would abandon rights discourse, and, in its preference for informality, would restyle arguments about rights into arguments about "needs".⁶⁰¹ However, as Williams notes, blacks have been describing their needs for generations and it has been a dismal failure as political activity.⁶⁰² In contrast, rights provide a "measure of actual entitlement" and serve as "a political mechanism capable of confronting the denial of need".⁶⁰³

Lesbians have the same investment in and commitment to rights-assertion. Changing the law to make it fit and serve the lives of lesbians is a symbolic way of resisting the derogatory characterisations fostered by the law. Rights are seen as empowering to the self, as protection for personal boundaries, and as a vehicle for the establishment of a social identity.

Only in the last two decades have lesbians in North America collectively begun to struggle against discrimination and the dehumanizing stereotypes which support it. Rights feel so "new in

⁶⁰⁰ Ibid. at 417.

⁶⁰¹ Ibid. at 412. However, the disutility argument errs by envisioning law as monolithic whereas law operates on a number of dimensions at the same time.

⁶⁰² Ibid. at 412.

⁶⁰³ Ibid. at 413.

our mouths...so deliciously empowering...a sign for and a gift of selfhood".⁶⁰⁴

6. Does the Charter protect only negative rights or can the Charter also confer positive rights?

The Charter, inspired by liberal theory, focuses on the "negative rights" that a citizen may assert against the state which are the political, civil and legal rights of individual citizens. These "negative rights" are believed to be essential prerequisites to the health and growth of a democratic society.⁶⁰⁵ Will the substantive scope of the Charter be limited primarily to civil, political and legal rights and freedoms, or will it extend to economic, social and cultural rights (often termed "positive rights")? The "positive" use of the Charter in court would entail forcing the state through court proceedings to pass legislation aimed at factual inequalities. Given present trends in judicial interpretation, the legislature is more likely than the judiciary to be receptive to "positive" uses of the Charter.⁶⁰⁶

Professor Andrew Petter argues that the Charter will not be interpreted to confer positive rights to improve the social conditions of women. He contends that the Charter

...is a regressive instrument more likely to undermine than advance the interests of socially and economically disadvantaged Canadians.⁶⁰⁷

Petter argues that the Charter is regressive partly because of

⁶⁰⁴ Ibid. at 431.

⁶⁰⁵ Sheppard, supra, note 440 at 204-05.

⁶⁰⁶ Eberts, supra, note 521 at 170.

⁶⁰⁷ Petter, supra, note 590.

the nature of the rights themselves and partly because of the nature of the judicial system. First, the Charter protects only negative rights which can only be invoked to protect the individual from the state by striking down laws and policies but which cannot create positive entitlements; and second, the Charter treats the distribution of wealth and power as the product of private initiative rather than state action. In Petter's view, the Charter removes from scrutiny the major cause of inequality which is the unequal distribution of wealth between private parties.⁶⁰⁸

Professor Lorenne Clark disagrees. She argues that, despite the Charter's liberal orientation toward negative rights, it can and should be interpreted to confer positive rights. She disagrees with Petter's critique

...of liberalism in the context of the Charter... [because of its] implication that the inequality and inferior status of women is a function specifically of liberal ideology and practice, and that the entrenching of a Charter with an admittedly liberal heritage within the Canadian welfare state must necessarily act as a brake on the evolution of Canadian social democracy.⁶⁰⁹

Clark believes that a "large and liberal" reading of the Charter is possible by "firmly situating" the Charter in the context of Canada's social-democratic tradition. She believes that

⁶⁰⁸ Ibid. There is some support in Andrews v. Law Society for Petter's position. La Forest J. said that he is

...not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second-guess policy decisions.

Andrews v. Law Society, supra, note 488 at pp. 38 (D.L.R.), 194 (S.C.R.) (emphasis in original).

⁶⁰⁹ Clark, supra, note 464 at 386.

it is not necessary to give up liberalism to get rid of social and economic inequalities.

Clark notes that Petter's position is the classical bare-bones "minimalist" liberal position of negative rights, popularized in the eighteenth century by John Locke, which contrasts with her "maximalist" liberal position which is informed by nineteenth-century European political developments (e.g. Marx, Engels and the French socialists) and was made popular by John Stuart Mill.⁶¹⁰ Whereas Lockean liberalism is satisfied with the unequal distribution of goods and with merely procedural fairness and the "equal opportunity" model of formal equality, Mill introduced the idea of substantive equality, particularly when remedial of previous discrimination.⁶¹¹ "Maximalist" liberalism supports a vision of the Charter that eliminates sex inequality in the private sphere and confers positive rights on women to ensure equality in the public sphere.⁶¹²

Since Canadians already understand social democracy as including some positive rights – including those rights conferred by human rights legislation – there is no good reason to believe that Charter equality rights will be interpreted solely as negative rights.⁶¹³

⁶¹⁰ Ibid. at 387.

⁶¹¹ Ibid. at 389, citing John Stuart Mill, "The Subjection of Women," in Alice S. Rossi, ed., Essays on Sex Equality (Chicago and London: University of Chicago Press, 1970) at 123ff.

⁶¹² Clark, supra, note 464 at 391.

⁶¹³ Ibid. at 388-89. The United States, founded in the eighteenth century, adheres to a minimalist interpretation whereas Canada, founded in the nineteenth century, is more maximalist in its greater commitment to social welfare principles. Ibid. See

7. Is the Charter's liberal model of equality so severely flawed that it cannot provide meaningful short-term progress toward sexual equality or, conversely, can the Charter incorporate a contextual and results-oriented model of equality?

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a. Introduction.

The Charter is a liberal document which will, to some extent, reproduce a liberal vision of society. Feminists ask whether a results-oriented, contextual equality theory can be incorporated into Charter equality jurisprudence. For example, the liberal idea of the public/private distinction is an obstacle to women's struggle for substantive equality in two ways: (1) the public/private distinction defines the scope of the Charter⁶¹⁴ and (2) the public/private distinction fosters formal equality "which by denying the relevance of the history of women's subordinate status perpetuates it".⁶¹⁵ The public/private distinction embodied in the formal equality model has been described as an insurmountable

also Madame Justice Wilson's dissenting judgment in McKinney v. Guelph (1990), 76 D.L.R. 545 (S.C.C.), where she outlines the history of interventionist activities of the Canadian state.

⁶¹⁴ In Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery (1986), [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577 (S.C.C.) [hereinafter "Dolphin Delivery"], the Supreme Court of Canada held that the Charter applies only to state action defined narrowly to exclude judicial action. Thus, the Charter was inapplicable to an injunction issued to enforce a common law rule prohibiting union picketing against an employer.

⁶¹⁵ Fudge, supra, note 515 at 489.

barrier to women's substantive equality.⁶¹⁶ Thus it is essential that the public/private distinction be overcome.

Feminists often define the family as the private sphere and the market as the public sphere.⁶¹⁷ Liberal political theory defines both the family and the market as private and the political sphere as the public sphere.⁶¹⁸ Definitions of the public and private spheres thus depend on the theoretical stance taken and the reason for the distinction.⁶¹⁹

Although lesbians suffer the effects of "separate spheres" thinking, lesbians - as lesbians - have been ignored in "separate spheres" discourse as if male exploitation of heterosexual women in the "privacy" of the family and the domination of women in the public sphere were sufficient to constitute the harm to women of "separate spheres" thinking. Ironically, however, the assumptions about women's "nature" that once supported women's seclusion in the private sphere of the family are the same assumptions which support the ideology of heterosexuality.

Although the overwhelming percentage of lesbians experience the oppressive dynamics of the heterosexual nuclear family in their families of origin and are therefore socialized to be heterosexual, lesbians obviously do not experience male exploitation and

⁶¹⁶ Hester Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Spheres Ideology" in C. Boyle et al., eds., Charterwatch: Reflections on Equality (Toronto: Carswell, 1986) 107 at 119.

⁶¹⁷ O'Donovan, supra, note 4.

⁶¹⁸ Mary McIntosh, "The Family, Regulation and the Public Sphere" in G. McLennan et al., eds., State and Society in Contemporary Britain (Cambridge: Polity Press, 1984) 202 at 204.

