

LESBIANS, GAY MEN, AND THE *CANADIAN CHARTER* *OF RIGHTS AND FREEDOMS*©

BY BRENDA COSSMAN*

The legacy of the first twenty years of the *Charter* for lesbians and gay men is a contradictory one of victories and defeats. At the level of doctrine, strategy, and politics, both the victories and defeats have been precarious and contradictory. While gaining formal equality rights, lesbians and gay men have not been able to secure rights to sexual freedom. And while formal equality has displaced the heteronormativity that denied legal recognition and subjectivity to lesbians and gay men, this formal equality has come at a cost. Lesbians and gay men are being reconstituted in law: some are being newly constituted as legal citizens while others are being re-inscribed as outlaws. The first twenty years of the *Charter* is a legacy of transgression and normalization; these new legal subjects are both challenging dominant modes of legal subjectivity and its insistence of heterosexuality, while being absorbed into them.

Dans les vingt premières années suivant son entrée en vigueur, la *Charte* a laissé un patrimoine marqué de victoires et d'échecs pour les lesbiennes et les hommes homosexuels. Les victoires et les échecs ont été précaires et contradictoires au niveau de la doctrine, de la stratégie et de la politique. Malgré la reconnaissance formelle à l'égalité, les lesbiennes et les hommes homosexuels n'ont pas pu obtenir le droit à la liberté sexuelle. Tandis que l'égalité formelle a déplacé la hétéronormativité qui privait les hommes homosexuels et les lesbiennes d'une reconnaissance juridique et d'une subjectivité, l'obtention de cette égalité formelle n'a pas été sans coût. Les lesbiennes et les hommes homosexuels sont reconstitués en droit: certains sont nouvellement désignés comme étant des citoyens juridiques tandis que d'autres sont redéfinis comme étant des hors-la-loi. Vingt ans après son entrée en vigueur, la *Charte* a laissé un patrimoine de transgression et de normalisation; ces nouveaux sujets juridiques contestent les principaux modes de la subjectivité juridique ainsi que l'accent mis sur la hétérosexualité, tout en étant absorbés par ceux-ci.

I.	INTRODUCTION	224
II.	THE EARLY CASES: <i>MOSSOP</i> AND <i>EGAN</i>	225
III.	THE TURNING POINT: <i>VRIEND</i>	231
IV.	THE HIGH WATER MARK: SAME-SEX RELATIONSHIP EQUALITY	233
V.	WHAT ABOUT SEX AND EXPRESSION? <i>LITTLE SISTERS BOOKSTORE</i>	239
VI.	CONFLICTING RIGHTS: RELIGION VERSUS SEXUALITY	243
VII.	VICTORIES, DEFEATS, AND NEW LEGAL SUBJECTS	246

© 2002, B. Cossman.

* Professor, Faculty of Law, University of Toronto. With thanks to Bruce Ryder for his comments and Joe-Anne Pickel for her excellent research assistance.

I. INTRODUCTION

Many stories have been told about the legacy of the first twenty years of the *Canadian Charter of Rights and Freedoms*¹ for lesbians and gay men. Some progressive voices tell a celebratory story, in which the *Charter* has been an important tool in challenging the denial of formal legal equality. Laws that discriminate against individual lesbians and gay men, as well as laws that discriminate against same-sex relationships, have been struck down by the courts, forcing begrudging legislatures to amend their laws to respect formal equality rights.² Other, often more conservative voices, tell a story about the powerful and dangerous potential of rights discourse and the *Charter*, which are eroding the rightful place of legislatures in a liberal democracy. According to these *Charter* critics, lesbians and gay men, like other equality-seeking or, in their language, “special interest” groups, have successfully used the *Charter* to hijack the democratic process.³

In attempting to evaluate the significance of the first twenty years of the *Charter* for lesbian and gay rights, I believe that there is some truth to both of these stories. The *Charter* has been an effective tool in challenging the denial of formal legal equality of lesbians and gay men. Laws that discriminate against lesbian and gay individuals and relationships have been struck down as unconstitutional, and legislatures have been forced to amend their laws to extend formal legal equality. In so doing, there has been a shift in the politics of democracy. The *Charter* critics—right and left—are correct to point out that courts have done what almost no legislature was prepared to do. The legalization of politics has delivered formal equality for lesbians and gay men.

But the legacy of the first twenty years of the *Charter* for lesbians and gay men is more complicated than either of these defenders or critics would suggest. My assessment is located within the more critical scholarship that emphasizes both the possibilities and limitations of *Charter* litigation and the

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

² See e.g. Donald G. Casswell, “Moving Toward Same-Sex Marriage” (2001) 80 Can. Bar Rev. 810; Donald G. Casswell, “Any Two Persons in Canada’s Lotusland, British Columbia” in Robert Wintemute & Mads Andenaes, eds., *Legal Recognition of Same-Sex Partnerships: A Study in National, European and International Law* (Oxford: Hart, 2001) 215; Kathleen A. Lahey, *Are We “Persons” Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

³ See Ranier Knopf & F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992); Ranier Knopf & F.L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

law more generally.⁴ The legacy of lesbian and gay legal struggles under the *Charter* is a contradictory one—both the victories and defeats have been “fragile, partial and contradictory.”⁵ In this article, I attempt to tease out and evaluate this contradictory nature of these legal victories and defeats on multiple levels by analyzing the doctrinal developments, the nature of the legal strategies, as well as the broader political implications of the decisions. This includes the mobilization of legal and political movements, both for and against gay and lesbian rights, the nature of the legal and political identities constituted by these movements, and both the assimilative and subversive potential of these identities. I am particularly interested in the new legal subjects that are being constituted on the legal stage. While the heteronormativity of law and the legal subject has been increasingly challenged, lesbians and gay men have been partially absorbed into dominant modalities of legal subjectivity. The complex processes of inclusion and exclusion have led to the emergence of new legal subjects who are both normalized and transgressive.⁶

II. THE EARLY CASES: *MOSSOP* AND *EGAN*

One of the first *Charter* challenges, brought by Karen Andrews under the banner “We Are Family,” challenged the exclusion of same-sex couples and their children from the Ontario Health Insurance Program.⁷ Doctrinally, she lost. The court held that there was no violation of section 15: while opposite sex couples could marry, procreate, and raise children, same-sex couples could not. Same-sex couples were biologically different, and hence, not entitled to formal equality with heterosexual couples. The heteronormativity of *Andrews* was echoed in decision after decision. In the first marriage challenge under the *Charter*, for example, the majority of the Ontario Court, General Division held

⁴ See e.g. Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) [Herman, *Rights of Passage*]; Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995); Carl F. Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 Can. J.L. & Jur. 49; Susan B. Boyd, “Family, Law and Sexuality: Feminist Engagements” (1999) 8 Social and Legal Studies 369 [Boyd, “Family, Law and Sexuality”].

⁵ Shelley A.M. Gavigan “Morgentaler and Beyond: Abortion, Reproduction and the Courts” in Janine Brodie, Shelley A.M. Gavigan & Jane Jenson, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) at 126.

⁶ See generally Jeffrey Weeks, “The Sexual Citizen” in Mike Featherstone, ed., *Love and Eroticism* (London: Sage, 1999) 35; Carl F. Stychin, “Sexual Citizenship in the European Union” (2001) 5 Citizenship Studies 285-320; Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

⁷ *Andrews v. Ontario (Minister of Health)* (1988), 49 D.L.R. (4th) 584 (Ont. H.C.J.) [*Andrews*].

that the exclusion of lesbian and gay couples from marriage was justified by the “biological limitations of such a union.”⁸ The dissenting opinion, however, rejected the focus on biological difference, and held that the state’s interest in promoting marriage and families should be related to function, not form.

