

**Dalhousie University Schulich School of Law**

---

**From the Selected Works of Elaine Craig**

---

2004

# 'I Do' Kiss and Tell: The Subversive Potential of Non-Normative Sexual Expression from Within Cultural Paradigms

Elaine Craig



Available at: [https://works.bepress.com/elaine\\_craig/29/](https://works.bepress.com/elaine_craig/29/)

**ARTICLE: 'I DO' KISS AND TELL: THE SUBVERSIVE  
POTENTIAL OF NON-NORMATIVE  
SEXUAL EXPRESSION FROM WITHIN CULTURAL PARADIGMS**

*Elaine Craig\**

**(Fall, 2004) 27 Dalhousie L.J. 403**

**16677 words**

Copyright (c) 2004 Dalhousie Law Journal Dalhousie Law Journal

**BIOGRAPHY:**

\* Elaine Craig is currently completing an LL.M. at Yale University

**HIGHLIGHTS:**

*Using a comparative analysis of the equality movements of sexual minorities in Canada and India the author identifies a symbiosis between the subversive benefits of a deconstructionist approach to equality and the practical achievements to be gained by a lights-based model of social justice. The analysis is conducted through an examination of the role that the expression of same-sex desire plays in the legal and social positions of sexual minorities in Canada and India. The author argues that the acquisition of rights can provide sexual minorities with greater access to dominant cultural rituals and that such access provides opportunities to directly engage and challenge those dominant norms underlying sexual minority oppression.*

*A l'aide d'une analyse comparative des mouvements de revendication de l'égalité des minorités sexuelles au Canada et en Inde, l'auteure relève une symbiose entre les avantages subversifs d'une approche déconstructionniste de l'égalité et les gains pratiques qui peuvent être obtenus grâce à un modèle de justice sociale fondé sur les droits. L'analyse est réalisée en procédant à un examen du rôle que joue l'expression du désir pour un individu du même sexe dans les positions légale et sociale des minorités sexuelles au Canada et en Inde. L'auteure affirme que l'acquisition de droits peut accroître l'accès des minorités sexuelles aux rituels culturels dominants, et que cet accès accru offre les possibilités de prendre à partie et de contester directement les normes dominantes qui*

*soustantif l'oppression des minorités sexuelles.*

**TEXT:**

*Foreword*

I recently attended my first lesbian wedding. The wedding was in every respect except one an exceptionally traditional event. In the days following this wedding I spoke with several other attendees. Some had attended many other lesbian weddings and commitment ceremonies. For others, this was, like mine, their first experience with same-sex nuptials. Everyone I spoke with however, articulated a similar sentiment about this particular celebration. Whether it was the white dress or the toasts to the brides or the tossing of the bouquets, each guest I spoke with identified several aspects of this very traditional wedding that made them feel disrupted in some manner. Each of the aspects identified pertained to one or another of the traditional rituals performed by the couple. Why did this wedding, filled with traditional rituals familiar to everyone, seem to create feelings of disruption in a way that the individualized commitment ceremonies commonly attended by the lesbian community do not? I believe that the discomfort arose because of the subversive impact created when well known cultural rituals are employed to express or depict something other than their commonly understood meaning.

*Introduction*

The purpose of this paper is to reconcile what I suggest is a false dichotomy in contemporary equality discourse. It seems that much energy and intellect is wasted pitting the subversive benefits of a queer theory/ deconstructionist approach to equality against the achievements reached thus far by the gay and lesbian rights movement. It is important to recognize that access to a rights regime such as that developed in Canada requires an identity-based approach to equality that inevitably leads to the exclusion of some, and the homogenization of others. However, so too is it important to recognize that rights create power and that some manifestation of power may be necessary to facilitate the subversion of those normative standards that contribute to heterosexual hegemony. I will argue that the subversive effect of minority sexual expression can be employed to counter or temper the homogenization and essentialism which appears to be the unavoidable by-product of a sexual minority rights movement. I will further suggest that the subversive potential of sexual minority expression is facilitated by rights discourse and the gay and lesbian rights movement.<sup>1</sup>

An examination of the role that the expression of same-sex desire plays in the legal, and social position of sexual minorities in both Canada and India reveals the subversive power of cultural appropriation and adaptation. An inter-play between rights discourse and the de-stabilization of normative standards exists and the successful pursuit of equality requires both. I will assert that the acquisition of rights by minorities promotes acceptance of these minorities among dominant populations. Acceptance broadens the conduct deemed permissible by dominant norms. This is a positive step towards sexual equality; however, it alone may not have a subversive effect. The process of broadening a norm still allows for a model of entitlement and equality based on

exclusivity. Equality also requires tolerance of conduct which does not conform to normative standards. Tolerance is 'acceptance' of conduct outside of the norm and as such it is not based on a model of exclusivity.<sup>2</sup> I will suggest that tolerance can be achieved through some degree of normative deconstruction. Without some deconstruction, acceptance into these dominant norms will be possible for some sexual minorities through the acquisition of power but tolerance for those who continue to exist outside the dominant norms will not develop.

The pursuit of equality for sexual minorities in Canada and India has taken different paths. In Canada the focus has very much been on the acquisition of rights. In India, the lack of a legal mechanism to pursue justice through the law has dictated an approach which may be more focused on the promotion of tolerance. A comparison between the legal and social position of sexual minorities in India and Canada, made through the lens of sexual minority expression, reveals that the disruption of a sexual hegemony requires both tolerance and power. The appropriation and adaptation of cultural rituals serves as an effective tool for de-stabilizing hetero-normative standards. I will argue that the acquisition of rights can provide sexual minorities with greater access to dominant cultural rituals which, through the social expression of non-normative sexual desire directly engages those dominant norms underlying sexual minority oppression.

### I. *Why Compare Canada and India?*

Contrasting the historical similarities and substantive constitutional similarities in India and Canada with the distinctions found in the contemporary rights regimes for sexual minorities in these countries permits an analysis focused on the role of sexual expression in these two culturally distinct societies. Constitutional law in India and Canada share in common a history of British colonialism. While the manner and duration of colonialism in the two countries is distinct,<sup>3</sup> there are similarities with respect to the historical treatment of sexual minorities in India and Canada. Both countries inherited laws from Britain which, by prohibiting acts such as sodomy, indirectly criminalized sexual relations between individuals of the same gender.<sup>4</sup> Gay men were prosecuted under these anti-sodomy laws more frequently than any other demographic by the post-colonial justice systems in both India and Canada.<sup>5</sup>

The Constitutions of both India and Canada guarantee fundamental rights to equality, which to varying degrees promise protection against discrimination for sexual minorities. In Canada, section 15 of the *Charter of Rights and Freedoms*<sup>6</sup> guarantees both equality before and under the law and the equal protection and benefit of the law, by prohibiting discrimination. Section 15 has been interpreted to include freedom from discrimination on the basis of sexual orientation.<sup>7</sup> In India, Article 14 of the *Constitution of India* guarantees equality before the law and the equal protection of the law.<sup>8</sup> Article 15 prohibits discrimination on the grounds of sex.<sup>9</sup> In Canada freedom of expression, including sexual expression, is guaranteed under section 2(b) of the *Charter*.<sup>10</sup> Article 19 of the *Constitution of India* states that all citizens have the right to freedom of speech and expression.<sup>11</sup>

Despite these historical and constitutional similarities, the post-colonial treatment, social and legal position, and perception and tolerance of sexual minorities in India and Canada have followed different paths. In Canada, Pierre Trudeau ostensibly pulled the government out of the bedrooms of Canadian sexual minorities by decriminalizing buggery and certain 'acts of gross indecency' in 1969.<sup>12</sup> With the 1995 determination by the Supreme Court of Canada that sexual orientation is a prohibited ground of discrimination under s. 15 of the *Charter*<sup>13</sup> has come ten years of arguably successful gay and lesbian rights litigation in Canada.<sup>14</sup> Today same-sex couples in Ontario, British Columbia, Quebec, Nova Scotia, Manitoba, the Yukon, and Newfoundland have the legal right to marry.<sup>15</sup>

Conversely, legal circumstances for sexual minorities in India have not changed significantly since adoption of the British anti-sodomy law that now constitutes the substance of s. 377 of the *Indian Penal Code*.<sup>16</sup> This provision subjects those members of Indian society who "voluntarily have carnal intercourse against the order of nature with any man, woman or animal," to the possibility of life imprisonment. While the section has not frequently been invoked in India, in those cases in which it has been applied, the accused has disproportionately been a member of a sexual minority group.<sup>17</sup>

A petition by the New Delhi based AIDS activist organization the Naz Foundation, challenging the constitutionality of s. 377 of the *Indian Penal Code* under the equality provisions enshrined in the *Constitution of India*, was filed with the Delhi High Court in 2002. While it has not yet been heard, the Court did note, in a preliminary hearing, that the government will have to present a strong case if it hopes to preserve the law.<sup>18</sup> The government's response to the petition, filed on September 20, 2003 claims that not only is the provision constitutional but it should be expanded in order to encompass more lesbian activity; the government asserts that "Indian society is intolerant to the practices of homosexuals/ lesbianism."<sup>19</sup>

Despite the Delhi High Court's comment in the Naz Foundation petition, the sentiment of India's judiciary towards sexual minorities appears to reflect the lack of acceptance articulated by government officials in response to the petition. In *Gopi v. State of Karnataka*, the Supreme Court of India, in likening an appellant convicted of raping a one and half year old girl to gays and lesbians, stated that "sexual offences . . . constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape."<sup>20</sup>

A substantive comparison between the text of the Canadian and Indian constitutions could potentially explain the seemingly radical difference in the treatment of sexual minorities in two countries which started with such similar legal approaches towards sexual minorities, and which now guarantee somewhat similar fundamental rights. One could point to the amending formula in the *Constitution of India* and argue that its undemanding procedure creates a defacto parliamentary supremacy that subjects Indian minorities to the tyranny of the majority. Perhaps distinctions in the wording of each constitution's limiting provisions on fundamental rights, or distinctions in the

declaration of emergency powers between the two constitutions could serve as explanations for the discrepancy. However, I would argue that distinctions in the wording of constitutions, or even distinctions between the political structures they establish are not alone determinative of whether or not constitutional guarantees will affect social change. The constitutional guarantees of equality and freedom from discrimination may be a necessary precursor for social change in a society, but whether such guarantees actually can or do create social change depends on the historical and cultural context in which they are situated.

