

# Getting Gay Rights Straight

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## Abstract

This article explores the radical transformation over the past twenty years in Canadian homosexuals' rights. Since entrenchment of s.15 of the Canadian Charter of Rights and Freedoms, homosexuals have made enormous rights gains in Canada in most policy areas, including the recent acquisition of the right for legal marriage. However, deployment of litigious strategies based on immutable and essentialist claims has seen previous liberationist strategies aimed at deconstructing the regulation of sexuality replaced by those that are in many ways reconstructive. This legitimizing discourse has sought equal access to existing norms and institutions – rather than endeavoring upon the more expansive project of contesting the authenticity of the norms and institutions themselves. While such a strategy is invaluable in advancing the safety, dignity and equality of homosexuals; its underbelly consists of a more conservative argument that emphasizes sameness at the expense of difference, the perils of which should not be overlooked. This article examines three key concerns in this regard: essentialism, exclusion, and heteronormativity and considers opportunities for greater change.

Twenty years ago Section 15 of the *Canadian Charter of Rights and Freedoms* came into effect and changed the face of human rights in Canada. To a great extent, this change was the result of constitutionally guaranteed protections from discrimination that are found in s.15(1); regardless of race, national or ethnic origin, color, religion, sex, age or mental disability.<sup>1</sup> While s.15 has had an enormous impact upon the rights and lives of all Canadians, it has impacted the lives of homosexuals perhaps more than any other group.

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1. Section 15 of the *Canadian Charter of Rights and Freedoms* came into effect on April 17, 1985 – three years after enactment of the *Charter* in order to provide provincial governments time to amend their statutes. Since that time, the Court has stated that its interpretation of the *Charter* will be informed by international human rights principles (*Slaight*); that, at a minimum, protections will be at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified; that it will embrace equality as a protean concept (*Andrews*); and that forward-thinking will prevail in its interpretation of the *Charter* and the corresponding 'dispensation of respect, dignity and freedom to all citizens' (*Law*).

Less than thirty years ago Canadian homosexuals had to fight for protection from criminalization and discrimination – for the basic rights that citizenship was meant to confer equitably. Today, we receive state legitimization and are increasingly gaining access to formerly heterosexually privileged rights and institutions. Over the intervening period, entrenchment of s.15 in 1985 saw gays and lesbians litigiously pursue *Charter* challenges premised on categorical immutability disadvantage.<sup>2</sup> These ‘rights fights’ has successfully instigated an astonishing range of judicially made gains in most policy areas; including immigration, housing, employment, health benefits, adoption, pensions, finances, hate crimes, and now, marriage.<sup>3</sup>

Yet, as advantageous as these gains have been, their cumulative effect has been to replace previous liberationist strategies aimed at deconstructing the regulation of sexuality with those that are in many ways reconstructive. Litigious pursuits have proceeded by means of a legitimizing and reconstructive discourse that seeks equal access to existing norms and institutions – rather than the more expansive project of contesting the authenticity of those norms and institutions themselves. While such a discourse has been invaluable in advancing the safety, dignity and equality of homosexuals; its underbelly presents a more conservative argument that emphasizes sameness at the expense of difference, the perils of which should not be overlooked.<sup>4</sup>

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2. *Immutability* refers to a personal characteristic that is unchangeable or changeable only at unacceptable cost to personal identity. Court interpretation of s.15 protections allows individuals not prescribed within s.15 enumerated groups to access protections through proof of comparable disadvantage (analogous grounds).

3. As a result of *Charter*-premised litigation, same-sex marriage legislation was passed in Ontario, British Columbia, Quebec, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and the Yukon. In response, the federal government introduced legislation (endorsed by the Supreme Court in 2004) extending marriage rights to homosexuals nationally which received Royal Assent on July 20, 2005.

4. See Boyd at 211.

This paper examines the complexities and contradictions of the Canadian gay rights experience from the perspective of a gay man who grew up and came out during the 1980s, ultimately to become legally married and assimilated in near-suburbia. In particular, I explore if the *Charter*-premised legitimization discourse that was deployed not only brought rights gains but also homogenization and normalization; thereby undermining broader opportunities for change that might better reflect queer diversity and therefore be more meaningful to queer existence. Section one gives historical context and shows some of the dynamics at play that have shaped the litigious fight for rights, which are outlined in section two. The third section examines three key concerns arising from the legitimization strategy deployed: essentialism, and related rights acquisition contingencies; exclusion, arising from s.15 categories and immutability; and heteronormativity, emerging from strategies dependent upon the law and state. This is followed by a discussion of how queer theory may offer some potential for meaningful change in the future that may be of benefit to both queers and non-queers alike.

## **Liberation?**

Late in the 19<sup>th</sup> century homosexuals started to become a more conspicuous part of North American societies. In Toronto, the Lieutenant Governor held a Grand Ball in Allan Gardens honoring Oscar Wilde and a proliferation of speakeasies began to emerge down the street where homosexuals began to gather. By the mid 1920s, a ‘pansy craze’ had hit theaters, cabarets, and social events in New York and homosexuality suddenly took on a new visibility and prominence both in the U.S. and Anglophone Canada.<sup>5</sup> Chauncey suggests much of this was a consequence of prohibition, as middle-class men and women found themselves compelled to break the law in order to socialize, resulting in class mixture, social boundary transgression and a new resistance to conventions and morality.<sup>6</sup>

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5. For a discussion on the pansy craze and homosexual history more generally see Chauncey, e.g. at 328.