The stage was set. Doctrinally, conservative judges focused on biological differences to justify the exclusion of same-sex couples while more progressive judges focused on the equality of same-sex relationships and the recognition of diverse family forms. These two positions would continue to divide judicial opinion.⁹ The *Layland* marriage case also set the strategic stage for lesbian and gay litigants. Rather than appealing the marriage decision, the lesbian and gay activists involved decided to focus their attention on challenging the common law definitions of spouse found in provincial and federal legislation.¹⁰ These challenges to opposite sex definitions of spouse had already begun to percolate their way up through the courts, with the decisions reflecting this conservative/progressive divide.

The first gay equality rights case to reach the Supreme Court of Canada involved a gay man, Brian Mossop, who challenged his employer’s refusal to grant him bereavement leave to attend the funeral of his partner’s father, on the ground that they were not members of each other’s “immediate family.”¹¹ The case was not strictly speaking a *Charter* challenge, although it had a number of doctrinal, strategic, and political implications for subsequent *Charter* challenges. Mossop took his case to the Canadian Human Rights Commission, arguing that the denial of the leave constituted discrimination on the basis of family status (sexual orientation was not at the time a prohibited ground within the *Canadian Human Rights Act*¹²). The majority of the Supreme Court dismissed the case on the ground that the denial was based on sexual

⁸ *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 at 222-23 (Ont. Ct. Gen. Div.) [*Layland*].

⁹ For cases following the conservative approach, see e.g. *Vogel v. Manitoba* (1992), 90 D.L.R. (4th) 84 (Man. Q.B.), rev’d (1995) 126 D.L.R. (4th) 72 (Man. C.A.); *Canada (A.G.) v. Mossop* (1990), 71 D.L.R. (4th) 661 (F.C.A.); and, most recently, *EGALE Canada Inc. v. Canada (A.G.)*, [2001] B.C.J. No. 1995 (S.C.) (QL). For cases following the progressive approach, see e.g. *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321 (T.D.); *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.); *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72 (Man. C.A.). For divided cases, see *Egan v. Canada* (1993), 103 D.L.R. (4th) 336 (F.C.A.), aff’d [1995] 2 S.C.R. 513 [*Egan*], and *M. v. H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.), aff’d [1999] 2 S.C.R. 3 [*M. v. H.*].

¹⁰ “The Impact of the Supreme Court Decision in *Egan v. Canada* Upon Claims for the Equal Recognition of Same-Sex Relationships,” online: EG ALE Canada <http://www.islandnet.com/~egale/legal/egan_an.htm>.

¹¹ *Mossop v. Canada (A.G.)*, [1993] 1 S.C.R. 554 at 555 [*Mossop*].

¹² R.S.C. 1985, c. H-6 [*Human Rights Act*].

orientation, not family status, and that absent a constitutional challenge to the *Human Rights Act*, there was no basis for the claim.

Doctrinally, the ruling in *Mossop* represented a defeat. However, the precedential value of *Mossop* for subsequent *Charter* litigation was limited. The Court had requested additional submissions from the litigants on the potential implications of *Haig*,¹³ in which the Ontario Court of Appeal held that the exclusion of sexual orientation from the federal *Human Rights Code* was a violation of section 15 of the *Charter*. The *Mossop* litigants decided not to raise the constitutional question, insisting instead that the Court decide the matter on the basis of family status. As a result of not raising the constitutional arguments, the decision had little precedential value for future *Charter* challenges.

While the majority dismissed the appeal, the dissenting opinion of Justice L'Heureux-Dubé included a compelling and sophisticated discussion of the meaning of family and argued for the need to recognize the diversity of Canadian families. The dissent represented a significant contribution to the emergence of judicial doctrine endorsing a more functional approach to the family. The doctrinal legacy of *Mossop* was contradictory, representing a very limited defeat, and a victory within that defeat.

Strategically, the litigants' arguments in the case—and the deliberations behind their decisions—were also contradictory, embodying partial victories and partial defeats. First, the case represented an interesting attempt by the litigants to frame the issue in the discourse of equality, while consciously trying to mitigate the sameness argument. In a conscious attempt to disrupt the heteronormativity of law, *Mossop* and the intervenors supporting his claim tried to limit their reliance on sameness arguments and the heterosexual equivalency of same-sex relationships.¹⁴ Even in arguing for a functional equivalency approach, *Mossop* himself refused to make arguments on the basis of sexual monogamy. Second, the litigants made complex arguments about intersectional discrimination, insisting that discrimination on the basis of family status included discrimination against same-sex couples. Both of these arguments were only partially successful. Functional approaches to the family are invariably measured against a set of norms about what families do or ought to do.¹⁵ While these functional definitions can help disrupt biological and conservative definitions, they are at the same time shaped by dominant familial

¹³ *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.).

¹⁴ See Jody Freeman, "Defining Family in *Mossop v. DSS*: The Challenge of Anti-essentialism and Intersective Discrimination for Human Rights Litigation" (1994) 44 U.T.L.J. 41.

¹⁵ See *ibid.*; Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Can. J. Fam. L. 269 [Cossman & Ryder, "What is Marriage-Like Like?"].

norms. The complex arguments about discrimination and identity did not have legal resonance, at least not for the majority. However, the arguments no doubt contributed to wider-ranging discussions about the meaning of family, as well as to broader debates about the possibility and limitations of presenting complex arguments about discrimination and identity in legal fora.¹⁶

In this sense, the broader political implications of *Mossop* were also highly contradictory. Despite the doctrinal loss, Mossop himself considered the case to be a victory because it had created space to talk about homosexuality.¹⁷ The relative success of the case was, in this view, to be measured not against the legal outcome, but rather, in terms of its contribution to public sphere deliberations. However, other commentators have pointed out that despite the complex arguments presented before the Court, the public presentation of the case featured a much more straightforward sameness argument.¹⁸ The broader message was of the equivalency of same-sex and opposite sex relationships; the more complex legal argument did not translate into the public sphere deliberations.

The *Mossop* challenge contained both transgressive and normalizing dimensions. It challenged the heteronormativity of dominant modalities of family and legal personhood, and it was partially successful in so far as the challenge made inroads in a strong dissent. The dissent, and the broader debates provoked by the litigation, challenged the idea of sameness as the basis for the recognition of same-sex families, insisting that equality did not require assimilation into an idealized conception of family. At the same time, the majority opinion subtly reinforced the heteronormativity of dominant familial discourses: family status did not include same-sex couples. The broader political message was a normalizing one of sameness and assimilation.

In the second same-sex equality rights case to reach the Supreme Court, *Egan v. Canada*, a gay couple who had been together for forty-two years challenged the refusal of the federal government to grant them a spousal pension benefit under the *Old Age Security Act*,¹⁹ on the ground that they were not spouses.²⁰ The Court unanimously held that sexual orientation was a prohibited ground of discrimination under section 15 of the *Charter*, even

¹⁶ See Freeman, *supra* note 14. See also Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L.J.* 179.

¹⁷ See Herman, *Rights of Passage*, *supra* note 4 at 60-61, an interview with Brian Mossop.

¹⁸ Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999) at 91.