I would suggest that constitutional law provides a mechanism through which to examine the necessary ingredients for social change; a society's application and interpretation of its constitution is, in part, a reflection of its culture and culture is a determinative factor in the process of social change. I am not asserting that difference is only related to culture or that recognition of cultural difference is all that is necessary to effect social change.<sup>21</sup> I am suggesting, however, that the cooption of cultural rituals can be employed to promote the tolerance of difference necessary to create social change. Indian theorist Ratna Kapur argues that tremendous potential for social change exists when "culture is invoked to counter culture."<sup>22</sup> A variation of this reasoning may be demonstrated by the manner in which the Metropolitan Community Church of Toronto used the ancient Christian tradition of publishing the banns of marriage as an alternative to a municipally issued marriage license when the city refused to grant licenses to same-sex couples.<sup>23</sup>

Comparing the pursuit of equality for sexual minorities in India and Canada and the current social and legal status of sexual minorities in these countries offers a unique framework through which to demonstrate that a comprehensive theory of justice requires the acquisition of rights and the subversion of norms. In Canada, as discussed above, the gay and lesbian rights movement has established legal protection and equality for gays and lesbians through the acquisition of rights. However, I would suggest that these successes have done little to subvert normative understandings of sexuality; as a result, these legal victories have not significantly advanced the level of actual tolerance for sexual diversity in Canada. "On the one hand we have largely won our formal human rights but on the other hand our sexualities are often still criminalized and our relationships stigmatized."<sup>24</sup> Unlike in Canada, as a result of the lack of legal rights for sexual minorities in India, "a major focus of Indian and South Asian Diaspora gay rights campaigns has been to challenge 'exclusionary narratives about culture.'"<sup>25</sup> As a result, any examination of equality for sexual minorities in India requires an analysis informed by culture and counterculture. The purpose of comparing India and Canada is to examine the process of pursuing access to democracy and equality for sexual minorities in both countries. That these countries may be at different stages in this pursuit, or on different paths towards this goal is relevant only insofar as it offers insight into each country's own processes and circumstances.

## II. *Normalizing and Queering*

In Canada, as noted, the gay and lesbian rights movement has achieved more individual rights for some sexual minorities than almost anywhere else in the world.<sup>26</sup> Yet, there exists an argument that

what has actually been achieved is limited access to a rights regime for a homogenized, essentialized segment of sexual minorities without any significant disruption of the heterosexual hegemony responsible for their oppression.

The purpose of my discussion is to assert that the relationship between rights discourse/identity politics and deconstructionist theories is not irreconcilable and that the two approaches are actually symbiotic.

To suggest such a symbiosis is to acknowledge some utility of both approaches. Since one underpinning of a deconstructionist approach to equality is a critique of the group identity based politics associated with rights based movements, making such an argument theoretically implies some affirmation of the value of these critiques to rights-based models of equality. It is necessary then, to identify these critiques. In identifying these critiques my focus will be on the Canadian gay and lesbian rights movement where the rights regime for sexual minorities is more developed than that in India.

The acquisition of rights for gays and lesbians has created a great deal of legal acceptance for same-sex couples in Canada. As noted in my introduction, however, it is my position that the notion of acceptance is based on a model of exclusivity in which the scope of the normative behavior is broadened to some degree, but the belief that behavior outside of the dominant norm is negative remains intact.

It appears as though the benefits gained by the legal victories of the gay and lesbian rights movements in Canada are available only to that segment of sexual minorities that most resembles heterosexual norms and ideals. "Some critical legal scholars have argued that rights are individualistic and formalistic and thus unable to address the systemic and structural ways in which disadvantaged groups are oppressed."<sup>27</sup> They argue that rights discourse in Canada obscures power dynamics and de-contextualizes and de-radicalizes the political aspect of rights claims.<sup>28</sup> Certainly rights have been achieved for monogamous gays and lesbians whose couplings and choice of family structure loosely conform with the normative standards in place for heterosexual relationships and families in Canada. However, those members of sexual minorities who are not monogamous, or whose gender or sexual orientation or financial situation do not fit easily into the categories developed by normative standards and sexual practices, or whose family structures do not resemble the traditional family model are often excluded from the benefits of these rights. If the model upon which the granting of recognition or status or equality remains one based on practices of exclusion or assimilation it is likely that the heterosexual hegemony that currently suppresses sexual minorities in Canada will remain intact. An equality movement that fails to disrupt these hetero-normative standards perpetuates a model of justice that remains exclusionary for many sexual minorities. In addition, the pursuit of equality through the acquisition of rights is limited to the acquisition of those 'rights' available under any particular regime. A rights regime that provides rights such as same-sex pension benefits, tax benefits, spousal support, child support, and employment benefits only assists those sexual minorities that can structure their families,

relationships, gender and sexuality in a manner which conforms to the infrastructure underlying such rights. An infrastructure built to support the majoritarian models of family, sex and lifestyle. Highlighting the difficulty with perpetuating rather than troubling normative standards, Brenda Cossman states, in the context of examining the deconstruction of gender norms, that

a fixed and rigid deployment of gender may allow some subjects to come on stage. But, the multiple other subjectivities constructed in and through gender remain beyond the margins, abject beings who are not yet the subjects of this discourse, who remain relegated to the zone of 'uninhabitability'.<sup>29</sup>

The decision in *A.(A) v. B.(B.)*,<sup>30</sup> in which a lesbian couple in Ontario made an application to the Superior Court of Ontario requesting that the non-biological mother's name be added to their son's birth certificate supports this position. The birth certificate stated only the names of the child's biological mother and biological father. The biological mother, the biological father and the non-biological mother had co-parented the child since birth. The Court refused the application, stating that neither the legislation nor the Court's *parens patriae* jurisdiction provided them with the authority to provide legal recognition of all three of the child's parents.<sup>31</sup>

The suggestion that the pursuit of access to a rights regime such as that found in Canada promotes conformity and assimilation<sup>32</sup> is advanced by Andrea Frolic in her analysis of Toronto Pride Festival themes over the course of the past two decades.<sup>33</sup> She suggests that the choice of themes for Toronto's annual Pride Festival have been distinctly more conformist during those years in which significant legal victories were achieved in the gay and lesbian rights movement. For example, in 1986 the theme of the Pride Festival was the confrontational "We are Everywhere: 150 Years of Faggots and Dykes." However, in 1987, the year that sexual orientation was identified as a prohibited ground of discrimination under the *Ontario Human Rights Code*, the theme was the more conformist "Rightfully Proud."<sup>34</sup> In the early 1990's she argues, the themes were overtly confrontational: "By All Means Necessary," "Breaking the Silence," "Come Out." However in 1995, the year that the Supreme Court read sexual orientation into section 15 of the *Charter*,<sup>35</sup> the more docile theme "Remember, Celebrate, Make A Difference" was adopted.<sup>36</sup>

The gay and lesbian rights movement in Canada has also been criticized for essentializing sexual minority identity. The manner in which the rights regime in Canada is structured has forced the gay and lesbian rights movement to essentialize sexual minorities in their efforts to pursue equality; this prioritizes one concept of sexuality over others. "It is not that citizenship and equality rights legitimize pre-existing identities, but rather, the contours of identity are shaped by the demands for citizenship and rights models themselves."<sup>37</sup> The manner in which the jurisprudence interpreting and applying section 15 has developed has also contributed to this effect.<sup>38</sup> To access equality rights in Canada, the test for a violation of section 15 of the *Charter* requires either that a claimant belong to an identifiable minority with a history of oppression or that the legal distinction challenged be based on an immutable personal characteristic of the claimant.<sup>39</sup> As noted by Justice Iacobucci in *Law*, section 15 of the *Charter* has developed as a comparative concept; as a result it is necessary to

identify a comparator group when making a claim under section 15.<sup>40</sup> To establish sexual orientation as an analogous ground of discrimination under section 15 required the creation of a singular group identity. The group identity created in turn impacted the course of the gay and lesbian rights movement. "The development of lesbian and gay movements . . . followed from both the production of this distinctive identity and its perceived exclusion (or inclusion as criminality) within dominant discourse."<sup>41</sup>

In the case of sexual minorities, the notion of a singular, discrete sexual minority identity was artificially constructed. This is problematic for two reasons. As Nancy Fraser would likely argue, the creation of an externally identifiable minority, even if done in the pursuit of positive recognition, might serve only to develop a more discernible target for further oppression.<sup>42</sup> In addition, the requirement that a singular 'gay identity' be created may lead to intolerance of sexual and gender diversity within sexual minority communities. This 'gay identity,' strategically developed to produce the least threatening subject to heterosexual sensibilities, is not representative or tolerant of a great number of sexual lifestyles and gender variations that cannot or will not conform to the fable identity. Those sexual minorities who can or do conform to the more palatable notion of the 'homosexual' and who as a result enjoy new found rights and power, have a vested interest in silencing those sexual minorities whose lifestyles, and gender identities do not support the gay identity developed and marketed to heterosexual society.