6. *Id.* at 328-9.

With the coming of the Second World War, however, homosexuality was restigmatized and seen as subversive. The notion of ‘homosexual’ transformed from being one of a gender persona to one of sexual object-choice and there was a simultaneous demonization of the ‘other’ endemic with the war. The need for invisibility quickly re-emerged and gay men took on a new virile masculinized look, visually defined by denim, T-shirts and leather jackets. Previously conventionally masculine gay men began to be more at ease in identifying as homosexual as doing so no longer required renunciation of their masculine identities. However, the new masculinized homosexual was more difficult to identify and was therefore perceived as even “more dangerous to society.”<sup>7</sup> Within a decade, this ‘danger’ would become a reality as gays and lesbians, as feminists had earlier, deployed radical militancy to combat mounting state oppression and hegemonic norms.

The gloves came off on June 27 1969. Police raided a gay bar, *Stonewall*, in New York because – and only because – it was a gay bar. They met resistance en masse. The raid provoked a riot that became a revolution. This defining moment in queer history is one that continues to be celebrated annually in cities across the world: Gay Pride Day.

Similar, but less violent, resistance in Canada resulted in the Trudeau government passing amendments within months after Stonewall to decriminalize private consensual sexual acts between same-sex adults. Yet the riots had provoked ambition for more than just rights in private. A wider universal claim for sexual freedom for all surfaced and a new gay-lesbian voice began a visible campaign for liberation and change.<sup>8</sup>

Soon an aggressive and rebellious Gay Liberation Front formed along with a ‘Gay Manifesto’ that called for “militant public action, a rejection of shame and guilt, the assertion of visibility, and the

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7. *Id.* at 359.

espousal of sexual freedom.”<sup>9</sup> Activists contested the authenticity of sexual identities, marriage, monogamy and family as defined by prevailing social norms; and saw their agenda as one that would “transform all sexual and gender relations”<sup>10</sup> Conventional sexual identities were seen as the product of a sexist and discriminatory society just as the hetero/homo binary was seen as the product of an invalid and oppressive typology. In fact, the notion that sexuality could be defined as fixed and biologically determined was rejected altogether and a grander project developed. New gay ‘liberationists’ equated sexual freedom with personal choice.<sup>11</sup> Messages of deconstructed sexual freedom were efficient and destabilizing as they demanded “reflection among the heterosexual majority that never had to give a second thought to their sexuality,”<sup>12</sup> while also acting as a three-pronged attack to simultaneously depathologize homosexuality, deconstruct hegemonic norms and transcend notions of categorization.

In 1981 another explosive event occurred, this time in Toronto. A coordinated police raid on four of Toronto’s five gay bathhouses resulted in the arrest of 286 gay men – the largest mass arrest in Canadian history since invocation of the War Measures Act eleven years before. A massive riot followed, Canada’s Stonewall. An astounding 4,000 people converged on Wellesley and Yonge.<sup>13</sup> Homosexuals across the world – in the U.S., Italy, Holland, Bonn, Denmark, Tel Aviv, Australia, Finland, Austria, Belgium, Ireland (and many of their respective governments) – demanded that Ottawa investigate this assault on civil rights. Under siege, the City of Toronto quickly produced the Bruner Report, calling for recognition of homosexuals as a “legitimate” part of our community.<sup>14</sup>

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8. See Stychin 05 at 93.

9. Warner at 64.

10. Phelan 01 at 108.

11. See Lehring in Phelan 97 at 191.

12. *Id.* at 176.

13. The protest was organized at the corner of Wellesley and Yonge Streets, marking a new ‘community’ concentration and contributing to the later development and location of Toronto’s ‘gay ghetto’.

14. See Bruner at 26.

Although gay liberation had begun as an attempt to deconstruct dominant exclusionary and oppressive social norms through radicalism and revolution,<sup>15</sup> in Canada the introduction of provincial human rights codes saw a second agenda emerge: acquiring normative rights. The Toronto bath raids had incited this new agenda and soon radical liberationists joined together with emerging assimilation/equality-oriented homosexuals around the common goal of creating sufficient change to prevent similar atrocities and violence. The coexistence was one, as Warner observes, that seems to have ignored the fundamental question of whether rights were the means or the end:

All was new and untested, especially the infant strategy of pursuing liberation by obtaining, in the short term, civil and human rights. There was great optimism regarding what small groups of committed lesbian and gay liberationists scattered about the country would be able to do to create broad social change – a revolution in which liberated sexuality would play a leading role... not significant at this time were division and dissent over the focus of the new movement, and the tactics it should use to achieve its goals – indeed, over what the goals should be: liberation or equality, revolution or integration.<sup>16</sup>

In a year filled with upheaval, 1981 also saw four letters spell hate in a new way: Gay-Related-Immune-Deficiency, or GRID. Although GRID was initially considered (and labeled) a minority problem, new understandings of its acquirability saw the disease renamed as AIDS in 1982. Acquirability reignited homosexual persecution and marginalization yet shifted the discourse from high-risk *populations* to high-risk *behaviors*. While this shift diffused the stigmatization of homosexuality, it also put the sexual freedom agenda under scrutiny. Liberationist calls for fluid sexuality became erased by dire warnings about sexual fluid; and messages celebrating difference were transformed into those that emphasized sameness.