¹⁹ R.S.C. 1985, c. O-9.

²⁰ *Egan*, *supra* note 9.

though it was not explicitly listed. In a 5–4 opinion, the majority held that the equality rights of James Egan and John Norris Nesbit had been violated. Writing for the majority on section 15, Justice Cory held that the opposite sex definition of spouse in the federal *Old Age Security Act*²¹ discriminated on the basis of sexual orientation and therefore constituted a violation of Egan and Nesbit’s equality rights. However, a very different majority held that the violation was a reasonable limit within the meaning of section 1. Four members of this majority found no violation of section 15. The fifth, Justice Sopinka, was the swing vote. He agreed with Justice Cory that section 15 was violated, but parted company with him at the section 1 stage of the analysis, finding that the violation was a reasonable limit. He held that since gays and lesbians were a fairly new equality-seeking group, the government needed to be given some latitude in deciding when and how to extend legal protections. In his view, “government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.”²²

Doctrinally, *Egan* represented a groundbreaking victory within a defeat. For the first time, the majority of the Court held that sexual orientation was an analogous ground and that an opposite sex definition of spouse constituted discrimination within the meaning of section 15. However, the majority on section 15 was defeated on section 1 by Justice Sopinka’s fiscal conservatism. The fragility and partiality of the victory was further underscored by the social conservatism of the dissenting opinion by Justice La Forest on section 15. In his view, the exclusion of same-sex couples was perfectly reasonable, given the importance of marriage and marriage-like relationships in reproduction:

Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d’être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of those relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.²³

Once again, differential treatment was justified in the name of

²¹ *Supra* note 19, s. 2.

²² *Egan*, *supra* note 9 at 516.

²³ *Ibid.* at 515. See Lori G. Beaman, “Sexual Orientation and Legal Discourse: Legal Constructions of the ‘Normal’ Family” (1999), 14 C.J.L.S. 173, who emphasizes the extent to which this dissenting opinion, alongside Justice Sopinka’s opinion, operated to reproduce dominant truths about the normal family.

biological difference. Yet, as Carl Stychin has observed, “the fact that La Forest J. found it necessary to articulate his wide-ranging defense of heterosexual marriage (and ‘traditional’ families) suggests that the norm may be somewhat ‘troubled’ by the public articulation of gay/lesbian narratives such as those of Egan and Nesbit.”²⁴ And the tide had begun to turn: only four of the nine justices signed on to this conservative vision. This too represented a kind of incremental victory within a fragile legal defeat.

Strategically, the arguments in *Egan* were more assimilationist than those in *Mossop*. While arguing that same-sex couples did not have to be “just like” heterosexual couples, the argument remained one of functional equivalency. The idea of sexual monogamy seemed to creep back in implicitly to this functional equivalency. As Miriam Smith has observed, “the optics of the *Egan* case certainly suggested a stable model of homosexual coupledness, as the public presentation of the case highlighted the fact that Egan and Nesbit had been partnered for over forty years.”²⁵

Politically, the impact of *Egan* was also contradictory. The defeat hardened the resolve of much of the lesbian and gay community, mobilizing support behind the demand for spousal recognition and rights. In the wake of the social and fiscal conservatism that defeated the challenge, the denial of basic formal equality seemed that much more egregious. The result was to increasingly silence the dissent within the lesbian and gay community on spousal rights and the contested issue of assimilation. It became progressively more difficult to argue against same-sex relationship recognition when the law’s reasons for doing so were so profoundly conservative.²⁶

Doctrinally, strategically, and politically, the ruling in *Egan* represented partial victories within partial defeats. Equality discourse was in ascendance, but not yet sufficient to displace the hold of fiscal and social conservatism. The equality dispute represented a profound challenge not only to these conservative discourses, but to the heteronormativity of law itself. Yet, the transgressive nature of the challenge was simultaneously normalizing. The legal subjects that the challenge brought at least partially onto the legal stage were being constituted in and through dominant familial discourses.

III. THE TURNING POINT: *VRIEND*

²⁴ Carl F. Stychin, “Novel Concepts: A Comment on *Egan and Nesbit v. the Queen*” (1995) 6:4 Const. Forum Const. 101 at 105. See also Herman, *Rights of Passage*, *supra* note 4.

²⁵ See Smith, *supra* note 18 at 92.

²⁶ As Stychin has observed, *supra* note 24 at 105, the arguments for same-sex state benefits provided very little room for a critique of the allocation of rights and responsibilities on the basis of family status.

In *Vriend v. Alberta*,²⁷ a science laboratory coordinator was fired from his job at a Christian college because he was gay. Delwin Vriend brought a challenge to the Alberta *Individual Rights Protection Act*²⁸ for failing to include sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada unanimously held that the *IRPA* violated section 15 of the *Charter* in its failure to prohibit discrimination on the basis of sexual orientation, and that this was not a reasonable limit on Vriend's equality rights. On the question of remedy, eight members of the Court were of the view that this was one of those exceptional cases where it was appropriate to cure the constitutional defect by reading words into the statute. The Court added the words "sexual orientation" to the list of grounds of discrimination prohibited by the *IRPA*.²⁹

Doctrinally, the case must be measured against the backdrop of the decision of Justice McClung, writing for the majority of the Alberta Court of Appeal, who had held that there was no government action to which the *Charter* could apply (the omission of sexual orientation did not, in his view, amount to government action), and that, in any case, there was nothing in the *IRPA* that distinguished between heterosexuals and homosexuals.³⁰ Moreover, Justice McClung's decision was replete with discourse of the critics of judicial activism, denouncing "constitutionally-hyperactive judges"³¹ and the "creeping barrage of the special-interest constituencies that now seem to have conscripted the *Charter*."³² The Supreme Court firmly rejected this neo-conservative attempt to deploy the discourse of privacy and formal equality to preempt the extension of equality rights. Furthermore, the Court attempted to engage with the critics of judicial activism, articulating its role in promoting democratic values.

Measured doctrinally, *Vriend* appears to be an unadulterated legal victory. It was groundbreaking because it was the first time that the majority of the Court held that the denial of formal equality to lesbians and gay men was not only a violation of section 15, but also not a reasonable limit within section 1. Moreover, the Court did not simply strike down the offending provisions of the legislation, but went so far as to use the reading-in remedy. The decision

²⁷ [1998] 1 S.C.R. 493.

²⁸ R.S.A. 1980, c. I-2 [*IRPA*].

²⁹ Justice Major dissented from the majority opinion on this issue of remedy. In his view, the Alberta government may prefer to have no human rights code at all rather than to have to include sexual orientation as a prohibited ground. In his view, this was a choice better left to the legislature.

³⁰ *Vriend v. Alberta* (1996), 181 A.R. 16 (C.A.).

³¹ *Ibid.* at 26.

³² *Ibid.* at 31.

represents an unequivocal statement of the formal equality of individual lesbians and gay men. *Vriend* was a sign of the future: discrimination on the basis of sexual orientation was not going to survive constitutional scrutiny.