⁶¹⁹ Fudge, supra, note 515 at 488.

domination in their lesbian relationships. However, lesbian and heterosexual women feel the effects of separate-spheres thinking in the marketplace in very similar ways.

All women experience sexist gender dynamics and pressure to market their sexual attractiveness to men on the job. The "glass ceiling" is a phenomenon affecting all women. Tolerating the sexism and heterosexism of the average workplace is difficult for any woman who is in touch with her feelings and detached from the need for male approval. However, it may cost more for a lesbian to market sexual attractiveness to men at work if it contradicts her basic self-concept.

As women, lesbians and heterosexual women experience the same social subordination in the public sphere. However, lesbians experience a more profoundly subordinate status because of their second subordinate status as lesbians. The double oppression of lesbians in the public sphere can take either of two forms. If a lesbian is out, she is exposed to a range of discrimination which may be blatant or subtle. If she is not out, she bears the burden of camouflaging herself and managing her false protective pseudo-identity as a supposed heterosexual.

Lesbians experience the private sphere of their lesbian relationships, their extended family of lesbian friends and their lesbian community as a protected haven of freedom and autonomy. In the private sphere, lesbians are free of male exploitation of their sexuality and their unpaid labour. Many lesbians, because they are free of the burdens of childbearing and child rearing have greater freedom to pursue their personal interests and career goals in the public sphere.

Although lesbians experience the private sphere very differently than heterosexual women, the public/private distinction maintains lesbian oppression by supporting male domination in the public sphere and coercing women into heterosexual arrangements, especially the heterosexual family, where women are oppressed and exploited by men which reinforces male domination in the public sphere.

b. The Charter's Reach is Limited to the Public Sphere.

Charter equality guarantees apply only to litigation challenging legislative, administrative or executive state action; even though litigants bring their Charter claims in a judicial forum, and the judiciary is a branch of the state, this is not deemed state action.⁶²⁰ Using a liberal interpretation to limit the reach of the Charter to state action, the Supreme Court of Canada withheld Charter application from the private sphere of the family and from the judicially created and judicially enforced rules of the common law.

Thus, the common law rules of contract, property and tort which are devised and developed by the judiciary and enforced by other arms of the state are outside the scope of Charter scrutiny.⁶²¹

Thus, in the employment sphere, wage disparities which are central to women's subordinate status are beyond the scope of the Charter because wages are deemed a matter of private contract.⁶²²

⁶²⁰ Dolphin Delivery, supra, note 614.

⁶²¹ Fudge, supra, note 515 at 491, citing Russo v. The Ontario Jockey Club (1988) 43 C.C.L.T. 1 (Ont.H.C.).

⁶²² Fudge, supra, note 515 at 494.

c. Formal Equality Ignores Women's Subordination in the Private Sphere.

Feminists regard the private sphere of the home, not as a haven from the competitive demands of the market, but as a site where men exploit women's sexuality and unpaid labour and not as a natural phenomenon but as a creature of state action. The second way that the public/private split interferes with women achieving substantive equality is that formal equality ignores the history of women's experience of subordination in the family, thereby reinforcing and maintaining women's subordinate status.

[T]he cases illustrate what amounts to either a profound unwillingness or inability on the part of the courts to regard the different treatment of men and women in terms of the legal regulation of the family as in any way related to the subordination of women either within or without the family.⁶²³

Subjects appear free and equal before the law, yet this formal legal equality and freedom is embedded in a social context of overreaching inequality. In other words, the formal legal equality before the state masks the systematic inequality in the private sphere. And this is exactly the significance of the public/private distinction for liberal constitutional adjudication; the Canadian Charter reifies the split and identifies the public sphere as the source of oppression while systematically obfuscating the extent to which the public sphere constitutes the private.⁶²⁴

As a concept, the public/private split masks the fact that (1) the family has contributed to women's economic, social, and emotional subordination to men, (2) women continue to be economically dependent on men because women's childbearing and child rearing duties have disadvantaged them in the labour market, (3) the state has played a primary role in defining and regulating

⁶²³ Ibid. at 524.

⁶²⁴ Ibid. at 534-35.

the family both through legislative and judicial action, and (4) the maintenance of the family "privacy" minimizes the role of the state in fulfilling the material needs of its citizens.⁶²⁵

Men have mounted Charter challenges claiming that laws protecting women from sexual violence and victimization violate the Charter. Significantly, the few courts which have upheld such laws base their decisions on biology (e.g., girls under the age of fourteen need protection from their own biological ability to get pregnant) and ignore men's systematic sexual victimization of women.⁶²⁶

Professor Andrew Petter argues the disutility of rights-assertion because he views the Charter as arming individuals with a negative set of rights enabling them to repel interference by the regulatory and redistributive arms of the state⁶²⁷ without providing an opportunity for challenging the root cause of women's disadvantage in society which is patriarchy itself. The Charter does not provide a means of challenging illiteracy, ill health, unemployment and the unequal distribution of property.

Petter notes that the Charter is based on a largely formal right of equal treatment which may occasionally take into account disparities in social condition but which does not directly address

⁶²⁵ Ibid. at 510-12, citing Mary McIntosh, "The State and the Oppression of Women" in A. Kuhn and A.M. Wolpe, eds., Feminism and Materialism (London, Routledge & Kegan Paul, 1978) at 254.

⁶²⁶ Fudge, supra, note 515 at 524-26.

⁶²⁷ Andrew Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (unpublished revised paper presented at workshop on Feminism, Critical Theory and the Canadian Legal System, Faculty of Law, University of Windsor, June 4-7, 1988) at 1.

or seek to change them.⁶²⁸ It requires litigants to accept its underlying values and assumptions – its formal vision of equality and the dichotomy between public and private – even when litigants have a conscious desire to resist or undermine those liberal values and assumptions.⁶²⁹ Women can succeed only if they frame their arguments in terms of the liberal rules which are calculated to divide elite and ordinary women and to achieve short-term gains which are long-term losses. By requiring litigants to adopt its vision of formal equality, Charter litigation legitimatizes "a view of equality that disregards women's real social disadvantage and supports the ability of men to claim an even greater share of scarce social resources".⁶³⁰ Finally, formal equality benefits men at the expense of women and extraordinary women at the expense of ordinary women.⁶³¹

Professor Petter illustrates these points in his analysis of three early sexual equality cases in which women's organizations had a voice and in which there was a concerted and sophisticated effort to implement Charter rights for progressive purposes.

In Re Blainey and Ontario Hockey Association⁶³², LEAF brought suit on behalf of Justine Blainey, an exceptional twelve-year-old female athlete, who was excluded from playing on a boy's hockey team due to a regulation barring girls. LEAF successfully argued

⁶²⁸ Ibid. at 3.

⁶²⁹ Ibid. at 5.

⁶³⁰ Ibid. at 8.

⁶³¹ Ibid.

⁶³² Blainey and Ontario Hockey Association, Re (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (Ont. C.A.).

that the regulation, and the provision of the Ontario Human Rights Code which permitted it, violated Blainey's section 15 equality rights.

While it may have benefitted a few extraordinary female athletes, the ruling did nothing to address the underlying, substantive inequalities experienced by a majority of female athletes – inequalities that stem from lack of funding, training and equipment (not to mention more deeply rooted social and political causes of sexual subordination).⁶³³

In Re Tomen and Federation of Women Teachers' Associations of Ontario⁶³⁴, as part of an on-going strategy to weaken a women teachers' union, a male-dominated teachers' union turned the argument made by LEAF in the Blainey case against the women teachers' union by arguing that a regulation of the Ontario Teacher's Federation requiring all women teachers to belong to the women's union violated the equality rights of Margaret Tomen, a woman principal.

Just as Blainey, an extraordinary athlete, felt that it was discriminatory to compel her to compete in a girls' league which was underfunded and did not cater to persons of her ability, Tomen, a principal, thought it was discriminatory to force her to belong to a women's organization whose primary concern was the plight of ordinary women teachers.⁶³⁵

Rather than disputing the reasoning of the Blainey decision, the lawyers for the women teachers' union argued that section 15 of the Charter did not apply because the Ontario Teacher's Federation, although regulated by statute, was a private rather than a

⁶³³ Petter, supra, note 627 at 9-10.