The legitimization agenda found resonance with a geographically converging gay-lesbian-bisexual-transsexual-transgender-gender variant-queer (glbtqvq) community and their desperate need for supportive health and social service partnerships and funding. Growth in community organizations

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15. See Warner at 67.

16. *Id.*, at 94-5.

was seeing a fusion of identity and neighborhoods, and ‘gay ghettos’ were springing up in most Canadian and U.S. urban centers.<sup>17</sup> To access much-needed resources to fight an epidemic far more threatening than homophobia, community organizations were essentially compelled to support legitimizing discourses and distance themselves from more radical demands for sexual freedom and resistance to state intervention. The agenda to acquire rights was rapidly escalated in a concerted response to importunate state denial and the aversion of many in the medical profession to provide treatment to HIV infected men and women.

## Rights Fights!

Just a century ago Lord Alfred Douglas, lover (and later enemy) of Oscar Wilde, referred to homosexuality as ‘the love that dare not speak its name.’ Since then, the love that dare not speak its name has become the love that won’t shut up.<sup>18</sup>

As GRID was becoming AIDS, the *Canada Act* established the *Constitution of Canada* and *Canadian Charter of Rights and Freedoms* as the supreme law of the land. The *Charter’s* entrenched rights stood over all enactments of all legislatures and the judiciary was empowered to ensure all government policies remained consistent with its provisions. Section 15(1) of the *Charter* brought new protections from discrimination for Canadian groups and individuals and the entitlement to equality before and under the law and to equal protection and benefit of the law, regardless of race, national or ethnic origin, color, religion, sex, age or mental disability. Although protection for sexual orientation was initially considered during the drafting of s.15, it was overwhelmingly rejected in a 23 to 2 Parliamentary Committee vote. In an 11<sup>th</sup> hour move, however, MP Svend Robinson did manage to push through (the current) open-ended language, foreseeing that the courts might

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17. The word ghetto originated in Italy in 1516 to describe the enclosed areas where Jews were required to live and be after curfew to prevent sexual intercourse with Christians. The term resurfaced in the 20th century to describe an increasing number of North American ethnocentric urban enclaves acting as immigrant staging areas. Contemporary resource mobilization theory suggests ghettos act to aggregate stigmatized groups seeking social approval and mobilize political will. Interestingly, the gay community seems to have freely adopted this terminology to described those urban communities where gays (and to a lesser extent lesbians) have settled and that similarly act as migrant and immigrant staging areas and the loci of the glbtq politics and culture.

ultimately reverse parliament's omission – a possibility acknowledged by then Justice Minister Chrétien,<sup>19</sup> and one soon to come true.

Although gay legitimizationists and liberations had begun to coalesce around advancing their rights through inclusion in provincial human rights codes that were emerging at the time, these efforts were localized, fragmented and largely ineffective. However, the drive for equal rights saw a rapid political mobilization of homosexuals who organized nationally for the first time.<sup>20</sup> In 1986, Equality for Gay and Lesbians Everywhere (EGALE) was formed as Canada's second national homosexual organization – one that soon would play a significant role in advancing the new equal rights agenda and remains at the forefront of contemporary gay rights litigation. The first key challenge was 1989 *Andrews*, where the Court ruled for a substantive approach to s.15 protections; extending protections to those groups not specifically named in the *Charter*. Although *Andrews* did not involve sexual orientation rights, Wilson J. defined equality as a comparative concept and allowed s.15 analogous grounds through comparison with conditions of relevant others.<sup>21</sup> Subsequent rulings would firmly establish s.15 protections hinging upon proof of comparative disadvantage.<sup>22</sup>

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18. Corvino at xv.
  19. During committee debate, Robinson asked Minister Chrétien if, given that s.15's open-ended list of grounds for discrimination, "you (the government) are allowing for the possibility that the courts might interpret this to include additional grounds of discrimination?" Minister Chrétien replied "yes."
  20. The National Gay Election Coalition was formed in both 1972 and 1974 as a temporary national organization both for the purpose of lobbying candidates in each of those elections. Between 1975 and 1981, the National Gay Rights Coalition (a grassroots organization, later re-named the Canadian Lesbian Gay Rights Coalition) existed, like EAGLE, for the purpose of advancing equal rights.
  21. "[I]t is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances... It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s.15 that it be interpreted with sufficient flexibility to ensure the unremitting protection of equality rights in the years to come." (1989) 56 D.L.R. (4th) 33.
  22. Because equality is a comparative concept, relevant "comparators" must be established; within the scope of the ground(s) of alleged discrimination claimed (alternatively, the court may refine a claimant's comparison, should it be insufficient or inaccurate). In *Granovsky v. Canada*, [2000] 1 S.C.R. 703, 2000 SCC 28, par. 45-50, the Court emphasized that "identification of the group in relation to which [an] appellant can properly claim 'unequal treatment' is crucial," and substituted a different "comparator group" for the group identified by the appellant. (Library of Parliament)

In 1990 *Veysey*, sexual orientation was conceded as analogous grounds (leading to its reading-in as if written in 1995 *Egan*). *Charter* challenges skyrocketed as legitimization became aggressively pursued through a mushrooming docket of litigation premised on categorical immutability. Cases included *M v. H*, which saw the opposite-sex definition of spouse declared unconstitutional; *Vriend*, which deemed the failure of Alberta's *Individual Rights Protection Act* to include sexual orientation in contravention of the *Charter*; *Rosenberg*, which added same-sex spouses to the definition of spouse in the *Income Tax Act*; and the *Halpern* ruling that found exclusion of same-sex couples from marriage unconstitutional.