However, *Vriend*'s own victory was partial; the case did not address his substantive complaint against his employer, but rather, he won the right to have his case heard before the Alberta Human Rights Tribunal. Nor did the case resolve some of the difficult issues of balancing the conflicting rights between the right to equality of lesbians and gay men and the right to freedom of religion of fundamentalist Christian colleges.³³

Further, some of the broader political implications of the victory are demonstrably more fragile and contradictory. Some members of the provincial government in Alberta, echoed by the voices of social conservatism across the country, denounced the decision and the Court. Many demanded that the legislature invoke the notwithstanding clause in section 33 of the *Charter*. Although his cabinet was divided, Premier Ralph Klein ultimately decided not to invoke the notwithstanding clause, though he tried to spin the ruling as a "very narrow decision, giving people the right to go to the Human Rights Commission on issues like residency, employment and services."³⁴ But the debate continued unabated, with critics of judicial activism and gay rights in full gear.³⁵ The decision sparked a broader debate about the desirability of invoking section 33, which would eventually lead to the passage of the *Constitutional Referendum Act*,³⁶ which provided that the government would hold a referendum prior to invoking the notwithstanding clause. Politically, the *Vriend* decision can be seen to have significantly contributed to the critique of judicial activism that has permeated mainstream media. It has also contributed to political and legal discourse, notwithstanding the Court's own effort to diffuse this critique. While *Vriend* may represent a legal victory, it has added fuel to the

³³ Rebecca Johnson & Thomas Kuttner, "Treading on Dicey Ground" in Carl Stychin & Didi Herman, eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000) 181.

³⁴ Joe Woodard, "A Narrow Decision?" *British Columbia Report* (20 April 1998) 24. However, Klein did defend the Court's ruling, specifically stating that it is "morally wrong to discriminate on the basis of sexual orientation." See Joe Woodard, "Ralph gets moral, and Alberta gets gay rights: How Klein snookered public opinion to satisfy homosexuals, the Supreme Court and the media" *Alberta Report* (20 April 1998) at 17.

³⁵ See e.g. David Frum, "Regulating Freedom of Conscience: Our Rule of Law is Lacking Objectivity" *The Financial Post* (21 April 1998) 19; K. Steel, "One Surrender Too Many: Klein's Capitulation on *Vriend* Prompts Talk of a Right-wing Revolt" *British Columbia Report* (4 May 1998) 13; K. Steel, "Rally 'round the family: sceptical of Klein's promised 'fences': CFAC keeps the heat on with rallies and a petition" *Alberta Report* (25 May 1998) 9.

³⁶ R.S.A. 2000, c. C-25.

powerful backlash that has rapidly become a part of the popular legal discourse.

IV. THE HIGH WATER MARK: SAME-SEX RELATIONSHIP EQUALITY

The fourth case, *M. v. H.*,³⁷ involved two women who lived together in a same-sex relationship for ten years. When their relationship broke down, M. brought an application for spousal support against H. under the *Family Law Act*.³⁸ Section 29 of the *FLA* defined the term “spouse” to include unmarried opposite sex couples “who had cohabited ... continuously for a period of not less than three years.”³⁹ M. challenged the constitutionality of the definition of spouse, arguing that the exclusion of same-sex couples violated section 15 of the *Charter*. H. was joined by the Ontario government and many right-wing organizations who intervened to support the constitutionality of the existing definition of spouse.

In yet another groundbreaking decision, a majority of the Supreme Court of Canada held that the opposite sex definition of spouse discriminated on the basis of sexual orientation and was not a reasonable limit on equality rights. The principal majority opinion was written by Justices Cory and Iacobucci. Justice Cory, writing the section 15 portion of their joint opinion, held that same-sex relationships may be conjugal within the meaning of section 29 of the *FLA*. Moreover, section 29 violates the human dignity of lesbian and gay couples by promoting the view that they are “less worthy of recognition and protection” and “incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples.”⁴⁰ Further, the exclusion of same-sex couples in the *FLA* further “perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”⁴¹ The Court therefore concluded that the definition of spouse in section 29 of the *FLA* was in violation of section 15 of the *Charter*.

Justice Iacobucci, writing the section 1 portion of the joint opinion, held that the exclusion of same-sex couples was not rationally related to the objectives underlying the spousal support provisions of the *FLA*. He characterized the objectives of the *FLA* as promoting “the equitable resolution of economic disputes

³⁷ *M. v. H.*, *supra* note 9.

³⁸ R.S.O. 1990, c. F.3 [*FLA*].

³⁹ *Ibid.*

⁴⁰ *M. v. H.*, *supra* note 9 at 57.

⁴¹ *Ibid.* at 57-58.

that arise when intimate relationships between individuals who have been financially interdependent break down”⁴² and the alleviation of “the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals.”⁴³ He held that these objectives would only be furthered if same-sex couples were included within the definition of spouse.⁴⁴ On the question of remedy, Justice Iacobucci was of the view that, unlike *Vriend*, the “reading in” remedy would be inappropriate in this case.⁴⁵ Instead, he declared section 29 to be of no force and effect, with a suspension of the operation of the declaration of invalidity for six months to enable the legislature to consider ways of bringing this provision, and other laws, into conformity with the equality rights in the *Charter*.⁴⁶

The decision in *M. v. H.* was groundbreaking. The Court recognized the legitimacy of gay and lesbian relationships and held that those relationships are entitled to legal protection. Within six years, the spirit of the powerful dissent from *Mossop* had become the majority opinion. Only one member of the Court, Justice Gonthier, echoed the social conservatism of the Justice La Forest dissenting view of equality rights in *Egan*. Otherwise, the neo-conservative vision of the family that had until recently defeated these challenges was now displaced by the powerful discourse of formal equality.⁴⁷

In the aftermath of *M. v. H.*, the Conservative government in Ontario reluctantly introduced legislation to grant rights and to impose responsibilities on same-sex couples. In *An Act to Amend Certain Statutes Because of the Supreme Court of Canada decision in M. v. H.*,⁴⁸ the government amended sixty-seven statutes to include “same sex partners.” The federal government subsequently enacted the *Modernization of Benefits and Obligations Act*,⁴⁹ which amended federal statutes to include “common law partners”—unmarried

⁴² *Ibid.* at 7.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 67. See also *ibid.* at 72.

⁴⁵ *Ibid.* at 10. See also Brenda Cossman & Bruce Ryder, “*M. v. H.*: Time to Clean up your Acts” (1999) 10:3 *Const. Forum Const.* 59, on the unpersuasive reasoning on remedy.

⁴⁶ *M. v. H.*, *supra* note 9 at 87.

⁴⁷ See Brenda Cossman, “Family Feuds: Neo Liberal and Neo Conservative Visions of the Reprivatization Project” in Brenda Cossman & Judy Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, forthcoming 2002) [Cossman, “Family Feuds”].

⁴⁸ S.O. 1999, c. 6.

⁴⁹ S.C. 2000, c. 12 [*Modernization Act*].

couples of the same or different sex—on the same basis as unmarried heterosexual couples. Other provinces have been following suit.⁵⁰ The powerful discourse of formal equality was effectively forced onto the legislatures.⁵¹

Both doctrinally and politically, *M. v. H.* represents an important victory for formal equality, that is, however, also partial, fragile, and contradictory. Doctrinally, it is a cautious decision that appeared sensitive to the charges of judicial activism that would inevitably be directed at the ruling. For example, Justices Cory and Iacobucci were both emphatic that the ruling was not about marriage. Unlike Justice L'Heureux-Dubé's dissenting opinion in *Mossop*, the ruling cleaves very closely to the technical elements of section 15 and section 1 jurisprudence, steering clear of any broader discussion of family social policy, changing family demographics, or family diversity. The ruling was also cautious in its avoidance of the "reading in" remedy which had proven so controversial in *Vriend*.