⁶³⁴ Tomen and Federation of Women Teachers' Associations of Ontario, Re (1987), 61 O.R. (2d) 489 (H.C.J.).

⁶³⁵ Petter, supra, note 627 at 11.

governmental agency.⁶³⁶ Petter notes the irony of the women teachers union seeking to prevent the application of the Charter to nongovernmental agencies, even if regulated by government, because women have long argued that these agencies need Charter scrutiny. Their position also reinforces the liberal myth that there is a natural separation between public and private spheres

...a myth that has consistently been attacked as being a means for perpetuating patriarchy and reinforcing 'private' power at the expense of the 'public' good.⁶³⁷

In Re Shewchuk and Ricard⁶³⁸, a father challenged legislation allowing affiliation and child support orders to be sought against fathers of illegitimate children but not against mothers. Instead of challenging the concept of formal equality by arguing that maleness is a characteristic of demonstrable social advantage and therefore the Charter's guarantee of sexual equality should be unavailable to males, LEAF adopted the view that all sexual distinctions in legislation should be treated alike as prima facie violations of section 15. By conceding section 15's application to males, LEAF avoided the risk of making a losing argument and concentrated instead on remedies by arguing that, in male equality cases, courts should extend legislative benefits to men rather than striking down the legislation conferring a benefit on women.

Shewchuk demonstrates the judiciary's willingness to uphold legislation which violates formal equality to ensure the

⁶³⁶ Ibid. at 12.

⁶³⁷ Ibid. at 12-13, footnote omitted.

⁶³⁸ Shewchuk and Ricard, [1986] 2 B.C.L.R. (2d) 324, 28 D.L.R. (4th) 429.

privatization of the cost of social reproduction.⁶³⁹ By reinforcing women and children's economic dependence on men, women's subordination to men is reinforced.⁶⁴⁰

Two other early cases illustrate how men have used the Charter to deprive women of economic benefits provided by the state. In A.G. v. Phillips (1986), 34 D.L.R. (4th) 633, 26 C.R.R. 322 (N.S.C.A.) and Re Family Benefits Act Reference (1986), 75 N.S.R. (2d) 338, 26 C.R.R. 336 (N.S.C.A.), the Nova Scotia Court of Appeal unanimously struck down as violative of section 15 of the Charter the provision of the Act which conferred state benefits on single mothers with dependent children but not on single fathers with dependent children. Despite overwhelming statistical evidence that single mothers constitute a high percentage of poor Canadians, the court ignored women's private-sphere experience of poverty when it defined the purpose of the legislation in general terms - as the alleviation of poverty in general - and asserted that the legislative distinction between men and women does not bear any true relationship to the relief of poverty.

d. Conclusion.

Even if courts use a contextualized approach to equality - using such an approach in one case does not guarantee that any other court will use the same approach in the next case raising an

⁶³⁹ Fudge, supra, note 515 at 520.

⁶⁴⁰ Judy Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989) 3 Canadian Journal of Women and the Law 246 at 255.

equality claim.⁶⁴¹ The dilemma for feminists in resorting to Charter litigation is the judicial tendency toward abstraction and away from context.⁶⁴²

Perhaps this is the ultimate paradox of the Charter: whilst feminist organizations are attempting to develop situated and contextual theories of equality which will address women's social and historic subordination, innumerable other litigants, including defendants charged with sexual assault offences and right-to-life organizations, are simultaneously invoking the Charter to claim a formal equality which may well erode victories which feminists believed they had already won.⁶⁴³

Even if women's sex-specific legislative gains survive male court challenges, scarce feminist resources are spent defending the status quo.⁶⁴⁴

Fudge emphasizes three major reasons that Charter litigation may fail to advance a feminist vision of equality:

(1) Charter rights are equally amenable to either a formal and narrow interpretation or to an expansive feminist interpretation;⁶⁴⁵

(2) The emphasis placed on developing interpretations of the general language of section 15 to cover varied fact situations is an emphasis on abstraction rather than an emphasis on results;⁶⁴⁶ and

⁶⁴¹ Fudge, supra, note 515 at 532.

⁶⁴² Ibid. at 533.

⁶⁴³ Ibid. at 529.

⁶⁴⁴ Ibid. at 509.

⁶⁴⁵ Ibid. at 533.

⁶⁴⁶ Ibid. at 533-34. A tendency toward abstraction is at the very foundation of liberal political and legal theory. Ibid. at 534.

(3) The judiciary has unfettered discretion to decide if a violation of section 15 is justified under section 1.⁶⁴⁷

Fudge counsels the use of extreme caution when considering the assertion of a Charter equality claim.

Thus, it is crucial to understand that Charter litigation, although at times a necessary arena for struggle, is not in itself sufficient (even when successful) to achieve substantive equality. However, it is equally important to understand that liberal rights and freedoms are contradictory and insufficient rather than illusory, and the struggle for social transformation may often involve pushing bourgeois forms of legality to their limit. Feminists must be vigilant against allowing litigation to dominate the political and social struggle to obtain substantive equality for women, because the tendency of litigation strategies is to transform politics into a series of narrow issues packaged as private and individual cases...Litigation must always be seen as part of a larger political struggle, and, therefore, must be evaluated in terms of what it contributes to the attainment of larger political goals. Charter litigation is a form of politics, but it is a peculiarly abstract and undemocratic form. Thus, it is crucial to consider the consequences of entering into an arena unsuited for concrete arguments about social conditions and organized around principles of universality and abstraction. Moreover, the consequences of both victory and defeat, the limited repertoire of judicial remedies, and the dangers of employing abstract rhetoric must be considered each time litigation is initiated.⁶⁴⁸

⁶⁴⁷ Ibid. at 534.

⁶⁴⁸ Ibid. at 548-49, citing S.A.M. Gavigan, "Women and Abortion in Canada: What's Law Got To Do With It?" in H.J. Maroney and M. Luxton, eds., Feminism and Political Economy: Women in Canada (Toronto: Methuen, 1987) at 5; R.B. Cowan, "Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-76" (1976) 8 Columbia Human Rights Law Review 373 at 402; H.J. Glasbeek and M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies/ Etudes Socialistes 84.

**VI. CASE LAW: APPROACHES RELIED ON
BY LESBIANS AND GAY MEN.**

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A. Introduction.

Feminists have long recognized that male resistance to female autonomy is often framed in essentialist terms - that women's traditional roles are based on nature rather than dictated by male supremacy. Sex-discrimination analysis recognizes the socially constructed nature of traditional social, gender or sexual roles based on biological sex; it can expose the sexist, heterosexist and patriarchal assumptions which enforce traditional roles for all women and stigmatize and marginalize lesbians in Canadian society; and it can recognize the political characteristics of lesbian existence.

My central argument - that lesbian oppression should be addressed as sex discrimination under the Charter - is based on my view that lesbian oppression is a social construction designed to maintain the patriarchy by stigmatizing lesbianism thereby maintaining traditional social, gender and sexual roles for women. The social construction of lesbianism as a stigmatized identity is accomplished through the ideology of heterosexuality expressed in a myriad of institutional and social practices including religion, science, law, literature and the media.

I argue that the oppression of lesbians as lesbians is embedded in the patriarchal oppression of all women through the false consciousness and male violence which maintain the ideology

and institution of heterosexuality. Analysing lesbian oppression under the rubric of sex discrimination can recognize this unity.

Sex discrimination, as a legal theory, is better suited to acknowledge the institution of heterosexuality as one of the enforced conditions under which women live subject to men. The patriarchal construction of "masculinity" and "femininity" perpetuates male authority over women by slotting women into traditional roles. Compulsory heterosexuality prevents women from liberating themselves from male domination and forces countless women to "fit mind, spirit and sexuality into a prescribed script".⁶⁴⁹

Sex discrimination analysis is centrally concerned with the social construction and the arbitrary assignment of traditional roles based on biological sex. Sexual orientation, as the legal basis for equality claims, ignores the role played by male supremacy and reinforces the idea of lesbianism as a minority sexual status that is fixed and immutable. Reinforcing dichotomous categories oversimplifies sexual diversity, masks the political aspects of lesbianism, and ignores women's agency and choice.