## Courting Change

One can find little disagreement that judicially instigated policies on gay-lesbian rights over the past two decades have resulted in an astonishing array of gains. In fact, gays and lesbians arguably have made more successful *Charter* challenges than any other minority. New rights have been acquired in key social policy areas, including immigration, housing, employment, health benefits, adoption, relationships, pensions, finances, hate crimes and marriage. In the space of a generation, one might argue, this extension of rights has helped to diminish stigmatization and lead to a significant increase in the assimilation of homosexuals within Canadian society.

Perhaps equal rights and the presence of the *Charter* affirm our equality. Rayside argues that s.15 served as a much-needed defense against oppression;<sup>23</sup> no doubt all the more imperative within a state that has historically assumed a stance of “gay rights if necessary, but not necessarily gay rights.”<sup>24</sup> Such a stance has afforded the government the advantage of avoiding political fallout from

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23. Rayside at 110.

24. Smith at 12.

rights opponents by shifting policy-making responsibility onto the courts and judicial review;<sup>25</sup> mitigating the uneasy political tension where legislative action is as untenable as inaction. However, as much as one might claim the law has been empowering, there are compelling arguments that it has been equally regulative and constraining. In this regard, I now set out three key concerns with the litigious pursuit of rights undertaken in our courting of change.

The first concern regards the problematic strategy of embracing essentialism. To maximize the opportunities presented by s.15, strategies had to shift from the more radical message that the individual constructed his/her sexuality to the litigiously expedient message that sexuality was a given, a consequence of biological/genetic pre-determination. The extension of s.15 rights to homosexuals was, of necessity, coterminous with the essentialization of homosexuality. Only by reconstituting sexuality *outside* the sphere of individual control would the gates to s.15 protections to swing open on their hinges of immutable comparative disadvantage. No longer was ‘sexuality’ a free or self-conscious choice.

Soon we began to advance messages of sameness: ‘my homosexuality, like your heterosexuality, is beyond my control;’ and later critiquing the apparent and fixed sexuality of others: ‘he’s so gay – he just doesn’t know it yet.’<sup>26</sup> By adopting essentialized self-explanations there is a risk that any articulation of individual and collective identities will be constrained by hegemonic boundaries or prevailing normative constructs, attenuating agency. By advancing immutability arguments

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25. Judicial review has caused our governments to become alert to rights concerns and to ensure all proposed legislation is in accord with the Charter. Proposed legislation, such as same-sex marriage, is submitted to the Court to ensure legislators are pre-informed of Courts concerns and the Justice Minister must certify that all bills have been Charter assessed. One might argue, as LeRoy J. and others, that s.15 thus has become a leading way in which the constitution confers rights and status on groups – one that is now almost unrestrained by s.1 ‘reasonable limits’ as the Court has virtually ceased subjecting claims to s.1 tests – of the 39 s.15 challenges between 1991 and 2003, only 2 of the 17 infringements found were saved by s.1.

26. See Lehring in Phelan 97 at 191.

one can easily confuse legally or politically expedient terms with identity or, at minimum, become constrained within dominant categories.<sup>27</sup> Because the dominant culture is infiltrated by legal concepts there is a very real danger in adopting these terms as our own as we are easily enticed into substituting legal categories and self-conceptualizations – which are, after all, the terms of the dominant majority – for queer ones. Moreover, as Kaplan cautions, the legacy of homosexual medical/legal discourse is one designed to discipline and regulate the homosexual subject and “[s]imply reversing the valence of these terms from negative to positive may perpetuate insidious features of domination.”<sup>28</sup>

These is also further entrenchment and masking of the invisible background norm Essentialism and sameness discourse serves to naturalize categories while leaving the norm’s own historical contingency uninterrogated.<sup>29</sup> The *Charter*-premised construction of an essentialized gay identity does not seem to have deconstructed heteronormativity so much as stabilize it primacy through the suspect process of granting legitimacy and rights that are contingent upon normalization:

Gay identity is absolutely necessary, essential, and crucial, because it is perennially threatened by denial, refusal, suppression, and ‘invisibilization’. And so it is always and everywhere important to insist on gay identity at all costs, to claim it and to affirm it, over and over again, precisely because it is continually treated as something shameful, deviant, pathological, and out of place. But gay identity is also dangerous, even treacherous. It is an identity which must be ceaselessly resisted and rejected, precisely because it normalizes and polices sexuality, because it functions to contain sexual and social difference, both in heteronormative culture at large and in lesbian and gay culture in particular. It is a politically catastrophic identity insofar as it enables society serenely to manage sexual diversity and in fact to stabilize and consolidate heterosexual identity itself, which would be a much more fluid, unstable and insecure entity without gay identity to shore it up.<sup>30</sup>

While essentialism was a litigiously powerful tool in achieving equal rights through judicial claim, it was also potent in reshaping public opinion. Building on the shift of discourse surrounding AIDS

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27. See Miller at 149.