As noted, the jurisprudence has also established that section 15 prohibits discrimination based on immutable personal characteristics. The Supreme Court of Canada agreed that sexual orientation was an analogous ground under section 15 by determining that sexual orientation "is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs".<sup>43</sup> This particular prerequisite to protection under section 15 has inadvertently contributed to a discourse that perpetuates a pathologization of gay identity purported to have been discarded in the 1970's when 'homosexuality' was removed from the DSM-IV.<sup>44</sup> Requiring the identification of an immutable personal trait restricted the way sexual minorities could characterize their sexuality within mainstream culture. It encouraged an era of 'it is not a choice,' 'it is not my fault' and 'we were born that way' defensive and apologetic declarations from the gay and lesbian community. Such discourse implicitly attaches a negative association to non-normative sexualities.

An infrastructure for attaining rights that requires the creation of a singular sexual minority identity with shared traits very effectively perpetuates the notion of sexuality as a static, immutable entity. In some ways it creates a false binary gay/ straight not dissimilar to the male/female dichotomy identified as a false by gender theorists such as Judith Butler. It inhibits acceptance of those more fluid and diverse conceptions of sexuality that, I would argue, pose an even greater threat to normative understandings of sexuality. While certainly an acknowledgement of some sexual diversity, the gay/ straight binary created by this system is not tolerant of any conception of sexuality which does not fit into one of these two categories; if nothing else, it allows the cultural and legal infrastructure developed by a heterosexual hegemony to continue to define sexuality.

The focus on the pursuit of gay and lesbian rights in Canada has, due to the inherent limitations of the rights-based model of justice employed in Canada, limited the ability to subvert dominant sexual norms. I would suggest further that the limiting provisions contained in section 1 of the *Charter*<sup>45</sup> and more specifically, the reasoning developed under the Oakes framework for interpreting section 1,<sup>46</sup> requires the Court to overtly refute any subversive effect a successful equality based *Charter* challenge might hold. This was demonstrated in *Canada (Attorney General) v. Halpern*, the Ontario same-sex marriage decision.<sup>47</sup> Aspects of the second branch of the Oakes test stipulate that to be proportional and therefore justified under section 1 of the *Charter*, a rights violation must be rationally connected to the objective of the law and the law must only minimally impair the right. This analysis inadvertently requires the Court, should it decide that the violation is not saved under section 1, to engage in an analysis which minimizes, dismisses or refutes the subversive potential of a finding in favor of the claimant. For instance, in *Halpern*, much of the Attorney-General's argument focused on a justification for the section 15 violation under section 1. This involved argument that the institution of marriage was sacred, and that it had static purposes which would be disrupted by allowing same-sex couples access to the institution. As a result, in determining that maintaining marriage as an exclusively heterosexual institution was not rationally connected to the purposes of marriage, the Court was careful to affirm that the traditional 'purposes' of marriage, to encourage procreation, child rearing and companionship, would not be disrupted by allowing access to gays and lesbians. The Court cautiously avoided any challenge to the normative understanding of marriage. "It is not disputed that marriage has been a stabilizing and effective societal institution."<sup>48</sup>

The Attorney General argued that the violation was minimally impairing because "changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution."<sup>49</sup> He argued that changing an essential feature of marriage by allowing same-sex couples to marry would result in a destabilization of the institution and would have adverse effects on men, women and children. In responding to the government's argument under section 1, the Court consistently articulated that allowing same-sex unions would not disrupt, destabilize or impact the institution of marriage in any manner.<sup>50</sup>

Similar rhetoric is evident in the choice of language employed by the Supreme Court of Canada in the same-sex marriage reference.<sup>51</sup> While the Court did reject the argument that the 'natural' growth of our living tree constitution precludes same-sex marriage, they did so not in objection to the notion that a 'natural' core meaning of marriage exists but because they were, in this instance, faced with competing views on what those natural limits are. The notion that an objective 'natural' meaning of marriage exists was not challenged.

### III. *Why is it Necessary to Subvert Majoritarian Sexual Norms?*

The tremendous progress towards legal equality achieved for sexual minorities in Canada has not been paralleled by an increased degree of tolerance for sexual diversity in Canadian society. The acquisition of rights by Canada's gay and lesbian movement has broadened the sexual conduct and relationships legally accepted in Canada. It has also, I will argue, placed gays and lesbians in

Canada in a position to facilitate the promotion of tolerance through the subversion of dominant sexual norms. However, the attainment of these rights alone has done little to subvert those sexual norms that support the heterosexual hegemony. Subversion of these norms is important to the pursuit of equality; while rights do the work necessary to attain legal status and as a result power, subversion is necessary to create tolerance. Disrupting dominant sexual norms challenges mainstream understandings of the scope of human sexuality; this, I suggest, promotes tolerance of sexual behaviors, lifestyles and relationships which fall outside of dominant sexual norms.

The Ontario government's response to the landmark decision in *M v. H*,<sup>52</sup> in which the Supreme Court of Canada ruled that the exclusively heterosexual definition of spouse under Ontario's *Family Law Act* violated the *Charter*, is indicative of the manner in which a legal victory can provide rights, such as access to spousal support, but do little to actually subvert the normative standards underlying the discrimination.<sup>53</sup> The Ontario government's 1999, omnibus Bill 5, enacted in response to the Supreme Court's directive in *M v. H* to provide same-sex partners with the same rights as common-law heterosexual couples, amended the language of sixty-seven provincial statutes in order to provide these rights, but did so without re-defining 'spouse' or 'family' to include same-sex relationships. The legislation granted the rights without challenging the definitions of terms deemed discriminatory by the Supreme Court of Canada. A similar move was made by the Nova Scotia government when it revamped the *Family Maintenance Act*<sup>54</sup> to include domestic rights for same-sex couples without re-defining the meaning of spouse. One could speculate cynically that, avoiding such inclusion is why the title of the act was changed to the *Maintenance and Custody Act*,<sup>55</sup> and no longer contains the word family.

Gary Kinsman's discussion of the Canadian government's exclusionary policies against sexual minorities, predominant in the 1950's and 1960's, but which he asserts did not formally end until the early 1990's, is illustrative of this lack of tolerance towards sexual diversity despite the protection of legal equality.<sup>56</sup> Kinsman notes that as late as 1998, a Canadian Security Intelligence Service (CSIS) spokesperson stated that "security clearances can still be denied to closeted homosexuals because they have something to hide."<sup>57</sup> This social intolerance of sexual diversity is further evidenced by Canadian jurisprudence on the issue of obscenity. Obscenity laws are meant to impugn particular types of sexual expression. However, qualifying material as obscene implicitly impugns the morality of both the sexual expression and the sexual conduct it represents.<sup>58</sup> An examination of obscenity laws then, may gauge the moral perspectives towards non-normative sexual practices of those creating and enforcing such laws. I would suggest that obscenity laws in Canada reflect the low degree of tolerance towards non-normative sexual conduct in Canadian society. Obscenity laws that disproportionately target or overtly impact materials depicting sexual acts between individuals of the same gender reflect social and legal communities intolerant of such sexual conduct.

In both Canada and India the legal approach to obscenity was inherited from the British common law. *R. v. Hicklin*,<sup>59</sup> which was the leading precedent in Canada well into the twentieth century, and remains the authority in India today.<sup>60</sup> The decision defines obscenity as any expression that could

corrupt morality. This is a broad and subjective definition with much room for individual judicial discretion. In *R v. Butler*, the leading case on the definition of obscenity in Canada today, Justice Sopinka, in dismissing the precedential value of *Hicklin* stated that "the prevention of dirt for dirt's sake is not a legitimate objective . . . ." <sup>61</sup> That said, the production of obscenity is currently prohibited in Canada by section 163 of the *Criminal Code* under a heading which harkens back to the language employed in *Hicklin*: "Offences Tending to Corrupt Morals." <sup>62</sup> An examination of the application of obscenity laws in Canada regarding sexually explicit material involving sexual minorities, in cases such as *Little Sisters Book and Art Emporium v. Canada*, reveals that despite the codification of obscenity laws and new case law on the issue, the approach in Canada today is not significantly more tolerant of sexual diversity than it was under the test set out in *Hicklin* 135 years ago. <sup>63</sup> In *Little Sisters*, the owners of a Vancouver bookstore challenged the constitutionality of certain provisions of the *Customs Act*. <sup>64</sup> *Little Sisters* involved Customs Officials who were targeting gay and lesbian materials imported to the bookstore. In upholding the legislation the Supreme Court of Canada determined that legislators were entitled to assume that their laws would be applied in a fashion consistent with the *Charter*. They held that it was not the responsibility of legislators to enact regulations to ensure that their laws were applied constitutionally; as a result, while the Court determined that the legislation violated freedom of expression under section 2 of the *Charter* they found that, with the exception of a reverse onus clause, it was saved under section 1. The majority also ruled that the "community standards" test applied to identify obscene material established in *Butler*, was constitutional. Taking a formal approach to the equality provisions under section 15 of the *Charter* they stated that the standard did not discriminate against sexual minorities because 'the national community' was made up of many minorities. <sup>65</sup>

In June 2001, the police in Lucknow, India raided the offices of two non-profit AIDS organizations whose objectives were to educate the gay community in Lucknow about sexual health and harm reduction. The police arrested four workers, confiscated their AIDS education material and charged them with possession of obscene materials and conspiracy to commit sodomy. <sup>66</sup> The Chief of Police in Lucknow repeatedly stated publicly that he would like to "eradicate homosexuality which is against Indian culture." <sup>67</sup>

In *Little Sisters* the claimants argued, and the Court acknowledged, that the legislation had been used for years by customs officials to inhibit the bookstore's ability to import into Canada literature which "consisted largely of books that included gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material, and gay and lesbian erotica." <sup>68</sup> As noted, many of the items identified as obscene and confiscated by customs officials contained educational material directed towards promoting sexual health among men who have sex with men, similar to that confiscated in the Lucknow case. While the Court cannot be said to have endorsed the customs officials' perceptions as to what constitutes obscene materials, the Court's formal equality approach to the issue resulted in a ruling that it was not necessary for the government to enact provisions to protect against such abuses of power in the future.