The cautious nature of the ruling in many ways reflects the arguments of *M.*, as well as the intervenors supporting the challenge. When compared to the arguments in *Mossop* and *Egan*, the arguments made by these litigants were decidedly more assimilationist—same-sex couples were, for all intents and purposes, just like opposite sex couples. The debates that had animated the submissions in *Mossop*, and to a lesser extent *Egan*, attempting to mitigate the assimilationist arguments, seem to have been marginalized in the face of the losses in the intervening years. While at least some of the intervenors tried to address this concern,⁵² the overall arguments were much more driven by the discourses of sameness. The contradictory nature of the strategies thus comes into view: the formal equality arguments had resonance with the Court, but the cost of this resonance was a resignation to the unreconstructed discourses of sameness.

In the aftermath of *M. v. H.*, gay and lesbian legal activists have turned their attention to the final frontier of same-sex relationship equality: marriage.

⁵⁰ At the federal level, see *ibid.* At the provincial level: British Columbia: *Definition of Spouse Amendment Act, 2000*, S.B.C. 2000, c. 24; Alberta: Bill 30, *Adult Interdependent Relationships Act*, 2d Sess., 25th Leg., Alberta, 2002; Saskatchewan: *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, S.S. 2001, c. 50 and *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)* S.S. 2001, c. 51; Manitoba: *Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, S.M. 2001, c. 37; Quebec: *An Act to Amend Various Legislative Provisions Concerning de facto Spouses*, S.Q. 1999, c. 14 and *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6; New Brunswick: *An Act to Amend the Family Services Act*, S.N.B. 2000, c. 59; Nova Scotia: *Law Reform (2000) Act*, S.N.S. 2000, c. 29; Newfoundland: *An Act to Amend the Family Law Act*, S.N. 2000, c. 29.

⁵¹ Cossman, "Family Feuds," *supra* note 47.

⁵² See Boyd, "Family, Law and Sexuality," *supra* note 4, discussing the intervention of LEAF in *M. v. H.*, *supra* note 9.

Strategically, this was the plan all along for many of the activists—to pursue incremental equality by developing the jurisprudence in relation to unmarried cohabitants, and only turning to marriage once that victory was in hand. After *M. v. H.*, this shift to marriage, with its unapologetically assimilationist agenda, represents a less radical shift than from the earlier days of *Mossop* and *Egan*, where at least some of the litigants were explicitly concerned with resisting a politics of sameness.

Politically, the story is also decidedly more fragile and contradictory. The decision in *M. v. H.* further fueled the fires of a conservative backlash that condemned judicial activism and mobilized in defence of marriage. Neo-conservative politicians assailed the ruling as anti-democratic. One Reform Party Member of Parliament called the ruling “one of the most outrageous exercises of raw judicial power in the history of modern democracy.”⁵³ He said, “responsible government itself is threatened by judicial usurpation of the role of elected legislators.”⁵⁴ The judicial activism critique was echoed throughout the mainstream Canadian media. In some, it was represented as one amongst a range of diverse opinions about the decision. In others, like the *National Post* or the *Alberta Report*, it became front page news, and the only really legitimate lens through which to view the decision. The Supreme Court’s ruling strengthened the resolve and the momentum of this backlash.

The fragility of the victory was further revealed by the fact that within a few days of the decision, the federal government approved a motion by a vote of 216-55, brought by the Reform Party stating that “it is necessary to state that marriage is and should remain the union of one man and one woman to the exclusion of all others,” and that Parliament “will take all necessary steps” within its jurisdiction “to preserve this definition of marriage in Canada.”⁵⁵ While the motion was entirely symbolic—it had no legal force—it was important precisely for its symbolic value. When the federal government introduced the *Modernization Act*, the minister of justice agreed to add a definition of marriage to the bill, once again defined as “the union of one man and one woman to the exclusion of all others.”⁵⁶

The ruling in *M. v. H.* must also be evaluated within the broader context

⁵³ Quoted in Carmen Wittmeier, “Playing House: Politicians Cower as the Supreme Court Overrides the Natural Family Order” *Alberta Report* (31 May 1999) 20 at 24.

⁵⁴ *Ibid.*

⁵⁵ *House of Commons Debates*, 36th Parliament, 1st Session, 240 (8 June 1999) at 1020.

⁵⁶ *Modernization Act*, *supra* note 49, s. 1.1. Alberta went further, passing the *Marriage Amendment Act*, S.A. 2000, c. 3, which defined marriage as “a marriage between a man and a woman,” and invoked the notwithstanding clause, providing that the law overrode the provisions in sections 2 and 7-15 of the *Charter*.

of neo-liberalism's politics of privatization.⁵⁷ Same-sex couples won the right to sue each other when their relationships break down. This was not a case that involved the extension of government or employer benefits, but rather, it was the kind of equality case that fit perfectly with an agenda of fiscal responsibility. The result of the ruling was to expand the scope of spousal support obligations, and thereby reduce demands on the state. Indeed, the Court emphasized that one of the goals of the spousal support provisions was "reducing the strain on the public purse" by "shifting the financial burden away from the government and on to those partners with the capacity to provide support for dependent spouses."⁵⁸ The ruling is consistent with the politics of reprivatization—a process in which the costs of social reproduction are being shifted from the public to private spheres and the family is being reconstituted as the natural site of economic dependency.⁵⁹

Yet even within this neo-liberal politics of privatizing the costs of social reproduction, the political implications of *M. v. H.* are contradictory. While the ruling did reinforce this agenda of fiscal and familial responsibility, the ensuing legislative enactments extended formal equality to a broad range of government rights and responsibilities. While in the wake of the demise of the welfare state, there are rather fewer rights left, those rights are now equally extended to opposite sex and same-sex couples alike.

Finally, while the ruling in *M. v. H.* has absorbed the lesbian subject into the discourses of conjugality, it has also led to a further questioning and destabilizing of the very category of conjugality.⁶⁰ While the Court endorsed the functional equivalency approach to conjugality, with its "generally accepted characteristics of shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple,"⁶¹ Justice Cory observed that a conjugal relationship could exist even in the absence of a sexual relationship. It is an observation that begins to undermine the very distinction between conjugal and non-conjugal relationships

⁵⁷ See Susan B. Boyd, "Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in *M v. H*" (1996) 13 Can. J. Fam. L. 321; Boyd, "Family, Law and Sexuality," *supra* note 4; Cossman, "Family Feuds," *supra* note 47.

⁵⁸ *M. v. H.*, *supra* note 9 at 69.

⁵⁹ See *supra* note 47. See also Judy Fudge & Brenda Cossman, "Introduction: Privatization, Law and the Challenge to Feminism" in Cossman & Fudge, *supra* note 47 [Fudge & Cossman, "Challenge to Feminism"].

⁶⁰ Cossman & Ryder, "What is Marriage-Like Like?," *supra* note 15.