28. Kaplan at 71.

29. See Iyer at 179.

30. Halperin at 18.

acquirability, relocation of sexuality outside the realm of individual choice maximized notions of sameness while minimizing opportunities for condemnation. For instance, a ‘born not made’ message was deployed to undermine mounting right-wing chants that AIDS was God’s retaliation against homosexual sin. Essentialist messages were disempowering, and far more palatable to the public than radical deconstructionist cries of gay liberationists. Unsurprisingly, public acceptance of homosexuals surged. Research indicates that the public’s appetite for extending rights to a minority is commensurate with favorable disposition toward groups, and that those groups perceived as most favorable are those that are perceived as non-threatening and normal.<sup>31</sup>

In little over a decade of the essentialized gay-lesbian, the number of Canadians holding favorable opinions towards homosexuals almost tripled, increasing from 26% in 1993 to 67% by 2003. A consistently increasing number also show support to same-sex marriage: the 1997 Canadian Election Survey (CES) found that 41% the public either strongly agreed/somewhat agreed with extending legal marriage rights; by 2000 the CES found this number had jumped to a majority of 54%. Subsequent polls suggest support is now even higher, surpassing two-thirds of the public in general, and four of every five persons under 40.<sup>32</sup> But perhaps the most interesting finding is the startling increase in Canadians who perceive sexual orientation is fixed at birth: rising from 13% in 1997 to well over 50% by 2001.<sup>33</sup> This jump reflects the efficacy of the shift in discourse from constructionism to essentialism and the deployment of equal rights premised arguments – which has seen the issue move significantly from the moral arena to a civil one, further supporting equal rights

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31. Wilcox and Wolpert conducted a comprehensive statistical regressive analysis of American National Election Surveys from 1992, 1993 and 1996. Findings included that “feelings about groups influence both the policy positions that individuals hold and the way they structure those positions. Individuals are less willing to extend civil liberties protections to members of groups they dislike or fear, and are also more likely to oppose policies that they associate with those groups... Negative affect toward gays and lesbians is a likely source of opposition to gay rights in all policy areas,” at 421.

32. Canadian Press/Leger June 2001 2002 Justice and Human Rights Committee hearing findings.

claims. Perhaps it is this very ‘popularity’ that buttresses the second concern that arises from legitimisation strategies: exclusion.

As s.15 categories become immutable distinctions for which protection is appropriate they concurrently function as a means whereby groups that deviate are contained and reinscribed with characteristics that serve to regulate. Moreover, by adopting essentialism we not only limit our own ability to change and to transform our ‘selves’ but simultaneously seem to exclude those who do. *Charter* categories fail to acknowledge a broader self-construction and those individual differences that are as important, if not more important, than categorical commonalities. The construction of the s.15 ‘gay-lesbian’ advances a narrowly defined and unitary subject that tends to negate multiple layers of agency and peripheral populations. Claims of discrimination that arise from the location of individuals in a matrix of different social groups become difficult to articulate and the complexity and contradictions of individual subjecthood are easily obfuscated. The fact that continuing contestation over bawdy-house and obscenity laws are relatively off the radar for so many gays and lesbians, or at least completely overshadowed by more mainstream rights concerns, suggests that there is a primacy to norms acquisition and simultaneous aversion to challenge the status quo. Categorical characteristics deployed to establish shared disadvantage and inclusion simultaneously establish exclusion whereby those deemed unfit for membership remain as outsiders.<sup>34</sup> Thus there is here a re-articulation of those very boundaries that gay liberationists have sought to deconstruct. As Stychlin cautions, our history is one replete with contestation over the question of who belongs<sup>35</sup> – a question that is now all too often posed by ourselves in order to police which queers are fit for membership and which are not.<sup>36</sup>

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33. Gallup 97, 01.

34. See Crossman at 245.

35. See Stychin 05 at 99.

36. Phelan 01 at 114.

A third concern is with the heteronormativity that ensues with rights acquisition strategies dependent upon the law and state. The use of law for broader societal rights acquisition is not without inherent challenges and litigious rights strategies must acknowledge, as Bumiller cautions, the law can only right the wrongs that law itself creates.<sup>37</sup> The use of litigation privileges law, courtrooms, and an apolitical approach that replaces broader challenges with the goal of winning cases. *Charter*-premised equality arguments entail the rather suspect legal and political construction of a responsible homosexual who wishes to assimilate as the equal of straights. Equal rights arguments resonated with the courts, but the cost of this resonance was an unreconstructed discourse of sameness.<sup>38</sup> The venue of the courtroom sees rights discourse shaped by elite actors (i.e. lawyers), who determine and frame the issue at hand at the expense of grassroots mobilization, more controversial challenges and more diverse solutions. The lawyer-client relationship remains privileged and unaccountable to broader collective interests. Litigation also lacks important social inputs on both sides of the courtroom. A handful of litigants hardly reflect the diversity of positions present in the community, and judicial rulings are often a choice between two extreme positions.<sup>39</sup>

The state plays an equally worrisome role and emerging state concerns can dramatically alter and reshape the impacts of rights acquisition. Governments change. For example, the election of the Mulroney Conservative Party in 1984 saw a new neo-liberal agenda thrust legitimization forward. The universalistic goals of the Keynesian welfare state gave way to individual responsibility, market dominance and an increased emphasis on the role of the family. Privatization redirected formerly public concerns (back) to the family in the name of increased individual self-reliance and fiscal efficiency. These state objectives were soon reinforced by the Court. For instance, Iacobucci J. in *M v. H* suggests that the recognition of same-sex relationships within ‘spouse’ would reduce: “...the

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37. See Bumiller at 61.