Sex-discrimination analysis of lesbian oppression can incorporate a political analysis by locating the source of lesbian oppression in patriarchal definitions of "masculinity" and "femininity" and assumptions about traditional social, gender and sexual roles which maintain male authority over women's consciousness, activities and bodies.

The legal category of sexual orientation has gained acceptance

⁶⁴⁹ Rich, supra, note 3 at 29.

as the legal category which explicitly addresses the oppression of lesbians and gay men. However, sexual-orientation discourse accepts the majority's viewpoint that lesbianism is primarily a sexual activity which is either an immutable characteristic setting lesbians apart as a distinct species of person or a freely made choice which is neither more nor less moral and normal than heterosexuality; sexual-orientation analysis masks the sources of lesbian oppression by assuming that lesbian identity is personal and apolitical; the category of sexual orientation suggests that lesbianism and heterosexuality are dichotomous categories; "sexual orientation" oversimplifies the complexity of lesbian identity by overemphasizing sexual activity and ignoring the other numerous, contradictory, changing and sometimes more compelling considerations that lead a woman to identify as lesbian; grouping lesbians and gay men together as a sexual minority distorts lesbian history and masks the relationship between lesbianism and women's healthy desire to avoid male domination and lead free and self-determining lives; "sexual orientation" ignores how lesbian oppression serves male domination; and finally, the popularity of sexual orientation as a legal category creates the risk that lesbians will define themselves in terms of sexual-orientation discourse.

Canadian lesbians lag far behind their non-lesbian sisters, hampered in their progress by laws that are blatantly discriminatory. For example, lesbians still cannot marry;⁶⁵⁰ they

⁶⁵⁰ Brunner, supra, note 526 at 468-471.

are disadvantaged in disputes over custody of their children;⁶⁵¹ they are excluded from various spousal or family benefits because statutory definitions refer only to heterosexuals;⁶⁵² they are excluded or expelled as lesbians or for lesbian acts from Canadian military service;⁶⁵³ and they cannot bring home to Canada their non-Canadian lesbian partners on the same basis as heterosexuals.⁶⁵⁴ Sexual orientation is not enumerated in the exclusive list of protected grounds in the Canadian Human Rights Act or the Charter. The provincial human rights codes of Manitoba⁶⁵⁵, Ontario⁶⁵⁶, Quebec⁶⁵⁷, New Brunswick, British Columbia, Nova Scotia⁶⁵⁸, and the Yukon⁶⁵⁹ prohibit discrimination based on sexual orientation but the others do not.

⁶⁵¹ Arnup, supra, note 117.

⁶⁵² E.g., Ontario Family Law Reform Act, R.S.O. 1980, c. 152; Succession Law Reform Act, R.S.O. 1980, c. 488; Absentees Act, R.S.O. 1980, c. 3, as am. S.O. 1986, c. 64; Business Corporations Act, R.S.O. 1982, c. 4, as am. S.O. 1986, c. 64; Compensation for Victims of Crime Act, R.S.O. 1980, c. 82, as am. S.O. 1986, c. 64; Coroners Act, R.S.O. 1980, c. 93, as am. S. O. 1986, c. 64; Election Act, R.S.O. 1984, c. 54, as am. S. O. 1986, c. 64.

⁶⁵³ Bruner, supra, note 526 at 478-84; Women in the military are subject to CFAO 19-20, "Homosexuality - Sexual Abnormality Investigation, Medical Examination and Disposal" which provides for expulsion for either being "homosexual" - defined as "one who has a propensity for persons of one's own sex" or for "sexual abnormality" - defined as "any form of sexual behaviour not conforming to accepted moral standards".

⁶⁵⁴ Bruner, supra, note 526 at 477.

⁶⁵⁵ S.M. 1987-88, c. 45.

⁶⁵⁶ S.O. 1981, c. 53, as am. S.O. 1986, c.64.

⁶⁵⁷ R.S.Q. 1977, c. C-12.

⁶⁵⁸ N.S.R.S. 1989, c. 214; as am. R.S. 1991, c. 12.

⁶⁵⁹ S.Y. 1987, c. 3.

Heterosexual feminists view lesbian oppression as affecting only a small minority of women and as discrediting to feminism and feminists. Consequently measures to eradicate lesbian oppression usually appear near the bottom of the long list of feminist programmes. The awkwardness of heterosexual feminists toward lesbian issues is one of the reasons that the sexual-orientation model appeals to lesbians as empowering because it is more lesbians-specific. Lesbian priorities include

- (1) protection from discrimination in employment, housing, and the provision of goods and services in every province;
- (2) full parity of lesbian and gay relationships with heterosexual relationships including
 - (a) marriage and divorce,⁶⁶⁰
 - (b) custody, spousal maintenance and child-support matters,
 - (c) adoption,
 - (d) alternative forms of insemination,
 - (e) spousal, partnership, and family benefits,
 - (f) immigration,
 - (g) inheritance,

⁶⁶⁰ In custody cases, courts use the "best interests of the child" test which allows wide judicial discretion concerning the weight to be given a woman's lesbianism. Although it is often said in court decisions that lesbianism is not a sufficient reason to deny custody, a judge may presume - especially in the absence of evidence to the contrary - that a lesbian mother's lack of discreetness and her "militancy" as a lesbian would be detrimental to her child. Similarly, the court may conclude that the social stigma of a mother being a lesbian would be harmful to the child. Eaton, supra, note 33 at 116-18.

- (h) taxation, and
- (i) tort remedies for harms to a spouse;
- (3) education of children concerning sexism, prejudice against lesbians and gay men, and heterosexism;
- (4) freedom from hate-motivated violence, including legislation specifically aimed at hate-motivated crimes, vigorous enforcement of such legislation, and education of children and of the public concerning violence and hate-motivated crimes perpetrated against lesbians and gay men;
- (5) freedom from degrading pornographic depiction of "lesbian" sex scenes;
- (6) non-threatening and non-erotic settings where lesbian teens can
 - (a) interact with other lesbian and gay teens,
 - (b) obtain accurate information about lesbian lifestyles and identity to develop a positive lesbian identity and reduce internalized prejudice, and
 - (c) interact with adult lesbian and gay role models;
- (7) an environment that is free of the rhetoric of prejudice which portrays lesbians and gay men as dangerous and perverted;
- (8) programmes for lesbian youth in the schools and universities which provide educational resources about being lesbian and counseling services in the

area of individual and family counseling and suicide prevention;

- (9) affirmative recruitment and hiring of out lesbians, particularly in government and in non-traditional jobs such as law enforcement;
- (10) affirmative measures such as public service television advertisements to eradicate the atmosphere of sexism, prejudice against lesbians, and heterosexism in the workplace and in society as a whole;
- (11) funding of research to find ways to create a lesbian-friendly and woman-friendly climate in society as a whole;
- (12) funding of lesbian- and woman-friendly television and radio programming including information services;⁶⁶¹
- (13) appointment of out lesbians to positions of power and visibility, such as judicial appointments and appointments to government boards and commissions, especially to human rights commissions;
- (14) official concern, expressed in public statements, for lesbian and gay issues; and

⁶⁶¹ Closeted lesbians, especially those who are in the process of self-identifying as lesbians, are often severely handicapped by the intensely private and hidden nature of lesbian existence because other lesbians are hidden and therefore socially inaccessible. Adult lesbians need social contact with other lesbians and positive lesbian role models; family, friends and co-workers who are supportive of lesbianism; and accurate information about lesbian lifestyles and identity - including information about survival skills. "Introduction" (1987) 14:1/2 Journal of Homosexuality 1.

(15) inclusion of lesbians in employment equity policies,
programmes and legislation.

B. Sexual-Orientation Claims.

This section reviews two cases, one brought by a lesbian and the other by a gay claimant, dealing with claims based on sexual orientation. Neither of the judgments analyse sexual orientation discrimination by reference to male supremacy and the institution and ideology of heterosexuality.