⁶¹ *M. v. H.*, *supra* note 9 at 50 (citing *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.)).

on which legislative definitions of spouse and common law partner rest. If the existence of a sexual relationship is no longer the marker of a conjugal relationship, it becomes difficult to sustain the legal recognition of only conjugal relationships. This destabilizing of conjugality has contributed to a broader rethinking of the legal regulation of adult personal relationships.⁶²

Like other same-sex relationship recognition cases, the challenge in *M. v. H.* was profoundly contradictory, containing both transgressive and normalizing dimensions. Equality discourses were now in ascendance, having displaced the discourses of social conservatism. The heteronormativity of the familial subject had also been dislodged. Yet the very discourses within which the new legal subject was being recognized were normalizing. The lesbian and gay legal subject was a familial subject, a subject recognized in and through dominant familial discourses. While the heteronormativity of the family may have been challenged, its role in an increasingly privatized world has not, and lesbian and gay subjects have been absorbed into this family. Similarly, while the seeds have been sown for a broader rethinking of conjugality, there is a risk it may lead to little more than a further expansion of the scope of the family and its role as the privileged site of social reproduction.

V. WHAT ABOUT SEX AND EXPRESSION? *LITTLE SISTERS BOOKSTORE*

In *Little Sisters Bookstore and Art Emporium v. Canada*,⁶³ a gay and lesbian bookstore in Vancouver brought a constitutional challenge against Canada Customs. For fifteen years, Canada Customs had been detaining and seizing shipments on route to the bookstore. In a protracted legal battle, Little Sisters argued that Canada Customs was unfairly targeting gay and lesbian materials headed to gay and lesbian bookstores. The bookstore challenged both the administrative practices of Canada Customs, as well as the provisions of the *Tariff Code*⁶⁴ that empower customs officials to detain materials that are obscene within the meaning of section 163(8) of the *Criminal Code*,⁶⁵ arguing that the law violated the right to freedom of expression in section 2(b) and the

⁶² See Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001). See also Cossman & Ryder, "What is Marriage-Like Like?," *supra* note 15.

⁶³ [2000] 2 S.C.R. 1120 [*Little Sisters*].

⁶⁴ *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, s. 1; *Customs Tariff*, R.S.C. 1985 (3d Supp.), c. 41, as rep. by *Customs Tariff*, S.C. 1997, c. 36, s. 213.

⁶⁵ R.S.C. 1985, c. C-46.

right to equality in section 15 of the *Charter*.

The Supreme Court held that Little Sisters did suffer differential treatment when compared to other bookstores that imported heterosexual sexually explicit material, and that this differential treatment was discriminatory. “[T]he adverse treatment meted out by Canada Customs to the appellants violated their legitimate sense of self-worth and human dignity. The Customs treatment was high-handed and dismissive of the appellants’ right to receive lawful expressive material”⁶⁶ In commenting on the “overzealous censorship” of Canada Customs, the Court held that “Little Sisters was targeted because it was considered ‘different’.”⁶⁷ But the Court concluded that there was nothing on the face of the legislation itself that encouraged this discriminatory treatment. The discrimination occurred at the administrative level of implementation. The Customs’ legislation was, in the Court’s view, capable of being implemented in a manner that did not violate *Charter* rights.

On the question of the administration of the Customs regime, the Court concluded that Little Sisters had been unfairly targeted and had suffered “excessive and unnecessary prejudice in terms of delays, cost and other losses”⁶⁸ at the hands of Customs. It held that Customs officers were inadequately trained and that Customs had failed to establish appropriate deadlines and criteria. However, the Court refused to provide a remedy for this failure. The majority noted that many changes had been made by Customs in the intervening six years, and that in the absence of more detailed information, it was not prepared to conclude that these changes were inadequate. In the majority’s view, Little Sisters could always launch a further action in the courts if they considered such action necessary.

Little Sisters Bookstore and some of the intervenors claimed that the ruling was a partial victory—their claim to harassment and discrimination at the hands of Customs was vindicated. But this partial victory was contained within what was otherwise a resounding defeat. The power of Customs to censor sexually explicit materials at the border was upheld and the *Butler*⁶⁹ test for obscenity was reaffirmed. Moreover, virtually no remedy was provided for the administrative discrimination.

Unlike the preceding cases, *Little Sisters* was not just about gay and lesbian equality; it was also about sexual freedom and sexual expression. Little

⁶⁶ *Little Sisters*, *supra* note 63 at 1125.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 1202.

⁶⁹ *R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler*].

Sisters and some of the intervenors emphasized the importance of sexual freedom and sexually expressive materials for lesbian and gay identity and community. It was simultaneously a claim to sameness and difference. As an equality claim, it was about the right to be free from harassment and discrimination on the basis of sexual orientation. It was about the right to be treated the same. But, as an expression claim, *Little Sisters* was an assertion of difference. It was an assertion of lesbian and gay sex—the very aspect of lesbian and gay identity that marks difference. Little Sisters, and some of the intervenors, attempted to translate this difference into law. For example, the bookstore tried to limit the applicability of the *Butler* harms-based test to heterosexual material, arguing that lesbian and gay sexuality and sexually explicit representations are different.⁷⁰ Little Sisters tried to negotiate this treacherous terrain between sameness and difference, equality and freedom, by insisting on the intersecting nature of the equality and freedom of expression violations.

Nevertheless, Little Sisters' strategic efforts were defeated by the dominance of the sameness paradigm. The very success of the strategies in the earlier equality rights jurisprudence and its paradigm of formal equality now seemed to operate as an epistemic obstacle⁷¹—the Court could not see past sameness to appreciate the importance of the freedom claim, nor the subtlety of the intersectional claim. Persuaded by the politics of sameness, the Court could not now accept an argument premised on the politics of difference. While paying lip service to the importance of sexual expression, it could not justify a departure from the equality norm of sameness. Nor could it trump the equality interests (that is, the alleged harm to women) that justified the legal regulation of obscenity. In the paradigm deployed by the Court, not only were equality and freedom distinct, but in the context of sexual speech, they seemed to be mutually exclusive.

Little Sisters demonstrates the partiality and fragility of lesbian and gay rights challenges. Only the equality claim had resonance with the Court, and, even then, not enough resonance to result in a remedy. The freedom claim, fundamental to lesbian and gay sexual politics, was unavailing. This broader sexual politics continues to be a highly contested terrain in which lesbian and

⁷⁰ *Little Sisters Bookstore and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 (Factum of the Appellant at 61-73). For a discussion of this issue and the Court's refusal to place lesbian and gay materials into context, see Joe-Anne Pickle, "Taking Big Brother to Court: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*" (2001) 59 U.T. Fac. L. Rev. 349.

⁷¹ J.-F. Gaudreault-Desbiens, "Gaston Bachelard and Legal Theory" (Paper presented at the American Law and Society Association and Canadian Law and Society Association, Joint Conference, Vancouver, May 2002) [unpublished].

gay sexuality remains subject to surveillance and control. Highly sexualized arenas—gay bars, gay strip clubs, lesbian bathhouses—have continued to be subject to police harassment and criminal regulation. In the last few years, criminal charges as well as provincial liquor license laws have been used to regulate lesbian and gay sexuality.⁷² In these areas, lesbian and gay rights claims continue to be cast within what William Eskridge calls a politics of protection—a defensive politics intended to protect lesbian and gay spaces from state intrusion.⁷³ While the politics of protection has made considerable inroads since the days of the bathhouse raids in the early 1980s, lesbian and gay sexuality still attracts the attention of the moral regulators. As the same-sex family subject is increasingly recognized in law, the highly eroticized subject of gay bars and bathhouses continues to be constituted as an outlaw.