38. See Crossman at 235.

strain on the public purse [by] by shifting the financial burden away from the government and on to those partners with the capacity to provide support for dependent spouses (para. 98)." Suddenly this particular state was less concerned with who family members were than with what they did to take care of themselves. Expanded definitions of family and spouse seemed to welcome compliant homosexual couples as model neo-liberal citizens who demonstrated increased self-reliance and willingness to take on familial responsibilities and costs.

Gotell makes the compelling argument that the state thus has constituted a new good homosexual as a worthy minority whose equality claims are legitimated by mimicking the heteronorm. As queer relationships become repositioned within dominant hetero-norms (e.g. marriage, monogamy, joint property ownership, child-rearing), newly constructed images of partnerships seem to suggest that 'good' self-reliant homosexuals seek entry into the institutions of marriage and family and, by implication, 'bad' homosexuals resist domestication.<sup>40</sup> This argument seems supported by EGALE's proclamation that without legislated entry into marriage the dignity of all queers is demeaned,<sup>41</sup> and the glbtgvq community's seemingly limited interest in less heteronormative solutions to the legal acknowledgment of couples – such as registered partnerships.<sup>42</sup> Normative mimicking is comes with

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39. See Kiedrowski & Webb at 381.

40. See Gotell at 45.

41. EAGLE, Factum of the Intervener in Halpern et al. and MCCT v. Canada [2001] note 40 at para. 4.

42. While the Netherlands and Belgium have expanded marriage to same-sex couples, other jurisdictions have created alternative policy vehicles for relationship recognition that provide many of the same benefits and obligations as marriage with the exception of adoption privileges, such as registered partnerships (RPs).

By both falling outside dominant modalities of relational subjecthood and historic typological castings of valid partnerships. RPs can facilitate the recognition of a broad range of relationships while acknowledging a range of emotional, physical and/or economic interdependence in all forms of coupledom, including same-sex and other non-conjugal partners – such as elderly sisters, those surrounding care-giving and the like. RPs offer the opportunity to formalize a relationship and

its challenges and while the new good gay-lesbian legal subject might dispute and displace the heteronormativity of legal subjectivity,<sup>43</sup> it is an unstable reconstitution through sameness where assimilation may remain as an unsecured privatization of difference – as Phelan reminds us:

Heterosexual culture is not a foreign country to which we come, but is our native land. Rejection by that culture is not a matter of barred entry – we are already here. Rather it is a matter of expulsion and exile, an exile that is lived in the midst of the expellers. Although for some this leads to conscious rejection of their native culture, for many more it does not. Instead, assimilation is a matter of regaining as consciously different a membership that was once taken for granted. This conscious difference does not entail a challenge to any other prevailing cultural norms. It may lead to that, but there is no automatic theoretical or practical linkage between social difference and rejection of social norms. The current ‘gayby boom’ and ‘deurbanization’ of homosexuality provide evidence that many if not most sexual strangers seek nothing more than to be at home in their communities of origin.

At another level, however, assimilation might prove to be an inevitable failure. The fate of the stranger is to be never fully inside nor fully outside. Moves toward assimilation work by reducing major differences (that is, those differences seen as major by the dominant group) to ‘private’ differences. Such was the attempt of German Jews; such is the current fate of American Jewry. As Marx pointed out, however, assimilation requires the dominant group to treat a significant difference as insignificant, thereby belying its importance in the lives of the minority. The ‘inclusion’ of sexual minorities in a state that continues to define itself as heterosexual, white, and masculine will be at best an addendum waiting to be nullified.<sup>44</sup>

## Queer Possibilities

Your generation of misogynist capitalist swine clones and half-baked numbskull granola feminists over 30 are directly responsible for segregated bars, sexism, racism, classism, separatism, mass complacency, and a complex network of selfish, over-educated, self-appointed rich people overseeing a vast fake-democratic lesbian and gay multinational bureaucracy that dictates how we think, dress, act and fuck.<sup>45</sup>

Opportunities for more expansive freedoms are suggested by queer theory and by a re-examination of the contingency of queer identities. The freedom focus that was initially advanced by early gay liberation efforts was later developed following the founding of Queer Nation in 1990. By adopting ‘queer,’ these later identity politics activists attempted to reclaim and politicize a

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voluntarily assume rights and responsibilities, while reducing uncertainties that surround common law ascription policies and outcomes.