In Andrews v. Ontario (Minister of Health),⁶⁶² Karen Andrews and Mary Trenholm, who had been lesbian partners for nine years, sought a declaration under the Ontario Human Rights Act and under sections 2(d), 7, and 15(1) of the Canadian Charter of Rights and Freedoms that they were entitled to dependent health coverage for Trenholm and Trenholm's children (Trenholm's biological children from a former heterosexual marriage) whom the couple was co-parenting.

The case turned on whether "spouse" in section 1(c) of the Ontario Health Insurance Act and "dependent" in sections 1(b) and 11(2) of the Act and section 1(c) of the regulations included same-sex partners who were cohabiting. The Ontario Provincial Court refused to consider the human-rights claim because the applicants had failed to exhaust their administrative remedies.

With respect to the Charter claim, the Andrews opinion is remarkable for its failure to consider and articulate the historical, cultural, social and legal context of Andrews and Trenholm's claim as women and as lesbians. In considering the section 15 claim, the court applied a three-step "similarly situated" test which was later rejected by the Supreme Court of

⁶⁶² Andrews v. Ontario (Minister of Health) (1988), 64 O.R.(2d) 258, 88 C.L.L.C. 17 (Ont. H.C.).

Canada in Andrews v. Law Society.

Noting that "if...[Andrews and Trenholm] were male and female they could be in a class of insured person with dependents", the court found that Andrews and Trenholm satisfied the first step: they belonged to a distinct class of "homosexual couples living together in a domestic situation".⁶⁶³

The court dismissed the application based on the second step – they were not "similarly situated" – and the third step – the law was not discriminatory. Andrews and Trenholm were not "similarly situated" because they cannot procreate and because other laws discriminate against them as lesbians (e.g., Andrews, as the non-biological parent, had no legal support obligation to the children and the law does not impose mutual support obligations on the two women). Ironically, the court noted but gave no legal significance to the fact that heterosexuals receive benefits under the Act regardless of any indicia of permanency, fertility or support obligations.⁶⁶⁴

The court found that the third step was not satisfied because the effect of the law was not discriminatory in the sense of a pejorative or invidious purpose or effect. In describing the law's impact on the women solely in economic terms – finding "no significant economic impact at all nor...any impairment of the individual applicant's life-style" – the court ignored the affront to Andrews and Trenholm's dignity and to the dignity of their relationship.

⁶⁶³ Ibid. at 263 (O.R.).

⁶⁶⁴ Ibid. at 261 (O.R.).

The court reached its result without any discussion of the broad purposes of the Charter and human rights legislation or of the historic disadvantage of lesbians, both as women and as non-conforming women. The court also ignored the sexual nature of Andrews and Trenholms' relationship by comparing it to same-sex non-sexual adult living arrangements.

In any event, the applicants are being treated in exactly the same manner as all other unmarried (whether in the legal or "common-law" sense) people in the province.

Heterosexual couples of the same sex, brothers and sisters, brothers, sisters and sisters, cousins, parents and adult children and any other combination of them may be living together under similar circumstances to the applicants but would in each case pay OHIP premiums as "single persons".⁶⁶⁵

In the other case, decided after the Supreme Court of Canada decided Andrews v. Law Society⁶⁶⁶, a gay litigant prevailed on a theory of sexual-orientation discrimination. In Vesey v. Commissioner of Correctional Service of Canada⁶⁶⁷, Vesey, a gay prison inmate, challenged his exclusion from the Private Family Visiting Program which allowed for extended visits with family members and which defined family as including common-law partners. It was undisputed that Vesey and his gay partner would have been considered eligible if his partner were a woman.

Vesey successfully argued that his rights had been violated under section 15 of the Charter. The court found that the prison's conduct constituted discrimination based on sexual orientation and

⁶⁶⁵ Ibid. at 263 (O. R.).

⁶⁶⁶ Andrews v. Law Society, supra, note 488.

⁶⁶⁷ Vesey v. Correctional Service of Canada (1989), 29 F.T.R. 74.

that sexual orientation is "analogous" to the enumerated grounds based on the social, political and legal context of gay men. The court considered "the place of the group in the entire social, political and legal fabric of our society"; the historic victimization and stigmatization of gay men; provincial and territorial human-rights codes which enumerate sexual orientation as a prohibited ground; the position of the House of Commons Parliamentary Committee on Equality Rights appearing in the report entitled "Equality for All"; and the immutability of sexual orientation.

Although the court defined immutability in fairly vague terms, it is unfortunate that immutability found its way into the Vesey judgment at all. The court gave immutability the following definition:

Most of the grounds enumerated in section 15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability.⁶⁶⁸

The Vesey judgment is clearly a "status return ceremony"⁶⁶⁹ in that the relationship of a gay inmate was accorded the same dignity as intimate heterosexual relationships. However, it is a win for the concept that sexual orientation as an immutable category determinative of membership in a sexual minority. The

⁶⁶⁸ Ibid. at 78.

⁶⁶⁹ Kallen, supra, note 1 at 33.

Vesey case was affirmed on appeal.⁶⁷⁰ The Court of Appeal expressly refrained from addressing the substantive issue of whether Vesey's section 15 equality rights were infringed because the appellant formally informed the court that the Attorney General of Canada conceded that sexual orientation is a ground covered by the Charter. This was an admission which was not made before the trial court.⁶⁷¹

These two sexual-orientation cases, decided just one year apart, show a gay litigant faring better than a lesbian. Interestingly, the lesbian was denied family benefits - a result which had the twin effects of withholding recognition of a lesbian family while minimizing the state's burden of support - whereas the gay inmate's "private" sexual needs were legally recognized.

⁶⁷⁰ Vesey v. Correctional Service of Canada (1990), 109 N.R. 300.

⁶⁷¹ Ibid. at 304.

C. Sex-Discrimination Claims.

There are two pre-Charter cases involving sex-discrimination claims brought by gay men. Although both cases were unsuccessful, the Charter may provide a viable basis for a sex discrimination claim to be brought by lesbian litigants in the future.

In Re Board of Governors at the University of Saskatchewan et al and the Saskatchewan Human Rights Commission⁶⁷², the gay claimant had been discriminated against in employment solely because he was a gay man. As an employee of the University, he had alleged discrimination on the basis of sex under section 3 of the Fair Employment Practices Act which provided that:

No employer shall refuse to employ or continue to employ, or otherwise discriminate against any person in regard to employment or any term or condition of employment because of his race, religion, creed, sex, nationality, ancestry or place of origin.⁶⁷³

Upon publication of the complainant's association with the Gay Liberation Movement, the University suspended certain of his employment functions including his supervision of student-practice teaching. After the complainant filed his complaint with the Saskatchewan Human Rights Commission, the University applied to the Court of Queen's Bench for an order prohibiting the Commission from commencing a formal inquiry.

In ruling against the claimant, Johnson J. had this to say about the meaning of "sex" in the Act. The prohibition of sex discrimination

⁶⁷² Re Board of Governors at the University of Saskatchewan et al and the Saskatchewan Human Rights Commission (1976), 66 D.L.R.(3d) 561 (Q.B.).

⁶⁷³ Fair Employment Practices Act, R.S.S. 1965, c.293 as am. 1972, c.43, s.4.

...would generally be considered to be on the basis of whether or not that person was a man or a woman, not on his sexual orientation, sexual proclivity, or sexual activity. In other words, sex as used in Section 3 would generally and popularly be regarded as referring to the gender of the employee...and not to the sexual activities or propensities of that person. It should be noted that the section in question prohibits discrimination on the basis of his race, his religion, his sex, etc. and not on the basis of his sexual activity, his sexual propensity or his sexual orientation.⁶⁷⁴

This case was cited with approval in a similar ruling seven years later, in Vogel v. Government of Manitoba.⁶⁷⁵ Vogel brought suit before a Board of Adjudication under the Manitoba Human Rights Act, claiming discrimination by his employer, the Government of Manitoba, because he was denied dental benefits for his gay partner. Had Vogel been a female, his male partner would have been covered. Vogel's complaint was based on claims of sex and marital-status discrimination (both of which were enumerated grounds) and sexual orientation which was then not included in the Manitoba code. The Board rejected all three claims. The Board was unwilling to find that a relationship between two men could constitute a common-law relationship, hence no "marital status" existed. The Board rejected his sexual-orientation claim because sexual orientation was not enumerated in the Act. The court disposed of Vogel's sex-discrimination claim in the following fashion.