If one accepts the assertion that a country's approach to defining and enforcing obscenity laws with respect to material which contains the expression of non-normative sexualities is indicative of the society's degree of tolerance towards sexual diversity, then the fact that the legal approach and societal reaction to 'obscene material' discussing or depicting non-normative sexual acts would be similar in two countries with such radically different legal status for sexual minorities, such as Canada and India, lends credence to the argument that legal status alone will not create tolerance.

#### IV. Why Examine Sexual Expression?

Michel Foucault stated that the key to understanding the history of human sexuality is not to:

. . . determine whether one says yes or no to sex . . . but to account for the fact that it is being spoken about, to discover who does the speaking, the positions and viewpoints from which they speak, the institutions which prompt people to speak about it and which store and distribute the things that are said.<sup>69</sup>

I use the term sexual expression to refer to a particular type of sexual expression: the social expression of sexuality. Francisco Valdes states that "the social expression of minority sexual identity is the ultimate target and battleground . . . because social expression of same-sex desire galvanizes the politics of self and group identification among lesbians and gay men by challenging the claimed superiority or actual hegemony of cross-sex desire."<sup>70</sup> While I don't agree with Valdes' ultimate conclusion that sexual expression of this sort challenges heterosexual norms by bolstering group identity among sexual minorities I do agree, for reasons to be discussed, that, in part due to its pervasive nature, it assists in the challenging of heterosexual hegemony. Valdes employs the term 'social sexual expression' to represent those forms of communication which signal in social forms or settings the underlying sexuality of the speaker. He identifies this as the social expression of desire.<sup>71</sup> Valdes identifies as examples of this type of speech, engagement rings, family photographs, and lifestyle anecdotes. I use the term to refer to expression such as he describes as well as cultural sexual expression such as that which may be found in film, literature and other pop culture. Valdes concludes that social sexual expression is important for sexual minorities in order to promote visibility and recognition; he argues that the presence of social sexual expression among heterosexuals is so pervasive it has a silencing effect on the sexual expression of sexual minorities. While this may be the case, I will focus on the subversive work done by social sexual expression as a result of its adoption, and subsequent adaptation of dominant cultural norms, customs and rituals I would argue that heterosexual expression of sexual desire is a cultural phenomenon and that hetero-normative standards and understandings of sexuality both inform and reflect dominant culture. As a result, invasion of these cultural rituals by sexual minorities can disrupt the norms that created them. The subversive effect of non-normative performance of these cultural rituals is heightened because cultural rituals carry with them commonly understood meaning. Culture, as suggested by Kapur, is employed to destabilize culture.<sup>72</sup> An example of this is found in Terry Gold's reference to:

. . . the camp way that gay activists in the United States use symbols of patriotism such as the flag The traditional American patriot stands in front of the Stars and Stripes, and he has a marine haircut and a gun The queer nationalist is in the same position, with the same haircut, but has traded the gun for a dildo, and is quite likely a she This is not so much a greater nation as the old one turned upside down.<sup>73</sup>

My examination focuses on the social expression of same-sex desire not on pornography The brief examination of obscenity laws above, was employed only to illustrate that the legal successes of gays and lesbians in Canada may not have diminished societal intolerance of sexual minorities to the degree which might be expected of such successes While pornography is often the focus of discourse regarding sexual expression, my choice to focus, rather, on social sexual expression is deliberate I would suggest that the threat to heterosexual hegemony posed by social sexual minority expression greatly exceeds the subversive potential of pornography, not because the actual depiction of non-normative sexual acts is not subversive but because, unlike pornography, social sexual expression infiltrates nearly every aspect of a culture This provides it with a higher profile and lends it more credibility Social sexual expression is ubiquitous in both sexual majority and minority cultures As a result, it acts as a medium through which minorities can appropriate cultural rituals to express their sexuality in formats readily understood by heterosexual majorities

The puritanical tinge of British colonialism still lingers in both Canada and India, where sex and sexual expression in general are often characterized as shameful and secret "Under this norm the expression of nonconforming desire . . . remains among the most shamed and secreted of domains."<sup>74</sup> It is important to note that there are actually two distinct normative restrictions on 'acceptable conduct' at work here. Any overt sexual expression, regardless of the gender/s of its subjects, is a challenge to social norms which discourage open dialogue on sex. Separate from this is the normative understanding of sexuality as an interaction between two individuals of opposite sex. In a way that pornography cannot, the social sexual expression of sexual minorities, while nonetheless a communication of sexual attraction and conduct between individuals of the same gender, allows challenges to normative understandings of sexuality without requiring that puritanical norms discouraging overt sexual dialogue be taken on at the same time. I do not, however, wish to be misunderstood as asserting that the content of social sexual expression is not sexual. The distinction between the social expression of desire and what Valdes labels the sexual expression of desire is a distinction based on method of expression not on the presence or absence of sexuality. Valdes carefully distinguishes the sexual expression of desire from the social expression of desire by desexualizing the latter.<sup>75</sup> I would suggest that he does this in order to combat a common misperception among heterosexual communities that sex is the defining characteristic of all gays and lesbians. "Gay sexuality, according to this common understanding, is all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure . . . ." <sup>76</sup> I do not think it is necessary, in this context, to emphasize the distinction Valdes makes. The inclination to de-sexualize gay and lesbian identity in an attempt to 'fit into' mainstream society may make sense within a rights discourse context; however, in the context of

destabilizing heterosexual norms it is unnecessary to diminish any of those aspects of the sexual minority which are distinct. Holding hands with a lover in public, discussing a particularly attractive drag king with co-workers, or wearing wedding rings are expressions to the public of one's choice/s in sexual partner/s. Sexuality informs the social expression of desire as much as it does the overt sexual expression of desire.

Setting aside normative aversions to the depiction of sex in general, I would suggest that the challenge to dominant sexual norms, posed by the expression of same-sex desire, is the same whether it is communicated through the portrayal of two men having anal sex, or three women having oral sex, or a queer sitcom which portrays network television's first lesbian kiss, or a book that talks about families with two blue dads.<sup>77</sup> The fearful response to any of these forms of expression relates to the challenge posed by alternative models of human relation to those normative models of sexual interaction underlying the heterosexual hegemony. Which people have what genitals and what they do or don't do with them in public or private is not the source of the perceived threat. An examination of Judith Butler's theory of gender provides support for this assertion.<sup>78</sup> Butler conceptualizes gender as a ". . . shifting and contextual phenomenon, gender does not denote a substantive being, but a relative point of convergence among culturally and historically specific sets of relations."<sup>79</sup> Butler states that gender is performative. She argues that sex is not the precursor of gender and that gender is not the cultural interpretation of sex. She asserts that gender is not a stable identity. Gender, Butler suggests, is created through the repetition of norms. The category of sex, she maintains, is normative, not natural. She states that the repeated performance of norms actually produces the male/female binary gender is thought to reflect.<sup>80</sup> "Gendered meanings frame the hypothesis and the reasoning of those biomedical inquiries that seek to establish "sex" for us as it is prior to the cultural meanings that it acquires."<sup>81</sup>

In mainstream culture, in both Canada and India, a binary model for both sex and gender has predominated. We have strict normative standards governing the constructs of gender and, according to Butler, sex as well. Members of sexual minorities often fit into neither of these normative constructs. If gender is performative, and if the biological 'body' is actually culturally pre-determined, in part through gender performance, rather than a pre-discursive natural state, then repeated subversive performances of normative rituals may threaten the male/female binary model of sex created through the normative performance of such rituals. I would suggest that the social expression of sexuality is also performative. Social sexual expression is the expression of sexuality through the performance of cultural rituals that express sexual desire. The social sexual expression of sexual minorities then, is the subversive performance of cultural rituals that express sexual desire.

Under Butler's theory of performative gender the repeated performance of normative rituals operates on a sophisticated social level at which the subjects/actors are not aware of the performances. It is likely however, that these gender performances are simultaneously occurring on a variety of levels. The performance of social sexual expression may be operating on both conscious and subconscious levels. Both types of performance subvert notions of 'gender' -- gender in this

context meaning the dominant understanding of gender as a cultural reflection of sex. Butler's performative theory challenges the dominant understanding of 'gender' and biological sex as inextricably linked. The expression of same-sex desire challenges the dominant understanding of sexuality and 'gender' as inextricably linked. Under Butler's theory, it becomes clear why Canadian and Indian societies socially police gender in such a vigilant manner.<sup>82</sup> Policing gender is a method of protecting the male/ female binary upon which these societies are premised. Butler's theory also offers analogous reasoning as to why minority sexual expression is treated and reacted to differently than heterosexual expression. It is treated and received differently in order to inhibit the revelation of alternative performances of rituals that evidence the fallacy of the binary male/female model of understanding sexuality and gender. Lesbians in tuxedos with gold wedding bands, drag queens who can 'pass,' and Indian women whose courtship and first sexual encounter occur during the performance of a traditional fasting ritual conducted to ensure the longevity of their husbands, all demonstrate non-normative sexual performances which trouble normative understandings of the links between sex, gender and sexuality.