43. See Crossman at 245.

44. Phelan, 01 at 113.

45. Johnny Noxzema, editor of BIMBOX (queer zine) in a letter to the Advocate gay newspaper.

derogatory term to simultaneously disarm its negativity and interrogate institutionalized heterosexuality. Central to the project was a rejection of legitimization (as too assimilationist); reclamation of radicalism, including controversial tactics such as the outing famous gays and lesbians; and a reconstruction of liberationist-type messages, such as Queer Nation Toronto's "*Queers are here, get used to it.*" Rejecting legitimization as a mainstreaming strategy that would lead only to heteronormativity (the resemblance of gays and lesbians to those of 'normal' society in everything but the sex of the partners); Queer Nation deployed queer theory while simultaneously reviving radical activism in order to challenge assimilationist discourses and identity politics. Through performance art and 'kissins' in public spaces like shopping malls, Queer Nation attempted to expose the extent to which public space was heterosexually normed and to validate alternative sexualities as already having an equal territorial presence.

Not long after the emergence of Queer Nation, the term 'queer theory' appeared in published form in Terese deLauretis 1991 work, *Queer Theory: Lesbian and Gay Studies: An Introduction*. Since that time, queer theory has come to represent the notion that queerness constitutes sexuality non-normatively, transcending binary distinctions (homosexual/heterosexual) and embracing all those who are disenfranchised by dominant sexual norms;<sup>46</sup> but, as Gamson and Moon argue, do so with the conscious acknowledgement that sexuality is inevitably intertwined with, even constitutive of, power relations.<sup>47</sup> Thus, sexual dichotomizing transcended through an understanding of the arbitrariness and instability of sexual categorization and concurrent recognition that identity has an essential fluidity that is inherently unfixed and constantly under negotiation and renegotiation.<sup>48</sup> Moreover and equally as important is a more realistic view of the terrain of social relations that can, through reconceptualization of dynamics at play, provide a powerful deconstruction of normative inequalities and identity-limiting self-constructions such as compulsory heterosexuality.

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46. See Stein at 50.

47. Gamson & Moon at 49.

48. See Duggan at 23.

This problematization of sexual and gender categories demands interrogation of boundaries and binaries that serve to entrench inequalities and limit individual rights. The entrenched self remains distanced from transformation, and thus from more fluid, liberating and multiple points of manifestation. In the case of sexual identity, Brekhus' work suggests our self constructs intersect and operate across multiple sites.<sup>49</sup> For some, gay is a noun, while for others it is a verb – and for others still, it remains an adjective.<sup>50</sup> Brekhus argues that contrary to common perceptions of “a unitary, easily identifiable, and coherent way to be gay (or to be any other identity), there are multiple ways to present and organize a marked identity,” and often “considerable conflict within identity categories about how to perform one’s identity.”<sup>51</sup>

The rejection of sexual categorization and of the notion of a unified and essentialist homosexual identity led to a broader conceptualization of sexuality that fostered alternative constructions of ‘self’ free from essentialist and other contingencies. At issue was not a simple questioning of the content of collective identities; but a larger questioning of the unity, stability, viability and political utility of sexual identities,<sup>52</sup> a more critical analysis that emerged where identities were seen as constantly in flux and capable of re-creation. This was a deconstructionist politic that saw categorical collectivities and binary typologies (gay/straight, man/woman) as instruments of oppression and obstacles. Fused to this politic was an empowering refusal to embrace any form of minority status.<sup>53</sup>

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49. Brekhus findings of an analysis of in-depth interviews of 30 gay men and informal interviews of over 100 other men resulted in developing three ‘identity management profiles.’ These three identity types he refers as lifestylers, commuters, and integrators. Brekhus suggests that for lifestylers ‘gayness’ is a noun, as they ground their sexuality as the core ingredient of self at all times and in all places (i.e. they self-represent as 100% gay 100% of the time). Commuters describe their “gayness” as a verb, grounding their sexuality in some places at some times but also submerging it and grounding ‘other selves’ during other times and in other places (i.e. they self-represent as 100% gay part of the time but ‘off duty’ the rest of the time). For integrators, gayness is an adjective, without grounding and essentially self-referencing as only mildly gay (e.g. 20%, 100% of the time).

50. See Gamson & Moon at 50; Brekhus at 11.

51. Brekhus at 11.

52. See Gamson 95 at 404.

53. *Id.* at 396.

Central to the project [was] the contestation of boundaries and categories, not only of sexual identity, but more widely to include the boundaries of normalcy itself. Queerness is in part a rejection of the minority group categorization. It suggests that the logic of identity is far more complex ‘along dimensions that can’t be subsumed under gender and sexuality at all: the ways that race, ethnicity, postcolonial rationality crisscross with these and other identity-constituting, identity-fracturing discourses. Moreover, queers constantly seek to reflect upon the contingency and ambiguity of all sexual categories. Rather than constituting an identity category itself, queerness highlights the contingency of all boundaries of social practice and identity, including its own.<sup>54</sup>

Queer theory not only provides contestation to the boundaries that heteronormativity delineates, but offers opportunities to redraw alternative renderings where conceptualization of identity can become unshackled from regulative and restrictive contingencies. As a result, the space for self and social actualization is expanded. The question then becomes one of identifying those arenas where opportunities for a more transformative agenda might take hold. Weeks, for instance, suggests that the focus might move from individual to relational – exploring opportunities emerging from queer relationships, friendships, experiences of intimacy and parenting.<sup>55</sup>

As we consider how queer theory might help to shape our future agenda we might benefit through returning to the notion of relationships. Nedelsky argues of rights as relationship and the importance to focus on those kinds of relationships that can foster self-actualization. Nedelsky uncovers the advantage in moving the issue from contestations around private spheres of control and the disappearance of differences in those spheres of control, to larger concerns around fostering advantageous autonomy and capacity-building relationships with diverse populations.<sup>56</sup>

What also underpins this bundle of responsibilities and rights, though, is an underlying faith in the power of the granting of rights to shape behavior and to foster stable relationships which, it is assumed, are beneficial to individuals and to society. But, on the other, the assumption is that law reform will strengthen those relationships, foster the forging of new long term relationships, and improve the quality of life of those who enter into them. The power of rights thus is substantial in shaping our relationship choices; perhaps as powerful as love in shaping relationships.<sup>57</sup>

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54. Stychin 95 at 61.