By its terms, the dental plan provided coverage for an "employee's spouse or common-law spouse", the latter being defined

⁶⁷⁴ Re Board of Governors at the University of Saskatchewan et al, supra, note 672 at 564.

⁶⁷⁵ Vogel v. Government of Manitoba (1983), 4 C.H.R.R. D/1654 (Man. Bd. of Adj.).

as "persons of the opposite sex". The Board of Adjudication, relying on Re Board of Governors at the University of Saskatchewan et al and the Saskatchewan Human Rights Commission⁶⁷⁶, stated as follows:

Sex discrimination and the meaning of "sex" for purposes of human rights legislation has been judicially considered in both the United States and in Canada, with the same results. Sex refers to the gender of the employee and not to the sexual proclivities or propensities of that person.⁶⁷⁷

The Board rejected the sex-discrimination claim based on the court's finding that the dental plan treated men and women equally.

Since Section 6(1) deals with discrimination in respect of terms or conditions of employment, it is the employee's sex that determines whether there is or is not discrimination. The question then is whether the denial of dental benefits to... [Vogel's partner] is a result of Mr. Vogel's gender or his sexual orientation or preference. Both males and females are treated the same under the Dental Services Plan. Thus, the plan does not discriminate according to the gender [sex] of the employee. The fact that Mr. Vogel is male does not give rise to any discrimination.⁶⁷⁸

Had the case involved lesbians and had the historical context of lesbian oppression been presented, the court might have adopted the sex-discrimination model which acknowledges male domination, the fundamentally different social experiences of the sexes, the widespread sex-segregation that persists in society, and the relationship of heterosexual privilege to the maintenance of women as an underclass.

Although sex discrimination, as a legal theory, was

⁶⁷⁶ Re Board of Governors at the University of Saskatchewan et al, supra, note 672.

⁶⁷⁷ Vogel v. Government of Manitoba, supra, note 675 at D/1656.

⁶⁷⁸ Ibid. at D/1656.

unsuccessful in these two cases, Charter equality jurisprudence goes beyond the "similarity of treatment" model of equality by recognizing male domination and incorporating effects-based reasoning. If the Andrews case, which involved a lesbian seeking family benefits, could be decided today based on a claim of sex discrimination under the Charter, the following equality principles which have been adopted by the Supreme Court of Canada should be emphasized:

1. The central function of section 15 is to address the disadvantages suffered by persistently disadvantaged groups;⁶⁷⁹

A sex-discrimination claim brought by a lesbian would start with the assertion that women are the relevant disadvantaged group (rather than lesbians only) and that the discriminatory statute disadvantages all women because, by penalizing lesbians, the statute reinforces male domination of women by reinforcing the assumptions that

(a) traditional social, gender and sexual roles for women are dictated by nature;

(b) heterosexual relations for women are dictated by nature;
and

(c) the heterosexual family is dictated by nature.

2. The equality rights of the Charter should be given a broad and purposive interpretation⁶⁸⁰ and should

⁶⁷⁹ Andrews v. Law Society, supra, note 488 at pp. 16 (D.L.R.), 172 (S.C.R.) (McIntyre J.).

⁶⁸⁰ Ibid. at 14 (D.L.R.); R v. Turpin, supra, note 554 at 35.

incorporate concepts of equal concern and respect;⁶⁸¹

For lesbians seeking equality under the Charter using the sex-discrimination model, asking a court to give equality rights a broad and purposive interpretation and to incorporate concepts of equal concern and respect would mean "equal concern and respect" for lesbians - and for all women - which would mean judicial recognition of the role played by the assumed innateness of traditional roles, heterosexual relations, and the heterosexual family in maintaining women's pervasive and profound subordinate status in Canadian society.

3. In assessing whether a complainant's rights have been infringed, a court must consider whether the distinction is based on an enumerated or analogous ground and whether the distinction has a discriminatory effect on the complainant.⁶⁸² Discrimination is either an intentional or unintentional distinction based on a personal characteristic which either (i) imposes burdens, obligations, or disadvantages or (ii) withholds or limits access to opportunities, benefits, and advantages available to other members of society.⁶⁸³

In deciding the Andrews case as a sex-discrimination case under section 15, a court would be called upon to decide whether the refusal by the Ontario Health Insurance Plan (OHIP) to pay dependent coverage - based on a narrow interpretation of the term "spouse" which excluded lesbian spouses - constituted discrimination by withholding or limiting access to benefits and advantages available to other members of society.

⁶⁸¹ Andrews v. Law Society, supra, note 488 at pp. 14-15 (D.L.R.), 182 (S.C.R.).

⁶⁸² Ibid. at pp. 23-24 (D.L.R.), 182 (S.C.R.).

⁶⁸³ Ibid. at pp. 18 (D.L.R.), 174-75 (S.C.R.).

Based on the history of women and lesbians' social subordination, the court would be asked to rule for Andrews because OHIP's denial of dependent-coverage benefits reinforces male domination. Lesbian history demonstrates that lesbian oppression has functioned to perpetuate the rigid assignment of traditional roles to women based on biological sex; lesbian history demonstrates that lesbian oppression serves male domination of women by reinforcing the ideology of heterosexuality which maintains the "law of male sex right to women";⁶⁸⁴ lesbian history shows that the coercion of women into heterosexual relations with men has contributed to women's pervasive social, economic, emotional, and sexual subordination in society by reinforcing the heterosexual family.⁶⁸⁵ By extending dependent-care coverage to Andrews, the court be recognizing the legal relevance of women's private-sphere oppression and would be affirming women's freedom, agency and choice. Forcing the court to recognize the legal relevance of lesbian and women's history would undermine the legal fiction that the public/private split is dictated by nature by exposing women's roles, compulsory heterosexuality, and the heterosexual family as socially constructed.

A lesbian-rights case seeking formal equality (the same benefits for lesbian families as for heterosexual families) on a

⁶⁸⁴ Rich, supra, note 3 at 17.

⁶⁸⁵ Feminist analysis of the family has exposed the oppressive effects of the segregation of women into individual household units: women are implicated emotionally in their subordination to individual men and male exploitation of women's sexuality and unpaid labour in the family results in women's economic dependence on men because women's childbearing and child rearing responsibilities leave them disadvantaged in the labour market.

theory of sexual orientation might be easier to win. However, using the sex-discrimination model offers a stronger analysis of lesbian oppression as one of the means of enforcing traditional roles for women, compulsory heterosexuality for all women, and the heterosexual family form for all women.

D. Family-Status Claims.

[T]he family, as we know and have known it, is no more natural than anything else based on the false assumption of the fixed nature of the sexual roles and the inequality which rests on it.⁶⁸⁶

The admission of lesbian partners to "family" status is hotly debated. Didi Herman cautions lesbians not to embrace family ideology because spousal rights-assertions risk de-politicizing the struggle to socialize the needs presently met by the family.⁶⁸⁷ In Herman's view, the admission of lesbians and gay men to the family will perpetuate the family which is "a fundamental pillar of maintaining women's oppression" which typically normalizes unequal power relations and validates male domination of women and children.⁶⁸⁸ The goal should be

...to jettison the privileged status of the heterosexual married couple...and to devise a system of rights, duties, or obligations which are not dependent on any form of 'coupledom' or marriage or quasi-marriage.⁶⁸⁹

Herman argues that buying into family ideology will not radicalize the family which is central to women's economic and ideological oppression. A central feature of the feminist project must be

...to ensure that the needs met practically or ideologically by the 'family' are met socially, are

⁶⁸⁶ Clark, supra, note 31 at 42.

⁶⁸⁷ Herman, supra, note 146 at 807, citing D'Emilio, supra, note 129.

⁶⁸⁸ Herman, supra, note 146 at 797.