BJ Wray, in discussing Shawna Dempsey and Lorri Milan's 1997 performance of *The Lesbian National Park Rangers* provides an example of subversive performance in the context of nationalism and citizenship.<sup>83</sup>

Dempsey and Millan humorously interrogate the "unnaturalness" of lesbian sexuality from within the confines of the state-sanctioned "naturalness" of Banff National Park. . . . Citizenship, as we will see in the Lesbian National Park Rangers, is not a static delineation of national belonging but is an active, ongoing performance that can never be fully or finally conferred. Conceptualized as performance, citizenship becomes newly accessible for re- signification by minority subjects.<sup>84</sup>

As Wray notes, their performance invades a significant site of Canadian nationalism and exploits its 'natural areas of Canadian significance' in order to challenge the assumption that lesbianism is unnatural and to contest the predominantly exclusionary practices utilized to create national identity. Similar to the impact I would suggest results from the expression of minority sexuality through the subversive performance of cultural rituals, ". . .The Lesbian National Park Rangers insists upon a mode of lesbian activism that critiques conventional discourses of national and sexual identification through direct engagement with these dominant paradigms."<sup>85</sup>

Despite the presence or absence of a gay and lesbian rights movement, the social expression of same-sex desire has caused similar reaction among mainstream culture in both India and Canada. Mainstream cultures in both of these post-colonial societies have, at some point, blamed external influences for importing 'homosexuality' into their countries by arguing that such behavior is not consistent with their culture. In Canada it was thought that 'homosexuality' "could not be part of the hardy, pure colonial life."<sup>86</sup> I have suggested that the impact of subversive cultural behavior, such as social sexual minority expression, and the acquisition of rights are interdependent. Both a gay and

lesbian rights movement, and the social expression of minority sexualities are present in Canada.<sup>87</sup> As a result, it may be difficult to isolate the individual impact of each in Canada; this is not the case in India. The lack of legal protection for sexual minorities in India, and the lack of significant legal progress towards equality and the acquisition of legal rights for sexual minorities in India may provide a clearer opportunity to examine the impact of cultural appropriation through social sexual expression by sexual minorities in India than might be the case in Canada.

#### V. *Social Sexual Expression in India*

In India, government officials have argued that sodomy and oral sex should not be decriminalized because homosexual behavior is not in keeping with Indian culture.<sup>88</sup> Members of the Hindu right have pointed to the effects of westernization in India as the cause of this scourge of homosexuality. "Sexual subalterns such as gays and lesbians are being targeted as Western contaminants threatening to erode Indian culture and ethos."<sup>89</sup>

The 1998 film *Fire*, by Indian producer Deepa Mehta, demonstrates the impact of cultural appropriation and subversion through the social expression of same-sex desire. Indicative of its impact is the significant effect this mainstream movie had on the issue of sexual minority in India. The film depicts a lesbian relationship between two sisters-in-law named Sita and Radha. Mehta's choice in names for these characters is indicative of her very purposeful use of Indian cultural symbols and rituals throughout the film. The names Radha and Sita are "the repositories of Indian cultural values in ancient texts and scripts."<sup>90</sup> The film frequently depicts Sita and Radha's social expression of desire for each other. In one scene the women, while having a picnic with their husbands and mother-in-law, share an intimate moment while Radha, at the request of her husband, massages Sita in front of the family. Mehta legitimates the actions of these lovers by her use of Indian Hindu culture to express their mutual desire. Their performance of *khavachauth*, a fasting ritual kept by wives to ensure their husband's longevity, ends in the first sexual encounter between the women after Radha, rather than Sita's husband as is the tradition, gives Sita the blessing to break her fast. The film appropriates traditional cultural expressions of desire, imputing legitimacy to the relationship; through its use of these rituals to express the growing sexual awareness and attraction between the sisters-in-law it unavoidably adapts the traditional meaning of the particular rituals performed. In the final scenes of the film, culture is invoked to provide ultimate sanction for their relationship. Mehta depicts an alternative version of *agnipariksha*, a burning ritual employed to ascertain the purity of the mythical Sita, in which the mythical Sita survives the fire thus affirming her purity; unfortunately, the mythical Sita is exiled from her community despite having established her purity.<sup>91</sup> In the film, Radha's sari accidentally catches on fire. She too survives the fire, affirming her purity despite her sexual relationship with a woman. However, unlike in the myth, Radha is rewarded and reunited with her lover rather than exiled from her community.

The screening of *Fire* in India sparked a national controversy that included protests, violence against moviegoers, destruction of theatre property and a second review by the Indian Censor Board.<sup>92</sup> As a result of the protests and violence, cinemas nationwide were forced to stop showing

the film.<sup>93</sup> A petition was filed with the Supreme Court of India by a group of film producers and lawyers requesting that the Court order the government to stop the violence and vandalism.<sup>94</sup> The petitioners asserted that the Chief Minister of Maharashtra and his party, Shiv Sena, instigated the violence under the pretext of expressing their opposition to the film. The government response to the petition was to return the film to the Censor Board for a second review. The Censor Board once again approved the film.<sup>95</sup> The Supreme Court of India dismissed the petition after an election in Maharashtra ousted the Shiv Sena party.<sup>96</sup>

Critics challenged the film on the ground that its depiction of lesbianism in a middle-class Hindu family was an inauthentic cultural representation. Traditionalist contingents of the Indian feminist movement stated that "Ms. Mehta's disdain for Indians except those who are supposedly sabotaging tradition by seeking sexual fulfillment in defiance of social norms . . . oozes out of virtually every dialogue in the film."<sup>97</sup> It seems that the depiction of lesbianism was not the only objectionable issue; it may be that a significant source of the controversy and outcry was that it was a depiction of Indian lesbianism.

One particular scene in the film seems to predict that conservative Indians, such as members of the Shiv Sena, would perceive the film as a cultural attack. In this scene Sita's husband, whose attire and demeanor is very westernized throughout the film, is having dinner with the family of a Chinese woman with whom he is having an affair. During dinner, the father of the woman viciously attacks Indian culture. Sita's husband acknowledges his criticisms and says nothing to defend the culture of his people. Mehta thus makes a comment, or perhaps a response to the criticisms she forecasted, by including in the film a heterosexual character that overtly rejects Indian culture in pursuing his heterosexual relationship, while her lesbian characters repeatedly embrace Indian custom and ritual both to pursue their courtship and to express their sexual desire.

The Chief Minister of the Shiv Sena stated that his party would stop the attacks and violence if the characters' names were changed from Sita and Radha to Muslim names. Noting that Mehta agreed to change the name of Sita to Neeta, Kapur writes "Mehta's compromise is a move that stands out as a stark example of the ways in which Indian society is being held ransom to one version, one story and one truth about Indian culture."<sup>98</sup> There was fear that such an inauthentic representation of Indian culture would contaminate an otherwise pure Indian society. Those opposed to the movie portrayed Indian culture as having clear, fixed meanings that needed to be protected from foreign influences.<sup>99</sup>

Why did this reaction to *Fire* occur in India? Theorist Madhavi Sunder suggests that the film serves as a critical cultural perspective that exposes differences in a culture that is normally represented as homogenous.<sup>100</sup> As a result, it affirms alternative notions of Indian cultural identity. She describes the reaction of the Hindu right to the film as a form of cultural protectionism, similar to notions of intellectual property law:

Cultural protectionists, while not explicitly relying on intellectual property law to

support their position, conceived Indian culture as having an essential meaning that needed to be legally preserved and protected against dilution by foreign influence, and sought an absolute right to define Indian culture and to exclude meanings that contradicted their definition.<sup>101</sup>

Sunder asserts that this cultural protectionism is a reaction to an era that has been characterized by identity politics and legal commitment to a cultural dissent consisting of the right to recast cultural mores, traditions, and meanings in light of new values, information and needs. Sunder suggests that the reaction to the film *Fire* reveals how post-colonial India "is characterized by narrow nationalist narratives that define Indian identity in the past and in opposition to the modern west."<sup>102</sup> She further notes that these nationalist narratives create 'cultural boundaries' which are difficult for minorities to overcome. While I would agree with Sunder that the prevalence of identity politics contributes to this cultural protectionism, I do not agree that there is legal commitment to cultural dissent in either Canada or India. In Canada, the *Charter* may have ensured legal commitment to political and legal dissent but not, I would suggest, to cultural dissent. While it is likely that cultural protectionism in post-colonial India stems, in part, from a strong sense of Indian nationalism developed as a reaction to fear of cultural imperialism and cultural appropriation, as has been suggested by academics,<sup>103</sup> this does not provide a full explanation for the phenomenon. To promote tolerance of deviance it is necessary to disrupt the stability of those dominant norms from which the subject is deviant. Sexual norms are an aspect of culture. I would assert that the motivation behind cultural protectionism is not solely 'cultural survival'; it is, to a significant degree, an effort to maintain control of those cultural elements which support the dominant norms underlying heterosexual hegemony and as a result sustain historical power imbalances.