55. See Weeks at 240.

56. See Nedelsky at 14-21.

57. Stychin 05(b).

For Phelan, queer relationships can bring new notions of kinship to bear upon prevailing normative concerns with the primacy of blood relations and the public/private split that so detrimentally conceives private connections between people as more real and rich than public ones.<sup>58</sup> Vaid sees value in bringing the gay and lesbian *morality* to heteronormativity – one that is centered around our commitment to honesty as demonstrated by the experience of coming out, commitment to community, love that we manifest beyond limited definitions of the family, and by the commitment to joy as expressed in the affirmation of pleasure, both sexual and non-sexual.”<sup>59</sup> These opportunities to expand queer horizons are as diverse as our manifestations of sexuality.

Gay liberation asked us to look beyond lesbian and gay mimicking of heterosexual relationships and to imagine different kinds of personal, family, and social arrangements that were less oppressive, more egalitarian, and more inspired. If we reject this message, if we buy wholesale into the idea that an equal rights ethos is the only legitimate progressive path, then we simply limit our ability to imagine ourselves differently, and differentiate ourselves imaginatively.<sup>60</sup>

Yet, as alluring as such new explorations might suggest themselves, there was and remains the need for a secure (or as secure as possible) rights-protected foundation. As Gamson argues, we reach a dilemma: fixed identity categories are both the basis for oppression and the basis for political power.<sup>61</sup> Whether future agendas involve the continued contestation of unacceptable constraints and contingencies around normative rights or more expansive transformative change, we should, as Gamson argues, consider *Charter* categories and challenges not only as dangerous but also necessary strategies; moves to both fix and unfix them remain reasonable.<sup>62</sup> The complexities and contradictions of the Canadian gay rights experience can be a double-edged sword, as Crossman argues:

The legacy of the first twenty years of the Charter is, then, a legacy of multiple and contradictory victories and defeats. At the doctrinal, strategic, and political levels, the legacy is profoundly

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58. See Phelan 01 at 59.

59. Vaid 95 at 380.

60. Lehring in Phelan 97 at 194.

61. See Gamson 94 at 391.

62. See Gamson at 190.

contradictory. ...[This legacy] is one that has produced a complex new identity for lesbians and gay men. It is an identity that has radically and fundamentally transformed the face of legal subjectivity, displacing its insistence on heteronormativity. But it is also an identity that reinforces other dominant norms of legal subjectivity and reconstitutes lesbian and gay men in its image.<sup>63</sup>

## Conclusion

In acknowledging this anniversary of s.15 of the *Charter*, I wish to pay homage to the benefit it has brought. As history has proven, climbing the first rung on the human rights ladder requires gaining a foothold of socio-political recognition – all too often achieved through legal and social dispute that demands a critical mass and a positioning suitably disposed to general public support. The *Charter* and legitimization agenda congealed an otherwise disaggregated population and rallied it into such an organized and critical mass. The ensuing call for equal rights resonated with the courts, state and the general public; far more so than the porous identity of gay liberationists and their deconstructive agenda of sexual freedom. As a result, new rights and empowerments were granted, persecution and criminalization diminished, and Canadian homosexuals are increasingly integrated within society. After years of being on the outside we are now, at least with one foot, inside.

Yet at the same time these benefits come with a cost. This paper has explored three key concerns and hopefully provided some argument that while legitimization may have brought an astonishing range of rights and benefits, its underbelly includes essentialism and concomitant attenuated agency; exclusion; and heteronormativity. The contingency of s.15 rights upon an essentialized homosexual subject and immutability tests has seen the deployment of dominant categories to explain and constrain queerness. Through the immutability paradigm, queerness is reinscribed with regulative characteristics that limit transformations and alternative constructions of self while excluding others. An ensuing self-created sameness erodes individual differences and easily undermines more meaningful platforms and opportunities for change.

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63. Crossman at 248.

The exigencies of past criminalization and persecution may be, at least almost, gone – but they have been replaced by the invidious, if not regulative, construction of social and sexual identities. We are now at risk of being constrained by the success of our own discourse. Whether or not we are complacent or complicit there is a strong argument to be made around the contraindication of current *Charter*-premised rights strategies.

Moving forward, these concerns may be addressed through a fuller conceptualization of identity and, more particularly, through exploring opportunities to define our relationships beyond the constraints of sexual binaries and normative primacy, such as advanced by queer theorists. The collaborative coexistence that liberationists and legitimatists fashioned ignored the fundamental question of whether rights were the means or the end. If they were the end, the agenda has succeeded. If they were the means, it has yet to reach its conclusion. At the moment, hopefully, it remains a grand and unfinished project with promising opportunities ahead, much like my recent marriage – for better, or worse.

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