⁶⁸⁹ Ibid. at 797, quoting Carol Smart, The Ties That Bind: Law, Marriage and The Reproduction of Patriarchal Relations (London: Routledge & Kegan Paul, 1984) 146.

unprivatized.⁶⁹⁰

The feminist critique of the family has been criticized by black feminists who argue that, for blacks, the family has been a source of strength and affirmation and a site of political and cultural resistance to racism.⁶⁹¹ The nuclear and patriarchal family critiqued by feminists is something quite different from the family referred to by black feminists (e.g., individuals who come together to provide economic and emotional support to one another⁶⁹²). Herman acknowledges that the black family bears striking similarities to lesbians and gay families.

Compelling arguments, however, can also be made that lesbian and gay families should receive the same legal recognition and benefits as heterosexual families. Forcing the law to publicly recognize lesbian families as worthy of the same dignity and respect as heterosexual families could have enormous symbolic value and could change the heterosexual family norm. The admission of lesbians to the institution of the family, having lesbian relationships deprivatized, and having the dignity and worth of lesbian relationships validated would be empowering and transformative for lesbians. Also, once lesbians have access to family and spousal benefits, lesbians would have economic incentives to come out and, as more lesbians do come out, social norms would change as society becomes more habituated to lesbians

⁶⁹⁰ Herman, supra, note 146 at 797, citing M. Barrett and M. McIntosh, The Anti-Social Family (London: Verso Editions, 1982) 134, 155-59.

⁶⁹¹ Herman, supra, note 146 at 799-801.

⁶⁹² Ibid. at 800, quoting Harriet Michel, "The Case for the Black Family" (1987) 4 Harvard Blackletter Journal 21 at 21.

both on the personal and social levels.

Recognition of lesbian families has the potential to radically transform the idea of the family because lesbian families

...deny the traditional belief and prescription that stable relations require hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex.⁶⁹³

Lesbian families also challenge one of the main tenets of the ideology of heterosexuality, that heterosexual marriage is the only natural, normal, and enriching form of adult relationship.

On balance, I favour the arguments for admitting lesbians to the institution of the family because lesbian relationships will be relocated in the public sphere of equal dignity and respect, make lesbianism visible, and discourage the hostile social atmosphere supported by the assumptions that privilege heterosexuality and degrade lesbian relationships.

A gay man used the family-status model in Mossop v. Canada (Secretary of State),⁶⁹⁴ a case decided by a human-rights tribunal under the Canadian Human Rights Act,⁶⁹⁵ Mossop claimed that the denial of bereavement leave to attend the funeral of his gay partner's father constituted discrimination on the basis of family status. Family status was chosen as the ground for relief under the Act because sexual orientation was not listed on the exclusive

⁶⁹³ Law, supra, note 63 at 218.

⁶⁹⁴ Mossop v. Canada (Secretary of State) (1989), 10 C.H.H.R. D/6064 (Can. H. R. Trib.).

⁶⁹⁵ Canadian Human Rights Act, supra, note 513.

list of prohibited grounds of discrimination. The Act prohibits both sex and family-status discrimination but not discrimination based on sexual orientation. It was undisputed that, had Mossop's relationship been either a heterosexual marriage or a heterosexual common-law relationship, his leave request would have been allowed under the terms of the collective agreement.

Counsel for the Commission argued that a gay couple can constitute a family, that Mossop and his partner of 13 years were a family, and that Mossop had been discriminated against because the collective agreement did not treat all families the same. Opposing counsel argued that Mossop's partner fell within the collective-agreement definition of common-law spouse except that his partner was not "of the opposite sex" hence bereavement leave was denied, not because of the nature of the relationship between Mossop and his partner, but rather because of Mossop's sexual orientation, a ground not covered by the Act.⁶⁹⁶

Dr. Margrit Eichler, who testified in the Mossop case as an expert, gave the term "family" a flexible and functional definition not requiring any single indicator to always be present. In Dr. Eichler's opinion, Mossop's relationship with his partner constituted a family relationship because

...[f]rom what I've heard this is a relationship of some standing in terms of time with the expectation of continuance. So it's not a relationship that is defined in terms of time. You have the joint residence, you have economic union in many ways as expressed by the fact that the house is jointly owned, that life insurance - the people, the two (2) partners are beneficiaries - that there's joint financing, it's a sexual relationship, housework is shared and it's an emotional relationship

⁶⁹⁶ Mossop v. Canada (Secretary of State) supra, note 694 at D/6070.

which is a very important aspect of familial relationships.⁶⁹⁷

Finding for Mossop, the tribunal ruled that the term "family status" was ambiguous⁶⁹⁸ and that it should be given a contemporary meaning that accords with "how people are living and how language reflects reality".⁶⁹⁹ Relying on case law supporting an expansive and liberal interpretation of the Act to advance its broad purpose, the tribunal concluded that Mossop's relationship met a functional definition of family.⁷⁰⁰

The Mossop decision was reversed on appeal⁷⁰¹ and that reversal has been upheld by the Supreme Court of Canada which stated that the result might have been different under the Charter.

Relying on a functional definition of family allowed Mossop to fit his gay relationship into the legal norm of the heterosexual marriage which involved a detailed comparison of his family or spousal relationship with the ideal heterosexual relationship. Despite Herman's concerns that embracing family ideology is anti-feminist, forcing the heterosexual-family norm to accommodate lesbian and gay families - and other family forms as well - may de-center the heterosexual nuclear family, thereby furthering feminist struggles to socialize the needs presently met by the family.

One of the harms of adopting family ideology which corresponds

⁶⁹⁷ Ibid. at D/6072.

⁶⁹⁸ Ibid. at D/6093.

⁶⁹⁹ Ibid. at D/6094.

⁷⁰⁰ Ibid. at D/6072-74.

⁷⁰¹ Attorney General of Canada v. Mossop, Unreported decision of the Federal Court of Appeal, June 29, 1990 (Court file A-199-89).

to the harm of adopting the sexual-orientation model, however, is the risk that lesbians will try to fit themselves into the legal norm rather than continuing to demand that legal norms fit lesbians. This is the phenomenon referred to by Robson as domestication, "...the domestication of our experiences into narratives constructed by the rules of law rather than ourselves".⁷⁰²

⁷⁰² Ruthann Robson, Lesbian (Out)Law: Survival Under the Rule of Law (Firebrand Books, Ithaca, New York, 1992) at 87.

VII. CONCLUSION

In R. v. Turpin⁷⁰³, Madame Justice Wilson acknowledged that the equality guarantees of the Charter may require the Supreme Court to rectify discrimination that is entrenched and socially accepted.

The argument that s. 15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel or disturbing is not, in my respectful view, an acceptable approach to the interpretation of Charter provisions.⁷⁰⁴

The ideology of heterosexuality and its myriad social manifestations are entrenched and socially accepted. Their recognition and critical examination as problematic would be novel and disturbing to many Canadians. Lesbians bringing Charter claims based on sex discrimination will expect judges to recognize that the pervasive legal disabilities affecting lesbians enforce a profound social censure which is inspired by and which perpetuates the most basic form of sex-stereotyping which is that women must wholeheartedly embrace heterosexual relations.

In 1989, the Supreme Court of Canada overturned the Bliss decision under section 15 of the Charter in Brooks v. Can. Safeway Ltd.⁷⁰⁵ Not only did the Supreme Court find that pregnancy discrimination was sex discrimination, the Brooks case also discredits the premise of the Bliss case - that sex-discrimination analysis notices only the superficial dichotomy of biological sex

⁷⁰³ R. v. Turpin, supra, note 554.

⁷⁰⁴ Ibid. at 32.

⁷⁰⁵ Brooks v. Canada Safeway (1989) 59 D.L.R. (4th) 321.

but not the consequences or component parts. Brooks recognizes that discrimination against a trait, such as pregnancy, can serve as a "proxy" for discrimination against women just like discrimination against persons lacking a high school diploma can be a "proxy" for discrimination against certain groups.⁷⁰⁶ Similar reasoning would recognize that discrimination against lesbians is proxy discrimination against all women by enforcing gender stereotypes for all women and thereby maintaining male supremacy.

Schachter v. Canada⁷⁰⁷ also supports using sex discrimination as a basis for discrimination against lesbians because the case turned on the analysis of gender stereotypes. Discrimination against a natural father was recognized as integrally related to women's social subordination. The Schachter sex-discrimination analysis could be read broadly to recognize discrimination against lesbians as a means of preserving rigid and stereotypical "masculine" and "feminine" gender and sexual roles for all women.