To employ culture when telling a different story, or painting a different picture makes the picture or the story more credible. Non-normative stories, if credible, challenge those normative stories and pictures that reinforce traditional power distributions. Indian conservatives, who perceived the film as an attempt to convert women to lesbianism, expressed concern that ". . . if women's physical needs are fulfilled through lesbian acts the institution of marriage would collapse."<sup>104</sup>

In the aftermath of the film *Fire*, many Indian queers came out of their closets for the first time. Indian lesbians in New Delhi brandished banners proclaiming that "lesbianism is part of our heritage."<sup>105</sup> The first ever New Delhi Pride Parade was held in the aftermath of the *Fire* controversy.<sup>106</sup> As Kapur notes, *Fire* portrayed Indian lesbians "as not simply abandoning the terrain of Indian cultural values, but rather, trying to write themselves into the script."<sup>107</sup> Proclamations of heritage and demands to be written into the cultural script might, in a rights discourse, be identified as assimilative. However, in the context of non-normative performances of cultural rituals, I would suggest that they are subversive.

The actors, filmmakers and artists who filed the petition with the Supreme Court of India requesting that the government do something to stop the rioting and violence dubbed the circumstances a "cultural emergency."<sup>108</sup> I note that they characterized the violence not as an attack on sexual

minority equality or the integrity of the Indian Constitution's guarantee of fundamental rights but rather as a cultural threat originating from the cultural protectionists ". . . imposition of a single set of values on India's multi-faceted society."<sup>109</sup>

Forty-six years before the Supreme Court of Canada determined in *Egan*,<sup>110</sup> that sexual orientation was an analogous ground of discrimination under s. 15 of the *Charter*,<sup>111</sup> Jim Egan, began his activist career writing anti-homophobic letters and articles.<sup>112</sup> As the founder of the Association for Social Knowledge whose mandate was to "help society understand and accept variations from the sexual norm" Egan relied on forms of political and social expression to pursue social justice for sexual minorities long before legal mechanisms to do so were available.<sup>113</sup> The film *Jim Loves Jack* tells the story of Egan's activism and long-term love affair with partner Jack Nesbitt. The purpose of discussing social sexual minority expression in India and juxtaposing its role in the pursuit for sexual minority equality with the gay and lesbian rights movement in Canada, is not to imply that the social expression of same-sex desire does not occur in Canada. Rather, as noted, the comparison is drawn because in India a rights regime for sexual minorities has not been achieved and as a result, the social expression of same-sex desire, through cultural appropriation has played a more prominent or at least more readily ascertainable role in India's sexual equality movement than it may have in Canada.

#### VI. *Power Facilitates Subversion*

In the introduction I suggested that the acquisition of rights can provide access to power which can facilitate some deconstruction of normative standards. While the acquisition of rights, due to its homogenizing and essentializing effect may not itself create tolerance for difference, it does create power; social change requires both tolerance and power. Inescapably, "power is as integral an element of all social life as are meanings and norms . . . All social interaction involves the use of power, as a necessary implication of the logical connection between human action and transformative capacity."<sup>114</sup> Implicit within the concept of essentialism, which I have argued is a by-product of rights-based models of equality, is the opportunity to create common identity and community. With the creation of an identity, particularly one that has been ascribed rights, comes power. "Rights can be important in consciousness-raising, in mobilizing marginalized groups, and in providing these groups with a powerful language with which to voice and legitimize their demands."<sup>115</sup> The legal acknowledgment of even one alternative conception of sexuality in Canada has provided a window through which sexual minorities can gain further access to those dominant cultural rituals which I have suggested have tremendous subversive potential.

Evidence of this may be found in the fight for same-sex marriage in Canada. Although gay and lesbian couples in Canada had already gained access to almost every right, and in some provinces every right,<sup>116</sup> which a heterosexual couple would receive upon marriage, the public controversy and national debate which stemmed from the Ontario and British Columbia same-sex marriage decisions was astonishing.<sup>117</sup> That the same-sex marriage issue is so hotly debated in a country where gays and lesbians have already achieved its underlying rights<sup>118</sup> implies that something more

is occurring than basic rights discourse. I would suggest that the uproar is, not unlike in *Fire*, a response to the fear of widespread social expression of same-sex desire. As noted by the Ontario Court of Appeal in *Halpern*, "through the institution of marriage individuals can publicly express their love and commitment to each other."<sup>119</sup> Marriage, the Court explained, is a public recognition and affirmation of a couples' feelings and desires for each other.

During the summer of 2003, after the Ontario Court of Appeal decision in *Halpern* was released, newspapers across the country published frontpage pictures of grooms kissing and of lesbian couples in tuxedos on the steps of the Toronto City Hall. Opinion polls on gay and lesbian marriage were collected and published almost daily. In July, 2003, the *Globe and Mail* published a week-long series on queer families. 'For better or worse,' everyone in Canada spent the summer of 2003 talking about same-sex marriage.<sup>120</sup> Both legal and public debate focused not on the rights associated with marriage, likely because the decisions had little impact on gay and lesbian rights, but rather on the meaning of marriage in Canada. What is the purpose of marriage? Should marriage be a state sanctioned institution? Is marriage a religious convention? Should it be the state or the church that acts as gatekeeper to the institution? Is marriage nothing more than a paternalistic custom that historically involved an economic arrangement between men?

Gary Kinsman argues that rather than seeking equality through the pursuit of rights such as same-sex marriage ". . . we need to contest social forms such as the state institutionalization of marriage and develop our relationships based on democracy, equality and social justice."<sup>121</sup> I would suggest that the actions taken by sexual minorities such as the lesbian couple whose wedding ceremony and reception I recently attended is a step towards contesting oppressive social forms, and can support the development of relationships based on democracy, equality and social justice. These women performed what is, in Canada, a recognized cultural ritual to express a committed desire for one another. Not unlike the characters in Mehta's film *Fire*, they incorporated a great number of dominant cultural rituals into a ceremony and celebration held to recognize and affirm a sexual relationship between two women. Yet, they married in Nova Scotia, despite having had the option to be married in a province that would legally recognize their union in the same manner as a heterosexual marriage.<sup>122</sup> They did not register under the Nova Scotia *Vital Statistics Act* as a registered domestic partnership. They did not make an oral or written separation agreement to address division of assets in the event that their relationship ends. Their union occurred without any government sanction or the exchange of a single legal right. However, they used exceptionally traditional cultural rituals to express their relationship. With their performance of a traditional wedding ceremony and reception the couple publicly expressed a non-normative sexuality and desire, while at the same time exploiting the legitimacy, authority, and credibility that such cultural rituals command. The social opportunity to perform these rituals in front of mainstream society may have been provided to these women as a result of increased acceptance into the dominant norm of certain sexual minority conduct as a result of legal victories in Canada. That the British Columbia Court of Appeal, the Quebec Court of Appeal and the Ontario Court of Appeal had determined that same-sex couples are constitutionally entitled to be civilly married, may have provided an additional degree of mainstream legitimacy for their union despite its legally non-normative form.

While likely inadvertent, I would argue that their non-normative performance of a traditional cultural ritual had a subversive effect on the meaning of the institution of marriage in Canada. Many of the criticisms commonly launched at the institution of marriage are not applicable in this context. The assertion that the institution of marriage is based on an exchange of economic rights was not relevant. The history of sexism and misogyny often ascribed to the institution of marriage were not pertinent here. The normative meanings of the institution of marriage were disrupted. Disrupted enough to dissolve the normative boundaries that exclude some and accept others, making tolerance of difference unnecessary? No. Disruptive enough to soften or weaken those boundaries to allow for still further deconstruction of the dominant norms underlying the institution of marriage, which will help promote tolerance for sexual relationships that cannot, or do not fit inside the norm? Perhaps.

In *Canada (Attorney General) v. Mossop*, the appellant sought recognition of his partner under his employment benefits for bereavement leave.<sup>123</sup> Although sexual orientation was already a prohibited ground of discrimination which would have provided a remedy for Mossop, he argued unsuccessfully that s.15 of the *Charter* required that the *Ontario Hitman Rights Code's* definition of family status include same-sex partners. *Mossop* was not about the acquisition of a right but was rather an attempt to destabilize the normative meaning of family. Justice LaForest stated in *Mossop* that "the appellant here argues that "family status" should cover a relationship dependent on a same-sex living arrangement. While some may refer to such a relationship as a "family", I do not think it has yet reached that status in the ordinary use of language."<sup>124</sup> Only ten years later the federal government argued, in their factum filed in the same-sex marriage reference, that in the 21st century the institution of marriage can include same-sex couples and the *Charter* requires it to do so.<sup>125</sup> Only ten years after *Mossop*, the Ontario Court of Appeal, in *Halpern*, recognized and affirmed the validity of same-sex families by ruling that their relationships were entitled to the same degree of social status and credibility afforded heterosexual couples who marry. Only ten years after *Mossop*, the Supreme Court of Canada stated that the right of same-sex couples to marry unequivocally flows from the *Charter*.<sup>126</sup> During the course of those ten years the meaning of family changed in Canada. Has it changed enough? No, but it has changed.