At the same time, Little Sisters garnered considerable public support during its struggle against Canada Customs. The struggle had a “David and Goliath”-like stature in which a gutsy little bookstore refused to bow down to the persistent and pernicious harassment of the powerful and often invisible bureaucracy. The legal intervention mobilized a broad coalition of civil libertarians, artists, writers, and feminists who intervened to support the lesbian and gay rights challenge. While the freedom of sexual expression claim was resulted in no immediate legal victory, the Court did provide importers with some legal resources that could help rein in Customs censorship in the years ahead.⁷⁴

The political legacy of *Little Sisters* is also mixed. Canada’s troubled regime of border censorship drew sustenance and legitimacy from the implausible seal of approval it received from the Court. The result may be more barriers to imported representations of minority sexual practices in the years to come. At the same time, the *Little Sisters* litigation advanced the legitimacy of the political claim to sexual freedom, and, for the first time, the Supreme Court affirmed the value of lesbian and gay sexual expression. When measured against these broader political mobilizations and discursive contestations, partial

⁷² In recent years, the Toronto police have raided and laid charges at Remington’s (a gay strip club), The Bijou (a gay porn bar), The Barn (a gay bar holding a special event for a men’s nudist organization), and Pussy Palace (a special-events lesbian bathhouse). Criminal charges were laid against Remington’s (convicted of indecent performance) and The Bijou (charges later dropped), whereas violations pursuant to the *Liquor License Act*, R.S.O. 1990, c. L. 19, were charged against The Barn (acquitted) and Pussy Palace (charges stayed due to violation of constitutional rights).

⁷³ William N. Eskridge Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002) at 1.

⁷⁴ See Bruce Ryder, “The *Little Sisters* Case, Administrative Censorship, and Obscenity Law” (2001), 39 *Osgoode Hall L.J.* 207.

and fragile victory emerges alongside defeat in this case. While legal regulation leans towards normalization of lesbian and gay subjects, the broader political implications inject some instability into the process.

And the story is not finished. Despite the widespread public support and fifteen years of legal battles, the bookstore is back where it started—in court battling further detentions. The contradictory story of normalization and subversion continues.

VI. CONFLICTING RIGHTS: RELIGION VERSUS SEXUALITY

The last case decided by the Supreme Court of Canada was not initiated by lesbian and gay litigants, but rather by a religious institution that opposed lesbian and gay rights. *Trinity Western University v. British Columbia College of Teachers*⁷⁵ involved a difficult balancing of the equality rights of gays and lesbians with the religious liberties of a Christian educational institution. The British Columbia College of Teachers (BCCT) refused to approve the teacher training program of Trinity Western University (TWU), a private religious institution associated with the Evangelical Free Church of Canada, on the ground that the university followed discriminatory practices, and therefore the approval was not in the public interest. The BCCT was concerned with the list of “Practices That are Biblically Condemned,” which included “sexual sins including ... homosexual behavior.”⁷⁶ All TWU students were required to sign a document in which they refused to participate in such activities.

The Supreme Court held that the BCCT had jurisdiction to consider discriminatory practices in assessing TWU's application. Justices Iacobucci and Bastarache, writing for the majority, held that even though TWU is a private institution and is exempted in part from the provincial human rights legislation and the *Charter*, the BCCT was entitled to consider these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. In the Court's view, the difficulty at the heart of the appeal was how to reconcile the religious freedoms of individuals who wished to attend TWU with the equality concerns of students in British Columbia's public school system.

The Court held that any potential conflict could be resolved through a proper definition of the scope of the rights involved. Neither freedom of religion nor equality rights are absolute. While the BCCT was right to consider the impact of TWU's policy on the public school environment, it did not sufficiently

⁷⁵ [2001] 1 S.C.R. 772 [*Trinity Western*].

⁷⁶ *Ibid.* at 785.

consider the impact of its decision on the right to freedom of religion of the members of TWU. Any restriction of freedom of religion must be justified by evidence that the exercise of this freedom will have a detrimental impact on the public school system.

The Court held that a line should be drawn between “belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.”⁷⁷ The BCCT does not require that public universities with teacher education programs screen out individuals with sexist, racist, or homophobic views. Acting on beliefs is a different matter, however, and discriminatory conduct would not be tolerated. According to the Court, there was no evidence that graduates of the TWU would treat gays and lesbians in a discriminatory manner. BCCT had thus acted on the basis of irrelevant considerations—that is, religious beliefs, not the actual impact of these beliefs on the public school environment. Therefore the order of mandamus issued by the lower court allowing approval of TWUs proposed teacher training program for five years was justified.

Trinity Western is a difficult case to assess from the perspective of lesbian and gay rights challenges. Doctrinally, the ruling was a partial victory for lesbian and gay students whose rights to be treated with respect was upheld. But, it was also a partial victory for the religious college, and for religious minorities more generally in that freedom of thought was vindicated, while freedom to act on those thoughts curtailed. The conflict in *Trinity Western* is paradigmatic of many cases on the multicultural horizon in which religion and equality will collide.⁷⁸ Doctrinally, it is unclear how helpful the distinction between conduct and belief is likely to be in resolving these conflicts. The Court has carved out in very abstract terms a private sphere of religious freedom which must coexist with the public sphere and its norms of equality. It does little to resolve the conflict in this coexistence, or to make concrete the terms of the relationship.

Trinity Western also raises difficult strategic concerns. The challenge was not brought by lesbian and gay litigants, but by a private religious college

⁷⁷ *Ibid.* at 775.

⁷⁸ In *Hall (Litigation Guardian of) v. Powers* (2002), 213 D.L.R. (4th) 308 (Ont. Sup. Ct. J.), 19-year-old Mark Hall won an injunction against the Durham Catholic District School Board, allowing him to bring his same-sex boyfriend to his high school prom. The school board refused to grant him permission because homosexuality is against the teachings of the Catholic Church. While an Ontario court granted the injunction, the issue remains unresolved, as the school board considers whether to pursue the matter. At issue is the scope of religious liberties of the Catholic schools, protected under section 93 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See also *Brookie v. Ontario (H.R.C.)*, [2001] O.J. No. 5316 (Ont. Sup. Ct. J.) (QL); *Chamberlain v. Surrey School District No. 36* (2000), 80 B.C.L.R. (3d) 181 (C.A.), appeal heard by Supreme Court of Canada, 12 June 2002.

that objected to the disqualification of its students by the BCCT. It raises questions about when lesbian and gay litigants should intervene in cases that are not directly driven by their legal and political agenda but which nonetheless have implications for lesbian and gay equality. Further, it raises questions about the extent to which lesbian and gay groups should argue that their right to equality should trump the right to religious freedom. Pitting equality against freedom has dangerous implications that can easily come back to haunt lesbian and gay politics. In *Little Sisters*, the Court was only too willing to let equality trump freedom. While sexual and religious freedoms may often times seem incommensurable, a politics of sexual freedom may need to be attentive to the contradictory overlaps of spheres of personal autonomy and self-determination. The progress narrative of formal equality simply will not provide answers in this terrain. The strategic and political implications of the case must also be measured against the restrictions on personal autonomy—restrictions which are both partial (conduct curtailed, thought vindicated) and contradictory (the autonomy of one group curtailed in the interests of the autonomy of another).

Yet there is also a degree of incommensurability between sexual and religious freedoms. The history of lesbian and gay rights challenges is also a history of the mobilization of many conservative religious organizations who have opposed these challenges in the name of religion.⁷⁹ These challenges have spawned what William Eskridge calls a new politics of preservation⁸⁰—resentment with liberal issues such as abortion, no-fault divorce, and teenage sexuality, which threatened the traditional family, found a new lightning rod in its opposition to gay rights and same-sex relationship recognition.