In Schachter v. Canada⁷⁰⁸, a natural father brought a section 15 claim under the Charter claiming sex discrimination because of the disparate treatment of natural fathers and adoptive parents under the Unemployment Insurance Act⁷⁰⁹. Section 32 of the Act provided for 15 weeks of benefits for time spent away from work by either an adoptive mother or father due to the adoption of a child.

⁷⁰⁶ Ibid. at 341-44.

⁷⁰⁷ Schachter v. Canada, [1988] 3 F. C. 515, 52 D.L.R. (4th) 525.

⁷⁰⁸ Ibid. at 539 (D.L.R.).

⁷⁰⁹ Unemployment Insurance Act, 1971, S. C. 1970-71-72, c. 78, ss. 30, 32.

Section 30 of the Act provided for 15 weeks of benefits for a natural mother to take time off from work after the birth of a child. A natural father, however, was eligible for benefits only if it was reasonable for him to do so due to the death or disability of the natural mother.⁷¹⁰ In extending the benefits available to adoptive fathers to natural fathers, the trial judge stated

I believe that a proper understanding of this distinction created by the Act requires that one consider the assumptions upon which it is based. These relate not only to the natural father as the plaintiff, upon whom it immediately impacts, but also to the natural mother. Even if one accepts...that s. 30 benefits are mainly for child-care purposes and are thus roughly the equivalent of s. 32 benefits, this approach is predicated on the belief that, upon the birth of a baby, its natural mother is the natural care-giver and that the father is the bread-winner. It assumes that not only it is unnecessary that the natural father have the opportunity to receive partial compensation in lieu of employment income in order to stay home and be the principal care-giver, but also that the natural mother should not at least have the option, which his presence at home during this period would afford, to return to paid employment herself as a bread-winner if she is otherwise able to do so. It is this opportunity and choice denied to the natural parents which is afforded to adoptive parents by s. 32.

Thus, in part, I am able to characterize this as discrimination based on "sex" which is one of the specified grounds in s-s. 15(1). This is because it has its roots in sexual stereotyping of the respective roles of the father and the mother generally, and specifically in relation to their natural new-born child. As was said by the Supreme Court of the United States in Califano v. Westcott, 443 U. S. 76 (1979) at p. 89, in respect of an Act of Congress which provided financial assistance for families with dependent children where they lacked support because the father (but not the mother) was unemployed, such gender classification

is...part of the "baggage of sexual stereotypes"...that presumes the father has the "primary responsibility to provide a home and its essentials"...while the mother is the

⁷¹⁰ Schachter v. Canada, supra, note 707 at 530-31 (D.L.R).

"center of the home and family life".⁷¹¹

As the Schachter court considered the assumptions upon which the Act was based, courts considering a sex-discrimination claim brought by lesbians must examine the assumptions which support the ideology of heterosexuality and which have caused lesbian social disadvantage - such as the essentialist and heterosexist judgment that it is normal and healthy for women to be sexually, emotionally and financially dependent on men.

Recognizing lesbian oppression as sex discrimination is the strong analysis. In contrast, the legal category "sexual orientation" is weak because it frames lesbian oppression as the historic disadvantage of a sexual minority. Sex discrimination analysis, because it is concerned with the sources of male domination of women, has the necessary analytical framework and therefore the persuasive power to explain and to overcome judicial and legislative resistance to full equality for lesbians.

Sexual orientation analysis is weak for two reasons. First, it is primarily concerned with sexual orientation as an irrelevant basis for classification and with the effects of the classification on the potential lesbian or gay claimant. These issues are indeed highly relevant to a finding of discrimination in a section 15 claim.⁷¹² In the case of discrimination against lesbians,

⁷¹¹ Ibid. at 539-40 (D.L.R.).

⁷¹² One of the strengths of Charter equality jurisprudence is its emphasis on the effects of discrimination on the victims of the discrimination. As stated by McIntyre J. in Andrews v. Law Society, the definition of discrimination applicable to section 15 claims focuses on whether a distinction is made on "grounds relating to a personal characteristic of the individual or group" which has the effect of imposing burdens or withholding benefits. Further,

however, the reasons for lesbian social subordination are, like the reasons for women's subordination generally, woven as invisible threads into every aspect of life and they will not disappear unless they are continually subjected to critical examination. In order to understand the deeply rooted underlying sources and causes of the subordinate status of lesbians it will be necessary to continuously examine the social construction of heterosexual privilege and its relationship to male domination.

The reason for advocating sex-discrimination analysis is obviously not that sexual orientation is unrecognized as a prohibited ground under the Charter as the judgment in the Court of Appeal in Vesey v. Correctional Service of Canada⁷¹³ makes clear. The Attorney General of Canada now concedes that sexual orientation is entitled to Charter protection. The reason for adopting sex discrimination analysis is the compassion/condonation dichotomy, described by Bruce Ryder as

...the most common response of heterosexually identified people to the struggles of lesbians and gays for equality: compassion for or tolerance of the misguided souls, yes; promotion or condonation of "their lifestyle", never.⁷¹⁴

* * *

The manner in which Canadian legislators and judges

...it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated ground or not. The effect of the impugned distinction or classification on the complainant must be considered.

Andrews v. Law Society, supra, note 488 at pp. 23-24 (D.L.R.), 182 (S.C.R.).

⁷¹³ Vesey v. Correctional Service of Canada, supra, note 670.

⁷¹⁴ Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) Canadian Journal of Family Law 39 at 43.

have responded to homosexuality can be understood in terms of the compassion/condonation dichotomy. The compassionate approach is evident in the belief, held by a strong majority of Canadians, that it should be illegal to deprive an individual of access to housing, employment and services solely because of his or her sexual orientation...[T]he "no condonation" approach is manifest in the wide range of overtly discriminatory laws and policies that provide material and ideological support to heterosexuality. Canadian law has consistently failed to provide any such support to gays and lesbians.⁷¹⁵

Ryder notes that the compassion/condonation dichotomy simultaneously affirms the superiority of heterosexuality and the inferiority of lesbians and gay men and operates to rationalize lesbian and gay oppression.

The compassion/condonation dichotomy provides the discursive framework through which the social and legal construction of heterosexual privilege is placed beyond critical examination. On the one hand, if heterosexual privilege is socially and legally constructed, it can be socially and legally dismantled. On the other hand, heterosexually-identified people can avoid confronting their privilege by viewing heterosexuality as a norm dictated by biology or nature. The flip-side of the "normal" heterosexual is, of course, the "abnormal" homosexual. For many years, homosexuality was treated as a pathology of the soul, leading to criminalization; later, as a pathology of the mind, leading to medicalization. The criminal and medical models are no longer dominant, but the tendency to believe that biology or nature has somehow failed the homosexual remains. She or he deserves our compassion for this trick of fate.

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

⁷¹⁵ Ibid., footnote omitted.

artificial institution, vulnerable to the conferral of social and legal supports to other sexualities.⁷¹⁶

Although I do not agree with Ryder's assumption that lesbians and gay men constitute a sexual minority, I share his view that

...there will be neither freedom nor equality of sexual identity until the walls of heterosexual privilege are dismantled, and lesbians and gay men no longer suffer the assaults of heterosexuality's natural pretensions.⁷¹⁷

Because heterosexuality is the organizing principle of male supremacy, a critical examination of the institution and ideology of heterosexuality will necessarily and directly implicate sex-discrimination theory.

The compassion/condonation dichotomy stems from the liberal construction of lesbianism as a sexual minority. Sex is a private sphere activity. Society is compassionate toward an alternative sexuality because it is a private-sphere activity. However, society balks at deprivatizing lesbianism by extending the same material and ideological support to lesbians as to heterosexuals. The sex-discrimination approach, as a means of addressing lesbian oppression, depends on making legally relevant the private-sphere experience of subordination of lesbians and women and thereby challenging heterosexual privilege.

⁷¹⁶ Ibid. at 43-44.

⁷¹⁷ Ibid. at 97.

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