### *Conclusion*

It is important to recognize that the benefits of disrupting discriminatory or exclusionary norms has its limits. Butler, upon reflecting on her assertions in *Gender Trouble*, ten years after it was published stated "I was writing in the tradition of immanent critique that seeks to provoke critical examination of the basic vocabulary of the movement and not criticism that seeks to undermine it altogether."<sup>127</sup> Setting aside theoretical purposes, there is little to be gained for minorities from the process of subversion if done simply for the sake of subversion. Subversion should be employed to destabilize normative assumptions, such as binary constructions of gender or sexuality, which lead to exclusionary and discriminatory practices and the resultant perpetuation of traditional power imbalances. It should not be used to deconstruct notions of sexuality to the point where the strength sexual minorities found in sexual subcultures is destroyed. Meaning, as Kapur suggests is also the case with culture,<sup>128</sup> should be conceptualized as a constantly changing process that engages

historical events and is challenged by contemporary evolutions in society. While to deconstruct meaning to the point where meaning attaches to nothing may dissolve the targets used to perpetuate oppression it would likely also dissolve the goals and targets which drive the pursuit of equality.

Equality consists of both legal and social aspects. The acquisition of rights may not disrupt normative standards as is necessary to promote the tolerance required for social equality; however, it can and does create legal equality for oppressed minorities. In Canada, the structure of our rights regime has promoted a homogenized, essentialized notion of sexual minority which does little to disrupt those sexual norms underlying heterosexual hegemony. However, an alternative infrastructure for the acquisition of power in Canada does not currently exist and I would suggest that it may not be necessary. Provided segments of sexual minority communities can access dominant cultural rituals, which a rights regime such as is present in Canada can provide, subversion can occur from within the system by the appropriation and adaptation of cultural norms through the social expression of sexual diversity. Such expression, which is pervasive and which does not require an essentialized, homogenized, non-subversive, de-sexualized representation of sexual minority will facilitate further access to dominant cultural paradigms for a greater spectrum of sexual minorities; this creates a positive feedback loop with the potential to perpetuate more power for, and tolerance of, a greater spectrum of sexual minorities in heterosexual society.

In India, the 'feedback loop' may function in the opposite direction. Sexual minorities in India have not yet achieved a significant degree of legal equality. That said, an equality movement premised on cultural appropriation, as is evidenced by films such as *Fire*, is occurring in India. I would suggest that the constitutional infrastructure to support a gay and lesbian rights movement in India, as a result of the equality provisions enshrined in the *Constitution of India*, already exists.<sup>129</sup> As the Indian majority continues to be confronted with subversive performances of recognizable and credible cultural symbols, the degree of tolerance towards these non-normative sexual practices will grow. Perhaps at some point, an increase in tolerance will place Indian sexual minorities in a position to pursue legal acceptance through India's constitutionally guaranteed equality rights.

## FOOTNOTES

1 I use the term sexual minority in an attempt to be inclusive of a diverse range of individuals and groups whose sexuality and gender identity do not conform with normative sexual ideology. This is neither a static, nor singular identity.

2 I note it could be argued that the term 'tolerance' acknowledges a power differential in which the dominant, power holders, 'grant' tolerance to a minority. However, I would suggest that the term tolerance leaves intact the notion of 'deviant from'; it implies a tolerance of the deviation rather than an acceptance of the deviant into the norm.

3 India did not adopt a constitution inaugurating a democratic republic until 26 January 1950  
DH Bayley, "Introduction to the Constitution of India" (1961) 109 U. Pa. L. Rev. 913.

4 *Indian Penal Code*, Act 45, 1860, online India Law Info <[www.indialawinfo.com/bareacts/ipc.html](http://www.indialawinfo.com/bareacts/ipc.html)>, see generally Sherry Joseph, "The Law and Homosexuality in India" (1998), online Global Reproductive Health Forum <<http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0909/rh374.html>>, see also Terry Goldie, "Queer Nation?" in Terry Goldie, ed., *In a Queer Country Gay and Lesbian Studies in the Canadian Context* (Vancouver Arsenal Pulp Press, 2001) 7 at 10.

5 Joseph, *ibid.*; see also Kelly Cogswell, "India: Kiss the Dinosaur Goodbye", online: The Gully <[www.thegully.com/essays/gaymundo/o21122\\_sect\\_377\\_antigay\\_inhtml](http://www.thegully.com/essays/gaymundo/o21122_sect_377_antigay_inhtml)>; F. Byrne, *Homophobia: a history* (New York: Metropolitan Books, 2000).

6 *Canadian Charter of Rights, and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 [*Charter*]

7 *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609.

8 *Constitution Act, 1950* (India), as am to *Constitution (Eighty-sixth Amendment) Act, 2002*, Article 14.

9 *Ibid.*, Article 15.

10 *Supra* note 6, s. 2(b).

11 *Supra* note 8, Article 19.

12 *Criminal Law Amendment Act, 1968-1969*, S.C. 1968-1969, c. 38, s. 7, see also Gary Kinsman, *The regulation of desire sexuality in Canada*, (Montreal Black Rose Books, 1987).

13 *Supra* note 7.

14 See *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 67 Alta. L.R. (3d) 1; *Halpern v. Canada (A.G.)* (2003) 65 O.R. (3d) 161 (C.A.) [*Halpern*].

15 *Halpern, ibid. Egale Canada Inc. v. Canada (A.G.)*, [2003] 7 WWR 22, B C J No 994 (C.A.) (QL) [*Egale Canada*]; *Ligue Catholique pour les droits de l'homme c. Hendricks*, [2004] J Q No. 2593, R.J.Q 851 (C.A.) (QL); *Boutin v. Nova Scotia (A.G.)*, [2004] N.S.J No. 357 (C.A.) (QL); *Vogel v. Canada (A.G.)*, [2004] M.J. No. 418 (Q.B.) (Fam. Div.) (QL); *Dunbar v. Yukon*, [2004] YKSC 54, Y.J No. 61 (S.C.); The Newfoundland case was uncontested by the Government and unreported.

16 *Supra* note 4.

17 Joseph, *supra* note 4.

18 Cogswell, *supra* note 5.

19 Siddharth Snvastava, "Demonising Homosexuals In India" *International Herald Tribune* (20 September 2003), online Counter Currents <[www.countercurrents.org/gen-snvastava200903.htm](http://www.countercurrents.org/gen-snvastava200903.htm)>.

20 [2000]4 L.R.I 1045 at para. 16.

21 Himani Banerjn argues that in order to address the underlying social and economic infrastructure that perpetuates oppression, difference must be conceptualized as something more than merely cultural. I do not dispute her assertion. I suggest only that the adaptation of mainstream cultural rituals by subcultures is one method of destabilizing the societal infrastructure which supports oppressive hegemonies. H. Bannerjii, "Chailes Taylor's Politics of Recognition A Critique" in Himani Bannerji, ed., *The Dark Side of the Nation* (Toronto: Canadian Scholars' Press, 2000) 125 at 142.

22 Ratna Kapur, "Postcolonial Erotic Disruptions Legal Narratives of Culture, Sex, and Nation in India" (2001) 10 Colum. J. Gender & L. 333 at 334.

23 *Halpern*, *supra* note 14 at para. 11.

24 Gary Kinsman, "Challenging Canadian and Queer Nationalisms" in Terry Goldie, ed., *In a Queer Country Cay and Lesbian Studies in the Canadian Context* (Vancouver Arsenal Pulp Press, 2001) 209 at 220.

25 Madhavi Sunder, "Intellectual Property and Identity Politics Playing with Fire" (2000) 4 J. Gender, Race, & Just. 69 at 93.

26 As noted, same-sex marriage has already been granted in a number of Canadian provinces.

27 Ratna Kapur and Brenda Cossman, *Subversive sites feminist engagements with law in India*, (New Delhi: Sage Publications, 1996) at 286.

28 *Ibid.* at 287.

29 Brenda Cossman, "Gender Performance, Sexual Subjects and International Law" (2002) 15 Can. J.L. & Jur. 281 at 289.

30 [2003] O.J. No. 1215, 225 D.L.R (4th) 371 (Sup. Ct.).

31 *Ibid.*

32 See *e.g.* Kinsman, *supra* note 12.

33 Andrea Frolic, "Wear it with Pride the Fashions of Toronto's Pride Parade and Canadian Queer Identities" in Terry Goldie, ed., *In a Queer Country Gay and Lesbian Studies in the Canadian Context* (Vancouver: Arsenal Pulp Press, 2001) 257 at 259.

34 *Ibid.*

35 Egan, *supra* note 7.

36 Frolic, *supra* note 33.

37 BJ Wray, "The Elephant, The Mouse, and The Lesbian National Park" in Terry Goldie, ed., *In a Queer Country Gay and Lesbian Studies in the Canadian Context* (Vancouver: Arsenal Pulp Press, 2001) 160 at 166.

38 The adverse impact of the manner in which section 15 has been applied may be unavoidable and is in all likelihood inadvertent. Nonetheless, its effects, if they are to be counteracted, must be identified.

39 For the evolution of the test for discrimination under section 15 of the *Charter* see *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 where the Supreme Court of Canada, in making one of their first attempts to define discrimination under section 15, stipulated that the claimant be a member of a discrete, insular minority. Following this decision was *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 in which the Court stated that the discrimination must be based on a personal characteristic. Today, the test for discrimination under section 15 of the Charter still requires that the discrimination be based on an immutable personal trait or that the claimant be in a historically disadvantaged position in society, see for example *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 2 [Law].

40 *Ibid.*

41 Didi Herman, *Rights of Passage Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 18.

42 Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age" in Nancy Fraser, ed., *Justice Interruptus Critical Reflections on the "Postsocialist" Condition* (New York: Routledge, 1997) 11.