In the Canadian context, the mobilization of these religious organizations has not been particularly successful in preventing formal equality and same-sex relationship recognition in the judicial arenas. Religious belief has not impeded the recognition of formal equality rights in the public sphere; however, this extension of formal equality has continued to mobilize an organized resistance which seeks to articulate its vision in the discourse of law.

It is this type of organized resistance that may have more legal and political resonance in cases like *Trinity Western* where equality and religion collide not only in the public sphere but also in the religious sphere. While religion may not be able to dictate the treatment of lesbians and gay men in the public sphere, cases like *Trinity Western* are generating broader legal and

⁷⁹ See Herman, *Rights of Passage*, *supra* note 4; Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997).

⁸⁰ Eskridge, *supra* note 73 at 9-12.

political debates about the extent to which the secular values of equality can and should govern beliefs and conduct within the religious sphere. The extent to which a sphere of religious liberty should be immunized from the dictates of the secular world is highly contested and can be expected to reappear in conflicts to come, from the ordaining of gay priests to same-sex marriage.

Doctrinally, strategically, and politically, *Trinity Western* is a highly contradictory case which defies classification as a victory or defeat for lesbian and gay equality rights. It is a case with normalizing, and perhaps subtly transgressive, implications. *Trinity Western* involved the administrative practices of a mainstream institution that had been mainstreaming equality concerns. While these mainstreaming practices of the college were intended to address the experience of lesbian and gay students and might be seen to challenge the heteronormativity of the student subject, there is, at the same time, a concern with the assimilation and normalization of the experience of these subjects who were all but invisible in the case.

VII. VICTORIES, DEFEATS, AND NEW LEGAL SUBJECTS

The legacy of the first twenty years of the *Charter* for lesbians and gay men is a legacy of victories and defeats, of a transformation in the legal and political landscape, in which many lesbians and gay men are accorded greater legal protection and in which others are not accorded the protection that they desire. It is a legacy in which a vision of formal equality rights has been vindicated and in which sexual freedom rights remain largely unprotected. It is a legacy in which lesbians and gay men are being reconstituted in law, where some lesbians and gay men are being newly constituted as legal subjects in law, while others are being reinscribed as outlaws. It is a legacy of transgression and normalization; these new legal subjects are simultaneously challenging dominant modes of legal subjectivity and heteronormativity and being absorbed within them.

The progress of formal equality in same-sex relationship recognition, which reached its apogee in *M. v. H.*, has brought a new lesbian and gay legal subject on stage. It is a subject constituted in and through the discourses of formal equality—a radically different subject than the lesbian and gay subject that was constituted in and through the conservative discourses of deviance, biology, and exclusion. This new legal subject is then a radical one, challenging and displacing the heteronormativity of legal subjectivity in the familial context. But the process of inclusion is at the same time a normalizing strategy in which gays and lesbians are reconstituted through the discourses of sameness. It is a process of assimilation, of reconstituting gay and lesbian subjects into the dominant legal narratives and ideologies, and of simultaneously excluding those subjects who do not conform. The process of inclusion is therefore always also

a process of exclusion that operates to police and discipline the borders of the new legal subject.

The new legal subject is a familialized subject. The new lesbian and gay subject lives in a monogamous and respectable relationship with responsibilities of mutual care and commitment. It is a subject constituted in and through ideologically dominant discourses of familialism at the same time as this subject reshapes these discourses. Ideologically dominant discourses of family have emphasized the heterosexual nuclear family as the basic and natural site for social reproduction—for producing and raising children and caring for dependent members. With the rise of the neo-liberal state and its emphasis on privatization, there is rather less emphasis given to the composition of the family (who a family is) and rather more importance given to the functions that a family performs (what a family does).⁸¹ The incorporation of lesbian and gay subjects into these ideologically dominant discourses of family is illustrative of this new emphasis on function over form and suggests that the traditional heterosexuality of these discourses is being displaced.

At the same time, the incorporation of lesbian and gay subjects reinforces this privatized model, with its emphasis on the family as the natural site of caregiving and support. The incorporation of the lesbian and gay legal subject into these dominant discourses of family reconstitutes these discourses and the legal subjects themselves in significant ways. Lesbian and gay subjects are legitimated through their familialization at the same time as familialism is further legitimated by its apparent adaptability to equality norms. The incorporation of the lesbian and gay subject into the folds of familialism further obscures the extent to which the family remains a highly gendered institution in which women provide a disproportionate amount of unpaid labour. The new familialized lesbian and gay subject is then one that both subverts the heteronormativity of ideologically dominant discourses of family at the same time as it normalizes these discourses.⁸²

The new legal subject is also a desexualized subject. Indeed, in *M. v. H.*, the lesbian subject was perfectly desexualized—the couple was separated, so the spectre of lesbian sex all but disappeared from view. Moreover, the importance of sex to the very category of conjugality has begun to fade from view. The lesbian and gay subject then arrives on stage at the very moment that the sexualized nature of the conjugal subject becomes less central. While the presence of sex cannot completely vanish—same-sex couples do have sex—the lesbian and gay subject is reconstituted through the discourses of “good” sex:

⁸¹ Fudge & Cossman, “Challenge to Feminism,” *supra* note 59.

⁸² Boyd, “Family, Law and Sexuality,” *supra* note 4.

monogamous, private, and quasi-marital.

The respectability of the new legal subjects requires this careful policing of the borders of recognition. The new legal subject is not the erotically charged subject of the gay bars and bathhouses who remains a sexual outlaw. The inclusion of gay and lesbian subjects into law is being regulated at its margins to ensure that the “others”—the sexually promiscuous, sexually public, and sexually non-monogamous—remain outlaws. In *Little Sisters*, sex, sexuality, and sexually explicit representations continued to be subject to regulatory surveillance, according to the good sex/bad sex legacy of the *Butler* decision.⁸³ And despite the Court’s insistence to the contrary, the legacy is one of heteronormativity. The erotically charged lesbian or gay man—the body that exudes sexual desire and delights in sexual pleasure—is a body at risk, a sexual other, an outsider. The inclusion of the familialized subject requires the exclusion of this sexualized body, a body which refuses to discipline itself in the law’s terms.

And yet, the exclusion is contested as the sexualized bodies continue to demand their right to exist on their own terms and as the politics of protectionism and its traditional sexual morality are cast into increasing disrepute. The process of exclusion, on which the new legal subject is premised, is itself fragile, partial, and contradictory, producing resistance from within and without. The process of exclusion then generates not only its own dynamics of transgression but also its own peculiar dynamics of assimilation.

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 contradictory. Formal equality has been won. Lesbian and gay subjects are now constituted in and through the discourses of formal legal equality. Discrimination on the basis of sexual orientation is no longer acceptable within the legal landscape. While these are formidable victories for a community that was long cast as deviant and despicable, the victories are not unequivocal. The powerful backlash that has been mobilized highlights the fragility of lesbian and gay rights victories. The inclusion of some subjects at the exclusion of others illustrates the partiality of the victories. And the extent to which the new legal subject reinforces a privatized model of familial relationships demonstrates the contradictory nature of these victories. The legacy of the first twenty years of the *Charter* is one that has produced a complex new identity for lesbians and gay men. It is an identity

⁸³ See Brenda Cossman, “Feminist Fashion or Sexual Morality in Drag” in Brenda Cossman *et al.*, eds., *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997).

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.