43 Egan, *supra* note 7 at para. 5.

44 Marc A. Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender- Role Stereotypes, and Legal Protection for Lesbians and Gay Men" (1992) 46 U. Miami L. Rev. 511 at 537. "Homosexuality is a pejorative descriptive term developed by a medical profession that basically believed those it called homosexual to be physically or mentally ill".

45 *Charter*, *supra* note 6.

46 *R v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

47 *Halpern*, *supra* note 14.

48 *Ibid.* at para 129.

49 *Ibid.* at para 133.

50 *Ibid.* at para 121.

51 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R 698, 246 D.L.R (4th) 193 The Federal Government referred to the Supreme Court of Canada four questions regarding the constitutionality of their proposed legislation legalizing same-sex marriage.

52 *Supra* note 14.

53 *Kinsman*, *supra* note 24.

54 R.S.N.S 1989, c. 160, renamed *Maintenance and Custody Act*.

55 R.S.N.S 1989, c. 160, as am. by 2000, c. 29, s. 2(2).

56 *Kinsman*, *supra* note 24 at 217.

57 *Ibid.*

58 Ratna Kapur, "Law and the Sexual Subaltern A Comparative Perspective" (Paper presented to the Symposium Re-Orienting Law and Sexuality, Cleveland State University, October 1999) (2000) 48Clev St. L. Rev. 15.

59 (1868), L.R 3 Q.B. 360 [*Hicklin*]

60 See *Ranjit v. State of Maharashtra*, 1965 A.I.R 881, where the Supreme Court of India, in affirming *Hicklin* as the authority, defined obscenity as material which is "offensive to modesty or decency, lewd, filthy and repulsive"

61 *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449.

62 *Criminal Code*, R.S.C. 1985, c.C-46, s.745.

63 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*].

64 *Customs Act*, R.S.C. 1985 (2nd Supp.) c. 1, ss. 58, 71.

65 *Little Sisters*, *supra* note 63 at para. 57.

66 IGLHRC Action Alert, "Demand the Immediate Release of HIV/ AIDS Prevention Workers Detained under Sodomy and Obscenity Laws", online International Gay and Lesbian Human Rights Commission <[www.iglhrc.org/world//s\\_asia/India\\_2001Jul\\_2.html](http://www.iglhrc.org/world//s_asia/India_2001Jul_2.html)> (accessed March 21, 2004); see also Cossman, *supra* note 29.

67 Kelly Cogswell, "India Condemned For Anti-Gay Abuses," online The Gully <[w.thegully.com/essays/gaymundo/020412\\_gay\\_lesbian\\_india.html](http://w.thegully.com/essays/gaymundo/020412_gay_lesbian_india.html)>.

67 *Supra* note 63 at para. 1.

69 Michel Foucault, *The History of Sexuality Volume I: An Introduction*, (New York: Vintage Books, 1978) at 1.

70 Francisco Valdes, "Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the end of the Twentieth Century" (1997) 1 *J. Gender Race & Just.* 213 at 215.

71 *Ibid.*

72 *Supra* note 22 at 334.

73 *Supra* note 4 at 8.

74 Valdes, *supra* note 70 at 214.

75 *Ibid.*

76 Fajer, *supra* note 44 at 537.

77 See *Chamberlain v Surrey School District No. 36*, [2002] 4 S.C.R 710, where a parent organization fought to have the children's book *One Dad, Two Dads, Brown Dads, Blue Dads* which depicted same-sex parented families in a positive light, banned from the student curriculum.

78 Judith Butler, *Gender Trouble Feminism and the Subversion of Identity* (New York: Routledge, 1990).

n79 *Ibid.* at 15.

80 *Supra* note 78.

81 Butler, *supra* note 78 at 139.

82 See Butler, *supra* note 78 for a discussion of the manner in which gender is policed socially.

83 Wray, *supra* note 37.

84 *Ibid.* at 161.

85 *Ibid.* at 163.

86 Goldie, *supra* note 4 at 14 In the late nineteenth century a brief trip to Canada made by Oscar Wilde sparked discussion that "that sort" of behavior, for which Oscar Wilde had become a symbol, certainly was not native to Canadian culture.

87 The presence of a gay and lesbian rights movement in Canada has been discussed at length For a discussion on minority social sexual speech in Canada, such as film and pop culture, see Goldie, *supra* note 4.

88 Srivastava, *supra* note 19.

89 Kapur, *supra* note 22 at 340.

90 *Ibid.* at 334.

91 Sunder, *supra* note 25 at 94.

92 Kapur, *supra* note 22 at 373.

93 Siddarth Srivastava, "In India, there's nothing to be gay about," online Asia Times Online <[www.atimes.com/atimes/South\\_Asia/FC18Df04.html](http://www.atimes.com/atimes/South_Asia/FC18Df04.html)>.

94 Yusuf Khan, *Dilip Kumar & Ors v. Manohar Joshi & Ors*, [2000] 1 L.R.I 994 [*Yusuf Khan*].

95 Kapur, *supra* note 22 at 374 Note that there was very little sexually explicit material in the film The majority of sexual expression in *Fire* was social and cultural.

96 Yusuf Khan, *supra* note 94.

97 Sunder, *supra* note 25 at 84.

98 Kapur, *supra* note 22 at 374.

99 Sunder, *supra* note 25 at 80.

100 *Ibid.* at 95.

101 *Ibid.* at 75.

102 *Ibid.*

103 See Sunder, *supra* note 25, see also Kapur, *supra* note 22.

104 Kapur, *supra* note 58 at 19 I am not suggesting that the film was a recruitment effort, but rather that a statement such as this reveals that the film was received as a threat to dominant social models. It is very much in the best interests of a conservative male demographic in India, should it want to maintain the power it currently possesses, to ensure that the traditional institution of marriage in India is maintained.

105 Sunder, *supra* note 25.

106 Cogswell, *supra* note 5.

107 Kapur, *supra* note 22 at 340.

108 Sunder, *supra* note 25 at 88.

109 *Ibid.*

110 *Supra* note 7.

111 *Supra* note 6.

112 Goldie, *supra* note 4 at 15.

113 Donald McLeod, *Lesbian and Gay Liberation in Canada: A selected Annotated Chronology, 1964 -- 1975* (Toronto: ECW Press, 1996) at 7.

114 A. Giddens, *A Contemporary Critique of Historical Materialism*, 2nd ed. (London: MacMillan Press, 1995) at 28. Giddens identifies power as one of the nine chief features of his social theory of structuration. While I would not wholeheartedly adopt his theory of social change, I would agree that power is an unavoidable social reality and as a result a requisite ingredient for social change.

115 Kapur & Cossman, *supra* note 27 at 287, paraphrasing the argument of feminist writer Elizabeth Schneider.

116 Subsequent to the decision in *M v H*, *supra* note 14, in which the Court ruled that the definition of spouse included same-sex partners, the federal and provincial governments enacted legislation which provided same-sex couples with access to child and spousal

support. Upon the Supreme Court of Canada's s. 15 ruling in *Vriend, supra* note 14, Alberta became the last province to include sexual orientation as a prohibited ground of discrimination under their human rights legislation. Some provinces have also created legislative provisions for registered domestic partnerships. See for example, Nova Scotia, where even prior to the legalization of same-sex marriage, same-sex couples who registered under the *Vital Statistics Act*, R.S.N.S. 1989, c.494 attained every legal right heterosexual couples acquire through marriage.

117 On 11 June 2003, one day after the *Halpern* ruling in Ontario, the *Globe and Mail* printed more than seven stories on gay and lesbian relationships, online Equal Marriage <<http://www.equalmamage.ca>>. See for example Derek Rogusky, "Marriage is Debased" *The Globe and Mail* (11 June 2003) A19, Gilles Marchildon, "The Court Gets it Right" *The Globe and Mail* (11 June 2003) A19, Kirk Makin, "Gay Marriage is Legalized" *The Globe and Mail* (11 June 2003) A1; Estanislao Oziwicz, "Same-sex Married Couples Rejoice" *The Globe and Mail* (11 June 2003) A4; Kim Lunman, "National Response Needed, Cauchon Maintains" *The Globe and Mail* (11 June 2003) A4; "Liberal MPs Divided on Same-Sex Marriage" *The Globe and Mail* (online 11 June, 2003 3:37 PM); "Ontario Will Register Same-Sex Marriage" *The Globe and Mail* (online 11 June, 2003 3:37 PM); "Canada's First Legal Same-Sex Marriage" *The Globe and Mail* (online 11 June, 2003 3:37 PM).

118 I recognize that without marriage same-sex partners in some areas do not have access to the same legal infrastructure regarding division of assets upon separation. In addition, as noted by the Court in *Halpern*, without marriage same-sex couples must reside together for a period of time before acquiring the rights heterosexuals can gain instantly through marriage.

119 *Halpern, supra* note 14 at para. 5.

120 See e.g. T.Tyler & T.Huffman, "Gay Couple Married After Ruling" *The Toronto Star* (11 June 2003), see also A. Dunfield, "Vatican Releases Rules on Same-sex Marriage" *The Globe and Mail* (31 July 2003).

121 *Supra* note 24 at para. 221.

122 Their wedding took place prior to the Nova Scotia ruling legalizing same-sex marriage in that province.

123 *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R 554, 100 D.L.R (4th) 658.

124 *Ibid.* at para. 46.

125 *Reference re Same-Sex Marriage, supra* note 51 at paras. 37,42.

126 *Ibid.* at para. 40.

127 Butler, *supra* note 78 at vii.

128 *Supra* note 22 at 376.

129 *Supra* note 8.